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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
The Honorable William A. McKinnon

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

Douglas Kelsey, ... Plaintiff,

v.

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

AND

House of Blues Myrtle Beach Restaurant Corporation, ... Appellant,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC, ... Respondents.

RECORD ON APPEAL
Volume I

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Sloon Shine, LLC

INDEX

I. Orders

Order Granting Motion to Reconsider in Part and Denying It In Part, filed July 31, 2020 by Judge McKinnon.....	001
Order of Dismissal as to Full Throttle LLC, Full Throttle Sloon Shine LLC, and American Outlaw Spirit, filed March 26, 2020 by Judge McKinnon	010
Form 4 Order Denying House of Blue’s Motion to Alter or Amend, filed March 4, 2020 by Judge Culbertson.....	028
Order of Dismissal as to Throttlefest LLC, filed February 5, 2020 by Judge Culbertson.....	031
Order of Dismissal as to Throttlefest LLC, filed February 4, 2020 by Judge Culbertson.....	044
Form 4 Order Granting Throttlefest LLC’s Motion to Dismiss re: Third-Party Complaint, filed January 8, 2020.....	057
Form 4 Order Granting Full Throttle, LLC and Full Throttle S’Loon Shine, LLC’s Motion to Dismiss re: First-Party Complaint, filed August 13, 2019.....	060
Form 4 Order Granting Throttlefest’s Motion to Dismiss First-Party Complaint, filed December 11, 2018.....	063
Stipulation of Dismissal with Prejudice as to Plaintiffs’ Claims against Defendants of March 17, 2021	066
Notice of Dismissal Without Prejudice as to American Outlaw Spirits, Inc., Michael Ballard, and Jesse James Dupree re: First-Party Complaint, filed Jan. 22, 2018	068

II. Pleadings

Complaint, filed May 12, 2017	069
First Amended Complaint, filed July 7, 2017.....	084
House of Blues’ Answer to Amended Complaint filed August 4, 2017.....	110
Throttlefest, LLC’s Answer to Amended Complaint filed January 15, 2018.....	126
Throttlefest, LLC’s Motion to Dismiss Amended Complaint filed November 6, 2018..	142

Throttlefest, LLC’s Memorandum in Support of its Motion to Dismiss filed November 30, 2018.....	150
House of Blues’ Memorandum in Opposition to Throttlefest, LLC’s Motion to Dismiss December 10, 2018	159
Full Throttle, LLC and Full Throttle S’Loon, LLC’s Motion to Dismiss filed June 25, 2019	164
Full Throttle, LLC and Full Throttle S’Loon, LLC’s Memorandum in Support of their Motion to Dismiss June 25, 2019	167
Second Amended Complaint filed October 15, 2019	170
House of Blues’ Answer & Third-Party Complaint filed October 18, 2019	189
Throttlefest, LLC’s Answer to Third-Party Complaint & Counterclaim filed December 5, 2019	217
Throttlefest, LLC’s Motion to Dismiss filed December 5, 2019	235
Full Throttle LLC’s Motion to Dismiss filed December 17, 2019	238
Full Throttle Sloon Shine, LLC’s Motion to Dismiss filed December 17, 2019.....	241
American Outlaw Spirits Incorporated’s Motion to Dismiss filed December 17, 2019	244
Throttlefest, LLC’s Memorandum in Support of its Motion to Dismiss filed December 30, 2019.....	247
Full Throttle, LLC’s Memorandum in Support of its Motion to Dismiss filed January 3, 2020	266
Full Throttle Sloon Shine, LLC’s Memorandum in Support of its Motion to Dismiss filed January 3, 2020.....	296
American Outlaw Spirits Incorporated’s Memorandum in Support of its Motion to Dismiss filed January 3, 2020.....	326
House of Blues’ Memorandum in Opposition to Throttlefest, LLC’s Motion to Dismiss filed January 7, 2020.....	354
House of Blues’ Memorandum in Opposition to Full Throttle, LLC, Full Throttle Sloon Shine, LLC and American Outlaw Spirits Incorporated’s Motion to Dismiss filed February 5, 2020.....	372

House of Blues’ Motion to Alter or Amend Judgment filed February 14, 2020	442
Throttlefest, LLC’s Memorandum in Opposition to Motion to Alter or Amend dated February 28, 2020	466
House of Blues’ Motion to Alter or Amend Judgment Entered March 26, 2020 filed April 6, 2020	474
American Outlaw Spirits, Inc, Full Throttle, LLC, and Full Throttle Sloon Shine, LLC’s Response in Opposition to House of Blues’ Motion to Alter or Amend Judgment filed April 17, 2020.....	494
Plaintiff’s Motion to Enforce Mediated Settlement Agreement and Release filed October 20, 2020	506
III. Transcripts	
Transcript of hearing before Judge McKinnon on July 23, 2020	521
Transcript of hearing before Judge McKinnon on February 5, 2020	573
Transcript of hearing before Judge Culbertson on January 8, 2020	603
Deposition Transcript of Travis Scott Wagoner on April 23, 2018.....	649
IV. Miscellaneous	
Co-Promotion Agreement of March 19, 2014	755
Affidavit of Jesse Dupree of January 2, 2020.....	763
Affidavit of Michael Ballard of January 3, 2020	765001133-0012

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

This matter is before the Court on Motions to Reconsider, Alter, and Amend filed by Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation (“House of Blues”). . After considering all materials of record and for the reasons set forth below, the Court hereby GRANTS IN PART AND DENIES IN PART Third-Party Plaintiff’s Motion to Reconsider.

This Order is substituted in the place of the Court’s March 26, 2020 Order.

FACTS

Full Throttle, LLC is a South Dakota real estate holding company that holds real estate only in South Dakota. Michael Ballard is its sole member. American Outlaw Spirits, Inc. (“AOC”) is a Georgia corporation that manufactures a brand of liquor. Jesse James Dupree is its sole owner. Sloon Shine, LLC is a Tennessee company that manufactures spirits in Tennessee. Michael Ballard is its sole member. Neither of these manufacturers has an office or facility in South Carolina; neither directly sells its products in South Carolina; and neither derives a substantial portion of its revenue from its respective regional distributors’ sales here. The liquor allegedly at issue was purchased wholesale, not from any of these entities.

The facts giving rise to this litigation concern an event that a different Third-Party Defendant, Throttlefest, put on with the Defendant House of Blues in 2014. Ballard and Dupree are the two members of Throttlefest. Throttlefest and House of Blues entered into a Co-Promotion Agreement (hereinafter the “Co-Promotion Agreement”) with an effective date of March 19, 2014 “concerning the functions and acts necessary for promoting and conducting” an event called the Full Throttle Festival (hereinafter the “Event”) which was held at the House of Blues in Myrtle Beach from May 9 until May 17, 2014. AOS, Sloon Shine, and Full Throttle were not parties to this contract.

Plaintiff alleges that Defendant Travis Wagoner was present at the House of Blues on May 16, 2014 and that House of Blues’ employee Michael Garner gave Wagoner two shots of liquor despite Wagoner showing signs of intoxication. Plaintiff then alleges that Wagoner left the House of Blues in an intoxicated state and caused an accident that injured the Plaintiff. Plaintiff alleges Garner was an employee of House of Blues. House of Blues has alleged Garner was acting as the employee or agent of Throttlefest, American Outlaw Spirits, Full Throttle, and Sloon Shine.

Additionally, House of Blues argues that Dupre and Ballard were acting not only as the hosts of ThrottleFest, but also as agents of American Outlaw Spirits, Full Throttle, and Sloon Shine.

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint on May 12, 2017 and an Amended Complaint on July 7, 2017. Plaintiff originally alleged that Garner was acting as an employee or agent of the Third-Party Defendants and House of Blues, and that he was selling alcohol under House of Blues' alcohol license. House of Blues did not file any crossclaims against American Outlaw Spirits, Full Throttle, or Sloon Shine.

Full Throttle, Sloon Shine, and AOS moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and 12(b)(6), SCRCPP. On January 2, 2018, Plaintiff dismissed AOS. Full Throttle and Sloon Shine settled with Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries Plaintiff sustained from the accident. Despite obtaining the Release from Plaintiff, House of Blues refused to consent to Sloon Shine's and Full Throttle's dismissal from the case, even though House of Blues did not have any claims pending against them. On June 25, 2019, Full Throttle and Sloon Shine again moved to dismiss the claims against them. The Court granted Full Throttle's and Sloon Shine's Motion to Dismiss on August 13, 2019.

On October 15, 2019, Plaintiff filed a Second Amended Complaint, which did not include AOS, Full Throttle, or Sloon Shine as Defendants. Plaintiff's Second Amended Complaint alleges that it was only House of Blues' employees and agents that served Wagoner alcohol to the point of intoxication and caused the accident. (Second Am. Compl. ¶¶ 8, 16, 29, 39, 40, 41, 42, 68, 74, 91, 93, 97.) Plaintiff's Second Amended Complaint alleges that Garner was solely House of Blues' employee and cites to House of Blues' testimony admitting the same. (*Id.* at ¶¶ 40-41.) Plaintiff

alleges that when he filed his first Amended Complaint he had not yet discovered that Garner was a House of Blues employee. (*Id.* at ¶ 68.)

On October 18, 2019, House of Blues filed its Answer to the Second Amended Complaint and its Third-Party Complaint. House of Blues asserted the following, third-party claims against all Third-Party Defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. On December 5, 2019, Throttlefest filed a Motion to Dismiss. On December 17, 2019, these Third-Party Defendants moved to dismiss House of Blues' claims. The Court, Judge Culbertson presiding, granted Throttlefest's Motion to Dismiss on February 4, 2020. Arguments on the remaining Third-Party Defendants' motions were heard on February 5, 2020.

LAW/ANALYSIS

"The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction." *Int'l Mariculture Res. v. Grant*, 336 S.C. 434, 437, 520 S.E.2d 160, 161 (Ct. App. 1999) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992)). To meet its burden at this pre-trial stage, House of Blues must make a prima-facie showing of jurisdiction by pleadings and affidavits. See *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). The showing of personal jurisdiction "must be based upon specific facts set forth in the record in order to defeat defendants' motion to dismiss." *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992). "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations

of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478.

I. The Court Lacks Jurisdiction Over These Third-Party Defendants.

The invocation of personal jurisdiction over a nonresident traditionally had involved a two-step analysis involving both the South Carolina long-arm statute and the relevant constitutional protections. In light of the interpretation that South Carolina’s long-arm statute extends as far as the due process clause, courts now focus on whether the nonresident’s contacts in South Carolina are sufficient to satisfy due process requirements. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Due process requires that there exist “minimum contacts” between the nonresident and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice. *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991). Without minimum contacts, the court does not have the “power” to adjudicate the action. *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131(1992).

The allegations here concern a claim of “specific jurisdiction,” that is, the right to exercise personal jurisdiction because the cause of action arises specifically from a defendant’s contacts with the state.¹ See *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The focus of the court’s inquiry must be the contacts generated *by the defendant*, and not on the unilateral actions of some other person or entity. *Id.*

The primary allegations at issue involve the actions Michael Garner. House of Blues acknowledges in its Answer that it issued Garner a W-2 for his work during the Event. Seeking to

¹ General jurisdiction, which arises from continuous and systematic contacts with the state, clearly is not present here. See *Coggeshall*, 376 S.C. at 17, 655 S.E.2d at 479.

distance itself from Garner's actions, House of Blues then says Garner was "part of the Throttlefest festival talent." 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." 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-contracting 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.

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. *See generally Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005) ("The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."); *Aviation Assocs.*, 402 S.E.2d at 180 (nonresident seller's limited contact insufficient); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 666 (Ct. App. 2008) (finding conclusory assertions unavailing). The only contact that these entities could be argued to have made here was the requirement by ThrottleFest that House of Blues buy liquor from the Third-Party Defendants to serve at the ThrottleFest event. This singular contact, which was directed by ThrottleFest rather than the Third-

Party Defendants themselves, is not enough to create jurisdiction. These Defendants did not conduct the requisite activity to have purposefully availed *themselves* of the laws of South Carolina. In other words, the actions of Throttlefest in South Carolina can subject itself to the jurisdiction to the courts of South Carolina, but not additional parties.

Additionally, House of Blues alleges that Ballard and Dupree, in conducting their duties as the hosts of ThrottleFest, were also serving as agents of the Third-Party Defendants, by nature of their positions within those companies. House of Blues therefore argues that the contacts made by Ballard and Dupree should be imputed to the Third-Party Defendants. The Court disagrees. House of Blues has not provided sufficient evidence that Dupree and Ballard were serving as agents for the Third-Party Defendants. Mere conclusory statements or allegations in pleadings concerning Dupree and Ballard serving as agents for these Third-Party Defendants are not enough to base the exercise of jurisdiction upon. As a result, the Court cannot exercise jurisdiction over these parties on this, or any other basis as alleged by House of Blues.

Because the Court finds it lacks the “power” to hear this matter with regard to these Defendants, the Court need not address the “fairness” prong of personal jurisdiction.

The Court declines to address Third-Party Defendants’ other defenses and arguments, as the Court has found it does not have personal jurisdiction over these parties.

CONCLUSION

Accordingly, House of Blues’ Motion to Reconsider is GRANTED IN PART AND DENIED IN PART. Additionally, (1) Full Throttle, LLC’s Motion to Dismiss is **GRANTED** and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal jurisdiction**; (2) American Outlaw Spirits, Incorporated’s Motion to Dismiss is GRANTED and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal**

jurisdiction; and (3) Full Throttle Sloon Shine, LLC's Motion to Dismiss is GRANTED and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal jurisdiction**. The Court declines to reach Third-Party Defendants' other defenses and arguments.

IT IS SO ORDERED.

The Honorable William A. McKinnon
Presiding Judge



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach
Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

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

This matter is before the Court on Motions to Dismiss filed pursuant to Rules 12(b)(2) and 12(b)(6) by Third-Party Defendants American Outlaw Spirits, Inc. (“AOS”); Full Throttle Sloon Shine, LLC (“Sloon Shine”); and Full Throttle, LLC. The motions seek to dismiss the claims filed against them by Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation’s (“House of Blues”). The parties fully briefed the motions and submitted oral argument to the Court in a hearing held on February 5, 2020. After considering all materials of

record and for the reasons set forth below, the Court hereby GRANTS these Third-Party Defendants' Motions to Dismiss.

FACTS

Full Throttle is a South Dakota real estate holding company that holds real estate only in South Dakota. Michael Ballard is its sole member. AOS is a Georgia corporation that manufactures a brand of liquor. Jesse James Dupree is its sole owner. Sloon Shine is a Tennessee company that manufactures spirits in Tennessee. Michael Ballard is its sole member. Neither of these manufacturers has an office or facility in South Carolina; neither directly sells its products in South Carolina; and neither derives a substantial portion of its revenue from its respective regional distributors' sales here. The liquor allegedly at issue was purchased wholesale, not from any of these entities. (House of Blues Answer, ¶ 13.)

The facts giving rise to this litigation concern an event that a different Third-Party Defendant, Throttlefest, put on with the Defendant House of Blues in 2014. Ballard and Dupree are the two members of Throttlefest. Throttlefest and House of Blues entered into a Co-Promotion Agreement (hereinafter the "Co-Promotion Agreement") with an effective date of March 19, 2014 "concerning the functions and acts necessary for promoting and conducting" an event called the Full Throttle Festival (hereinafter the "Event") which was held at the House of Blues in Myrtle Beach from May 9 until May 17, 2014. (Third-Party Complaint ¶¶ 93-97.) AOS, Sloon Shine, and Full Throttle were not parties to this contract.

Plaintiff alleges that Defendant Travis Wagoner was present at the House of Blues on May 16, 2014 and that House of Blues' employee Michael Garner gave Wagoner two shots of liquor despite Wagoner showing signs of intoxication. (Third-Party Complaint ¶¶ 108-09; Plaintiff's Second Am. Compl. ¶¶ 8, 16, 29, 40, 41, 42, 68, 74, 93.) Plaintiff then alleges that

Wagoner left the House of Blues in an intoxicated state and caused an accident that injured the Plaintiff. (Third-Party Compl. ¶¶ 110-11.) Plaintiff alleges Garner was an employee of House of Blues. (Plaintiff's Second Am. Compl. ¶¶ 8, 16, 29, 40, 41, 42, 68, 74, 93.) House of Blues has alleged Garner was acting as the employee or agent of Throttlefest, American Outlaw Spirits, Full Throttle, and Sloon Shine. (Third-Party Compl. ¶¶ 114-115.)

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint on May 12, 2017 and an Amended Complaint on July 7, 2017. Plaintiff originally alleged that Garner was acting as an employee or agent of the Third-Party Defendants and House of Blues, and that he was selling alcohol under House of Blues' alcohol license. House of Blues did not file any crossclaims against American Outlaw Spirits, Full Throttle, or Sloon Shine.

Full Throttle, Sloon Shine, and AOS moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and 12(b)(6), SCRCp. On January 2, 2018, Plaintiff dismissed AOS. Full Throttle and Sloon Shine settled with Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries Plaintiff sustained from the accident. Despite obtaining the Release from Plaintiff, House of Blues refused to consent to Sloon Shine's and Full Throttle's dismissal from the case, even though House of Blues did not have any claims pending against them. On June 25, 2019, Full Throttle and Sloon Shine again moved to dismiss the claims against them. The Court granted Full Throttle's and Sloon Shine's Motion to Dismiss on August 13, 2019.

On October 15, 2019, Plaintiff filed a Second Amended Complaint, which did not include AOS, Full Throttle, or Sloon Shine as Defendants. Plaintiff's Second Amended Complaint alleges that it was only House of Blues' employees and agents that served Wagoner alcohol to

the point of intoxication and caused the accident. (Second Am. Compl. ¶¶ 8, 16, 29, 39, 40, 41, 42, 68, 74, 91, 93, 97.) Plaintiff's Second Amended Complaint alleges that Garner was solely House of Blues' employee and cites to House of Blues' testimony admitting the same. (*Id.* at ¶¶ 40-41.) Plaintiff alleges that when he filed his first Amended Complaint he had not yet discovered that Garner was a House of Blues employee. (*Id.* at ¶ 68.)

On October 18, 2019, House of Blues filed its Answer to the Second Amended Complaint and its Third-Party Complaint. House of Blues asserted the following, third-party claims against all Third-Party Defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. On December 5, 2019, Throttlefest filed a Motion to Dismiss. On December 17, 2019, these Third-Party Defendants moved to dismiss House of Blues' claims. The Court, Judge Culbertson presiding, granted Throttlefest's Motion to Dismiss on February 4, 2020. Arguments on the remaining Third-Party Defendants' motions were heard on February 5, 2020.

LAW/ANALYSIS

"The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction." *Int'l Mariculture Res. v. Grant*, 336 S.C. 434, 437, 520 S.E.2d 160, 161 (Ct. App. 1999) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992)). To meet its burden at this pre-trial stage, House of Blues must make a prima-facie showing of jurisdiction by pleadings and affidavits. See *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). The showing of personal jurisdiction "must be based upon specific facts set forth in the record in order to defeat defendants' motion to dismiss." *Magic Toyota, Inc. v. Southeast Toyota*

Distributors, Inc., 784 F. Supp. 306, 310 (D.S.C. 1992). “When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. Unless unsupported by the evidence or influenced by an error of law, the decision of the trial court will be affirmed. *Id.*

Under Rule 12(b)(6), the Court must dismiss a complaint if fails to state facts sufficient to constitute a cause of action. “Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint.” *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004). However, the Court may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity. *Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 698–99 (1987); *see also Martin v. Companion Healthcare Corp.*, No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609 (4th Cir. 1999)); *Goines v. Valley Cmt’y Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court “may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document’s authenticity.”).¹

I. The Court Lacks Jurisdiction Over These Third-Party Defendants.

The invocation of personal jurisdiction over a nonresident traditionally had involved a two-step analysis. In light of the interpretation that South Carolina’s long-arm statute extends as

¹ “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).

far as the due process clause, courts now focus on whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Due process requires that there exist minimum contacts between the nonresident and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice. *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991). The allegations here concern a claim of “specific jurisdiction,” that is, the right to exercise personal jurisdiction because the cause of action arises specifically from a defendant’s contacts with the state.² See *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The focus of the court’s inquiry must be the contacts generated by the defendant, and not on the unilateral actions of some other person or entity. *Id.*

The primary allegations at issue involve the actions Michael Garner. House of Blues acknowledges in its Answer that it issued Garner a W-2 for his work during the Event. Seeking to distance itself from Garner’s actions, House of Blues then says Garner was “part of the Throttlefest festival talent.” (House of Blues Answer ¶ 8.) 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.” (Third-Party Compl. ¶¶ 97-98.) 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 pin those non-resident, non-contracting parties with the duties of the contract party, as discussed more fully in Section II.A below, 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

² General jurisdiction, which arises from continuous and systematic contacts with the state, clearly is not present here. See *Coggeshall*, 376 S.C. at 17, 655 S.E.2d at 479.

talent” that another entity purportedly obtained—and who House of Blues presumably paid for his work and reported to the IRS to have been an employee.

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. *See generally Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005) (“The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.”); *Aviation Assocs.*, 402 S.E.2d at 180 (nonresident seller’s limited contact insufficient); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 666 (Ct. App. 2008) (finding conclusory assertions unavailing).

II. House of Blues’ Claims Are Dismissed Under Rule 12(b)(6), SCRCP.

While dismissal is warranted under Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, dismissal of House of Blues’ third-party claims is also appropriate under Rule 12(b)(6), SCRCP. House of Blues has failed to state third-party claims for which relief can be granted against these Third-Party Defendants. Each cause of action will be addressed in turn.

A. House of Blues’ Contract-Based Claims Fail.

House of Blues has asserted breach of contract and contractual indemnification claims against Full Throttle, American Outlaw Spirits, and Sloon Shine based upon their alleged obligations under the Co-Promotion Agreement. House of Blues has not alleged in the Third-Party Complaint that these Third-Party Defendants were parties to the Co-Promotion Agreement.

Further, the Third-Party Complaint contains no allegations that these entities were intended, third party beneficiaries of the Co-Promotion Agreement. Instead, House of Blues alleges that Throttlefest, LLC only was party to the Co-Promotion Agreement but asserts it was acting as an agent of the remaining Third-Party Defendants. (Third-Party Compl. ¶¶ 97, 124.)

Under South Carolina law, “one not in privity of contract with another cannot maintain an action against [another] in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable[.]” *Windsor Green Owners Ass’n v. Allied Signal, Inc.*, 362 S.C. 12, 16, 605 S.E.2d 750, 752 (Ct. App. 2004). It is undisputed that American Outlaw Spirits, Full Throttle, and Sloon Shine were not parties to the Co-Promotion Agreement. Throttlefest only was a party to this agreement, and this Court dismissed it from this action on February 4, 2020.

Additionally, House of Blues has not alleged any of the elements establishing that Throttlefest, LLC had either actual or apparent authority as an agent to bind each of these Third-Party Defendants such that they would be bound by this contract. *See Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991) (“The elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment.”). House of Blues’ breach of contract and contractual indemnification claims against Full Throttle, American Outlaw Spirits, and Sloon Shine, therefore, are dismissed.

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

South Carolina Code § 15-38-50 provides that “[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for

the same injury or the same wrongful death: . . . (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.” In *Smith v. Tiffany*, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), the South Carolina Supreme Court confirmed that when the injured party releases one potential joint tortfeasor from liability, the released tortfeasor “is also immune from *any liability* to non-settling alleged tortfeasors . . . by virtue of section 15-38-50.” (emphasis added). There, Smith was injured in a motor vehicle accident and settled with Mizell and gave Mizell a covenant not to execute, making Mizell immune from liability to Smith. *Id.* at 554, 799 S.E.2d at 482. Smith then sued Tiffany for causing the accident. *Id.* Tiffany responded and asserted a third-party complaint against Mizell under Rule 14, SCRCP, claiming that Mizell was responsible for part of Smith’s damages. *Id.*

The supreme court found that Tiffany could not bring Mizell into the case as a third-party defendant because doing so would “require (1) a plaintiff to maintain a suit against someone with whom he has already settled; (2) a settling defendant to defend a lawsuit he has already settled” *Id.* at 569, 799 S.E.2d at 485. The supreme court recognized that Rule 14, SCRCP, provides “a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him* for all or part of the plaintiff’s claim against him.” *Id.* at 560, 799 S.E.2d at 486 (emphasis in original). The *Tiffany* Court held that Tiffany could not bring a third-party complaint against Mizell because Mizell was “not subject to liability for any part of Smith’s claims based on the covenant not to execute he obtained from Smith.” *Id.* at 560-61, 799 S.E.2d at 486.

A similar factual scenario presents itself in this action. Full Throttle and Sloon Shine are not subject to liability for any part of Plaintiff’s claims based on the Release they obtained from Plaintiff in October 2018. Thus, according to *Tiffany* and S.C. Code § 15-38-50, House of Blues

does not have a contribution claim against Full Throttle and Sloon Shine because Plaintiff released them from all liability to him. House of Blues cannot use Rule 14, SCRCP, to bring Full Throttle and Sloon Shine into this case as third-party defendants under a contribution theory. Accordingly, House of Blues' contribution cause of action against Full Throttle and Sloon Shine is dismissed.

House of Blues argues that S.C. Code Ann. § 15-38-50 does not apply here because the settlement between the Plaintiff, Full Throttle, and Sloon Shine was not in "good faith," as is required by the statute. However, House of Blues did not allege in its Third-Party Complaint that the settlement was not in good faith. House of Blues did not present anything else that the Court could consider in support of this argument. Accordingly, the Court rejects it.

House of Blues next argues that *Smith v. Tiffany* did not decide whether due process and equal protection would allow a non-settling defendant to bring a settling party back into a case. While it is true that *Smith v. Tiffany* did not decide this issue, the Court declines to rule that House of Blues' due process or equal protection rights would be violated by not allowing it to bring Full Throttle and Sloon Shine back into this case. Full Throttle and Sloon Shine have already settled with the Plaintiff. House of Blues had ample opportunity to assert crossclaims against them when they were parties to this case, and further has had opportunities to file a separate action against them. 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. House of Blues' constitutional rights are not violated by its inability to bring Full Throttle and Sloon Shine back into this case.

As it pertains to American Outlaw Spirits, House of Blues has failed to allege any facts that would support relief under a contribution theory. In the Third-Party Complaint, House of Blues inconsistently asserts that the damages incurred by the Plaintiff were due to the primary fault of the Third-Party Defendants or their authorized agents, servants, or employees but also that House of Blues and these Third-Party Defendants are joint tortfeasors. *Compare* Third-Party Compl. ¶ 147 *with* ¶ 156-157. However, House of Blues has not alleged that Garner served Wagoner shots of AOS's liquor, nor has it alleged anything else to suggest this Third-Party Defendant may share common liability for the damages suffered by Plaintiff. *See Charleston Elec. Servs., Inc. v. Rahall*, 427 S.C. 317, 322, 831 S.E.2d 122, 124 (Ct. App. 2019) (defining contribution defined as "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."). House of Blues' contribution claim against American Outlaw Spirits is dismissed.

C. House of Blues' Negligence and Negligent Misrepresentation Claims Are Barred by the Statute of Limitations.

In South Carolina, the statute of limitations for negligence actions is three years. S.C. Code § 15-3-530 (2018). An action upon a contract also must be commenced within three years of the breach. S.C. Code § 15-3-530(1). The South Carolina Supreme Court has "repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) ("The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some

promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist.”). “The date on which discovery should have been made is an objective, not subjective, question.” *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016). A statute of limitations begins to run at the time the cause of action accrues. *King v. James*, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). The question of when a cause of action accrues is a question of law for the court to decide. *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). A cause of action accrues when defendant breaches a duty owed to the plaintiff, even though substantial damages either were not discovered or did not even occur until sometime later. *Grooms v. Med. Soc. of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989); *see also Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004) (“The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose.”).

In its negligence cause of action, House of Blues alleges that “the Third-Party Defendants undertook to perform under the Agreement.” Third-Party Compl. ¶ 139. House of Blues next alleges they had “an obligation to exercise due care in their performance.” *Id.* at ¶ 140. Accordingly, House of Blues’ claims sound in contract, not tort. *See Seebaldt v. First Fed. Sav. & Loan Ass’n*, 269 S.C. 691, 692-93, 239 S.E.2d 726, 727 (1977) (“The character of an action is primarily determined by the allegations contained in the complaint. . . . Bare allegations of negligence cannot convert a breach of contract action into an action in tort.”). As held above, these Third-Party Defendants were not parties to the Co-Promotion Agreement. Noticeably absent from the Third-Party Complaint is any duty owed by these Third-Party Defendants apart

from their alleged obligations under the Co-Promotion Agreement. The Third-Party Complaint is fatally defective on this element.

House of Blues argues that these Third-Party Defendants voluntarily undertook a duty to procure and supervise Garner, to promote and distribute their alcohol, and to obtain insurance coverage. House of Blues, however, failed to plead a voluntarily assumed duty. Even had House of Blues properly pled a negligence claim against these Third-Party Defendants, the Court still finds that the negligence claim arose in 2014 and is time-barred.

House of Blues claims that these Third-Party Defendants were negligent, careless, and reckless by:

- a. "Failing to comply with all laws related to the sale and service of alcohol, including any and all prohibitions on the service of free alcohol";
- b. "Engaging in promotion of their own alcohol brands, including but not limited to, S'loon Shine and American Outlaw liquor";
- c. "Failing to use due care [sic] in providing festival talent and personalities for the Throttle Fest event";
- d. "Failing to properly train and supervise Michael Garner";
- e. "Such other and further deficiencies or failures as discovery will reveal"; and
- f. "Being otherwise negligent."

Third-Party Compl. ¶ 141. House of Blues was or should have been on notice of its negligence claim at the end of the Throttle Fest, on or about May 17, 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

House of Blues' cause of action for negligent misrepresentation fails for the same reason. House of Blues asserts that the Third-Party Defendants made false representations to it regarding the following:

- a. "That Third-Party Defendants were experienced in putting on a Full Throttle festival";
- b. "That Third-Party Defendants would act in a commercially reasonable manner";
- c. "That Third-Party Defendants would comply with all laws related to the sale and service of alcohol, inclusion [sic] any and all prohibitions on the service of free alcohol"; and
- d. "That Third-Party Defendants would properly train and supervise Michael Garner."

Third-Party Compl. ¶ 131. House of Blues also alleges they made false representations regarding the procurement and maintenance of insurance coverage in advance of the Event that took place in May 2014. *Id.* at ¶ 130. The Event took place between May 9 and May 17, 2014 and the incident giving rise to the Plaintiff's lawsuit occurred on May 16, 2014. *Id.* at ¶¶ 93, 97, 108-110. House of Blues either knew or should have known of at least some of these Third-Party Defendants' alleged misrepresentations prior to and during the Event. Since the Event occurred on House of Blues' premises and House of Blues employed Garner, it either knew or should have known in May 2014 that these Third-Party Defendants had allegedly misrepresented their ability to train and supervise Garner.

Accordingly, House of Blues' negligent misrepresentation cause of action accrued in May 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which

is, again, outside of the three-year window. House of Blues' negligence and negligent misrepresentation claims are time-barred and are dismissed.

House of Blues argues that these causes of action did not accrue until October 20, 2016, when it learned of Plaintiff's injuries. However, House of Blues' claims are not based solely on Plaintiff's injuries. Some are based on the Third-Party Defendants' alleged misrepresentations which occurred prior to the Event and alleged actions during the Event, which House of Blues either knew of or should have known of during the Event (*e.g.*, these Third-Party Defendants' alleged impermissible participation in alcohol sponsorships during the Event). House of Blues either knew or should have known enough at the time of the Event for its causes of action to accrue.

Equitable tolling also does not assist House of Blues here. House of Blues' claims would still be barred even if the Court would find the statute of limitations tolled prior to these Third-Party Defendants' respective dismissals from this action. As noted above, the claims accrued during the Event, which occurred in May 2014. If the statute of limitations was stopped when Plaintiff filed this action in May 2017, there would have been less than a month left until it expired. If the clock restarted on January 2, 2018 and August 13, 2019, the dismissals of American Outlaw Spirits and then Full Throttle and Sloon Shine, respectively, that remaining month would have passed before House of Blues filed its Third-Party Complaint in October 2019.

Finally, the Court rejects House of Blues' argument that these Third-Party Defendants should be equitably estopped from arguing the statute of limitations because they defended themselves in this case when they were involved as first-party defendants. These parties had no other option than to defend themselves. A review of this case's procedural history reveals that

these parties filed Motions to Dismiss and only Sloon Shine filed an Answer but asserted the statute of limitations as an affirmative defense therein.

D. House of Blues' equitable indemnification claim fails.

South Carolina law recognizes the principle of equitable indemnification. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. 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." *Town of Winnsboro v. Wiedeman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (*Winnsboro II*) (citation omitted).

Courts have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties. *Vermeer Carolina's, Inc.*, 336 S.C. at 60, 518 S.E.2d at 305. Traditionally, equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. *Id.* at 63, 518 S.E.2d at 307. If the second party is also at fault, it comes to court without equity and has no right to indemnity. *Id.* The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault. *Id.*; *see also Scott v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357-58 (1990) ("Under South Carolina law, there can be no indemnity among mere joint tortfeasors."). Thus, for a party to recover under a theory of equitable indemnification, three things must be proven: (1) that the party from whom indemnity is sought (the indemnitor) was liable for causing the damages which are the subject of the claim for indemnity; (2) the party seeking indemnity (the indemnitee) was

without fault for those damages; and (3) the indemnitee paid for claims against it which were eventually proven to be the fault of the indemnitor. *Vermeer Carolina's Inc.*, 336 S.C. at 63, 518 S.E. 2d at 307.

Even assuming the truth of the matters alleged, House of Blues has failed to state a claim for equitable indemnity against Full Throttle, American Outlaw Spirits, and Sloon Shine. House of Blues asserts that the damages alleged by the Plaintiff were due to the primary fault of the Third-Party Defendants and/or its authorized agents, servants, or employees. There is no allegation that House of Blues has been forced to pay damages for the negligence of these Third-Party Defendants. And House of Blues has pled no special relationship exists between it and Full Throttle, American Outlaw Spirits, and Sloon Shine. Here, House of Blues fails to articulate a basis for which these Third-Party Defendants can be held to indemnify House of Blues. This claim is dismissed.

CONCLUSION

Accordingly, it is adjudged, and decreed: (1) Full Throttle, LLC's Motion to Dismiss is granted and the third-party claims asserted against it by House of Blues are dismissed with prejudice; (2) American Outlaw Spirits, Incorporated's Motion to Dismiss is granted and the third-party claims asserted against it by House of Blues are dismissed with prejudice; and (3) Full Throttle Sloon Shine, LLC's Motion to Dismiss is granted and the third-party claims asserted against it by House of Blues are dismissed with prejudice.

IT IS SO ORDERED.

The Honorable William A. McKinnon
Presiding Judge



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Dismissal

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2020-03-26 12:25:32 page 18 of 18

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2603008

Douglas Kelsey et al
PLAINTIFF(S)

House Of Blues Myrtle Beach Restaurant Corporation et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

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

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

NUMERICAL TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2020-03-03 14:32:10 page 3 of 3

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A No.: 2017-CP-26-03008

Douglas Kelsey,

Plaintiff,

vs.

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

Defendants.

ORDER

House of Blues Myrtle Beach Restaurant
Corporation,

Third-Party Plaintiff,

vs.

Throttlefest, LLC; American Outlaw
Spirits Incorporated; Full Throttle LLC;
and Full Throttle Sloon Shine, LLC,

Third-Party Defendants.

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

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

FACTS¹

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

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

House of Blues alleges that it entered into a contract (the Agreement) with Throttlefest “concerning the functions and acts necessary for promoting and conducting” the Event. Third-Party Complaint ¶¶93-97. The Agreement itself⁴ states that it “shall be strictly limited to all functions and acts necessary for promoting and conducting” the Event (Article 1(a)), that it shall not govern or restrict the parties from conducting other business or activities, *and that the parties shall not have any obligations whatsoever to each other outside of the Agreement* (Article 7(n)). House of Blues’ Third-Party Complaint alleges that Throttlefest is liable to it because of Throttlefest’s actions or inactions during the Event. Accordingly, House of Blues’ Third-Party Complaint sounds in breach of contract, not tort. Seebaldt v. First Federal Savings & Loan

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

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

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

CONCLUSION

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

Benjamin H. Culbertson
Presiding Judge



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach
Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

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ELECTRONICALLY FILED - 2020 Feb 05 3:30 PM - HORRY - COMMON PLEAS - CASE#2017CP2603008

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A No.: 2017-CP-26-03008

Douglas Kelsey,)

Plaintiff,)

vs.)

ORDER

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

Defendants.)

House of Blues Myrtle Beach Restaurant)
Corporation,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

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

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

FACTS¹

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

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

House of Blues alleges that it entered into a contract (the Agreement) with Throttlefest “concerning the functions and acts necessary for promoting and conducting” the Event. Third-Party Complaint ¶¶93-97. The Agreement itself⁴ states that it “shall be strictly limited to all functions and acts necessary for promoting and conducting” the Event (Article 1(a)), that it shall not govern or restrict the parties from conducting other business or activities, *and that the parties shall not have any obligations whatsoever to each other outside of the Agreement* (Article 7(n)). House of Blues’ Third-Party Complaint alleges that Throttlefest is liable to it because of Throttlefest’s actions or inactions during the Event. Accordingly, House of Blues’ Third-Party Complaint sounds in breach of contract, not tort. Seebaltd v. First Federal Savings & Loan

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

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

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

CONCLUSION

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

Benjamin H. Culbertson
Presiding Judge



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach
Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2020-02-04 11:09:25 page 13 of 13

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2603008

Douglas Kelsey et al
PLAINTIFF(S)

House Of Blues Myrtle Beach Restaurant Corporation et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Def Throttlefest LLC Motion/Dismiss is GRANTED.
Attorney Jeffrey Michael Bogdan is to prepare a formal order.

PLT's Motion/Sever is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/08/2020 .

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

NAME OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach
Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2020-01-08 12:51:30 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2603008

Douglas Kelsey et al
PLAINTIFF(S)

House Of Blues Myrtle Beach Restaurant Corporation et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Motion/Dismiss is granted.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/13/2019 .

Michael Garner
Full Throttle Saloon And Campground LLC
Katherine T Merritt for Douglas Kelsey, Mark Shimmenger

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Electronic Form 4

So Ordered

s/ Larry B. Hyman 2152

Electronically signed on 2019-08-13 10:01:58 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2603008

Douglas Kelsey et al
 PLAINTIFF(S)

House Of Blues Myrtle Beach Restaurant Corporation et al
 DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant Throttlefest LLC's Motion to Dismiss is Granted.

Defendant Throttlefest LLC's Motion for Sanctions is Denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/11/2018 .

William James Luse for Full Throttle Sloon Shine LLC, Full Throttle LLC
 Christian Stegmaier for House Of Blues Myrtle Beach Restaurant Corporation, HOB
 Entertainment Inc, House Of Blues Concerts Inc
 Amy Lynn Neuschafer for House Of Blues Myrtle Beach Restaurant Corporation, HOB
 Entertainment Inc, House Of Blues Concerts Inc
 William Edward Lawson for Travis Scott Wagoner
 Michael Garner
 Full Throttle Saloon And Campground LLC
 James John Rainsford for Douglas Kelsey, Mark Shimmenger
 M. Dawes Cooke, Jr. for Throttlefest LLC
 Jeffrey Michael Bogdan for Throttlefest LLC

NAME OF PARTY ADDITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach
Restaurant Corporation , defendant, et al
Case Number: 2017CP2603008
Type: Order/Electronic Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2018-12-11 16:39:26 page 3 of 3

ELECTRONICALLY FILED - 2018 Dec 11 4:51 PM - HORRY - COMMON PLEAS - CASE#2017CP2603008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	Civil Action No. 2017-CP-26-03008
	)	
DOUGLAS KELSEY AND	)	
MARK SHIMMENDER,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	STIPULATION OF DISMISSAL WITH
	)	PREJUDICE AS TO THE
HOUSE OF BLUES MYRTLE	)	PLAINTIFFS' CLAIMS AGAINST
BEACH RESTAURANT	)	DEFENDANTS
CORPORATION; HOB	)	(NOT ENDING ACTION)
ENTERTAINMENT, INC.; AND	)	
TRAVIS SCOTT WAGONER,	)	
	)	
Defendants.	)	
	)	

It has been made to appear to the Court that the Plaintiffs and the Defendants have resolved their differences and this matter is no longer at issue as to these parties. Upon motion of William E. Lawson, attorney for Defendant, Travis Scott Wagoner, and with the consent of James Rainsford, attorney for Plaintiffs, Douglas Kelsey and Mark Shimmenger, and Christian Stegmaier, attorney for Defendants, House of Blues Myrtle Beach Restaurant Corporation and HOB Entertainment, Inc.

IT IS HEREBY STIPULATED by and between the parties that the claims against Defendants, House of Blues Myrtle Beach Restaurant Corporation and HOB Entertainment, Inc. and Travis Scott Wagoner in this matter is dismissed with prejudice.

DATED this 17th day of March, 2021

WE STIPULATE:

/s/ William E. Lawson
 William E. Lawson, SC Bar No. 03239
 Attorney for Defendant, Travis Scott Wagoner

/s/ James Rainsford

James Rainsford, SC Bar No. 74924

Attorney for Plaintiffs

/s/ Christian Stegmaier

Christian Stegmaier, SC Bar No. 68648

Attorney for Defendants, House of Blues

Myrtle Beach Restaurant Corporation and

HOB Entertainment, Inc.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A No.: 2017-CP-26-03008

Douglas Kelsey and Mark Shimmenger,)

Plaintiffs,)

vs.)

House of Blues Myrtle Beach Restaurant)
Corporation; House of Blues Concerts,)
Inc.; HOB Entertainment, Inc.; Full)
Throttle, LLC; Full Throttle Sloon Shine,)
LLC; Throttlefest, LLC; American)
Outlaw Spirits, Inc.; Michael Ballard;)
Jesse James Dupree; Michael Garner; and)
Travis Scott Wagoner,)

Defendants.)

**NOTICE OF DISMISSAL WITHOUT
PREJUDICE**

Pursuant to Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure and by and through their undersigned counsel, Plaintiffs Douglas Kelsey and Mark Shimmenger hereby dismiss, *without prejudice*, Defendants American Outlaw Spirits, Inc., Michael Ballard, and Jesse James Dupree from this action. This action remains pending against the other Defendants.

This the 22nd day of January, 2018

Respectfully Submitted,

/s/James Rainsford
South Carolina Bar Number 38696
Coleman, Gledhill, Hargrave, Merritt & Rainsford, P.C.
129 East Tryon Street
Hillsborough, North Carolina 27278
Phone: 919-732-2196
Fax: 919-732-7997
Email: j rainsford@hillsboroughnclaw.com
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
DOUGLAS KELSEY and)
MARK SHIMMENDER,)
Plaintiffs)
v.)
HOUSE OF BLUES MYRTLE)
BEACH RESTAURANT)
CORPORATION; HOUSE OF)
BLUES CONCERTS, INC.;)
HOB ENTERTAINMENT,)
INC.; FULL THROTTLE, LLC;)
FULL THROTTLE SLOON SHINE,)
LLC; FULL THROTTLE SALOON)
AND CAMPGROUND, LLC;)
AMERICAN OUTLAW)
SPIRITS, INC.; MICHAEL)
BALLARD; JESSE JAMES DUPREE;)
MICHAEL GARNER; and)
TRAVIS SCOTT WAGONER;)
Defendants)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2017-CP-_____

COMPLAINT
(jury trial demanded)

NOW COME Plaintiffs, Douglas Kelsey and Mark Shimmenger, by and through their attorney, James Rainsford, and make the following Complaint against Defendants and pray for the relief requested herein:

PARTIES

1. Plaintiff Douglas Kelsey is a resident and citizen of Franklinton, North Carolina.
2. Plaintiff Mark Shimmenger is a resident and citizen of Franklinton, North Carolina.
3. Defendant House of Blues Myrtle Beach Restaurant Corporation d/b/a/ House of Blues (hereinafter "House of Blues") is a Delaware corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina.

4. Defendant House of Blues Concerts, Inc. d/b/a/ House of Blues (hereinafter "House of Blues") is a California corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina.
5. Defendant HOB Entertainment, Inc. d/b/a House of Blues (hereinafter "House of Blues") is a Delaware corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina.
6. Defendant Full Throttle, LLC (hereinafter "Full Throttle") is a South Dakota corporation and it transacts business in, markets its products in, and sells products in South Carolina.
7. Defendant Full Throttle Sloon Shine, LLC (hereinafter "Sloon Shine") is a Tennessee corporation and it transacts business in, markets its products in, and sells products in South Carolina.
8. Defendant Full Throttle Saloon and Campground, LLC (hereinafter "Full Throttle") is a South Dakota corporation and it transacts business in, markets its product in, and sells products in South Carolina.
9. Defendant American Outlaw Spirits, Inc. (hereinafter "American Outlaw") is a Georgia corporation and it transacts business in, markets its products in, and sells products in South Carolina.
10. Defendant Michael Ballard (hereinafter "Defendant Ballard") is, upon information and belief, a resident and citizen of Memphis, Tennessee. Defendant Ballard is the owner of Full Throttle and Sloon Shine.
11. Defendant Jesse James Dupree (hereinafter "Defendant Dupree") is, upon information and belief, a resident and citizen of Kennesaw, Georgia. Defendant Dupree is the owner, CEO and CFO of American Outlaw and part owner of Full Throttle.
12. Defendant Michel Garner (hereinafter "Fajita Mike") is, upon information and belief, a resident and citizen of Newport, North Carolina.
13. Defendant Travis Wagoner (hereinafter "Defendant Wagoner") is a resident and citizen of West Jefferson, North Carolina.

JURISDICTION AND VENUE

14. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
15. The acts and injuries complained of herein were committed in Horry County, South Carolina and as such this Court has jurisdiction of the parties and subject matter and venue is proper.
16. For purposes of this Complaint, the term "Defendants" includes all of the named Defendants with the exception of Defendant Wagoner (and unless otherwise specified elsewhere within the Complaint).

FACTUAL ALLEGATIONS

17. In May of 2014, Defendants partnered to host "Throttle Fest," a week-long event in which the House of Blues was essentially transformed into Full Throttle, which is the self-proclaimed world's largest biker bar located in South Dakota.
18. Full Throttle became the subject of a reality television series that premiered on November 10, 2009.
19. The show chronicles the exploits of the Full Throttle owners, staff, and customers including Fajita Mike.
20. On the show and off the show, Fajita Mike is known for his drunken antics, his wild behavior, and his status as a "loose cannon" according to one of Full Throttle's owners, Michael Ballard.
21. Full Throttle gets the majority of its business during the annual week-long Sturgis Motorcycle Rally, which is held in August.
22. At the time of the events in question, Full Throttle had indoor and outdoor bars as well as several large stages, a burn-out pit, a tattoo parlor, zip lines, and a wrestling ring.
23. Each year, the first full week of August marks the beginning of the Sturgis Motorcycle Rally, during which time the Saloon could average 20,000 guests each night.
24. For the remainder of the year, Full Throttle has drastically less business and as a result it decided to "take the show on the road" by partnering with venues across the country to create week long gatherings that recreate the

Full Throttle “experience” including, among other things, wild nights of drinking Sloon Shine liquor and American Outlaw liquor.

25. Sloon Shine liquor is liquor produced by and sold by Sloon Shine. American Outlaw liquor is liquor produced by and sold by American Outlaw.
26. One such partnership is Throttle Fest Myrtle Beach, which is an annual gathering each May where Full Throttle partners with the House of Blues to create a wild, rowdy, biker bar atmosphere with an emphasis on drinking.
27. In 2014, Throttle Fest was hosted from May 9 through May 17 at the House of Blues in Myrtle Beach, South Carolina.
28. During the week of Throttle Fest, Fajita Mike, while at the House of Blues, demonstrated his drunken antics and wild behavior by drinking excessive amounts of Sloon Shine liquor and American Outlaw liquor and sold and gave shots of these products to customers (and took shots of these products with customers).
29. Upon information and belief, Fajita Mike was able to earn sales bonuses and incentives by selling certain quantities of Sloon Shine liquor and American Outlaw liquor.
30. Fajita Mike was also an agent for the three House of Blues Defendants in that his presence at and position as server was designed to attract customers to the House of Blues because Fajita Mike was, at the time, a television personality on the reality television program “Full Throttle Saloon.”
31. Fajita Mike was also selling alcohol pursuant to the House of Blues’ liquor license. House of Blues is licensed by the State of South Carolina to serve alcoholic beverages.
32. Upon information and belief, part of Fajita Mike’s compensation at Throttle Fest was also provided by or on behalf of the three House of Blues Defendants.
33. Thus, Fajita Mike was acting on behalf of and in furtherance of the financial interests of the three House of Blues Defendants.
34. He used his television persona to make money and further the business and economic interests of Defendants, and advertised for customers to travel to Full Throttle’s principal place of business in Sturgis, South Dakota.

35. At the time of Throttle Fest, Fajita Mike was the national sales representative of Sloon Shine and American Outlaw and he was promoting and selling products for both companies during the entire week of Throttle Fest at the behest of and direction of Defendant Ballard and Defendant Dupree.
36. Defendant Ballard and Defendant Dupree were physically present at the House of Blues during the week of Throttle Fest and on May 16 and May 17, 2017.
37. Defendants were all aware of Fajita Mike's reputation as a "loose cannon" and his drunken antics.
38. Defendants were aware of and endorsed the fact he was selling and giving shots of Sloon Shine liquor and American Outlaw liquor to customers, and taking shots of Sloon Shine liquor and American Outlaw liquor with customers at the House of Blues the entire week of Throttle Fest, including the night in question.
39. Defendants accepted the financial benefits of Fajita Mike's actions, they had full knowledge of what he was doing, and they elected to allow him to do this throughout the entirety of Throttle Fest. Indeed, they adopted his reckless and illegal behavior as shall be further explained herein.
40. Defendants had the right to control the actions of Fajita Mike, they were all responsible in one way or another for his payment, they furnished him with Sloon Shine liquor and American Outlaw liquor, and they had the right to fire him from Throttle Fest, his position as a sales manager, and his position at Full Throttle.
41. Upon information and belief, Defendants had the ability to control the actions of the bartenders and the servers.
42. On the night of May 16, 2014, there were bartenders working behind the bars at the House of Blues and there were additional servers walking around selling shots of liquor for cash.
43. The majority of these additional servers were scantily clad women who are sometimes referred to in the bar business as "shot girls," although for purposes of this Complaint they have been and shall be referred to as "servers."
44. The servers were serving Sloon Shine liquor and American Outlaw liquor.

45. Upon information and belief, Defendants all received some portion of the proceeds from the sale of the shots of these products.
46. On May 16, 2014 at approximately 7:30 p.m., Defendant Wagoner arrived at the House of Blues in Myrtle Beach, South Carolina to see a concert and to take part in Throttle Fest.
47. He was sober when he arrived. He purchased a ticket to Throttle Fest and the concert in the House of Blues which was being put on and promoted by Defendants.
48. Once inside, Defendant Wagoner was served beer and liquor by or on behalf of Defendants up to and well after the point that he became visibly intoxicated.
49. At approximately 11:15 to 11:30 p.m., Defendant Wagoner was approached by Fajita Mike and was given approximately two shots of Sloop Shine liquor which Fajita Mike was serving in plastic cups.
50. This was done in the middle of the House of Blues in full sight of its staff members and at a time when the house lights were on (and thus the room was not dark).
51. Thus, while at the House of Blues, Defendants individually or through agents and/or employees served Defendant Wagoner alcoholic beverages with actual knowledge and with constructive knowledge of Defendant Wagoner's visibly intoxicated condition and Defendants permitted Defendant Wagoner to drive away in a visibly intoxicated condition.
52. 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.
53. Approximately twenty five minutes after leaving the parking lot, and having consumed no additional alcohol since his departure from inside the House of Blues, Defendant Wagoner crashed his motorcycle into Plaintiff Douglas Kelsey, and made limited contact with Plaintiff Mark Shimmenger's motorcycle.
54. 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.

55. Plaintiff Douglas Kelsey's left leg was nearly severed as a result of the collision. Although surgeons later tried to save his leg, after multiple surgeries and multiple muscle realignments, his leg had to be amputated above the knee.
56. Plaintiff Mark Shimmenger came to his aid and literally held Plaintiff Douglas Kelsey's leg together until emergency medical services arrived.
57. Plaintiff Douglas Kelsey, believing he was facing imminent death, asked Plaintiff Mark Shimmenger to take care of his daughters.
58. Shortly after the crash, police officers arrived on the scene to investigate.
59. Officers on the scene noted that Defendant Wagoner was visibly intoxicated.
60. The officers on the scene administered Defendant Wagoner several field sobriety tests and thereafter arrested him for Driving Under the Influence ("DUI") after he failed these tests.
61. A sample of Defendant Wagoner's blood was taken approximately four hours after his last drink of alcohol. Even with that lapse of time, his blood alcohol level was still well above the legal limit.
62. On November 4, 2015, Defendant Wagoner pled guilty to DUI.
63. Dr. Robert B. Forney, Jr., a forensic toxicologist, has evaluated the information in this case and has determined that at the time just before Defendant Wagoner took the shots of Sloop Shine liquor with Fajita Mike, his blood alcohol level was at least .16 (over twice the State's *per se* legal limit for operating a vehicle), and that he would have been exhibiting noticeable signs of intoxication.
64. A video recording of Defendant Wagoner taken just after the crash corroborates Dr. Forney's opinion in that it shows a visibly intoxicated Defendant Wagoner who is unsteady on his feet and who almost falls to the ground while trying to perform field sobriety tests being administered by PFC Bauer (the arresting police officer with the Myrtle Beach Police Department).

FIRST CLAIM FOR RELIEF
(Dram Shop Liability – Defendants)

65. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
66. The essential purpose of South Carolina Code Annotated § 61-4-580 and § 61-6-220 (“the statutes”) is to protect Plaintiffs and others similarly situated from the type of harm Plaintiffs suffered.
67. It also creates a duty for Defendants and their respective agents and/or employees to protect Plaintiffs from such harm.
68. 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.
69. 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.
70. 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; and
 - g. and such other acts as shall be shown at the trial of this matter.
71. Defendants' afore-mentioned violations of the statutes and acts of negligence were the direct and proximate cause of Defendant Wagoner's crash that caused the injuries and damages suffered by Plaintiffs.
 72. Defendants' afore-mentioned acts also constitute a common nuisance as that term is defined by South Carolina Code Annotated § 61-8-10 and thus constitute an additional violation of the statutes.
 73. As a result of Defendants' afore-mentioned acts, Plaintiff Douglas Kelsey has suffered and continues to suffer lost time and/or income and impairment of his ability to work; out of pocket expenses and past and future medical expenses; physical pain and suffering and disfigurement and scarring; loss of family services and consortium; loss of enjoyment of life, deprivation of normal life expectancy, and alteration of lifestyle; mental distress, mental anguish, psychological trauma; and embarrassment and humiliation; and such other past future physical and economic damages as shall be shown at the trial of this matter.
 74. Plaintiff Mark Shimmenger is a close personal friend to Plaintiff Douglas Kelsey. He had to be hospitalized as a result of the carnage he witnessed and as the result of almost being killed by Defendant Wagoner's motorcycle.
 75. As a result of Defendants' aforementioned acts, Plaintiff Mark Shimmenger incurred physical and economic damages.
 76. Based on the above, Plaintiffs allege that they are entitled to judgment for actual and punitive damages from Defendants in an amount to be determined at trial.
 77. Defendants' conduct (including Defendant Wagoner) was willful, wanton, reckless, grossly negligent, violated the statutes, and involved the use, sale and possession of alcohol.

