

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

RECEIVED
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SC Court of Appeals

Douglas Kelsey, ... Plaintiff,

v.

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

AND

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

v.

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

RECORD ON APPEAL
Volume II

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The sole question therefore becomes whether the exercise of personal jurisdiction would violate due process. *Id.* Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. 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). If sufficient minimum contacts exist, the court must also find that the exercise of jurisdiction is “reasonable” or “fair.” *Id.*

Accordingly, the Court first focused on whether these Third-Party Defendants’ contacts were sufficient to satisfy due process requirements. (Order at 5-6). The Order elaborates on the allegations purporting to give this Court jurisdiction and found that House of Blues did not establish that these nonresidents had sufficient minimum contacts to have purposely availed themselves of the privilege of conducting activities within South Carolina. (*Id.* at 7.)

House of Blues scolds the Court for apparently not considering deposition testimony cited in its briefing, but the Court made apparent that it considered “the materials submitted to the Court to address the lack of contacts of these Third-Party Defendants and other matters of record,” as it was permitted to do. *See Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008) (“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.”). There was no need for the Court to reach the second, “fairness” prong because it had already determined that these Third-Party Defendants lacked minimum contacts. *See Southern Plastics Co.*, 310 S.C. at 261, 423 S.E.2d at 131 (“If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport

with the requirements of due process.”); *see also Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 334, 594 S.E.2d 878, 886 (Ct. App. 2004) (declining to address second prong because the first, “power” prong of the due process analysis was not met). There are no errors in the Court’s personal jurisdiction analysis.

II. The Court’s Order Is Within Rule 12(b)(6)’s Scope of Review.

House of Blues next argues that the Court erred in considering evidence outside of the pleadings and therefore improperly converted the Motions to Dismiss into Motions for Summary Judgment. House of Blues does not cite any specific evidence relied on by the Court outside of the Complaint or any instance where the Court so relied.

The Court properly decided these Third-Party Defendants’ Motions to Dismiss under the Rule 12(b)(6) standard. The Order makes clear that the Court did *not* convert the Motions to Dismiss into motions for summary judgment. For example, there is no indication that the Court considered the Co-Promotion Agreement, an outside document explicitly relied on and referred to in the Complaint, because it found that House of Blues did not allege that the Third-Party Defendants were parties to or third-party beneficiaries of the Agreement. (Order at 7-8.) House of Blues’ contract-based claims were dismissed based on the allegations in House of Blues’ Complaint. Moreover, the Court could have considered the Co-Promotion agreement under the Rule 12(b)(6) standard because that document is integral to the complaint, explicitly relied on in the complaint, and there is no challenge to its authenticity. *See Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 698–99 (1987). Review of the Co-Promotion Agreement would reveal no drafting error in the Complaint or need for review of additional materials; rather, it would reveal that the claims were properly dismissed against these entities who were not parties to the agreement.

To the extent House of Blues challenges the dismissal of its contribution claim against Full

Throttle and Sloon Shine based on the Court's alleged consideration of the Release, this argument fails. According to the South Carolina Supreme Court in *Spence v. Spence*, 368 S.C. 106, 124, 628 S.E.2d 869, 878 (2006),

the general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice. Most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) 'when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense....' This view is in keeping with the pleading and discovery system established by the Rules of Civil Procedure, which allow a party to raise Rule 12(b) defenses in a pre-answer motion.

These Third-Party Defendants have not filed Answers yet. Thus, in this instance, Full Throttle and Sloon Shine properly asserted their affirmative defense of release and satisfaction in a Rule 12(b)(6) motion. *See id.* ("[The defendant] in this instance properly asserted the affirmative defense of bona fide purchaser for value in a Rule 12(b)(6) motion" and the court "properly dismissed the complaint."). The Court should affirm the Order as it was properly decided under Rule 12(b)(6), SCRPC.

III. The Court Did Not Err in Dismissing House of Blues' Contract-Based Claims.

House of Blues seeks to pursue these Third-Party Defendants on contract-based claims, despite the undisputed fact that American Outlaw Spirits, Full Throttle, and Sloon Shine were not parties to or intended third-party beneficiaries of the Co-Promotion Agreement. The Court correctly dismissed these claims because these companies lack privity of contract with House of Blues. *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 16, 605 S.E.2d 750, 752 (Ct. App. 2004).

The Court also appropriately dismissed these claims because House of Blues failed to plead any of the elements establishing that Throttlefest, LLC had authority as an agent to bind each of these Third-Party Defendants. The only allegation in the Third-Party Complaint pertaining to

Throttlefest, LLC's alleged agency is: "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." (Third-Party Compl. at ¶ 124.) Beyond this legal conclusion—which the Court is not bound to accept as true—the Third-Party Complaint contains no support for relief under an agency theory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949–50 (2009) ("The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") *See also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007) ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation"). The total absence of any factual agency allegations, an essential element in pleading, supports this Court's dismissal of the contract-based claims on an agency theory.

IV. The Court Correctly Dismissed House of Blues' Contribution Claims Against Full Throttle and Sloon Shine Pursuant to S.C. Code Ann. §15-38-50 at the Motion to Dismiss Stage.

House of Blues next argues that the Court erred in dismissing its contribution claim against Full Throttle and Sloon Shine at this stage, and that "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." (Mot. at 13.)

Settlement and release is a valid, affirmative defense to a contribution claim under S.C. Code Section 15-38-50. ("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 . . . it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.") As

discussed in Section II above, courts are permitted to allow such defenses to be raised in a motion to dismiss under Rule 12(b)(6), SCRCP. *Spence v. Spence*, 368 S.C. 106, 124, 628 S.E.2d 869, 878 (2006). “This view is in keeping with the pleading and discovery system established by the Rules of Civil Procedure, which allow a party to raise Rule 12(b) defenses in a pre-answer motion.” *Id.* 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.

House of Blues also takes issue with the Court’s alleged failure to find that its due process and equal protection rights were violated. House of Blues restates its argument previously made in its opposition to these Third-Party Defendants’ Motions to Dismiss, and claims 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 these parties earlier, when they were first-party Defendants in this case. House of Blues’ current claim that it is being treated unfairly is unavailing, particularly when it previously sat on its rights. Moreover, House of Blues’ argument that its constitutional rights will be violated by the content of the verdict form is premature; 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, whereas in other cases named parties are protected (when all tortfeasors are named). This argument is ineffective here because, at one time, all alleged tortfeasors (including these Third-Party Defendants) were named defendants and House of Blues failed to exercise its right to assert crossclaims against them before these parties settled with the Plaintiff and were dismissed.

Finally, House of Blues contends the empty-chair defense provides it no remedy because “Subsection (D) only provides protection to named-defendants on a ‘perfect’ empty-chair defendant argument.” A “perfect” empty chair defense, however, is exactly what House of Blues alleges it has, since it claims that only the Third-Party Defendants, and not House of Blues, were responsible for Michael Garner’s service of alcohol to the Plaintiff. If House of Blues can convince the jury that what it alleges is true, its empty-chair defense will absolve it of liability. For all of these reasons, the Court should affirm the Order because House of Blues’ contribution cause of action is barred by S.C. Code Ann. § 15-38-50 and there is no clear error of law for the Court to reconsider and correct.

V. The Court Correctly Held That the Statute of Limitations Barred House of Blues’ Negligence and Negligent Misrepresentation Claims.

First, House of Blues argues the Court erred in considering matters outside of the Complaint. House of Blues does not state what outside matters the Court apparently reviewed. A cursory scan of the Court’s Order clearly shows the Court only relied on, and even made bulleted lists of, the allegations set forth on the face of the Complaint that would render these claims time-barred. (Order at 13-14.) House of Blues’ first argument is without merit.

Second, House of Blues claims that the 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), SCRCP. House of Blues appears to rely on *Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d

697, 699 (1987) in support of its proposition; however, the *Brown* Court's holding was that "a ruling on the statute of limitations . . . was error because the defenses were not apparent *from the face of the complaint*." (Emphasis added.) Again, here, the statute of limitations defense is apparent from the face of House of Blues' Complaint. Dismissal on a statute of limitations basis was proper. See *Spell v. S.C. Dep't of Highways & Pub. Transp.*, 292 S.C. 228, 230, 355 S.E.2d 860, 861 (1987) (affirming grant of motion to dismiss based on statute of limitations); *Gillman v. City of Beaufort*, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006) (affirming grant of motion to dismiss on statute of limitations grounds). House of Blues' second argument is without merit.

Third, House of Blues states that this Court erred in misapplying the discovery rule. House of Blues simply repeats its argument made at the Motion to Dismiss stage: that its claims did not accrue until October 20, 2016, when it learned of Plaintiff's motorcycle accident, and therefore, the three-year statute of limitations had not expired when it filed its pleading on October 19, 2016. But the Order aptly notes that House of Blues' claims are not based solely on Plaintiff's injuries. (Order at 15.) House of Blues' Third-Party Complaint instead alleges these Third-Party Defendants committed torts prior to and during the Throttlefest event. Since the event occurred on House of Blues' premises, the Court correctly found that it either knew or should have known in May 2014 that these Third-Party Defendants had allegedly acted negligently or made misrepresentations. *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' third argument is without merit. There is nothing for the Court to reconsider here.