78. Therefore, Defendants have joint and several liability for the damages suffered by Plaintiffs.

SECOND CLAIM FOR RELIEF
(Negligence *Per Se* – Travis Wagoner)

79. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
80. Defendant Wagoner owed a duty of care to Plaintiffs while operating a motor vehicle upon a public roadway, namely to exercise ordinary care in order to avoid an accident from which an injury might result.
81. He breached that duty, proximately causing damages to Plaintiffs, in that he:
- a. Failed to maintain a proper lookout;
 - b. Failed to see what was there to be seen;
 - c. Failed to keep his vehicle under proper control;
 - d. Failed to keep his vehicle within its lane of travel;
 - e. Failed to exercise ordinary care while on a public street;
 - f. Left his lane of travel without first determining that it was safe to do so;
 - g. Crossed the center line of the roadway and entered the oncoming lane of travel without first determining that it was safe to do so;
 - h. Drove a vehicle in such a manner as to indicate a willful or wanton disregard for the safety of persons or property, in violation of South Carolina Code Annotated § 56-5-2920, which violation constitutes negligence *per se*;
 - i. Operated a vehicle while under the influence of alcohol to the extent that his faculties were materially and appreciably impaired, in violation of South Carolina Code Annotated § 56-5-2930, which violation constitutes negligence *per se*;

- j. While under the influence of alcohol drove a motor vehicle and when driving the motor vehicle did an act forbidden by law or neglected a duty imposed by law in the driving of the motor vehicle, proximately causing great bodily injury, in violation of South Carolina Code Annotated § 56-5-2945, which violation constitutes negligence *per se*; and
 - k. Otherwise failed to operate his vehicle as a reasonable and prudent person would and should have done under like and similar circumstances.
82. On November 4, 2015, Defendant Wagoner pled guilty to DUI. Under South Carolina law, that guilty plea serves as an admission by him to all of the elements of South Carolina Code Annotated § 56-5-2930(A).
 83. Accordingly, he has admitted and is estopped from contesting that he was operating a vehicle while under the influence of alcohol, drugs, or a combination thereof to the extent that his faculties were materially and appreciably impaired at the time that the collision took place.
 84. As a direct and proximate result of Defendant Wagoner's breaches of duty as alleged above, Plaintiffs suffered physical and economic injury as previously alleged in the Complaint.
 85. To date, Plaintiff Douglas Kelsey has incurred medical expenses in excess of \$1,000,000 for reasonable and necessary treatment rendered to him as a result of the collision, and his treatment remains ongoing.
 86. Defendant Wagoner's actions in causing the collision were reckless, willful, wanton, malicious, and evinced as conscious disregard for the life and well-being of others.
 87. The negligence and gross negligence of Defendant Wagoner were aggravated by his aforesaid willful and wanton conduct.
 88. Therefore, Plaintiffs are entitled to recover actual and punitive damages from Defendant Wagoner in an amount to be determined at trial.
 89. Based upon the facts as alleged in the First Claim for Relief and incorporated herein, Defendants (including Defendant Wagoner) have joint and several liability for the damages suffered by Plaintiffs.

THIRD CLAIM FOR RELIEF

(*Respondeat Superior* and Agency – Defendants)

90. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
91. As has been previously alleged herein, at the time Fajita Mike gave Defendant Wagner the shots of liquor, Fajita Mike was acting as Defendants' agent and/or employee.
92. As has been previously alleged herein, at the time the bartenders gave Defendant Wagner the alcohol, the bartenders were acting as Defendants' agents and/or employees.
93. Fajita Mike's motive and purpose at the time he served Defendant Wagoner the shots of liquor was to benefit Defendants who were his employer and/or his principals/masters.
94. The bartenders' motives and purposes at the time they served Defendant Wagoner the alcohol was to benefit Defendants who were their employer and/or their principals/masters.
95. The negligence, gross negligence, and violation of the statutes by Fajita Mike and by the bartenders set forth in this Complaint is imputed to Defendants pursuant to the doctrine of *respondeat superior* and/or agency.
96. As a direct and proximate result of the aforesaid negligence, gross negligence, and violation of the statutes by Fajita Mike and the bartenders, Plaintiffs are entitled to recover actual and punitive damages from Defendants, jointly and severally, in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF

(Joint Enterprise/Negligent Supervision – Defendants)

97. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
98. Throttle Fest was a joint enterprise of Defendants, jointly sponsored, organized, managed, and held by Defendants for their collective benefit.
99. Defendants shared a common purpose, goal, and community of interest in sponsoring, organizing, and managing Throttle Fest, and at the time of their actions alleged above they were acting toward the accomplishment of that purpose.

100. Defendants had an equal right to manage, direct, and control Throttle Fest, including the actions of Fajita Mike, the bartenders, and the servers.
101. An agency relationship was formed between Defendants with respect to the sponsorship, organization, and managing of Throttle Fest, including the actions of Fajita Mike, the bartenders, and servers.
102. Defendants were all aware of Fajita Mike's reputation as a "loose cannon", his drunken antics, and the fact that he was selling shots and taking shots of Sloon Shine liquor and American Outlaw liquor with customers at the House of Blues the entire week of Throttle Fest.
103. Defendants had the ability and the duty to manage and control what happened at the event, including supervision of Fajita Mike, the bartenders, and the servers.
104. Defendants breached this duty and as a direct and proximate result of said breach, Defendant Wagoner crashed his motorcycle into Plaintiffs who were then injured and suffered damages, both physical and economic.
105. Based on the foregoing, Defendants were negligent, grossly negligent, and violated the statutes in allowing the bartenders and Fajita Mike to overserve alcohol to the visibly intoxicated Defendant Wagoner, and said negligence, gross negligence, and violation of the statutes is imputed to each of the Defendants (except for Defendant Wagoner).
106. As a direct and proximate result of Defendants' aforesaid negligence, gross negligence, and violations of the statutes, Plaintiffs are entitled to recover actual and punitive damages from Defendants, jointly and severally, in an amount to be determined at trial.

PUNITIVE DAMAGES

107. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
108. In each cause of action set out herein, Plaintiffs are entitled to actual damages and punitive damages from Defendants (including Defendant Wagoner).
109. The actions of Defendants (including Defendant Wagoner) as described herein violated the statutes and were willful, wanton, malicious, and in

reckless disregard of Plaintiffs' rights and also involved the use, sale and possession of alcohol.

110. Defendants' actions constitute a conscious failure to exercise and observe reasonable care.
111. Defendants' actions were committed in such a manner that a person of ordinary prudence would conclude that they were done in reckless disregard for Plaintiffs' rights.
112. Defendants' actions as described herein were performed by their officers, directors, members, managers, employees, and agents.
113. Thus Plaintiffs are entitled to an award of punitive damages against Defendants in an amount to be determined at trial.
114. For purposes of the Complaint, the term "acts" and "actions" include acts and omissions.

WHEREFORE, Plaintiffs Pray the Court for the following relief as to all causes of action:

- I. For judgment against Defendants including Defendant Wagoner for actual damages and punitive damages;
- II. For any and all pre-judgment and post-judgment interest as allowed by law;
- III. For the costs and disbursements of this action; and
- IV. For such other and further relief as this Honorable Court may deem just and proper.

s/James Rainsford
 South Carolina Bar Number 74924
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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2017-CP- 2603008

DOUGLAS KELSEY and)
MARK SHIMMENDER,)

Plaintiffs)

v.)

HOUSE OF BLUES MYRTLE)
BEACH RESTAURANT)
CORPORATION; HOUSE OF)
BLUES CONCERTS, INC.;)
HOB ENTERTAINMENT,)
INC.; FULL THROTTLE, LLC;)
FULL THROTTLE SLOON SHINE,)
LLC; THROTTLEFEST, LLC;)
AMERICAN OUTLAW)
SPIRITS, INC.; MICHAEL)
BALLARD; JESSE JAMES DUPREE;)
MICHAEL GARNER; and)
TRAVIS SCOTT WAGONER;)

Defendants)

SUMMONS

(jury trial demanded)

TO THE DEFENDANTS NAMED ABOVE

YOU ARE HEREBY SUMMONSED and required to answer the amended complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said Plaintiffs upon the subscribed, at his office at 129 East Tryon Street, Hillsborough, North Carolina, 27278, within thirty (30) days after the service hereof, exclusive of the day of such service. If you shall fail to appear and defend in this matter within the time set forth herein above, judgment by default will be rendered against you for the relief demanded in the Complaint.

/s James Rainsford
JAMES RAINSFORD
ATTORNEY FOR PLAINTIFFS

Dated: July 7, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	2017-CP-2603008
DOUGLAS KELSEY and	)	
MARK SHIMMENDER,	)	
	)	
Plaintiffs	)	
v.	)	
	)	
HOUSE OF BLUES MYRTLE	)	AMENDED COMPLAINT
BEACH RESTAURANT	)	(jury trial demanded)
CORPORATION; HOUSE OF	)	
BLUES CONCERTS, INC.;	)	
HOB ENTERTAINMENT,	)	
INC.; FULL THROTTLE, LLC;	)	
FULL THROTTLE SLOON SHINE,	)	
LLC; THROTTLEFEST, LLC;	)	
AMERICAN OUTLAW	)	
SPIRITS, INC.; MICHAEL	)	
BALLARD; JESSE JAMES DUPREE;	)	
MICHAEL GARNER; and	)	
TRAVIS SCOTT WAGONER;	)	
	)	
Defendants	)	

NOW COME Plaintiffs, Douglas Kelsey and Mark Shimmenger, by and through their attorney, James Rainsford, and, pursuant to South Carolina Rule of Civil Procedure 15(a) and pursuant to South Carolina Rule of Civil Procedure 15(c), hereby make the following Amended Complaint against Defendants and pray for the relief requested herein:

PARTIES

1. Plaintiff Douglas Kelsey is a resident and citizen of Franklinton, North Carolina.
2. Plaintiff Mark Shimmenger is a resident and citizen of Franklinton, North Carolina.
3. Defendant House of Blues Myrtle Beach Restaurant Corporation d/b/a/ House of Blues (hereinafter "House of Blues") is a Delaware corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina.

4. Defendant House of Blues Concerts, Inc. d/b/a/ House of Blues (hereinafter "House of Blues") is a California corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina.
5. Defendant HOB Entertainment, Inc. d/b/a House of Blues (hereinafter "House of Blues") is a Delaware corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina.
6. Defendant Full Throttle, LLC (hereinafter "Full Throttle") is a South Dakota corporation and it transacts business in, markets its products in, and sells products in South Carolina.
7. Defendant Full Throttle Sloon Shine, LLC (hereinafter "Sloon Shine") is a Tennessee corporation and it transacts business in, markets its products in, and sells products in South Carolina.
8. Defendant Throttlefest, LLC (hereinafter "Full Throttle") is a Florida corporation and it transacts business in, markets its product in, and sells products in South Carolina. Throttlefest, LLC has been 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 (and who is not named in this Amended Complaint).
9. Defendant American Outlaw Spirits, Inc. (hereinafter "American Outlaw") is a Georgia corporation and it transacts business in, markets its products in, and sells products in South Carolina.
10. Defendant Michael Ballard (hereinafter "Defendant Ballard") is, upon information and belief, a resident and citizen of Memphis, Tennessee. Defendant Ballard is the owner of Full Throttle and Sloon Shine.
11. Defendant Jesse James Dupree (hereinafter "Defendant Dupree") is, upon information and belief, a resident and citizen of Kennesaw, Georgia. Defendant Dupree is the owner, CEO and CFO of American Outlaw and part owner of Full Throttle.
12. Defendant Michel Garner (hereinafter "Fajita Mike") is, upon information and belief, a resident and citizen of Deland, Florida.
13. Defendant Travis Wagoner (hereinafter "Defendant Wagoner") is a resident and citizen of West Jefferson, North Carolina.

JURISDICTION AND VENUE

14. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
15. The acts and injuries complained of herein were committed in Horry County, South Carolina and as such this Court has jurisdiction of the parties and subject matter and venue is proper.
16. For purposes of this Complaint, the term "Defendants" includes all of the named Defendants with the exception of Defendant Wagoner (and unless otherwise specified elsewhere within the Complaint).

FACTUAL ALLEGATIONS

17. In May of 2014, Defendants partnered to host "Throttle Fest," a week-long event in which the House of Blues, located at 4640 Highway 17 South, North Myrtle Beach, South Carolina 29582, was essentially transformed into Full Throttle, which is the self-proclaimed world's largest biker bar located in Sturgis, South Dakota.
18. A contract was also entered into by and between Defendant House of Blues Myrtle Beach Restaurant Corporation and Defendant Throttlefest, LLC, the terms of which governed some of the aspects of "Throttle Fest."
19. Full Throttle became the subject of a reality television series that premiered on November 10, 2009. The show chronicles the exploits of the Full Throttle owners and staff, including Defendant Michael Ballard, Jesse James Dupree, and Fajita Mike, as they operate the self-proclaimed world's largest biker bar in Sturgis, South Dakota.
20. On the show and off the show, Fajita Mike is known for his drunken antics, his wild behavior, and his status as a "loose cannon" according to one of Full Throttle's owners, Michael Ballard.
21. Full Throttle gets the majority of its business during the annual week-long Sturgis Motorcycle Rally, which is held in August.
22. At the time of the events in question, Full Throttle had indoor and outdoor bars as well as several large stages, a burn-out pit, a tattoo parlor, zip lines, and a wrestling ring.

23. Each year, the first full week of August marks the beginning of the Sturgis Motorcycle Rally, during which time the Saloon could average 20,000 guests each night.
24. For the remainder of the year, Full Throttle has drastically less business and as a result it decided to "take the show on the road" by partnering with venues across the country to create week long gatherings that recreate the Full Throttle "experience" including, among other things, wild nights of drinking Sloon Shine liquor and American Outlaw liquor.
25. Sloon Shine liquor is liquor produced by and sold by Sloon Shine. American Outlaw liquor is liquor produced by and sold by American Outlaw.
26. One such partnership is Throttle Fest Myrtle Beach, which is an annual gathering each May where Full Throttle partners with the House of Blues to create a wild, rowdy, biker bar atmosphere with an emphasis on drinking.
27. In 2014, Throttle Fest was hosted from May 9 through May 17 at the House of Blues in Myrtle Beach, South Carolina. A copy of the Throttle Fest promotional photo is attached hereto as Exhibit A.
28. During the week of Throttle Fest, Fajita Mike, while at the House of Blues, demonstrated his drunken antics and wild behavior by drinking excessive amounts of Sloon Shine liquor and American Outlaw liquor and sold and gave shots of these products to customers (and took shots of these products with customers).
29. Upon information and belief, Fajita Mike was able to earn sales bonuses and incentives by selling certain quantities of Sloon Shine liquor and American Outlaw liquor.
30. Fajita Mike was also an agent for the House of Blues in that his presence at and position as server was designed to attract customers to the House of Blues because Fajita Mike was, at the time, a television personality on the reality television program "Full Throttle Saloon."
31. Fajita Mike was also selling alcohol pursuant to the House of Blues' liquor license. House of Blues is licensed by the State of South Carolina to serve alcoholic beverages.
32. Upon information and belief, part of Fajita Mike's compensation at Throttle Fest was also provided for in some measure by or on behalf of the House of Blues Defendants.

33. Thus, Fajita Mike was acting on behalf of and in furtherance of the financial interests of the House of Blues.
34. He used his television persona to make money and further the business and economic interests of Defendants, and advertised for customers to travel to Full Throttle's principal place of business in Sturgis, South Dakota.
35. At the time of Throttle Fest, Fajita Mike was the national sales representative of Sloon Shine and American Outlaw and he was promoting and selling products for both companies during the entire week of Throttle Fest at the behest of and direction of Defendant Ballard and Defendant Dupree.
36. Defendant Ballard and Defendant Dupree were physically present at the House of Blues during the week of Throttle Fest and on May 16 and May 17, 2017.
37. Defendants were all aware of Fajita Mike's reputation as a "loose cannon" and his drunken antics.
38. Defendants were aware of and endorsed the fact he was selling and giving shots of Sloon Shine liquor and American Outlaw liquor to customers, and taking shots of Sloon Shine liquor and American Outlaw liquor with customers at the House of Blues the entire week of Throttle Fest, including the night in question.
39. Defendants accepted the financial benefits of Fajita Mike's actions, they had full knowledge of what he was doing, and they elected to allow him to do this throughout the entirety of Throttle Fest. Indeed, they adopted his reckless and illegal behavior as shall be further explained herein.
40. Defendants had the right to control the actions of Fajita Mike, they were all responsible in one way or another for his payment, they furnished him with Sloon Shine liquor and American Outlaw liquor, and they had the right to fire him from Throttle Fest, his position as a sales manager, and his position at Full Throttle.
41. Plaintiffs contend that Fajita Mike had Defendants' express authority to serve Sloon Shine to Defendant Wagoner.
42. Furthermore, Fajita Mike's apparent authority to serve Sloon Shine to Defendant Wagoner was created by Defendants by their allowing and in no way preventing Fajita Mike from serving Sloon Shine to Defendant

Wagoner in the middle of the House of Blues in full view of others; and it was reasonable for Defendant Wagoner to believe that Defendants consented to Fajita Mike giving Defendant Wagoner the shots of Sloon Shine.

43. Defendants' either intended to cause Defendant Wagoner to believe Fajita Mike was authorized to act for them, or they should have realized his conduct was likely to create such a belief in Defendant Wagoner.
44. Indeed, at the time he gave Defendant Wagoner the shots of Sloon Shine, Fajita Mike also allowed himself to be photographed with one of Defendant Wagoner's friends. It was not a brief encounter. A copy of that photograph is attached hereto as Exhibit B.
45. Additionally, the next year, at Throttlefest 2015, a commercial was made advertising Throttlefest 2015 in which Fajita Mike challenges any person coming to Throttlefest to go "shot for shot" with him. Defendant Michael Ballard is also in the commercial.
46. Upon information and belief, Defendants also had the ability to control the actions of the bartenders and the servers.
47. Specifically, on the night of May 16, 2014, the House of Blues employed bartenders who were selling alcohol to customers at the House of Blues and the House of Blues had also contracted for additional servers walking around selling shots of liquor for cash. All of these individuals selling and serving alcohol were doing so under the liquor license of the House of Blues.
48. The majority of these additional servers were scantily clad women who are sometimes referred to in the bar business as "shot girls," although for purposes of this Complaint they have been and shall be referred to as "servers."
49. The servers were serving Sloon Shine liquor and American Outlaw liquor.
50. Upon information and belief, Defendants all received financial benefit in one form or another based on the proceeds from the sale of the shots of these products.
51. On May 16, 2014 at approximately 7:30 p.m., Defendant Wagoner arrived at the House of Blues in Myrtle Beach, South Carolina to see a concert and to take part in Throttle Fest.

52. He was sober when he arrived. He purchased a ticket to Throttle Fest and the concert in the House of Blues which was being put on and promoted by Defendants.
53. Once inside, Defendant Wagoner was served beer and liquor by or on behalf of Defendants up to and well after the point that he became visibly intoxicated.
54. At approximately 11:15 to 11:30 p.m., Defendant Wagoner was approached by Fajita Mike and was given approximately two shots of Sloop Shine liquor which Fajita Mike was serving in plastic cups.
55. This was done in the middle of the House of Blues in full sight of its staff members and at a time when the house lights were on (and thus the room was not dark).
56. Thus, while at the House of Blues, Defendants individually or through agents and/or employees served Defendant Wagoner alcoholic beverages with actual knowledge and with constructive knowledge of Defendant Wagoner's visibly intoxicated condition and Defendants permitted Defendant Wagoner to drive away in a visibly intoxicated condition.
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, 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.
60. Plaintiff Douglas Kelsey did not know what or who hit him. His left leg was nearly severed as a result of the collision. Although surgeons later tried to save his leg, after multiple surgeries and multiple muscle realignments, his leg had to be amputated above the knee.

61. Plaintiff Mark Shimmenger came to his aid and literally held Plaintiff Douglas Kelsey's leg together until emergency medical services arrived.
62. Plaintiff Douglas Kelsey, believing he was facing imminent death, asked Plaintiff Mark Shimmenger to take care of his daughters. He lost consciousness shortly thereafter.
63. Plaintiff Douglas Kelsey did not regain consciousness until May 23, 2014. It was at some point after that May 23, 2014 date that he was actually told that he had been hit by Defendant Wagoner.
64. Shortly after the crash, police officers arrived on the scene to investigate.
65. Officers on the scene noted that Defendant Wagoner was visibly intoxicated. In fact, an affidavit was prepared by the arresting officer in which he attests to this fact. A copy of the affidavit is attached hereto as Exhibit C.
66. The officers on the scene administered Defendant Wagoner several field sobriety tests and thereafter arrested him for Driving Under the Influence ("DUI") after he failed these tests.
67. A sample of Defendant Wagoner's blood was taken approximately four hours after his last drink of alcohol. Even with that lapse of time, his blood alcohol level was still well above the legal limit.
68. On November 4, 2015, Defendant Wagoner pled guilty to DUI.
69. Dr. Robert B. Forney, Jr., a forensic toxicologist, has evaluated the information in this case and has determined that at the time just before Defendant Wagoner took the shots of Sloop Shine liquor with Fajita Mike, his blood alcohol level was at least .16 (over twice the State's *per se* legal limit for operating a vehicle), and that he would have been exhibiting noticeable signs of intoxication.
70. A copy of Dr. Forney, Jr.'s preliminary report is attached hereto as Exhibit D.
71. Thus, according to Dr. Forney, Jr., Defendant Wagoner had already been overserved alcohol by the House of Blues employees and agents after the point at which he would have been visibility intoxicated and at a point in which his blood alcohol level was at least twice the legal limit.

72. So, even before Fajita Mike gave Defendant Wagoner the shots of Sloon Shine, Defendants had violated South Carolina Code Annotated § 61-4-580 and § 61-6-2220.
73. A video recording of Defendant Wagoner taken just after the crash corroborates Dr. Forney's opinion in that it shows a visibly intoxicated Defendant Wagoner who is unsteady on his feet and who almost falls to the ground while trying to perform field sobriety tests being administered by PFC Bauer (the arresting police officer with the Myrtle Beach Police Department).
74. Prior 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.
75. The claims asserted in the original complaint and asserted herein against Throttlefest, LLC arose out of the conduct set forth in the original complaint. Defendant Michael Garner and Defendant Jesse James Dupree are the sole managing members/managers of Throttlefest, LLC and held such office at all times relevant to this amended complaint.
76. Defendant Throttlefest, LLC, within the period provided by law for commencing the action against it, had received such notice of the institution of the action that it is not and will not be prejudiced in maintaining its defense on the merits; and it knew and/or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it.
77. Defendant Throttlefest, LLC's managing members/managers, Defendant Michael Garner and Defendant Jesse James Dupree, were contacted to arrange service of process on or about May 16, 2017. Defendant Michael Garner was personally served with a copy of the original complaint on May 18, 2014, which is within the period provided by law for commencing the action against it. Defendant Michael Garner was personally served with a copy of the original complaint on May 19, 2014, which is within the period provided by law for commencing the action against it.

FIRST CLAIM FOR RELIEF

(Violations of S.C. Code Annotated § 61-4-580 and § 61-6-2220 – Defendants)

78. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.

79. The essential purpose of South Carolina Code Annotated § 61-4-580 and § 61-6-2220 ("the statutes") is to protect Plaintiffs and others similarly situated from the type of harm Plaintiffs suffered.
80. It also creates a duty for Defendants and their respective agents and/or employees to protect Plaintiffs from such harm.
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.
85. Defendants' aforementioned violations of the statutes and acts of negligence were the direct and proximate cause of Defendant Wagoner's crash that caused the injuries and damages suffered by Plaintiffs.
86. As a result of Defendants' aforementioned acts, Plaintiff Douglas Kelsey has suffered and continues to suffer lost time and/or income and impairment of his ability to work; out of pocket expenses and past and future medical expenses; physical pain and suffering and disfigurement and scarring; loss of family services and consortium; loss of enjoyment of life, deprivation of normal life expectancy, and alteration of lifestyle; mental distress, mental anguish, psychological trauma; and embarrassment and humiliation; and such other past future physical and economic damages as shall be shown at the trial of this matter.
87. Plaintiff Mark Shimmenger is a close personal friend to Plaintiff Douglas Kelsey. He had to be hospitalized as a result of the carnage he witnessed and as the result of almost being killed by Defendant Wagoner's motorcycle.
88. As a result of Defendants' aforementioned acts, Plaintiff Mark Shimmenger incurred physical and economic damages.
89. Based on the above, Plaintiffs allege that they are entitled to judgment for actual and punitive damages from Defendants in an amount to be determined at trial.

90. Defendants' conduct (including Defendant Wagoner) was willful, wanton, reckless, grossly negligent, violated the statutes, and involved the use, sale and possession of alcohol.
91. Therefore, Defendants have joint and several liability for the damages suffered by Plaintiffs.

SECOND CLAIM FOR RELIEF
(Negligence *Per Se* – Travis Wagoner)

92. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
93. Defendant Wagoner owed a duty of care to Plaintiffs while operating a motor vehicle upon a public roadway, namely to exercise ordinary care in order to avoid an accident from which an injury might result.
94. He breached that duty, proximately causing damages to Plaintiffs, in that he:
 - a. Failed to maintain a proper lookout;
 - b. Failed to see what was there to be seen;
 - c. Failed to keep his vehicle under proper control;
 - d. Failed to keep his vehicle within its lane of travel;
 - e. Failed to exercise ordinary care while on a public street;
 - f. Left his lane of travel without first determining that it was safe to do so;
 - g. Crossed the center line of the roadway and entered the oncoming lane of travel without first determining that it was safe to do so;
 - h. Drove a vehicle in such a manner as to indicate a willful or wanton disregard for the safety of persons or property, in violation of South Carolina Code Annotated § 56-5-2920, which violation constitutes negligence *per se*;
 - i. Operated a vehicle while under the influence of alcohol to the extent that his faculties were materially and appreciably

impaired, in violation of South Carolina Code Annotated § 56-5-2930, which violation constitutes negligence *per se*;

- j. While under the influence of alcohol drove a motor vehicle and when driving the motor vehicle did an act forbidden by law or neglected a duty imposed by law in the driving of the motor vehicle, proximately causing great bodily injury, in violation of South Carolina Code Annotated § 56-5-2945, which violation constitutes negligence *per se*; and
 - k. Otherwise failed to operate his vehicle as a reasonable and prudent person would and should have done under like and similar circumstances.
95. On November 4, 2015, Defendant Wagoner pled guilty to DUI. Under South Carolina law, that guilty plea serves as an admission by him to all of the elements of South Carolina Code Annotated § 56-5-2930(A).
 96. Accordingly, he has admitted and is estopped from contesting that he was operating a vehicle while under the influence of alcohol, drugs, or a combination thereof to the extent that his faculties were materially and appreciably impaired at the time that the collision took place.
 97. As a direct and proximate result of Defendant Wagoner's breaches of duty as alleged above, Plaintiffs suffered physical and economic injury as previously alleged in the Complaint.
 98. To date, Plaintiff Douglas Kelsey has incurred medical expenses in excess of \$1,000,000 for reasonable and necessary treatment rendered to him as a result of the collision, and his treatment remains ongoing.
 99. Defendant Wagoner's actions in causing the collision were reckless, willful, wanton, malicious, and evinced as conscious disregard for the life and well-being of others.
 100. The negligence and gross negligence of Defendant Wagoner were aggravated by his aforesaid willful and wanton conduct.
 101. Therefore, Plaintiffs are entitled to recover actual and punitive damages from Defendant Wagoner in an amount to be determined at trial.
 102. Based upon the facts as alleged in the First Claim for Relief and incorporated herein, Defendants (including Defendant Wagoner) have joint and several liability for the damages suffered by Plaintiffs.

THIRD CLAIM FOR RELIEF

(*Respondeat Superior* and Agency – Defendants)

103. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
104. As has been previously alleged herein, at the time Fajita Mike gave Defendant Wagner the shots of liquor, Fajita Mike was acting as Defendants' agent and/or employee.
105. As has been previously alleged herein, at the time the bartenders gave Defendant Wagner the alcohol, the bartenders were acting as Defendants' agents and/or employees.
106. Fajita Mike's motive and purpose at the time he served Defendant Wagoner the shots of liquor was to benefit Defendants who were his employer and/or his principals/masters.
107. The bartenders' motives and purposes at the time they served Defendant Wagoner the alcohol was to benefit Defendants who were their employer and/or their principals/masters.
108. The negligence, gross negligence, and violation of the statutes by Fajita Mike and by the bartenders set forth in this Complaint is imputed to Defendants pursuant to the doctrine of *respondeat superior* and/or agency.
109. As a direct and proximate result of the aforesaid negligence, gross negligence, and violation of the statutes by Fajita Mike and the bartenders, Plaintiffs are entitled to recover actual and punitive damages from Defendants, jointly and severally, in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF

(Joint Enterprise/Negligent Supervision – Defendants)

110. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
111. Throttle Fest was a joint enterprise of Defendants, jointly sponsored, organized, managed, and held by Defendants for their collective benefit.
112. Defendants shared a common purpose, goal, and community of interest in sponsoring, organizing, and managing Throttle Fest, and at the time of their actions alleged above they were acting toward the accomplishment of that purpose.

113. Defendants had an equal right to manage, direct, and control Throttle Fest, including the actions of Fajita Mike, the bartenders, and the servers.
114. An agency relationship was formed between Defendants with respect to the sponsorship, organization, and managing of Throttle Fest, including the actions of Fajita Mike, the bartenders, and servers.
115. Defendants were all aware of Fajita Mike's reputation as a "loose cannon", his drunken antics, and the fact that he was selling shots and taking shots of Sloop Shine liquor and American Outlaw liquor with customers at the House of Blues the entire week of Throttle Fest.
116. Defendants had the ability and the duty to manage and control what happened at the event, including supervision of Fajita Mike, the bartenders, and the servers.
117. Defendants breached this duty and as a direct and proximate result of said breach, Defendant Wagoner crashed his motorcycle into Plaintiffs who were then injured and suffered damages, both physical and economic.
118. Based on the foregoing, Defendants were negligent, grossly negligent, and violated the statutes in allowing the bartenders and Fajita Mike to overserve alcohol to the visibly intoxicated Defendant Wagoner, and said negligence, gross negligence, and violation of the statutes is imputed to each of the Defendants (except for Defendant Wagoner).
119. As a direct and proximate result of Defendants' aforesaid negligence, gross negligence, and violations of the statutes, Plaintiffs are entitled to recover actual and punitive damages from Defendants, jointly and severally, in an amount to be determined at trial.

PUNITIVE DAMAGES

120. The foregoing paragraphs of the Complaint are hereby repleaded and incorporated herein by reference.
121. In each cause of action set out herein, Plaintiffs are entitled to actual damages and punitive damages from Defendants (including Defendant Wagoner).
122. The actions of Defendants (including Defendant Wagoner) as described herein violated the statutes and were willful, wanton, malicious, and in

reckless disregard of Plaintiffs' rights and also involved the use, sale and possession of alcohol.

123. Defendants' actions constitute a conscious failure to exercise and observe reasonable care.
124. Defendants' actions were committed in such a manner that a person of ordinary prudence would conclude that they were done in reckless disregard for Plaintiffs' rights.
125. Defendants' actions as described herein were performed by their officers, directors, members, managers, employees, and agents.
126. Thus Plaintiffs are entitled to an award of punitive damages against Defendants in an amount to be determined at trial.
127. For purposes of the Complaint, the term "acts" and "actions" include acts and omissions.

WHEREFORE, Plaintiffs Pray the Court for the following relief as to all causes of action:

- I. For judgment against Defendants including Defendant Wagoner for actual damages and punitive damages;
- II. For any and all pre-judgment and post-judgment interest as allowed by law;
- III. For the costs and disbursements of this action;
- IV. For a trial by jury; and
- V. For such other and further relief as this Honorable Court may deem just and proper.

s/James Rainsford
 South Carolina Bar Number 74924
 Attorney for Plaintiffs
 129 East Tryon Street
 Hillsborough, North Carolina 27278
 (919) 732-2196 Telephone
 (919) 732-7997 Facsimile
 jrainsford@hillsboroughncclaw.com

MAY 9-17

HOUSE OF BLUES

DECK OPEN ALL DAY
NOON TO MIDNIGHT
MEET STARS FROM
FULL THROTTLE SALOON

PLAINTIFF'S EXHIBIT
A

With the ENTIRE CAST from the hit show Full Throttle Saloon on **17.5** TV & the FTS RockStar Bartenders

MICHAEL

JESSE

FULL THROTTLE SALOON PRESENTS:

THROTTLE FEST

Myrtle Beach

ANGIE

GORT

THE LACS
and Sunny Ledford
FRIDAY, MAY 9TH

Blackberry Smoke
SATURDAY, MAY 10TH

Zoso
TUESDAY, MAY 13TH

Danny "The Count" Koker and Zoso
WEDNESDAY, MAY 14TH

Jackyl
THURSDAY, MAY 15TH

Jackyl
FRIDAY, MAY 16TH

Jackyl
SATURDAY, MAY 17TH

➤ MAIN STAGE CONCERTS HOSTED BY FULL THROTTLE

➤ APPEARANCES BY FULL THROTTLE TEAM

➤ LIVE MUSIC ON THE DECK - 3 LIVE BANDS DAILY NOON-MIDNIGHT FEATURING LOWLIFE, PREACHER STONE AND MORE!

➤ CONTESTS AND GIVEAWAYS SPONSORED BY ROCK 107

4640 Hwy 17 S, North Myrtle Beach | WWW.HOB.COM | 843.272.3000

WWW.FULLTHROTTLESALOON.COM | WWW.HOUSEOFBLUES.COM | WWW.TICKETMASTER.COM

TICKETS AVAILABLE: 843.272.3000 OR WWW.TICKETMASTER.COM

May 9-17

THIS IS A NEUTRAL EVENT. NO GUNS OR DRUGS.





ELECTRONICALLY FILED - 2017 Jul 07 3:43 PM - Horry - COMMON PLEAS - CASE#2017CP2603008

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) AFFIDAVIT
MUNICIPALITY OF MYRTLE BEACH)

Personally appeared before me, one Christopher Murphy who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Travis Scott Wagoner (White male DOB- 1/27/1983 of 1094 Old Orvis Rd, West Jefferson NC 28694

**DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED**

Travis Scott Wagoner (White male DOB- 1/27/1983 of 1094 Old Orvis Rd, West Jefferson NC 28694. Travis Scott Wagoner is currently at Grand Strand Regional Medical Center located at 809 82nd Ave North within the city of Myrtle Beach SC

**REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECTS PREMISES**

The affiant is a Traffic Officer with the Myrtle Beach Police Department, and has been employed as a law enforcement officer for over 4 years. The affiant is a graduate of the South Carolina Criminal Justice Academy.

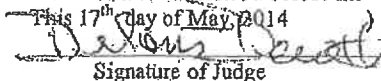
On May 17th, 2013 at 0041 hours, officers responded to a motor vehicle collision at 34th Ave North on US Hwy 17 Business, which is in the city limits of Myrtle Beach SC. The defendant, Travis Wagoner, was the operator of a motorcycle traveling southbound on US 17 when it crossed the centerline and was involved in a collision with another motorcycle head on where the driver of the motorcycle has sustained great bodily injury to his person. Officers on scene observed that Wagoner appeared intoxicated, had glassy eyes, and smelled of alcohol. Wagoner subsequently completed three field sobriety tests including the horizontal gaze nystagmus, walk and turn, and the one-legged stand test all of which he failed.

The affiant knows through training and experience that a blood draw from the defendant would determine the blood alcohol content (BAC) of the defendant to determine the intoxication level of the defendant at the time of the collision. The BAC level is sought in the form of a blood draw from an extremity of the defendant by a qualified medical personnel as required by SC state law.

The affiant stated that based on the above facts set forth above is more likely than not that the blood draw sought will provide further evidence that the defendant Travis Scott Wagoner was indeed operating a motorcycle on a state highway violating SC Code of Law 56-05-2945 Felony driving under the influence.

Sworn to and Subscribed before me

This 17th day of May, 2014

 (L.S.)

Signature of Judge

(L.S.)

 8/10/2

Affiant

Address: 1101 Oak Street
Myrtle Beach, SC 29577
Phone: 843-918-1907

Robert B. Forney, Jr., Ph.D.
Forensic Toxicologist

8825 WEST BANCROFT
TOLEDO, OHIO 43617

OFFICE: 419-213-3927
HOME: (419) 829-2394
Cell: (419) 509-8962
Email: robert.forney@rbforney.com



February 2, 2017

James Rainsford, Esquire

COLEMAN, GLEDHILL, HARGRAVE, MERRITT & RAINSFORD, P.C.
129 East Tryon Street
Post Office Drawer 1529
Hillsborough, North Carolina 27278
(919) 732- 2196

Re: Douglas Kelsey v Travis Wagoner

Dear Mr. Rainsford:

I have reviewed the materials that you have provided in the above captioned matter, including:

1. Police Reports re: crash involving Mr. Travis Wagoner;
2. Medical Records of Mr. Travis Wagoner;
3. May 17, 2014 Emergency 911 call mp4;
4. Transcript of Mr. Travis Wagoner from his criminal plea;
5. Video recording of Mr. Wagoner performing standardized field sobriety testing.

Summary

Mr. Travis Scott Wagoner, a 31 year old, white male, being 6 feet 4 inches tall and weighing 249 lbs. testified that he had a beer at a place called Capt. Poo's Bar and Grille in North Myrtle Beach, South Carolina between 1:00 pm and 2:00 pm on

Friday, May 16, 2014. He snacked on some appetizers but does not recall eating anything else either at Capt. Poo's Bar and Grille nor anything to eat for the rest of that night.

Mr. Wagoner then left Capt. Poo's Bar and Grille and returned to the condominium where he was staying. After a few hours of relaxing, he went to the House of Blues with some friends. He and two of his friends stated that Mr. Wagoner was "stone cold sober" when he went to the House of Blues.

Arriving at the House of Blues, it took approximately one hour to get inside as the line was quite long. During this time, "shotgirls" were walking around the premises serving shots of a liquor called "Sloonshine" for cash. Sloonshine is a brand of alcohol made by Full Throttle Sloonshine Moonshine. It is a seventy (70) proof brand of moonshine sold at liquor stores.

Once inside the House of Blues, Travis milled around and ultimately watched the live music show performed by the band Jackyl, known for wild stage performances that include cutting up chairs with chainsaws and chugging Sloonshine on stage. Mr. Wagoner stated that the end of Jackyl's show was after 11:00 p.m.

Travis and his friend Hope Johnson were approached by Fajita Mike, from the show "Full Throttle Saloon". Ms. Johnson wanted her picture taken with Fajita Mike. Mr. Wagoner took the picture of Fajita Mike and Ms. Johnson. Fajita Mike gave Travis two shots of Sloonshine from a bottle taken from a shotgirl. This was at approximately 11:15 to 11:30 p.m. Both Mr. Wagoner and Ms. Johnson have said

that Fajita Mike was drunk. Mr. Wagoner left the House of Blues approximately forty-five minutes to an hour after taking the shots.

Leaving the House of Blues, Mr. Wagoner drove his motorcycle down Kings Highway and fell off. The motorcycle continued down the highway and crashed into a motorcycle operated by Mr. Doug Kelsey in the opposite direction of travel. 911 was called at 12:41 p.m. on May 17, 2014.

Prior to the crash, after leaving the House of Blues, Mr. Wagoner made no stops and did not stop at any other establishments and did not drink any more alcoholic beverages. This fact has been corroborated by Ms. Hope Johnson.

Mr. Wagoner stated that he has never previously wrecked his motorcycle and that he would not have crashed on May 17, 2014 if he had not been drinking.

The police report indicates that Mr. Wagoner had "very slow delayed actions" and "an odor of an alcoholic beverage emitting from his person". Mr. Wagoner told the officer at the scene that he had "a couple of beers" prior to the collision. Performing the horizontal gaze nystagmus test, the officer observed in both of Mr. Wagoner's eyes, lack of smooth pursuit, sustained nystagmus at maximum deviation and onset of nystagmus before 45 degrees. On the walk and turn test, the officer observed that Mr. Wagoner did not touch heel to toe, did not turn properly and stepped off the line. Performing the one leg stand, the officer observed that Mr. Wagoner put his foot down, didn't keep his hands at his sides, swayed while balancing and could not keep his foot raised without losing his balance. The video recording demonstrates Mr. Wagoner's difficulties performing the standardized field

sobriety tests (SFSTs) more vividly than the officer's report indicates.

At 2:15 am Mr. Wagoner was still at the police station. Later he was transported to Grand Strand Medical Center where he arrived at 3:12 am. His condition was largely atraumatic except for abrasions on his right side. The abrasions were on his right knee, right upper arm, elbow, forearm and hand producing tenderness. But his capillary refill was noted to be normal, his motor function and sensory were intact distally. During treatment he received morphine sulfate at 0327 hrs. and cefazolin sodium and tetanus/diphtheria toxoids at 0328 hrs.

At 3:18 am, specimens of blood and urine were collected from Mr. Wagoner for drug and alcohol analyses among other tests. A positive opiate urine screen was reported but not confirmed. A result of 146 mg/dL serum alcohol was reported. A specimen of blood was collected at 0318 hrs. and given to law enforcement for analysis. A result of 0.105 % whole blood ethanol was reported from this analysis.

Opinions

Considering this information, and as a result of my education, training and experience, I have formed the following opinions to a reasonable degree of scientific certainty:

1. At 11:15 pm on May 16, 2014, the time just before the last drink was served to Mr. Travis Scott Wagoner, his blood ethanol concentration was at least 0.16 + 0.02 %.
2. At 11:15 pm on May 16, 2014, the time just before the last drink was served to Mr. Travis Scott Wagoner, he was under the influence of ethanol and exhibiting visible,

3. noticeable signs of intoxication. He would have exhibited the signs of slurred speech, indistinct gaze and unsteady gait when this drink was served. He would also have had the odor of alcoholic beverages about his person.
4. At 12:41 pm on May 17, 2014, the time of the crash, Mr. Travis Scott Wagoner had a blood ethanol concentration of at least 0.14 + 0.02 %
5. At the time of the crash, Mr. Travis Scott Wagoner was significantly impaired in his perception, judgment, reaction and coordination. Additionally, at this time he was significantly impaired in his perception of danger and willingness to take risks.

I reserve the right to amend or extend these opinions should more information become available to me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert B. Forney, Jr.", with a stylized flourish at the end.

Robert B. Forney, Jr., Ph.D.

Attachment: *Curriculum Vitae*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Douglas Kelsey and Mark Shimmenger,	)	Civil Action No.: 2017-CP-26-03008
	)	
Plaintiffs,	)	
	)	
vs.	)	ANSWER TO AMENDED COMPLAINT
	)	BY DEFENDANTS
House of Blues Myrtle Beach Restaurant	)	HOUSE OF BLUES MYRTLE BEACH
Corporation; House of Blues Concerts, Inc.;	)	RESTAURANT CORPORATION,
HOB Entertainment, Inc.; Full Throttle,	)	HOUSE OF BLUES CONCERTS, INC.,
LLC; Full Throttle Sloon Shine, LLC;	)	AND HOB ENTERTAINMENT, INC.
Throttlefest, LLC; American Outlaw Spirits,	)	
Inc.; Michael Ballard; Jesse James Dupree;	)	
Michael Garner; and Travis Scott Wagoner,	)	
	)	
Defendants.	)	
	)	
	)	

(Jury Trial Demanded)

TO: JAMES RAINSFORD, ESQUIRE, ATTORNEY FOR PLAINTIFFS:

Defendants House of Blues Myrtle Beach Restaurant Corporation,¹ House of Blues Concerts, Inc., and HOB Entertainment, Inc. (collectively “Defendants”), reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure or any other dispositive motion, respond to the Amended Complaint of Plaintiffs Douglas Kelsey and Mark Shimmenger by denying each and every allegation not hereinafter specifically admitted, by demanding strict proof thereof, and further respond as follows:

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Each and every allegation not herein admitted is hereby denied and strict proof thereof demanded.

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

2. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 1 and 2 and therefore deny the same and demand strict proof thereof.
3. Defendants admit the allegations of Paragraphs 3 through 5.
4. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 6 through 13 and therefore deny the same and demand strict proof thereof.
5. In response to Paragraph 14, Defendants restate and reallege their responses to Paragraphs 1 through 13.
6. Defendants admit so much of Paragraph 15 as alleges jurisdiction and venue are proper in this Court. Defendants deny any remaining allegations of Paragraph 15 and demand strict proof thereof.
7. Paragraph 16 is a procedural paragraph, which requires no response. To the extent a response is required, Defendants deny any allegation that alleges negligence or other wrongdoing by Defendants and demand strict proof thereof.
8. Defendants admit only so much of Paragraph 17 as alleges Throttle Fest was held at the House of Blues location in North Myrtle Beach, South Carolina in May 2014. Defendants lack sufficient information in which to form a belief as the allegation of Paragraph 17 that Full Throttle is the “self-proclaimed world’s largest biker bar” and therefore deny the same and demand strict proof thereof. Defendants deny any remaining allegations of Paragraph 17 and demand strict proof thereof.
9. Defendants admit the allegations of Paragraph 18.
10. Defendants lack sufficient information in which to form a belief as the allegation of Paragraph 19 that Full Throttle is the “self-proclaimed world’s largest biker bar” and

therefore deny the same and demand strict proof thereof. Defendants admit the remaining allegations of Paragraph 19 upon information and belief.

11. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 20 through 24 as written and therefore deny the same and demand strict proof thereof.
12. Upon information and belief, Defendants admit the allegations of Paragraph 25. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
13. Defendants admit only so much of Paragraph 26 as alleges Throttle Fest was held at the House of Blues location in Myrtle Beach, South Carolina. Defendants deny the remaining allegations of Paragraph 26 and demand strict proof thereof.
14. Defendants deny the allegations of Paragraph 27 as written and demand strict proof thereof. In further response to Paragraph 27, Defendants state the Full Throttle Festival was held at the House of Blues located in Myrtle Beach, South Carolina from May 9-17, 2014. Defendants admit that Throttlefest promotional material is attached to the Amended Complaint as Exhibit A.
15. Defendants deny the allegations of Paragraph 28 as written and demand strict proof thereof.
16. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 29 and therefore deny the same and demand strict proof thereof.
17. Defendants deny the allegations of Paragraph 30 and demand strict proof thereof.
18. Defendants deny the allegations of Paragraph 31 as written and demand strict proof thereof. Defendants further deny any allegation within Paragraph 31 to the extent such allegation

alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.

19. Defendants deny the allegations of Paragraph 32 as written and demand strict proof thereof. Defendants further deny any allegation within Paragraph 32 to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
20. Defendants deny the allegations of Paragraph 33 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
21. Defendants deny the allegations of Paragraph 34 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
22. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraph 35 and therefore deny the same and demand strict proof thereof.
23. Upon information and belief, Defendants admit the allegations of Paragraph 36. However, Defendants deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
24. Defendants deny the allegations of Paragraph 37 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation

alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.

25. Defendants deny the allegations of Paragraph 38 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
26. Defendants deny the allegations of Paragraph 39 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
27. Defendants deny the allegations of Paragraph 40 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
28. Paragraphs 41 and 42 call for legal conclusions to which no response is necessary. Alternatively, Defendants deny the allegations of Paragraphs 41 and 42 as written and demand strict proof thereof.
29. Defendants deny the allegations of Paragraph 43 as written and demand strict proof thereof.
30. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 44 and 45 and therefore deny the same and demand strict proof thereof.
31. Defendants admit only so much of Paragraph 46 as alleges bartenders and servers employed by Defendant House of Blues Myrtle Beach Restaurant Corporation on May 16, 2014, working within the course and scope of their defined employment were in fact

subject to the management of Defendant House of Blues Myrtle Beach Restaurant Corporation. Defendants deny any remaining allegations of this paragraph and further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.

32. Defendants admit only so much of Paragraph 47 as alleges bartenders and servers employed by Defendant House of Blues Myrtle Beach Restaurant Corporation were working at the House of Blues Myrtle Beach venue on May 16, 2014. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
33. Defendants deny the allegations of Paragraph 48 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
34. Defendants admit only so much of Paragraph 49 as alleges servers employed by Defendant House of Blues Myrtle Beach Restaurant Corporation were serving alcoholic beverages on May 16, 2014. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
35. Defendants deny the allegations of Paragraph 50 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation

alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.

36. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 51 through 55 and therefore deny the same and demand strict proof thereof.
37. Defendants deny the allegations of Paragraph 56 and demand strict proof thereof.
38. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraphs 57 through 68 and therefore deny the same and demand strict proof thereof.
39. Defendants lack sufficient information in which to form a belief as to the allegations of Paragraph 69 concerning the evaluation and opinions of Dr. Robert B. Forney, Jr. and therefore deny the same and demand strict proof thereof. Defendants further deny Paragraph 69 to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
40. Defendants admit only so much of Paragraph 70 as alleges Exhibit D to the Amended Complaint purports to be a preliminary report authored by Dr. Forney. Defendants lack sufficient information to form a belief as to the statements, opinions, and conclusions in this report and therefore deny the same and demand strict proof thereof. Defendants further deny any statements, opinions, and conclusions in Exhibit D that allege or could be construed as alleging negligence or other wrong doing by Defendants and demand strict proof thereof.
41. Defendants deny the allegations of Paragraph 71 and 72 and demand strict proof thereof.
42. Defendants lack sufficient information to form a belief as to the allegations of Paragraph 73 concerning the contents of the referenced video recording and the evaluation and opinions of Dr. Robert Forney, Jr. and therefore deny the same and demand strict proof

thereof. Defendants further deny Paragraph 73 to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.

43. Defendants admit only so much of Paragraph 74 as alleges they were aware of the subject accident and that Plaintiffs planned to file suit. Defendants deny any remaining allegations of Paragraph 74 and demand strict proof thereof.
44. Paragraphs 75 through 77 contains no allegation against these Defendants and constitute conclusions of law; accordingly, Defendants need not respond. To the extent a response is required, Defendants deny any allegations in Paragraphs 75 through 77 that allege or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
45. In response to Paragraph 78, Defendants reallege and restate their responses to Paragraphs 1 through 77.
46. Paragraphs 79 through 80 constitute conclusions of law to which Defendants need not respond. To the extent a response is required, Defendants deny the same and demand strict proof thereof.
47. Defendants deny the allegations of Paragraph 81 through 83 and demand strict proof thereof.
48. Defendants deny the allegations of Paragraph 84—including all subparts—and demand strict proof thereof.
49. Defendants deny the allegations of Paragraphs 85 through 86 and demand strict proof thereof.

50. Defendants lack sufficient information in which to form a belief as the allegations of Paragraph 87 and therefore deny the same and demand strict proof thereof.
51. Defendants deny the allegations of Paragraphs 88 through 91 and demand strict proof thereof.
52. In response to Paragraph 92, Defendants reallege and restate their responses to Paragraphs 1 through 91.
53. Paragraphs 93 through 101 are not directed to these Defendants and therefore require no response. To the extent a response is required, Defendants deny the allegations of Paragraph 93 through 101 and demand strict proof thereof. Defendants further deny any allegation in Paragraphs 93 through 101 that allege or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
54. Defendants deny the allegations of Paragraph 102 and demand strict proof thereof.
55. In response to Paragraph 103, Defendants reallege and restate their responses to Paragraphs 1 through 102.
56. Defendants deny the allegations of Paragraph 104 and demand strict proof thereof.
57. Defendants admit only so much of Paragraph 105 as alleges bartenders employed by Defendant House of Blues Myrtle Beach Restaurant Corporation were working at the House of Blues Myrtle Beach venue on May 16, 2014. With that stated, Defendants deny the allegations of Paragraph 105 as written and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence or other wrongdoing by Defendants and demand strict proof thereof.
58. Defendants deny the allegations of Paragraph 106 and demand strict proof thereof.

59. Defendants lack sufficient information to form a belief as to the allegations of Paragraph 107 and therefore deny the same and demand strict proof thereof.
60. Paragraph 108 constitutes a conclusion of law to which Defendants need not respond. To the extent a response is required, Defendants deny the allegations of Paragraph 108 and demand strict proof thereof. Defendants further deny any allegation within this paragraph to the extent such allegation alleges or could be construed as alleging negligence, gross negligence, or violation of a statute by Defendants and demand strict proof thereof.
61. Defendants deny the allegations of Paragraph 109 and demand strict proof thereof.
62. In response to Paragraph 110, Defendants reallege and restate their responses to Paragraphs 1 through 109.
63. Paragraph 111 constitutes a conclusion of law to which Defendants need not respond. To the extent a response is required, Defendants state that House of Blues Myrtle Beach Restaurant Corporation entered into a contractual relationship with Throttlefest, LLC concerning the Full Throttle Festival held in May 2014 and deny any allegations of Paragraph 111 that are inconsistent with the terms of this contractual relationship and demand strict proof thereof. Defendants deny any remaining allegations of Paragraph 111 and demand strict proof thereof.
64. Paragraph 112 constitutes a conclusion of law to which Defendants need not respond. To the extent a response is required, Defendants state that House of Blues Myrtle Beach Restaurant Corporation entered into a contractual relationship with Throttlefest, LLC concerning the Full Throttle Festival held in May 2014 and deny any allegations of Paragraph 112 that are inconsistent with the terms of this contractual relationship and

demand strict proof thereof. Defendants deny any remaining allegations of Paragraph 112 and demand strict proof thereof.

65. Defendants deny the allegations of Paragraphs 113 through 119 and demand strict proof thereof.
66. In response to Paragraph 120, Defendants reallege and restate their responses to Paragraphs 1 through 119.
67. Defendants deny the allegations of Paragraphs 121 through 126 and demand strict proof thereof.
68. Paragraph 127 is a procedural paragraph to which Defendants need not respond. To the extent a response is required, Defendants deny any “acts,” “actions,” or “omissions” by Defendants proximately caused Plaintiffs’ alleged damages and demand strict proof thereof.
69. Defendants deny Plaintiffs are entitled to the relief sought in the prayer for relief—including all subparts—and demand strict proof thereof. Defendants likewise demand a jury trial.

FOR A SECOND DEFENSE

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

FOR A THIRD DEFENSE

71. Any injuries sustained by Plaintiffs were due to and caused by the sole negligence of third persons (including some or all of Co-Defendants) over whom Defendants had no control; therefore, Defendants should not be liable to Plaintiffs in any sum whatsoever.

FOR A FOURTH DEFENSE

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

FOR A FIFTH DEFENSE

73. Plaintiffs' claims may be barred or otherwise reduced due to their failure to mitigate damages as required by law.

FOR A SIXTH DEFENSE

74. Plaintiffs' claims may be barred by the doctrine of unavoidable accident.

FOR A SEVENTH DEFENSE

75. Plaintiffs' claims may be barred by the doctrine of waiver, estoppel, and/or laches.

FOR AN EIGHTH DEFENSE

76. Plaintiffs' claims may be barred by the applicable statute of limitations.

FOR A NINTH DEFENSE

77. To 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.

FOR A TENTH DEFENSE

78. To the extent the discovery conducted in this litigation demonstrates the same, any injuries or damages sustained by Plaintiffs were due to and caused and occasioned by Plaintiffs' own negligence, gross negligence, recklessness, willfulness, and wantonness which was

the direct and proximate cause of Plaintiffs' alleged injuries or damages, if any, and without which the same would not have occurred. Therefore, due to Plaintiffs' sole negligence, gross negligence, recklessness, willfulness, and wantonness, Plaintiffs' claims are barred.

FOR AN ELEVENTH DEFENSE

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

FOR A TWELFTH DEFENSE

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

FOR A THIRTEENTH DEFENSE

81. Any recovery by Plaintiffs must be reduced or offset by amounts Plaintiffs have received or will receive from others for the same injuries claimed in this lawsuit.

FOR A FOURTEENTH DEFENSE

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

FOR A FIFTEENTH DEFENSE

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

FOR A SIXTEENTH DEFENSE

84. Pursuant to Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424, 121 S.Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages "[are] not really a fact tried by the jury" therefore Plaintiffs' request for punitive damages "to be determined by the jury" violates the United States Constitution.

FOR A SEVENTEENTH DEFENSE

85. Notwithstanding Defendants' prior defenses incorporating Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424 (2001) and State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003), and the cases upon which they are based, in the event the trial court permits the jury to return a punitive damages award in the

instant case, such damages are to be limited to an amount that is no greater than the jury's award of actual damages, as explicated within Exxon Shipping Company v. Baker, 128 S. Ct. 2605 (2008).

FOR AN EIGHTEENTH DEFENSE

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

FOR A NINETEENTH DEFENSE

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

FOR A TWENTIETH DEFENSE

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

FOR A TWENTY-FIRST DEFENSE

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

WHEREFORE, having fully answered Plaintiffs' Complaint, Defendants respectfully request:

1. Plaintiffs take nothing by this action;
2. A judgment of dismissal be entered in favor of Defendants regarding Plaintiffs' Complaint;
3. Defendants be awarded the cost of the suit incurred; and
4. Defendants be awarded such other and further relief as the Court deems proper.