VI. The Court Did Not Err in Finding House of Blues Failed to Properly Plead a Voluntarily Assumed Duty.

House of Blues argues that the Court erred in finding that its negligence and negligent misrepresentation claims were flawed because it did not plead a voluntary undertaking. At best, this is a misunderstanding of the Court's Order. The Order states that the only duties House of Blues alleged arose out of the Co-Promotion Agreement. (Order at 12 (citing Third-Party Compl. ¶ 139-140) ("the Third-Party Defendants undertook to perform under the Agreement.")) The Court evaluated the allegations on the face of House of Blues' Complaint and found them "fatally defective" on the duty element of a negligence claim. (Order at 13.)

House of Blues subsequently argued 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, but the Court noted that House of Blues failed to plead a voluntarily assumed duty. Where there is no duty, the defendant in a negligence action is entitled to a judgment as a matter of law. *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006). The Court's Order is correct and should not be altered.

VII. The Court's Dismissal of House of Blues' Claims Was not a Drastic Remedy.

House of Blues argues that it should have been afforded an opportunity to amend its Complaint, citing *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 826 S.E.2d 585 (2019). The Court is not required to provide a party an opportunity to amend; it has discretion to deny such a request if the amendment would be futile. *See id.* at 182, 826 S.E.2d 589. House of Blues never filed a Motion to Amend its Third-Party Complaint or a proposed, amended Third-Party Complaint; however, it is clear that any proposed amendment would be futile because of "substantive and procedural considerations." *Kramer v. Omnicare ESC, LLC*, 307 F.R.D. 459, 464 (D.S.C. 2015).

The following considerations would render amendment futile. First, this Court previously held that it lacked personal jurisdiction over these Third-Party Defendants. *See Dolgaleva v. Virginia Beach City Pub. Sch.*, 364 F. App'x 820, 824 (4th Cir. 2010) (affirming district court's denial of amendment where amendment would be futile because court lacked jurisdiction). The Court further found that House of Blues' tort claims were time barred. *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000) ("Where the statute of limitations bars a cause of action, amendment may be futile and therefore can be denied."). Finally, the Court found that these Third-Party Defendants could not be liable under a contract theory since they were not in privity of contract with House of Blues. *See Collier v. Varco-Pruden Buildings, a Div. of United Dominion Indus., Inc.*, 886 F. Supp. 528, 530 (D.S.C. 1995) (finding amendment would be futile where a privity relationship was required and was not present). Amendments cannot save House of Blues' claims in this instance; dismissal was the proper remedy.

WHEREFORE, Third-Party Defendants American Outlaw Spirits, Full Throttle, and Sloon Shine pray that this Honorable Court enter an order denying House of Blues' Motion to Alter or Amend and affirm its prior Order granting these Third-Party Defendants' Motions to Dismiss.

This 17th day of April, 2020 at Charleston, South Carolina.

s/Kara S. Grevey
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Attorneys for Third-Party Defendants

*American Outlaw Spirits, Inc.; Full Throttle, LLC;
and Full Throttle Sloon Shine, LLC*

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	)	
	)	
v.	)	MOTION TO ENFORCE
	)	MEDIATED SETTLEMENT
HOUSE OF BLUES MYRTLE BEACH	)	AGREEMENT AND RELEASE
RESTAURANT CORPORATION, HOB	)	
ENTERTAINMENT, INC., and TRAVIS	)	
SCOTT WAGONER,	)	
	)	
Defendants	)	

TO: CHRISTIAN STEGMAIER, Attorney for Defendant House of Blues Myrtle Beach Restaurant Corporation and Defendant HOB Entertainment, Inc. (collectively "Defendants"):

You will please take notice that the undersigned, as attorney for Plaintiff, will appear on the tenth day after service hereof, or as soon after counsel may be heard, before the presiding Judge, and move for an Order enforcing the terms and conditions of a Mediated Settlement Agreement entered into between Plaintiff, Defendant, and Defendant's insurers on June 30, 2020 and a Release entered into between Plaintiff, Defendant, Defendant's insurers, and other non-parties to the litigation on August 28, 2020. The following facts are not in dispute:

1. Plaintiff settled his lawsuit against the House of Blues Defendants at a mediated settlement conference on June 30, 2020.
2. A Mediated Settlement Agreement was executed on June 30, 2020 indicating that the House of Blues Defendants would have thirty days to pay Plaintiff the agreed upon settlement amount after Plaintiff signed a Release. A copy of the Mediated Settlement Agreement is attached hereto as Exhibit A and incorporated herein by reference.
3. A Release was thereafter signed by Plaintiff on August 28, 2020, a copy of which is attached hereto as Exhibit B and incorporated herein by reference.
4. All of the parties to the Mediated Settlement Agreement and all of the parties to the Release have performed except for the House of Blues Defendants' primary insurance carrier, Starr Indemnity and Liability Company ("Starr").
5. Starr's payment obligation pursuant to the plain terms of the Release is as follows:

"Starr Indemnity & Liability Company shall issue a check in the amount of ONE MILLION (\$1,000,000.00) DOLLARS made payable to

COLEMAN, GLEDHILL, HARGRAVE, MERRITT & RAINSFORD, P.C. and DOUGLAS KELSEY representing compensation for any and all damages Kelsey may claim to have against *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc.* and *Starr Indemnity & Liability Company* for any reason whatsoever.”

6. Starr has not and refuses to issue a \$1,000,000 check made payable to Plaintiff and Plaintiff’s counsel’s law firm despite Starr’s obligation to do so and without any justification for non-payment. Starr’s thirty day time period to pay has expired.
7. All other parties to the Mediated Settlement Agreement and the Release have made their required payments to Plaintiff.
8. As a result of Starr’s willful and wanton breach of the Mediated Settlement Agreement and the Release, Plaintiff has suffered damages and is now forced to bring this motion to enforce the terms of the Mediated Settlement Agreement and the Release.
9. Plaintiff is entitled to statutory interest on the funds Starr is required to pay pursuant to section 34-31-20(A) of the South Carolina Code.
10. The undersigned counsel has communicated with Defendants’ counsel in an effort to resolve this matter, but Starr has failed and has refused to fulfill its obligations under the Mediated Settlement Agreement and the Release.

WHEREFORE, Plaintiff prays that this Court enter an Order compelling Defendant to comply with the terms of the Mediated Settlement Agreement and the Release; an award of attorney’s fees as sanctions against Starr for its willful and wanton refusal to pay Plaintiff the agreed upon settlement amounts; all costs for the efforts made to enforce the terms of the Mediated Settlement Agreement and Release, including but not limited to the filing of this Motion; and all pre-judgment and post-judgment interest as allowed by law, including but not limited to statutory interest on Starr’s payment pursuant to section 34-31-20(A) of the South Carolina Code.

This the 20th day of October, 2020.

s/James Rainsford
 South Carolina Bar Number 74924
 129 East Tryon Street
 Post Office Drawer 1529
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ATTORNEY FOR PLAINTIFF

EXHIBIT A

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Douglas Kelsey,)

Plaintiff,)

vs.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE 15th JUDICIAL CIRCUIT
CASE NO.: 2017-CP-26-03008

CONSENT ORDER AND SETTLEMENT AGREEMENT

House of Blues Myrtle Beach Restaurant
Corporation,)

Plaintiff,)

vs.)

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

Defendants.)

The parties have settled the above-captioned matter for a payment to Plaintiff by
Defendants of \$ 5,000,000 ^{for \$1,000 of which is confidential} in return for a full release and order of dismissal

with prejudice.

*parties agree to confidentiality
Plaintiff responsible for lien & MSA
Defendant reserves 3rd party claims
payment within 30 days of execution
of release
structure must be corroborated with
Chubb approved broker (Mike Murphy)*

[Handwritten signature]
[Handwritten signature]
[Handwritten signature]

C. [Handwritten signature]

W/ EXPRESS APPROVAL OF
HOUSE OF BURS DEFENDANTS,
STARR, AND GIBB

Dated: 6/30/20

EXHIBIT B

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.)

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

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

**CONFIDENTIAL
RECEIPT AND GENERAL
RELEASE IN FULL**

The undersigned party *Douglas Kelsey* ("Plaintiff"), for and in consideration of the sum of FIVE MILLION and No/100 (\$5,000,000.00) DOLLARS, paid to him by *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, the receipt and sufficiency whereof is hereby acknowledged, does for himself and his heirs, assigns, executors and administrators, hereby remise, release, acquit, and forever discharge *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, their agents, servants, employees, insurers, sureties, re-insurers, parents, subsidiaries, affiliates, predecessors, successors and assigns, and all other persons, firms, affiliates, corporations, and associations or partnerships, whether herein named, who may be jointly or severally liable to the undersigned, of and from any and all claims, including but not limited to, cross-claims, demands, debts, rights, actions, causes of action, costs, interest, emotional distress, fees, expenses and compensation of any nature, now existing or which may hereinafter accrue, and all known and unknown, foreseen and unforeseen injuries or damages and the consequences thereof resulting which heretofore have

been, or which hereinafter may be, sustained by the undersigned as a result of any matter arising out of the incident alleged to have occurred on or about May 17, 2014 on U.S. 17/ North Kings Highway, in Myrtle Beach, South Carolina, as set forth in the Complaint on file with the Court of Common Pleas, Horry County, South Carolina, entitled DOUGLAS KELSEY v. HOUSE OF BLUES MYRTLE BEACH RESTAURANT CORPORATION; HOB ENTERTAINMENT, INC.; AND TRAVIS SCOTT WAGONER, C.A. No. 2017-CP-26-03008.

This Release represents the total and complete settlement of all claims, known or unknown, arising out of the incident alleged to have occurred on or about May 17, 2014 on U.S. 17/ North Kings Highway, in Myrtle Beach, South Carolina, including but not limited to expenses or damages actually incurred by *Douglas Kelsey* or paid on behalf of *Douglas Kelsey* or any future expenses anticipated to be incurred as a result of this claim, if any. Douglas Kelsey has abandoned all claims to past, present, or future lost wages and all claims for past, present, or future loss of earning capacity (all such lost wage or earning capacity damages are listed as “economic damages” for purposes of this Release). This \$5,000,000 settlement is for payment of all past, all present, and all future medical treatment related to this incident and for all past, all present, and all future pain and suffering and all other non-economic injuries related to this injury. This settlement does not include any payment for economic damages. These economic damage claims are being dismissed and although no compensation has been or will be paid for these economic damage claims, this Release covers all economic damage claims that have been or could have been asserted by Douglas Kelsey.

In reaching agreement on the terms of this Release, the parties acknowledge the undersigned’s entitlement to Social Security disability benefits pursuant to 42 U.S.C. § 423 and receipt of Medicare or Medicaid benefits under 42 U.S.C § 1395y, as well as the entitlement of the

Centers for Medicare and Medicaid Services ("CMS") to pursue subrogation and intervention, pursuant to 42 U.S.C. § 1395y(b)(2) to recover any alleged overpayment made by CMS.

The parties to this Release agree this Release is not intended to shift to CMS the responsibility for payment of medical expenses for the treatment of injury related conditions.

Accordingly, it is hereby stipulated the parties have sought to protect the interest of Medicare and therefore it is not the purpose of this Release to shift responsibility of medical care in this matter to the Medicare program. Instead, this Release is intended to resolve a dispute among the Plaintiff and *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, and the other Releasees as a result of the incident on May 17, 2014.

The parties agree this Release is intended to provide Plaintiff a lump sum payment that will foreclose the responsibility of *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company* and the other Releasees for future payment of all injury related medical expenses. Therefore, the parties make the following representations/averments:

- (a) the parties have carefully and appropriately considered Medicare's interest and have concluded the following:
 - i. The nature of the claim as it pertains to liability is in dispute. This settlement is the compromise of a disputed claim, including all known and unknown injuries of any party, and that the consideration paid is adequate and sufficient, and that payment made in settlement thereof is not to be construed as an admission of liability on the part of the party or parties or any of them hereby released;

- ii. Plaintiff has created an MSA to provide for all anticipated non-prosthetic care, as outlined in his lifecare plan created during the instant litigation, which totals approximately \$435,000; and
- iii. Plaintiff warrants and guarantees that any and all prosthetic-related care and purchases, as outlined in his lifecare plan created during the instant litigation, will be satisfied by funds emanating from the instant settlement. Plaintiff made direct inquiry with CMS/Medicare and was expressly advised the prosthetics he sought, as outlined in his lifecare plan, were not covered by CMS/Medicare. Accordingly, Plaintiff covenants to bear the full costs for any and all prosthetic-related care and purchases, as outlined in his lifecare plan created during the instant litigation.

This Release is based upon a good faith determination of the parties in order to resolve a questionable claim. The parties have resolved this matter in compliance with both state and federal law and the settlement terms adequately consider Medicare's interest and do not reflect any attempt to shift responsibility of treatment to Medicare pursuant to 42 U.S.C. § 1395y(b). The parties acknowledge and understand that any present or future action or decision by CMS on this settlement, or on the Plaintiff's eligibility or entitlement to Medicare or Medicare payments, will not render this release void or ineffective, or in any way affect the finality of this liability settlement.

THE UNDERSIGNED agrees that he is responsible for satisfying any and all outstanding or prospective liens related to this matter.

THE UNDERSIGNED acknowledges and assumes all risk, chance, or hazard that said damages may be or become permanent, progressive, greater, or more extensive than is now known, anticipated or expected.

THE UNDERSIGNED agrees to indemnify, defend, and hold *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, and the other Releasees harmless from any action by any medical lien holder for Douglas Kelsey's medical

treatment and expenses related to the incident alleged to have occurred on or about May 17, 2014 on U.S. 17/ North Kings Highway, in Myrtle Beach, South Carolina.

THE UNDERSIGNED agrees to indemnify, defend, and hold *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, and the other Releasees harmless from any action by Medicare seeking payment of past, current, or future validated related medical expenses for Douglas Kelsey's medical treatment and expenses related to the incident alleged to have occurred on or about May 17, 2014 on U.S. 17/ North Kings Highway, in Myrtle Beach, South Carolina.

The Undersigned shall further hold *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, and the other Releasees harmless from any and all adverse consequences in the event this settlement results in the loss of right to Social Security, Medicare, and/or other benefits to the extent The Undersigned would have been entitled to those benefits in the absence of this Release.

The parties to this Release understand that many common medical expenses are not payable or reimbursable under the Medicare program. These medical expenses, not covered by Medicare, but necessary in the treatment of Plaintiff's injury, and without an admission of liability on the part of *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, and the other Releasees, have been taken into consideration in the calculation and settlement of Plaintiff's future medical expenses, if any. Funds for these non-Medicare covered

medical expenses have been included in the lump sum settlement amount and shall not be paid from any Medicare allocation amount.

THE UNDERSIGNED acknowledges that any decision regarding entitlement to Social Security benefits or Medicare or Medicaid benefits, including the amount and duration of payments and offset reimbursement for prior payments is exclusively within the jurisdiction of the Social Security Administration, the United States Government, and the federal courts, and is determined by Federal law and regulations. As such, the United States Government is not bound by any of the terms of this Release.

THE UNDERSIGNED has been apprised of his right to seek assistance from legal counsel of his choosing or directly from the Social Security Administration or other government agencies regarding the impact this Release may have on Plaintiff's current or future entitlement to Social Security or other governmental benefits. Plaintiff acknowledges that acceptance of these settlement funds may affect Plaintiff's rights to other governmental benefits, insurance benefits, disability benefits, or pension benefits. Notwithstanding this possibility, the undersigned desires to enter into this Release to settle this injury claim according to the terms set forth herein.

IN CONSIDERATION OF THE ABOVE PAYMENT, the undersigned also agrees that this settlement is the compromise of a disputed claim, including all known and unknown injuries of any party, and that the consideration paid is adequate and sufficient, and that payment made in settlement thereof according to the terms set forth herein is not to be construed as an admission of liability on the part of the party or parties or any of them hereby released, and that *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc., Starr Indemnity & Liability Company, Westchester Fire Insurance Company*, and the other

Releasees specifically deny liability of any nature or kind to any person for the aforementioned incident or for any injuries arising from same.

THE UNDERSIGNED FURTHER AGREES that this Release is CONFIDENTIAL, and that no particulars of the settlement, including the amount, are to be revealed or communicated to any person, firm or corporation, except for purposes of obtaining legal, financial, or tax advice or as otherwise required by law. It is further understood and agreed that this provision, commonly known as a "confidentiality clause," is part of the consideration of the within Release, that a breach of this provision is to be considered as a material breach of the entire agreement, and that the terms of this paragraph are contractual and not a mere recital. One Thousand and No/100 Dollars (\$1,000.00) out of the total settlement payment is consideration for the inclusion of the confidentiality clause in this agreement.

THE UNDERSIGNED FURTHER AGREES, as a further consideration and inducement for this compromise settlement, that the settlement shall apply to unknown and unanticipated injuries and damages resulting from the above-described incident, including property damage and death, as well as to those now disclosed.

THE UNDERSIGNED FURTHER DECLARES and represents that no promise, inducement or agreement except as herein expressed has been made to the undersigned and this Release contains the entire agreement between the parties hereto, and the terms of this Release are contractual and not a mere recital.

THE UNDERSIGNED FURTHER AGREES that the consideration paid in this compromise and Release is and shall be a complete bar to any subsequent action or proceeding to set aside or vacate this instrument because of a mistake in fact or otherwise.

THE UNDERSIGNED FURTHER AGREES that there are no collateral or outside agreements of any kind between the parties hereto and payment is in accord and satisfaction of the disputed claims.

THE UNDERSIGNED DOES hereby grant unto his attorneys, full and complete authority to consent to such Order or Orders as may be necessary to dismiss and forever end the above-entitled action with prejudice.

This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED further states he has carefully read the foregoing release, knows the contents thereof, and signs the same as his own free act.

REGARDING TRANSFER OF FUNDS

Westchester Fire Insurance Company (Chubb) Portion of the Settlement Only

In consideration of Plaintiffs' agreement to the terms herein, *Westchester Fire Insurance Company* (Chubb) agrees:

- o To pay a single sum of THREE MILLION (\$3,000,000.00) DOLLARS ("Total Settlement Amount by Chubb"), which shall be issued within 7 days after the Effective Date of this Agreement and following the dismissal of the Litigation with prejudice in accordance with the procedures set forth below.
- o The Total Settlement Amount by *Westchester Fire Insurance Company (Chubb)* will be made payable via Automated Clearing House transfer to COLEMAN, GLEDHILL, HARGRAVE, MERRITT & RAINSFORD, P.C. and shall be paid to Plaintiff as follows: THREE MILLION Dollars and Zero Cents (\$3,000,000.00), representing compensation for any and all damages Kelsey may claim to have against *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc.* and *Westchester Fire Insurance Company* for any reason whatsoever.