Respectfully submitted,

COLLINS & LACY, P.C.

By: s/Christian Stegmaier
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ATTORNEYS FOR DEFENDANTS HOUSE OF
 BLUES MYRTLE BEACH RESTAURANT
 CORPORATION, HOUSE OF BLUES
 CONCERTS, INC., & HOB ENTERTAINMENT,
 INC.

ANSWER TO AMENDED COMPLAINT

These Defendants Demand a Trial by Jury.

Murrells Inlet, South Carolina
 August 4, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No.: 2017-CP-26-03008
Douglas Kelsey and Mark Shimmenger,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	THROTTLEFEST, LLC'S ANSWER
House of Blues Myrtle Beach Restaurant	)	
Corporation; House of Blues Concerts,	)	
Inc.; HOB Entertainment, Inc.; Full	)	
Throttle, LLC; Full Throttle Sloon Shine,	)	
LLC; Throttlefest, LLC; American	)	
Outlaw Spirits, Inc.; Michael Ballard;	)	
Jesse James Dupree; Michael Garner; and	)	
Travis Scott Wagoner,	)	
	)	
Defendants.	)	
	)	

TO: JAMES RAINSFORD, ATTORNEYS FOR PLAINTIFFS

The Defendant, Throttlefest, LLC (hereinafter "this Defendant" or "Throttlefest"), by and through its undersigned counsel, hereby submit this Answer to the Plaintiffs' Amended Complaint as follows. All allegations contained in Plaintiffs' Amended Complaint that are not specifically admitted herein are hereby denied.

AS TO THE PARTIES

1. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 1 and, therefore, denies the same.
2. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 2 and, therefore, denies the same.

3. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 3 and, therefore, denies the same.

4. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 4 and, therefore, denies the same.

5. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 5 and, therefore, denies the same.

6. This Defendant denies the allegations contained in Paragraph 6.

7. This Defendant admits, upon information and belief, the allegations contained in Paragraph 7.

8. In response to Paragraph 8, this Defendant admits only that it is a Florida limited liability company that has entered into contracts in South Carolina. This Defendant denies all allegations contained in Paragraph 8 that are inconsistent with or expand upon this limited admission.

9. This Defendant denies the allegations contained in Paragraph 9.

10. This Defendant denies the allegations contained in Paragraph 10.

11. In response to Paragraph 11, this Defendant admits that Defendant Dupree is a resident of Kennesaw, Georgia. This Defendant denies all allegations contained in Paragraph 11 that are inconsistent with or expand upon this limited admission.

12. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 12 and, therefore, denies the same.

13. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 13 and, therefore, denies the same.

AS TO JURISDICTION AND VENUE

14. In response to Paragraph 14, this Defendant incorporates its responses to the prior paragraphs of the Amended Complaint.

15. This Defendant admits the allegations contained in Paragraph 15 as to this Defendant only.

16. In response to Paragraph 16, this Defendant admit that Plaintiffs have defined the term “Defendants” to include it, but denies that this is proper.

AS TO THE FACTUAL ALLEGATIONS

17. This Defendant denies the allegations contained in Paragraph 17.

18. In response to Paragraph 18, this Defendant craves reference to the contract cited therein and denies all allegations inconsistent therewith.

19. This Defendant denies the allegations contained in Paragraph 19.

20. This Defendant denies the allegations contained in Paragraph 20.

21. This Defendant denies the allegations contained in Paragraph 21.

22. This Defendant denies the allegations contained in Paragraph 22.

23. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 23 and, therefore, denies the same.

24. This Defendant denies the allegations contained in Paragraph 24.

25. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 25 and, therefore, denies the same.

26. This Defendant denies the allegations contained in Paragraph 26.

27. This Defendant admits the allegations contained in Paragraph 27.

28. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 28 and, therefore, denies the same.

29. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 29 and, therefore, denies the same.

30. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 30 and, therefore, denies the same.

31. This Defendant admits, upon information and belief, the allegations contained in Paragraph 31.

32. This Defendant admits, upon information and belief, the allegations contained in Paragraph 32.

33. This Defendant admits, upon information and belief, the allegations contained in Paragraph 33.

34. This Defendant denies the allegations contained in Paragraph 34 that relate to it.

35. This Defendant denies the allegations contained in Paragraph 35.

36. This Defendant admits, upon information and belief, the allegations contained in Paragraph 36.

37. This Defendant denies the allegations contained in Paragraph 37 that relate to it.

38. This Defendant denies the allegations contained in Paragraph 38 that relate to it.

39. This Defendant denies the allegations contained in Paragraph 39 that relate to it.

40. This Defendant denies the allegations contained in Paragraph 40 that relate to it.

41. In response to Paragraph 41, this Defendant admits that the Plaintiff contends that Fajita Mike had all of the defendants' express authority to act, but denies that Fajita Mike had any authority to act from this Defendant.

42. This Defendant denies the allegations contained in Paragraph 42 that relate to it.

43. This Defendant denies the allegations contained in Paragraph 43 that relate to it.

44. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 44 and, therefore, denies the same.

45. In response to Paragraph 45, this Defendant craves reference to the “commercial” cited therein and denies all allegations inconsistent therewith.

46. This Defendant denies the allegations contained in Paragraph 46 that relate to it.

47. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 47 and, therefore, denies the same.

48. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 48 and, therefore, denies the same.

49. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 49 and, therefore, denies the same.

50. This Defendant denies the allegations contained in Paragraph 50 that relate to it.

51. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 51 and, therefore, denies the same.

52. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 52 and, therefore, denies the same.

53. This Defendant denies the allegations contained in Paragraph 53 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant.

54. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 54 and, therefore, denies the same.

55. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 55 and, therefore, denies the same.

56. This Defendant denies the allegations contained in Paragraph 56 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant.

57. This Defendant admits the allegations contained in Paragraph 57 that relate to it.

58. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 58 and, therefore, denies the same.

59. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 59 and, therefore, denies the same.

60. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 60 and, therefore, denies the same.

61. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 61 and, therefore, denies the same.

62. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 62 and, therefore, denies the same.

63. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 63 and, therefore, denies the same.

64. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 64 and, therefore, denies the same.

65. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 65 and, therefore, denies the same.

66. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 66 and, therefore, denies the same.

67. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 67 and, therefore, denies the same.

68. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 68 and, therefore, denies the same.

69. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 69 and, therefore, denies the same.

70. In response to Paragraph 70, this Defendant admits only that a document is attached as Exhibit D to the Plaintiffs' Amended Complaint.

71. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 71 and, therefore, denies the same.

72. This Defendant denies the allegations contained in Paragraph 72. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

73. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 73 and, therefore, denies the same.

74. This Defendant denies the allegations contained in Paragraph 74.

75. This Defendant denies the allegations contained in Paragraph 75.

76. This Defendant denies the allegations contained in Paragraph 76

77. This Defendant denies the allegations contained in Paragraph 77.

AS TO THE FIRST CLAIM FOR RELIEF
(Violations of S.C. Code Annotated § 61-4-580 and § 61-6-2220 – Defendants)

78. In response to Paragraph 78, this Defendant incorporates its responses to the prior paragraphs of the Amended Complaint.

79. Paragraph 79 contains conclusions of law to which no response is required. To the extent a response is required, this Defendants denies those allegations that relate to it.

80. This Defendant denies the allegations contained in Paragraph 80 that relate to it. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

81. This Defendant denies the allegations contained in Paragraph 81 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant states that Fajita Mike was not its agent or employee. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

82. This Defendant denies the allegations contained in Paragraph 82 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

83. This Defendant denies the allegations contained in Paragraph 83 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant states that Fajita Mike was not its agent or employee. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

84. This Defendant denies the allegations contained in Paragraph 84, including subparagraphs a – h, that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant states that Fajita Mike was not its agent or employee. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

85. This Defendant denies the allegations contained in Paragraph 85 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant states that Fajita Mike was not its agent or employee. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

86. This Defendant denies the allegations contained in Paragraph 86 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other

person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant states that Fajita Mike was not its agent or employee. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

87. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 87 and, therefore, denies the same.

88. This Defendant denies the allegations contained in Paragraph 88 that relate to it. This Defendant specifically states that it did not serve alcohol to Defendant Wagoner, or any other person, nor did anyone serve alcohol to Wagoner, or any other person, on behalf of this Defendant. This Defendant states that Fajita Mike was not its agent or employee. This Defendant further states that, since it does not sell or furnish alcoholic beverages, it does not hold a permit authorizing it to do the same and, therefore, is not governed by South Carolina Code Annotated § 61-4-580 or § 61-6-2220.

89. This Defendant denies the allegations contained in Paragraph 89.

90. This Defendant denies the allegations contained in Paragraph 90.

91. This Defendant denies the allegations contained in Paragraph 91.

AS TO THE SECOND CLAIM FOR RELIEF
(Negligence *Per Se* – Travis Wagoner)

92. In response to Paragraph 92, this Defendant incorporates its responses to the prior paragraphs of the Amended Complaint.

93. Paragraph 93 is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant admits, upon information and belief, those allegations.

94. Paragraph 94, including subparagraphs a – k, is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant is without sufficient information or knowledge to either admit or deny those allegations.

95. Paragraph 95 is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant is without sufficient information or knowledge to either admit or deny those allegations.

96. Paragraph 96 is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant is without sufficient information or knowledge to either admit or deny those allegations.

97. Paragraph 97 is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant is without sufficient information or knowledge to either admit or deny those allegations.

98. This Defendant is without sufficient information or knowledge to either admit or deny the allegations contained in Paragraph 98 and, therefore, denies the same.

99. Paragraph 99 is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant is without sufficient information or knowledge to either admit or deny those allegations.

100. Paragraph 100 is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant is without sufficient information or knowledge to either admit or deny those allegations.

101. Paragraph 101 is not directed to this Defendant and, therefore, no response is required. To the extent a response is required, this Defendant is without sufficient information or knowledge to either admit or deny those allegations.

102. This Defendant denies the allegations contained in Paragraph 102 that relate to it.

AS TO THE THIRD CLAIM FOR RELIEF
(Respondeat Superior and Agency - Defendants)

103. In response to Paragraph 103, this Defendant incorporates its responses to the prior paragraphs of the Amended Complaint.

104. This Defendant denies the allegations contained in Paragraph 104 that relate to it. This Defendant specifically states that Fajita Mike was not its agent or employee.

105. This Defendant denies the allegations contained in Paragraph 105 that relate to it. This Defendant specifically states that the House of Blues' bartenders were not this Defendant's agents or employees.

106. This Defendant denies the allegations contained in Paragraph 106 that relate to it. This Defendant specifically states that Fajita Mike was not its agent or employee.

107. This Defendant denies the allegations contained in Paragraph 107 that relate to it. This Defendant specifically states that the House of Blues' bartenders were not this Defendant's agents or employees.

108. This Defendant denies the allegations contained in Paragraph 108 that relate to it.

109. This Defendant denies the allegations contained in Paragraph 109 that relate to it.

AS TO THE FOURTH CLAIM FOR RELIEF
(Joint Enterprise/Negligent Supervision - Defendants)

110. In response to Paragraph 110, this Defendant incorporates its responses to the prior paragraphs of the Amended Complaint.

111. This Defendant denies the allegations contained in Paragraph 111.

112. This Defendant denies the allegations contained in Paragraph 112.

113. This Defendant denies the allegations contained in Paragraph 113.

114. This Defendant denies the allegations contained in Paragraph 114.

115. This Defendant denies the allegations contained in Paragraph 115.

116. This Defendant denies the allegations contained in Paragraph 116.

117. This Defendant denies the allegations contained in Paragraph 117.

118. This Defendant denies the allegations contained in Paragraph 118.

119. This Defendant denies the allegations contained in Paragraph 119.

AS TO PUNITIVE DAMAGES

120. In response to Paragraph 120, this Defendant incorporates its responses to the prior paragraphs of the Amended Complaint.

121. This Defendant denies the allegations contained in Paragraph 121.

122. This Defendant denies the allegations contained in Paragraph 122.

123. This Defendant denies the allegations contained in Paragraph 123.

124. This Defendant denies the allegations contained in Paragraph 124.

125. This Defendant denies the allegations contained in Paragraph 125.

126. This Defendant denies the allegations contained in Paragraph 126.

127. Paragraph 127 warrants no response.

128. In response to the “WHEREFORE” Paragraph, this Defendant asserts that Plaintiffs are not entitled to any relief from it, including but not limited to the relief prayed for in the Amended Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, **THIS DEFENDANT ALLEGES:** **(Comparative Negligence)**

129. That, upon information and belief, even if this Defendant was negligent as described in the Amended Complaint, which is specifically denied, the Plaintiffs’ alleged injuries and damages, if any, resulted from, or were due to their own negligence, which combined and concurred with any negligence on

the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Rule 12(b)(6))

130. Plaintiffs' Amended Complaint fails to state facts sufficient to constitute a cause of action against this Defendant and, therefore, must be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Sole Negligence)

131. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiffs, as described in the Amended Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiffs, so far as to bar the Plaintiffs from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Negligence of Others)

132. This Defendant alleges that any injuries and damage sustained by the Plaintiffs were due to and caused by the sole and negligent acts or omissions of some other entity or entities other than this Defendant over whom this Defendant neither had nor exercised any authority or control, and, therefore, this Defendant is not liable to the Plaintiffs for any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Unforeseeable Intervening or Superseding Events)

133. The damages complained of were solely the result of unforeseeable intervening or superseding events over which this Defendant had no control.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

134. That, even if this Defendant was negligent, as alleged in the Amended Complaint, which is specifically denied, the negligence of this Defendant was not the direct or proximate cause of any injury alleged by the Plaintiffs and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiffs.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Joint and Several Liability)

135. This Defendant expressly deny fault or liability whatsoever with respect to Plaintiffs' alleged injuries. However, to the extent that this Defendant is found to have any fault related to the injuries alleged by the Plaintiffs, S.C. Code Ann. § 15-38-15 specifies that if there are multiple defendants in a civil action, joint and several liability does not apply to any defendant fifty-percent (50%) percent or less responsible for the damages. Therefore, this Defendant cannot be held liable for actions which amount to less than fifty-percent (50%) of the total fault thereof.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

136. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Statute of Limitations)

137. This Defendant states that all of the Plaintiffs' claims against it are barred by the applicable statute of limitations.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

138. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the applicable Rules of Civil Procedure.

139. WHEREFORE, having fully answered the Plaintiffs' Amended Complaint, this Defendant prays that the claims against it be dismissed with costs, and for such other and further relief as the Court deems appropriate

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

M. Dawes Cooke, Jr., Esquire
 Jeffrey M. Bogdan, Esquire
 288 Meeting Street, Suite 200
 Charleston, SC 29401
 843-577-7700 (phone)
 843-577-7708 (fax)
mdc@barnwell-whaley.com
jbogdan@barnwell-whaley.com
Attorneys for Defendant Throttlefest, LLC

January 15, 2018
 Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A No.: 2017-CP-26-03008

Douglas Kelsey and Mark Shimmenger,)

Plaintiffs,)

vs.)

House of Blues Myrtle Beach Restaurant)
Corporation; House of Blues Concerts,)
Inc.; HOB Entertainment, Inc.; Full)
Throttle, LLC; Full Throttle Sloon Shine,)
LLC; Throttlefest, LLC; Michael Garner)
and Travis Scott Wagoner,)

Defendants.)

MOTION TO DISMISS

YOU WILL PLEASE TAKE NOTICE that the Defendant, Throttlefest, LLC (hereinafter "Throttlefest"), by and through its undersigned counsel, will move before the court on the tenth day after service hereof or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure dismissing Throttlefest from this case. In support of this Motion, Throttlefest states as follows:

1. Following 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.

2. On October 12, 2018, pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, the undersigned counsel circulated via email a draft Stipulation of Dismissal, with prejudice, to all parties who have appeared in this action, and asked whether each party would consent to the dismissal. See Exhibit A.

3. Plaintiffs' counsel responded that the undersigned could place his electronic signature on the stipulation of dismissal. See Exhibit B.

4. Counsel for defendants Full Throttle, LLC; Full Throttle Sloop Shine, LLC; and Travis Scott Wagoner have also given written permission for the undersigned to include their electronic signature on the stipulation of dismissal. See Exhibit C.

5. *Pro Se* defendant Michael Garner has not responded to the undersigned's email.

6. While counsel for defendants House of Blues Myrtle Beach Restaurant Corporation; House of Blues Concerts, Inc.; and HOB Entertainment, Inc. have recognized receipt of the October 12, 2018 email, those House of Blues defendants have not indicated whether they will consent to the dismissal.

While Throttlefest has the consent of the Plaintiffs (the only parties who have claims pending against Throttlefest) for a voluntary dismissal, it does not have the consent of the House of Blues defendants and, therefore, cannot effectuate a voluntary dismissal under Rule 41(a)(1). Therefore, Throttlefest asks this Court to enter an order dismissing it from this case, with prejudice.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

M. Dawes Cooke, Jr., Esquire

Jeffrey M. Bogdan, Esquire

288 Meeting Street, Suite 200

Charleston, SC 29401

843-577-7700 (phone)

843-577-7708 (fax)

mdc@barnwell-whaley.com

jbogdan@barnwell-whaley.com

Attorneys for Defendant Throttlefest, LLC

November 6, 2018
Charleston, South Carolina

Jeff Bogdan

From: Jeff Bogdan
Sent: Friday, October 12, 2018 11:26 AM
To: 'James Rainsford'; Christian Stegmaier; Amy Neuschafer; wlawson@turnerpadget.com; bill@getlusenow.com; 'Fajitamike3@gmail.com'; M. Dawes Cooke
Subject: Kelsey v. House of Blues
Attachments: SOD w-Prejudice (00840921xA18B7).docx

All,

Plaintiffs have agreed to dismiss Throttlefest, LLC from this case. Attached is a draft Stipulation of Dismiss which, under Rule 41(a)(1)(B), must be signed by all parties who have appeared. Since Horry County uses e-filing, please let me know if I have each of your permission to include an e-signature on this document.

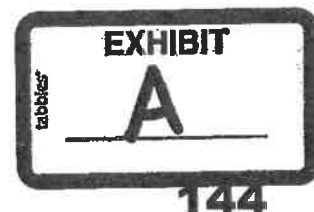
Of course, if anyone has proposed revisions, please let me know.

Thanks,
 Jeff

JEFFREY M. BOGDAN
BARNWELL WHALEY PATTERSON & HELMS, LLC
 288 Meeting Street, Suite 200 | Charleston, SC 29401 | 843.577.7700 | 843.818.4318
jbogdan@barnwell-whaley.com | [Web Site](#) | [Bio](#) | [vCard](#) | [Twitter](#)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No.: 2017-CP-26-03008
Douglas Kelsey and Mark Shimmenger,	)	
	)	
Plaintiffs,	)	
	)	STIPULATION OF DISMISSAL
vs.	)	<i>With Prejudice</i>
	)	
House of Blues Myrtle Beach Restaurant	)	
Corporation; House of Blues Concerts,	)	
Inc.; HOB Entertainment, Inc.; Full	)	
Throttle, LLC; Full Throttle Sloon Shine,	)	
LLC; Throttlefest, LLC; Michael Garner	)	
and Travis Scott Wagoner,	)	
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE that, pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiffs DOUGLAS KELSEY and MARK SHIMMENDER, 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. This Stipulation of Dismissal shall not effect Plaintiffs' claims against any other defendants named herein.

This ____ day of October, 2018.

[Signature blocks on following page]

WE SO STIPULATE:

**COLEMAN, GLEDHILL, HARGRAVE,
MERRITT & RAINSFORD, P.C.**

s/
James Rainsford, Esquire
Katherine T. Merritt, Esquire
129 East Tryon Street
Hillsborough, North Carolina 27278
(919) 732-2196 (phone)
(919) 732-7997 (facsimile)
jainsford@hillsboroughnclaw.com
kmerritt@hillsboroughnclaw.com
Attorneys for Plaintiff

s/
Michael Garner
718 Albert Lane
DeLand, FL 32720
(731) 377-3170 (phone)
Fajitamike3@gmail.com
Pro Se Defendant

TURNER PADGET

s/
William E. Lawson, Esquire
P.O. Box 2116
Myrtle Beach, SC 29578
(843) 213-5501 (phone)
(843) 213-5601 (facsimile)
wlawson@turnerpadget.com
Attorneys for Travis Wagoner

WE SO STIPULATE:

**BARNWELL WHALEY PATTERSON
& HELMS, LLC**

s/
Jeffrey M. Bogdan, Esquire
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700 (phone)
(843) 577-7708 (facsimile)
jbogdan@barnwell-whaley.com
Attorneys for Throttlefest, LLC

COLLINS & LACY, P.C.

s/
Christian Stegmaier, Esquire
Amy L. Neuschafer, Esquire
11945 Grandhaven Drive, Suite D
Murrells Inlet, SC 29576
(843) 353-2350 (phone)
(843) 652-0301 (facsimile)
cstegmaier@collinsandlacy.com
aneuschafer@collinsandlacy.com
*Attorneys for House of Blues Myrtle Beach
Restaurant Corporation, House of Blues
Concerts, Inc and HOB Entertainment, Inc.*

LAW OFFICE OF WILLIAM J. LUSE

s/
William James Luse, Esquire
917 Broadway Street
Myrtle Beach, SC 29577
(843) 839-4795 (phone)
(843) 839-4815 (facsimile)
bill@getlusenow.com
*Attorneys for Full Throttle Sloon Shine, LLC
and Full Throttle, LLC*

Jeff Bogdan

From: James Rainsford <JRainsford@hillsboroughncdclaw.com>
Sent: Friday, October 12, 2018 11:49 AM
To: Jeff Bogdan
Subject: Re: Kelsey v. House of Blues

You have mine

Sent from my iPhone

On Oct 12, 2018, at 11:26 AM, Jeff Bogdan <jbogdan@barnwell-whaley.com> wrote:

All,

Plaintiffs have agreed to dismiss Throttlefest, LLC from this case. Attached is a draft Stipulation of Dismiss which, under Rule 41(a)(1)(B), must be signed by all parties who have appeared. Since Horry County uses e-filing, please let me know if I have each of your permission to include an e-signature on this document.

Of course, if anyone has proposed revisions, please let me know.

Thanks,
Jeff

JEFFREY M. BOGDAN

BARNWELL WHALEY PATTERSON & HELMS, LLC

288 Meeting Street, Suite 200 | Charleston, SC 29401 | 843.577.7700 | 843.818.4318

jbogdan@barnwell-whaley.com | [Web Site](#) | [Bio](#) | [vCard](#) | [Twitter](#)

<image001.png>

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<SOD w-Prejudice (00840921xA18B7).docx>



Jeff Bogdan

From: bill@getlusenow.com
Sent: Friday, October 12, 2018 12:18 PM
To: Jeff Bogdan
Cc: James Rainsford; Christian Stegmaier; Amy Neuschafer; wlawson@turnerpadget.com; Fajitamike3@gmail.com; M. Dawes Cooke
Subject: RE: Kelsey v. House of Blues

To All:

You have my permission to sign.

William Luse

-----Original Message-----

From: "Jeff Bogdan" <jbogdan@barnwell-whaley.com>
Sent: Friday, October 12, 2018 11:25am
To: "James Rainsford" <JRainsford@hillsboroughnclaw.com>, "Christian Stegmaier" <cstegmaier@collinsandlacy.com>, "Amy Neuschafer" <aneuschafer@collinsandlacy.com>, "wlawson@turnerpadget.com" <wlawson@turnerpadget.com>, "bill@getlusenow.com" <bill@getlusenow.com>, "Fajitamike3@gmail.com" <Fajitamike3@gmail.com>, "M. Dawes Cooke" <mdc@barnwell-whaley.com>
Subject: Kelsey v. House of Blues

All,

Plaintiffs have agreed to dismiss Throttlefest, LLC from this case. Attached is a draft Stipulation of Dismiss which, under Rule 41(a)(1)(B), must be signed by all parties who have appeared. Since Horry County uses e-filing, please let me know if I have each of your permission to include an e-signature on this document.

Of course, if anyone has proposed revisions, please let me know.

Thanks,
 Jeff

JEFFREY M. BOGDAN

BARNWELL WHALEY PATTERSON & HELMS, LLC

288 Meeting Street, Suite 200 | Charleston, SC 29401 | 843.577.7700 | 843.818.4318

jbogdan@barnwell-whaley.com | [Web Site](#) | [Bio](#) | [vCard](#) | [Twitter](#)



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Jeff Bogdan

From: Lawson, William E. <WLawson@TurnerPadget.com>
Sent: Friday, October 12, 2018 12:56 PM
To: Jeff Bogdan; James Rainsford; Christian Stegmaier; Amy Neuschafer; bill@getlusenow.com; Fajitamike3@gmail.com; M. Dawes Cooke
Subject: RE: Kelsey v. House of Blues

I consent

From: Jeff Bogdan [mailto:jbogdan@barnwell-whaley.com]
Sent: Friday, October 12, 2018 11:26 AM
To: James Rainsford; Christian Stegmaier; Amy Neuschafer; Lawson, William E.; bill@getlusenow.com; Fajitamike3@gmail.com; M. Dawes Cooke
Subject: Kelsey v. House of Blues

All,

Plaintiffs have agreed to dismiss Throttlefest, LLC from this case. Attached is a draft Stipulation of Dismiss which, under Rule 41(a)(1)(B), must be signed by all parties who have appeared. Since Horry County uses e-filing, please let me know if I have each of your permission to include an e-signature on this document.

Of course, if anyone has proposed revisions, please let me know.

Thanks,
 Jeff

JEFFREY M. BOGDAN
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No.: 2017-CP-26-03008
Douglas Kelsey and Mark Shimmenger,	)	
	)	
Plaintiffs,	)	
	)	MEMORADNUM IN SUPPORT OF
vs.	)	MOTION TO DISMISS
	)	
House of Blues Myrtle Beach Restaurant	)	
Corporation; House of Blues Concerts,	)	
Inc.; HOB Entertainment, Inc.; Full	)	
Throttle, LLC; Full Throttle Sloon Shine,	)	
LLC; Throttlefest, LLC; Michael Garner	)	
and Travis Scott Wagoner,	)	
	)	
Defendants.	)	
	)	

YOU WILL PLEASE TAKE NOTICE that the Defendant, Throttlefest, LLC (hereinafter “Throttlefest”), by and through its undersigned counsel, hereby submits this Memorandum in Support of its Motion to Dismiss filed November 6, 2018 (hereinafter the “Motion”).

Pursuant to 41(a)(1) of the South Carolina Rules of Civil Procedure, if a plaintiff wants to dismiss a party who has already answered the complaint, the plaintiff can only do so, without an order of the court, if all parties who have appeared sign a stipulation of dismissal. Otherwise, the court will have to enter an order of dismissal. See Rule 41(a)(2).

As indicated in the Motion, the Plaintiffs desire to dismiss Throttlefest from this case, and all represented defendants, save for the House of Blues defendants, have consented and agreed to sign a stipulation of dismissal. See Exhibits A-C to the Motion to Dismiss. At the time Throttlefest filed the Motion, the House of Blues defendants had not responded one way or the other regarding Throttlefest’s request for consent for dismissal. Since then, the House of Blues defendants have refused to consent to Throttlefest’s dismissal and refused to sign a stipulation of dismissal. The

House of Blues defendants have provided no valid explanation or basis for refusing to consent to the dismissal, other than wanting to keep a co-defendant in the case. None of the House of Blues defendants have asserted any cross-claims against Throttlefest.

On November 9, 2018, Throttlefest informed the House of Blues defendants that it would be seeking recovery of all attorney fees and costs it incurs as a result of the House of Blues defendants' unreasonable and baseless refusal to consent to the dismissal. See Exhibit 1. To date, House of Blues defendants have still failed to communicate a reasonable basis for refusing to give consent and have knowingly continued to force Throttlefest to participate in this litigation. Attached is the undersigned's affidavit stating the amount of attorney fees and costs incurred by Throttlefest beginning on November 6, 2018 (the day it file the Motion) and ending as of the date of this filing. See Exhibit 2. Throttlefest will incur additional attorney fees and costs after this filing, and the undersigned will file an additional affidavit supporting those fees and costs.

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. Id.

Throttlefest respectfully requests the Court to enter an Order dismissing it from this case and requiring the defendants House of Blues Myrtle Beach Restaurant Corporation; House of Blues Concerts, Inc.; and/or HOB Entertainment, Inc. to pay all attorney fees and costs incurred by Throttlefest from November 6, 2018 until the Order of dismissal is signed.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

M. Dawes Cooke, Jr., Esquire

Jeffrey M. Bogdan, Esquire

288 Meeting Street, Suite 200

Charleston, SC 29401

843-577-7700 (phone)

843-577-7708 (fax)

mdc@barnwell-whaley.com

jbogdan@barnwell-whaley.com

Attorneys for Defendant Throttlefest, LLC

November 30, 2018

Charleston, South Carolina

Jeff Bogdan

From: Jeff Bogdan
Sent: Friday, November 09, 2018 1:18 PM
To: 'Christian Stegmaier'
Cc: 'Amy Neuschafer'
Subject: RE: Kelsey v. House of Blues

Christian,

I am disappointed in your clients' refusal to consent to Plaintiffs' dismissal from my client from this case, particularly because you could not articulate any valid reason for refusing to consent. As I told you on the phone, when my recent filed Motion to Dismiss is heard (which I will ask to be heard during the sanctions roster on November 30) I will ask the Court to order that your clients pay my client's attorney fees and costs incurred as a result of the refusal to consent to the dismissal, which would include preparing for and participating in the depositions on Monday (and the likely continuation thereof).

Jeff

Jeffrey M. Bogdan
 BWPH
 843-577-7700

From: Jeff Bogdan
Sent: Wednesday, November 07, 2018 10:28 AM
To: 'Christian Stegmaier' <cstegmaier@collinsandlacy.com>
Cc: Amy Neuschafer <aneuschafer@collinsandlacy.com>
Subject: RE: Kelsey v. House of Blues

Thanks Christian.

I was unaware until late yesterday that House of Blues' 30(b)(6) and Robert Simeone's depositions have been scheduled for Monday 11/12 (I was not copied on the notice, which I know is not your fault). My problem is that, if my client is not going to be dismissed from this case, I will need to participate in these depositions, and have adequate time to prepare. It happens that I am available Monday, but I will need Friday to prepare. So can you let me know by 10am Friday morning if your client will consent to the dismissal? Of course, if you can let me know earlier, that would be much appreciated.

I am also worried about one day not being enough time to depose both of these witnesses, if both James and I will be asking questions (I will likely have a few hours of questioning). So these depositions may not finish on Monday if I participate. Further, I still have not received complete discovery responses from your clients (despite an order compelling you to produce them – see attached). I would have to keep these depositions open until I receive complete responses.

I also understand that a mediator and mediation date (12/12) were selected without my input. I have another mediation on 12/12, so we will have to reschedule that.

Of course, the simplest solution to these issues is for your clients to consent to my client's dismissal.

I am around today if you want to discuss any of this.



Thanks,

Jeff

Jeffrey M. Bogdan
BWPH
843-577-7700

From: Christian Stegmaier <cstegmaier@collinsandlacy.com>
Sent: Monday, November 05, 2018 8:51 AM
To: Jeff Bogdan <jbogdan@barnwell-whaley.com>
Cc: Amy Neuschafer <aneuschafer@collinsandlacy.com>
Subject: Re: Kelsey v. House of Blues

We will have a response to you by no later than Friday. Our folks are still looking at recent depositions and assessing next steps.

CS

On Oct 29, 2018, at 10:27 AM, Jeff Bogdan <jbogdan@barnwell-whaley.com> wrote:

Christian and Amy,

Have you heard from your client? It has been almost three weeks.

Jeffrey M. Bogdan
BWPH
843-577-7700

From: Jeff Bogdan
Sent: Monday, October 22, 2018 11:06 AM
To: Christian Stegmaier <cstegmaier@collinsandlacy.com>
Cc: Amy Neuschafer <aneuschafer@collinsandlacy.com>
Subject: RE: Kelsey v. House of Blues

Christian and Amy:

Any word from your clients on this?

Thanks,
Jeff

Jeffrey M. Bogdan
BWPH
843-577-7700

From: Christian Stegmaier <cstegmaier@collinsandlacy.com>
Sent: Monday, October 15, 2018 11:31 AM
To: Jeff Bogdan <jbogdan@barnwell-whaley.com>
Cc: Amy Neuschafer <aneuschafer@collinsandlacy.com>
Subject: Re: Kelsey v. House of Blues

We don't have permission yet.

CS

On Oct 15, 2018, at 10:56 AM, Jeff Bogdan <jbogdan@barnwell-whaley.com> wrote:

Christian and Amy,

Do your clients consent?

Thanks,
Jeff

Jeffrey M. Bogdan
BWPH
843-577-7700

From: Lawson, William E. <WLawson@TurnerPadgett.com>
Sent: Friday, October 12, 2018 12:56 PM
To: Jeff Bogdan <jbogdan@barnwell-whaley.com>; James Rainsford <JRainsford@hillsboroughnclaw.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>; Amy Neuschafer <aneuschafer@collinsandlacy.com>; bill@getlusenow.com; Fajitamike3@gmail.com; M. Dawes Cooke <mdc@barnwell-whaley.com>
Subject: RE: Kelsey v. House of Blues

I consent

From: Jeff Bogdan [<mailto:jbogdan@barnwell-whaley.com>]
Sent: Friday, October 12, 2018 11:26 AM
To: James Rainsford; Christian Stegmaier; Amy Neuschafer; Lawson, William E.; bill@getlusenow.com; Fajitamike3@gmail.com; M. Dawes Cooke
Subject: Kelsey v. House of Blues

All,

Plaintiffs have agreed to dismiss Throttlefest, LLC from this case. Attached is a draft Stipulation of Dismiss which, under Rule 41(a)(1)(B), must be signed by all parties who have appeared. Since Horry County uses e-filing, please let me know if I have each of your permission to include an e-signature on this document.

Of course, if anyone has proposed revisions, please let me know.

Thanks,
Jeff

JEFFREY M. BOGDAN
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200 | Charleston, SC 29401 | 843-577-7700 |
843.818.4318
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<image001.png>

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Christian Stegmaier

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No.: 2017-CP-26-03008
Douglas Kelsey and Mark Shimmenger,	)	
	)	
Plaintiffs,	)	
	)	AFFIDAVIT OF JEFFREY M.
vs.	)	BOGDAN IN SUPPORT OF CLAIM
	)	FOR ATTORNEYS' FEES AND
	)	COSTS
House of Blues Myrtle Beach Restaurant	)	
Corporation; House of Blues Concerts,	)	
Inc.; HOB Entertainment, Inc.; Full	)	
Throttle, LLC; Full Throttle Sloon Shine,	)	
LLC; Throttlefest, LLC; Michael Garner	)	
and Travis Scott Wagoner,	)	
	)	
Defendants.	)	
	)	

COMES NOW, the affiant, Jeffrey M. Bogdan, and first being duly sworn upon his oath under the pain and penalties of perjury now states the following:

1. My name is Jeffrey M. Bogdan. I am over the age of 18, a resident of Charleston County, and an attorney at Barnwell Whaley Patterson & Helms, LLC. I am competent to make this affidavit and do so of my own personal knowledge.
2. I represent the Defendant Throttlefest, LLC in the above-captioned matter. My firm charges my time at the hourly rate of \$170.00.
3. I and other attorneys at my firm keep detailed and contemporaneous time entries for the purpose of submitting invoices to our clients.
4. I have reviewed the invoices and time entries spent on this matter and believe them to be reasonable for the work done.
5. The total attorney fees incurred by my client between November 6, 2018 and the November 30, 2018 is \$7,092.00.
6. The total litigation expenses incurred by my client between November 6, 2018 and November 30, 2018 is \$122.51.



7. My client will incur additional attorney fees and expenses associated with my preparation for and attendance at the December 11, 2018 hearing on my client's Motion to Dismiss. My client may also incur additional attorney fees and costs after today's date based on their continued presence as a party to this case.
8. If the Court grants my client's Motion to Dismiss and orders that the House of Blues defendants pay my attorney fees and costs as requested, I will submit an additional affidavit stating the additional fees and costs incurred.

Further the Affiant sayeth not.



Jeffrey M. Bogdan

SWORN TO before me this
30th day of November 2018


Notary Public for South Carolina
My commission Expires: 10/13/19

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Douglas Kelsey and Mark Shimmenger,	)	Civil Action No.: 2017-CP-26-3008
	)	
Plaintiffs,	)	
	)	
vs.	)	MEMORANDUM IN OPPOSITION TO
	)	DEFENDANT THROTTLEFEST, LLC'S
	)	MOTION TO DISMISS
House of Blues Myrtle Beach Restaurant	)	
Corporation; House of Blues Concerts, Inc.;	)	
HOB Entertainment, Inc.; Full Throttle,	)	
LLC; Full Throttle Sloon Shine, LLC;	)	
Throttlefest, LLC; Michael Garner; and	)	
Travis Scott Wagoner,	)	
	)	
Defendants.	)	

TO: JEFFREY M. BOGDAN, ESQ. AND M. DAWES COOKE, JR., ESQUIRE, ATTORNEYS FOR THROTTLEFEST, LLC:

On November 6, 2018, Defendant Throttlefest, LLC ("Throttlefest") moved this Court for an Order pursuant to Rule 41(a)(2), SCRCF, dismissing Throttlefest from the present matter. Defendants House of Blues Myrtle Beach Restaurant Corporation,¹ House of Blues Concerts, Inc., and HOB Entertainment, Inc. (collectively "HOB Defendants") respond to Throttlefest's Motion to Dismiss as follows:

FACTS/PROCEDURAL BACKGROUND

The instant alcohol liability lawsuits arises out of a May 16, 2014 motor vehicle accident involving Plaintiffs Kelsey, Douglas Mark Shimmenger and Defendant Travis Scott Wagoner. Plaintiffs allege they were riding their motorcycles travelling southbound on North Kings Highway in Myrtle Beach, South Carolina during bike week at approximately 12:40 a.m. when they were

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

struck by Defendant Travis Scott Wagoner, who was operating a motorcycle under the influence of alcohol.

On May 12, 2017, Plaintiffs Douglas Kelsey and Mark Shimmenger (“Plaintiffs”) filed the Summons and Complaint commencing the instant action. They named the following Defendants: House of Blues Myrtle Beach Restaurant Corporation; House of Blues Concerts, Inc.; HOB Entertainment, Inc.; Full Throttle, LLC; Full Throttle Sloop Shine, LLC; Full Throttle Saloon and Campground, LLC; American Outlaw Spirits, Inc.; Michael Ballard; Jesse James Dupree; Michael Garner; and Travis Scott Wagoner. Plaintiffs subsequently filed an Amended Complaint substituting Defendant Full Throttle Saloon and Campground, LLC with Throttlefest LLC on July 7, 2017.²

In the Amended Complaint, Plaintiffs allege Defendant Wagoner was a patron of House of Blues Myrtle Beach on May 16, 2014. Specifically, Wagoner attended “Throttle Fest,” a week-long event at the House of Blues, wherein House of Blues adopts the concept of the famous biker bar, “Full Throttle.” Full Throttle is also the subject of a reality television show that follows the activities of its owners Michael Ballard and Jesse James Dupree. (Am. Compl., ¶ 19). Throttlefest and the HOB Defendants entered into an agreement whereby Defendants jointly co-sponsored, organized, and managed the event. (Am. Compl., ¶ 17-18). Evidence also supports the proposition that Defendants further co-employed the individuals who purportedly served alcohol to the tortfeasor driver at the event. Plaintiffs allege that Michael Ballard, also known as “Fajita Mike,” as well as the bartenders and servers at the event overserved Defendant Wagoner, which proximately caused the subject accident. (Am. Compl., ¶¶ 56-59).

² On January 22, 2018, Defendants American Outlaw Spirits, Inc., Michael Ballard, and Jesse James Dupree were dismissed from this matter without prejudice.

Plaintiffs allege that Defendants are responsible by virtue of *respondeat superior* for the alleged negligence, gross negligence, and statutory violations of Fajita Mike and the bartenders who served Wagoner. (Am. Compl., ¶¶ 104-109). Specifically, Plaintiffs assert that the HOB Defendants and Throttlefest jointly presented the event for their mutual and collective benefit and negligently supervised Fajita Mike, the bartenders, and the servers of alcohol at the event. (Am. Compl., ¶ 111-119). On November 6, 2018, Throttlefest filed a Motion to Dismiss pursuant to Rule 41(a)(2), SCRCF on the grounds that Throttlefest has reached a settlement with the Plaintiffs and therefore, should be dismissed as a party from this matter.

LAW/ANALYSIS

Rule 19, SCRCF provides, in relevant part: “A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties” “Rule 19, SCRCF allows a court to join, whenever possible, persons materially interested in an action so that a complete determination can be made.” Gillman v. City of Beaufort, 368 S.C. 24, 28, 627 S.E.2d 746, 748 (Ct. App. 2006). See also First Citizens Bank v. Strable, 292 S.C. 146, 148, 355 S.E.2d 278, 279 (Ct. App. 1987) (holding that a party must be joined if “in his absence complete relief cannot be accorded among the parties.”).

Therefore, the rule requires that an indispensable or necessary party be joined in lawsuits. A party is indispensable if the action cannot afford complete relief among the existing parties or leaves the remaining parties “subject to substantial risk of incurring multiple or inconsistent obligations by reason of the absent party not being joined.” Stewart v. State Crop Pest Comm., 307 S.C. 133, 139, 414 S.E.2d 121, 125 (1992). See also Slatton v. Slatton, 289 S.C. 128, 130, 345 S.E.2d 248, 249 (1986) (“A necessary party is one whose rights must be ascertained and settled before the rights of the parties to the action can be determined.”) The decision to grant or deny a

Rule 19, SCRC motion “lies within the sound discretion of the trial court.” Ex parte Gov’t Emp.’s Ins. Co. v. Goethe, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007).

In the matter at bar, the HOB Defendants and Throttlefest, pursuant to an agreement, mutually presented the subject event as a joint venture. They further co-promoted, organized, and managed the event. Most importantly, the HOB Defendants and Throttlefest acted as co-employers of Fajita Mike and the other employees who are alleged to have overserved Wagoner and proximately caused the subject motorcycle accident and alleged injuries. Even by Plaintiffs’ own assertions, all Defendants had the ability to “manage, direct, and control” the actions of Fajita Mike and the other employees, which allegedly led the subject accident. (See Am. Compl., ¶ 116). Throttlefest clearly has a “material interest” in the subject matter and its dismissal would prevent a complete determination of liability as to the remaining Defendants. Furthermore, because the HOB Defendants and Throttlefest acted as co-employers to the individuals who allegedly overserved Wagoner, the HOB Defendants would be deprived of complete relief if Throttlefest is dismissed as a party from this action.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Throttlefest’s Motion to Dismiss.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
COLLINS & LACY, P.C.

By: s/Christian Stegmaier
CHRISTIAN STEGMAIER (SC Bar # 68648)
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER (SC Bar #73922)
aneuschafer@collinsandlacy.com
11945 Grandhaven Drive, Suite D
Murrells Inlet, South Carolina 29576
(843) 353-2350 (voice)
(843) 652-0301 (facsimile)

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

Murrells Inlet, South Carolina
December 10, 2018

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NO. 2017-CP-26-03008

DOUGLAS KELSEY and MARK)
 SHIMMENDER,)
)
 PLAINTIFFS,)

vs.)

HOUSE OF BLUES MYRTLE BEACH)
 RESTAURANT CORPORATION;)
 HOUSE OF BLUES CONCERTS, INC.;)
 HOB ENTERTAINMENT, INC.; FULL)
 THROTTLE, LLC; FULL THROTTLE)
 S'LOON SHINE, LLC; MICHAEL)
 GARNER AND TRAVIS SCOTT)
 WAGONER,)

DEFENDANTS.)

MOTION TO DISMISS

YOU WILL PLEASE TAKE NOTICE that the Defendants, Full Throttle, LLC and Full Throttle S'Loon Shine, LLC, by and through their undersigned counsel, will move before the Court on the tenth day after service hereof or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure dismissing both Full Throttle, LLC and Full Throttle S'Loon Shine, LLC from this case. In support of this Motion, Full Throttle, LLC and Full Throttle S'Loon Shine, LLC state as follows:

1. Following the October 9, 2018 depositions of Throttlefest's 30(b)(6) designee and defendant Michael Garner, counsel for the Plaintiff's agreed to voluntarily dismiss both Full Throttle, LLC and Full Throttle S'Loon Shine, LLC from this case.
2. In October of 2018 pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, numerous e-mails were circulated amongst the attorneys with a draft

Stipulation of Dismissal, with prejudice, to all parties who have appeared in this action, and asked whether each party would consent to the dismissal.

3. Plaintiffs' counsel responded that the undersigned could place his electronic signature on the stipulation of dismissal.
4. Counsel for all of the Defendants at the time except for the House of Blues Defendants also gave their consent to allow Full Throttle, LLC and Full Throttle S'Loon Shine, LLC to be dismissed from the lawsuit.
5. *Pro Se* Defendant Michael Gardner has not responded to any emails.
6. In May of 2019 pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, a second round of e-mails was circulated amongst the attorneys with a draft Stipulation of Dismissal, with prejudice, to all parties who have appeared in this action, and asked whether each party would consent to the dismissal. Plaintiff's counsel again responded that the undersigned could place his electronic signature on the stipulation of dismissal.
7. Counsel for all of the Defendants at the time except for the House of Blues Defendants have also given their consent to allow Full Throttle, LLC and Full Throttle S'Loon Shine, LLC to be dismissed from the lawsuit other than *Pro Se* Defendant Michael Gardner who has not responded to any emails.
8. While Full Throttle, LLC and Full Throttle S'Loon Shine, LLC has the consent of the Plaintiffs (the only parties who have pending claims against them) for a voluntary dismissal, it does not have the consent of the House of Blues defendants and, therefore, cannot effectuate a voluntary dismissal under Rule 41(a)(1).

9. A previous Motion to Dismiss was filed under similar circumstances by Throttlefest, LLC. The Motion hearing was heard on December 11, 2018 with Judge Seals presiding. The Court Dismissed Throttlefest, LLC as a party Defendant. (See Exhibit 1).
10. Defendants Full Throttle, LLC and Full Throttle S'Loon Shine, LLC have already entered into a confidential settlement with the Plaintiffs' and the Plaintiffs' counsel has agreed to dismiss Full Throttle, LLC and Full Throttle S'Loon Shine, LLC.
11. The House of Blues Defendants has not filed any cross claims or counterclaims against Full Throttle, LLC or Full Throttle S'Loon Shine, LLC. The only claims ever alleged against Full Throttle, LLC or Full Throttle S'Loon Shine, LLC were by the Plaintiffs.'

Defendants Full Throttle, LLC and Full Throttle S'Loon Shine, LLC would now ask this Court to enter an Order dismissing them from this case, with prejudice.

Law Office of William J. Luse

S/William J. Luse
 William J. Luse, Esquire
 SC Bar No: 72790
 917 Broadway Street
 Myrtle Beach, SC 29577
 Phone: (843) 839-4795
 Fax: (843) 839-4815
bill@getlusenow.com
 Attorney for Full Throttle, LLC &
 Full Throttle S'Loon Shine, LLC

June 24, 2019
 Myrtle Beach, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO. 2017-CP-26-03008
DOUGLAS KELSEY and MARK	)	
SHIMMENDER,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HOUSE OF BLUES MYRTLE BEACH	)	
RESTAURANT CORPORATION;	)	
HOUSE OF BLUES CONCERTS, INC.;	)	
HOB ENTERTAINMENT, INC.; FULL	)	
THROTTLE, LLC; FULL THROTTLE	)	
S'LOON SHINE, LLC; MICHAEL	)	
GARNER AND TRAVIS SCOTT	)	
WAGONER,	)	
	)	
	)	
	)	
DEFENDANTS.	)	
	)	

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

YOUR WILL PLEASE TAKE NOTICE that Defendants Full Throttle, LLC and Full Throttle S'Loon Shine, LLC, by and through their undersigned counsel, hereby submits this memorandum in support of their Motion to Dismiss.

Pursuant to 41(a)(1) of the South Carolina Rules of Civil Procedure, if a plaintiff wants to dismiss a party who has already answered the complaint, the plaintiff can only do so, without order of the court, if all parties who have appeared sign a stipulation of dismissal. Otherwise, the court will have to enter an order of dismissal. See Rule 41(a)(2).

In this case the Plaintiffs desire to dismiss Full Throttle, LLC and Full Throttle S'Loon Shine, LLC from this case, and all represented defendants, but for the House of Blues Defendants, have consented and agreed to an order of dismissal. A previous and similar motion to dismiss was filed by Throttlefest, LLC. The previous motion was heard on December 11, 2018

with Judge Seals presiding. The Court found that the Defendant, Throttlefest, LLC was no longer a necessary party as the Plaintiffs consented to a dismissal and the HOB defendants had failed to file any cross claims or counterclaims against Throttlefest, LLC. Despite the courts previous ruling the HOB defendants continue to not consent to the Plaintiffs' dismissal of Full Throttle, LLC and Full Throttle S'Loon Shine, LLC. The HOB defendants have provided no legitimate reason or basis for refusing to consent to the dismissal, other than wanting to keep a co-defendant in the case. Although, the HOB defendants may want to keep Full Throttle LLC and Full Throttle S'Loon Shine, LLC in the case they have not filed any cross claims or counter claims against them.

Full Throttle, LLC and Full Throttle S'Loon Shine, LLC have reached a confidential settlement with the Plaintiffs related to this case. South Carolina law has long recognized that a plaintiff in a lawsuit has the right to choose its defendant(s). Smith v. Tiffany, 419 S.C. 548, 562-564, 799 S.E.2d 479, 487—88 (2017). The Plaintiffs in this case have chosen to settle with and not pursue any claims against Full Throttle, LLC and Full Throttle S'Loon Shine, LLC. The House of Blues defendants, which have no claims against Full Throttle, LLC and Full Throttle S'Loon Shine, LLC, do not have a right to block the Plaintiffs' right to choose. Id.

Full Throttle, LLC and Full Throttle S'Loon Shine, LLC respectfully request the court enter an Order dismissing them from this case with prejudice.

SIGNATURE PAGE TO FOLLOW

Law Office of William J. Luse

S/William J. Luse

William J. Luse, Esquire

SC Bar No: 72790

917 Broadway Street

Myrtle Beach, SC 29577

Phone: 843-839-4795

Fax: 843-839-4815

bill@getlusenow.com

Attorney for Full Throttle, LLC &

Full Throttle S' Loon Shine, LLC

June 24, 2019

Myrtle Beach, SC

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2017-CP-2603008

DOUGLAS KELSEY and MARK)
SHIMMENDER,)
)
Plaintiffs)
)
v.)
)
HOUSE OF BLUES MYRTLE BEACH)
RESTAURANT CORPORATION, HOB)
ENTERTAINMENT, INC., and TRAVIS)
SCOTT WAGONER,)
)
Defendants)
_____)

SUMMONS
(Second Amended Complaint)

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONSED and required to answer the Second Amended Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Plaintiffs upon the subscribed, at his office at 129 East Tryon Street, Post Office Drawer 1529, Hillsborough, North Carolina, 27278, within fifteen (15) days after the service hereof, exclusive of the day of such service. If you shall fail to appear and defend in this matter within the time set forth herein above, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/James Rainsford
South Carolina Bar Number 74924
129 East Tryon Street
Post Office Drawer 1529
Hillsborough, North Carolina 27278
(919) 732-2196 Telephone
(919) 732-7997 Facsimile
jrainsford@hillsboroughncclaw.com

Dated: October 15, 2019

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2017-CP-2603008

DOUGLAS KELSEY,)
)
Plaintiff)
v.)
)
HOUSE OF BLUES MYRTLE BEACH)
RESTAURANT CORPORATION, HOB)
ENTERTAINMENT, INC., and TRAVIS)
SCOTT WAGONER,)
)
Defendants)
_____)

SECOND AMENDED COMPLAINT

NOW COMES Plaintiff, Douglas Kelsey, by and through undersigned counsel, and pursuant to South Carolina Rule of Civil Procedure 15(a), hereby makes the following Second Amended Complaint against Defendants and prays for the relief requested herein:

PARTIES

1. Plaintiff Douglas Kelsey is a resident and citizen of Oxford, North Carolina.
2. Defendant House of Blues Myrtle Beach Restaurant Corporation ("the House of Blues") is a Delaware corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina. The House of Blues is licensed by the State to serve alcoholic beverages by the drink at its physical location in North Myrtle Beach.
3. Defendant HOB Entertainment, Inc. ("HOBE") is a Delaware corporation duly licensed to conduct business in South Carolina and doing business in Horry County, South Carolina. HOBE is a multi-faceted entertainment concept that integrates a high volume restaurant and bar, a live music venue such as the House of Blues, and branded specialty retailing in what it alleges to be an authentic Southern style juke-joint.
4. Defendant Travis Scott Wagoner ("Defendant Wagoner") is a resident and citizen of West Jefferson, North Carolina.

JURISDICTION AND VENUE

5. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated.

6. The acts complained of herein were committed in Horry County, South Carolina and this Court has jurisdiction of the parties and subject matter and venue are proper.

INTRODUCTION

7. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated. The terms "acts" and "actions" in the Second Amended Complaint also includes omissions.
8. From May 9 through May 17, 2014, the House of Blues employed Michael "Fajita Mike" Garner to work as a bartender at an event called "Throttlefest 2014."
9. Because of Fajita Mike's minor celebrity status on the television show "Full Throttle Saloon," the House of Blues was aware prior to hiring him that he had a reputation as both a "loose cannon" and someone who would get intoxicated while working.
10. On May 16, 2014, the House of Blues illegally sold twenty-nine bottles of liquor to its own bartender, Fajita Mike, with the knowledge and intent that he would serve this liquor to the House of Blues' patrons, which he did.
11. Fajita Mike illegally served two shots of this illegal liquor to an intoxicated patron (Defendant Wagoner) in the House of Blues' music hall at approximately 12:15 a.m. on May 17, 2014.
12. A few minutes later an intoxicated Defendant Wagoner departed the House of Blues on his motorcycle. A few miles down the road he fell off his motorcycle which then crashed into Plaintiff.
13. The crash occurred approximately twenty-five minutes after Fajita Mike served Defendant Wagoner the two shots of liquor at the House of Blues.
14. The crash occurred in Myrtle Beach while Defendant Wagoner was driving southbound on North Kings Highway and Plaintiff was driving on a motorcycle in the opposite direction.
15. Plaintiff almost died as a result of the crash and, he suffered and continues to suffer physical, emotional, and economic damages, including the loss of his left leg and the loss of his two businesses.
16. Thus, Plaintiff is suing the House of Blues and HOBE based on negligence and public/common nuisance and he is suing Defendant Wagoner based on negligence. The actions of the House of Blues are imputed to HOBE, and the actions of Fajita Mike are

imputed to the House of Blues. He seeks an award of punitive damages from both Defendants.

FACTUAL ALLEGATIONS

17. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated.
18. During the week of May 11, 2014, the House of Blues purchased multiple bottles of Sloonshine liquor from a local retail dealer for \$19.80 per bottle.
19. On May 16, 2014 the House of Blues then illegally sold twenty-six bottles of this liquor to Fajita Mike at prices ranging from \$96.07 per bottle to \$110 per bottle.
20. During the week of May 11, 2014, the House of Blues also purchased multiple bottles of Jesse James Honey Whiskey from a local retail dealer for \$15.99 per bottle.
21. On May 16, 2014 the House of Blues then illegally sold three bottles of this liquor to Fajita Mike at prices ranging from \$96.07 per bottle to \$110 per bottle.
22. These transactions were profitable for the House of Blues because for every bottle of liquor it sold to Fajita Mike, its profits ranged from approximately \$76 per bottle to \$94 per bottle.
23. Fajita Mike was able to serve the liquor faster than the other bartenders because he was not limited to working behind a bar, he was not required to ring in those liquor sales in the computer point of sale system, and most of all, the House of Blues alleges he was serving the liquor free of charge to patrons.
24. All told, on May 16, 2014 the House of Blues sold Fajita Mike just under \$3,000 worth of liquor and profited by approximately \$2,250 from these illegal sales.
25. Lieutenant Pamela Williamson of the South Carolina Law Enforcement Division ("SLED") testified at her deposition that an alcohol licensee such as the House of Blues cannot legally sell a full bottle of liquor to someone because the House of Blues was only authorized to sell liquor by the drink pursuant to South Carolina Code § 61-6-1636(A).
26. According to the House of Blues' management, Fajita Mike was permitted by the House of Blues to serve the liquor for free to any and all the House of Blues patrons.
27. According to the House of Blues' management, its patrons would sometimes pay cash tips to Fajita Mike after he did shots of liquor with them.