In consideration of Plaintiffs' agreement to the terms herein, *Westchester Fire Insurance Company* (Chubb) agrees:

- To pay a single sum of THREE MILLION (\$3,000,000.00) DOLLARS ("Total Settlement Amount by Chubb"), which shall be issued within 7 days after the Effective Date of this Agreement and following the dismissal of the Litigation with prejudice in accordance with the procedures set forth below.
- The Total Settlement Amount by *Westchester Fire Insurance Company (Chubb)* will be made payable via Automated Clearing House transfer to COLEMAN, GLEDHILL, HARGRAVE, MERRITT & RAINSFORD, P.C. and shall be paid to Plaintiff as follows: THREE MILLION Dollars and Zero Cents (\$3,000,000.00), representing compensation for any and all damages Kelsey may claim to have against *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc.* and *Westchester Fire Insurance Company* for any reason whatsoever.

Regarding the balance of the TWO MILLION (\$2,000,000.00) DOLLARS:

- *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc.* shall issue a check in the amount of ONE MILLION (\$1,000,000.00) DOLLARS made payable to COLEMAN, GLEDHILL, HARGRAVE, MERRITT & RAINSFORD, P.C. and DOUGLAS KELSEY representing compensation for any and all damages Kelsey may claim to have against *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc.* for any reason whatsoever; and
- *Starr Indemnity & Liability Company* shall issue a check in the amount of ONE MILLION (\$1,000,000.00) DOLLARS made payable to COLEMAN, GLEDHILL, HARGRAVE, MERRITT & RAINSFORD, P.C. and DOUGLAS KELSEY representing compensation for any and all damages Kelsey may claim to have against *House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc., Live Nation Entertainment, Inc.* and *Starr Indemnity & Liability Company* for any reason whatsoever.

YOU ARE MAKING A FINAL SETTLEMENT. READ BEFORE SIGNING.

[SIGNATURE PAGES TO FOLLOW]

I HAVE READ THE FOREGOING RELEASE. I ACCEPT THESE TERMS AND
AGREE TO ABIDE BY THEM.

WITNESSES:

Douglas Kelsey
DOUGLAS KELSEY

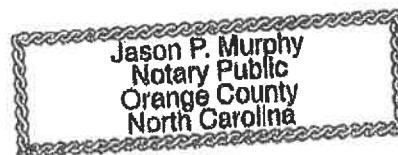
ACKNOWLEDGMENT

BEFORE ME, the undersigned Notary Public, on this day personally appeared *Douglas Kelsey*, who being duly sworn, deposed and said that he is the Plaintiff in the foregoing matter, that he has read the foregoing instrument and is familiar with the contents thereof, that he executed the foregoing instrument for the purposes and consideration therein expressed, and that the recitations and representations contained in said instrument are true and correct.

SWORN TO AND SUBSCRIBED before me this

28 day of August, 2020

[Signature]
Notary Public for Orange County, North Carolina



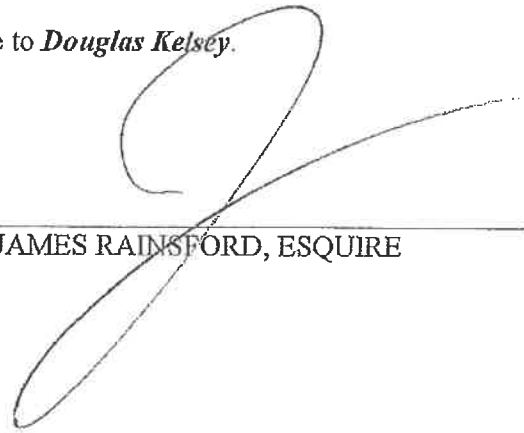
My Commission expires: July 17, 2023

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

ATTORNEY'S CERTIFICATE

As attorney for *Douglas Kelsey* in the foregoing matter, and as a member of the South Carolina Bar, I hereby certify that the execution of this Release has been performed properly, and that I have explained the terms of the Release to *Douglas Kelsey*.

HILLSBOROUGH, North Carolina
AUGUST 28, 2020



JAMES RAINSFORD, ESQUIRE

1 STATE OF SOUTH CAROLINA

2 -----x

3 DOUGLAS KELSEY,

4 Plaintiff,

6 Case No.

7 -against-

2017-CP-26-03008

8 HOUSE OF BLUES MYRTLE RESTAURANT CORP.

9 HOB ENTERTAINMENT, INC., AND TRAVIS SCOTT,

10 WAGONER; HOUSE OF BLUES MYRTLE BEACH

11 RESTAURANT CORP.,

12 Defendants

13 -against-

14 THROTTLEFEST LLC, AMERICAN OUTLAW

15 SPIRITS INCORPORATED, FULL THROTTLE, LLC

16 AND FULL THROTTLE SLOON SHINE, LLC

17 Defendants

18 -----x

19 July 23, 2020

20 York, S.C.

22 B E F O R E:

23 HONORABLE WILLIAM A. MCKINNON

1 A P P E A R A N C E S:

2 DUFFY & YOUNG LLC

3 BRIAN C. DUFFY, Esquire

4 Attorney for the Plaintiff

5

6 COLLINS & LACY

7 CHRISTIAN STEGMAIER, Esquire

8 Attorney for the Defendant,

9 House of Blues

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Aileen Butler

24

Official Court Reporter

25

1 THE COURT: Good morning counsel.

2 MR. STEGMAIER: Good morning, Your Honor.

3 THE COURT: Thank you all for making the trip
4 down.

5 MR. STEGMAIER: Yes, sir.

6 THE COURT: House of Blues' motion so whenever you
7 all are ready.

8 MR. STEGMAIER: Good morning, again, sir. I'm
9 Christian Stegmaier with Collins and Lacy in Columbia.

10 THE COURT: Yes, sir.

11 MR. STEGMAIER: And we are representing the House
12 of Blues the defendant in this motion to reconsider.

13 I will say a couple of things. Number one, this
14 is only the second live hearing I've been to in the last
15 five months, so thank you for inviting us to come up
16 here.

17 THE COURT: You're welcome.

18 MR. STEGMAIER: It's nice to get out of the
19 office.

20 The second thing to is -- well, hopefully the Court
21 has a copy of our motion.

22 THE COURT: I've read it.

23 MR. STEGMAIER: So there are multiple points as to
24 why we believe that reconsideration is warranted. I do
25 want to share with you and I've shared with Mr. Duffy to

1 and I'm certainly not constraining his argument in any
2 way, shape or form. He may disagree with me.

3 But point number five, is the Smith versus Tiffany
4 argument as it relates --

5 THE COURT: The due process argument?

6 MR. STEGMAIER: Yes, sir. As it relates to
7 bringing in the Throttlefest related defendant -- I'm
8 sorry, the Sloon Shine related defendants into the first
9 part of the case. Our position is that's potentially
10 mooted by virtue of the fact that a first party claim
11 has been resolved in mediation. So --

12 THE COURT: I apologize. I'm not following you
13 Mr. Stegmaier.

14 MR. STEGMAIER: Okay.

15 THE COURT: Isn't that always the case in these
16 situations. I mean the claims have been resolved?

17 MR. STEGMAIER: No. And just to refresh your
18 recollection I know this was a thousand motions ago, but
19 --

20 THE COURT: Is your argument the fact that the
21 plaintiff's claim the entirety has been resolved?

22 MR. STEGMAIER: Correct.

23 THE COURT: So that's your argument. That puts it
24 into a different situation.

25 MR. STEGMAIER: So we believe that Smith versus

1 Tiffany should be revisited by the Supreme Court
2 ultimately and specifically we believe that what we were
3 trying to achieve in this case and what we were trying
4 to convince the Court of was for purposes of due process
5 we believe that the Sloon Shine entities should be
6 included on the verdict form in the first party case.
7 And to the extent that that argument exists, or existed
8 it's been mooted by Virtue of the fact that there's no
9 first party claim any more. All that exists now are
10 these third-party claims, for what that's worth, sir. I
11 don't mean to confuse or derail the conversation in any
12 way, shape or form.

13 THE COURT: I want to make sure I'm understanding.
14 The argument is under the Tiffany case they paid their
15 money and there's clear case law in South Carolina
16 saying therefore they're released from any claims
17 including for other purported tortfeasors, correct? So
18 the fact that the plaintiff have resolved all their
19 claims doesn't seem -- at least first blush relevant to
20 me.

21 MR. STEGMAIER: And I appreciate that point
22 because that's why I don't necessarily want to constrain
23 myself either because for what you just enunciated that
24 remains active. That remains active as an argument.
25 But to the extent that there was an argument that the

1 third parties should appear on the first party verdict
2 form.

3 THE COURT: I'm sorry. Now I understand. I
4 apologize. You're telling me your argument is mooted --
5 the due process argument is mooted because theirs is no
6 first-party claim any more?

7 MR. STEGMAIER: Right. We're not arguing over a
8 verdict form anymore. Now, with that said Mr. Duffy I
9 anticipate will say the Tiffany case is operative as is
10 the statute because we paid our money and there's no
11 contribution claim. I'm certain that's what he is going
12 to argue and re-argue today. But I just wanted to
13 create that clarification.

14 THE COURT: Okay.

15 MR. STEGMAIER: I don't think that Court was
16 acquainted yet with the fact that there had been a
17 mediation earlier this month.

18 The other thing to is this -- and I don't say this
19 to try to ingratiate myself to you sir at all, but
20 candidly you've developed a reputation as being very
21 meticulous and being thoughtful with how your handling
22 your caseload and we very much appreciate that.

23 THE COURT: I appreciate that.

24 MR. STEGMAIER: And I would say this to as well,
25 it would have been very easy for this Court just to

1 issue a Form 4 denying the motion to reconsider and
2 we're glad you didn't and we're glad we've been invited
3 up to York to re-argue our case. You obviously do have
4 our brief that I think we have argued in fine detail
5 what our points are to support reconsideration. What
6 I'm interested if I can ask you a question, is there
7 something that has been asserted in the arguments either
8 that we have raised or the other party has raised that
9 has engendered a desire on the part of the Court to have
10 us all come up here to argue to you. I say that for
11 purposes of if you want to get hyper-focused about
12 something we can start there.

13 THE COURT: No, I'll be honest. I appreciate you
14 asking me that. But my view is if a party takes time to
15 file a motion to reconsider I'll give them a chance to
16 be heard on it.

17 MR. STEGMAIER: Well, I appreciate that and thank
18 you very much. I can't tell you how many Form 4's I've
19 gotten in years past. So we appreciate at least the
20 opportunity.

21 THE COURT: I can't say that I am going to do that
22 in every single case but this is a complicated case with
23 a lot of issues. One thing maybe if you wouldn't mind
24 starting out with, I'm struggling with one of the issues
25 with these defendants. It seems to me that you're

1 almost making a piercing the corporate veil argument but
2 you are making it after the fact to collect a judgement.
3 You're making it in advance to tie these defendants.
4 These were not contracting parties, right? Your client
5 contracted with Throttlefest not with these parties.

6 MR. STEGMAIER: Well, you're correct about that.
7 So as far as them being an actual signatory to the
8 co-promotion agreement that existed in the venue for the
9 2014 event they are not signatories. But this is what
10 we've learned and this is what we've asserted in our
11 complaint to as well, is this Fajita Mike character who
12 was there at the House of Blues during the Throttlefest
13 event in 2014. He was -- based on our investigation --
14 and this is again we've made these allegations. And
15 again, this is a Rule 12.

16 What triggered the Court's involvement initially is
17 a Rule 12 motion. This not a Rule 56 motion so we
18 didn't get into all of the facts or anything. There
19 wasn't any decisions by the Court of anything other than
20 the fact that had we clearly pleaded colorable causes of
21 action. Our position is that we did and if we got into
22 discovery if the defendants after discovery believed
23 that Stegmaier you still can't prove your case as to
24 some or all of these causes of action then Title 56
25 would have -- not title, Rule 56 would have been

1 available to them. If the case had gone to trial they
2 certainly could have made a directed verdict motion.
3 Certainly had the opportunity JNOB motion at the end if
4 they didn't believe that we had proven our case.

5 Our position is that with regard to the pleading
6 requirements that have been enunciated by the rules of
7 civil procedure, as well as what's been defined by the
8 courts and their interpretation is pretty minimal.
9 Pretty minimal standard as far as making a colorable
10 cause of action and of course we've alleged causes of
11 action in this case for breach of contract, negligent
12 misrepresentation, equitable indemnification,
13 contractual indemnification and contribution. But to
14 get back to the question you asked is, are these
15 expressed parties? Are you trying to create some sort
16 of argument that is akin to piercing the corporate veil
17 and I guess our argument, or our response to that is,
18 no, but it's similar in as much as -- and I refer to
19 page three. There are four bullet points in page three
20 of our argument. It says, "Though Throttlefest L.L.C.
21 was the named party to and the signatory on the
22 agreement, it was also acting as an agent of the
23 remaining third party defendants; American Outlaw
24 Spirits, Full Throttle and Sloon Shine and we argued
25 that in our complaint. Michael Ballard who was the

1 managing member of Throttlefest L.L.C. and who was the
2 sole managing member of Full Throttle Sloon Shine
3 attended Throttlefest event as a representative of these
4 companies. And as we articulated in our response to the
5 motion to dismiss, we provided some affidavit testimony
6 in response to the -- I'm sorry not affidavit testimony,
7 deposition testimony, in response to these affidavits
8 that had been submitted to the Court in conjunction with
9 a Rule 12 motion asserting that there was no personal
10 jurisdiction. What we were able to articulate in pages
11 8 through 17 of our memoranda was through sworn
12 testimony people like Mike Ballard and Jesse James
13 Dupree were there giving direction to this "Fajita Mike"
14 character and the argument could be made, well, this was
15 just Throttlefest related activities, but we know this
16 to as well. What's alleged is the drink at issue that
17 was poured that allegedly created this intoxication was
18 the Sloon Shine product. We also know that as a
19 requirement of this event to occur with these folks
20 being co-promoters Mr. Ballard and Mr. Dupree required
21 House of Blues to order the spirits of the American
22 Outlaw Spirits as well as the Sloon Shine spirits. They
23 required them to be a component of this festival that
24 these two entities were co-promoting. And we know this
25 to as well as we've alleged in the complaint. Again, I

1 just reiterate the fact that this is just a Rule 12
2 motion. We're not talking about Rule 56. A Rule 12.

3 We've asserted in our complaint that Fajita Mike
4 traveled the country performing similar functions on
5 behalf Sloon Shine and American Outlaw Spirits where
6 they were doing liquor tasting's whether they're in
7 liquor stores or bars including even Myrtle Beach in
8 conjunction with the event and in times past with
9 Throttlefest.

10 THE COURT: There's a TV show, isn't there?

11 MR. STEGMAIER: Yes, sir. So Fajita Mike is a
12 character on this TV show to as well. And the Court can
13 take judicial notice of that. That is just a plain
14 fact. There is this relationship that exists and all we
15 have done at this points is make the allegation. All
16 we've done at this point in time is make the allegation
17 that these entities were an agent of Throttlefest. That
18 these entities were also directing through Mr. Dupree,
19 Mr. Ballard, the activities of Fajita Mike as it related
20 to him, pushing and promoting their products; the Sloon
21 Shine specifically. In addition to the American Outlaw
22 Spirit which I think is a bourbon.

23 So we've got Mr. Ballard and Mr. Dupree who was the
24 managing member -- who is a managing member of
25 Throttlefest and the sole incorporator officer of

1 American Outlaw Spirits attended Throttlefest event as a
2 representative of this company and this corporation.
3 And our last averment is throughout the Throttlefest
4 event Fajita Mike was acting act as an employee or agent
5 of Throttlefest and these third-party defendants. And
6 of course we've satisfied Rule 11 because we've done the
7 investigation. We're able to make the links between
8 what Fajita Mike and what his duties and what he was
9 doing at the Throttlefest event, House of Blues was, and
10 compare that with similar duties and functions that he
11 performed all over the country at similar events. I
12 think that's abundantly important and that's why we
13 believe these folks come in. And in addition to that,
14 sir, in response to the affidavits that have been
15 submitted, again, we pray reference to our memorandum
16 pages eight through 17 where we have explicit expressed
17 deposition testimony from among other people, Robert
18 Simeone who is the general manager of the House of Blues
19 venue who said Ballard and Dupree and specifically
20 Ballard was giving direction to Fajita Mike during it
21 the course of that event.

22 THE COURT: How does that help you if he's also a
23 member of Throttlefest?

24 MR. STEGMAIER: Let's talk about that, and I say
25 this respectfully. That motion was similarly decided

1 how this motion was disposed of. Respectfully we don't
2 think the Circuit Court in that case got it right as far
3 as that goes. So I can appreciate the question, as far
4 as how does that help you. I would say number one,
5 that's on appeal right now.

6 THE COURT: I just meant -- let me ask my question
7 more clearly. I meant if he's there he's one of the
8 members of Throttlefest, correct, of the L.L.C.?

9 MR. STEGMAIER: Yes.

10 THE COURT: So if he's giving directions wouldn't
11 the natural -- I mean he's there on behalf of
12 Throttlefest contracting party and he's giving direction
13 as an agent of Throttlefest, right?

14 MR. STEGMAIER: And here's the conjunction "and",
15 and in addition to Throttlefest L.L.C.. I'm sorry, in
16 addition to Throttelfest L.L.C. entity they're there as
17 also owners of, agents of, directors of the alcohol
18 companies that they own and operate that is being sold
19 and being promoted at this event.

20 The argument that we're making ultimately, judge,
21 and this is what we argued in the first party claim and
22 this is what we will continue to argue in this case, at
23 the end of the day, Sloon Shine entity, American Outlaw
24 Spirits through Ballard through Dupree were just
25 treating this event as another opportunity. As another

1 vehicle to promote their alcohol.