28. According to the House of Blues' management, Fajita Mike was permitted to serve free shots of liquor in the House of Blues' music hall on the night of May 16 through the early morning of May 17, 2014.
29. The House of Blues produced a "Labor Summary by Employee" report for May 16, 2014 which indicates that Fajita Mike's bartender work shift started at 2:19 p.m. and ended at 2:13 a.m. on May 17, 2014.
30. Nineteen of the twenty-nine bottles of liquor the House of Blues illegally sold to Fajita Mike were sold to him after 8:00 p.m. on May 16, 2014.
31. At approximately 7:30 p.m. on May 16, 2014, Defendant Wagoner alleges that he arrived at the House of Blues to watch a hard rock concert performed by "Jackyl" in the House of Blues' music hall.
32. He had purchased a ticket to the concert earlier that same day at the House of Blues.
33. Defendant Wagoner states that he was sober when he arrived and that he drank beer and liquor at the House of Blues from 8:30 p.m. until just after the Jackyl concert ended, which was at approximately 12:20 a.m. according to the House of Blues.
34. Defendant Wagoner states that during this time period, he was served the equivalent of eleven alcoholic beverages in the House of Blues' music hall.
35. Specifically, he states that he was served four twenty-four ounce cans of Bud Light; one Royal Flush (which consists of approximately three ounces of different liquors); and at least two shots of liquor served to him by Fajita Mike.
36. A sales receipt produced by the House of Blues confirms that Defendant Wagoner was sold beer and liquor while at the House of Blues on May 16, 2014.
37. Defendant Wagoner was intoxicated before Fajita Mike served him the two shots of liquor in the House of Blues' music hall.
38. Prior to taking the last two shots, Defendant Wagoner had already been served the equivalent of nine drinks (a combination of beer and liquor) in the roughly three hours he had been drinking alcohol at the House of Blues.
39. These nine previous drinks were served to him by the House of Blues' employees and agents who were acting in the course and scope of their employment.

40. At the time Fajita Mike served Defendant Wagoner the two shots of liquor, he was acting in the course and scope of his employment as the House of Blues' employee and/or agent.
41. The House of Blues has offered sworn testimony that Fajita Mike was its employee during Throttlefest 2014 which includes the days May 16 and 17, 2014.
42. Fajita Mike was on the House of Blues' employee work schedule from 2:19 p.m. on May 16, 2014 until 2:13 a.m. on May 17, 2014; he received a W-2 from the House of Blues for his work in 2014; the House of Blues issued him an employee MICROS card that allowed him to ring drink sales into the House of Blues' point of sale computer system; he completed a cash-out at the end of the night whereby he accounted to the House of Blues for all of his alcohol sales for the night in question; and he received a paycheck from the House of Blues for his employment with it for the time period of May 9 through 17, 2014.
43. According to the cash out records produced by the House of Blues, Fajita Mike sold at least 100 beers as well as shots of Jack Daniels and Jose Cuervo to the House of Blues' patrons on May 16 and 17, 2014.
44. The House of Blues contends that Fajita Mike served Defendant Wagoner at least two shots of liquor just prior to Defendant Wagoner's departure from the House of Blues.
45. An intoxicated Defendant Wagoner traveled approximately nine miles southbound on North Kings Highway before he fell off his motorcycle at approximately 12:40 a.m.
46. When he fell off his motorcycle, it crossed the median and hit Plaintiff who was travelling on a motorcycle northbound on North Kings Highway.
47. Plaintiff had not been drinking alcohol prior to the crash as was confirmed by a blood test performed after the crash at Grand Strand Regional Medical Center ("Grand Strand").
48. After the crash, Defendant Wagoner was administered standardized field sobriety tests ("SFSTs") by Officer Phillip Bauer of the Myrtle Beach Police Department.
49. Officer Bauer noted that Defendant Wagoner was visibly intoxicated, that he failed the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. He also exhibited vertical nystagmus, indicating gross alcohol impairment.
50. Officer Bauer arrested Defendant Wagoner and took him to Grand Strand for treatment of superficial injuries where doctors drew his blood solely for medical purposes at 3:18 a.m.

- three hours after he had been served his last two shots by Fajita Mike at the House of Blues.
- 51. The results of the medical blood test demonstrated that Defendant Wagoner's blood alcohol concentration ("BAC") was approximately 146 ± 3 mg/dl (reduced to a whole blood BAC range of approximately .121 to .133) at the time of the hospital blood draw.
- 52. A BAC of 0.08 is above the legal limit to operate a vehicle in South Carolina.
- 53. Dr. Robert B. Forney, Jr., a forensic toxicologist, has evaluated the information in this case and has determined that just before Defendant Wagoner was served the two shots of liquor by Fajita Mike, his BAC was over the legal limit and he would have been exhibiting noticeable signs of intoxication.
- 54. A video recording of Defendant Wagoner taken during his SFSTs corroborates Dr. Forney's opinion because it shows a visibly intoxicated Defendant Wagoner who is unsteady on his feet, who almost falls to the ground while trying to perform SFSTs, and who falsely alleges that Plaintiff's motorcycle struck him.
- 55. At about the same time Defendant Wagoner's blood was being drawn, surgeons at Grand Strand were trying to save Plaintiff's left leg which had been essentially severed when Defendant Wagoner's motorcycle struck him.
- 56. The wreck was the first time Plaintiff's leg was cut off.
- 57. Surgeons at Grand Strand had to first clean the trauma location which was contaminated from the crash with metal, plastic, dirt, grass, and bits of bone.
- 58. The surgeons were then able to temporarily stabilize Plaintiff's leg with an external fixator (a process whereby surgeons drill screws into the bone above and below the trauma location to create anchor points for the attachment of an external steel rod).
- 59. After two more surgeries, on May 20, 2014 Plaintiff was airlifted to Duke University Hospital in Durham, North Carolina where he underwent eight additional surgeries which encompassed approximately twenty procedures.
- 60. On May 28, 2014, it became medically necessary to surgically remove Plaintiff's right latissimus dorsi muscle ("lat muscle") to try to use it to create connecting/replacement muscle at the trauma location on his left leg.

61. Plaintiff still suffers daily from the loss of his right lat muscle and, among other things, it hinders his ability to pull on his prosthetic leg.
62. This procedure was unsuccessful and on May 29, 2014, it became medically necessary to amputate Plaintiff's left leg below the knee because of the damage from the crash.
63. This was the second time Plaintiff's leg was cut off.
64. On June 2, 2014, it became medically necessary to amputate Plaintiff's left leg above the knee because his surgical site had become infected.
65. This was the third time Plaintiff's leg was cut off.
66. Over the next three years, Plaintiff had two additional surgeries that were medically necessary as a result of the crash, including a left rotator cuff surgery.
67. Plaintiff is scheduled for an additional surgery on his left leg on January 15, 2020, and likely will have future surgeries to revise the remains of his left leg.
68. When the Complaint and Amended Complaint were filed, Plaintiff had not yet discovered that Fajita Mike was the House of Blues' employee, that the House of Blues had illegally sold him twenty-nine bottles of liquor on May 16, 2014, that the House of Blues permitted him to illegally serve this liquor for free and to drink this liquor with the House of Blues' patrons, and that the House of Blues' music hall was the location where all of the alcoholic beverages were served to Defendant Wagoner (as opposed to on the House of Blues' deck which is where Throttlefest 2014 was being conducted).
69. According to the former House of Blues' music hall manager, the House of Blues' music hall was separate from Throttlefest 2014 which was occurring on the House of Blues' deck.
70. Additionally, Plaintiff has discovered that HOBE helped pay for Fajita Mike's employment for May 9 through 17, 2014 and also helped arrange for his hotel accommodations during that time.
71. According to the House of Blues, HOBE's human resource manager provided in part some of the training in the safe service of alcohol to the House of Blues' employees from May 9 through 17, 2014.
72. According to the House of Blues, it was given permission by HOBE to sell the Sloonshine brand of liquor from May 9 through 17, 2014. This is the same liquor that Fajita Mike

served Defendant Wagoner just before Defendant Wagoner crashed his motorcycle into Plaintiff.

73. Thus, HOBE exercised control over the House of Blues' sale of liquor from May 9 through 17, 2014.
74. According to the House of Blues, HOBE approved the House of Blues' request to put Fajita Mike on the House of Blues' payroll, and it also signed off on Fajita Mike's employment termination paperwork.
75. Therefore, HOBE exercised control over the House of Blues' decision to hire Fajita Mike.
76. In order for the House of Blues to become a HOBE venue, it was required by HOBE to sell alcoholic beverages.
77. HOBE makes any and all "Team Members" (employees who work at the various HOBE venues, including the House of Blues) sign a responsible alcohol management policy.
78. Within this policy, HOBE reserves the right to terminate the employment of any team member who violates any provision of the responsible alcohol management policy.
79. This HOBE policy was in effect on May 16 and May 17, 2014 according to the House of Blues.
80. HOBE makes any and all "Team Members" (employees who work at the various HOBE venues, including the House of Blues) sign an alcohol sales and service policy.
81. Within this policy, HOBE reserves the right to terminate the employment of any team member who violates any provision of the alcohol sales and service policy.
82. This HOBE policy was in effect on May 16 and May 17, 2014 according to the House of Blues.
83. With this knowledge, Plaintiff makes this Second Amended Complaint which seeks to hold accountable those who are legally responsible for his injuries: the House of Blues, Defendant Wagoner, and HOBE as it is responsible for the actions of its agent, the House of Blues.

FIRST CLAIM FOR RELIEF AGAINST THE HOUSE OF BLUES
(Negligence *Per Se*)

84. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated.

85. The essential purpose of South Carolina Code §§ 61-4-580, 61-6-2220, and 61-6-1640(1-10) ("the Statutes") is to protect Plaintiff and others similarly situated from the type of harm that Plaintiff suffered.
86. These Statutes are the only three places in Chapter 61 of the South Carolina Code that specifically prohibits serving alcohol to an intoxicated person. In fact, South Carolina Code § 61-6-1640(8) states that a free sample of alcohol "may not be offered to or consumed by an intoxicated person."
87. The essential purpose of Sections 3-3 and 3-4 of the duly adopted Code of Ordinances of the City of North Myrtle Beach ("the Ordinances") is to protect Plaintiff and others similarly situated from the type of harm that Plaintiff suffered.
88. Ordinance Sec. 3-3 makes it unlawful to sell alcohol to an intoxicated person, and Ordinance Sec. 3-4 makes it unlawful to give alcohol to someone to whom it cannot be legally sold (e.g., an intoxicated person).
89. The Statutes and the Ordinances create a duty for the House of Blues and its agents and/or employees to protect Plaintiff because the House of Blues owns and/or operates the business and/or property that functions as a commercial server of alcohol.
90. On May 16 and 17, 2014, the House of Blues and its employees and agents knowingly sold and served Defendant Wagoner alcohol in violation of the Statutes and the Ordinances.
91. The House of Blues and its employees and agents knew or should have known that Defendant Wagoner was intoxicated at the time they served him alcohol.
92. Fajita Mike's serving the two shots of liquor to Defendant Wagoner constitute a sale of alcohol because the term "sale" in the context of illegal alcohol sales has been broadly construed by the South Carolina Supreme Court. *See City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E.2d 53 (Sup. Ct. 2011).
93. In addition, the House of Blues' illegal alcohol sales to Fajita Mike, and its permitting him to illegally serve the liquor for free, equate to the House of Blues allowing its employee to buy anyone in the House of Blues a liquor drink, including Defendant Wagoner. Thus, Fajita Mike's service of liquor to Defendant Wagoner was a sale to Defendant Wagoner.

94. Finally, according to the House of Blues' own internal policies, "all served [alcoholic] beverages must be rung as sales." Thus, the shots of liquor Fajita Mike illegally served Defendant Wagoner are considered sales by the House of Blues.
95. If Fajita Mike's serving the two shots of liquor to Defendant Wagoner are not considered sales (which is denied), then such conduct still violates Ordinance Sec. 3-4 and Statute § 61-6-1640(8) because both that Ordinance and that Statute prohibit giving alcohol to an intoxicated person or allowing an intoxicated person to consume alcohol.
96. The House of Blues, individually and through the acts of its employees and agents, owed Plaintiff, as a member of the general public, duties of care not to allow its patrons to become intoxicated, not to serve alcohol to its intoxicated patrons, and to protect Plaintiff from the possible consequences of its patrons' intoxication to which it contributed for financial gain.
97. The House of Blues, individually and through the acts of its employees and agents, breached this duty by knowingly serving Defendant Wagoner alcohol at the House of Blues up to and past the point where he became visibly intoxicated and by continuing to serve him beer and liquor after they knew or should have known he was intoxicated.
98. The House of Blues' and its agents' and employees' aforementioned violations of the Statutes and the Ordinances constitute negligence *per se*. Each individual violation of the Statutes or the Ordinances constitutes negligence *per se* and each individual violation of the Statutes or the Ordinances was a proximate cause of Plaintiff's injuries.
99. The House of Blues was responsible for its employees' and agents' service of alcohol to its patrons, including Defendant Wagoner; thus its employees' and agents' willful, wanton, reckless, grossly negligent, and negligent acts as described herein are imputed to the House of Blues pursuant to the doctrine of *respondeat superior* and/or agency.
100. The willful, wanton, reckless, grossly negligent, negligent acts, and violations of the Statutes and the Ordinances by the House of Blues and its employees and agents who sold and served alcohol to Defendant Wagoner as set forth in this Second Amended Complaint are also imputed to the House of Blues pursuant to the duly adopted Code of Ordinances, City of North Myrtle Beach, South Carolina Section 1-7 ("Any violation of this Code by an officer, agent or other person acting for or employed by any corporation or unincorporated association or organization while acting within the scope of such person's

office or employment, shall in every case also be deemed to be a violation by such corporation, association or organization.”).

101. Defendant Wagoner’s intoxication, the vehicle collision, and Plaintiff’s damages were proximately caused by Defendant Wagoner being overserved alcohol by the House of Blues and its employees and agents in violation of the Statutes and the Ordinances.
102. As a direct and proximate result of the House of Blues’ and its employees’ and agents’ willful, wanton, reckless, grossly negligent, and negligent acts as described herein, Plaintiff suffered one or more of the following elements of damage: past, present, and future physical pain, suffering, mental anguish, and emotional distress; past medical expenses; future medical expenses; lost income; loss of future earning potential; loss of Plaintiff’s enjoyment of life; disfigurement and scarring; and other damages that will be shown at trial.
103. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of the House of Blues and its employees and agents as described herein, Plaintiff is entitled to recover actual and punitive damages as determined at trial by jury.
104. The willful, wanton, reckless, grossly negligent, negligent acts, and violations of the Statutes and the Ordinances by the House of Blues and its employees and agents who sold and served alcohol to Defendant Wagoner as set forth in this Second Amended Complaint are also imputed to HOBE pursuant to the doctrine of *respondeat superior* and/or agency and pursuant to the duly adopted Code of Ordinances, City of North Myrtle Beach, South Carolina Section 1-7.

SECOND CLAIM FOR RELIEF AGAINST THE HOUSE OF BLUES

(Public/Common Nuisance)

105. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated.
106. The unlawful sale of liquor has been declared to be a common nuisance pursuant to South Carolina Code § 61-8-10.
107. Additionally, South Carolina Code § 61-4-580(5) commands that no holder of a permit authorizing the sale of beer or wine, or a servant, agent, or employee of the permittee, may knowingly permit any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this State.

108. Pursuant to South Carolina Code § 61-6-1636(A), the House of Blues was licensed to sell alcoholic beverages by the drink, not by the bottle.
109. The House of Blues and its employees and agents permitted Fajita Mike to serve liquor for free to the House of Blues' patrons in violation of South Carolina Code §§ 61-6-4550 and 61-6-1640(8).
110. The essential purpose of South Carolina Code §§ 61-8-10, 61-4-580(5), 61-6-1636, 61-6-4550 and 61-6-1640(8) is to protect Plaintiff and others similarly situated from the type of harm that Plaintiff suffered.
111. It also creates a duty for the House of Blues and its employees and/or agents to protect Plaintiff from such harm.
112. The House of Blues' and its employees' and agents' sale of twenty-nine bottles of liquor to Fajita Mike and allowing him to serve the liquor for free was illegal and violated the House of Blues' license to serve alcoholic beverages by the drink and constitutes a crime pursuant to South Carolina law.
113. The House of Blues and its employees and agents knew that Fajita Mike was drinking liquor with the House of Blues' patrons, knew that he was serving the liquor for free, and knew that Fajita Mike was not in a position to determine whether or not the House of Blues' patrons he was serving were intoxicated.
114. It was reasonably foreseeable that by illegally putting twenty-nine bottles of liquor in the hands of a bartender who was permitted to drink alcohol and serve free shots, someone would get overserved alcohol, drive a vehicle, and injure another motorist. That is exactly what happened.
115. Plaintiff has suffered injuries as a direct and proximate result of the public/common nuisance created by the House of Blues and its employees and agents via the illegal sales of liquor to Fajita Mike, permitting him to drink alcohol while serving the liquor, and permitting him to serve liquor for free to the House of Blues' patrons.
116. Plaintiff has suffered injuries as alleged herein that are different in kind and in degree from the public at large.
117. As a direct and proximate result of the public/common nuisance created by the acts of the House of Blues and its employees and agents, Plaintiff suffered one or more of the

following elements of damage: past, present, and future physical pain, suffering, mental anguish, and emotional distress; past medical expenses; future medical expenses; lost income; loss of future earning potential; loss of Plaintiff's enjoyment of life; disfigurement and scarring; and other damages that will be shown at trial.

118. The House of Blues is responsible for the acts of its employees and agents, including but not limited to the creation of the public/common nuisance described herein, and thus liability is imputed to it pursuant to the doctrine of *respondeat superior* and/or agency.
119. A cause of action based on public/common nuisance for violation of South Carolina alcohol control laws was implicitly recognized in South Carolina in Steele v. Rogers, 306 S.C. 546, 413 S.E.2d 329 (Ct. App. 1992) in which the South Carolina Court of Appeals reversed the trial court's grant of summary judgment for Defendant (regarding the issue of proximate cause) and remanded the case for trial by jury on two causes of action: negligence *per se* and public nuisance as defined in Chapter 61 of the South Carolina Code.
120. Based on the above, Plaintiff alleges that he is entitled to judgment for actual and punitive damages from the House of Blues in an amount to be determined at trial by jury.
121. The willful, wanton, reckless, grossly negligent, negligent acts, and violations of the Statutes and the Ordinances by the House of Blues and its employees and agents who sold and served alcohol to Defendant Wagoner as set forth in this Second Amended Complaint are also imputed to HOBE pursuant to the doctrine of *respondeat superior* and/or agency and pursuant to the duly adopted Code of Ordinances, City of North Myrtle Beach, South Carolina Section 1-7.

THIRD CLAIM FOR RELIEF AGAINST THE HOUSE OF BLUES

(Negligence *Per Se*)

122. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated.
123. The acts alleged in the second cause of action against the House of Blues and its employees and agents constitute negligence *per se*, and Plaintiff suffered injuries as a direct and proximate cause of the House of Blues' and its agents' and employees' violations of South Carolina Code §§ 61-8-10, 61-4-580(5), 61-6-1636, 61-6-4550 and 61-6-1640(8).

124. The essential purpose of South Carolina Code §§ 61-8-10, 61-4-580(5), 61-6-1636, 61-6-4550 and 61-6-1640(8) is to protect Plaintiff and others similarly situated from the type of harm that Plaintiff suffered.
125. It also creates a duty for the House of Blues and its employees and/or agents to protect Plaintiff from such harm.
126. The House of Blues and its employees and agents owed Plaintiff a duty of care not to illegally sell liquor to Fajita Mike and/or permit him to illegally serve that same liquor for free to the House of Blues' patrons such as Defendant Wagoner.
127. The House of Blues and its employees and agents breached this duty when it and they illegally sold twenty-nine bottles of liquor to Fajita Mike, with the knowledge and intent that he would serve this liquor for free to the House of Blues' patrons such as Defendant Wagoner, which he did at a time when Defendant Wagoner was intoxicated.
128. The House of Blues' and its employees' and agents' aforementioned violations of South Carolina Code §§ 61-8-10, 61-4-580(5), 61-6-1636, 61-6-4550 and 61-6-1640(8) constitute negligence *per se*. Each individual violation of South Carolina Code §§ 61-8-10, 61-4-580(5), 61-6-1636, 61-6-4550 and 61-6-1640(8) constitutes negligence *per se* and each individual violation of South Carolina Code §§ 61-8-10, 61-4-580(5), 61-6-1636, 61-6-4550 and 61-6-1640(8) are a proximate cause of Plaintiff's injuries.
129. The House of Blues was responsible for its employees and agents serving alcohol to its patrons including Defendant Wagoner; thus its employees' and agents' willful, wanton, reckless, grossly negligent, and negligent acts as described herein are imputed to the House of Blues pursuant to the doctrine of *respondeat superior* and/or agency.
130. Defendant Wagoner's intoxication, the vehicle collision, and Plaintiff's damages were proximately caused by the House of Blues' and its employees' and agents' illegal sales of twenty-nine bottles of liquor to Fajita Mike with the knowledge and intent that he would serve this liquor to the House of Blues' patrons such as Defendant Wagoner which he did at a time when Defendant Wagoner was intoxicated.
131. As a direct and proximate result of the House of Blues' and its employees' and agents' willful, wanton, reckless, grossly negligent, and negligent acts as described herein, Plaintiff suffered one or more of the following elements of damage: past, present, and future physical

pain, suffering, mental anguish, and emotional distress; past medical expenses; future medical expenses; lost income; loss of future earning potential; loss of Plaintiff's enjoyment of life; disfigurement and scarring; and other damages that will be shown at trial.

132. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of the House of Blues individually and its employees and agents as described herein, Plaintiff is entitled to recover actual and punitive damages as determined at trial by jury.
133. The willful, wanton, reckless, grossly negligent, negligent acts, and violations of the Statutes and the Ordinances by the House of Blues and its employees and agents who sold and served alcohol to Defendant Wagoner as set forth in this Second Amended Complaint are also imputed to HOBE pursuant to the doctrine of *respondeat superior* and/or agency and pursuant to the duly adopted Code of Ordinances, City of North Myrtle Beach, South Carolina Section 1-7.

FIRST CLAIM FOR RELIEF AGAINST DEFENDANT WAGONER
(Negligence *Per Se*)

134. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated.
135. Defendant Wagoner owed Plaintiff a duty of care while operating a motor vehicle upon a public roadway.
136. Defendant Wagoner breached that duty, proximately causing Plaintiff's injuries, when he:
 - a. Failed to maintain a proper lookout;
 - b. Failed to keep his vehicle under proper control;
 - c. Failed to exercise ordinary care while on a public street;
 - d. Operated a vehicle while under the influence of alcohol to the extent that his faculties were materially and appreciably impaired, in violation of South Carolina Code § 56-5-2930(A), which constitutes negligence *per se*, and which proximately caused great bodily injury, in violation of South Carolina Code § 56-5-2945(A); and
 - e. Otherwise failed to operate his vehicle as a reasonable and prudent person would and should have done under like and similar circumstances.
137. On November 4, 2015, Defendant Wagoner pled guilty to driving under the influence ("DUI"), thereby admitting to all of the elements of South Carolina Code § 56-5-2930(A).

138. Accordingly, he has admitted and is estopped from contesting that he was operating a vehicle while under the influence of alcohol to the extent that his faculties were materially and appreciably impaired at the time the crash occurred.
139. As a direct and proximate result of Defendant Wagoner's breaches of duty as alleged above, Plaintiff suffered physical, mental, and economic injury as previously alleged herein.
140. Defendant Wagoner's actions in causing the collision were reckless, willful, wanton, and malicious, and evinced a conscious disregard for the life and health of others.
141. The negligence and gross negligence of Defendant Wagoner were aggravated by his aforesaid willful and wanton conduct.
142. Therefore, Plaintiff is entitled to recover actual and punitive damages from Defendant Wagoner in an amount to be determined at trial.

PUNITIVE DAMAGES

143. All paragraphs of the Second Amended Complaint are hereby repleaded and incorporated.
144. In each cause of action set out herein, Plaintiff is entitled to actual damages and punitive damages from the House of Blues, HOBE, and from Defendant Wagoner.
145. The actions of the House of Blues and its employees and agents, the actions of HOBE and its employees and agents, and the actions of Defendant Wagoner as described herein, were willful, wanton, malicious, and in reckless disregard of Plaintiff's rights.
146. The actions of the House of Blues and its employees and agents, HOBE and its employees and agents, and Defendant Wagoner constitute a conscious failure to exercise and observe reasonable care.
147. On April 25, 2014, less than one month prior to the events at issue in this case, a different lawsuit was filed in Horry County against the House of Blues in which it was alleged that the House of Blues had violated South Carolina Code §§ 61-4-580 and 61-6-2220, resulting in serious injuries to a person. (Horry County Civil Action No.: 2013-CP-26-7012).
148. The lawsuit also alleged that the House of Blues was negligent in its hiring of its management and employees and negligent in supervising its management and employees.
149. Then, less than one month after the lawsuit was filed, the House of Blues hired Fajita Mike, illegally sold him at least twenty-nine bottles of liquor at a profit, permitted him to illegally

serve the liquor for free, and permitted him to drink the liquor with customers while he was bartending and receiving hourly wages from the House of Blues.

150. The actions of the House of Blues, its employees and agents, and Defendant Wagoner's actions were committed in such a manner that a person of ordinary prudence would conclude that they were done in reckless disregard for Plaintiff's rights.
151. The House of Blues was negligent in its hiring of Fajita Mike and was grossly negligent in supervising him.
152. The House of Blues systematically committed a multitude of illegal acts for its own financial benefit.
153. The House of Blues' ignored its own policies which included the following:
 - a. "House of Blues does not sell, serve, give, or otherwise furnish alcoholic beverages to anyone who is or appears to be intoxicated and does not knowingly allow individuals to become intoxicated on the premises."
 - b. "It is unlawful to sell, serve, and give away or otherwise furnish any alcoholic beverage to an intoxicated person."
 - c. "It is against the law to provide complimentary alcohol without proper documentation and authorization from the [manager on duty]."
154. The House of Blues' willful, wanton, malicious, and reckless actions as described herein were performed individually and through its employees and agents; thus liability is imputed to the House of Blues pursuant to the doctrine of *respondeat superior* and/or agency.
155. HOBE's willful, wanton, malicious, and reckless actions as described herein were performed individually and through its employees and agents; thus liability is imputed to it pursuant to the doctrine of *respondeat superior* and/or agency.
156. Plaintiff is entitled to an award of punitive damages against the House of Blues, HOBE, and Defendant Wagoner in an amount to be determined at trial.

WHEREFORE, Plaintiff Prays the Court for the following relief:

1. Judgment against HOBE, the House of Blues, and Defendant Wagoner for actual damages;
2. Judgment against HOBE, the House of Blues, and Defendant Wagoner for punitive damages;
3. Any and all pre-judgment and post-judgment interest as allowed by law;
4. The costs and disbursements of this action;
5. Trial by jury; and
6. Such other and further relief as this Honorable Court may deem just and proper.

This the 15th day of October, 2019.

s/James Rainsford
South Carolina Bar Number 74924
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Hillsborough, North Carolina 27278
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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Douglas Kelsey,

Plaintiffs,

vs.

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

Defendants.

House of Blues Myrtle Beach Restaurant
Corporation,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

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

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

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

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

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

Respectfully submitted,

COLLINS & LACY, P.C.

By: s/Christian Stegmaier
CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER
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ATTORNEYS FOR THIRD-PARTY
PLAINTIFF/DEFENDANT HOUSE OF BLUES
MYRTLE BEACH RESTAURANT
CORPORATION

THIRD-PARTY SUMMONS

Murrells Inlet, South Carolina
October 18, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Douglas Kelsey,	)	Civil Action No.: 2017-CP-26-03008
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
House of Blues Myrtle Beach Restaurant	)	DEFENDANTS
Corporation; HOB Entertainment, Inc.; and	)	HOUSE OF BLUES MYRTLE BEACH
Travis Scott Wagoner,	)	RESTAURANT CORPORATION
	)	AND HOB ENTERTAINMENT, INC.'S
Defendants.	)	ANSWER TO SECOND AMENDED
	)	COMPLAINT
	)	AND
	)	THIRD-PARTY COMPLAINT
	)	
House of Blues Myrtle Beach Restaurant	)	(Jury Trial Demanded)
Corporation,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Throttlefest LLC; American Outlaw Spirits	)	
Incorporated; Full Throttle, L.L.C.; and	)	
Full Throttle Sloop Shine LLC;	)	
	)	
Third-Party Defendants.	)	
	)	

TO: JAMES RAINSFORD, ESQUIRE, ATTORNEY FOR PLAINTIFF:

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

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

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

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

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

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

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

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

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

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

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

FOR A SECOND DEFENSE

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

FOR A THIRD DEFENSE

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

FOR A FOURTH DEFENSE

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

FOR A FIFTH DEFENSE

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

FOR A SIXTH DEFENSE

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

FOR A SEVENTH DEFENSE

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

FOR AN EIGHTH DEFENSE

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

FOR A NINTH DEFENSE

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

FOR A TENTH DEFENSE

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

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

FOR AN ELEVENTH DEFENSE

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

FOR A TWELFTH DEFENSE

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

FOR A THIRTEENTH DEFENSE

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

FOR A FOURTEENTH DEFENSE

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

FOR A FIFTEENTH DEFENSE

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

FOR A SIXTEENTH DEFENSE

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

FOR A SEVENTEENTH DEFENSE

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

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

FOR AN EIGHTEENTH DEFENSE

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

FOR A NINETEENTH DEFENSE

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

FOR A TWENTIETH DEFENSE

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

FOR A TWENTY-FIRST DEFENSE

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

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

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

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

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

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

“prohibited.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- a. Serving free alcohol;
 - b. Failing to take reasonable care in ascertaining the intoxication level of whom he was serving;
 - c. Serving of alcohol to an intoxicated person;
 - d. Serving of alcohol in such a manner to lead to and promote over-intoxication;
 - e. Such other and further deficiencies or failures as discovery will reveal; and,
 - f. Being otherwise negligent.
143. If Plaintiff's allegations are proven true, which is expressly denied by House of Blues, then as a direct and proximate result of the Third-Party Defendants' negligence, House of Blues has incurred special damages, damages, and may incur damages in the amount of any monies it is adjudged to owe Plaintiff, if any, or which it pays Plaintiff in any settlement of Plaintiff's claims, plus the costs of investigating and defending Plaintiff's claims.
144. Upon information and belief, House of Blues is entitled to judgment for actual damages against the Third-Party Defendants in the amount of any amount it may be adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims, as well as special damages, consequential damages, punitive damages, fees and costs incurred in the investigation, defense, and settlement of Plaintiff's claim, and any and all other damages.

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

145. The above paragraphs, not inconsistent herewith, are incorporated herein, as if repeated verbatim.
146. If Plaintiff's allegations are proven true, and if House of Blues is found liable for the

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

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

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

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

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

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

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

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

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

JURY DEMAND

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

WHEREFORE, House of Blues respectfully requests the following relief:

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

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

COLLINS & LACY, P.C.

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

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

These Defendants Demand a Trial by Jury

Murrells Inlet, South Carolina
October 18, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A No.: 2017-CP-26-03008

Douglas Kelsey,

Plaintiff,

vs.

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

Defendants.

**THROTTLEFEST, LLC'S ANSWER
TO THIRD-PARTY COMPLAINT
AND COUNTERCLAIM**

House of Blues Myrtle Beach Restaurant
Corporation,

Third-Party Plaintiff,

vs.

Throttlefest, LLC; American Outlaw
Spirits Incorporated; Full Throttle LLC;
and Full Throttle Sloon Shine, LLC,

Third-Party Defendants.

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

The Third-Party Defendant, Throttlefest, LLC (hereinafter “this Third-Party Defendant” or “Throttlefest”), by and through its undersigned counsel, hereby submits this Answer to the Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation’s (hereinafter “Third-Party Plaintiff” or “House of Blues”) Third-Party Complaint, along with Counterclaims, as follows. All allegations contained in the Third-Party Complaint that are not specifically admitted herein are hereby denied.

1. Paragraphs 1 – 84 constitute Third-Party Plaintiff's Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint and no response from Throttlefest is required.

2. Paragraph 85 makes no allegations against Throttlefest and, therefore, no response is required.

3. Throttlefest admits, upon information and belief, the allegations contained in Paragraph 86.

4. Throttlefest denies the allegations contained in Paragraph 87.

5. Paragraph 88 makes no allegations against Throttlefest and, therefore, no response is required.

6. Paragraph 89 makes no allegations against Throttlefest and, therefore, no response is required.

7. Paragraph 90 makes no allegations against Throttlefest and, therefore, no response is required.

8. Throttlefest denies the allegations contained in Paragraph 91.

9. Throttlefest admits, upon information and belief, the allegations contained in Paragraph 92.

10. In response to Paragraph 93, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

11. In response to Paragraph 94, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

12. In response to Paragraph 95, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

13. In response to Paragraph 96, Throttlefest craves reference to the pleadings and orders in this matter and denies all allegations inconsistent therewith.

14. In response to Paragraph 97, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

15. In response to Paragraph 98, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

16. In response to Paragraph 99, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

17. In response to Paragraph 100, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

18. In response to Paragraph 101, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

19. In response to Paragraph 102, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

20. In response to Paragraph 103, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

21. In response to Paragraph 104, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

22. In response to Paragraph 105, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

23. In response to Paragraph 106, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

24. In response to Paragraph 107, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

25. In response to Paragraph 108, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

26. In response to Paragraph 109, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

27. In response to Paragraph 110, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

28. In response to Paragraph 111, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

29. In response to Paragraph 112, Throttlefest admits only that Michael Ballard attended the event in question.

30. In response to Paragraph 113, Throttlefest admits only that Jesse James Dupree attended the event in question.

31. Throttlefest denies the allegations contained in Paragraph 114 as the documents produced by House of Blues in this matter, along with the testimony of Michael Garner and House of Blues' General Manager, unequivocally prove that Michael Garner was an employee of House of Blues.

32. Throttlefest denies the allegations contained in Paragraph 115 as they relate to Throttlefest.

33. Throttlefest denies the allegations contained in Paragraph 116 as they relate to Throttlefest.

34. Throttlefest denies the allegations contained in Paragraph 117 as they relate to Throttlefest.

35. Throttlefest denies the allegations contained in Paragraph 118 as they relate to Throttlefest.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

36. In response to Paragraph 119, Throttlefest incorporates its responses to the prior paragraphs of the Third-Party Complaint.

37. In response to Paragraph 120, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

38. In response to Paragraph 121, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

39. In response to Paragraph 122, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

40. In response to Paragraph 123, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

41. Throttlefest denies the allegations contained in Paragraph 124.

42. Throttlefest denies the allegations contained in Paragraph 125 as they relate to Throttlefest.

43. Throttlefest denies the allegations contained in Paragraph 126, including subparagraphs a through d, as they relate to Throttlefest.

44. Throttlefest denies the allegations contained in Paragraph 127 as they relate to Throttlefest.

45. Throttlefest denies the allegations contained in Paragraph 128 as they relate to Throttlefest.

AS TO THE SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

46. In response to Paragraph 129, Throttlefest incorporates its responses to the prior paragraphs of the Third-Party Complaint.

47. Throttlefest denies the allegations contained in Paragraph 130 as they relate to Throttlefest.

48. Throttlefest denies the allegations contained in Paragraph 131, including subparagraphs a through f, as they relate to Throttlefest.

49. Throttlefest denies the allegations contained in Paragraph 132 as they relate to Throttlefest.

50. Throttlefest denies the allegations contained in Paragraph 133 as they relate to Throttlefest.

51. Throttlefest denies the allegations contained in Paragraph 134 as they relate to Throttlefest.

52. Throttlefest denies the allegations contained in Paragraph 135 as they relate to Throttlefest.

53. Throttlefest denies the allegations contained in Paragraph 136 as they relate to Throttlefest.

54. Throttlefest denies the allegations contained in Paragraph 137 as they relate to Throttlefest.

AS TO THE THIRD CAUSE OF ACTION
(Negligence)

55. In response to Paragraph 138, Throttlefest incorporates its responses to the prior paragraphs of the Third-Party Complaint.

56. In response to Paragraph 139, Throttlefest states that it did perform under the Co-Promotion Agreement.

57. Throttlefest denies the allegations contained in Paragraph 140 as they relate to Throttlefest.

58. Throttlefest denies the allegations contained in Paragraph 141, including subparagraphs a through f, as they relate to Throttlefest.

59. Throttlefest denies the allegations contained in Paragraph 142, including subparagraphs a through f, as they relate to Throttlefest.

60. Throttlefest denies the allegations contained in Paragraph 143 as they relate to Throttlefest.

61. Throttlefest denies the allegations contained in Paragraph 144 as they relate to Throttlefest.

AS TO THE FOURTH CAUSE OF ACTION
(Equitable Indemnification)

62. In response to Paragraph 145, Throttlefest incorporates its responses to the prior paragraphs of the Third-Party Complaint.

63. Throttlefest denies the allegations contained in Paragraph 146 as they relate to Throttlefest.

64. Throttlefest denies the allegations contained in Paragraph 147 as they relate to Throttlefest.

65. Throttlefest denies the allegations contained in Paragraph 148 as they relate to Throttlefest.

AS TO THE FIFTH CAUSE OF ACTION
(Contractual Indemnification)

66. In response to Paragraph 149, Throttlefest incorporates its responses to the prior paragraphs of the Third-Party Complaint.

67. In response to Paragraph 150, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

68. In response to Paragraph 151, Throttlefest craves reference to the Co-Promotion Agreement and denies all allegations inconsistent therewith.

69. Throttlefest denies the allegations contained in Paragraph 152.

70. In response to Paragraph 153, Throttlefest craves reference to the pleadings in this matter and denies all allegations inconsistent therewith.

71. Throttlefest denies the allegations contained in Paragraph 154 as they relate to Throttlefest.

AS TO THE SIXTH CAUSE OF ACTION
(Contribution)

72. In response to Paragraph 155, Throttlefest incorporates its responses to the prior paragraphs of the Third-Party Complaint.

73. Throttlefest denies the allegations contained in Paragraph 156 as they relate to Throttlefest.

74. Throttlefest denies the allegations contained in Paragraph 157 as they relate to Throttlefest.

75. Throttlefest denies the allegations contained in Paragraph 158 as they relate to Throttlefest.

76. Throttlefest denies the allegations contained in Paragraph 159 as they relate to Throttlefest.

77. In response to Paragraph 160, Throttlefest recognizes that House of Blues has demanded a jury trial, but denies that it is entitled to one.

78. In response to the WHEREFORE paragraph, including subparagraphs 1 through 6, Throttlefest asserts that House of Blues is not entitled to any relief from it, including but not limited to the relief prayed for in the Third-Party Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Comparative Negligence)

79. That, upon information and belief, even if Throttlefest was negligent to the Plaintiff or as described in the Second Amended Complaint and Third-Party Complaint, which is specifically denied, the Plaintiff's and the Third-Party Plaintiff's alleged injuries and damages, if any, resulted from, or were due to their own negligence, which combined and concurred with any negligence on the part of Throttlefest, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Rule 12(b)(6))

80. The Third-Party Complaint fails to state facts sufficient to constitute some or all of the causes of action alleged against Throttlefest and, therefore, must be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Sole Negligence)

81. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiff or Third-Party Plaintiff, as described in the Second Amended Complaint and Third-Party Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiff and Third-Party Plaintiff, so far as to bar the Plaintiff and Third-Party Plaintiff from recovery against Throttlefest.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Negligence of Others)

82. Throttlefest alleges that any injuries and damage sustained by the Plaintiff and Third-Party Plaintiff were due to and caused by the sole and negligent acts or omissions of some other entity or entities other than Throttlefest over whom Throttlefest neither had nor exercised any authority or control, and, therefore, Throttlefest is not liable to the Plaintiff or Third-Party Plaintiff for any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Unforeseeable Intervening or Superseding Events)

83. The damages complained of were solely the result of unforeseeable intervening or superseding events over which Throttlefest had no control.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(No Proximate Cause)

84. That, even if Throttlefest was negligent or otherwise liable, as may be alleged in the Second Amended Complaint or as is alleged in the Third-Party Complaint, which is specifically

denied, the negligence or other actions of Throttlefest was not the direct or proximate cause of any injury alleged by the Plaintiff or Third-Party Plaintiff and therefore Throttlefest is not liable for any damages allegedly sustained by the Plaintiff or Third-Party Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(No Joint and Several Liability)

85. Throttlefest expressly denies fault or liability whatsoever with respect to Plaintiff's and Third-Party Plaintiff's alleged injuries. However, to the extent that Throttlefest is found to have any fault related to the injuries alleged by the Plaintiff or Third-Party Plaintiff, S.C. Code Ann. § 15-38-15 specifies that if there are multiple defendants in a civil action, joint and several liability does not apply to any defendant fifty-percent (50%) percent or less responsible for the damages. Therefore, Throttlefest cannot be held liable for actions which amount to less than fifty-percent (50%) of the total fault thereof.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Punitive Damages Unconstitutional)

86. That any award or assessment of punitive damages as prayed for by the Third-Party Plaintiff would violate Throttlefest's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Statute of Limitations)

87. Throttlefest states that all of the Third-Party Plaintiff's claims against it are barred by the applicable statute of limitations.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:

(Release)

88. 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.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:

(Waiver)

89. Some or all of the Third-Party Plaintiff's claims against Throttlefest are barred by the doctrine of waiver.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:

(Estoppel)

90. Some or all of the Third-Party Plaintiff's claims against Throttlefest are barred by the doctrines of judicial estoppel and equitable estoppel.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:

(Unclean Hands)

91. Some or all of the Third-Party Plaintiff's claims against Throttlefest are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:

(Rule 11)

92. Throttlefest contends that Third-Party Plaintiff knowingly instituted this action despite having no good ground to support it and, therefore, Third-Party Plaintiff is subject to sanctions pursuant to Rule 11 of the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:

(Violation of the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 *et seq*)

93. Throttlefest contends that Third-Party Plaintiff knowingly instituted this action despite it being completely unwarranted under existing law and, therefore, Third-Party Plaintiff is subject to sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 *et seq*.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THROTTLEFEST ALLEGES:
(Reservation and Non-Waiver)

94. Throttlefest reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the applicable Rules of Civil Procedure.

95. WHEREFORE, having fully answered the Third-Party Complaint, Throttlefest prays that the claims against it be dismissed with costs, and for such other and further relief as the Court deems appropriate

FURTHER ANSWERING AND BY WAY OF COUNTERCLAIM,
THROTTLEFEST ALLEGES:

96. House of Blues was solely responsible for all aspects of alcohol sales at Throttlefest 2014.

97. The Co-Promotion Agreement between Throttlefest and House of Blues governed the relationship between Throttlefest and House of Blues for Throttlefest 2014 and provided that House of Blues “shall be solely responsible for the costs of good, labor and other expenses related to the sale of alcoholic beverages” during Throttlefest 2014.

98. The Co-Promotion Agreement further provided that House of Blues was to retain all revenue related to the sale of alcoholic beverages collected during Throttlefest 2014.

99. The Co-Promotion Agreement further provided that House of Blues “shall have the right to manage and control the presentation of” and “shall assume the responsibility for . . . producing” Throttlefest 2014.

100. The Co-Promotion Agreement stated that House Blues

AGREES TO INDEMNIFY, DEFEND AND HOLD [THROTTLEFEST], ITS PARENTS, PARTNERS, AFFILIATES AND SUBSIDIARIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS AND EMPLOYEES (COLLECTIVELY, “[THROTTLEFEST” PARTIES”), HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, SUITS, CAUSES OF ACTION, LIABILITY, JUDGMENTS, DAMAGES, COSTS AND EXPENSES (INCLUDING REASONABLE ATTORNEYS’ FEES AND COURT COSTS) ASSERTED AGAINST ANY OF THE [THROTTLEFEST] PARTIES AND ARISING OUT OF OR RESULTING FROM ANY (A) ACT OR OMISSION OF [HOUSE OF BLUES] OR ITS EMPLOYEES, AGENTS OR CONTRACTORS IN CONNECTION WITH [HOUSE OF BLUES]’ PERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY CLAIMS FOR BODILY INJURY, DEATH OR PROPERTY DAMAGE; AND/OR (B) ANY MATERIAL BREACH OF THIS AGREEMENT BY [HOUSE OF BLUES].

101. The Co-Promotion Agreement, and the prior and subsequent Co-Promotion Agreements between Throttlefest and House of Blues for Throttlefest events before and after 2014, further provided precisely how profits generated during Throttlefest 2014 and in other years would be divided between Throttlefest and House of Blues.

102. Plaintiff alleges that on May 16 - 17, 2014, Michael Garner, while acting in his role as a House of Blues employee, served Travis Wagoner alcohol inside the House of Blues Music Hall while Wagoner was visibly intoxicated.

103. Plaintiff alleges that on May 16-17, 2014, other House of Blues employees, while acting in their roles as House of Blues employees, also served Travis Wagoner alcohol inside the

House of Blues Music Hall while Wagoner was visibly intoxicated.

104. Plaintiff alleges that House of Blues' employees' over-service of alcohol to Travis Wagoner was the proximate cause of Plaintiff's damages.

105. Plaintiff and another individual, Mark Shimmenger (an original co-Plaintiff in this action), named Throttlefest as a part to this case by way of their first Amended Complaint only because they had not yet discovered and proven that Michael Garner was an employee of House of Blues, not Throttlefest.

106. During Throttlefest 2014, Michael Garner was an employee of House of Blues.

107. Michael Garner received paychecks from House of Blues from which House of Blues withheld money for federal and state taxes.

108. Michael Garner was assigned a House of Blues employee identification number, under which he operated during Throttlefest 2014.

109. House of Blues' General Manager Robert Simeone admitted under at his deposition that Michael Garner was an employee of House of Blues during Throttlefest 2014.

110. House of Blues' Finance Manager Kellie Honeycutt also admitted under oath at her deposition that Michael Garner was a House of Blues employee during Throttlefest 2014.

111. Michael Garner was not an employee, contractor, or agent of Throttlefest during Throttlefest 2014.

112. Michael Garner testified under oath at his deposition that he was an employee of House of Blues Throttlefest 2014.

113. Michael Garner testified under oath at his deposition that he has never been an employee, contractor, or agent of Throttlefest.

114. Throttlefest's Rule 30(b)(6) designee testified that Michael Garner was not an employee, agent, or contractor of Throttlefest.

115. Nevertheless, in its Answer and Third-Party Complaint, which was signed by its counsel, House of Blues denied that Michael Garner was an employee of House of Blues and instead alleged that Michael Garner was an employee or agent of Throttlefest.

116. The other House of Blues employees that served Travis Wagoner alcohol were House of Blues employees.

117. The other House of Blues employees that served Travis Wagoner alcohol were not Throttlefest's agents, employees, or contractors.

118. Throttlefest 2014 was an event that was held on the outside deck at House of Blues, not inside the Music Hall.

119. Throttlefest had no ability to control Michael Garner or other House of Blues employees when they were serving alcohol to Wagoner or other House of Blues patrons inside the House of Blues music hall on March 16-17, 2014.

120. Travis Wagoner testified that he only purchased, was given, and consumed alcohol inside the House of Blues Music Hall on March 16-17, 2014.

121. House of Blues' General Manager Robert Simeone testified under oath at his deposition that all people that served alcohol inside the House of Blues Music Hall were under House of Blues' sole control.

122. Nevertheless, in its Answer and Third-Party Complaint, which was signed by its counsel, House of Blues is now alleging that Throttlefest was responsible for the alleged over-service of alcohol to Travis Wagoner inside the House of Blues Music Hall.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

123. Throttlefest incorporates the above Paragraphs of this pleading as if restated herein verbatim.

123. The Co-Promotion Agreement required House of Blues to indemnify, defend, and hold Throttlefest harmless when the Plaintiff initially sued Throttlefest in this action.

124. House of Blues breached the indemnification provision of the Co-Promotion Agreement by failing and refusing to indemnify Throttlefest.

125. House of Blues further breached the indemnification provision of the Co-Promotion Agreement by bringing Throttlefest back into this action by way of the Third-Party Complaint.

126. House of Blues further breached the Co-Promotion Agreement, and the Co-Promotion Agreements from years before and after 2014, by failing to divide the profits with Throttlefest as provide for therein.

127. Specifically, House of Blues claimed that all revenue generated from food and merchandise sales were not to be factored into the profit division, despite the Co-Promotion Agreements providing otherwise.

128. Throttlefest has suffered damages proximately caused by House of Blues' breaches of the Co-Promotion Agreement.

129. Throttlefest is entitled to and prays for judgment against Plaintiff for both actual and punitive damages, prejudgment interest, attorneys' fees and costs, and for any other such relief that the Court may find appropriate.

130. WHEREFORE, having fully answered the Third-Party Complaint, Throttlefest prays that the Third-Party Complaint be dismissed with attorneys' fees and costs being award to Throttlefest, that the Court enter judgment against House of Blues on Throttlefest's Counterclaim

for both actual and punitive damages, prejudgment interest, attorneys' fees and costs, and for any other such relief that the Court may find appropriate.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

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Attorneys for Defendant Throttlefest, LLC

December 5, 2019

Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A No.: 2017-CP-26-03008

Douglas Kelsey,

Plaintiff,

vs.

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

Defendants.

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

House of Blues Myrtle Beach Restaurant
Corporation,

Third-Party Plaintiff,

vs.

Throttlefest, LLC; American Outlaw
Spirits Incorporated; Full Throttle LLC;
and Full Throttle Sloon Shine, LLC,

Third-Party Defendants.

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

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

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

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

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

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

[Signature block on following page]

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

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Attorneys for Defendant Throttlefest, LLC

December 5, 2019

Charleston, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

**FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2017-CP-26-03008**

**DOUGLAS KELSEY and MARK
SHIMMINGER,**

Plaintiffs,

v.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,**

Defendants.

**THIRD-PARTY DEFENDANT FULL
THROTTLE, LLC'S MOTION TO
DISMISS**

**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.

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

PLEASE TAKE NOTICE that Third-Party Defendant Full Throttle, LLC ("Full Throttle"), will move, within ten days of the date of this Motion or as soon thereafter as counsel may be heard, before the Circuit Judge of Horry County for an Order dismissing Third-Party Plaintiff House of

Blues Myrtle Beach Restaurant Corporation's ("HOB") Third-Party Complaint against Full Throttle, pursuant to Rules 12(b)(2) and (6) of the South Carolina Rules of Civil Procedure.

In support of its Motion, Full Throttle will show unto the Court that this Court lacks personal jurisdiction over it and that HOB has failed to state any claim upon which relief can be granted against it. As Full Throttle will detail in its Memorandum of Law to be filed with the Court prior to a hearing on this matter, Full Throttle's Motion should be granted because:

- 1) This Court lacks personal jurisdiction over Full Throttle, LLC, which is a South Dakota entity holding real estate located in South Dakota. Full Throttle's contacts in South Carolina are insufficient to satisfy due process requirements.
- 2) On July 18, 2017, Full Throttle moved to dismiss Plaintiff's claims against it with prejudice,¹ and in that Motion, asserted its lack of personal jurisdiction defense.
- 3) Full Throttle subsequently settled with Plaintiff, and this Court granted Full Throttle's Motion to Dismiss on August 13, 2019. Full Throttle therefore has no liability to Plaintiff, thus absolving it of any potential liability to HOB. *See Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C. Ct. App. 2017) (*citing* S.C. Code Ann. Sec. 15-38-50) ("When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.").
- 4) HOB's claims are purely contractual, as they arise from the Co-Promotion Agreement dated March 19, 2014, between HOB and Throttlefest, LLC *only*. Any contract-based claims against a nonparty to the agreement—such as Full Throttle—fail.

¹ Full Throttle filed its Memorandum in Support on June 25, 2019.

5) Because HOB's claims are contractual, HOB's causes of action sounding in tort or in equity are barred by South Carolina law.

6) HOB's claims arising from alleged breaches of contract, negligence, and negligent misrepresentations arose in 2014. HOB did not file the instant Third-Party Complaint until October 18, 2019 and are therefore barred by the applicable statutes of limitations.

WHEREFORE, Full Throttle prays that this Honorable Court grant its Motion to Dismiss the third-party claims asserted by HOB with prejudice.

DUFFY & YOUNG, LLC

s/ Brian C. Duffy

Brian C. Duffy

Kara Grevey

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Attorneys for Third-Party

Defendant Full Throttle, LLC

December 17, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-26-03008

DOUGLAS KELSEY and MARK
SHIMMINGER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

THIRD-PARTY DEFENDANT FULL
THROTTLE SLOON SHINE LLC'S
MOTION TO DISMISS

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.

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

PLEASE TAKE NOTICE that Third-Party Defendant Full Throttle Sloon Shine LLC
("FTSS"), will move, within ten days of the date of this Motion or as soon thereafter as counsel
may be heard, before the Circuit Judge of Horry County for an Order dismissing Third-Party

Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("HOB") Third-Party Complaint against FTSS, pursuant to Rules 12(b)(2) and (6) of the South Carolina Rules of Civil Procedure.

In support of its Motion, FTSS will show unto the Court that that this Court lacks personal jurisdiction over it and that HOB has failed to state any claim upon which relief can be granted against it. As FTSS will detail in its Memorandum of Law to be filed with the Court prior to a hearing on this matter, FTSS's Motion should be granted because:

- 1) This Court lacks personal jurisdiction over Full Throttle Sloon Shine, LLC, which is a South Dakota limited liability company. FTSS's contacts in South Carolina are insufficient to satisfy due process requirements.
- 2) On July 18, 2017, FTSS moved to dismiss Plaintiff's claims against it with prejudice, and in that Motion, asserted its lack of personal jurisdiction defense.¹
- 3) FTSS subsequently settled with Plaintiff, and this Court granted FTSS's Motion to Dismiss on August 13, 2019. FTSS therefore has no liability to Plaintiff, thus absolving it of any potential liability to HOB. *See Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C. Ct. App. 2017) (*citing* S.C. Code Ann. Sec. 15-38-50) ("When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.").
- 4) HOB's claims are purely contractual, as they arise from the Co-Promotion Agreement dated March 19, 2014, between HOB and Throttlefest, LLC *only*. Any contract-based claims against a nonparty to the agreement—such as FTSS—fail.

¹ FTSS filed its Memorandum in Support on June 25, 2019.

- 5) Because HOB's claims are contractual, HOB's causes of action sounding in tort or in equity are barred by South Carolina law.
- 6) HOB's claims arising from alleged breaches of contract, negligence, and negligent misrepresentations arose in 2014. HOB did not file the instant Third-Party Complaint until October 18, 2019 and are therefore barred by the applicable statutes of limitations.

WHEREFORE, FTSS prays that this Honorable Court grant its Motion to Dismiss the third-party claims asserted by HOB with prejudice.

DUFFY & YOUNG, LLC

s/ Brian C. Duffy

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Attorneys for Third-Party

Defendant Full Throttle

Sloon Shine, LLC

December 17, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

**FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2017-CP-26-03008**

**DOUGLAS KELSEY and MARK
SHIMMENDER,**

Plaintiffs,

v.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,**

Defendants.

**THIRD-PARTY DEFENDANT
AMERICAN OUTLAW SPIRITS
INCORPORATED'S MOTION TO
DISMISS**

**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.

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

PLEASE TAKE NOTICE that Third-Party Defendant American Outlaw Spirits Incorporated ("American Outlaw"), will move, within ten days of the date of this Motion or as soon thereafter as counsel may be heard, before the Circuit Judge of Horry County for an Order dismissing Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("HOB")

Third-Party Complaint against American Outlaw, pursuant to Rules 12(b)(2) and (6) of the South Carolina Rules of Civil Procedure.