2 The testimony thus far -- and again, I keep saying
3 Rule 12 and I don't want to bring stuff in from outside
4 the record, but I just make the representation to the
5 Court is prior to the Throttlefest event and after the
6 Throttlefest event these alcohol spirits; the spirits,
7 the bourbons, the Sloon Shine product, they weren't sold
8 at the House of Blues before or after these events. So
9 when they had this event these guys mandated the House
10 of Blues buy this alcohol for purposes of distribution
11 by among other people, Fajita Mike. And what Fajita
12 Mike was doing was he was giving it away or selling it.
13 But our argument is they were promoting this product
14 without telling us they were doing this and we relied on
15 them to do things the right way. The allegation in the
16 first party claim is Fajita Mike wasn't doing things the
17 right way. And our assertion is we've just resolved
18 that first party claim, we would like to have the
19 opportunity to pursue all or part of what we've had to
20 lay out to settle in the first part of claim we would
21 like to pursue these companies that we believe Fajita
22 Mike was an agent of. Again, we just made these
23 allegations. A jury could agree or disagree. A Circuit
24 Judge in summary judgement could agree or disagree. But
25 we just want to get over the Rule 12 hump. Our

1 assertion is, respectfully, I think we got way into kind
2 of a Rule 56 type of analysis on multiple occasions and
3 then as it relates -- especially as it relates to
4 personal jurisdiction. Again, respectfully, we don't
5 think the Court made the requisite findings that it's
6 required to under our case law as it relates to these
7 two prongs. I feel like the first year of law school
8 when we're talking about all this, but minimum contacts,
9 about the power and the fairness prongs.

10 THE COURT: This is first time I've had to rule
11 personal jurisdiction as a judge.

12 MR. STEGMAIER: Yes, sir.

13 THE COURT: So please feel free to go over the
14 basics.

15 MR. STEGMAIER: Well, and of course we've outlined
16 all of this in the brief and I don't want to be here
17 reading the brief to you, but we've cited case law,
18 South Carolina case law with regard to the minimum
19 jurisdiction analysis. While there's discretion the
20 Circuit Judge possesses as it relates to whether there
21 is jurisdiction or not, there is no discretion as it
22 relates to actually engaging in the analysis with regard
23 to the two prong power and fairness prongs. And
24 respectfully with regard to the order that was issued
25 there's no analysis to that end.

1 Our argument is stated succinctly. We satisfied
2 those elements and we note to as well, that a single
3 contact is sufficient for jurisdiction and we cite South
4 Carolina case law to support that proposition. Our
5 argument is had the Court engaged in the analysis it
6 would find that personal jurisdiction existed. But
7 irrespective of all of that it didn't engage in that
8 analysis. Instead it made a conclusory statement about
9 the lack of contact. And again, respectfully, while you
10 have the discretion to determine whether or not there is
11 jurisdiction or not, but you don't exercise that, that's
12 an error of law that, you know, is conceivably
13 reversible.

14 THE COURT: Right. Okay. But doesn't one act can
15 create specific jurisdiction. The defendant has to
16 purposely avail themselves of forum state laws, right?

17 MR. STEGMAIER: At least avail themselves of the
18 jurisdiction.

19 THE COURT: Right.

20 MR. STEGMAIER: And so let's think about that.
21 Let's think about the type of product that we are
22 discussing here. We're discussing alcohol which is a
23 heavily regulated product. For instance, House of Blues
24 wasn't able to just buy it directly from them because of
25 the three-tier system that existed. House of Blues had

1 to buy it from the distributor that they sold it to.
2 So, if the Court is concerned with, well, did they avail
3 themselves of the law, well, House of Blues legally
4 bought that product that is otherwise very well
5 regulated in South Carolina. So, again, I feel like I'm
6 in Professor's Flannagan's --

7 THE COURT: Again, it's been a long time since
8 this issue. I hope you don't mind me interrupting you.

9 MR. STEGMAIER: No, sir.

10 THE COURT: I just think it helps me to narrow the
11 issues so you know what my questions are.

12 MR. STEGMAIER: Yes, sir.

13 THE COURT: My recollection is putting products
14 into the stream of commerce is not sufficient. I can't
15 remember if it was a case involving a tire company and
16 they said that merely the fact that your product is sold
17 somewhere is not enough. You got to do something more
18 to purposely avail yourself of the forum state's laws,
19 right?

20 MR. STEGMAIER: Yes, sir.

21 THE COURT: And my difficulty here is it doesn't
22 sound like -- Throttlefest purposely availed themselves
23 of South Carolina laws. It seems to be a tough argument
24 that the other companies did.

25 MR. STEGMAIER: Well, I wish when we argued the

1 other motion that same observation by the bench about
2 Throttlefest. I say that as an aside, but getting back
3 to our case, so if we look at the power prong of the
4 analysis, this Moosally case, M-o-o-s-a-l-l-y, says that
5 the Court must find the defendant directed his
6 activities to the residents of South Carolina and that
7 the cause of action arises out of or relates to the
8 activities. So I appreciate and understand the question
9 the Court has posed about Throttlefest. They've
10 arguably availed themselves because they signed this
11 contract and it's here in South Carolina.

12 THE COURT: I just meant specifically your
13 allegation about that your client was required to buy
14 these Spirit products.

15 MR. STEGMAIER: Right.

16 THE COURT: They weren't required by, for example,
17 American Outlaw Spirits. It was a contract with
18 Throttlefest, right?

19 MR. STEGMAIER: Well, that's part of the
20 allegation. I mean, that's part of argument is that
21 there was a requirement to sell this product or
22 distribute this product or give this product away at
23 this particular event that Jesse James Dupree and Mike
24 Ballard had in this case and there is ample testimony to
25 support that. I don't necessarily want to get into

1 that, but that's the allegation and it goes back to --
2 it's a good question that the Court asked about; well,
3 Ballard and Dupree they were there for Throttlefest and
4 our response is yes, but, or yes and they were there for
5 these entities.

6 So my suggestion is this as it relates to personal
7 jurisdiction, it seems like I am either going to win or
8 lose based on whether or not I can convince the Court
9 whether or not the Court will accept that Dupree and
10 Ballard could have been there on behalf of multiple
11 entities. Our suggestion is yes, and candidly I don't
12 see a prohibition otherwise. I don't see where there
13 would be a limitation otherwise. Dupree and Ballard
14 could have been wearing multiple hats and part of the
15 hat, you know, they were there. They were there for
16 Throttlefest because they were co-promoters. They were
17 there because they were part of the band that played the
18 last night at House of Blues. They were there because
19 they owned and operated these alcohol companies.

20 THE COURT: The physical action -- I just want to
21 make sure -- the physical action that you are alleging
22 that gives them sufficient contact with South Carolina
23 is the requirement that your client purchase these
24 liquors and then serve them that night, right?

25 MR. STEGMAIER: Yes, sir. And because it was not

1 of House of Blues own volition.

2 THE COURT: Right.

3 MR. STEGMAIER: Because again, like I say, it
4 wasn't sold there before. It wasn't sold there after
5 Throttlefest. This was part of the deal.

6 THE COURT: And again, that's my difficulty. The
7 reason your client was required to due that was a
8 contract your client had with Throttlefest, not with
9 these defendants.

10 MR. STEGMAIER: So, what -- I can't represent to
11 you is this; I can't represent to you that what you just
12 said is in black and white in that contract. You know,
13 there are components to these agreements that exist.
14 Every contract that exists a lot of times there are
15 these ancillary agreements or understanding
16 requirements, and so I can't represent -- I just don't
17 have it committed to memory that that was a part of it,
18 but I know that Robert Simeone who is the general
19 manager of company and I guess if were accepting
20 affidavit testimony from the other parties about why
21 they don't think they have any relationship with
22 jurisdiction. I mean, I'm just going to point to that
23 and I would ask for the leave to supplemental if I need
24 to from testimony from Mr. Simeone.

25 THE COURT: What does he say?

1 MR. STEGMAIER: Well, the bottom line is that this
2 alcohol was never sold before or after these events. It
3 was a requirement for it to be sold.

4 THE COURT: I guess I'm not expressing myself.

5 MR. STEGMAIER: No, you are.

6 THE COURT: But the only party that your client
7 contracted with was Throttlefest, right?

8 MR. STEGMAIER: Correct.

9 THE COURT: So when you say they were required to
10 sell these spirits which they didn't normally sell the
11 only person that could have required them is the party
12 they contracted with, right, which is Throttlefest?

13 MR. STEGMAIER: Well, the alcohol had to get there
14 somehow. The alcohol had to get there somehow and so
15 when we look at the analysis of directed his activities
16 to the residence of South Carolina, if these folks who
17 were the manufacturers of these alcohol they had to
18 direct it to South Carolina by just getting it here.

19 THE COURT: Aren't we back to just putting it in
20 the stream of commerce then?

21 MR. STEGMAIER: Well, let's talk about it a little
22 bit further then that. Again, allegations. We just
23 want to get over the Rule 12 hump. We know Fajita Mike.
24 We know in our heart of hearts and we have to convince
25 everybody else including 12 people. We know in our

1 heart of heart Fajita Mike was there to promote that
2 product. We know that because he had been around the
3 country doing identically the same thing and we know
4 that he was under the direction of Mike Ballard and
5 Jesse James Dupree, and so, all right, so they put it in
6 the stream of commerce but the part B in all of this is
7 and they did something with it. And they did something
8 with it. They promoted there product at House of Blues
9 in South Carolina.

10 Our position is that second part B, if the Court
11 isn't satisfied with the alcohol getting there in and of
12 itself then our assertion would be -- again, based on
13 our allegation, Fajita Mike took that alcohol and
14 promoted it.

15 THE COURT: All right.

16 MR. STEGMAIER: All right, and I appreciate that
17 and I appreciate the time you're giving me as far as
18 this goes to as well. So that's as it relates to issue
19 one. Obviously we made reference to our briefing in
20 this. And I don't think -- I don't think your
21 apprehensive at all about this just based on the fact
22 that we collectively had a lot of communication from the
23 Court after the original motion was heard. You've
24 recognize that this is a complicated issue and I think
25 it would be very hard to sit up at the bench and just

1 make a ruling. So as the Court thinks and considers it
2 we certainly invite -- and I think I speak on behalf of
3 Mr. Duffy -- we certainly invite additional questions,
4 if something needs to be briefed anything like that
5 because I know the Court wants to get it right or as
6 right as possibly can.