In support of its Motion, American Outlaw will show unto the Court that this Court lacks personal jurisdiction over it and that HOB has failed to state any claim upon which relief can be granted against it. As American Outlaw will detail in its Memorandum of Law to be filed with the Court prior to a hearing on this matter, American Outlaw's Motion should be granted because:

- 1) This Court lacks personal jurisdiction over American Outlaw, a Georgia corporation. American Outlaw's contacts in South Carolina are insufficient to satisfy due process requirements.
- 2) On July 18, 2017, American Outlaw moved to dismiss Plaintiff's claims against it, and on January 22, 2018, American Outlaw was dismissed from this action.
- 3) HOB's claims are purely contractual, as they arise from the Co-Promotion Agreement dated March 19, 2014, between HOB and Throttlefest, LLC *only*. Any contract-based claims against a nonparty to the agreement—such as American Outlaw—fail.
- 4) Because HOB's claims are contractual, HOB's causes of action sounding in tort or in equity are barred by South Carolina law.
- 5) HOB's claims arising from alleged breaches of contract, negligence, and negligent misrepresentations arose in 2014. HOB did not file the instant Third-Party Complaint until October 18, 2019 and are therefore barred by the applicable statutes of limitations.

WHEREFORE, American Outlaw prays that this Honorable Court grant its Motion to Dismiss the third-party claims asserted by HOB with prejudice.

[Signature page follows]

DUFFY & YOUNG, LLC

s/ Brian C. Duffy

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Defendant American Outlaw
Spirits Incorporated*

December 17, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A No.: 2017-CP-26-03008

Douglas Kelsey,)

Plaintiff,)

vs.)

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

Defendants.)

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

House of Blues Myrtle Beach Restaurant)
Corporation,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

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

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

INTRODUCTION

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

FACTS¹

House of Blues and Throttlefest entered into a Co-Promotion Agreement (hereinafter the "Agreement") with an effective date of March 19, 2014 "concerning the functions and acts necessary for promoting and conducting" an event called the Full Throttle Festival (hereinafter the "Event") which was held at the House of Blues in Myrtle Beach from May 9 until May 17, 2014. Third-Party Complaint ¶¶93-97. The Agreement, which is attached hereto as Exhibit A,² states

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

² "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint." Doe v. Marion, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004), citing Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995)). However, the "Court may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity." Martin v. Companion Healthcare Corp., No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing Phillips v. LCI Int'l, Inc., 190 F.3d 609 (4th Cir. 1999); see also Goines v. Valley Cmt'y Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court "may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity."); Epstein v. World Acceptance Corp., 203 F. Supp. 3d 655, 662 (D.S.C. 2016) (in deciding a motion to dismiss, the court may consider "only the facts alleged in the complaint, which may include any documents referenced, and matters of which the court may take judicial notice."). "In the absence of prior state law on the issue

that it “shall be strictly limited to all functions and acts necessary for promoting and conducting [the Event]” See Agreement at Article 1(a). The Agreement also provides that it shall not govern or restrict the parties from conducting other business or activities and that the parties shall not have any obligations whatsoever to each other outside of the Agreement. Id. at Article 7(n).

The Agreement contains cross-indemnification provisions, which require House of Blues and Throttlefest to indemnify, defend, and hold each other harmless “from and against any and all claims, demands, suits, causes of action, liability, judgments, damages, costs and expenses (including reasonable attorneys fees and costs) asserted against [one party] and arising out of or resulting from any (A) act or omission of [the other party] or its employees, agents, or contractors in connection with [the other party’s] performance of its obligations under this Agreement, . . . and/or (B) any material breach of this Agreement” But the Agreement does not require one party to defend or indemnify the other party “for any claims, demands, suits, liabilities, expenses, etc. that arise out of the sole negligence or willful misconduct of [the other party] or its respective contractors. Id. at Article 5.

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

in question, federal cases interpreting the rule are persuasive.” Unisum Ins. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000).

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

employee of Throttlefest and not House of Blues.³ Compare Plaintiff's Second Amended Complaint ¶¶8, 16, 29, 40, 41, 42, 68, 74, 93 with Third-Party Complaint ¶¶114-115.

PROCEDURAL HISTORY

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

Throttlefest settled with the Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries the Plaintiff sustained from the accident allegedly caused by Mr. Wagoner and his intoxication.⁴ Despite obtaining the Release from the Plaintiff, House of Blues refused to consent to Throttlefest's dismissal from the case, even though House of Blues did not have any claims pending against Throttlefest. Throttlefest was forced to file a Motion to Dismiss, which House of Blues opposed. This Court granted Throttlefest's Motion to Dismiss on December 11, 2018.

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

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

On October 15, 2019, Plaintiff filed his Second Amended Complaint, which does not include Throttlefest as a defendant.⁵ Plaintiff's Second Amended Complaint alleges that it was only House of Blues' employees and agents that served Travis Wagoner alcohol to the point of intoxication and caused the accident. Second Amended Complaint ¶¶8, 16, 29, 39, 40, 41, 42, 68, 74, 91, 93, 97. Plaintiff's Second Amended Complaint cites to specific House of Blues documents showing that Michael Garner was acting as a House of Blues employee on May 16, 2014 when he allegedly gave Wagoner two shots of liquor. *Id.* at ¶¶29, 42, 43. Plaintiff's Second Amended Complaint alleges that Michael Garner was solely House of Blues' employee and cites to House of Blues' sworn testimony admitting the same. *Id.* at ¶¶40-41. Plaintiff alleges that when he filed his first Amended Complaint (which named Throttlefest) he had not yet discovered that Michael Garner was a House of Blues employee. *Id.* at ¶68.

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

LAW/ANALYSIS

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

⁵ The initial Complaint and the Amended Complaint had two Plaintiffs, Douglas Kelsey and Mark Shimmenger. Mr. Shimmenger is not included as a Plaintiff in the Second Amended Complaint.

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

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

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

against Mizell because Mizell was “not subject to liability for any part of Smith’s claims based on the covenant not to execute he obtained from Smith.” Id. at 560-61, 799 S.E.2d at 486.

Here, just like in Tiffany, Throttlefest is not subject to liability for any part of Plaintiff’s claims based on the Release Throttlefest obtained from Plaintiff. Therefore, according to Tiffany, Throttlefest is immune from *any* liability to House of Blues because Plaintiff released Throttlefest from all liability to him. House of Blues cannot use Rule 14 to bring Throttlefest into this case as a third-party defendant. At the very least, according to Tiffany and the plain language of §15-38-50, House of Blues does not have a cause of action against Throttlefest for contribution. Accordingly, House of Blues entire Third-Party Complaint should be dismissed as to Throttlefest or, at the very least, House of Blues’ contribution cause of action should be dismissed because Plaintiff has released Throttlefest from any and all liability.

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

Assuming the Court does not dismiss House of Blues’ entire Third-Party Complaint against Throttlefest pursuant to §15-38-50, Rule 14, and/or Tiffany, it should dismiss House of Blues’ causes of action sounding in tort and equity because the Agreement governs the entire relationship between House of Blues and Throttlefest. “A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.” Stanley Smith & Sons, Inc. v. Limestone College, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). “[I]n the case of actual contracts the agreement defines the duty[.]” Webb v. First Fed. Sav. & Loan Ass’n, 300 S.C. 507, 510, 388 S.E.2d 823, 825 (Ct. App. 1989) (quoting 66 Am.Jur.2d Restitution and Implied Contracts Section 2 (1973), overruled on other grounds by Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)). “Under South Carolina law, ‘if

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

House of Blues alleges that it entered into a contract (the Agreement) with Throttlefest “concerning the functions and acts necessary for promoting and conducting” the Event. Third-Party Complaint ¶¶93-97. The Agreement itself states that it “shall be strictly limited to all functions and acts necessary for promoting and conducting” the Event (Article 1(a)), that it shall not govern or restrict the parties from conducting other business or activities, *and that the parties shall not have any obligations whatsoever to each other outside of the Agreement* (Article 7(n)). House of Blues’ Third-Party Complaint alleges that Throttlefest is liable to it because of Throttlefest’s actions or inactions during the Event. Accordingly, House of Blues’ Third-Party Complaint sounds in breach of contract, not tort. Seebaltd v. First Federal Savings & Loan Association, 269 S.C. at 692, 239 S.E.2d at 727. House of Blues’ Equitable Indemnification cause of action should similarly be dismissed because the Agreement contains cross-indemnification provisions. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 132, 414 S.E.2d 118, 121 (1992) (“A right to indemnity may arise by contract (express or implied) *or by operation*

of law as a matter of equity between the first and second party. . . . The very nature of equitable indemnification is that a contract for indemnity is unnecessary.”) (emphasis added).

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

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

House of Blues alleges two separate causes of action based on breach of contract. The “Breach of Contract” cause of action alleges that Throttlefest Breached the Agreement by: (1) failing to name House of Blues as an Additional Insured on the insurance policies Throttlefest was required to obtain under the Agreement (Third-Party Complaint ¶125); (2) failing to use due care in providing festival talent and personalities for the Event (Third-Party Complaint ¶126(a)); (3) engaging in prohibited alcoholic beverage sponsorships (Third-Party Complaint ¶126(b)); and (4) failing to comply with state and local laws applicable to its activities (Third-Party Complaint ¶126(c)). The “Contractual Indemnification” cause of action alleges that Throttlefest is contractually required to indemnify and defend House of Blues against the allegations made in this case. House of Blues’ remaining causes of action based in negligence and equity also stem from Throttlefest’s alleged actions or inactions during or leading up to the Event.

An action upon a contract must be commenced within three years of the breach. S.C. Code §15-3-530(1). The statute of limitations for negligence actions in South Carolina is also three years. S.C. Code §15-3-530. The South Carolina Supreme Court has “repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded.” City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (“The statute

runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.”); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) (“[T]he injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist.”). “The date on which discovery should have been made is an objective, not subjective, question.” Stokes–Craven Holding Corp. v. Robinson, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016); Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). A statute of limitations begins to run at the time the cause of action accrues. King v. James, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). The question of when a cause of action accrues is a question of law for the court to decide. Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). “A cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose.” Bergstrom v. Palmetto Health All., 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004), quoting Stephens v. Draffin, 327 S.C. 1, 4–5, 488 S.E.2d 307, 309 (1997); McAlhany v. Carter, 415 S.C. 54, 67, 781 S.E.2d 105, 112 (Ct. App. 2015), aff’d, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017). A cause of action accrues when defendant breaches a duty owed to the plaintiff, even though substantial damages either were not discovered or did not even occur until sometime later. Grooms v. Med. Soc. of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989).

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

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

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

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

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: s/ Jeffrey M. Bogdan

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Attorneys for Defendant Throttlefest, LLC

December 30, 2019
Charleston, South Carolina



March 19, 2014

Throttlefest, LLC
Jesse Dupree
Via Email: jid@mightyloud.com
Cc: Melanie@mightyloud.com

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

This AGREEMENT ("Agreement") is entered into effective as of March 19, 2014 by and between House of Blues Myrtle Beach Restaurant Corp. ("HOB") whose address is 4640 Highway 17 South ~ N, Myrtle Beach, SC 29582 and Throttlefest LLC ("Co-Promoter") whose address is 1480 Old 41 HWY - Kennesaw, GA 30152.

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

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

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

An example of this arrangement is as follows:

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

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

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

An example of this alternate arrangement is as follows:

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

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC

By: _____

Name: Jesse James Dupree

Title: President

House of Blues Myrtle Beach Restaurant Corp.

By: _____

Name: Robert Simone

Title: General Manager



Throttlefest - 000040
BWPH 59.037

CO-PROMOTION AGREEMENT

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

1. Purpose and Scope.

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

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

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

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

HOB: Artist contract and payment; production; ticketing

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

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

HOB to provide:

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

Co-Promoter to provide:

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

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

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

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

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

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

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

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

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

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

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

4. Box Office Revenues / Distributions / Accounting.

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

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

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

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

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

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

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

6. Insurance.

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

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

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

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

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

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

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

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

7. Miscellaneous Provisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC

By: 

Name: JESSE JAMES DUFFEE

Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: Robert Simone

Title: General Manager

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008

DOUGLAS KELSEY and MARK
SHIMMINGER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,

Third-Party Plaintiff,

v.

THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,

Third-Party Defendants.

THIRD-PARTY DEFENDANT FULL
THROTTLE, LLC'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS

COMES NOW Third-Party Defendant Full Throttle, LLC ("Full Throttle") and hereby submits this Memorandum in Support of its Motion to Dismiss filed December 17, 2019 pursuant to Rules 12(b)(2) and 12(b)(6) of the South Carolina Rules of Civil Procedure.

Full Throttle requests that its Motion be granted because this Court lacks personal jurisdiction over it, as it is a South Dakota corporation without sufficient contacts to South Carolina. In addition, House of Blues' third-party claims against Full Throttle must be dismissed

because House of Blues has failed to state facts which would entitle it to relief against Full Throttle. First, Full Throttle previously settled with Plaintiffs and was dismissed from this action, absolving it of any potential liability to House of Blues. Second, House of Blues' contract-based claims require dismissal because Full Throttle never entered a contract with House of Blues. Finally, the statute of limitations bars House of Blues' claims against Full Throttle. Dismissal is proper here.

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 2017, Plaintiffs filed their Amended Summons and Complaint against the following parties: House of Blues Myrtle Beach Restaurant Corporation d/b/a House of Blues; House of Blues Concerts, Inc. d/b/a House of Blues; HOB Entertainment, Inc. d/b/a House of Blues; Full Throttle, LLC; Full Throttle Sloon Shine, LLC ("Sloon Shine"); Throttlefest, LLC; American Outlaw Spirits, Inc. ("American Outlaw Spirits"); Michael Ballard; Jesse James Dupree; Michael Garner; and Travis Wagoner (hereinafter, "the Underlying Matter"). Defendant/Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation d/b/a House of Blues ("House of Blues") answered on August 4, 2017 and lodged no cross-claims against Full Throttle.

The Underlying Matter stems from a motorcycle collision on May 16, 2014 between Plaintiffs and Defendant Wagoner, an individual who allegedly was served alcohol at an event known as the Full Throttle Saloon Festival or "Throttle Fest." This festival took place at the House of Blues in Myrtle Beach, South Carolina between May 9-17, 2014. House of Blues and Third-Party Defendant Throttlefest, LLC *only* had previously entered a Co-Promotion Agreement dated March 19, 2014, attached hereto as Exhibit A,¹ regarding the functions and acts necessary for

¹ In considering a 12(b)(6) motion, the trial court "may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity." *Martin v. Companion Healthcare Corp.*, No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609 (4th Cir. 1999); see also *Goines v.*

promoting and conducting the Full Throttle Saloon Festival. Full Throttle, American Outlaw Spirits, and Sloon Shine were not parties to this contract. (*See* Ex. A.)

Full Throttle is a limited liability company organized in South Dakota. (Exhibit B, Affidavit of Michael Ballard, at ¶ 5.) It is a real estate holding company which transacts no business in South Carolina. (*Id.* at ¶ 6.) Sloon Shine is a Tennessee limited liability company which transacts no business in this state. (*Id.* at ¶¶ 13, 16.) Instead, it is a manufacturer of distilled spirits, which are distributed through wholesalers. (*Id.* at ¶¶ 14-15.) Michael Ballard is the sole member of Full Throttle and Sloon Shine. (*Id.* at ¶ 2.) American Outlaw Spirits is a Georgia corporation that manufactures one brand of liquor in Tennessee. (Exhibit C, Affidavit of Jesse James Dupree, at ¶¶ 5-6.) Jesse James Dupree is the sole owner of American Outlaw Spirits. (*Id.* at ¶ 2.)

Plaintiffs asserted causes of action against Full Throttle, as well as American Outlaw Spirits, Sloon Shine, Ballard, and Dupree, for violations of S.C. Code Ann. § 61-4-580 and § 61-6-2220, respondeat superior and agency, and joint enterprise/negligent supervision. Full Throttle, Sloon Shine, American Outlaw Spirits, Ballard, and Dupree moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and (b)(6), SCRCp.

Valley Cmt'y Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court “may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document’s authenticity.”); *Epstein v. World Acceptance Corp.*, 203 F. Supp. 3d 655, 662 (D.S.C. 2016) (in deciding a motion to dismiss, the court may consider “only the facts alleged in the complaint, which may include any documents referenced, and matters of which the court may take judicial notice.”). “In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.” *Unisum Ins. v. Hawkins*, 542, 537 S.E.2d 559, 561-62 (S.C. Ct. App. 2000). The Court should consider the Agreement for the purposes of deciding this Motion to Dismiss because House of Blues premises some of its causes of action on the Agreement and directly quotes the Agreement in its Third-Party Complaint.

On January 2, 2018, Plaintiffs dismissed American Outlaw Spirits, Ballard, and Dupree without prejudice. In October 2018, Plaintiffs reached a confidential settlement agreement with Full Throttle and Sloon Shine and agreed to dismiss them with prejudice. House of Blues, however, refused to consent to Full Throttle's and Sloon Shine's dismissal—despite the fact that it had asserted no claims against them at that time. On June 25, 2019, Full Throttle and Sloon Shine again moved to dismiss the claims against them. The Court granted Full Throttle's and Sloon Shine's Motion to Dismiss on August 13, 2019.

On October 18, 2019, House of Blues filed the instant Third-Party Complaint against Full Throttle, Sloon Shine, American Outlaw Spirits, and Throttlefest, LLC. House of Blues asserted the following, third-party claims against all third-party defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. Full Throttle filed its Motion to Dismiss on December 17, 2019 and respectfully requests that this Court grant its Motion.

STANDARDS OF REVIEW

I. Rule 12(b)(2)

“The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction.” *Int’l Mariculture Res. v. Grant*, 520 S.E.2d 160, 161 (S.C. Ct. App. 1999) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 423 S.E.2d 128, 130 (S.C. 1992)). To meet this burden, the plaintiffs must make a prima-facie showing of jurisdiction by pleadings and affidavits. *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798 (S.C. 1990.) While written allegations of jurisdictional facts are generally construed in a plaintiff's favor, the showing of personal jurisdiction “must be based upon specific facts set forth in the record

in order to defeat defendants' motion to dismiss.” *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992).

II. Rule 12(b)(6)

Under Rule 12(b)(6), SCRCP, a party may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537, 539 (S.C. 2011). In considering a motion to dismiss under Rule 12(b)(6), the trial court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 645 S.E.2d 245 (S.C. 2007). However, the trial court may treat a Rule 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings if the parties are afforded a reasonable opportunity to respond to such matters. *Brown v. Leverette*, 353 S.E.2d 697, 698–99 (S.C. 1987).

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over Full Throttle.

“The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis. First, the trial judge must determine that the South Carolina long-arm statute applies. Second, the trial judge must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements.” *Southern Plastics Co.*, 423 S.E.2d at 130. Neither requirement is met here.

A. South Carolina’s long-arm statute does not authorize jurisdiction here.

South Carolina’s “long-arm” statute is codified at S.C. Code Ann. 36-2-803 and extends personal jurisdiction over non-residents as to a cause of action arising from the person’s:

- 1) transacting any business in this State;
- (2) contracting to supply services or things in the State;
- (3) commission of a tortious act in whole or in part in this State;
- (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other

persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
 (5) having an interest in, using, or possessing real property in this State;
 (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
 (7) entry into a contract to be performed in whole or in part by either party in this State; or
 (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803 (2018). House of Blues cannot establish any of the eight, enumerated situations such that personal jurisdiction would exist over Full Throttle.

The only jurisdictional allegations in the Third-Party Complaint regarding Full Throttle are that it is a South Dakota company that “transacts business in South Carolina.” (Compl. ¶¶ 89, 91.)² Full Throttle is a South Dakota holding company which was established to hold real estate located in South Dakota; it does not transact business in South Carolina. (Ex. B, Ballard Aff. ¶ 5-7.) It also does not contract to supply services or things in South Carolina, own any interest in property in South Carolina, or produce, manufacture, and/or distribute goods or services in South Carolina. (*Id.* at ¶ 6-11.) This has been the case from 2014 through present. (*See id.*) House of Blues cannot make the requisite showing to invoke jurisdiction under the long-arm statute.

B. Due-process requirements have not been met.

Even if the long-arm statute authorized jurisdiction over Full Throttle, House of Blues cannot show the requirements of due process are met. “Before personal jurisdiction may be exercised over a nonresident, due process requires that there exist minimum contacts between the nonresident and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice.” *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d

² References to House of Blues’ Answer and Third-Party Complaint are denoted “Compl.” followed by the corresponding paragraph number.

177, 180 (S.C. 1991). South Carolina courts apply four factors in determining whether due process requirements are satisfied: (1) the duration of the defendant's activity in this state; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the state's interest in exercising jurisdiction. *Id.*

House of Blues has not alleged any activity of Full Throttle in South Carolina, let alone activity of significant duration. House of Blues only alleges that Full Throttle's member, Michael Ballard, attended Throttle Fest, and that Full Throttle had a responsibility to supervise Michael Garner ("Fajita Mike")—despite undisputed evidence in this case that Garner was *not* an employee of Full Throttle during the Throttle Fest event. (Compl. ¶ 112, 116; *see also* Ex. B, at ¶ 24.) Although a single act may support jurisdiction, it must create a "substantial connection" with the forum. *Aviation Assocs.*, 402 S.E.2d at 180. That is not the case here: Ballard's presence at Throttle Fest does not equate to Full Throttle having a substantial connection with South Carolina. This is especially true when considering Ballard is also a member of Throttlefest, LLC and a celebrity performer.

As for the character and circumstances of Full Throttle's acts, there is nothing before this Court to indicate that Full Throttle purposefully availed itself of the privilege of conducting business activities in South Carolina to the extent necessary to find personal jurisdiction over it. Again, it is a South Dakota, real estate holding company. (Ex. B, Ballard Aff. ¶ 6.) It is extremely inconvenient for Full Throttle to defend this suit in South Carolina, and particularly so when no business was transacted in this State by Full Throttle. (*Id.* at ¶ 26.) South Carolina's interest in providing redress for its citizens is diminished when a nonresident does not operate in this State. Full Throttle does not have minimum contacts comporting with due process.

II. House of Blues Has Failed to Allege Facts to Support its Third-Party Claims.

Should this Court find that it has personal jurisdiction over Full Throttle, this action should be dismissed with prejudice because House of Blues has failed to state third-party claims against Full Throttle for which relief can be granted.

A. Full Throttle has no liability to House of Blues.

House of Blues' third-party claims against Full Throttle fail because Full Throttle's settlement with Plaintiffs absolves it of any potential liability to an alleged co-tortfeasor. *See Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C. Ct. App. 2017) (citing S.C. Code Ann. § 15-38-50) ("When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.").

In *Smith*, the plaintiff (Smith) named as defendants Norman Tiffany, Brown Trucking Co., and Brown Integrated Logistics, Inc. (collectively, "the Brown defendants"), in addition to the driver of the vehicle who crashed into him, Mizzell. 799 S.E.2d at 481-82. Defendant Norman Tiffany was a commercial driver employed by the Brown defendants, which owned and operated Tiffany's commercial vehicle. On the morning of the accident, Tiffany's commercial vehicle was disabled and parked along the shoulder of the road, adjacent to the exit of a gas station. Mizzell had stopped at the gas station, and as he attempted to exit the parking lot, his view of oncoming traffic was obstructed by Tiffany's truck positioned alongside the highway. When Mizzell eased forward to get a better view of oncoming traffic, his vehicle collided with Smith's vehicle.

Mizzell's liability carrier tendered the limits of Mizzell's liability policy to Smith in full settlement of Smith's claims against him. Smith then brought suit against Tiffany and the Brown defendants, who in turn asserted a third-party complaint under Rule 14, SCRCP, naming Mizzell

as a third-party defendant. Mizzell filed a motion for summary judgment as to the third-party claims, asserting he neither owed nor breached any duty to the Brown defendants as third-party plaintiffs, and because section 15-38-50 of the South Carolina Contribution Among Joint Tortfeasors Act (“the Act”) discharged him as a settling tortfeasor from liability for contribution to any other tortfeasor. The trial court agreed, and the Brown defendants appealed.

On appeal, the Court of Appeals affirmed. The court found that Mizzell was not subject to liability for any part of Smith’s claims due to his prior settlement. The covenant not to execute that Mizzell obtained from Smith included language protecting Mizzell from any further liability to Smith in excess of the agreed-upon settlement amount. The court explained that in section 15-38-50 of the Act, the legislature expanded the scope of a settling tortfeasor's immunity to include protection from liability to non-settling tortfeasors. Section 15-38-50 specifically provides:

When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . *it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.*

(Emphasis added). Thus, Mizzell had no additional liability to Smith and therefore was immune from any liability to non-settling tortfeasors by virtue of section 15-38-50. The court held that absent any potential liability to either the plaintiff or to non-settling defendants, impleader under Rule 14 is not proper.

A nearly-identical factual scenario presents itself here. Full Throttle settled with Plaintiffs in October 2018. Notwithstanding, House of Blues impleaded them as a third-party defendant roughly one year later. Full Throttle has no further liability to Plaintiffs. Under the plain terms of the Act, Full Throttle is discharged of liability for contribution to any other tortfeasor. House of Blues’ Rule 14, third-party claims are improper and therefore should be dismissed.

B. Full Throttle owed no duty House of Blues, contractual or otherwise.

House of Blues has asserted breach of contract, negligence, and contractual indemnification claims against Full Throttle based upon its alleged obligations under the Co-Promotion Agreement. House of Blues, however, has not alleged that Full Throttle was a party to, or beneficiary of, the Co-Promotion Agreement. Instead, House of Blues correctly states that only Throttlefest, LLC and House of Blues were parties to the Co-Promotion Agreement. (Compl. ¶ 97.) Full Throttle was not a party to this contract. (*See Ex. A.*) Under South Carolina law, “one not in privity of contract with another cannot maintain an action against [another] in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable[.]” *Windsor Green Owners Ass’n v. Allied Signal, Inc.*, 605 S.E.2d 750, 752 (S.C. Ct. App. 2004). Because Full Throttle was not in privity with House of Blues or an intended, third-party beneficiary of the Co-Promotion Agreement, House of Blues’ breach of contract and contractual indemnification claims must be dismissed.

Moreover, in its negligence cause of action, House of Blues alleges that “the Third-Party Defendants undertook to perform under the Agreement” and undertook “to exercise due care in their performance.” (Compl. ¶¶ 139-140.) House of Blues then claims the Third-Party Defendants negligently breached this duty. (*See id.* at ¶ 141.) It is clear House of Blues has tried to recycle its breach of contract claim against Throttlefest, LLC into a negligence claim against Full Throttle. This is improper, for bare allegations of negligence cannot convert a breach of contract action into an action in tort. *Seebaltd v. First Federal Savings & Loan Association*, 239 S.E.2d 726 (S.C. 1977) (affirming dismissal of a complaint containing allegations couched in terms of negligence where the only duties owed were contractual). Indeed, under South Carolina law, “if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the

parties, an action in tort will not lie.” *Toney v. LaSalle Bank Nat. Ass’n*, 896 F. Supp. 2d 455 (D.S.C. 2012), *aff’d*, 2013 WL 751299 (4th Cir. 2013) (holding that a plaintiff cannot establish a claim for gross negligence where the claim arises from a contract).

Finally, House of Blues has failed to allege any facts that would support relief under its equitable indemnification and contribution claims. House of Blues asserts that the damages alleged by Plaintiffs were due to the primary fault of the Third-Party Defendants and/or its authorized agents, servants, or employees. (Compl. ¶ 147.) However, there is nothing before this Court to suggest that Full Throttle was a joint tortfeasor with House of Blues, and even if it was, these claims are barred due to its settlement with Plaintiffs.

C. The statute of limitations bars House of Blues’ claims.

In South Carolina, claims arising upon a contract and claims for injury to a person or rights of another must be brought within three years. S.C. Code Ann. § 15-3-530(1), (5) (2018). House of Blues’ claims arising from Full Throttle’s alleged breaches of contract, negligence, and negligent misrepresentations arose in 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019. Because House of Blues did not bring its claims against Full Throttle within the respective, three-year statutes of limitations, these claims are time-barred and must be dismissed.

1. Breach of Contract

In its breach of contract claim, House of Blues states that the Third-Party Defendants breached the Co-Promotion Agreement by: failing to include House of Blues as an Additional Insured; failing to use due care in providing festival talent and personalities for the Throttle Fest; engaging in prohibited alcohol beverage sponsorship; and failing to comply with state and local laws applicable to their activities. (See Compl. ¶¶ 125-126.) As stated above, Full Throttle was

not a party to the Co-Promotion Agreement and therefore cannot be in breach of it. However, assuming *arguendo* Full Throttle somehow were bound by it, this agreement is dated March 19, 2014. Throttle Fest ended on or about May 17, 2014. Any breaches of this contract therefore arose, at the latest, on or around May 17, 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

2. Negligent Misrepresentation

House of Blues asserts that the Third-Party Defendants made false representations to it regarding procurement and maintenance of insurance coverage in advance of the Throttle Fest that took place in May 2014. (*See* Compl. ¶ 130.) It also contends the Third-Party Defendants made false representations regarding its experience in putting on a Full Throttle festival, its compliance with laws relating to service of alcohol at the festival, and other actions in preparation for the festival. (*See id.* at ¶ 131.) These alleged misrepresentations—which Full Throttle denies making—therefore had to have occurred prior to May 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

3. Negligence

House of Blues claims that the Third-Party Defendants were negligent, careless, and reckless by: failing to comply with laws pertaining to the sale and service of alcohol; engaging in promotion of their alcohol brands; failing to use due care in providing festival talent and personalities for Throttle Fest; failing to properly train and supervise Michael Garner; and being otherwise negligent. (*See id.* at ¶ 141.) House of Blues was on notice of its negligence claim at the end of the Throttle Fest, on or about May 17, 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

Because the statutes of limitations on the above claims have expired, the Court should dismiss House of Blues' claims.

WHEREFORE, Third-Party Defendant Full Throttle, LLC respectfully prays that this Honorable Court enter an order dismissing the Third-Party Complaint with prejudice pursuant to Rules 12(b)(2) and (b)(6), SCRCP. Full Throttle further prays for an award of all costs and fees incurred in responding to the Third-Party Complaint and in preparing and arguing this Motion, and any further relief as the Court may deem just and proper.

This 3rd day of January, 2020 at Charleston, South Carolina.

s/Brian C. Duffy
Brian C. Duffy
Kara S. Grevey
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Charleston, South Carolina 29401
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*Attorneys for Third-Party Defendant
Full Throttle, LLC*

EXHIBIT A



March 19, 2014

Throttlefest, LLC

Jesse Dupree

Via Email: jid@mightyloud.com

Cc: Melanie@mightyloud.com

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

This AGREEMENT ("Agreement") is entered into effective as of March 19, 2014 by and between House of Blues Myrtle Beach Restaurant Corp. ("HOB") whose address is 4640 Highway 17 South - N. Myrtle Beach, SC 29582 and Throttlefest LLC ("Co-Promoter") whose address is 1480 Old 41 HWY - Kennesaw, GA 30152.

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

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

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

An example of this arrangement is as follows:

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

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

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

An example of this alternate arrangement is as follows:

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

ACCEPTED AND AGREED as of the date first above written.

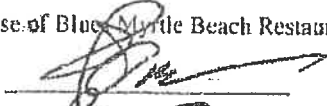
Throttlefest LLC

By: 

Name: JESSE JAMES DUPREE

Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: General Manager

Title: General Manager

CONFIDENTIAL

HOB 001

280

CO-PROMOTION AGREEMENT

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

1. Purpose and Scope.

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

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

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

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

HOB: Artist contract and payment; production; ticketing

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

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

HOB to provide:

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

Co-Promoter to provide:

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

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

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

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

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

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

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

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

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

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

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

4. Box Office Revenues / Distributions / Accounting.

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

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

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

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

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

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

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

6. Insurance.

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

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

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

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

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

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

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

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

7. Miscellaneous Provisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC

By: 

Name: JESSE JAMES DURRE

Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: BRENT SIMONE

Title: General Manager

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008

DOUGLAS KELSEY and MARK
SHIMMENDER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,

Third-Party Plaintiff,

v.

THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,

Third-Party Defendants.

AFFIDAVIT OF
MICHAEL BALLARD

Michael Ballard, being first duly sworn, deposes and says:

1. My name is Michael Ballard, and I am a citizen of Tennessee. I am over eighteen years of age, am competent to make this affidavit, and do so of my own personal knowledge.
2. I am the sole member of Third-Party Defendants Full Throttle, LLC (Full Throttle) and Full Throttle Sloon Shine LLC (Sloon Shine).

3. I am one of two members of Third-Party Defendant Throttlefest, LLC; Jesse James Dupree is the other member.

4. Full Throttle and Sloon Shine have not consented to and do not consent to the personal jurisdiction of this Court. This affidavit is submitted for the specific purpose of contesting personal jurisdiction in this action.

5. Full Throttle is a limited liability company organized and existing under the laws of South Dakota.

6. Full Throttle is engaged in the business of holding real estate located in South Dakota.

7. Full Throttle does not engage in and has never engaged in providing any product or service or any other business activity in South Carolina.

8. Full Throttle does not maintain and has never maintained an office or facility of any kind in South Carolina.

9. Full Throttle has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

10. Full Throttle has never engaged in any course of conduct in South Carolina, nor has Full Throttle derived revenue from goods used or consumed or services rendered in South Carolina.

11. Full Throttle has never held any interest in or possession of any real property anywhere in South Carolina.

12. Except its retention of the law firm of Duffy & Young, LLC for the specific purpose of contesting this Court's personal jurisdiction over Full Throttle, Full Throttle does not

employ or maintain and has never employed or maintained any employee or agent in South Carolina.

13. Sloon Shine is a limited liability company organized and existing under the laws of Tennessee, with its principal place of business in Tennessee.

14. Sloon Shine is engaged in the business of manufacturing distilled spirits and produces a brand of moonshine called "S'loonshine" in Trimble, Tennessee.

15. Sloon Shine does not directly sell its products in South Carolina; rather, it contracts with distributors who sell throughout the region.

16. At this time, S'loonshine is not available in South Carolina and has not been for several years.

17. Sloon Shine does not derive substantial revenue from the sale or consumption of S'loonshine or any other goods used or consumed in South Carolina.

18. In 2015, South Carolina sales comprised three percent of Sloon Shine's revenue; in 2016-2017, only one percent of its revenue; and in 2018-2019, zero percent of its revenue.

19. Sloon Shine does not maintain and has never maintained an office or facility of any kind in South Carolina.

20. Sloon Shine has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

21. Sloon Shine has never engaged in any course of conduct in South Carolina.

22. Sloon Shine has never held any interest in or possession of any real property anywhere in South Carolina.

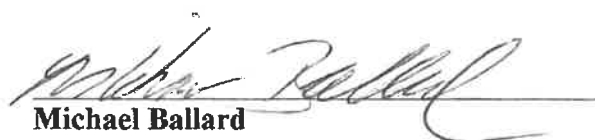
23. Full Throttle and Sloon Shine had no involvement in any wrongdoing related to the Throttle Fest that took place in May of 2014.

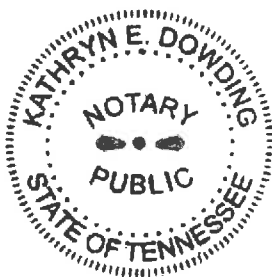
24. Michael Garner, or "Fajita Mike," was not employed by, or an agent of, Full Throttle or Sloon Shine during the Throttle Fest that took place in May of 2014.

25. Full Throttle and Sloon Shine settled the claims asserted against them by the Plaintiffs in October of 2018.

26. It would be extremely burdensome for Full Throttle and Sloon Shine to defend this action, as it would require travel from out-of-state to South Carolina as the action progresses, to exchange documents and other evidence with other parties and attorneys in South Carolina, and to attend the trial of this action.

FURTHER AFFIANT SAYETH NOT.


Michael Ballard



I certify that the information
above is true, to the best
of my knowledge.
State of Tennessee, County
of Dyer.


Kathryn E. Dowding

Jan 3, 2020

My commission expires
9.15.2021

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008

DOUGLAS KELSEY and MARK
SHIMMENDER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,

Third-Party Plaintiff,

v.

THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,

Third-Party Defendants.

AFFIDAVIT OF
JESSE JAMES DUPREE

Jesse James Dupree, being first duly sworn, deposes and
says:

1. My name is Jesse James Dupree, and I am a citizen of Georgia. I am over eighteen years of age, am competent to make this affidavit, and do so of my own personal knowledge.

2. I am the sole owner of Third-Party Defendant American Outlaw Spirits Incorporated ("American Outlaw Spirits").

3. I am one of two members of Third-Party Defendant Throttlefest, LLC; Michael Ballard is the other member.

4. American Outlaw Spirits has not consented to and does not consent to the personal jurisdiction of this Court. This affidavit is submitted for the specific purpose of contesting personal jurisdiction in this action.

5. American Outlaw Spirits is a corporation incorporated and existing under the laws of Georgia.

6. American Outlaw Spirits manufactures one brand of liquor, Devils Devil Cinnamon Whiskey, and did not begin

producing this liquor until 2018.

7. American Outlaw Spirits did not transact business in South Carolina at the time of the Full Throttle Saloon Festival in May of 2014. American Outlaw Spirits did not become registered to do business in South Carolina until March 6, 2018.

8. American Outlaw Spirits does not directly sell its products in South Carolina; rather, it contracts with distributors who sell throughout the region.

9. American Outlaw Spirits does not maintain and has never maintained an office or facility of any kind in South Carolina.

10. American Outlaw Spirits has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

11. American Outlaw Spirits has never engaged in any course of conduct in South Carolina.

12. American Outlaw Spirits has never held any interest in or possession of any real property anywhere in South Carolina.

13. American Outlaw Spirits only has one brand of liquor available in South Carolina and it has never been carried by the House of Blues in Myrtle Beach, South Carolina.

14. American Outlaw Spirits does not derive substantial revenue from the sale or consumption of its goods used or consumed in South Carolina.

15. American Outlaw Spirits had no involvement in any wrongdoing related to the Full Throttle Saloon Festival that took place in May of 2014.

16. Michael Garner, or "Fajita Mike," has never been employed by, or been an agent of, American Outlaw Spirits.

17. It would be extremely burdensome for American Outlaw Spirits to defend this action, as it would require travel from out-of-state to South Carolina as the action progresses, to exchange documents and other evidence with other parties and attorneys in South Carolina, and to attend the trial of this action.

FURTHER AFFIANT SAYETH NOT.

Jesse James Dupree



Nishit Bhavsar

01-02-20

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DOUGLAS KELSEY and MARK
SHIMMINGER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,

Third-Party Plaintiff,

v.

THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008

THIRD-PARTY DEFENDANT FULL
THROTTLE SLOON SHINE, LLC'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

COMES NOW Third-Party Defendant Full Throttle Sloon Shine, LLC ("Sloon Shine") and hereby submits this Memorandum in Support of its Motion to Dismiss filed December 17, 2019 pursuant to Rules 12(b)(2) and 12(b)(6) of the South Carolina Rules of Civil Procedure.

Sloon Shine requests that its Motion be granted because this Court lacks personal jurisdiction over it, as it is a Tennessee corporation without sufficient contacts to South Carolina. In addition, House of Blues' third-party claims against Sloon Shine must be dismissed because

House of Blues has failed to state facts which would entitle it to relief against Sloon Shine. First, Sloon Shine previously settled with Plaintiffs and was dismissed from this action, absolving it of any potential liability to House of Blues. Second, House of Blues' contract-based claims require dismissal because Sloon Shine never entered a contract with House of Blues. Finally, the statute of limitations bars House of Blues' claims against Sloon Shine. Dismissal is proper here.

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 2017, Plaintiffs filed their Amended Summons and Complaint against the following parties: House of Blues Myrtle Beach Restaurant Corporation d/b/a House of Blues; House of Blues Concerts, Inc. d/b/a House of Blues; HOB Entertainment, Inc. d/b/a House of Blues; Full Throttle, LLC ("Full Throttle"); Sloon Shine; Throttlefest, LLC; American Outlaw Spirits, Inc. ("American Outlaw Spirits"); Michael Ballard; Jesse James Dupree; Michael Garner; and Travis Wagoner (hereinafter, "the Underlying Matter"). Defendant/Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation d/b/a House of Blues ("House of Blues") answered on August 4, 2017 and lodged no cross-claims against Sloon Shine.

The Underlying Matter stems from a motorcycle collision on May 16, 2014 between Plaintiffs and Defendant Wagoner, an individual who allegedly was served alcohol at an event known as the Full Throttle Saloon Festival or "Throttle Fest." This festival took place at the House of Blues in Myrtle Beach, South Carolina between May 9-17, 2014. House of Blues and Third-Party Defendant Throttlefest, LLC *only* had previously entered a Co-Promotion Agreement dated March 19, 2014, attached hereto as Exhibit A,¹ regarding the functions and acts necessary for

¹ In considering a 12(b)(6) motion, the trial court "may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity." *Martin v. Companion Healthcare Corp.*, No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609 (4th Cir. 1999); see also *Goines v.*

promoting and conducting the Full Throttle Saloon Festival. Sloon Shine, Full Throttle, and American Outlaw Spirits were not parties to this contract. (*See* Ex. A.)

Full Throttle is a limited liability company organized in South Dakota. (Exhibit B, Affidavit of Michael Ballard, at ¶ 5.) It is a real estate holding company which transacts no business in South Carolina. (*Id.* at ¶ 6.) Sloon Shine is a Tennessee limited liability company which transacts no business in this state. (*Id.* at ¶¶ 13, 16.) Instead, it is a manufacturer of distilled spirits, which are distributed through wholesalers. (*Id.* at ¶¶ 14-15.) Michael Ballard is the sole member of Full Throttle and Sloon Shine. (*Id.* at ¶ 2.) American Outlaw Spirits is a Georgia corporation that manufactures one brand of liquor in Tennessee. (Exhibit C, Affidavit of Jesse James Dupree, at ¶ 5-6.) Jesse James Dupree is the sole owner of American Outlaw Spirits. (*Id.* at ¶ 2.)

Plaintiffs asserted causes of action against Sloon Shine, as well as American Outlaw Spirits, Full Throttle, Ballard, and Dupree, for violations of S.C. Code Ann. § 61-4-580 and § 61-6-2220, respondeat superior and agency, and joint enterprise/negligent supervision. Full Throttle, Sloon Shine, American Outlaw Spirits, Ballard, and Dupree moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and (b)(6), SCRCp.

Valley Cmty Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court “may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document’s authenticity.”); *Epstein v. World Acceptance Corp.*, 203 F. Supp. 3d 655, 662 (D.S.C. 2016) (in deciding a motion to dismiss, the court may consider “only the facts alleged in the complaint, which may include any documents referenced, and matters of which the court may take judicial notice.”). “In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.” *Unisum Ins. v. Hawkins*, 542, 537 S.E.2d 559, 561-62 (S.C. Ct. App. 2000). The Court should consider the Agreement for the purposes of deciding this Motion to Dismiss because House of Blues premises some of its causes of action on the Agreement and directly quotes the Agreement in its Third-Party Complaint.

On January 2, 2018, Plaintiffs dismissed American Outlaw Spirits, Ballard, and Dupree without prejudice. In October 2018, Plaintiffs reached a confidential settlement agreement with Full Throttle and Sloon Shine and agreed to dismiss them with prejudice. House of Blues, however, refused to consent to Full Throttle's and Sloon Shine's dismissal—despite the fact that it had asserted no claims against them at that time. On June 25, 2019, Full Throttle and Sloon Shine again moved to dismiss the claims against them. The Court granted Full Throttle's and Sloon Shine's Motion to Dismiss on August 13, 2019.

On October 18, 2019, House of Blues filed the instant Third-Party Complaint against Full Throttle, Sloon Shine, American Outlaw Spirits, and Throttlefest, LLC. House of Blues asserted the following, third-party claims against all third-party defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. Sloon Shine filed its Motion to Dismiss on December 17, 2019 and respectfully requests that this Court grant its Motion.

STANDARDS OF REVIEW

I. Rule 12(b)(2)

“The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction.” *Int’l Mariculture Res. v. Grant*, 520 S.E.2d 160, 161 (S.C. Ct. App. 1999) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 423 S.E.2d 128, 130 (S.C. 1992)). To meet this burden, the plaintiffs must make a prima-facie showing of jurisdiction by pleadings and affidavits. *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798 (S.C. 1990.) While written allegations of jurisdictional facts are generally construed in a plaintiff's favor, the showing of personal jurisdiction “must be based upon specific facts set forth in the record

in order to defeat defendants' motion to dismiss.” *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992).

II. Rule 12(b)(6)

Under Rule 12(b)(6), SCRCP, a party may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537, 539 (S.C. 2011). In considering a motion to dismiss under Rule 12(b)(6), the trial court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 645 S.E.2d 245 (S.C. 2007). However, the trial court may treat a Rule 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings if the parties are afforded a reasonable opportunity to respond to such matters. *Brown v. Leverette*, 353 S.E.2d 697, 698–99 (S.C. 1987).

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over Sloon Shine.

“The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis. First, the trial judge must determine that the South Carolina long-arm statute applies. Second, the trial judge must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements.” *Southern Plastics Co.*, 423 S.E.2d at 130. Neither requirement is met here.

A. South Carolina’s long-arm statute does not authorize jurisdiction here.

South Carolina’s “long-arm” statute is codified at S.C. Code Ann. 36-2-803 and extends personal jurisdiction over non-residents as to a cause of action arising from the person’s:

- 1) transacting any business in this State;
- (2) contracting to supply services or things in the State;
- (3) commission of a tortious act in whole or in part in this State;
- (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other

persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
 (5) having an interest in, using, or possessing real property in this State;
 (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
 (7) entry into a contract to be performed in whole or in part by either party in this State; or
 (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803 (2018).

House of Blues cannot establish that personal jurisdiction exists over Sloon Shine. The only jurisdictional allegations in the Third-Party Complaint regarding Sloon Shine are that it is a South Dakota company that “transacts business in South Carolina.” (Compl. ¶¶ 90-91.)² This is incorrect: Sloon Shine is a Tennessee company that manufactures a premium brand of moonshine in Trimble, Tennessee. (Ex. B, Ballard Aff. ¶¶ 13-14.) It does not directly sell its products in South Carolina; rather, it contracts with distributors who sell throughout the region. (*Id.* at ¶ 15.) In fact, its moonshine (“S’loonshine”) is presently not available in South Carolina and has not been for several years. (*Id.* at ¶ 16.) Sloon Shine does not derive substantial revenue from its product consumed in this state. (*Id.* at ¶ 17.) House of Blues cannot make the requisite showing to invoke jurisdiction under the long-arm statute.

B. Due-process requirements have not been met.

Even if the long-arm statute authorized jurisdiction over Sloon Shine, House of Blues cannot show the requirements of due process are met. “Before personal jurisdiction may be exercised over a nonresident, due process requires that there exist minimum contacts between the nonresident and the forum state such that the maintenance of the suit does not offend traditional

² References to House of Blues’ Answer and Third-Party Complaint are denoted “Compl.” followed by the corresponding paragraph number.

notions of fair play and justice.” *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991). South Carolina courts apply four factors in determining whether due process requirements are satisfied: (1) the duration of the defendant's activity in this state; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the state's interest in exercising jurisdiction. *Id.*

House of Blues has not alleged any activity by Sloon Shine in South Carolina, let alone activity of significant duration. House of Blues only alleges that Sloon Shine’s member, Michael Ballard, attended Throttle Fest, and that Sloon Shine had a responsibility to supervise Michael Garner (“Fajita Mike”)—despite undisputed evidence in this case that Garner was *not* an employee of Sloon Shine during the Throttle Fest event. (Compl. ¶ 112, 116; *see also* Ex. B, at ¶ 24.) Although a single act may support jurisdiction, it must create a “substantial connection” with the forum. *Aviation Assocs.*, 402 S.E.2d at 180. That is not the case here: Ballard’s presence at Throttle Fest does not equate to Sloon Shine having a substantial connection with South Carolina. This is especially true when considering Ballard is also a member of Throttlefest, LLC and a celebrity performer.

As for the character and circumstances of Sloon Shine’s acts, there is nothing before this Court to indicate that it purposefully availed itself of the privilege of conducting business activities in South Carolina to the extent necessary to find personal jurisdiction over it in this case. The Third-Party Complaint does not even allege Sloon Shine’s products were consumed by the at-fault driver such that it would be tied to the Underlying Matter in that way. And Sloon Shine’s product is not available in South Carolina at this time. (Ex. B, Ballard Aff. ¶ 16.) Sloon Shine does not have sufficient minimum contacts with this State, and it is extremely inconvenient for Sloon Shine

to defend this suit here. (*Id.* at ¶ 26.) House of Blues cannot prove that personal jurisdiction over Sloon Shine is proper.

II. House of Blues Has Failed to Allege Facts to Support its Third-Party Claims.

Should this Court find that it has personal jurisdiction over Sloon Shine, this action should be dismissed with prejudice because House of Blues has failed to state third-party claims against Sloon Shine for which relief can be granted.

A. Sloon Shine has no liability to House of Blues.

House of Blues' third-party claims against Sloon Shine fail because Sloon Shine's settlement with Plaintiffs absolves it of any potential liability to an alleged co-tortfeasor. *See Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C. Ct. App. 2017) (*citing* S.C. Code Ann. § 15-38-50) ("When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.").

In *Smith*, the plaintiff (Smith) named as defendants Norman Tiffany, Brown Trucking Co., and Brown Integrated Logistics, Inc. (collectively, "the Brown defendants"), in addition to the driver of the vehicle who crashed into him, Mizzell. 799 S.E.2d at 481-82. Defendant Norman Tiffany was a commercial driver employed by the Brown defendants, which owned and operated Tiffany's commercial vehicle. On the morning of the accident, Tiffany's commercial vehicle was disabled and parked along the shoulder of the road, adjacent to the exit of a gas station. Mizzell had stopped at the gas station, and as he attempted to exit the parking lot, his view of oncoming traffic was obstructed by Tiffany's truck positioned alongside the highway. When Mizzell eased forward to get a better view of oncoming traffic, his vehicle collided with Smith's vehicle.

Mizzell's liability carrier tendered the limits of Mizzell's liability policy to Smith in full settlement of Smith's claims against him. Smith then brought suit against Tiffany and the Brown defendants, who in turn asserted a third-party complaint under Rule 14, SCRCP, naming Mizzell as a third-party defendant. Mizzell filed a motion for summary judgment as to the third-party claims, asserting he neither owed nor breached any duty to the Brown defendants as third-party plaintiffs, and because section 15-38-50 of the South Carolina Contribution Among Joint Tortfeasors Act ("the Act") discharged him as a settling tortfeasor from liability for contribution to any other tortfeasor. The trial court agreed, and the Brown defendants appealed.

On appeal, the court of appeals affirmed. The court found that Mizzell was not subject to liability for any part of Smith's claims due to his prior settlement. The covenant not to execute that Mizzell obtained from Smith included language protecting Mizzell from any further liability to Smith in excess of the agreed-upon settlement amount. The court explained that in section 15-38-50 of the Act, the legislature expanded the scope of a settling tortfeasor's immunity to include protection from liability to non-settling tortfeasors. The Act specifically provides:

When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . *it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.*

S.C. Code Ann. § 15-38-50 (2018) (emphasis added). Thus, Mizzell had no additional liability to Smith and therefore was immune from any liability to non-settling tortfeasors by virtue of section 15-38-50. The court held that absent any potential liability to either the plaintiff or to non-settling defendants, impleader under Rule 14 is not proper.

A nearly-identical factual scenario presents itself here. Sloon Shine settled with Plaintiffs in October 2018. Notwithstanding, House of Blues impleaded them as a third-party defendant roughly one year later. Sloon Shine has no further liability to Plaintiffs. Under the plain terms of

the Act, Sloon Shine is discharged of liability for contribution to any other tortfeasor. House of Blues' Rule 14, third-party claims are improper and therefore should be dismissed.

B. Sloon Shine owed no duty House of Blues, contractual or otherwise.

House of Blues has asserted breach of contract, negligence, and contractual indemnification claims against Sloon Shine based upon its alleged obligations under the Co-Promotion Agreement. House of Blues, however, has not alleged that Sloon Shine was a party to, or beneficiary of, the Co-Promotion Agreement. Instead, House of Blues correctly states that only Throttlefest, LLC and House of Blues were parties to the Co-Promotion Agreement. (Compl. ¶ 97.) Sloon Shine was not a party to this contract. (See Ex. A.) Under South Carolina law, “one not in privity of contract with another cannot maintain an action against [another] in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable[.]” *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 605 S.E.2d 750, 752 (S.C. Ct. App. 2004). Because Sloon Shine was not in privity with House of Blues or an intended, third-party beneficiary of the Co-Promotion Agreement, House of Blues' breach of contract and contractual indemnification claims must be dismissed.

Moreover, in its negligence cause of action, House of Blues alleges that “the Third-Party Defendants undertook to perform under the Agreement” and undertook “to exercise due care in their performance.” (Compl. ¶¶ 139-140.) House of Blues then claims the Third-Party Defendants negligently breached this duty. (See *id.* at ¶ 141.) It is clear House of Blues has tried to recycle its breach of contract claim against Throttlefest, LLC into a negligence claim against Sloon Shine. This is improper, for bare allegations of negligence cannot convert a breach of contract action into an action in tort. *Seebaltd v. First Federal Savings & Loan Association*, 239 S.E.2d 726 (S.C. 1977) (affirming dismissal of a complaint containing allegations couched in terms of negligence

where the only duties owed were contractual). Indeed, under South Carolina law, “if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.” *Toney v. LaSalle Bank Nat. Ass’n*, 896 F. Supp. 2d 455 (D.S.C. 2012), *aff’d*, 2013 WL 751299 (4th Cir. 2013) (holding that a plaintiff cannot establish a claim for gross negligence where the claim arises from a contract).

Finally, House of Blues has failed to allege any facts that would support relief under its equitable indemnification and contribution claims. House of Blues asserts that the damages alleged by Plaintiffs were due to the primary fault of the Third-Party Defendants and/or its authorized agents, servants, or employees. (Compl. ¶ 147.) However, there is nothing before this Court to suggest that Sloon Shine was a joint tortfeasor with House of Blues, and even if it was, these claims are barred due to its settlement with Plaintiffs.

C. The statute of limitations bars House of Blues’ claims.

In South Carolina, claims arising upon a contract and claims for injury to a person or rights of another must be brought within three years. S.C. Code Ann. § 15-3-530(1), (5) (2018). House of Blues’ claims arising from Sloon Shine’s alleged breaches of contract, negligence, and negligent misrepresentations arose in 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019. Because House of Blues did not bring its claims against Sloon Shine within the respective, three-year statutes of limitations, these claims are time-barred and must be dismissed.

1. Breach of Contract

In its breach of contract claim, House of Blues states that the Third-Party Defendants breached the Co-Promotion Agreement by: failing to include House of Blues as an Additional Insured; failing to use due care in providing festival talent and personalities for the Throttle Fest; engaging in prohibited alcohol beverage sponsorship; and failing to comply with state and local

laws applicable to their activities. (*See* Compl. ¶¶ 125-126.) As stated above, Sloon Shine was not a party to the Co-Promotion Agreement and therefore cannot be in breach of it. However, assuming *arguendo* Sloon Shine somehow were bound by it, this agreement is dated March 19, 2014. Throttle Fest ended on or about May 17, 2014. (*See id.* at ¶ 97.) Any breaches of this contract therefore arose, at the latest, on or around May 17, 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

2. Negligent Misrepresentation

House of Blues asserts that the Third-Party Defendants made false representations to it regarding procurement and maintenance of insurance coverage in advance of the Throttle Fest that took place in May 2014. (*See* Compl. ¶ 130.) It also contends the Third-Party Defendants made false representations regarding its experience in putting on a Full Throttle festival, its compliance with laws relating to service of alcohol at the festival, and other actions in preparation for the festival. (*See id.* at ¶ 131.) These alleged misrepresentations—which Sloon Shine denies making—therefore had to have occurred prior to May 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

3. Negligence

House of Blues claims that the Third-Party Defendants were negligent, careless, and reckless by: failing to comply with laws pertaining to the sale and service of alcohol; engaging in promotion of their alcohol brands; failing to use due care in providing festival talent and personalities for Throttle Fest; failing to properly train and supervise Michael Garner; and being otherwise negligent. (*See id.* at ¶ 141.) House of Blues was on notice of its negligence claim at the end of the Throttle Fest, on or about May 17, 2014. (*See id.* at ¶ 97.) House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

Because the statutes of limitations on the above claims have expired, the Court should dismiss House of Blues' claims.

WHEREFORE, Third-Party Defendant Full Throttle Sloon Shine, LLC respectfully prays that this Honorable Court enter an order dismissing the Third-Party Complaint with prejudice pursuant to Rules 12(b)(2) and (b)(6), SCRCP. Sloon Shine further prays for an award of all costs and fees incurred in responding to the Third-Party Complaint and in preparing and arguing this Motion, and any further relief as the Court may deem just and proper.

This 3rd day of January, 2020 at Charleston, South Carolina.

s/Brian C. Duffy

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*Attorneys for Third-Party Defendant
Full Throttle Sloon Shine, LLC*

EXHIBIT A



March 19, 2014

Throttlefest, LLC
 Jesse Dupree
 Via Email: jid@mightyloud.com
 Cc: Melanie@mightyloud.com

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

This AGREEMENT ("Agreement") is entered into effective as of March 19, 2014 by and between House of Blues Myrtle Beach Restaurant Corp. ("HOB") whose address is 4640 Highway 17 South - N. Myrtle Beach, SC 29582 and Throttlefest LLC ("Co-Promoter") whose address is 1480 Old 41 HWY - Kennesaw, GA 30152.

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

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

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

An example of this arrangement is as follows:

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

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

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

An example of this alternate arrangement is as follows:

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

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC

By: 

Name: JESSE JAMES DUPREE

Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: BRUCK SIMPSON

Title: GENERAL MANAGER

CONFIDENTIAL

HOB 001

310

CO-PROMOTION AGREEMENT

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

1. Purpose and Scope.

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

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

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

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

HOB: Artist contract and payment; production; ticketing

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

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

HOB to provide:

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

Co-Promoter to provide:

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

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

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

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

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

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

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

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

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

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

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

4. Box Office Revenues / Distributions / Accounting.

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

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

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

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

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

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

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

6. Insurance.

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

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

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

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

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

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

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

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

7. Miscellaneous Provisions.

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

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

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

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

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

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

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

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

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

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

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

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

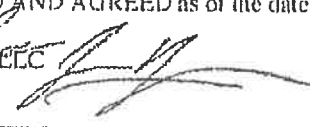
(l) Compliance with Laws. Each party shall be responsible for compliance with all federal, state and local laws and regulations applicable to such party's activities in connection with this Agreement or the Event, including, without limitation, obtaining any permits applicable to the Event or the activities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

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

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

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC

By: 

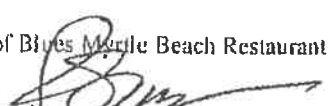
Name:

JESSE JAMES DAISE

Title:

PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name:

ROBERT SIMPSON

Title:

General Manager

EXHIBIT B

**STATE OF SOUTH CAROLINA
COUNTY OF HORRY**

**IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008**

**DOUGLAS KELSEY and MARK
SHIMMENDER,**

Plaintiffs,

v.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,**

Defendants.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,**

Third-Party Plaintiff,

v.

**THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,**

Third-Party Defendants.

**AFFIDAVIT OF
MICHAEL BALLARD**

Michael Ballard, being first duly sworn, deposes and says:

1. My name is Michael Ballard, and I am a citizen of Tennessee. I am over eighteen years of age, am competent to make this affidavit, and do so of my own personal knowledge.
2. I am the sole member of Third-Party Defendants Full Throttle, LLC (Full Throttle) and Full Throttle Sloon Shine LLC (Sloon Shine).

3. I am one of two members of Third-Party Defendant Throttlefest, LLC; Jesse James Dupree is the other member.

4. Full Throttle and Sloon Shine have not consented to and do not consent to the personal jurisdiction of this Court. This affidavit is submitted for the specific purpose of contesting personal jurisdiction in this action.

5. Full Throttle is a limited liability company organized and existing under the laws of South Dakota.

6. Full Throttle is engaged in the business of holding real estate located in South Dakota.

7. Full Throttle does not engage in and has never engaged in providing any product or service or any other business activity in South Carolina.

8. Full Throttle does not maintain and has never maintained an office or facility of any kind in South Carolina.

9. Full Throttle has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

10. Full Throttle has never engaged in any course of conduct in South Carolina, nor has Full Throttle derived revenue from goods used or consumed or services rendered in South Carolina.

11. Full Throttle has never held any interest in or possession of any real property anywhere in South Carolina.

12. Except its retention of the law firm of Duffy & Young, LLC for the specific purpose of contesting this Court's personal jurisdiction over Full Throttle, Full Throttle does not

employ or maintain and has never employed or maintained any employee or agent in South Carolina.

13. Sloon Shine is a limited liability company organized and existing under the laws of Tennessee, with its principal place of business in Tennessee.

14. Sloon Shine is engaged in the business of manufacturing distilled spirits and produces a brand of moonshine called "S'loonshine" in Trimble, Tennessee.

15. Sloon Shine does not directly sell its products in South Carolina; rather, it contracts with distributors who sell throughout the region.

16. At this time, S'loonshine is not available in South Carolina and has not been for several years.

17. Sloon Shine does not derive substantial revenue from the sale or consumption of S'loonshine or any other goods used or consumed in South Carolina.

18. In 2015, South Carolina sales comprised three percent of Sloon Shine's revenue; in 2016-2017, only one percent of its revenue; and in 2018-2019, zero percent of its revenue.

19. Sloon Shine does not maintain and has never maintained an office or facility of any kind in South Carolina.

20. Sloon Shine has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

21. Sloon Shine has never engaged in any course of conduct in South Carolina.

22. Sloon Shine has never held any interest in or possession of any real property anywhere in South Carolina.

23. Full Throttle and Sloon Shine had no involvement in any wrongdoing related to the Throttle Fest that took place in May of 2014.

24. Michael Garner, or "Fajita Mike," was not employed by, or an agent of, Full Throttle or Sloon Shine during the Throttle Fest that took place in May of 2014.

25. Full Throttle and Sloon Shine settled the claims asserted against them by the Plaintiffs in October of 2018.

26. It would be extremely burdensome for Full Throttle and Sloon Shine to defend this action, as it would require travel from out-of-state to South Carolina as the action progresses, to exchange documents and other evidence with other parties and attorneys in South Carolina, and to attend the trial of this action.

FURTHER AFFIANT SAYETH NOT.


Michael Ballard



I certify that the information
above is true, to the best
of my knowledge.
State of Tennessee, County
of Dyer.


Kathryn E. Dowding

Jan 3, 2020

My commission expires
9.15.2021

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008

DOUGLAS KELSEY and MARK
SHIMMENDER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,

Third-Party Plaintiff,

v.

THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,

Third-Party Defendants.

AFFIDAVIT OF
JESSE JAMES DUPREE

Jesse James Dupree, being first duly sworn, deposes and
says:

1. My name is Jesse James Dupree, and I am a citizen of Georgia. I am over eighteen years of age, am competent to make this affidavit, and do so of my own personal knowledge.

2. I am the sole owner of Third-Party Defendant American Outlaw Spirits Incorporated ("American Outlaw Spirits").

3. I am one of two members of Third-Party Defendant Throttlefest, LLC; Michael Ballard is the other member.

4. American Outlaw Spirits has not consented to and does not consent to the personal jurisdiction of this Court. This affidavit is submitted for the specific purpose of contesting personal jurisdiction in this action.

5. American Outlaw Spirits is a corporation incorporated and existing under the laws of Georgia.

6. American Outlaw Spirits manufactures one brand of liquor, Devils Devil Cinnamon Whiskey, and did not begin

producing this liquor until 2018.

7. American Outlaw Spirits did not transact business in South Carolina at the time of the Full Throttle Saloon Festival in May of 2014. American Outlaw Spirits did not become registered to do business in South Carolina until March 6, 2018.

8. American Outlaw Spirits does not directly sell its products in South Carolina; rather, it contracts with distributors who sell throughout the region.

9. American Outlaw Spirits does not maintain and has never maintained an office or facility of any kind in South Carolina.

10. American Outlaw Spirits has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

11. American Outlaw Spirits has never engaged in any course of conduct in South Carolina.

12. American Outlaw Spirits has never held any interest in or possession of any real property anywhere in South Carolina.

13. American Outlaw Spirits only has one brand of liquor available in South Carolina and it has never been carried by the House of Blues in Myrtle Beach, South Carolina.

14. American Outlaw Spirits does not derive substantial revenue from the sale or consumption of its goods used or consumed in South Carolina.

15. American Outlaw Spirits had no involvement in any wrongdoing related to the Full Throttle Saloon Festival that took place in May of 2014.

16. Michael Garner, or "Fajita Mike," has never been employed by, or been an agent of, American Outlaw Spirits.

17. It would be extremely burdensome for American Outlaw Spirits to defend this action, as it would require travel from out-of-state to South Carolina as the action progresses, to exchange documents and other evidence with other parties and attorneys in South Carolina, and to attend the trial of this action.

FURTHER AFFIANT SAYETH NOT.

Jesse James Dupree



Nishit Bhavsar

01-02-20

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008

DOUGLAS KELSEY and MARK
SHIMMENDER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,

Third-Party Plaintiff,

v.

THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,

Third-Party Defendants.

THIRD-PARTY DEFENDANT AMERICAN
OUTLAW SPIRITS INCORPORATED'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

COMES NOW Third-Party Defendant American Outlaw Spirits Incorporated ("American Outlaw Spirits") and hereby submits this Memorandum in Support of its Motion to Dismiss filed December 17, 2019 pursuant to South Carolina Rules of Civil Procedure 12(b)(2) and 12(b)(6).

Dismissal of House of Blues' third-party claims is warranted because House of Blues cannot establish that this Court has personal jurisdiction over American Outlaw Spirits. Further, the allegations in support of these claims fail to state facts which would entitle House of Blues to

relief against American Outlaw Spirits. Finally, the statute of limitations bars House of Blues' claims against American Outlaw Spirits. For these reasons and as elaborated herein, American Outlaw Spirits requests that its Motion be granted.

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 2017, Plaintiffs filed their Amended Summons and Complaint against the following parties: House of Blues Myrtle Beach Restaurant Corporation d/b/a House of Blues; House of Blues Concerts, Inc. d/b/a House of Blues; HOB Entertainment, Inc. d/b/a House of Blues; Full Throttle, LLC ("Full Throttle"); Full Throttle Sloon Shine LLC ("Sloon Shine"); Throttlefest, LLC; American Outlaw Spirits; Michael Ballard; Jesse James Dupree; Michael Garner; and Travis Wagoner (hereinafter, "the Underlying Matter"). Defendant/Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation d/b/a House of Blues ("House of Blues") answered on August 4, 2017 and lodged no cross-claims against American Outlaw Spirits.

The Underlying Matter stems from a motorcycle collision on May 16, 2014 between Plaintiffs and Defendant Wagoner, an individual who allegedly was served alcohol at an event known as the Full Throttle Saloon Festival or "Throttle Fest." This festival took place at the House of Blues in Myrtle Beach, South Carolina between May 9-17, 2014. House of Blues and Third-Party Defendant Throttlefest, LLC *only* had previously entered a Co-Promotion Agreement dated March 19, 2014, attached hereto as Exhibit A,¹ regarding the functions and acts necessary for

¹ In considering a 12(b)(6) motion, the trial court "may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity." *Martin v. Companion Healthcare Corp.*, No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609 (4th Cir. 1999); see also *Goines v. Valley Cmt'y Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court "may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity."); *Epstein v. World Acceptance Corp.*, 203 F. Supp. 3d 655, 662

promoting and conducting the Full Throttle Saloon Festival. Sloon Shine, Full Throttle, and American Outlaw Spirits were not parties to this contract. (*See* Ex. A.)

Full Throttle is a limited liability company organized in South Dakota. (Exhibit B, Affidavit of Michael Ballard, at ¶ 5.) It is a real estate holding company which transacts no business in South Carolina. (*Id.* at ¶ 6.) Sloon Shine is a Tennessee limited liability company which transacts no business in this state. (*Id.* at ¶¶ 13, 16.) Instead, it is a manufacturer of distilled spirits, which are distributed through wholesalers. (*Id.* at ¶¶ 14-15.) Michael Ballard is the sole member of Full Throttle and Sloon Shine. (*Id.* at ¶ 2.) American Outlaw Spirits is a Georgia corporation that manufactures one brand of liquor in Tennessee. (Exhibit C, Affidavit of Jesse James Dupree, at ¶ 5-6.) Jesse James Dupree is the sole owner of American Outlaw Spirits. (*Id.* at ¶ 2.)

Plaintiffs asserted causes of action against American Outlaw Spirits, as well as Full Throttle, Sloon Shine, Ballard, and Dupree, for violations of S.C. Code Ann. § 61-4-580 and § 61-6-2220, respondeat superior and agency, and joint enterprise/negligent supervision. Full Throttle, Sloon Shine, American Outlaw Spirits, Ballard, and Dupree moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and (b)(6), SCRCPP.

On January 2, 2018, Plaintiffs dismissed American Outlaw Spirits, Ballard, and Dupree without prejudice. On August 13, 2019, the Court granted Full Throttle's and Sloon Shine's motion to dismiss Plaintiffs' claims against them, as they had reached a settlement agreement.

(D.S.C. 2016) (in deciding a motion to dismiss, the court may consider "only the facts alleged in the complaint, which may include any documents referenced, and matters of which the court may take judicial notice."). "In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive." *Unisum Ins. v. Hawkins*, 542, 537 S.E.2d 559, 561-62 (S.C. Ct. App. 2000). The Court should consider the Agreement for the purposes of deciding this Motion to Dismiss because House of Blues premises some of its causes of action on the Agreement and directly quotes the Agreement in its Third-Party Complaint.

Shortly thereafter, on October 18, 2019, House of Blues filed the instant Third-Party Complaint against Full Throttle, Sloon Shine, American Outlaw Spirits, and Throttlefest, LLC. House of Blues asserted the following, third-party claims against all third-party defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. American Outlaw Spirits filed its Motion to Dismiss on December 17, 2019 and respectfully requests that this Court grant its Motion.

STANDARDS OF REVIEW

I. Rule 12(b)(2)

“The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction.” *Int’l Mariculture Res. v. Grant*, 520 S.E.2d 160, 161 (S.C. Ct. App. 1999) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 423 S.E.2d 128, 130 (S.C. 1992)). To meet this burden, the plaintiffs must make a prima-facie showing of jurisdiction by pleadings and affidavits. *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798 (S.C. 1990.) While written allegations of jurisdictional facts are generally construed in a plaintiff’s favor, the showing of personal jurisdiction “must be based upon specific facts set forth in the record in order to defeat defendants’ motion to dismiss.” *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992).

II. Rule 12(b)(6)

Under Rule 12(b)(6), SCRCF, a party may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537, 539 (S.C. 2011). In considering a motion to dismiss under Rule 12(b)(6), the trial court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 645 S.E.2d 245 (S.C. 2007). However, the trial court may treat a Rule 12(b)(6) motion as a motion for summary

judgment and consider matters presented outside of the pleadings if the parties are afforded a reasonable opportunity to respond to such matters. *Brown v. Leverette*, 353 S.E.2d 697, 698–99 (S.C. 1987).

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over American Outlaw Spirits.

“The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis. First, the trial judge must determine that the South Carolina long-arm statute applies. Second, the trial judge must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements.” *Southern Plastics Co.*, 423 S.E.2d at 130. Neither requirement is met here.

A. South Carolina’s long-arm statute does not authorize jurisdiction here.

South Carolina’s “long-arm” statute is codified at S.C. Code Ann. 36-2-803 and extends personal jurisdiction over non-residents as to a cause of action arising from the person’s:

- 1) transacting any business in this State;
- (2) contracting to supply services or things in the State;
- (3) commission of a tortious act in whole or in part in this State;
- (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
- (5) having an interest in, using, or possessing real property in this State;
- (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
- (7) entry into a contract to be performed in whole or in part by either party in this State; or
- (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803 (2018).

House of Blues cannot establish that personal jurisdiction exists over American Outlaw Spirits. The only jurisdictional allegations in the Third-Party Complaint regarding American

Outlaw Spirits are that it is a Georgia company that “transacts business in South Carolina.” (Compl. ¶¶ 88, 91.)² American Outlaw Spirits is incorporated in Georgia and manufactures one brand of liquor, Devils Devil Cinnamon Whiskey. (Ex. C, Dupree Aff. ¶¶ 5-6.) Production of this liquor began in 2018—after the events alleged in the Underlying Matter. (*Id.* at ¶ 6.) It does not directly sell its product in South Carolina; rather, it contracts with distributors who sell throughout the region. (*Id.* at ¶ 8.) American Outlaw Spirits does not derive substantial revenue from its product consumed in South Carolina. (*Id.* at ¶ 14.) House of Blues cannot make the requisite showing to invoke jurisdiction under the long-arm statute.

B. Due-process requirements have not been met.

Even if the long-arm statute authorized jurisdiction over American Outlaw Spirits, House of Blues cannot show the requirements of due process are met. “Before personal jurisdiction may be exercised over a nonresident, due process requires that there exist minimum contacts between the nonresident and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice.” *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991). South Carolina courts apply four factors in determining whether due process requirements are satisfied: (1) the duration of the defendant's activity in this state; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the state's interest in exercising jurisdiction. *Id.*

House of Blues has not alleged any targeted activity by American Outlaw Spirits in South Carolina, let alone activity of significant duration. House of Blues alleges that American Outlaw Spirits liquor was served at Throttle Fest; that American Outlaw Spirits’ owner, Jesse James

² References to House of Blues’ Answer and Third-Party Complaint are denoted “Compl.” followed by the corresponding paragraph number.

Dupree, attended Throttle Fest; and that American Outlaw Spirits had a responsibility to supervise Michael Garner (“Fajita Mike”)—despite undisputed evidence in this case that Garner was *not* an employee of American Outlaw Spirits during the Throttle Fest event. (*See* Compl. ¶ 107, 113, 116; *see also* Ex. C, Dupree Aff. ¶ 16.) Although a single act may support jurisdiction, it must create a “substantial connection” with the forum. *Aviation Assocs.*, 402 S.E.2d at 180. That is not the case here: Dupree’s presence at Throttle Fest does not equate to American Outlaw Spirits having a substantial connection with South Carolina. This is especially true when considering Dupree is also a member of Throttlefest, LLC and a celebrity performer.

As for the character and circumstances of American Outlaw Spirits’ acts, there is nothing before this Court to indicate that it purposefully availed itself of the privilege of conducting business activities in South Carolina to the extent necessary to find personal jurisdiction over it in this case. The Third-Party Complaint does not even allege American Outlaw Spirits’ liquor was consumed by the at-fault driver such that it would be tied to the Underlying Matter in that way. In fact, American Outlaw Spirits did not even begin manufacturing its brand of liquor until 2018. (Ex. C, Dupree Aff. ¶ 6.) American Outlaw Spirits does not have sufficient minimum contacts with this State and it is extremely inconvenient for it to defend this suit here. (*Id.* at ¶ 17.) House of Blues cannot prove that personal jurisdiction over American Outlaw Spirits is proper.

II. House of Blues Has Failed to Allege Facts to Support its Third-Party Claims.

Should this Court find that it has personal jurisdiction over American Outlaw Spirits, this action should be dismissed with prejudice because House of Blues has failed to state third-party claims against American Outlaw Spirits for which relief can be granted.

A. American Outlaw Spirits owed no duty House of Blues, contractual or otherwise.

House of Blues has asserted breach of contract, negligence, and contractual indemnification claims against American Outlaw Spirits based upon its alleged obligations under the Co-Promotion Agreement. House of Blues, however, has not alleged that American Outlaw Spirits was a party to, or beneficiary of, the Co-Promotion Agreement. Instead, House of Blues correctly states that only Throttlefest, LLC and House of Blues were parties to the Co-Promotion Agreement. (Compl. ¶ 97.) American Outlaw Spirits was not a party to this contract. (*See* Ex. A.) Under South Carolina law, “one not in privity of contract with another cannot maintain an action against [another] in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable[.]” *Windsor Green Owners Ass’n v. Allied Signal, Inc.*, 605 S.E.2d 750, 752 (S.C. Ct. App. 2004). Because American Outlaw Spirits was not in privity with House of Blues or an intended third-party beneficiary of the Co-Promotion Agreement, House of Blues’ breach of contract and contractual indemnification claims must be dismissed.

Moreover, in its negligence cause of action, House of Blues alleges that “the Third-Party Defendants undertook to perform under the Agreement” and undertook “to exercise due care in their performance.” (Compl. ¶¶ 139-140.) House of Blues then claims the Third-Party Defendants negligently breached this duty. (*See id.* at ¶ 141.) It is clear House of Blues has tried to recycle its breach of contract claim against Throttlefest, LLC into a negligence claim against American Outlaw Spirits. This is improper, for bare allegations of negligence cannot convert a breach of contract action into an action in tort. *Seebald v. First Federal Savings & Loan Association*, 239 S.E.2d 726 (S.C. 1977) (affirming dismissal of a complaint containing allegations couched in terms of negligence where the only duties owed were contractual). Indeed, under South Carolina law,

“if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.” *Toney v. LaSalle Bank Nat. Ass’n*, 896 F. Supp. 2d 455 (D.S.C. 2012), *aff’d*, 2013 WL 751299 (4th Cir. 2013) (holding that a plaintiff cannot establish a claim for gross negligence where the claim arises from a contract).

Finally, House of Blues has failed to allege any facts that would support relief under its equitable indemnification and contribution claims. House of Blues asserts that the damages alleged by Plaintiffs were due to the primary fault of the Third-Party Defendants and/or its authorized agents, servants, or employees. (Compl. ¶ 147.) However, there is nothing before this Court to suggest that the Court should invoke its equitable power and award House of Blues the requested relief.

B. The statute of limitations bars House of Blues’ claims.

In South Carolina, claims arising upon a contract and claims for injury to a person or rights of another must be brought within three years. S.C. Code Ann. § 15-3-530(1), (5) (2018). House of Blues’ claims arising from American Outlaw Spirits’ alleged breaches of contract, negligence, and negligent misrepresentations arose in 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019. Because House of Blues did not bring its claims against American Outlaw Spirits within the respective, three-year statutes of limitations, these claims are time-barred and must be dismissed.

1. Breach of Contract

In its breach of contract claim, House of Blues states that the Third-Party Defendants breached the Co-Promotion Agreement by: failing to include House of Blues as an Additional Insured; failing to use due care in providing festival talent and personalities for the Throttle Fest; engaging in prohibited alcohol beverage sponsorship; and failing to comply with state and local

laws applicable to their activities. (*See* Compl. ¶¶ 125-126.) As stated above, American Outlaw Spirits was not a party to the Co-Promotion Agreement and therefore cannot be in breach of it. However, assuming arguendo American Outlaw Spirits somehow were bound by it, this agreement is dated March 19, 2014. Throttle Fest ended on or about May 17, 2014. (*See id.* at ¶ 97.) Any breaches of this contract therefore arose, at the latest, on or around May 17, 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

2. Negligent Misrepresentation

House of Blues asserts that the Third-Party Defendants made false representations to it regarding procurement and maintenance of insurance coverage in advance of the Throttle Fest that took place in May 2014. (*See* Compl. ¶ 130.) It also contends the Third-Party Defendants made false representations regarding its experience in putting on a Full Throttle festival, its compliance with laws relating to service of alcohol at the festival, and other actions in preparation for the festival. (*See id.* at ¶ 131.) These alleged misrepresentations—which American Outlaw Spirits denies making—therefore had to have occurred prior to May 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

3. Negligence

House of Blues claims that the Third-Party Defendants were negligent, careless, and reckless by: failing to comply with laws pertaining to the sale and service of alcohol; engaging in promotion of their alcohol brands; failing to use due care in providing festival talent and personalities for Throttle Fest; failing to properly train and supervise Michael Garner; and being otherwise negligent. (*See id.* at ¶ 141.) House of Blues was on notice of its negligence claim at

the end of the Throttle Fest, on or about May 17, 2014. (*See id.* at ¶ 97.) House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

Because the statutes of limitations on the above claims have expired, the Court should dismiss House of Blues' claims.

WHEREFORE, Third-Party Defendant American Outlaw Spirits Incorporated respectfully prays that this Honorable Court enter an order dismissing the Third-Party Complaint with prejudice pursuant to Rules 12(b)(2) and (b)(6), SCRCP. American Outlaw Spirits further prays for an award of all costs and fees incurred in responding to the Third-Party Complaint and in preparing and arguing this Motion, and any further relief as the Court may deem just and proper.

This 3rd day of January, 2020 at Charleston, South Carolina.

s/Brian C. Duffy
 Brian C. Duffy
 Kara S. Grevey
 DUFFY & YOUNG, LLC
 96 Broad Street
 Charleston, South Carolina 29401
 (843) 720-2044 (phone)
 (843) 720-2047 (fax)
bduffy@duffyandyoung.com
kgrevey@duffyandyoung.com

*Attorneys for Third-Party Defendant
 American Outlaw Spirits Incorporated*

EXHIBIT A



March 19, 2014

Throttlefest, LLC
 Jesse Dupree
 Via Email: jed@mightycloud.com
 Cc: Melanie@mightycloud.com

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

This AGREEMENT ("Agreement") is entered into effective as of March 19, 2014 by and between House of Blues Myrtle Beach Restaurant Corp. ("HOB") whose address is 4640 Highway 17 South - N. Myrtle Beach, SC 29582 and Throttlefest LLC ("Co-Promoter") whose address is 1480 Old 41 HWY - Kennesaw, GA 30152.

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

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

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

An example of this arrangement is as follows:

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

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

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

An example of this alternate arrangement is as follows:

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

ACCEPTED AND AGREED as of the date first above written.

Throttlefest LLC

By: 

Name: JESSE JAMES DUPREE

Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: Robert Simone

Title: General Manager

CONFIDENTIAL

HOB 001

338

CO-PROMOTION AGREEMENT

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

1. Purpose and Scope.

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

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

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

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

HOB: Artist contract and payment; production; ticketing

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

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

HOB to provide:

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

Co-Promoter to provide:

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

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

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

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

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

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

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

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

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

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

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

4. Box Office Revenues / Distributions / Accounting.

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

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

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

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

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

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

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

6. Insurance.

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

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

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

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

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

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

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

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

7. Miscellaneous Provisions.

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

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

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

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

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

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

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

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

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

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

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

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

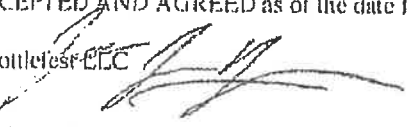
(l) Compliance with Laws. Each party shall be responsible for compliance with all federal, state and local laws and regulations applicable to such party's activities in connection with this Agreement or the Event, including, without limitation, obtaining any permits applicable to the Event or the activities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

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

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

ACCEPTED AND AGREED as of the date first above written.

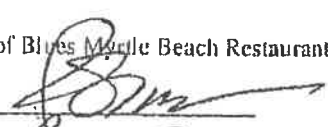
Throttlefest LLC

By: 

Name: JESE JAMES DURRE

Title: PRESIDENT

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: ROBERT SIMONE

Title: General Manager

EXHIBIT B

**STATE OF SOUTH CAROLINA
COUNTY OF HORRY**

**IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008**

**DOUGLAS KELSEY and MARK
SHIMMENDER,**

Plaintiffs,

v.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,**

Defendants.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,**

Third-Party Plaintiff,

v.

**THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,**

Third-Party Defendants.

**AFFIDAVIT OF
MICHAEL BALLARD**

Michael Ballard, being first duly sworn, deposes and says:

1. My name is Michael Ballard, and I am a citizen of Tennessee. I am over eighteen years of age, am competent to make this affidavit, and do so of my own personal knowledge.
2. I am the sole member of Third-Party Defendants Full Throttle, LLC (Full Throttle) and Full Throttle Sloon Shine LLC (Sloon Shine).

3. I am one of two members of Third-Party Defendant Throttlefest, LLC; Jesse James Dupree is the other member.

4. Full Throttle and Sloon Shine have not consented to and do not consent to the personal jurisdiction of this Court. This affidavit is submitted for the specific purpose of contesting personal jurisdiction in this action.

5. Full Throttle is a limited liability company organized and existing under the laws of South Dakota.

6. Full Throttle is engaged in the business of holding real estate located in South Dakota.

7. Full Throttle does not engage in and has never engaged in providing any product or service or any other business activity in South Carolina.

8. Full Throttle does not maintain and has never maintained an office or facility of any kind in South Carolina.

9. Full Throttle has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

10. Full Throttle has never engaged in any course of conduct in South Carolina, nor has Full Throttle derived revenue from goods used or consumed or services rendered in South Carolina.

11. Full Throttle has never held any interest in or possession of any real property anywhere in South Carolina.

12. Except its retention of the law firm of Duffy & Young, LLC for the specific purpose of contesting this Court's personal jurisdiction over Full Throttle, Full Throttle does not

employ or maintain and has never employed or maintained any employee or agent in South Carolina.

13. Sloon Shine is a limited liability company organized and existing under the laws of Tennessee, with its principal place of business in Tennessee.

14. Sloon Shine is engaged in the business of manufacturing distilled spirits and produces a brand of moonshine called "S'loonshine" in Trimble, Tennessee.

15. Sloon Shine does not directly sell its products in South Carolina; rather, it contracts with distributors who sell throughout the region.

16. At this time, S'loonshine is not available in South Carolina and has not been for several years.

17. Sloon Shine does not derive substantial revenue from the sale or consumption of S'loonshine or any other goods used or consumed in South Carolina.

18. In 2015, South Carolina sales comprised three percent of Sloon Shine's revenue; in 2016-2017, only one percent of its revenue; and in 2018-2019, zero percent of its revenue.

19. Sloon Shine does not maintain and has never maintained an office or facility of any kind in South Carolina.

20. Sloon Shine has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

21. Sloon Shine has never engaged in any course of conduct in South Carolina.

22. Sloon Shine has never held any interest in or possession of any real property anywhere in South Carolina.

23. Full Throttle and Sloon Shine had no involvement in any wrongdoing related to the Throttle Fest that took place in May of 2014.

24. Michael Garner, or "Fajita Mike," was not employed by, or an agent of, Full Throttle or Sloon Shine during the Throttle Fest that took place in May of 2014.

25. Full Throttle and Sloon Shine settled the claims asserted against them by the Plaintiffs in October of 2018.

26. It would be extremely burdensome for Full Throttle and Sloon Shine to defend this action, as it would require travel from out-of-state to South Carolina as the action progresses, to exchange documents and other evidence with other parties and attorneys in South Carolina, and to attend the trial of this action.

FURTHER AFFIANT SAYETH NOT.


Michael Ballard



I certify that the information
above is true, to the best
of my knowledge.
State of Tennessee, County
of Dyer.


Kathryn E. Dowding

Jan 3, 2020

My commission expires
9.15.2021

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008

DOUGLAS KELSEY and MARK
SHIMMENDER,

Plaintiffs,

v.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,

Defendants.

HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,

Third-Party Plaintiff,

v.

THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,

Third-Party Defendants.

AFFIDAVIT OF
JESSE JAMES DUPREE

Jesse James Dupree, being first duly sworn, deposes and
says:

1. My name is Jesse James Dupree, and I am a citizen of Georgia. I am over eighteen years of age, am competent to make this affidavit, and do so of my own personal knowledge.

2. I am the sole owner of Third-Party Defendant American Outlaw Spirits Incorporated ("American Outlaw Spirits").

3. I am one of two members of Third-Party Defendant Throttlefest, LLC; Michael Ballard is the other member.

4. American Outlaw Spirits has not consented to and does not consent to the personal jurisdiction of this Court. This affidavit is submitted for the specific purpose of contesting personal jurisdiction in this action.

5. American Outlaw Spirits is a corporation incorporated and existing under the laws of Georgia.

6. American Outlaw Spirits manufactures one brand of liquor, Devils Devil Cinnamon Whiskey, and did not begin

producing this liquor until 2018.

7. American Outlaw Spirits did not transact business in South Carolina at the time of the Full Throttle Saloon Festival in May of 2014. American Outlaw Spirits did not become registered to do business in South Carolina until March 6, 2018.

8. American Outlaw Spirits does not directly sell its products in South Carolina; rather, it contracts with distributors who sell throughout the region.

9. American Outlaw Spirits does not maintain and has never maintained an office or facility of any kind in South Carolina.

10. American Outlaw Spirits has never contracted to supply any service, pay any money, or provide consideration of any kind in South Carolina.

11. American Outlaw Spirits has never engaged in any course of conduct in South Carolina.

12. American Outlaw Spirits has never held any interest in or possession of any real property anywhere in South Carolina.

13. American Outlaw Spirits only has one brand of liquor available in South Carolina and it has never been carried by the House of Blues in Myrtle Beach, South Carolina.

14. American Outlaw Spirits does not derive substantial revenue from the sale or consumption of its goods used or consumed in South Carolina.

15. American Outlaw Spirits had no involvement in any wrongdoing related to the Full Throttle Saloon Festival that took place in May of 2014.

16. Michael Garner, or "Fajita Mike," has never been employed by, or been an agent of, American Outlaw Spirits.

17. It would be extremely burdensome for American Outlaw Spirits to defend this action, as it would require travel from out-of-state to South Carolina as the action progresses, to exchange documents and other evidence with other parties and attorneys in South Carolina, and to attend the trial of this action.

FURTHER AFFIANT SAYETH NOT.

Jesse James Dupree



Nishit Bhavsar

01-02-20

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Douglas Kelsey,	)	Civil Action No.: 2017-CP-26-03008
	)	
Plaintiffs,	)	
	)	
vs.	)	HOUSE OF BLUES
	)	MYRTLE BEACH RESTAURANT
House of Blues Myrtle Beach Restaurant	)	CORPORATION'S
Corporation; HOB Entertainment, Inc.; and	)	MEMORANDUM IN OPPOSITION
Travis Scott Wagoner,	)	TO THROTTLEFEST LLC'S
	)	MOTION TO DISMISS
Defendants.	)	
	)	
House of Blues Myrtle Beach Restaurant	)	
Corporation,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Throttlefest LLC; American Outlaw Spirits	)	
Incorporated; Full Throttle, L.L.C.; and	)	
Full Throttle Sloon Shine, LLC,	)	
	)	
Third-Party Defendants.	)	
	)	
	)	

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

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

FACTUAL/PROCEDURAL BACKGROUND

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

When a release or a covenant not to sue or not to enforce judgment is given **in good faith** to one of two or more persons liable in tort for the same injury or the same wrongful death:

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

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

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

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

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

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

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

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

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

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

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

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

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

S.C. Const. Art. I, § 3.

The United States Constitution similarly states:

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

U.S. CONST. amend. XIV.

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

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

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

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

...

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

Section 15-38-15 continues:

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

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

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

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

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

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

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

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

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

Rule 8(e)(2), SCRPC,

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

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

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

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

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

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

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

Throttlefest, LLC correctly notes that the statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) ("Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence."). However, Throttlefest, LLC attempts to impute Plaintiff Kelsey's knowledge of the underlying incident to House of Blues, despite the fact that the incident occurred off of the House of Blues property. In reality, House of Blues was not notified of the incident involving Kelsey and the alleged over-service by Fajita Mike until after October 20, 2016. Moreover, it was during the course of discovery in the first-party litigation that House of Blues learned that Throttlefest, LLC's breaches of contract, tortious conduct, and the need for indemnification. Thus, the fact that Throttlefest 2014 was held from May 9-17, 2014, is of no consequence. Rather, the earliest date from which House of Blues knew or should have known of its third-party claims against Throttlefest, LLC was October 20, 2016.

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

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

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

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

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

CONCLUSION

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

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,
COLLINS & LACY, P.C.

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PLAINTIFF/DEFENDANT HOUSE OF BLUES
MYRTLE BEACH RESTAURANT
CORPORATION

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

Murrells Inlet, South Carolina
January 7, 2020

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Douglas Kelsey,)

Plaintiffs,)

vs.)

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

Defendants.)

House of Blues Myrtle Beach Restaurant)
Corporation,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

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

**HOUSE OF BLUES
MYRTLE BEACH RESTAURANT
CORPORATION'S
MEMORANDUM IN OPPOSITION
TO FULL THROTTLE, L.L.C., FULL
THROTTLE SLOON SHINE, LLC, AND
AMERICAN OUTLAW SPIRITS
INCORPORATED'S
MOTIONS TO DISMISS**

TO: BRIAN C. DUFFY, ESQUIRE, AND KARA S. GREVEY, ESQUIRE, ATTORNEYS
FOR THIRD-PARTY DEFENDANTS FULL THROTTLE, L.L.C., FULL THROTTLE
SLOON SHINE, LLC, AND AMERICAN OUTLAW SPIRITS INCORPORATED.

Third Party Defendants Full Throttle, L.L.C. ("Full Throttle"), Full Throttle Sloon Shine, LLC ("Sloon Shine"), and American Outlaw Spirits Incorporated ("American Outlaw Spirits") each filed a motion to dismiss and supporting memorandum, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, requesting the Court dismiss Defendant/Third Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("House of Blues") Third-Party Complaints against it.

Because each of these motions involve the same or substantially similar arguments, House of Blues offers this single memorandum of law in opposition to the motions filed by Full Throttle, Sloon Shine, and American Outlaw Spirits (collectively “these Third-Party Defendants”).

FACTUAL/PROCEDURAL BACKGROUND

This is an alleged alcohol liability case related to a motorcycle on motorcycle collision on May 16, 2014 in Myrtles Beach, South Carolina, which resulted in injuries to Plaintiff. Plaintiff alleges that Travis Wagoner was overserved with two free shots allegedly given to him by Michael “Fajita Mike” Garner during an event called “Throttlefest 2014.” (See Pl.’s Second Am. Compl., ¶¶ 8-15; HOB Third Party Compl., ¶¶ 93, 104, 107-111). The shots allegedly being served by Fajita Mike at Throttlefest were S’loon Shine liquor and American Outlaw Spirits liquor. (HOB Third Party Compl., ¶¶ 105-109).

House of Blues has vehemently denied any liability to Plaintiff and disputes that Fajita Mike was acting as its employee when he allegedly served Wagoner. (HOB Third Party Compl., ¶¶ 8, 94, 114-116). Rather, House of Blues asserts that the alleged personal injury asserted in the first-party action arose or resulted from acts and/or omissions of Third-Party Defendants, either personally or by the subcontractors, agents, employees, and/or event sponsors secured by Third-Party Defendants. (*Id.* at ¶ 104). Throughout the Throttle Fest event, Throttlefest LLC, American Outlaw Spirits, Full Throttle., and Sloon Shine, all financially benefited from Michael Garner’s alleged actions. (*Id.* at ¶ 117).

Though all of the Third-Party Defendants were previously named as defendants in the first-party litigation, only the House of Blues Defendants and Travis Wagoner remain in the case. This court dismissed Full Throttle and Sloon Shine by order entered on August 13, 2019; dismissed Throttlefest LLC by order entered on December 14, 2018; and dismissed American Outlaw Spirits,

Michael Ballard, and Jesse James Dupree by order entered on January 22, 2018. (HOB Third-Party Compl., ¶¶ 95-96).

Throttlefest LLC, and House of Blues entered into a Co-Promotion Agreement (“Agreement”) with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. (HOB Third-Party Compl., ¶ 97). Though Throttlefest LLC was the named party to and signatory on the Agreement, it was also acting as an agent of the remaining Third-Party Defendants American Outlaw Spirits, Full Throttle, and Sloon Shine. (HOB Third-Party Compl., ¶ 124).

Michael Ballard, who is a managing member of Throttlefest LLC, and who is the sole managing member of Full Throttle and Sloon Shine attended the Throttle Fest event as a representative of these companies. (*Id.* at ¶ 112). Jesse James Dupree, who is a managing member of Throttlefest LLC and the sole incorporator and officer of American Outlaw Spirits, attended the Throttle Fest event as a representative of this company and corporation. (*Id.* at ¶ 113). Throughout the Throttle Fest event, Fajita Mike was acting as the employee or agent of Throttlefest LLC and these Third-Party Defendants. (*Id.* at ¶ 115). Further, Throttlefest LLC and these Third-Party Defendants all had the opportunity and responsibility to supervise and control Fajita Mike and all financially benefited from Fajita Mike’s alleged actions. (*Id.* at ¶¶ 116-117). Consequently, House of Blues asserts claims for breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification, and contribution against Throttlefest LLC and these Third-Party Defendants. (*Id.* at ¶¶ 119-159).

Full Throttle, Sloon Shine, and American Outlaw Spirits assert the same or similar bases for their motions to dismiss. First, they all assert that this Court lacks personal jurisdiction over

their respective entities. Second, they all contend that House of Blues has failed to allege facts to support its third-party claims. Specifically, Full Throttle and Sloon Shine contend they have no liability to House of Blues because they entered into a good faith settlement with the first-party plaintiff. Further, Full Throttle, Sloon Shine, and American Outlaw Spirits all assert that they owe no duty to House of Blues, contractual or otherwise. Third and finally, they all contend that House of Blues' claims are barred by the applicable statute of limitations. For the reasons discussed herein, Full Throttle, Sloon Shine, and American Outlaw Spirits's motions to dismiss should be denied.

STANDARDS OF REVIEW

Rule 12(b)(2)

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008).

Rule 12(b)(6)

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

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

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

LAW/ANALYSIS

I. This Court Has Personal Jurisdiction Over These Third-Party Defendants

“The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based.” Cribb v. Spatholt, 382 S.C. 490, 497, 676 S.E.2d 714, 718 (Ct. App. 2009) (quoting Boan v. Jacobs, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988)). Courts may

have specific jurisdiction over a cause of action arising from a defendant's contacts with the state pursuant to the long-arm statute. Id. at 498, 676 S.E.2d at 718.

The South Carolina Long-Arm Statute is codified at Section 36-2-803 of the South Carolina Code. The Long-Arm Statute provides, in relevant part:

- (A) A court may exercise personal jurisdiction over a person who acts directly **or by an agent** as to a cause of action arising from the person's:
- (1) transacting any business in this State;
 - ...
 - (3) commission of a tortious act in whole or in part in this State;
 - ...
 - (7) entry into a contract to be performed in whole or in part by either party in this State;....

S.C. Code Ann. § 36-2-803(A)(1),(3),&(7).

Despite the enumerated provisions of the Long-Arm Statute, South Carolina Courts has construed the statute to extend to the outer limits of the due process clause. Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (1998); Cozi Investments v. Schneider, 272 S.C. 354, 252 S.E.2d 116 (1979) (stating that South Carolina's long-arm statute has been construed as a grant of jurisdiction as broad as constitutionally permissible).

Thus, our courts no longer follow the traditional two-step analysis to determine whether specific jurisdiction is proper by 1) determining if the long arm statute applies and 2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. Cribb, 382 S.C. at 498, 676 S.E.2d at 718. Instead, the recent trend compresses the analysis into a due process assessment only. Id. (citing Cockrell v. Hillerich & Bradsby Co. 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.")).

Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). “Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there.” Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 431-32, 665 S.E.2d 660, 665 (Ct. App. 2008). Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Id. at 432, 665 S.E.2d at 665. “The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the ‘power’ to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair.” Id. To support a finding of due process, both prongs must be satisfied. Id.

To satisfy the “power” prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). Under the “fairness” prong, the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction. State v. NV Sumatra Tobacco Trading Co., 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008). A single transaction is sufficient to confer jurisdiction if these factors are met.” Moosally, 358 S.C. at 331, 594 S.E.2d at 884; see also 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.”). Although a single act may support jurisdiction, it must create a “substantial connection” with the forum. Burger King Corp., 471 U.S. 462, 475 n. 18 (1985); White v. Stephens, 300 S.C. 241, 247, 387 S.E.2d 260, 263 (1990). A single act that causes harm in this State may create sufficient minimum contacts where the harm arises out of or relates to that act. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992).

A. This Court has Personal Jurisdiction Over Full Throttle and Sloon Shine

Full Throttle’s contention that the Court lacks personal jurisdiction is two-fold: There are insufficient contacts with the state of South Carolina and the due process standard is not satisfied. Specifically, Full Throttle avers that its owner, Michael Ballard’s, attendance at Throttle Fest is not sufficient contact to subject Full Throttle to the jurisdiction over this state. Full Throttle further contends that while House of Blues alleges that Full Throttle had a responsibility to supervise Michael Garner (“Fajita Mike”), there is “undisputed evidence in this case that Garner was *not* an employee of Full Throttle during the Throttle Fest event.” (Full Throttle Memo. in Supp. of Mot. to Dismiss, p. 7) (emphasis in original). Full Throttle further argues, with regard to the due process analysis, that it is “inconvenient for Full Throttle to defend this suit in South Carolina” and South Carolina’s interest in providing redress for its citizens is diminished when a non-resident does not operate in South Carolina. (Id.).

Sloon Shine similarly avers that House of Blues cannot make the requisite showing to invoke jurisdiction under the long-arm statute. Sloon Shine relies upon an argument that it does not directly sell its product in South Carolina; rather, it contracts with distributors who sell throughout the region. Sloon Shine contends that its moonshine is not presently available in South Carolina “and has not been for several years.” Sloon Shine further alleges, in the same manner

and through the same arguments as Full Throttle, that the due-process requirements have not been met.

Full Throttle Saloon was a reality television series that chronicles the daily operations of the world's largest biker bar, Full Throttle Saloon, located in Sturgis, South Dakota. The concept of bringing Full Throttle Saloon to Myrtle Beach for an event called Throttle Fest began in 2012, with a three-day festival, and continued for four days in 2013 and for ten days in 2014. (**Exhibit A**, Depo. Tr. of Robert Simeone o/b/o House of Blues, p. 165, line 17 – p. 167, line 20). House of Blues 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 Third-Party Compl., ¶¶ 97, 124). These entities are all owned and managed by either Michael Ballard and/or Jesse James Dupree. Ballard and Dupree are the managing members of Throttlefest LLC. (HOB Third Party Compl., ¶¶ 97, 112-113). Ballard is also the sole managing member of Full Throttle and Sloon Shine. (*Id.* at ¶ 112). Dupree is also the sole incorporator and officer of American Outlaw Spirits. (*Id.* at ¶ 113). Further, both Sloon Shine liquor and American Outlaw Spirits liquor were being distributed by Fajita Mike at Throttle Fest 2014. (*Id.* at ¶¶ 105-109). Jesse James Dupree previously testified that he attended Throttlefest 2014 along with several other personalities from the Full Throttle Saloon show, including Michael Ballard, Michael “Fajita Mike” Garner, and Greg “Goat” Cook. (**Exhibit B**, Depo. Tr. of Jesse James Dupree, p. 9, line 7 – p. 10, line 15).

Full Throttle’s contention that the actions of Fajita Mike are unrelated to Michael Ballard and Throttlefest are without foundation. The bases for the allegations asserted by House of Blues against Full Throttle (as well as the other third-party defendants) is that owners Michael Ballard

and Jesse James Dupree attended the Throttlefest event as representatives of their respectively owned companies. House of Blues further contends that Ballard and Dupree were tasked with and had the opportunity and responsibility to supervise and control Fajita Mike's actions. (HOB Third Party Compl., ¶¶ 97-117). Accordingly, Fajita Mike—at a minimum—was an agent of the corporations and companies owned and represented at Throttle Fest by Ballard and Dupree. Indeed, 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:

- Q. Do you have a recollection of having an express understanding with ThrottleFest that Fajita Mike and his activities would be limited to the deck versus inside the Music Hall?
- A. **Fajita Mike's movements were under the direction of Mike Ballard. Mike Ballard told Fajita Mike the role that he wanted him to play.**
- Q. How do you know?
- A. **Mike told me that's what he was going to have him do.**
- ...
- Q. So...Steve-O, who was not a house of Blue employee, had supervisory power over House of Blues employees?
- A. Over the crew that Mike brought that we put on our payroll so that could pour drinks. They brought a bar manager with them every year to schedule those girls, tell them when they worked – when they would work and make sure that we knew who was coming. They would communicate with us and tell us what staff they were bringing with them and when they were going to show up each year.
- Q. Prior to ThrottleFest, did you know Steve-O?
- A. No.
- Q. How was House of Blues able to evaluate whether Steve-O would be, I guess, an appropriate individual to manage people selling alcohol under the House of Blues license?
- A. He came -- he came with Mike [Ballard]. I mean, that was part of Mike's entourage, you know. The people that we listed before were part of ThrottleFest's crew: Mike, Jesse, Goat, Fajita....

(Exhibit A, Depo. Tr. of Robert Simeone o/b/o House of Blues, p. 52, lines 13-22; p. 65, lines 1-23).

During Michael "Fajita Mike" Garner's deposition in the first-party action, taken on October 9, 2018, he testified:

- Q. Jackyl performed at the House of Blues 2014, correct?
- A. Yes.
- Q. You were selling, I guess, shots that night of S'Loonshine; is that correct?
- A. I'm sure. Probably, S'Loonshine and Jesse James and something else. I mean, I don't remember exactly what we were selling.
- ...
- Q. And the flavors, what type of liquor were you selling?
- A. I did -- we did, you know, primarily the Jesse James and S'Loonshine. We also did like Fireball and all the other stuff, too. I mean, it just depended on whatever was -- you know, really it depended on the crowd.

(Exhibit C, Depo. Tr. of Michael Garner, p. 12, lines 10-17; p. 18, lines 12-18).

Travis Wagoner, the at fault driver who was allegedly overserved at Throttle Fest 2014 testified to the following at his deposition, held April 23, 2018:

- Q. ...Sum total, how many -- how many alcoholic drinks did you have at House of Blues while you were there?
- A. I had about four of the -- those can beers. They serve can beers. I want to think that they was 22 ounce.
- Q. Okay.
- A. And one liquor drink and we had -- I think it was two or three liquor shots.
- Q. Okay.
- A. And two of the liquor shots was served by somebody from the group with the moonshine -- or the show. The -- the Full Throttle show.
- Q. The Full Throttle show. When you say --

- A. **Fajita Mike.**
- Q. So two out of those three liquor shots that you're telling me about were served to you by Fajita Mike?
- A. Yes.
- Q. All right. With regard to the -- to the television show involving Throttlefest, had you ever seen that television show?
- A. Some.
- Q. Did you know who Fajita Mike was?
- A. Just a little, yeah.
- Q. So you understood him to be a television personality that appeared on that TV show?
- A. Yes.
- Q. **You didn't understand him to be an employee of House of Blues, did you?**
- A. **No.**
- ...
- Q. All right. **Who at House of Blues saw you being served by Fajita Mike?**
- A. **I don't know that -- for sure that somebody had saw.**
- Q. Okay.
- A. But it --
- Q. **So you're just guessing.**
- A. **Yes. That's a -- that's a guess.**
- ...
- Q. ...Were there any of the seven to eight drinks that you're telling me that you consumed at the House of Blues that were just given to you?
- A. Yes. The -- the two shots from Fajita Mike.
- Q. Okay. They were just given to you?
- A. Yes.
- Q. There was no sale?
- A. No.
- ...
- Q. Okay. And you said that Fajita Mike gave you the two shots; right?
- A. Yes.

- Q. Did he approach you, or did you approach him?
- A. There was somebody -- well, we approached him.
- Q. Okay.
- A. The way to say, yes.
- Q. Was he by himself?
- A. No. He had a girl with him.
- Q. Okay. Well, do you know who the girl was?
- A. No. I -- I assume that she was actually -- well, she had cups and stuff with her.
- Q. Did she have on any identifying clothing that would let you know who she was?
- A. Like something to do with the -- the shine, the moonshine, or whatever it's called.
- Q. Okay. So was she wearing a House of Blues T-shirt?
- A. No.
- Q. She was wearing a T-shirt of the brand of liquor?
- A. Yes. As I recall, yes.
- Q. Okay. All right. Do you know who she worked for?
- A. No.

(Exhibit D, Depo. Tr. of Travis Wagoner, p. 27, line 9 – p. 28, line 14; p. 45, line 20 – p. 46, line 2; p. 53, line 18 – p. 54, line 2; p. 64, line 7 – p. 65, line 10).

Wagoner was also familiar with the Jesse James Dupree, as the lead singer of Jackyl, who was promoting SloonShine on stage.

- Q. The band Jackyl performed while you were there; correct?
- A. Correct.
- Q. Do you recall the lead singer of Jackyl chugging the moonshine while he was on stage?
- A. Yes.

(Exhibit D, Depo. Tr. of Travis Wagoner, p. 86, lines 9-14).

Importantly, Michael Ballard, in addition to his role as co-owner of Throttlefest, LLC, also had an interest in the promotion of the liquor sales for Sloon Shine. It was Michael Ballard who contacted Fajita Mike and procured his attendance at Throttle Fest 2014. (**Exhibit C**, Depo. Tr. of Michael Garner, p. 61, lines 9-17). While Full Throttle maintains that “[i]t is a real estate holding company which transacts no business in South Carolina,” House of Blues has not been provided any opportunity to conduct discovery or cross-examine the affiant regarding this matter in order to test its veracity. (Full Throttle Memo. in Supp. of Mot. to Dismiss, p. 3). It is notable that. (**Exhibit A**, Depo. Tr. of Robert Simeone o/b/o House of Blues, p. 118, line 16 – p. 119, line 24).

Considering all of these facts, House of Blues has satisfied its burden to establish personal jurisdiction. There is evidence that Michael Ballard, Jesse James Dupree, and Fajita Mike attended Throttle Fest 2014 as representatives and agents of a conglomeration of entities that included Full Throttle and Sloon Shine. 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 girl who allegedly assisted Fajita Mike in distributing shots to Wagoner. All of these activities were directed at promoting the Full Throttle, Throttle Fest, and Sloon Shine brands to residents of South Carolina and give rise to the causes of action alleged in the Third-Party Complaint, satisfying the “power” prong of due process. Regarding the “fairness” prong, these entities participated in a ten-day event at Throttle Fest 2014, which the third annual event, growing in length each year. These entities were serving as promoters of alcohol amongst other things. While some travel for depositions and trial may be required, in our technological age, conducting discovery and defending an action from South Dakota and Tennessee is hardly unusual or burdensome. The only known employees who would be called to testify would be Jesse Dupree

and Michael Ballard, whereas the first-party plaintiff and House of Blues have a variety of witnesses in South Carolina and nearby North Carolina. Thus, when considering the available alternate forums, South Carolina is the most convenient. Lastly, South Carolina has an interest in exercising jurisdiction since these entities 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. This is a substantial connection sufficient to confer jurisdiction.

B. This Court has Personal Jurisdiction Over American Outlaw Spirits

In arguing that this Court lacks personal jurisdiction, American Outlaw Spirits has ostensibly incorporated the arguments of Full Throttle and Sloon Shine regarding the lack of minimum contacts and the failure to satisfy the due process analysis, albeit with regard to the contacts of the owner of American Outlaw Spirits, Jesse James Dupree, rather than the contacts by Michael Ballard. In addition, American Outlaw Spirits avers that the single brand of liquor manufactured by it, Devils Devil Cinnamon Whisky, was not placed into production until 2018.

As an initial matter, Dupree states in his affidavit: “American Outlaw Spirits manufactures one brand of liquor, Devils Devil Cinnamon Whiskey, and did not begin producing this liquor until 2018. American Outlaw Spirits did not transact business in South Carolina at the time of the Full Throttle Saloon Festival in May of 2014. American Outlaw Spirits did not become registered to do business in South Carolina until March 6, 2018. ... American Outlaw Spirits only has one brand of liquor available in South Carolina and it has never been carried by the House of Blues in Myrtle Beach, South Carolina.” (Aff. of Jesse James Dupree, at ¶¶ 6, 7, and 13). Dupree’s assertions in his affidavit are **directly controverted by his own testimony** in the first-party action provided on October 9, 2018. Specifically, Dupree testified:

- Q. Now, American Outlaw Spirits, does it have any other product other than the bourbon?
- A. Yes.
- Q. What are those products?
- A. The Devil's Devil.
- Q. What kind of alcohol is that?
- A. It's a cinnamon whiskey.
- Q. Any other product?
- A. A Tennessee – there's a bourbon and a Tennessee – there's honey bourbon, spice bourbon, regular bourbon, the Tennessee whiskey and the Devil's Devil cinnamon whiskey.
- Q. Is the Devil's Devil a separate label from Jesse James Dupree's bourbon; is it sold as Devil's Devil?
- A. Yes.
- ...
- Q. What American Outlaw Spirits Products were available for sale in May 2014?
- A. To the best of my recollection, the Jesse James products that were selling in 2014 available for sale would be the Jesse James regular bourbon, the Jesse James spice bourbon, and the Jesse James honey bourbon.
- Q. And to your personal knowledge or recollection, were all three of those products for sale at House of Blues May of 2014 during Throttlefest?
- A. To the best of my recollection, I think they were all three there. I also recall that there was times that the House of Blues was not able to get all three of them.