7 Our second argument is -- and we've asserted this
8 already -- is that again is this a 12(b)(6) motion and
9 our position is that we got -- our assertion is we got
10 into some Rule 56 territory with finding of facts and
11 using those facts as a basis for some conclusions in the
12 case. We certainly didn't have any notice of the fact
13 this was going to be converted to a Rule 56 motion. We
14 recognize their argument, the other side's argument
15 about, well, we can use affidavits for purposes of
16 jurisdiction, but respectfully I think we went a little
17 bit further. So to the extent that we were getting into
18 Rule 56 territory we'd ask the Court to reconsider those
19 findings.

20 Our third argument was with regard to this apparent
21 authority of Throttlefest and I'm starting here on page
22 11 of our briefing in this case. "In granting a
23 dismissal in this matter as it relates to breach of
24 contract with contractual indemnification claim, the
25 Court found House of Blues has not alleged any of the

1 elements establishing that Throttlefest had either
2 actual or apparent authority as an agent to bind each of
3 these third party defendants such that they would be
4 bound by this contract." And the Court said
5 specifically or said expressly that these causes of
6 action fail because we did not specifically plead this
7 it apparent authority. Our response to that as we have
8 outline in our briefing is that we did allege in our
9 complaint that Throttlefest was acting as an agent of
10 the third party defendant and that the third party
11 defendants were intended beneficiaries under the
12 contract and did in fact benefit and they did in fact
13 benefit under the contract. And again, I point to the
14 fact that we were required to purchase this product.
15 But if we look at the complaint we believe and we've
16 cited some cases that support this. For example, this
17 Chambers of South Carolina versus Entrepreneur
18 Incorporated stand for the proposition that our courts
19 have specifically ruled that the Doctrine of Apparent
20 Authority need not be plead in the complaint. So that
21 would be in contravention to the order as it's worded in
22 this matter and for that reason we ask the Court to are
23 reconsider.

24 As it relates to our fourth point that pertains to
25 the settlement about Good Faith, that House of Blues did

1 not allege the settlements were arrived at in good faith
2 and of course this relates to the contribution action
3 and the other side -- the other parties in this case
4 assert that 15-38-50 precludes recovery in this case.
5 And of course they've cited in support to that Smith
6 versus Tiffany.

7 As we've alleged in this case we -- and we've got
8 case law supporting this proposition is that we need not
9 have anticipated the defense in good faith and their
10 assertion in and of itself that these were good faith
11 settlements doesn't dispose of the -- doesn't dispose of
12 the issue. And our position is as we got into this
13 analysis respectfully the Court changed the standard.
14 It went from a Rule 12 standard to a Rule 56 standard
15 where I think there were some findings of facts or some
16 conclusions that were made in this situation. We know
17 this, we know in relation to what was alleged as far as
18 the severity goes the settlements that were ultimately
19 made were de minimis. Were de minimis. And that in of
20 itself in our minds at last creates the argument that --
21 and I say this respectfully to the other parties -- was
22 for purposes of satisfying section 15-38-50 were not
23 made in good faith so as to preclude our pursuit of
24 contribution in this action.

25 We've cited as support for this Stevens versus

1 Hendricks which stands for the proposition that it is a
2 general principal that a pleading need and should not by
3 it's averments anticipated offense thereto and negative
4 or avoid it.

5 Our position as we outlined in our case, in our
6 complaint, we've outline the allegations as it relates
7 to contribution and we should able to pursue it.
8 They've raised as a defense that we got a good faith
9 settlement and we like to attack it. We like to attack.
10 We would like to examine it and I don't think we're
11 precluded from that. Again, we're at Rule 12. We're
12 not at Rule 56. So if we do the requisite discovery and
13 Rule 56's remains available to the defendants in this
14 case then they can make their motion. Where they can
15 make the motion for a directed verdict or JNOV but not
16 in a Rule 12. Not the way think got that dismissal. It
17 went past Rule 12. Went into Rule 56.

18 We've talked about our issue, number five, as it
19 relates to Smith versus Tiffany to the extent that we're
20 talking about the jury verdict form that's been mooted.
21 But as it relates to Smith versus Tiffany and their use
22 and their support of that case to defeat the
23 contribution action in this matter, we again, reference
24 the fact that Smith versus Tiffany doesn't line up in as
25 much as it is not a Rule 12 case. It's a Rule 56 case.

1 It's a different standard. A different standard applies
2 and we don't believe it is applicable in this matter.

3 Our sixth -- our next argument, the sixth argument,
4 this is probably in our minds the one probably the most
5 important argument in addition to the first, the
6 jurisdictional argument. This relates to the statute of
7 limitations. And I think we're -- if the Court is going
8 to adopt the argument that has been propounded by the
9 defense in this case it's arguably going to change the
10 law here in South Carolina, and I don't think in a good
11 way especially when you think of constructive defect
12 litigation. I mean I wouldn't want to go back and
13 report to defendants that I'm defending that I somehow
14 change the law to where the statute of limitations for a
15 contribution claim or an indemnification claim runs from
16 the date of the original accident. I don't think as you
17 know and as you can remember from your private practice,
18 well, when the statute runs as it relates to
19 contribution indemnification seems to be a moving target
20 in South Carolina. I've had cases -- I've had third
21 party claims dismissed because I had judges say it is
22 not ripe. I had other judges adopt the position that
23 it's ripe when it's asserted in the first party claim as
24 a third party claim. But irrespective of all those
25 considerations the argument that was propounded by

1 defendants in this case is that the accident happens in
2 May of 2014 and that we knew or should have known about
3 this accident and that any claims we possessed against
4 them ran from that date and so -- what we represented to
5 this Court and is the truth is, number one, the accident
6 didn't occur on House of Blues' property. It occurred
7 miles and miles down the beach. No SLED agent came to
8 our location after the accident to ask questions. No
9 other law enforcement. No lawyer no nothing. We got a
10 letter of representation from Mr. Rainsford who
11 represented the plaintiff in this case in October 2016,
12 more than two years afterwards. That was the first
13 notice in this case. And so we brought our actions in
14 the abundance of caution. My suggestion is, I don't
15 think until we settled the case earlier this month that
16 the contribution and indemnification claims began to run
17 until that happened. But let's put that aside. Let's
18 just say that it all started running from when we had
19 first notice of the claim. We didn't have first notice
20 of the claim until October 2016 and we plead our
21 third-party complaint before that three-year term ran.
22 And so, the argument that was made in this situation was
23 that we knew or should have known in May of 2014 about
24 this accident. As we outlined in page 17 of our brief
25 we don't know these things until we're told. And so to

1 have the statute of limitations apply to us in such a
2 way, number one, is incongruent with the case law as I
3 understand it in South Carolina. And number two, it's
4 incongruent with just how the discovery rules apply,
5 typically. If they can prove or demonstrate down the
6 road that we either knew or should have know earlier
7 than October 2016 perhaps we revisit that argument. But
8 that's the representation we're making to the Court. At
9 this point in time hasn't been contradicted. And so,
10 again we're at the Rule 12 stage --

11 THE COURT: Are you talking solely about your
12 indemnification claim or are you talking about the other
13 claims like misrepresentation and negligence and all
14 those claims?

15 MR. STEGMAIER: Well, it would have to include all
16 claims. I think it would, wouldn't it?

17 I am just saying, our position has always been,
18 worse case scenario -- worse case scenario, the
19 contribution and the indemnification claim survive
20 because we just settled the case. Arguably we can raise
21 those -- the three years arguably starts the day we
22 settle this case.

23 THE COURT: If you have a claim under the Tiffany
24 case.

25 MR. STEGMAIER: Understood. Understood. But our

1 position is that we're not at worse case scenario
2 circumstances here. That we raised all of these causes
3 of action; the negligence base claims, the contractual
4 base claims, all prior to the running of what would
5 otherwise be the three-year statute of limitation. And
6 that's the representation we have made to the Court that
7 we didn't know until October 2016 about this. Mr.
8 Ransford for whatever reason amended his pleadings I
9 think in September of last year and, you know, when we
10 filed our amended complaint we included these
11 third-party claims and we were right to do so. It was
12 within our discretion and it was within that three
13 years. So, we believe that we've satisfied the statute
14 of limitations on this case. And respectfully, we just
15 believe the Court had misapplied the discovery rule and
16 that we had satisfied the statute of limitations and
17 that none of these causes of action should be disposed
18 of based on statute of limitations.

19 THE COURT: Do you have damages for these various
20 causes of action like say misrepresentation if this
21 motorcycle accident had not occurred?

22 MR. STEGMAIER: Well, that's an interesting
23 question. I'll say no because the focus is on Mr.
24 Kelsey. Mr. Kelsey was the plaintiff and so those
25 damages that we sustained which is in the form of, among

1 other things indemnity payment to him. They wouldn't
2 have arisen but for the fact that he got injured and
3 made this claim.

4 I'm interested to know why you asked me that. I'm
5 intrigued by that question.

6 THE COURT: Well, I'm just thinking. I mean,
7 they're all really indemnification claims, aren't they?
8 Because if you don't have damages you don't have a
9 claim. You're missing one of the prongs of the tort
10 claim.