(Exhibit B, Depo. Tr. of Jesse James Dupree, p. 98, line 23 – p. 100, line 25).

This direct testimony from Dupree undermines the validity of the statements within his affidavit. Additionally, Dupree admitted in reviewing photographs taken during Throttlefest that there were both S'loonshine products as well as American Outlaw Spirits/Jesse James Dupree products photographed. (Exhibit B, Depo. Tr. of Jesse James Dupree, p. 102, line 18 – p. 104, line 25). To the extent that the Jesse James brand of liquor was being distributed by predecessor

entity of American Outlaw Spirits, this does not connote a lack of personal jurisdiction but a need to clarify the proper party in interest.

As discussed more fully in Part I.A, supra, the facts and law support a finding of personal jurisdiction over American Outlaw Spirits. There is evidence that Michael Ballard, Jesse James Dupree, and Fajita Mike attended Throttle Fest 2014 as representatives and agents of a conglomeration of entities that included American Outlaw Spirits. An American Outlaw Spirits liquor was being sold at Throttle Fest 2014 and distributed by Fajita Mike. These activities were directed at promoting the American Outlaw Spirits brand to residents of South Carolina and gave rise to the causes of action alleged in the Third-Party Complaint, satisfying the “power” prong of due process. Regarding the “fairness” prong, these entities participated in a ten-day event at Throttle Fest 2014, which the third annual event, growing in length each year. American Outlaw Spirits was serving as a promoter of its own alcohol, amongst other things. While some travel for depositions and trial may be required, in our technological age, conducting discovery and defending an action from Georgia is hardly unusual or burdensome. The only known current, employee of American Outlaw Spirits is Jesse Dupree, whereas the first-party plaintiff and House of Blues have a variety of witnesses in South Carolina and nearby North Carolina. Thus, when considering the available alternate forums, South Carolina is the most convenient. Lastly, South Carolina has an interest in exercising jurisdiction since American Outlaw Spirits 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 its’ employee and agent, Fajita Mike, resulting the alleged over service of alcohol to a bike week patron. This is a substantial connection sufficient to confer jurisdiction.

II. Rule 12(b)(6) Dismissal of House of Blues' Third-Party Complaint Against These Third-Party Defendants is Improper Because it Would Require Findings of Fact Not Evident on the Face of the Third-Party Complaint

The third-party defendants brought this motion pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the ruling on which must be based solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). While a 12(b)(6) motion may be converted to a motion for summary judgment when matters outside the pleading are presented to and not excluded by the Court, all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Baird v. Charleston Cty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing Rule 12(b)(6), SCRPC). “The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).” Id. (quoting Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987)). Thus, where the trial court does not give notice to the parties that it will consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment, consideration of the same, the evidence outside of the complaint is not properly considered. Id.

Here, Full Throttle, Sloon Shine, and American Outlaw Spirits made their motions solely pursuant to Rule 12(b)(6), SCRPC, and reference only Rule 12(b)(6) in their memoranda in support of its motion, filed on January 3, 2020. Considering only the allegations of the Complaint, as required by the applicable Rule, these Third-Party Defendants cannot show that they are entitled to dismissal, as such would require reliance on evidence outside of the Complaint.¹

With respect to Full Throttle and Sloon Shine's alleged “good faith” settlement agreements with Plaintiff Kelsey, the Court's evaluation of these arguments requires a review of the contents

¹ To the extent House of Blues cites deposition testimony obtained in the first-party action to demonstrate the fallacy of these Third-Party Defendants' personal jurisdiction arguments, the same should not be construed as consent to convert the instant motions to ones for summary judgment.

and terms of the Settlement Agreement, a matter outside of the Third-Party Complaint. It is notable that Smith v. Tiffany, upon which Full Throttle and Sloon Shine rely in support of their argument, involved a motion for summary judgment and not a motion to dismiss. 419 S.C. 548, 555, 799 S.E.2d 479, 482 (2017). With respect to all of these Third-Party Defendant's claim that they were not "an intended, third-party beneficiary of the Co-Promotion Agreement," a ruling on this argument requires consideration and evaluation of testimony and evidence that is outside of the Third-Party Complaint. Lastly, with respect to the claim that the third-party action is barred by the statute of limitations, the Court's evaluation of the argument requires consideration of when House of Blues knew or should have known of its third-party claims, which is outside of the Third-Party Complaint.

In light of the lack of any notice that these motions to dismiss will be converted to one for summary judgment, this Court cannot consider matters outside of the Complaint itself. Accordingly, these Third-Party Defendants cannot support their arguments and their motions to dismiss should be denied.

III. Full Throttle and Sloon Shine's Purported Settlement with The First-Party Plaintiff Does Warrant Dismissal of the Third-Party Claims Where There is No Evidence The Settlement was Made in Good Faith, Even a Good Faith Settlement Could Only Bar a Contribution Claim, and Dismissal Would Violate House of Blues' Due Process and Equal Protection Rights.

A. Only a Good Faith Settlement Triggers S.C. Code Ann. § 15-38-50

In Smith v. Tiffany, our Supreme Court acknowledged that "achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the [South Carolina Contribution Among Joint Tortfeasors] Act." 419 S.C. 548, 556, 799 S.E.2d 479, 483-84 (2017). "[T]he legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements." Id. at 557, 799 S.E.2d at 484. The Act provides:

When a release or a covenant not to sue or not to enforce judgment is given **in good faith** to one of two or more persons liable in tort for the same injury or the same wrongful death:

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

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

Accordingly, in order for a joint tortfeasor's settlement to operate to "discharge[] the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor," the plain language of section 15-38-50 of the South Carolina Code requires that the release or covenant not to sue or not to enforce judgment be "given in good faith" S.C. Code Ann. § 15-38-50. Thus, the mere fact of a settlement is not in and of itself sufficient to trigger section 15-38-50.

Our courts have long recognized the competing interests in settling cases with alleged joint tortfeasors.

In Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, the Court wrote:

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

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

Here, there are significant public policy concerns regarding whether Full Throttle and Sloon Shine's dismissal from the case was truly a good faith settlement or a mere nominal, self-

protectionist release for a responsible party with no deep pocket insurance coverage. The Texas Supreme Court, in Elbaor v. Smith, discussed its balance of such competing interests, writing:

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

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

We do not know the terms, conditions, basis or amount of Full Throttle and Sloon Shine's alleged settlements, 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 in Part III.C, infra, will be amplified. Thus, as argued in Part II, supra, whether Full Throttle and Sloon Shine's alleged settlements with the first-party Plaintiff were in "good faith" necessarily requires a review and evaluation of the contents and terms of the Settlement Agreement(s). Because these agreements are outside of the Third-Party Complaint, disposition under Rule 12(b)(6) is improper.

B. Assuming *Arguendo* the Settlements Were in Good Faith, It Could Operate to Bar the Contribution Claim Only

Even if this Court were to obtain and review the settlement agreements and find that they were entered into in good faith, neither Smith v. Tiffany nor the Uniform Contribution Among Tortfeasors Act provide support for dismissal of the causes of action outside of contribution that

were asserted in the Third-Party Complaint. This case is distinguishable from Smith v. Tiffany, an automobile accident case, in that the appellants therein conceded that Mizzell did not breach any duty of care owed to them. 419 S.C. at 554, 799 S.E.2d at 482. The Smith v. Tiffany appellants asserted only that they were entitled to apportionment based on an independent contribution claim against Mizzell. Id. Here, House of Blues asserts several causes of action outside of the contribution claim, including breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification.

It is undisputed that Throttlefest, LLC had a contractual relationship with House of Blues pursuant to the Co-Promotional Agreement for the Throttlefest 2014 event. House of Blues asserts that Throttlefest, LLC was also acting as an agent of these Third-Party Defendants, including Full Throttle and Sloon Shine. (HOB Third Party Compl., ¶ 124). Michael Ballard and Jesse James Dupree both attended the Throttlefest 2014 event. (Id. at ¶¶ 112, 113). While Ballard is a managing member of Throttlefest, LLC, Ballard is the sole managing member of Full Throttle and Sloon Shine. House of Blues contends that Ballard attended Throttle Fest 2014 as a representative of all of these companies. (Id. at ¶ 112). Similarly, Dupree is a managing member of Throttlefest, LLC and the sole incorporator and officer of American Outlaw Spirits. House of Blues contends that Dupree attended Throttle Fest 2014 as a representative of this company and corporation. (Id. at ¶ 113). It was Michael Ballard and Jesse James Dupree, acting on behalf of all of these entities, who had the opportunity and responsibility to supervise and control Michael Garner and financially benefited from his actions. (Id. at ¶¶ 97-117). Assuming *arguendo* that Full Throttle and Sloon Shine were not beneficiaries under the contract, they can still be liable in tort where they voluntarily undertook a duty to procure and supervise Fajita Mike for Throttle Fest 2014, to

promote and distribute their alcohol at the event, and to obtain insurance coverage for the event. See discussion in Part III.B, *infra*.

Accordingly, even if Full Throttle and Sloon Shine's settlement agreements were entered into in good faith, such cannot warrant dismissal of House of Blues' claims for breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification.

C. Dismissal of Its' Claims Would Violate House of Blues' Due Process and Equal Protection Rights

While Throttlefest, LLC argues that *Smith v. Tiffany* forecloses the notion of placing a settling party on the jury verdict form for purposes of allocation of fault, **the Supreme Court's opinion did not preclude the of filing a third party action, declaratory judgment action or any motion pursuant to Rule 14 or 19 of the South Carolina Rules of Civil Procedure against a settling tortfeasor for the sole purpose of allocation of fault under S.C. Code Ann. § 15-38-15, on the grounds of due process and equal protection.** Specifically, the Court stated that "because Appellants' brief includes only conclusory reference to 'due process consideration of fairness and equity' and sets forth no substantive legal argument or supporting citations to authority (even to the due process clauses themselves), we do not consider Appellants' argument that the trial court erred in finding their due process rights were violated by the inability to join [third party defendant] or include him on the verdict form for purposes of allocation." *Smith*, 419 S.C. at 558, n. 3, 799 S.E.2d at 484, n.3.

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

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

S.C. Const. Art. I, § 3.

The United States Constitution similarly states:

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

U.S. CONST. amend. XIV.

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

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

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

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

...

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

Section 15-38-15 continues:

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

The dismissal of a third-party action against a settling tortfeasor for the purpose of naming the settling tortfeasor as a defendant violates the due process and equal protection rights afforded under the modified joint and several liability law. In short, section 15-38-15 would provide protections to some defendants (i.e., in cases where all named tortfeasors are named as a defendant) while extinguishing the protections to others (i.e., in cases where not all tortfeasors are named as a defendant). In the latter scenario, the defendants are “forced to absorb the entire fault of non-parties.”

Section 15-38-15(D) provides no safety net. While the statute permits for a defendant to assert that an “empty-chair defendant” contributed “to the alleged injury or damages and/or may

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

Justice Pleicones, in his dissent, illustrates this principal through several hypotheticals. See Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (Pleicones, J., dissenting); Town of Kearny v. Brandt, 214 N.J. 76, 67 A.3d 601 (2013) (finding that where the joint and several liability statute regarding allocation of fault references allocation among the parties, a named defendant can request that a jury consider the specific apportionment of fault as to nondefendant tortfeasors); see generally Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (Kan. 1978) (“The legislature intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. **There is nothing**

inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.”); Amity S. Edmonds, Tort Liability in South Carolina: Does Section 15-38-15 Truly Limit Joint and Several Liability or Is It A Mere Illusion in the Realm of Phantom Tortfeasors?, 5 Charleston L. Rev. 679 (2011) (“It is fundamentally unfair to hoist the entire burden of a phantom or absent tortfeasor on a marginally negligent co-defendant However, if South Carolina courts fail to allow apportionment of fault to nonparty or settling defendants, the ostensible protection provided to defendants within the Act from the harsh injustice of joint and several liability could all but vanish without a trace.”).

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

IV. House of Blues Has Sufficiently Pled Its Cause of Action Against These Third-Party Defendants

South Carolina’s general rules of pleading provide:

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

Rule 8(e)(2), SCRCp. To the extent this Court determines that there are any defects in its pleading, the proper relief would be to allow leave to amend the Complaint. Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted. Skydive Myrtle Beach, Inc., 426 S.C. at 189, 826 S.E.2d at 592. “A complaint is not subject to dismissal with prejudice unless it appears *to a certainty* that no relief can be granted under any set of facts that can be proved in support of its allegations.” Id. at 189-90, 826 S.E.2d at 592-93 (quoting Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006)).

A. House of Blues Has Viable Claims for Breach of Contract and Contractual Indemnification

“Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff.” Windsor Green Owners Ass’n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (quoting Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct.App. 1994)). “However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” Id.

These Third-Party Defendants assert that “because [they] were not in privity with House of Blues or an intended, third-party beneficiary of the Co-Promotion Agreement, House of Blues’ breach of contract and contractual indemnification claims must be dismissed.” (Full Throttle Memo. in Supp. of Mot. to Dismiss, p. 10); (Sloon Shine Memo. in Supp. of Mot. to Dismiss, p.

10); (American Outlaw Spirits Memo. in Supp. of Mot. to Dismiss, p. 8). Here, it is undisputed that these Third-Party Defendants are not a named party to the Co-Promotion Agreement.

The Co-Promotion Agreement was executed by and between Jesse James Dupree as “president” of Throttlefest, LLC and House of Blues, with an effective date of March 19, 2014. The Agreement concerned 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 HOB Third Party Compl., ¶¶ 97, 124). However, House of Blues alleges that Throttlefest, LLC was acting as the agent of these Third-Party Defendants, who were intended beneficiaries under the Agreement and did—in fact—actually benefit from the Agreement. (See id. at ¶¶ 115-117, 119-124).

The intertwined relationship of Throttlefest, LLC and these Third-Party Defendants is seen first in their ownership and management. Michael Ballard and Jesse James Dupree are the managing members of Throttlefest LLC. (HOB Third Party Compl., ¶¶ 97, 112-113). Ballard is also the sole managing member of Full Throttle and Sloon Shine. (Id. at ¶ 112). Dupree is also the sole incorporator and officer of American Outlaw Spirits. (Id. at ¶ 113). Further, both Sloon Shine liquor and American Outlaw Spirits liquor were being distributed by Fajita Mike at Throttle Fest 2014. (Id. at ¶¶ 105-109); see also discussion in Part I, supra. To the extent that the sale of alcohol would have benefited House of Blues, by providing profits, the distribution of free alcohol provides no benefit to House of Blues. Rather, if the alcohol was given away by Fajita Mike to Travis Wagoner free, as alleged, it served to benefit no one other than the alcohol distributors and the Full Throttle and Throttle Fest brands. Thus, while additional discovery is necessary, House of Blues has sufficiently alleged its cause of actions for breach of contract and contractual indemnity against these Third-Party Defendants.

B. House of Blues Has Viable Claims for Negligent Misrepresentation, Negligence, Equitable Indemnification and Contribution

These Third-Party Defendants argue both that they are not in privity of contract such that the contractual causes of action should be dismissed and that the negligence cause of action should be dismissed because it is premised upon contractual duties. (Full Throttle Memo. in Supp. of Mot. to Dismiss, p. 10); (Sloon Shine Memo. in Supp. of Mot. to Dismiss, p. 10); (American Outlaw Spirits Memo. in Supp. of Mot. to Dismiss, pp. 8-9). It is true that “[i]n most instances, a negligence action will not lie when the parties are in privity of contract.” Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) “When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.” Id.

In the present case, in addition or alternatively to the breach of contract claim discussed in Part III.A, supra, House of Blues has asserted that these Third-Party Defendants made false representations to House of Blues regarding insurance coverage and regarding their experience and conduct at Throttle Fest 2014, upon which House of Blues justifiably relied. (HOB Third Party Compl., ¶¶ 129-137). House of Blues has also asserted similar claims for negligence against these Third-Party Defendants. (HOB Third Party Compl., ¶¶ 138-144). Assuming *arguendo* that Full Throttle and Sloon Shine were not beneficiaries under the contract, they can still be liable in tort where they voluntarily undertook a duty to procure and supervise Fajita Mike for Throttle Fest 2014, to promote and distribute their alcohol at the event, and to obtain insurance coverage for the event. See Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019) (“While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken. The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether

the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder.” (internal citations and quotations omitted)).

With respect to the equitable indemnification claim, House of Blues may properly pled contractual and equitable indemnification as alternative claims. House of Blues does not intend to pursue double recovery under both causes of action. See, e.g., Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 188, 826 S.E.2d 585, 592 (2019) (finding plaintiff properly pled alternative theories of liability). Further, as discussed in Part III, supra, the settlement agreements of Full Throttle and Sloon Shine do not necessitate dismissal.

Accordingly, House of Blues’ additional and alternative tort and equity claims are properly pleaded.

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

House of Blues reiterates that an evaluation of the statute of limitations defense cannot be properly conducted without reference to matters outside of the Third-Party Complaint itself. See Part II, supra. Nonetheless, the Third-Party Complaint was timely filed on October 18, 2019, where House of Blues first notice and discovery of the underlying first party claim, which in turn gave rise to the third-party claims, was a letter dated October 20, 2016, from Plaintiff Kelsey’s counsel sent certified mail to House of Blues. See S.C. Code Ann. § 15-3-530 (establishing three years limitations period).

These Third-Party Defendants correctly note that the statute of limitations period applicable to the third-party claims is three years. Under South Carolina law, however, the limitations period “begins to run when the party either knew or should have known that some legal right had been invaded.” City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692

S.E.2d 510, 513 (2010); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) (“Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence.”). “The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.” McAlhany v. Carter, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015).

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

Here, it not dispositive that Throttlefest 2014 was held from May 9-17, 2014 such that these Third-Party Defendant’s misconduct must have occurred before and during that time period. While actual notice is also not the ultimate test, there is no evidence that House of Blues had reason to believe that any these Third-Party Defendants had done anything wrong prior to notice of the first-party claim from Kelsey’s counsel. The motorcycle accident injuring first-party Plaintiff Kelsey did not occur on House of Blues property and was unknown to them until notified of the claim by Kelsey’s lawyer by letter dated October 20, 2016. It was in that letter that House of Blues was notified of first-party Plaintiff Kelsey’s allegation that Fajita Mike overserved a bar patron Travis Wagoner, resulting in the motorcycle accident and his severe injuries. Travis Wagoner

admitted that he was not sure if anyone at House of Blues saw him being served by Fajita Mike. (**Exhibit D**, Depo. Tr. of Travis Wagoner, p. 45, line 20 – p. 46, line 2). It was during the course of discovery in the first-party litigation that House of Blues learned additional facts supporting its claims against these Third-Party Defendants, including their failure to procure the requisite insurance and the specific liquors involved. Thus, the operative date for the statute of limitations is the earliest date from which House of Blues knew or should have known of its third-party claims against these Third-Party Defendants, which was October 20, 2016.

Though this Court need not resort to tolling to find that there was no violation of the statute of limitations, equitable tolling should apply to the period when these Third-Party Defendants were parties to the first-party litigation. In addition to statutory tolling mechanisms, “in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.” Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). “‘Tolling’ refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting.” 51 Am. Jur. 2d Limitation of Actions § 169 (2000). “Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period.” Id. “The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.” Hooper, 386 S.C. at 115, 687 S.E.2d at 32.

Here, until these Third-Party Defendants were dismissed as parties in the first party litigation, House of Blues was adequately protected by the assertion of many of its same claims against these Third-Party Defendants having been made by Plaintiff. Once these Third-Party Defendants were dismissed, the third-party claims became necessary to protect House of Blues.

These Third-Party Defendants were well aware during their involvement in the first-party litigation that House of Blues defense included that Fajita Mike was truly the agent and employee of Throttlefest, LLC and these Third-Party Defendants, who were solely responsible for his supervision and control. Thus, for Full Throttle and Sloon Shine equitable tolling should be applied from May 12, 2017, when Plaintiff Kelsey's Complaint was filed, through August 13, 2019, when Full Throttle and Sloon Shine were dismissed from the first-party action. For American Outlaw Spirits equitable tolling should be applied from May 12, 2017, when Plaintiff Kelsey's Complaint was filed, through January 22, 2018, when American Outlaw Spirits was dismissed from the first-party action.

Similarly, equitable estoppel may preclude dismissal under these Third-Party Defendants' statute of limitations theory. In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit. Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 339 (Ct. App. 2001). "Application of equitable estoppel does not require an intentional misrepresentation." Id. at 360, 559 S.E.2d at 338-39. "It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire." Id. "Whether the defendant's actions lulled the plaintiff into "a false sense of security" is usually a question of fact." Id. at 360-61, 559 S.E.2d at 339. Here, these Third-Party Defendants actively defended the first-party litigation for almost a year (American Outlaw Spirits) and over two years (Full Throttle and Sloon Shine), leading House of Blues to believe that its third-party claims did not need to be asserted. These Third-Party Defendants were well aware that House of Blues defense included that Fajita Mike was truly an agent and employee of Throttlefest, LLC and these Third-Party Defendants, who were solely responsible for his supervision and control. Rather than

admit their true connection to Fajita Mike, these Third-Party Defendants falsely claimed that they had no connection to Fajita Mike's presence at Throttlefest 2014, fraudulently inducing a settlements and dismissal from the first-party lawsuit.

In sum, the statute of limitations issue is not proper for 12(b)(6) dismissal, the third-party claims were timely filed, and any untimely filing should be excused under the doctrines of equitable tolling and/or estoppel. Accordingly, dismissal is not warranted. See Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."); Arant v. Kressler, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) ("When there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide."); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("Whether a claimant knew or should have known that they had a cause of action is question for the jury.").

CONCLUSION

Based on the foregoing, House of Blues respectfully requests the Court deny the motions to dismiss filed by Full Throttle, L.L.C., Full Throttle Sloon Shine, LLC, and American Outlaw Spirits Incorporated.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

COLLINS & LACY, P.C.

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

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION'S
MEMORANDUM IN OPPOSITION TO FULL
THROTTLE, L.L.C., FULL THROTTLE
SLOON SHINE, LLC, AND AMERICAN
OUTLAW SPIRITS INCORPORATED'S
MOTION TO DISMISS**

Murrells Inlet, South Carolina
February 5, 2020

EXHIBIT A

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 Horry County

4 DEPOSITION OF ROBERT SIMEONE
30(b)(6) HOUSE OF BLUES MYRTLE BEACH
5 VOLUME 1

6 DOUGLAS KELSEY AND MARK SHIMMINGER,
7 Plaintiffs,

8 vs. CASE NO. 2017-CP-26-3008
9 HOUSE OF BLUES MYRTLE BEACH RESTAURANT
CORPORATION; HOUSE OF BLUES CONCERTS, INC.; HOB
10 ENTERTAINMENT, INC.; FULL THROTTLE, LLC; FULL
THROTTLE SLOON SHINE, LLC; THROTTLEFEST, LLC;
11 MICHAEL GARNER; AND TRAVIS SCOTT WAGONER,
12 Defendants.

13 DEPONENT: ROBERT SIMEONE

14 DATE: NOVEMBER 12, 2018

15 TIME: 10:03 A.M.

16 LOCATION: COLLINS & LACY
17 MURRELLS INLET, SOUTH CAROLINA

18 REPORTED BY: RONDA K. BLANTON, RPR
19 NCRA REGISTERED PROFESSIONAL
REPORTER

CLARK & ASSOCIATES, INC.

20 P.O. BOX 73129

CHARLESTON, SC 29415

21 843-762-6294

office@clark-associates.com

22 WWW.CLARK-ASSOCIATES.COM
23
24
25

1 A P P E A R A N C E S
2 ON BEHALF OF THE PLAINTIFF:
3 COLEMAN GLEDHILL HARGRAVE MERRITT
 & RAINSFORD, PC
4 BY: JAMES RAINSFORD, ESQ.
 129 East Tryon Street
5 Hillsborough, NC 27278
6 ON BEHALF OF THE DEFENDANTS HOUSE OF BLUES MYRTLE
 BEACH RESTAURANT CORPORATION; HOUSE OF BLUES
7 CONCERTS, INC.; AND HOB ENTERTAINMENT, INC.:
8 COLLINS & LACY, PC
 BY: CHRISTIAN STEGMAIER, ESQ.
9 1330 Lady Street
 Columbia, SC 29201
10
11 ON BEHALF OF THE DEFENDANT THROTTLEFEST, LLC:
12 BARNWELL WHALEY PATTERSON & HELMS, LLC
 BY: JEFFREY M. BOGDAN, ESQ.
 288 Meeting Street, Suite 200
13 Charleston, SC 29401
14 PRESENT: Kellie Honeycutt
 30(b)(6) House of Blues Myrtle Beach

15 - - -
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1 Mr. Stegmaier, asked a question that was curious
2 to me. So I'm going to ask you the same
3 question.

4 Do you have any recollection of making
5 an express -- being ThrottleFest, LLC, and the
6 House of Blues Myrtle Beach Restaurant
7 Corporation -- having an express agreement or an
8 express understanding that Fajita Mike was to
9 only be on the deck rather than inside the Music
10 Hall during ThrottleFest?

11 A. State that again.

12 Q. Sure.

13 Do you have a recollection of having an
14 express understanding with ThrottleFest that
15 Fajita Mike and his activities would be limited
16 to the deck versus inside the Music Hall?

17 A. Fajita Mike's movements were under the
18 direction of Mike Ballard. Mike Ballard told
19 Fajita Mike the role that he wanted him to play.

20 Q. How do you know?

21 A. Mike told me that's what he was going to
22 have him do.

23 Q. What did Mike tell you that he was going
24 to have him do?

25 A. That he wanted him to walk around. He

1 Q. So House of Blues -- Steve-O, who was
2 not a House of Blues employee, had supervisory
3 power over House of Blues employees?

4 A. Over the crew that Mike brought that we
5 put on our payroll so they could pour drinks.
6 They brought a bar manager with them every year
7 to schedule those girls, tell them when they
8 worked -- when they would work and make sure that
9 we knew who was coming. They would communicate
10 with us and tell us what staff they were bringing
11 with them and when they were going to show up
12 each year.

13 Q. Prior to ThrottleFest, did you know
14 Steve-O?

15 A. No.

16 Q. How was House of Blues able to evaluate
17 whether Steve-O would be, I guess, an appropriate
18 individual to manage people selling alcohol under
19 the House of Blues license?

20 A. He came -- he came with Mike. I mean,
21 that was part of Mike's entourage, you know. The
22 people that we listed before were part of
23 ThrottleFest's crew: Mike, Jesse, Goat, Fajita.

24 The first year Fajita showed up, he was
25 cooking food; and we didn't -- we were told that

1 House of Blues allowed to assign that sort of
2 thing to an outside entity? Meaning, Mike
3 Ballard wasn't your employee; correct?

4 A. No. He was our partner.

5 Q. I thought the contract -- the
6 Co-Promotion Agreement has a clause saying that
7 it's not a partnership. Let's look at it. All
8 right. I'm marking Plaintiff's Exhibit --

9 (Plaintiff's Exhibit No. 20 was marked
10 for identification.)

11 Q. I'm going to hand you Plaintiff's
12 Exhibit No. 20. Copies for your counsel.
13 Actually, we're going to be moving on to 21
14 quickly. I had an interesting question about
15 this one.

16 Can you go to -- can you see at the top
17 on page 1, this seems to be an email from Jovanna
18 Quinones to Jesse Dupree.

19 Have you ever seen this email before?

20 A. I don't think so.

21 Q. Okay. Well, the date of this email is
22 March 19, 2014, at 4:41 p.m. And it references
23 agreements for this year's Full ThrottleFest. So
24 if you turn to page 2.

25 A. (Complies with request.)

1 Q. I guess the first full paragraph there
2 indicates the agreement is being entered into
3 between Myrtle Beach -- House of Blues Myrtle
4 Beach Restaurant Corporation and Full Throttle
5 Saloon, LLC; and the signature line at the bottom
6 is for Full Throttle, LLC, as well.

7 Do you see that?

8 A. Uh-huh, I do.

9 Q. And then all the way on the last page of
10 Plaintiff's Exhibit No. 20, same thing.
11 Signature lines for Full Throttle Saloon.

12 Do you see that?

13 A. Correct.

14 Q. Okay. Now, the executed copy of that
15 that we were given changes -- it doesn't have
16 Full Throttle Saloon, LLC, listed in the
17 signature contract. It's changed to
18 ThrottleFest.

19 Did you ever see this contract actually
20 had Full Throttle Saloon, LLC, listed as the
21 co-promotor?

22 A. It's -- it's possible I've seen it, you
23 know. I don't -- I don't off the top of my head
24 recall it, but it's possible.

25 Q. The executed contract that we have a

1 A. Uh-huh. (Nods head.)

2 Q. Why?

3 A. 2,000 people coming to a show, drinking,
4 you know, the liquor that day -- you've been to a
5 show there. So you know what it's like, what we
6 do with those; and those are big ticket. Those
7 are big-ticket events; and when you're doing
8 four, five, and six shows a week, that's a lot of
9 cash. And that's what was attractive to Jesse
10 and Mike to become a partner with us.

11 Q. At the 30(b)(6) deposition of
12 ThrottleFest, there was an assertion that was
13 made that House of Blues wanted to partner with
14 ThrottleFest so that the bike crowd would come
15 from, I guess, the southern part of Myrtle Beach
16 up to Barefoot Landing.

17 So I guess my question to you is: Is
18 that your understanding, kind of, the genesis of
19 the relationship as well for the House of Blues
20 was to attract some of that Bike Week crowd?

21 A. There's a bigger cultural answer to that
22 than just ThrottleFest.

23 Q. Okay. Tell me what that means.

24 A. So back in '07 -- I may have my dates
25 wrong. You could look this up. '06-'07, the

1 City of Myrtle Beach enacted a no-helmet law. A
2 helmet law for motorcycles. So to ride in the
3 city limits of Myrtle Beach, you had to wear a
4 helmet.

5 That had everything to do with the
6 Harley spring rally depleting to, maybe, half of
7 what it was before that. So before that, we were
8 ringing cash registers on the deck with Full
9 Throttle, without Full Throttle. It didn't
10 matter because there was upwards of 400 to
11 450,000 bikers coming to the beach; and there was
12 plenty of room for everybody.

13 Murrells Inlet was always, kind of, the
14 hub because of the two Suck Bang Blow units and
15 then the whole Marsh Walk thing. Once the helmet
16 law went into effect -- I think it was in effect
17 for three years -- Bike Week became almost
18 nonexistent. Then they -- then the Judge
19 reversed it, and it started to come back; but to
20 this day, it's not back to what it was pre-helmet
21 law.

22 So one of the things, again -- and I,
23 you know, I'm not blaming Jim. But Jim is the
24 one that, because he had a relationship with
25 Jesse over 25 years, they came up with the idea

1 of bringing Full Throttle, which at the time was
2 still a popular TV show on, I think, True TV.
3 They weren't into reruns just yet.

4 And they said, you know, "Why don't we
5 bring the festival to North Myrtle Beach? Maybe
6 that'll help invigorate, get some more bikers
7 there." And that's how it started. We started
8 with three days in '12, four days in '13, and
9 then a week in '14. And that's -- and that's how
10 it was born.

11 Q. You say a week in '14, but it was almost
12 ten days. I mean, it was from the 9th through
13 the 17th; correct?

14 A. It was really Friday through Saturday.

15 Q. Okay. Okay.

16 A. I mean, but -- they say Bike Week goes
17 from the Friday through the following Sunday, but
18 the Sunday everybody's leaving. There isn't --
19 there's nothing that happens on the Sunday of the
20 end of the week.

21 Q. Okay.

22 A. So it, you know, it was always an entity
23 where we had an asset. They had an asset. We
24 were going to take the two assets and bring them
25 together and then share in what we each could do,

EXHIBIT B

In The Matter Of:

*Kelsey, et al. v.
House of Blues, et al.*

*Jesse James Dupree, 30(b)(6)
October 09, 2018*

*Regency-Brentano, Inc.
13 Corporate Square
Suite 140
Atlanta, Georgia 30329
404.321.3333*



REGENCY-BRENTANO, INC.
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Page 1

1 STATE OF SOUTH CAROLINA - COUNTY OF HORRY
2 IN THE COURT OF COMMON PLEAS - 15TH JUDICIAL CIRCUIT
3
4 Douglas Kelsey and Mark Shimmenger,
5 Plaintiffs, CIVIL ACTION FILE
6 vs. 2017-CP-26-03008
7 House of Blues Myrtle Beach
8 Restaurant Corporation; House of
9 Blues Concerts, Inc.; HOB
10 Entertainment, Inc.; Full Throttle, LLC;
11 Full Throttle Sloop Shine, LLC;
12 Throttlefest, LLC; American Outlaw
13 Spirits, Inc.; Michael Ballard; Jesse
14 James Dupree; Michael Garner; and
15 Travis Scott Wagoner,
16 Defendants.
17
18 30(b)(6) DEPOSITION OF
19 THROTTLEFEST, LLC
20 THROUGH JESSE JAMES DUPREE
21
22 October 9, 2018
23 9:50 a.m.
24
25 Hilton Garden Inn Atlanta NW
Kennesaw Town Center
895 Cobb Place Boulevard NW
Kennesaw, Georgia 30144
Michelle J. Ruiz, CCR, B-1397

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Page 2

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21 Blues Concerts, Inc. and HOB
22 Entertainment, Inc.:
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Page 1

C O N T E N T S		
	EXAMINATION	FURTHER EXAMINATION
1	30(b)(6) DEPOSITION OF THROTTLEFEST, LLC	
2	THROUGH JESSE JAMES DUPREE	
3	BY MR. RAINSFORD	PAGE 4 PAGE 110
4	BY MR. STEGMAIER	PAGE 56 PAGE 113
5		
6		
7		
8	E X H I B I T S	
9	PLAINTIFFS' EXHIBITS	IDENTIFICATION PAGE
10	EXHIBIT 1	CONTRACT 7
11	EXHIBIT 2	CONTRACT 15
12	EXHIBIT 3	PHOTOGRAPH 26
13	EXHIBIT 4	PHOTOGRAPH 26
14	EXHIBIT 5	PHOTOGRAPH 26
15	EXHIBIT 6	PHOTOGRAPH 26
16	EXHIBIT 7	PHOTOGRAPH 26
17	EXHIBIT 8	PHOTOGRAPH 26
18	EXHIBIT 9	PHOTOGRAPH 26
19	EXHIBIT 10	PHOTOGRAPH 26
20	EXHIBIT 11	PHOTOGRAPH 26
21	EXHIBIT 12	PHOTOGRAPH 26
22	EXHIBIT 13	PHOTOGRAPH 26
23	EXHIBIT 14	PHOTOGRAPH 26
24	EXHIBIT 15	REIMBURSEMENT LOG 44
25		

Page 2

1 OCTOBER 9, 2018
2 30(b)(6) DEPOSITION OF
3 THROTTLEFEST, LLC
4 THROUGH JESSE JAMES DUPREE
5 PROCEEDINGS
6 JESSE JAMES DUPREE,
7 being first duly sworn, was examined and
8 testified as follows:
9 EXAMINATION
10 BY MR. RAINSFORD:
11 Q Good morning. My name is James Rainsford
12 and I'm the attorney for the plaintiffs in this
13 case.
14 Just a couple of ground rules. Have you
15 ever had your deposition taken before?
16 A I have.
17 Q Okay. How long ago? Based on the delay,
18 it seems like it wasn't recent?
19 A It's not been recent.
20 Q Well, couple of things then. During the
21 deposition, if at any point I ask you a question and
22 you don't understand my question, please let me
23 know. Because, if you answer my question, I will
24 assume that you understand what I'm asking you.
25 Does that seem fair?
A Yes.

Page 9

1 Q Okay. Where did you meet him?
2 A At the House of Blues.
3 Q Was it prior to the beginning of
4 Throttlefest 2014?
5 A I do not recall the days, time frame, if
6 it was prior or during.
7 Q Okay. So, lots of different people from
8 the show, Full Throttle Saloon attended Throttlefest
9 2014, correct?
10 A Please clarify that question.
11 Q Sure. You were on a television show
12 called Full Throttle Saloon, correct?
13 A Yes.
14 Q And, you attended Throttlefest 2014,
15 correct?
16 A Yes.
17 Q Michael Ballard was on that television
18 program, correct?
19 A Yes.
20 Q He attended Throttlefest 2014, correct?
21 A Yes.
22 Q Michael Garner, also known as Fajita Mike,
23 was on the television program, correct?
24 A He did appear on the TV show.
25 Q You have seen the television show,

Page 10

1 correct?
2 A Yes.
3 Q So, he was in certain episodes?
4 A Yes, he did appear on the Full Throttle TV
5 show.
6 Q He also was at Throttlefest 2014, correct?
7 A Yes, he was.
8 Q Goat. What is --
9 A Yes.
10 Q What is Goat's real name? I have it
11 somewhere in the documents.
12 A Greg Cook.
13 Q Thank you. And, he attended Throttlefest
14 2014?
15 A Yes.
16 Q Michael Ballard's wife, Angie, was on the
17 program -- on the show, correct?
18 A Yes, she was.
19 Q And, she attended Throttlefest 2014,
20 correct?
21 A I don't recall if that -- if she made that
22 year or not. She had had some pregnancy issues.
23 Q I remember on one of the seasons their
24 child had been born, Angie and Michael's child had
25 been born, correct?

Page 10

1 A Yes.
2 Q And, you and Michael get in trouble a
3 little bit with her for using the kid in an episode?
4 A Yes.
5 Q We don't need to go into that, but.
6 A Yes.
7 Q How did all of these people show up for
8 Throttlefest? Did you arrange for these people to
9 come to Throttlefest, these people that I have just
10 mentioned?
11 A How did these people? Who are these
12 people? Forgive me, I'm just trying to get to
13 clarity on these people.
14 Q Goat, Fajita Mike, Michael Ballard, all
15 these people were at Throttlefest 2014. And, what
16 I'm trying to figure out is, did you arrange for
17 everyone to be there as president of Throttlefest
18 LLC?
19 A Only Michael, Greg Cook, Angie and myself
20 and, of course, Angie had pregnancy problems. I
21 believe that was the year. Again, could be -- all
22 the years run together. I do a lot of things and
23 sometimes it's hard to remember a year -- four or
24 five years back exactly which ones are the ones she
25 didn't make it in.

Page 11

1 Q Is it fair to say the aim of the
2 Throttlefest was to transform the House of Blues
3 into the Full Throttle experience?
4 A So, just to clarify your question, you're
5 asking me what the goal was for Throttlefest?
6 Q Yes, sir.
7 A Yes. The House of Blues is located in
8 North Myrtle Beach. Myrtle Beach bike week
9 predominantly happens in Murrells Inlet, which is on
10 the other side of Myrtle Beach proper. The House of
11 Blues languishes during that week because there is
12 no reason for the motorcycle enthusiast to make the
13 trek; with traffic and such could be over 30, 45
14 minutes to come through Myrtle to get up to the
15 House of Blues.
16 So, to answer your question, the reason we
17 were there was to be a lost leader for people to
18 come to the House of Blues. The House of Blues
19 needed something to have some integrity with the
20 bike enthusiasts.
21 Q And, did the House of Blues reach out to
22 you to try to arrange that or did you reach out to
23 the House of Blues, if you recall?
24 A There is an executive named Jim Malleone
25 that is my longest running relationship as far as

1 Q You don't have any idea whether Mr. Garner
2 drafted that himself or he had any sort of
3 assistance?

4 A I just know from my attorney that he -- I
5 know that he had filed an affidavit.

6 Q Is there a distributor that American
7 Outlaw Spirits works with to distribute its product?

8 A American Outlaw Spirits does not work with
9 any distributors.

10 Q Do you know of distributors that buy the
11 product?

12 A Yes.

13 Q How many distributors?

14 A That's a more complex question. There is
15 Republic National, which is in multiple states but
16 they're called different things. There is Johnson
17 Brothers. There is Bay State. There is major
18 distributors. There is multiple distributors across
19 the country.

20 Q Right. Who would distribute the product
21 in South Carolina?

22 A Republic National, RNDC.

23 Q Do you know who the retailer in Myrtle
24 Beach was that bought the bourbon product from the
25 distributor for the May 2014 event?

1 A Do I know who the retailer is?

2 Q Right.

3 A Being -- what do you -- again, I don't
4 know. That's a broad term. I don't know who you're
5 calling the retailer.

6 Q Well, you know about -- as somebody --

7 A The House of Blues is the retailer in this
8 case?

9 Q That's a fair question. But, being in the
10 business, you are cognizant of the three tier
11 system?

12 A Yes.

13 Q So, the distributor has to sell it to
14 somebody in South Carolina?

15 A Yes.

16 Q Do you know who the distributor would have
17 sold it to for resale to the House of Blues?

18 A That was House of Blues. House of Blues
19 would have to answer that question.

20 Q That's fine. That's fair. I just didn't
21 know if you knew.

22 A I don't.

23 Q Now, American Outlaw Spirits, does it have
24 any other product other than the bourbon?

25 A Yes.

1 Q What are those products?

2 A The Devil's Devil.

3 Q What kind of alcohol is that?

4 A It's a cinnamon whiskey.

5 Q Any other product?

6 A A Tennessee -- there's a bourbon and a
7 Tennessee -- there's honey bourbon, spice bourbon
8 regular bourbon, the Tennessee whiskey and the
9 Devil's Devil cinnamon whiskey.

10 Q Is the Devil's Devil a separate label from
11 Jesse James Dupree's bourbon; is it sold as Devil's
12 Devil?

13 A Yes.

14 Q Okay. I haven't seen it, so that's why
15 I'm asking the question.

16 A It just came out this year.

17 Q Okay. So, you've already --

18 A Only in a couple of places.

19 Q You have answered the question for me
20 then. So, that particular product wasn't for sale
21 in May 2014?

22 A No.

23 Q What American Outlaw Spirits products were
24 available for sale in May 2014?

25 A Again, you're asking -- this is me

1 personally outside of --

2 Q Yes, that's fair.

3 A Just for the record -- Throttlefest?

4 Q Yes.

5 A Throttlefest has no --

6 Q Got you.

7 A -- business with any of those things.

8 Q That's clear.

9 A Very clear. So, your question is, what
10 products were sold?

11 Q What American Outlaw Spirits were
12 available for sale in May of 2014?

13 A To the best of my recollection, the Jesse
14 James products that were selling in 2014 available
15 for sale would be the Jesse James regular bourbon,
16 the Jesse James spice bourbon, and the Jesse James
17 honey bourbon.

18 Q And, to your personal knowledge or
19 recollection, were all three of those products for
20 sale at House of Blues May of 2014 during
21 Throttlefest?

22 A To the best of my recollection, I think
23 they were all three there. I also recall that there
24 was times that the House of Blues was not able to
25 get all three of them.

1 Q So, I guess the only thing I'm focused on
2 is Throttlefest during that week in May. Were all
3 three products available?

4 A I don't recall. That's a question you'll
5 have to ask House of Blues.

6 Q Okay. Was there anybody employed by
7 American Outlaw Spirits to be at House of Blues
8 Myrtle Beach in May of 2014 to promote the product?

9 A American Outlaw Spirits has no employees.

10 Q Okay. Was Mr. Garner employed to promote
11 the product?

12 A No.

13 Q I think you had related to me that you
14 don't -- as far as Exhibit Number 3, you don't know
15 what kind of, presumably alcohol, that is depicted
16 in that photograph, correct?

17 A I have no clue. It's not -- again, it's
18 not my -- I wouldn't know.

19 Q So, with regard to the other photographs,
20 you know, obviously there is some photographs where
21 he's holding beer. I understand that.

22 A I don't have any affiliation with
23 Budweiser.

24 Q With regard to the spirits or the liquor
25 that are depicted in the other photographs -- and

1 BY MR. STEGMAIER:

2 Q That's fine. So in Plaintiffs' Exhibit
3 12, Mr. Garner is depicted in a photograph of a
4 S'Loonshine related product, correct?

5 A There is a woman -- there is a lady that I
6 recognize as a House of Blues employee that is
7 holding a bottle of S'Loonshine.

8 Q How do you know she's a House of Blues
9 employee?

10 A Because, I remember seeing her working the
11 event.

12 Q So, she's not a S'Loonshine employee?

13 A So, it'd be my assumption because the
14 House of Blues was in control of all the alcohol and
15 all of its employees that had anything to do with
16 alcohol. They made it very clear to us that they
17 were in control of all that.

18 Q I got you. But, the question I asked you
19 is, the alcohol that's depicted there, the spirit
20 that's depicted in the photograph, that's a
21 S'Loonshine related product?

22 A That bartender is holding a bottle of
23 S'Loonshine as she stands beside Mike Garner holding
24 a Budweiser.

25 Q Same thing with Exhibit 10, that's a

1 you can certainly look through them -- is it fair to
2 say other than what we are looking at there in
3 Exhibit 3, that what is depicted as far as liquor or
4 alcohol or spirits, other than the beer, is either a
5 S'Loonshine related product or an American Outlaw
6 Spirits related product that Mr. Garner has in his
7 possession?

8 MR. BOGDAN: Object to the form.

9 BY MR. STEGMAIER:

10 Q You can look through the photographs.
11 It's either yes or no.

12 A I don't -- please clarify your question.

13 Q So, through these photographs, Mr. Garner
14 is holding liquor, spirits, in some of these
15 photographs. I'm not talking about beer. We're
16 talking about liquor or spirits.

17 A Okay.

18 Q In those photographs where he is holding
19 the liquor or spirits, other than in photograph
20 three, is it fair to say that what he's holding is
21 either a S'Loonshine related product or an American
22 Outlaw Spirits related product?

23 MR. BOGDAN: Object to the form.

24 THE WITNESS: I can't -- there is various
25 photographs and there's -- it's --

1 S'Loonshine related product that's depicted in that
2 photograph, correct?

3 A It does appear to be S'Loonshine, correct.

4 Q And Plaintiffs' Exhibit 9, that appears to
5 be an American Outlaw Spirit related product
6 depicted in that photograph, correct?

7 A There is a lady holding a bottle of what
8 appears to be Jesse James bourbon, which again, is
9 in her hands.

10 Q In Plaintiffs' Exhibit 6, Mr. Garner
11 appears to be holding a S'Loonshine related product,
12 correct, in addition to the Budweiser?

13 A Yes, he does.

14 Q And then, Plaintiffs' Exhibit 5, the lady
15 in that photograph that's situated next to Mr.
16 Garner, that's a S'Loonshine related product,
17 correct?

18 A The lady is holding a bottle of
19 S'Loonshine.

20 Q Sure. And, in Plaintiffs' Exhibit 4, Mr.
21 Garner appears to be holding, in addition to a beer,
22 a S'Loonshine related product, correct?

23 A And, he appears to love Budweiser.

24 Q Is that a yes or no --

25 A Yes.

EXHIBIT C

STATE OF SOUTH CAROLINA - COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS - 15TH JUDICIAL CIRCUIT

Douglas Kelsey and Mark Shimmenger,

Plaintiffs,

CIVIL ACTION FILE

vs.

2017-CP-26-03008

House of Blues Myrtle Beach
Restaurant Corporation; House of
Blues Concerts, Inc; HOB
Entertainment, Inc.; Full Throttle, LLC;
Full Throttle Sloon Shine, LLC;
Throttlefest, LLC; American Outlaw
Spirits, Inc.; Michael Ballard; Jesse
James Dupree; Michael Garner; and
Travis Scott Wagoner,

Defendants.

VIDEO CONFERENCE DEPOSITION OF
MICHAEL GARNER

October 9, 2018

2:00 p.m.

Hilton Garden Inn Atlanta NW
Kennesaw Town Center
895 Cobb Place Boulevard NW
Kennesaw, Georgia 30144

Michelle J. Ruiz, CCR, B-1397

REGENCY-BRENTANO, INC.
Certified Court Reporters
13 Corporate Square, Suite 140
Atlanta, Georgia 30329
(404) 321-3333

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2

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18 Beach Restaurant Corporation, House of

19 Blues Concerts, Inc, and HOB

20 Entertainment, Inc.:

21

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Page 2

1 OCTOBER 9, 2018

2 VIDEO CONFERENCE DEPOSITION OF

3 MICHAEL GARNER

4 PROCEEDINGS

5 MR. RAINSFORD: I have a court reporter

6 here who is going to swear you in unless you

7 have a notary or somebody there with you.

8 THE WITNESS: Hold on one second. Do what

9 now?

10 MR. RAINSFORD: I have a court reporter

11 here who is going to put you under oath for

12 your deposition, unless you have a notary there

13 with you. Is there a notary there where you

14 are?

15 THE WITNESS: She can put me under.

16

17 MICHAEL GARNER,

18 being first duly sworn, was examined and

19 testified as follows:

20 EXAMINATION

21 BY MR. RAINSFORD:

22 Q Mr. Garner, my name is James Rainsford and

23 I represent the plaintiffs in this case.

24 Before I start asking you any questions, I

25 want to go over some ground rules. First of all,

Page 4

1 CONTENTS

2 WITNESS EXAMINATION FURTHER EXAMINATION

3 MICHAEL GARNER

4 BY MR. RAINSFORD PAGE 4

5 BY MR. STEGMAIER PAGE 47 PAGE 77, 78

6 BY MR. BOGDAN PAGE 69

7

8 EXHIBITS

9 PLAINTIFFS'

10 EXHIBITS IDENTIFICATION PAGE

11 EXHIBIT 1 PHOTOGRAPH 26

12 EXHIBIT 2 PHOTOGRAPH 29

13 EXHIBIT 3 PHOTOGRAPH 30

14 EXHIBIT 4 PHOTOGRAPH 33

15 EXHIBIT 5 PHOTOGRAPH 34

16 EXHIBIT 6 PHOTOGRAPH 35

17 EXHIBIT 7 PHOTOGRAPH 38

18 EXHIBIT 8 PHOTOGRAPH 45

19 (EXHIBITS RETAINED BY COUNSEL)

20

21

22

23

24

25

Page 3

1 have you ever had your deposition taken before?

2 A No.

3 Q Well, I'm going to ask you a series of

4 questions. You have just taken an oath, so it's as

5 if you were testifying in court. You know, the

6 penalties of perjury do apply to your testimony. If

7 at any time I ask a --

8 A Okay.

9 Q If I ask a question and you don't

10 understand the question, please tell me. Because,

11 if you answer my question, I'm going to assume that

12 you understood what I was asking you. Is that fair?

13 A Yes, that's fine.

14 Q At any time, if you need a break, let me

15 know. Don't suffer in silence, so to speak, we can

16 take as many breaks as you need. Do you understand?

17 A Yes, I'm good.

18 Q Do you have any questions of me before we

19 begin?

20 A Nope.

21 Q State your name and date of birth for the

22 record, please.

23 A Michael Todd Garner; 6-15-67.

24 Q Where do you live, Mr. Garner?

25 A Deland, Florida; 718 Albert Lane.

Page 5

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2 (Pages 2 to 5)

1 you have any recollection of how you got in contact 2 with the House of Blues management team? 3 A I was actually told through Michael that 4 they wanted me there. And then, when I got there, 5 they had me a hotel and everything. 6 Q When you say they had a hotel for me, was 7 that the House of Blues? 8 A Yes. 9 Q And, for the work you did during 10 Throttlefest 2014, you were paid by the House of 11 Blues for that, correct? 12 A I was paid by check through them. And 13 also through the tips, I split it with the girls. 14 Q So, for the drinks that were sold during 15 the week, you were getting a portion of the tips? 16 A Yes. 17 Q How was that calculated; did you do, like, 18 a tip-out at the end of the night or how did that 19 work? 20 A We just split what tips we had. All the 21 liquor had to be purchased through the House of 22 Blues. 23 Q The waitress -- 24 A Every bottle had to be accounted. So, 25 they had actually had it under one of their Page 10	1 A It was always different, depending on who 2 they had on the shift. 3 Q Do you remember any of the waitress' names 4 that you worked with? 5 A No, I definitely don't. I mean, when I 6 was there, you got to understand, I meet so many 7 people. It's just insane the amount of people you 8 meet. 9 Q Yes, sir. You were working the night that 10 Jackyl performed at the House of Blues 2014, 11 correct? 12 A Yes. 13 Q You were selling, I guess, shots that 14 night of S'Loonshine; is that correct? 15 A I'm sure. Probably, S'Loonshine and Jesse 16 James and something else. I mean, I don't remember 17 exactly what we were selling. 18 Q There is some photographs that I'm going 19 to show you in a little while, various photographs 20 of you during the week of House of Blues, or the 21 Throttlefest 2014. 22 Before I show them to you, I will ask you 23 some questions about what you were doing that week 24 as far as drinking. I will show you the pictures 25 and in a lot of them you have what looks to be a Page 12
1 management cards every time we purchased a bottle. 2 And that year, as a matter of fact, they told us 3 point blank, they're like, Fajita, we'd love for you 4 to work anywhere because evidently we broke every 5 record they ever had for that year. 6 Q When you say we purchased a bottle through 7 the management or the management card, who is the we 8 you're referring to? 9 A I would have to go with the girls and we'd 10 have to go up and get one of the managers to give us 11 a bottle. We had to give them the cash, which I 12 forgot what it was; I think it was \$100, \$135 a 13 bottle. And then, we had to go sell it to make our 14 money back. We had to pay for the bottle upfront. 15 Q Did you pay for that with your own cash or 16 how did that work? 17 A Yes. They had to carry a bank and that's 18 how you did it. 19 Q The waitresses you were working with, was 20 it a waitress from the House of Blues or was it an 21 independent waitress? 22 A No. It was a waitress from the House of 23 Blues. 24 Q Did you work with the same waitress every 25 day and night, or were they different? Page 11	1 24-ounce Bud light bottle in your hand, or an 2 aluminum bottle shaped can. 3 Do you remember having Bud lights while 4 you were working with the waitresses? 5 A Yes. 6 Q Was that something anybody told you you 7 could not do? 8 A No. They told me -- they accepted it 9 because of the way that we do our business at 10 Sturgis. And, they understood that people -- that 11 was the whole reason why I had to have one of their 12 girls with me and why she had to handle it, because 13 by South Carolina state law, I couldn't legally be 14 drinking and selling the liquor. Okay. You got 15 that? 16 Q Yes, sir. 17 A So, that was their main reason why they 18 had their girls with me. 19 Q Okay. 20 A Because, people wanted to do shots and 21 they'd always buy me shots, buy me drinks, and 22 they'd buy it for me, go to all of us. 23 Q So when, I guess, the shots would be sold, 24 there were times during that week that you would do 25 shots with the customer? Page 13

REGENCY-BRENTANO, INC.

4 (Pages 10 to 13)

1 remember all the girls. Robert. He wouldn't really 2 come to me directly. He would send his supporting 3 manager to me. And, the ones that were over the 4 liquor directly, like James and them, and they would 5 say, hey, what do you want to start with today, if I 6 was starting with a fresh bottle, and he'd introduce 7 me to whoever was working with me that day. And 8 then, boom, I'd say, all right, let's start with 9 this. It depended on, you know, what type of day it 10 was, what crowd it was, because it was so many 11 different flavors. 12 Q And the flavors, what type of liquor were 13 you selling? 14 A I did -- we did, you know, primarily the 15 Jesse James and S'Loonshine. We also did like 16 Fireball and all the other stuff, too. I mean, it 17 just depended on whatever was -- you know, really it 18 depended on the crowd. 19 Q The beer that you would drink while you 20 were there, did you have to pay for those beers like 21 a customer? 22 A Well, sometimes, yes. A lot of times the 23 customer would buy them for us. 24 Q Okay. Did you ever get the beers from the 25 House of Blues bar itself? Page 18	1 A Have I been trained for what? 2 Q Through something called Serve Safe. 3 A Yes. 4 Q Have you ever been certified through 5 something called TIPS? 6 A Not TIPS, no. 7 Q Okay. 8 A No, that I'm aware of. 9 Q Okay. Well, I want to talk to you about 10 some of the fundamentals of responsible alcohol 11 service. 12 Specifically, you understand that there 13 are safety rules in the industry to protect the 14 public from people who are over served by bars and 15 restaurants, correct? 16 A Yes. 17 MR. STEGMAIER: Object to the form. 18 BY MR. RAINSFORD: 19 Q And those fundamental safety rules, I'm 20 going to go through a list of 10 to see if you can 21 agree with them. Is that okay? 22 A Yes. 23 Q Number one, you never serve a guest who is 24 under 21 years of age, correct? 25 MR. STEGMAIER: Same objection. Page 20
1 A Yes. I'd go up and purchase it like 2 everybody else. 3 Q Can you sort of describe to me the 4 atmosphere at Throttlefest; I mean, what was 5 Throttlefest? I have never been to it. 6 A It's just like -- it's like a mini version 7 of Sturgis. It's just a bike ride. Everybody knows 8 us from the show and everybody wants to come out and 9 meet us. Of course, being on TV and all, it was 10 just like a mini Full Throttle or mini Sturgis. I 11 mean, it's just a party atmosphere. We got bands, 12 we got girls, we got me, Goat, all of us. 13 Q Stripper poles? 14 A Yes. I mean, it's the basics. It's the 15 run-of-the-mill, you know, party scene. 16 Q How long have you been in the food and 17 service industry, Mr. Garner? 18 A How long have I been what now? 19 Q In the food and beverage industry. 20 A Oh, I'm 51-years-old. I've been in ever 21 since I was 15. 22 Q Long time? 23 A Right. 24 Q Have you ever been trained through Serve 25 Safe? Page 19	1 THE WITNESS: Correct. 2 BY MR. RAINSFORD: 3 Q You never serve a guest to the point of 4 intoxication or a guest who is intoxicated, 5 regardless of whether they are driving a motor 6 vehicle, correct? 7 MR. STEGMAIER: Same objection. 8 THE WITNESS: Correct. 9 BY MR. RAINSFORD: 10 Q Counting drinks is the gold standard for 11 preventing intoxication, correct? 12 MR. STEGMAIER: Same objection. 13 THE WITNESS: No. I don't understand 14 that, what you're saying. 15 BY MR. RAINSFORD: 16 Q Do you understand the concept of counting 17 drinks in the alcohol -- 18 A You mean how many drinks you drink or how 19 many drinks you're serving? I mean, what are you 20 saying? 21 Q Well, I'm asking you, did you have any 22 training on coordinating with other people in the 23 bar to sort of count the drinks that customers were 24 having to avoid over serving customers? 25 A Well, yes. But, you got to understand, we Page 21

REGENCY-BRENTANO, INC.

6 (Pages 18 to 21)

1 Mike, fair to say? 2 A Right. 3 Q And so, there is a certain attraction to 4 that character where you're expected to play in 5 places like Throttlefest, correct? 6 MR. BOGDAN: Object to the form. 7 THE WITNESS: Agreed. 8 BY MR. STEGMAIER: 9 Q And so, when you were working with Mike 10 and Jesse with their alcohol businesses and you were 11 going around the country touring with liquor 12 representatives, were you essentially playing the 13 role of Fajita Mike, too, as well? 14 A Yes, to an extent. I mean, I was 15 utilizing the name and the notoriety, yes. 16 Q Sure. I understand. And so, when you 17 would make those appearances at bars, you were doing 18 things very similar to the activities at House of 19 Blues Myrtle Beach in May of 2014, fair to say? 20 A Yes, as an independent contractor. 21 Q I got it. So, looking back on your 22 affidavit, and I think you were already asked this 23 question, about you coming down to Myrtle Beach, 24 your testimony here on paragraph four is that -- it 25 says, prior to the start of the 2014 Myrtle Beach Page 58	1 event? 2 A Yes. 3 Q Did you ever talk with him prior to the 4 2014 event about your prospective employment at the 5 venue during the Throttlefest event? 6 A No. But, I can tell you what he did tell 7 me is, at the conclusion of the event, told me that 8 the House of Blues was extremely happy and I could 9 go to work at Orlando or any other House of Blues I 10 wanted. 11 Q The question I asked you was, did you talk 12 with Robert Simeone about your prospective 13 employment for the 2014 event prior to you getting 14 down to Myrtle Beach? 15 A He -- I got -- as soon as I got there, I 16 met them all. 17 Q So the answer is, no, you didn't talk with 18 Robert Simeone prior to you getting to Myrtle Beach, 19 correct? 20 A No. 21 Q Did you talk with anybody else at House of 22 Blues prior to you getting down to Myrtle Beach for 23 the 2014 event? 24 A No, not that I'm aware of. 25 Q So, your understanding was from Mike Page 60
1 spring bike rally, I was offered a job by the House 2 of Blues management team to work as a House of Blues 3 employee for the events being held during the spring 4 bike rally at the HOB. Are you able to read that? 5 A Yes, I'm listening. Go ahead. 6 Q Okay. I got you. And, I think in the 7 testimony during the direct portion of this 8 deposition, you had stated that House of Blues -- 9 someone in House of Blues had contacted you in North 10 Carolina to come down for this event, is my 11 understanding correct? 12 A They had Michael contact me, Robert did. 13 Their management team got ahold of me and asked me 14 to come down there since I was in North Carolina and 15 so close. That's exactly what I said and that's 16 exactly what happened. 17 Q So, Mike Ballard contacted you to come 18 down there? 19 A Michael had contacted me for Robert -- 20 Q Have you ever met -- 21 A -- from House of Blues wanting me to come 22 down there. 23 Q Have you ever met Robert Simeone? 24 A Yes. 25 Q Did you meet and talk with him in the 2014 Page 59	1 Ballard who contacted you, he tells you that House 2 of Blues wants you to come down for the event? 3 A No. My understanding is, he told me that 4 they wanted me to come down. And, as soon as I got 5 there, that was also confirmed by Robert and his 6 staff, glad to have you, hey, Fajita, how you doing, 7 nice to meet you, so glad you could make the time to 8 come down. And, I took off work to go down there. 9 Q Sure. I understand. But, the only point 10 of contact before you getting to Myrtle Beach was 11 Mike Ballard, correct? 12 A Correct. 13 Q All right. You didn't talk with anybody 14 else at House of Blues, nobody at Live Nation, about 15 your appearance at House of Blues for the 16 Throttlefest prior to you getting to Myrtle Beach? 17 A Not prior to me getting there. 18 Q As I understand your testimony, in 19 response to the questioning during the direct 20 portion of the exam is, that you did not pour 21 alcohol for customers at House of Blues, is my 22 understanding correct? 23 A Not that I'm aware of. 24 Q Now, you understand the allegations in 25 this case that have been articulated both in the Page 61

REGENCY-BRENTANO, INC.

16 (Pages 58 to 61)

EXHIBIT D

1 A P P E A R A N C E S
2 ON BEHALF OF THE PLAINTIFF:
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 & RAINSFORD, PC
4 BY: JAMES RAINSFORD, ESQ.
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 BEACH RESTAURANT CORPORATION; HOUSE OF BLUES
7 CONCERTS, INC.; AND HOB ENTERTAINMENT, INC.:
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 Columbia, SC 29201
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12 BARNWELL WHALEY PATTERSON & HELMS, LLC
 BY: JEFFREY M. BOGDAN, ESQ.
 288 Meeting Street, Suite 200
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14 ON BEHALF OF THE DEFENDANT TRAVIS SCOTT WAGONER:
15 TURNER PADGET GRAHAM & LANEY, PA
 BY: JULIE OLIVER, ESQ.
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 Myrtle Beach, SC 29577
17

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19
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21
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25

1 Q. Yes?

2 A. Yes.

3 Q. All right. On page -- I'm sorry. On
4 paragraph 53, it says, "Once inside, Defendant
5 Wagoner was served beer and liquor by or on
6 behalf of the Defendants up to and well after the
7 point that he became visibly intoxicated."

8 So I got a couple questions about that
9 one. Sum total, how many -- how many alcoholic
10 drinks did you have at House of Blues while you
11 were there?

12 A. I had about four of the -- those can
13 beers. They serve can beers. I want to think
14 that they was 22 ounce.

15 Q. Okay.

16 A. And one liquor drink and we had -- I
17 think it was two or three liquor shots.

18 Q. Okay.

19 A. And two of the liquor shots was served
20 by somebody from the group with the moonshine --
21 or the show. The -- the Full Throttle show.

22 Q. The Full Throttle show. When you say --

23 A. Fajita Mike.

24 Q. So two out of those three liquor shots
25 that you're telling me about were served to you

1 by Fajita Mike?

2 A. Yes.

3 Q. All right. With regard to the -- to the
4 television show involving Throttlefest, had you
5 ever seen that television show?

6 A. Some.

7 Q. Did you know who Fajita Mike was?

8 A. Just a little, yeah.

9 Q. So you understood him to be a television
10 personality that appeared on that TV show?

11 A. Yes.

12 Q. You didn't understand him to be an
13 employee of House of Blues, did you?

14 A. No.

15 Q. All right. Were there any other
16 personalities that you would have seen on that
17 television show that you saw at the venue that
18 night?

19 A. Yes.

20 Q. Who did you see?

21 A. I saw Jesse James from Jackyl, the
22 little -- little person, the leprechauns, the --
23 the owner, Mike Ballard; and I think that may
24 have been it that I recognized.

25 Q. Okay. So these are folks that you

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

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

12 A. Uh-huh.

13 Q. All right. Is that a yes?

14 A. Yes.

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

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

18 Q. So were the house lights on?

19 A. Yes.

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

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

24 Q. Okay.

25 A. But it --

1 Q. So you're just guessing.

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

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

5 A. Yes.

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

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

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

19 A. Correct.

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

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

1 Q. Okay.

2 A. It's a local.

3 Q. So it's called Life Store?

4 A. Yeah.

5 Q. And that's in your hometown?

6 A. Yes.

7 Q. And as far as the actual card, is it a
8 Visa or a MasterCard?

9 A. MasterCard.

10 Q. So it's a MasterCard issued by Life
11 Store that was a debit card?

12 A. Yes.

13 Q. And your testimony is that's the only
14 card you would have used at House of Blues?

15 A. Yes.

16 Q. All right. And so with regard to the
17 other purchases -- I guess let me ask this:

18 Were there any of the seven to eight
19 drinks that you're telling me that you consumed
20 at the House of Blues that were just given to
21 you?

22 A. Yes. The -- the two shots from Fajita
23 Mike.

24 Q. Okay. They were just given to you?

25 A. Yes.

1 Q. There was no sale?

2 A. No.

3 Q. With -- taking Fajita Mike's two shots
4 out of the equation, were any of the beers or
5 liquor drink or maybe the other shot that you
6 were telling me about, were they bought for you
7 or given to you by anybody else?

8 A. No.

9 Q. All right. So everything else that you
10 would have consumed would have been the product
11 of a purchase.

12 A. Yes.

13 Q. And you're telling me that there was one
14 drink that you consumed plus two others that you
15 had bought for two other guests that would have
16 been on that debit card.

17 A. Yeah. There was two drinks that I
18 bought, yeah. Outside of anything, yeah.

19 Q. Yeah. But you bought one for yourself.

20 A. I bought one beer, yes.

21 Q. Yeah, yeah. So everything else was a
22 cash transaction?

23 A. Yes.

24 Q. All right. And they were bought at
25 House of Blues?

1 don't think this will be too terribly long.

2 The alcohol that you were served or that
3 you consumed at House of Blues, was every --
4 every alcoholic beverage consumed inside the
5 building?

6 A. Yes.

7 Q. Okay. And you said that Fajita Mike
8 gave you the two shots; right?

9 A. Yes.

10 Q. Did he approach you, or did you approach
11 him?

12 A. There was somebody -- well, we
13 approached him.

14 Q. Okay.

15 A. The way to say, yes.

16 Q. Was he by himself?

17 A. No. He had a girl with him.

18 Q. Okay. Well, do you know who the girl
19 was?

20 A. No. I -- I assume that she was
21 actually -- well, she had cups and stuff with
22 her.

23 Q. Did she have on any identifying clothing
24 that would let you know who she was?

25 A. Like something to do with the -- the

1 shine, the moonshine, or whatever it's called.

2 Q. Okay. So was she wearing a House of
3 Blues T-shirt?

4 A. No.

5 Q. She was wearing a T-shirt of the brand
6 of liquor?

7 A. Yes. As I recall, yes.

8 Q. Okay. All right. Do you know who she
9 worked for?

10 A. No.

11 Q. Okay. So was -- did she have -- you
12 said she had cups.

13 A. Like plastic cups. Small ones.

14 Q. Like a stack of them?

15 A. Yeah.

16 Q. Okay. And did she have a tray, or was
17 she carrying these in her hand?

18 A. In her hand.

19 Q. Was she also the one carrying the
20 liquor?

21 A. No. He was.

22 Q. He was carrying the liquor, and she was
23 carrying the cups?

24 A. Uh-huh.

25 Q. Is that a yes?

1 Q. And that would have been --

2 A. Yes.

3 Q. Sorry. That would have been about 8:30?

4 A. Yes.

5 Q. Okay. I may have one or two questions.
6 I just need to look at my notes.

7 (Pause in proceedings.)

8 BY MR. RAINSFORD:

9 Q. The band Jackyl performed while you were
10 there; correct?

11 A. Correct.

12 Q. Do you recall the lead singer of Jackyl
13 chugging the moonshine while he was on stage?

14 A. Yes.

15 MR. BOGDAN: Object to the form.

16 Q. What was the temperature like inside the
17 House of Blues?

18 A. Best I recall, it was hot.

19 Q. Just one more moment. I think that I am
20 done.

21 (Pause in proceedings.)

22 MR. RAINSFORD: Yeah. Those are my
23 questions.

24 MR. STEGMAIER: Thank you.

25 (The deposition concluded at 12:31 p.m.)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Douglas Kelsey,	)	Civil Action No.: 2017-CP-26-03008
	)	
Plaintiffs,	)	
	)	
vs.	)	HOUSE OF BLUES
	)	MYRTLE BEACH RESTAURANT
House of Blues Myrtle Beach Restaurant	)	CORPORATION'S
Corporation; HOB Entertainment, Inc.; and	)	MOTION TO ALTER OR AMEND
Travis Scott Wagoner,	)	JUDGMENT
	)	
Defendants.	)	
	)	
House of Blues Myrtle Beach Restaurant	)	
Corporation,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Throttlefest LLC; American Outlaw Spirits	)	
Incorporated; Full Throttle, L.L.C.; and	)	
Full Throttle Sloon Shine, LLC,	)	
	)	
Third-Party Defendants.	)	
	)	
	)	

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

Defendant/Third Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("House of Blues"), pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, files this Motion to Alter or Amend the Orders granting Third Party Defendant Throttlefest LLC's ("Throttlefest") Motion to Dismiss the causes of action against Throttlefest raised in House of Blue's Third-Party Complaint, and in support thereof states as follows.

RELEVANT FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

This Court also dismissed the remaining causes of action for breach of contract, contractual indemnity, negligent misrepresentation, and negligence, finding that they were barred by the applicable statute of limitations. Regarding the contractually based causes of action for breach of contract and contractual indemnity, this Court found that because "the Event occurred on House of Blues' premises," "House of Blues either knew or should have known of at least some Throttlefest's alleged breaches of the Agreement during the Event, especially the allegations that Throttlefest engaged in prohibited alcohol sponsorships during the Event, failed to fulfill its duties during the Event, and failed to name House of Blues as an Additional Insured on Throttlefest's insurance policies." (Order, pp. 8-9). Thus, this Court reasoned that the breach of contract actions accrued in May 2014. (Order, p. 9). This Court found that the negligent misrepresentation and negligence causes of action "are based, at least in part, on Throttlefest's alleged improper promotion of alcohol brands during the Event," such that they also accrued in May 2014. (Order, p. 9). This Court found that despite the fact that House of Blues did not learn of Plaintiff's injuries until October 20, 2016, that the third-party claims "are not based solely on Plaintiff's injuries." (Order, pp. 9-10). Rather, "[s]ome are based on Throttlefest's actions during the event which House of Blues either knew of or should have known of during the Event (e.g. Throttlefest's alleged impermissible participation in alcohol sponsorships during the Event). House of Blues either knew or should have known enough at the time of the Event for its causes of action to accrue." (Order, p. 10).

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

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

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

STANDARDS OF REVIEW

Rule 59(e) Motion

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

Rule 12(b)(6) Motion

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

This Court wrote:

House of Blues argues that §15-38-50 does not apply here because the settlement between Throttlefest and the Plaintiff was not in "good faith," as is required by the statute. However, House of Blues did not allege in its Third-Party Complaint that the settlement was not in good faith. Nor did House of Blues present anything else that the Court could consider to support this argument. Accordingly, the Court rejects it.

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

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

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

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

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

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

This Court ruled:

House of Blues next argues that Smith v. Tiffany did not decide whether due process and equal protection would allow a non-settling defendant to bring a settling party back into a case. **While it is true that Smith v. Tiffany did not decide this issue, the Court declines to rule that House of Blues' due process or equal protection rights would be violated by not allowing it to bring Throttlefest back into this case.** Throttlefest has already settled with the Plaintiff. House of Blues had ample opportunity to assert cross-claims against Throttlefest when they were both parties to this case, and further has had opportunities to file a separate action against Throttlefest. House of Blues' constitutional rights are not violated by its inability to bring Throttlefest back into this case. House of Blues further argues that its ability to use the "empty-chair defense" at trial is insufficient to protect its rights. **However, the empty-chair defense was adopted by the legislature and discussed in Smith v. Tiffany as a non-settling defendant's remedy in place of being able to bring settling entities in as parties to a case.**

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

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

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

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

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

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

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

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

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

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

Under South Carolina law, however, the limitations period "begins to run when the party either knew or should have known that some legal right had been invaded." *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); *see also RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) ("Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence."). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *McAlhany v. Carter*, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015).

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

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

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

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

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

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

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

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

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

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

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

(Order, p. 12).

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

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

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

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

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

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

South Carolina general rules of pleading provides:

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

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

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

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

CONCLUSION

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

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,
COLLINS & LACY, P.C.

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

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

Murrells Inlet, South Carolina
February 14, 2020

EXHIBIT A

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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

COLEMAN GLEDHILL HARGRAVE MERRITT
& RAINSFORD, PC

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

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

COLLINS & LACY, PC

BY: CHRISTIAN STEGMAIER, ESQ.
1330 Lady Street
Columbia, SC 29201

ON BEHALF OF THE DEFENDANT THROTTLEFEST, LLC:

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: JEFFREY M. BOGDAN, ESQ.
288 Meeting Street, Suite 200
Charleston, SC 29401

ON BEHALF OF THE DEFENDANT TRAVIS SCOTT WAGONER:

TURNER PADGET GRAHAM & LANEY, PA

BY: JULIE OLIVER, ESQ.
2411 North Oak Street, Suite 301
Myrtle Beach, SC 29577

- - -

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

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

12 A. Uh-huh.

13 Q. All right. Is that a yes?

14 A. Yes.

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

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

18 Q. So were the house lights on?

19 A. Yes.

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

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

24 Q. Okay.

25 A. But it --

1 Q. So you're just guessing.

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

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

5 A. Yes.

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

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

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

19 A. Correct.

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

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No.: 2017-CP-26-03008

Douglas Kelsey,	)
	)
Plaintiff,	)

vs.

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

**THROTTLEFEST, LLC'S
MEMORANDUM IN OPPOSITION
TO HOUSE OF BLUES MYRTLE
BEACH RESTAURANT
CORPORATION'S MOTION TO
ALTER OR AMEND JUDGMENT**

House of Blues Myrtle Beach Restaurant Corporation,	)
	)
Third-Party Plaintiff,	)

vs.

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

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

Third-Party Defendant Throttlefest, LLC ("Throttlefest") hereby submits this Memorandum in Opposition to House of Blues Myrtle Beach Restaurant Corporation's ("House of Blues") Motion to Alter or Amend Judgment. Throttlefest was once a co-defendant in this case along with House of Blues. House of Blues chose not to assert any claims against Throttlefest at that time, instead electing to oppose Plaintiff's dismissal of Throttlefest after Throttlefest settled with the Plaintiff. House of Blues cannot not bring Throttlefest back into this case. For the reasons

stated below, Throttlefest requests that the Court deny House of Blues' Motion and stand by its Order granting Throttlefest's second Motion to Dismiss.

Courts have identified three circumstances in which a Rule 59(e) motion may be granted: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at [the hearing]; or (3) to correct a clear error of law or prevent manifest injustice." Slachta v. Reliance Std. Life Ins. Co., 444 F. Supp. 2d 587, 592 (D.S.C. 2006) (quoting United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002)).¹ "Rule 59(e) motions may not be used to raise arguments that could have been raised before the judgment was issued, or to argue the case under a new legal theory." Id.

Plaintiffs do not identify any change in law or new evidence since the Court granted Throttlefest's Motion to Dismiss, so only the third circumstance could apply here. However, the Court's Order is soundly supported by the law, and, in fact, prevents the manifest injustice that would arise should Throttlefest be forced to remain as a party in the same case that it already settled out of, particularly when the statute of limitations on House of Blues' claims against Throttlefest expired before House of Blues brought Throttlefest back into this case.

I. THE COURT'S ORDER IS WITHIN RULE 12(B)(6)'S SCOPE OF REVIEW

House of Blues' first argument is that the Court *should have* considered evidence outside of the pleadings in ruling on the Motion to Dismiss, not that it erred in considering evidence outside of the pleadings. House of Blues then circuitously suggests that the Motion to Dismiss was

¹ Although South Carolina courts have not stated explicitly the standards for a Rule 59(e) motion, "[b]ecause Rule 59(e), SCRCP is substantially the federal rule, an examination of authorities addressing this [the application of the rule], as it pertains to the federal courts, is appropriate." Heins v. Heins, 344 S.C. 146, 153, 543 S.E.2d 224, 227 (2001); see also Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 152, 723 S.E.2d 835 (2012) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

converted to a motion for summary judgment, without giving House of Blues adequate notice and opportunity to present evidence.

The Court decided the Motion to Dismiss under the Rule 12(b)(6) standard. House of Blues does not take issue with any evidence that the Court considered that is outside of the pleadings. The Court did not convert the Motion to Dismiss into a motion for summary judgment, nor was it necessary for the Court to consider any evidence outside of the pleadings (except that which it was allowed to consider under Rule 12(b)(6) and its interpreting case law²). The Court addressed House of Blues' argument that deposition testimony would have to be considered to decide some of the issues raised in the Motion to Dismiss, expressly finding that consideration of deposition testimony was not necessary. See Order at n.4. The Court should affirm the Order as it was properly decided under Rule 12(b)(6), there was no clear error of law for the Court to correct, and there is no manifest injustice for the Court to prevent. Slachta, 444 F. Supp. 2d at 592.

II. THE COURT'S ORDER CORRECTLY DISMISSED HOUSE OF BLUES' CONTRIBUTION CAUSE OF ACTION PURSUANT TO S.C. CODE §15-38-50

a. The Court Properly Rejected House of Blues' Argument that the Settlement Between Throttlefest and the Plaintiff was Not in Good Faith

House of Blues first argues that the Court erred in failing to demand evidence regarding whether the settlement between the Plaintiff and Throttlefest was in good faith before finding S.C. Code §15-38-50 precluded House of Blues' Contribution cause of action. Based on the plain

² The "Court may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity." Martin v. Companion Healthcare Corp., No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing Phillips v. LCI Int'l, Inc., 190 F.3d 609 (4th Cir. 1999); see also Goines v. Valley Cmt'y Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court "may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity."); Epstein v. World Acceptance Corp., 203 F. Supp. 3d 655, 662 (D.S.C. 2016) (in deciding a motion to dismiss, the court may consider "only the facts alleged in the complaint, which may include any documents referenced, and matters of which the court may take judicial notice.")).

language of the pleadings and the documents outside of the pleadings that the Court properly relied on, there is nothing to suggest that the settlement between the Plaintiff and Throttlefest was not made in good faith. There is not even an allegation of a bad faith settlement. The Court did not require House of Blues to produce evidence of a bad faith settlement; rather, it simply recognized that there was not even an allegation of such. The Court should affirm the Order because House of Blues' Contribution cause of action is barred by §15-38-50, there was no clear error of law for the Court to correct, and there is no manifest injustice for the Court to prevent. Slachta, 444 F. Supp. 2d at 592.

b. The Court Correctly Ruled that House of Blues' Due Process Rights are Not Violated by Throttlefest's Dismissal

House of Blues also argues that the Court erred in failing to find that its Due Process and Equal Protection rights were violated. Like it did in its opposition to the Motion to Dismiss, House of Blues seems to argue that, because the Supreme Court in Smith v. Tiffany did not decide whether a party's inability to include a non-party on a verdict form violated the party's due process rights, this Court *must* decide that those rights would be violated by application of §15-38-50. The Court considered House of Blues' constitutional arguments and did not agree that House of Blues' constitutional rights would be violated by allowing §15-38-50 to bar the contribution claim. Despite House of Blues' assertions to the contrary, it is relevant that House of Blues sat on its rights by not bringing its claims against Throttlefest earlier, when Throttlefest was a first-party Defendant in this case. According to House of Blues' own arguments, it had claims outside of contribution that could have been asserted at that time as cross-claims, yet it failed to do so. House of Blues' current claim that it is being treated unfairly is unavailing, when it previously sat on its rights. Further, House of Blues' argument that its constitutional rights will be violated by the

content of the verdict form is premature. This case is still in the discovery phase and the trial court has not yet considered or ruled on the content of the verdict form.

House of Blues further argues that the Court was wrong in stating that House of Blues' rights would be protected by its statutory ability to argue the empty chair defense at trial. House of Blues states that named parties like itself are not protected when not all tortfeasors are named as co-defendants, where in other cases named parties are protected (when all tortfeasors are named). This argument is especially unavailing in this case because at one time all alleged tortfeasors (including Throttlefest) were named defendants and House of Blues failed to exercise its right to assert cross-claims before Throttlefest and others settled with the Plaintiff and were dismissed from this case. House of Blues further argues that only a "perfect" empty chair defense will provide it protection. Yet a "perfect" empty chair defense is exactly what House of Blues alleges it has, since it claims that only Throttlefest, and not House of Blues, was responsible for Michael Garner's service of alcohol to Wagoner. If House of Blues can convince the jury that what it alleges is true, its empty chair defense will absolve it of liability. Finally, like House of Blues' argument about the verdict form, House of Blues' argument about the empty chair defense is premature since trial has not yet begun. The Court should affirm the Order because House of Blues' Contribution cause of action is barred by §15-38-50, there was no clear error of law for the Court to correct, and there is no manifest injustice for the Court to prevent. Slachta, 444 F. Supp. 2d at 592.

III. THE COURT'S ORDER CORRECTLY FOUND THAT THE STATUTE OF LIMITATIONS BARRED HOUSE OF BLUES' BREACH OF CONTRACT, NEGLIGENT MISREPRESENTATION, AND NEGLIGENCE CAUSES OF ACTION

Next, House of Blues reiterated its argument that it made at the Motion to Dismiss stage that its claims did not accrue until October 20, 2016, when it learned of the Plaintiff's motorcycle

accident, and therefore, the three-year statute of limitations had not expired when it filed the pleading bringing Throttlefest back into this case. This argument may have merit if House of Blues' claims against Throttlefest were based solely on Throttlefest's alleged control over service of alcohol to Wagoner. But House of Blues went further in its Third-Party Complaint, critically alleging that Throttlefest breached the Agreement and committed torts when it, amongst other things, engaged in alcohol sponsorships that were prohibited by Agreement during the Event in May 2014. Since the Event occurred on House of Blues' property, the Court correctly found that a reasonable entity in House of Blues' position *should* have known that Throttlefest was engaging in these prohibited alcohol sponsorship on its property in May 2014 and, thus, its breach of contract and tort claims accrued in May 2014, even though they were not fully developed and may have later been supplemented with other theories of liability (i.e. improper service of alcohol to Wagoner). House of Blues claims that it is not omniscient; but it does not have to be. Instead, any reasonable entity in House of Blues' position should have known, at the time it occurred, of its claim that Throttlefest breached the Agreement by engaging in alcohol sponsorships during the Event in May 2014 at House of Blues' North Myrtle Beach location. City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010) (A "statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded.").

House of Blues further argues that the statute of limitations on its indemnity claims could not have expired because they do not accrue until a judgment is entered against House of Blues. Throttlefest maintains that the Order correctly found that House of Blues' Contractual Indemnification cause of action is actually a breach of contract cause and that all claims for breach of contract accrued in 2014 when House of Blues should have known that Throttlefest allegedly breached the Agreement by engaging in alcohol sponsorships on House of Blues' property.

Nevertheless, if House of Blues is correct that its Contractual Indemnification cause of action does not accrue until judgment is entered against House of Blues, then its Contractual Indemnification cause of action should be dismissed as premature, since it has not yet accrued. The Court should affirm the Order because House of Blues' Breach of Contract, Negligent Misrepresentation, and Negligence claims are barred by the statute of limitations, there was no clear error of law for the Court to correct, and there is no manifest injustice for the Court to prevent. Slachta, 444 F. Supp. 2d at 592.

IV. THE COURT'S ORDER CORRECTLY FOUND THAT THE AGREEMENT BETWEEN HOUSE OF BLUES AND THROTTLEFEST PRECLUDED HOUSE OF BLUES TORT CAUSES OF ACTION

House of Blues' final argument is that the Court erred in dismissing its tort and equity claims because they were preempted by the Agreement between House of Blues and Throttlefest. House of Blues claims that it alleged that Throttlefest acted negligently in ways that were not covered by the Agreement and that it should be able to plead contract and tort/equity claims in the alternative. The Court correctly cited to established South Carolina precedent stating that when there is a contract between two parties, it is the contract that defines the duty and all claims between the parties would sound in contract, not tort or equity.³ The Agreement between Throttlefest and House of Blues unequivocally states that it "shall be strictly limited to all functions and acts necessary for promoting and conducting" the Event (Article 1(a)), that it shall not govern or restrict

³ "[I]n the case of actual contracts the agreement defines the duty[.]" Webb v. First Fed. Sav. & Loan Ass'n, 300 S.C. 507, 510, 388 S.E.2d 823, 825 (Ct. App. 1989) (quoting 66 Am.Jur.2d Restitution and Implied Contracts Section 2 (1973), overruled on other grounds by Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)). "Under South Carolina law, 'if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.'" Toney v. LaSalle Bank Nat. Ass'n, 896 F. Supp. 2d 455 (D.S.C. 2012), *aff'd*, 2013 WL 751299 (4th Cir. 2013) (holding that a plaintiff cannot establish a claim for gross negligence where the claim arises from a contract). "Bare allegations of negligence cannot convert a breach of contract action into an action in tort." Seebaltd v. First Federal Savings & Loan Association, 269 S.C. 691, 239 S.E.2d 726 (1977) (affirming dismissal of a complaint containing allegations couched in terms of negligence where the only duties owed were contractual). "When it is questionable whether an action is plead on contract or in tort, doubt is generally resolved in favor of regarding the action to be on contract." Id. at 693, 239 S.E.2d at 727.

the parties from conducting other business or activities, *and that the parties shall not have any obligations whatsoever to each other outside of the Agreement* (Article 7(n)). House of Bleus even alleged that the Agreement governs “the functions and acts necessary for promoting and conducting” the Event. Third-Party Complaint ¶¶93-97. Accordingly, the Court correctly found that the Agreement controls the relationship between the parties and that all claims based on that relationship must sound in contract, not tort or equity. The Court should affirm the Order because House of Blues’ tort and equity claims are precluded by the Agreement, there was no clear error of law for the Court to correct, and there is no manifest injustice for the Court to prevent. Slachta, 444 F. Supp. 2d at 592.

WHEREFORE Throttlefest prays that this Honorable Court issue an order denying House of Blues’ Motion to Alter or Amend and affirming its prior Order granting Throttlefest’s Motion to Dismiss the Third-Party Claims asserted by House of Blues.

BARNWELL WHALEY PATTERSON & HELMS, LLC

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***Attorneys for Third-Party Defendant Throttlefest,
LLC***

February 28, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Douglas Kelsey,	)	Civil Action No.: 2017-CP-26-03008
	)	
Plaintiffs,	)	
	)	
vs.	)	HOUSE OF BLUES
	)	MYRTLE BEACH RESTAURANT
House of Blues Myrtle Beach Restaurant	)	CORPORATION'S
Corporation; HOB Entertainment, Inc.; and	)	MOTION TO ALTER OR AMEND
Travis Scott Wagoner,	)	JUDGMENT ENTERED
	)	MARCH 26, 2020
Defendants.	)	
	)	
House of Blues Myrtle Beach Restaurant	)	
Corporation,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Throttlefest LLC; American Outlaw Spirits	)	
Incorporated; Full Throttle, L.L.C.; and	)	
Full Throttle Sloon Shine, LLC,	)	
	)	
Third-Party Defendants.	)	
	)	

TO: BRIAN C. DUFFY, ESQUIRE AND KARA S. GREVEY, ESQUIRE, ATTORNEYS
FOR THIRD-PARTY DEFENDANTS FULL THROTTLE, L.L.C., FULL THROTTLE
SLOON SHINE, LLC, AND AMERICAN OUTLAW SPIRITS INCORPORATED.

Defendant/Third Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("House of Blues"), pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, files this Motion to Alter or Amend the Order entered March 26, 2020 granting Full Throttle, L.L.C. ("Full Throttle"), Full Throttle Sloon Shine, LLC ("Sloon Shine"), and American Outlaw Spirits Incorporated ("American Outlaw Spirits") (collectively "These Third-Party Defendants") Motion

to Dismiss the causes of action against them raised in House of Blues' Third-Party Complaint, and in support thereof states as follows.

RELEVANT FACTS AND PROCEDURAL HISTORY

This is an alleged alcohol liability case related to a motorcycle on motorcycle collision on May 16, 2014 in Myrtles Beach, South Carolina, which resulted in injuries to Plaintiff. Plaintiff alleges that Travis Wagoner was overserved with two free shots allegedly given to him by Michael "Fajita Mike" Garner during an event called "Throttlefest 2014." (See Pl.'s Second Am. Compl., ¶¶ 8-15; HOB Third-Party Compl., ¶¶ 93, 104, 107-111). The shots allegedly being served by Fajita Mike at Throttlefest were of S'loon Shine liquor and/or American Outlaw Spirits liquor. (HOB Third-Party Compl., ¶¶ 105-109).

House of Blues has vehemently denied any liability to Plaintiff and disputes that Fajita Mike was acting as its employee when he allegedly served Wagoner. (HOB Third-Party Compl., ¶¶ 8, 94, 114-116). Rather, House of Blues asserted that the alleged personal injury asserted in the first-party action arose or resulted from acts and/or omissions of Third-Party Defendants, either personally or by the subcontractors, agents, employees, and/or event sponsors secured by Third-Party Defendants. (*Id.* at ¶ 104). House of Blues further alleged that throughout the Throttlefest 2014 event, Throttlefest LLC, American Outlaw Spirits, Full Throttle., and S'loon Shine, all financially benefited from Michael Garner's alleged actions. (*Id.* at ¶ 117).

Throttlefest LLC, and House of Blues entered into a Co-Promotion Agreement ("Agreement") with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. (HOB Third-Party Compl., ¶ 97). House of Blues' Third-Party Complaint includes various allegations regarding how These Third-

Party Defendants were also responsible under the Agreement or separately undertook a duty, rendering them liable to House of Blues on contract and/or tort. Specifically, House of Blues argued:

- Though Throttlefest LLC was the named party to and signatory on the Agreement, it was also acting as an agent of the remaining Third-Party Defendants American Outlaw Spirits, Full Throttle, and Sloon Shine. (HOB Third-Party Compl., ¶ 124).
- Michael Ballard, who is a managing member of Throttlefest LLC, and who is the sole managing member of Full Throttle and Sloon Shine attended the Throttle Fest event as a representative of these companies. (Id. at ¶ 112).
- Jesse James Dupree, who is a managing member of Throttlefest LLC and the sole incorporator and officer of American Outlaw Spirits, attended the Throttle Fest event as a representative of this company and corporation. (Id. at ¶ 113).
- Throughout the Throttle Fest event, Fajita Mike was acting as the employee or agent of Throttlefest LLC and these Third-Party Defendants. (Id. at ¶ 115).

Throttlefest LLC and These Third-Party Defendants all had the opportunity and responsibility to supervise and control Fajita Mike and all financially benefited from Fajita Mike's alleged actions. (Id. at ¶¶ 116-117). Though all of the Third-Party Defendants were previously named as defendants in the first-party litigation, only the House of Blues Defendants and Travis Wagoner remained in the case at the time that Plaintiff filed its Second Amended Complaint. (Id. at ¶¶ 95-96).

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

These Third-Party Defendants each filed a Motion to Dismiss, followed by a Memorandum in Support thereof.¹ A hearing on the motion was held on February 5, 2020 before The Honorable William A. McKinnon. Judge McKinnon took the matter under advisement and requested proposed orders from the parties. This Court entered a written order granting These Third-Party Defendants' motions to dismiss on March 26, 2020.

This Court granted dismissal pursuant to Rule 12(b)(2), SCRPC, based upon a lack of personal jurisdiction over These Third-Party Defendants. (Order, pp. 5-7). This Court then ruled that dismissal was also proper pursuant to Rule 12(b)(6), SCRPC. (Order pp. 7-17). Specifically, this Court granted dismissal of the contract claims because House of Blues "has not alleged any of the elements establishing that Throttlefest, LLC had either actual or apparent authority as an agent to bind each of These Third-Party Defendants such that they would be bound by this contract." (Order, p. 8). This Court granted dismissal of the third-party claim for contribution, citing S.C. Code Ann. § 15-38-50 and Smith v. Tiffany, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), and finding that House of Blues does not have a contribution claim against Full Throttle and Sloon Shine because Plaintiff released them from all liability. This Court further found that the Third-Party Complaint did not allege that the settlement was not in good faith or House of Blues did not produce any other evidence to support such an argument. This Court agreed that Smith v. Tiffany was not decided on due process and equal protection grounds. However, it found that these rights would not be violated by precluding These Third-Party Defendants from being brought back into this case where House of Blues had ample opportunity

¹ Third-Party Defendant Throttlefest, LLC also filed motion to dismiss, which was heard at an early motions hearing than the motions of These Third-Party Defendants, with The Honorable Benjamin Culbertson presiding. Judge Culbertson granted Throttlefest, LLC's motion to dismiss and denied House of Blues' motion to reconsider. House of Blues has filed its Notice of Appeal and is preparing for briefing at the Court of Appeals.

to assert cross-claims or a separate cause of action against These Third-Party Defendants before and can assert an “empty-chair defense.” (Order, pp. 8-10). With respect to the contribution claim against American Outlaw Spirits, this Court granted dismissal, finding “House of Blues has not alleged that Garner served Wagoner shots of AOS’s liquor, nor has it alleged anything else to suggest this Third- Party Defendant may share common liability for the damages suffered by Plaintiff.” (Order, p. 11).

This Court also dismissed the causes of action for negligence and negligent misrepresentation, finding that House of Blues failed to plead voluntarily undertaking and that the claims were barred by the applicable statute of limitations. (Order, pp. 11-16). Regarding equitable indemnification, this Court dismissed because “House of Blues fails to articulate a basis for which These Third-Party Defendants can be held to indemnify House of Blues.” (Order, pp. 16- 17).

As will be discussed more fully *infra*, this Court’s ruling that it lacks personal jurisdiction over the parties is conclusory and ignores the specific facts and deposition testimony cited by House of Blues.² Further, this Court failed to rule upon House of Blues’ argument that Plaintiff’s arguments were not proper for Rule 12(b)(6) dismissal because they required the Court to consider information outside of the Third-Party Complaint. This Court further erred in ruling that House of Blues was required to specifically plead apparent agency in order for its contractual claims to survive summary judgment. This Court further erred in finding that House of Blues was required to plead that the settlements with Plaintiff were not in good faith or present evidence of the same in order for its contribution claim to survive. This Court additionally erred in relying upon Smith

² Consistent with the purpose and scope of a Rule 59(e) motion, House of Blues is not reasserting every argument presented to the trial court in support of its opposition to these motions to dismiss. Rather, House of Blues is pointing out legal errors and those arguments upon which the trial court failed to rule.

v. Tiffany to find that the House of Blues' federal and state constitutional rights of due process and equal protection were protected after admitting that the case explicitly failed to consider such arguments. In conclusory fashion, this Court finds that empty-chair defense is the legislatively adopted remedy for any concern. In dismissing causes of action for negligence and negligent misrepresentation, the Court failed to properly apply the discovery rule and ignored the Complaint's specific allegation that These Third-Party Defendants undertook a duty to House of Blues. Lastly, this Court failed to address why amendment of the pleadings was not the proper remedy for any alleged deficiency in the initial pleading.

STANDARDS OF REVIEW

Rule 59(e) Motion

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

Rule 12(b)(2)

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits.” Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). “When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008).

Rule 12(b)(6) Motion

In considering a Rule 12(b)(6), SCRCF motion, a trial court must base its ruling solely on the allegations on the face of the Complaint. Styles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). A motion under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413 (Ct. App. 2003); see also Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case).

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

LAW/ANALYSIS

I. This Court Failed to Engage in the Requisite Due Process Analysis Regarding Personal Jurisdiction Over These Third-Party Defendants.

Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). “Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there.” Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 431-32, 665 S.E.2d 660, 665 (Ct. App. 2008). Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Id. at 432, 665 S.E.2d at 665. “The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the ‘power’ to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair.” Id. To support a finding of due process, both prongs must be satisfied. Id.

To satisfy the “power” prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). Under the “fairness” prong, the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State’s interest in exercising jurisdiction. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008). A single transaction is sufficient to confer jurisdiction if these factors are met.” Moosally, 358 S.C. at 331, 594 S.E.2d at 884.

Despite the necessity of evaluating both of the “power” and “fairness” prongs and engaging in a multi-factored analysis under the latter of these, this Court instead entered a conclusory finding: “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 nonresident companies themselves had sufficient contacts to have purposefully availed themselves of the privilege of conducting activities within South Carolina.” (Order, p. 7). House of Blues discussed these factors in its Opposition and cited deposition testimony that directly contradicted averments made in the affidavits submitted by These Third-Party Defendants. (HOB Memo. in Opp. to Summ. Jmt, pp. 8-17). This court’s failure to weigh the requisite factors amounts to an abuse of discretion. See Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (holding that although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”). Accordingly, House of Blues requests that

this Court provide a ruling on the personal jurisdiction that properly considers and evaluates the evidence presented under the prongs and factors required.

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

In House of Blues' Memorandum in Opposition to These Third-Party Defendants' Motion to Dismiss, we specifically raised the limited scope of review pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, which must be based solely upon allegations set forth on the face of the complaint. (HOB Memo. in Opp., pp. 18-19). In order to convert a 12(b)(6) motion to a motion for summary judgment, all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Baird v. Charleston Cty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing Rule 12(b)(6), SCRCP). "The notice provisions in Rule 56 are incorporated into Rule 12(b)(6)." Id. (quoting Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987)). Thus, where the trial court does not give notice to the parties that it will consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment, consideration of the same, the evidence outside of the complaint is not properly considered. Id.

House of Blues argued that These Third-Party Defendants' arguments for dismissal all required reliance on evidence outside of the Complaint. (HOB Memo. in Opp., pp. 18-19). In order to *fully and fairly* decide them, this Court would have to consider evidence outside of the Third-Party Complaint. However, there was no notice provided to House of Blues that the motion to dismiss would be converted to one for summary judgment. Thus, House of Blues was not given an opportunity to fully contravene these arguments with deposition testimony, affidavits, and other evidence.

This Court's Order was silent as to this procedural defect raised by House of Blues. Accordingly, House of Blues requests that this Court provide a ruling on this issue. See Herring

v. Home Depot, Inc., 350 S.C. 373, 382 n.19, 565 S.E.2d 773, 777 n.19 (Ct. App. 2002) (“To preserve an issue for review on appeal, a party must raise the issue and obtain a ruling.”).

III. This Court Erred in Dismissing the Contract Based Claims Where House of Blues Was Not Required to Include Allegations of Apparent Authority in Its Third-Party Complaint.

In granting dismissal of House of Blues’ breach of contract and contractual indemnification claims against These Third-Party Defendants, this Court found that “House of Blues has not alleged any of the elements establishing that Throttlefest, LLC had either actual or apparent authority as an agent to bind each of These Third-Party Defendants such that they would be bound by this contract.” (Order, p. 8).

“The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.” Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). Our Courts have specifically ruled that the doctrine of apparent authority need not be pled in the Complaint. See Chambers of S.C., Inc. v. Entrepreneur, Inc., 292 S.C. 97, 100, 354 S.E.2d 921, 923 (Ct. App. 1987) (Chambers did not specifically plead the doctrine of apparent authority as a basis for recovery. However, this doctrine is available to a party under a general allegation of agency and need not be specifically pleaded.”). Nonetheless, as more fully explicated in House of Blues’ Memorandum in Opposition to Dismissal, House of Blues alleges that Throttlefest, LLC was acting as the agent of These Third-Party Defendants, who were intended beneficiaries under the Agreement and did—in fact—actually benefit from the Agreement. (See HOB Memo. in Opp., pp. 28-29; HOB Third-Party Compl. at ¶¶ 115-117, 119-124).

Accordingly, House of Blues requests that this Court recognize that House of Blues properly pled its claims for breach of contract and contractual indemnity against These Third-Party Defendants and amend its Order to deny dismissal of these claims.

IV. This Court Erred in Dismissing the Contribution Cause of Action Where House of Blues Was Not Required to Plead that the Settlements with Plaintiff Were Not in Good Faith or Present Evidence of the Same in Order for Its Contribution Claims Against Full Throttle and Sloon Shine to Survive.

This Court wrote:

House of Blues argues that S.C. Code Ann. § 15-38-50 does not apply here because the settlement between the Plaintiff, Full Throttle, and Sloon Shine was not in “good faith,” as is required by the statute. However, House of Blues did not allege in its Third-Party Complaint that the settlement was not in good faith. House of Blues did not present anything else that the Court could consider in support of this argument. Accordingly, the Court rejects it.

(Order p. 10). Importantly, House of Blues’ Third-Party Complaint contains no allegation that a settlement was made with any of the Third-Party Defendants at all. Rather, the Third-Party Complaint asserts: “All of the Third-Party Defendants were previously named as defendants in the first-party litigation.” (HOB Answer to Second Am. Compl./Third-Party Compl., ¶ 95). Additionally, it asserts: “In light of the trial court’s Orders of Dismissal entered on August 13, 2019 (dismissing Full Throttle and Full Throttle Sloon Shine, LLC), December 14, 2018 (dismissing Throttlefest LLC), and January 22, 2018 (dismissing without prejudice Defendants American Outlaw Spirits, Inc., Michael Ballard, and Jesse James Dupree), none of the Third Party Defendants remain as co-defendants in the first party action.” (*Id.* at ¶ 96).

It was Full Throttle and Sloon Shine’s Motions to Dismiss and memorandum which raised an argument that the contribution cause of action (and all other causes of action) should be precluded pursuant to S.C. Code Ann. §15-38-50 and Smith v. Tiffany. In response, House of Blues distinguished Smith v. Tiffany, which was notably a summary judgment case, and argued

that this Court's decision would necessarily require consideration of matters outside of the Third-Party Complaint to determine if the settlements were made in good faith. (HOB Memo. in Opp., pp. 19-27).

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

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

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

This Court ruled:

House of Blues next argues that *Smith v. Tiffany* did not decide whether due process and equal protection would allow a non-settling defendant to bring a settling party back into a case. **While it is true that *Smith v. Tiffany* did not decide this issue, the Court declines to rule that House of Blues' due process or equal protection rights would be violated by not allowing it to bring Full Throttle and Sloon Shine back into this case.** Full Throttle and Sloon Shine have already settled with the Plaintiff. House of Blues had ample opportunity to assert crossclaims against them when they were parties to this case, and further has had opportunities to file a separate action against them. 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.** House of Blues' constitutional rights are not violated by its inability to bring Full Throttle and Sloon Shine back into this case.

(Order, pp. 10-11) (emphasis added). This reasoning is circular and fails to address and rule upon the specific constitutional arguments raised under the state and federal constitutions. As an initial matter, this Court's reference to past opportunities to file cross-claims or a separate action certainly has no bearing on the Court's analysis. If the contribution claim was truly precluded now, the same causes of action raised in a different posture would not be in any better position to survive.

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

[P]erhaps in recognition of the perceived inequity complained of by Appellants, the General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not

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

419 S.C. at 557, 799 S.E.2d at 484 (internal citations omitted). The Court specifically noted that it was not considering “Appellants’ argument that the trial court erred in finding their due process rights were violated by the inability to join [third party defendant] or include him on the verdict form for purposes of allocation.” 419 S.C. at 558, n. 3, 799 S.E.2d at 484, n.3. Thus, the discussion of this defense in Smith v. Tiffany was not grounded in any consideration of due process or equal protection.

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

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

IV. This Court Erred in Misapplying the Discovery Rule and Finding that House of Blues' Negligence and Negligent Misrepresentation Claims Were Barred by the Statute of Limitations.

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

This Court further erred in misapplying the discovery rule. Under South Carolina law, however, the limitations period "begins to run when the party either knew or should have known that some legal right had been invaded." City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) ("Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence."). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." McAlhany v. Carter, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015).

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

Here, it not dispositive that Throttlefest 2014 was held from May 9-17, 2014 such that These Third-Party Defendants' misconduct must have occurred before and during that time period. While actual notice is also not the ultimate test, there is no evidence that House of Blues had reason to believe that any These Third-Party Defendants had done anything wrong prior to notice of the first-party claim from Kelsey's counsel. House of Blues is not omniscient. The motorcycle accident injuring first-party Plaintiff Kelsey did not occur on House of Blues property and was unknown to them until notified of the claim by Kelsey's lawyer by letter dated October 20, 2016. It was in that letter that House of Blues was notified of first-party Plaintiff Kelsey's allegation that Fajita Mike overserved a bar patron Travis Wagoner, resulting in the motorcycle accident and his severe injuries. Travis Wagoner admitted that he was not sure if anyone at House of Blues saw him being served by Fajita Mike. (Exhibit D to HOB Memo. in Opp., Depo. Tr. of Travis Wagoner, p. 45, line 20 – p. 46, line 2).³ It was during the course of discovery in the first-party litigation that House of Blues learned additional facts supporting its claims against These Third-Party Defendants, including their failure to procure the requisite insurance and which specific liquors were allegedly involved. Considering this, the operative date for the statute of limitations is the

³ This deposition testimony was not previously submitted to the Court because House of Blues was relying upon application of the Rule 12(b)(6) standard.

earliest date from which House of Blues knew or should have known of its third-party claims against These Third-Party Defendants, which was October 20, 2016.

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

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

VII. This Court Erred in Further Finding that House of Blues' Negligence and Negligent Misrepresentation Claims Were Barred Because House of Blues Did Not Plead Voluntary Undertaking.

"While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019). "The question of whether such a duty arises in a given case may depend on the existence of particular facts" Id. "Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." Id.

This Court ruled:

House of Blues argues that these Third-Party Defendants voluntarily undertook a duty to procure and supervise Garner, to promote and distribute their alcohol, and to obtain insurance coverage. House of Blues, however, failed to plead a voluntarily assumed duty. Even had House of Blues properly pled a negligence claim against these Third-Party Defendants, the Court still finds that the negligence claim arose in 2014 and is time-barred.

(Order, p. 13). In addition to the factual allegations asserted throughout House of Blues' Third-Party Complaint, under the Negligence cause of action House of Blues specifically avers "The Third-Party Defendants undertook to perform under the Agreement." (HOB Third-Party Compl. ¶ 139). While the word "voluntarily" is not included in this paragraph, dismissal based upon such semantics is not in line with the Rule 12(b)(6) standard. See Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009) ("Where a pleading is attacked for an alleged failure to state a cause of action, the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case.").

Accordingly, House of Blues requests that this Court reconsider its ruling and amend its Order to deny dismissal.

VIII. This Court Erred in Resorting to the Drastic Remedy of Dismissal.

House of Blues argued that to the extent the Court determined that there are any defects in its pleading, the proper relief would be to dismiss the claims without prejudice and allow leave to amend, citing Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 826 S.E.2d 585 (2019). (HOB Memo. in Opp., p. 28). "A complaint is not subject to dismissal with prejudice unless it appears *to a certainty* that no relief can be granted under any set of facts that can be proved in support of its allegations." Skydive Myrtle Beach, 426 S.C. at 189-90, 826 S.E.2d at 592-93 (quoting Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006)). This Court failed to rule upon or explain why an opportunity to amend its pleadings was not the proper remedy for any

alleged deficiency in the Third-Party Complaint. Accordingly, House of Blues request that this Court rule upon why an opportunity to amend its Third-Party Complaint is not the proper and sufficient remedy.

CONCLUSION

Based on the foregoing, House of Blues respectfully requests the Court reconsider its March 26, 2020 Orders granting dismissal of the third-party claims against Full Throttle, Sloon Shine, and American Outlaw Spirits and amend its Judgment to deny their respective Motions to Dismiss.

Respectfully submitted,
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**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION'S MOTION
TO ALTER OR AMEND JUDGMENT
ENTERED MARCH 26, 2020**

Murrells Inlet, South Carolina
April 6, 2020

**STATE OF SOUTH CAROLINA
COUNTY OF HORRY**

**IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-26-03008**

**DOUGLAS KELSEY and MARK
SHIMMENDER,**

Plaintiffs,

v.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION; HOB
ENTERTAINMENT, INC.; and TRAVIS
SCOTT WAGONER,**

Defendants.

**HOUSE OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION,**

Third-Party Plaintiff,

v.

**THROTTLEFEST LLC; AMERICAN
OUTLAW SPIRITS INCORPORATED;
FULL THROTTLE, LLC; and FULL
THROTTLE SLOON SHINE LLC,**

Third-Party Defendants.

**THIRD-PARTY DEFENDANTS AMERICAN
OUTLAW SPIRITS, INC.'S, FULL
THROTTLE, LLC'S, AND FULL
THROTTLE SLOON SHINE, LLC'S
RESPONSE IN OPPOSITION TO HOUSE
OF BLUES MYRTLE BEACH
RESTAURANT CORPORATION'S
MOTION TO ALTER OR AMEND
JUDGMENT**

COME NOW Third-Party Defendants American Outlaw Spirits, Inc. (“American Outlaw Spirits”); Full Throttle, LLC (“Full Throttle”); and Full Throttle Sloon Shine, LLC (“Sloon Shine”) (collectively, “these Third-Party Defendants”) and hereby submit this Response in Opposition to House of Blues Myrtle Beach Restaurant Corporation’s (“House of Blues”) Motion to Alter or Amend Judgment. House of Blues’ Motion fails to set forth a viable reason for altering the Court’s well-reasoned—and correct—Order. Its Motion should be denied.

The South Carolina Rules of Civil Procedure contemplate two situations in which a party should consider filing a Rule 59(e) motion:

A party *may wish* to file such a motion when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphases in original). House of Blues contends that the Court did not analyze and apply the law properly and failed to rule on certain issues raised. However, the Court's March 26, 2020 Order is based upon the facts of this case and the applicable law. For the reasons set forth below, no alteration of the Order is necessary.

I. The Court's Personal Jurisdiction Analysis Was Not Erroneous.

House of Blues' argument that the Court failed to undertake the requisite, two-step analysis is flawed. As an initial matter, of what import is this alleged error? If the House of Blues fails in the step analyzed, what does it matter if the Court analyzed another step? Nevertheless, the Court found that House of Blues' allegations concern a claim of "specific jurisdiction," that is, the right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the state. (Order at 6.) Specific jurisdiction over a cause of action arising from a defendant's contacts with the state is granted pursuant to the long-arm statute. S.C. Code Ann. § 36-2-803 (2003). South Carolina's long-arm statute, which includes the power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause. *Cockrell v. Hillerich & Bradshy Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (citing *Meyer v. Paschal*, 330 S.C. 175, 498 S.E.2d 635 (1998)).