11 MR. STEGMAIER: Correct.

12 THE COURT: And if you don't have damages but for
13 the claim brought against you by a third party, they're
14 really all indemnification claims, right?

15 MR. STEGMAIER: So, I don't disagree about that
16 characterization. You know, I learned on the front end
17 of practicing if a cause of action is available to you
18 you better as assert it.

19 THE COURT: Right.

20 MR. STEGMAIER: And so our position is we're going
21 to try and skin the cat one way or the other. Because
22 every one of these causes of action have different
23 elements to them. Maybe hypothetically we can't satisfy
24 all the elements of "X" but we can of "Y". So we can
25 skin the cat using "Y" that's what we would do. I

1 will share this just based on you giving me a little
2 clarification. Our damages didn't become fully
3 developed until we made an agreement to pay this
4 indemnity claim in the first-party case. I mean, we
5 could have tried the case and we could have conceivably
6 won the case. We elected not to do that but now we got
7 a bill. We had to pay this man money to settle the
8 first-party claim and that's an articulable damages, but
9 for the negligence, but for the breach of contract, but
10 for the negligent representation of the defendants in
11 this case we would never have incurred that obligation.

12 THE COURT: So doesn't that mean though that the
13 clock starts ticking when misrepresentation occurs?

14 MR. STEGMAIER: How do you know that?

15 THE COURT: Well --

16 MR. STEGMAIER: And they tried to get into that.
17 And I don't mean to cut you off. But that was part of
18 their argument. You either knew or should have known
19 about this misrepresentation. Well, no. And that's not
20 what the discovery rule stands for. I mean, the
21 discovery rule stands for like the day you find out
22 about it that's day one.

23 THE COURT: Well, when did you find if out?

24 MR. STEGMAIER: October of 2016.

25 THE COURT: Well, that's when you found out you

1 had damages. When did you find out you had a
2 misrepresentation?

3 MR. STEGMAIER: October 2016.

4 THE COURT: How so?

5 MR. STEGMAIER: Because we didn't know -- and I
6 appreciate the questions. The allegation, underlying
7 allegation is Fajita Mike inappropriately or negligently
8 or intentionally -- however you want to characterize it
9 -- over-served Mr. Wagner, the tortfeasor driver in this
10 case.

11 The representation to us that we would state exists
12 is that Fajita Mike is coming to South Carolina. He
13 going to do his job correctly. He is going to do it in
14 compliance with the rules that govern safe alcohol
15 service.

16 THE COURT: And you up found out he didn't do it
17 right because in October 2016 someone claimed that they
18 had been injured by his actions?

19 MR. STEGMAIER: Exactly. Exactly. So --

20 THE COURT: I hate to cut you off but I need you
21 to wind up pretty quickly.

22 MR. STEGMAIER: Sure.

23 THE COURT: I need to make sure Mr. Duffy has a
24 chance to argue too.

25 MR. STEGMAIER: For those reasons as well the ones

1 we articulated in our brief that we prayed, we
2 respectfully request this Court to reconsider its
3 decision and deny the motion to dismiss.

4 THE COURT: Thank you, Mr. Stegmaier.

5 MR. STEGMAIER: Thank you, sir.

6 THE COURT: Yes, sir.

7 MR. DUFFY: Good morning, Your Honor. Brian Duffy
8 here on behalf of American Outlaw Spirits Inc., Full
9 Throttle L.L.C. Full Throttle Sloon Shine L.L.C.

10 Your Honor, let me just start if I may with easing
11 your mind of any concerns you have on this personal
12 jurisdiction matter because that is where this analysis
13 should start and stops.

14 The complaint in the motion for reconsideration
15 about Your Honor's analysis is really vacant and I will
16 walk through that with you. There's nothing that they
17 really can complain about. The first telling point is
18 they say that there are these two prongs that have you
19 to analyze, power prong and the fairness prong. Well,
20 that's in a full analysis sure. Well, you went through
21 the power prong. The pages at six and seven of Your
22 Honor's Order discuss the allegations, the primary
23 allegations of what was done here and then decides in
24 light of the materials submitted House of Blues can not
25 establish that the three nonresident companies

1 themselves had sufficient contact to purposely avail
2 themselves of the privilege of conducting activities
3 with South Carolina. That's the power prong. And if I
4 may, the case that they cite for this analysis that
5 they're saying that Your Honor did not do is the
6 Moosally case which Mr. Stegmaier had cited here this
7 morning also. That's exactly how Moosally describes the
8 power prong. As the essence of the power prong is
9 minimum contact. The plaintiff has to have a showing
10 that the defendant purposely availed itself of the
11 privilege of conducting activities within the forum
12 state thus evoking the benefits and protections of it's
13 laws. That's the prong. Your Honor did the analysis.
14 Found they didn't meet it. It's over.

15 Moosally decides and states clearly and it's not the
16 only case but since that's what they cited I will rely
17 on that one. Quote, "If either prong fails, comma, the
18 exercise of personal jurisdiction over the nonresident
19 defendant fails to comport with the requirements of due
20 process." End quote. Moosally court itself goes on and
21 analyzes the first two defendants of many, finds the
22 power prong isn't met and quits the analysis. You don't
23 have to go through fairness prong and entertain all
24 these --

25 THE COURT: The fairness prong is a protection for

1 defendants, right?

2 Not -- if you already find that there's no power
3 there's no reason to go into the fairness prong, right?

4 MR. DUFFY: The power is a threshold for fairness.
5 The power prong not satisfied, you stop. That's exactly
6 the Moosally court did. That what the Coggeshall court
7 did which I believe Your Honor cited in the order. You
8 find there's no power the case is over. There's no
9 jurisdiction.

10 Just another point though, Your Honor, that the
11 argument that they make even beyond that, Your Honor,
12 should consider these factors and they suggest that this
13 was an abuse of discretion. So even if you get to this
14 point, my point is the cases they're citing about abuse
15 of discretion this is an error of law now. It's not an
16 abuse of discretion analysis. They're citing cases
17 about discovery sanctions and about trial evidentiary
18 admissions at trial, not a personal jurisdiction legal
19 analysis. There's no way that your -- that the alleged
20 failure to consider certain factors is an abuse of
21 discretion so grave that it's now an error of law. That
22 analysis doesn't apply to the personal jurisdiction
23 error of law standard. But the point is, it doesn't
24 even get there. I'm just showing how have vacant this
25 argument is on personal jurisdiction side.

1 Your Honor decided it. There's not sufficient
2 contact. The power prong failed. End of story.

3 So, what I would like to do next just because there
4 was a lot of discussion about it, is talk a little bit
5 more about those factors. But I want to hit on these
6 points that Your Honor had touched on and Mr. Stegmaier
7 touched on, is the contribution claim was discussed at
8 length. Not only do we still have the argument about
9 the releases being valid and there being no contribution
10 claim, the fact is now in light of the settlement there
11 can be no contribution claim at all. Section 15-38-20
12 subsection (d), Your Honor, says a tortfeasor who enters
13 into a settlement with a claimant is not entitled to
14 recover contribution from another tortfeasor whose
15 liability for the injury or wrongful death is not
16 extinguished by a settlement. Their settlement doesn't
17 extinguish our liability. We had already been dismissed
18 with prejudice. There was no liability to the plaintiff
19 any more. And the one entity who had been dismissed
20 without prejudice, the statute had run on them anyway
21 and had a release. There can no be contribution claim
22 because their settlement does not extinguish our
23 liability. It was already gone, the liability to the
24 plaintiff. So there isn't a contribution case.

25 Now, Your Honor, you all went into some discussion

1 that was really was sort of about the facts. Their
2 arguments about the jurisdiction, and Your Honor was
3 right hitting on all -- all the rights points and our
4 opinion is that counsel to their credit are doing their
5 best for their client but they are creating legal
6 fantasies and trying to jump over legal hurdles in a
7 single bound including corporate formality and
8 jurisdictional lives, economic loss rules. All of these
9 things they try to leap over as if they don't exist.
10 You can not just say someone is an agent and create
11 jurisdiction.

12 The cases that we've cited on that, the power --
13 excuse me. Power products case, is an alleged trade
14 secret. They're even competing affidavits but because
15 it was so clear that the people involved had moved out
16 of the state by this time, even though they were alleged
17 to otherwise have stolen trade secrets and misapplied
18 them and everything else the court said, no, no, those
19 are conclusory allegations. They aren't sufficient to
20 create jurisdiction and it's even less than that here as
21 Mr. Stegmaier says, they've try to say, well, yeah, they
22 were also here not just for Throttlefest but they were
23 here and for Throttlefest and these other entities. You
24 can't just reach through corporations. And Your Honor,
25 it's even double piercing. They don't allege it which

1 is another failure. They don't even allege the
2 piercing. But they're not just piercing to get to the
3 individuals, they're trying to reach beyond that and
4 drag in companies. They're trying -- just to give you a
5 little bit of context. The bar that promoted and hosted
6 this event where there's this liability that arose is
7 trying to sue a real estate holding company 1,886 miles
8 away that owns a bar out there, saying it's responsible
9 because the common member of the two L.L.C.'s was there
10 on behalf of the promoter of the event. That's just not
11 how the law works. You can't jump the legal hurdles of
12 corporate bounds and jurisdictional lines by just
13 saying, yes, they were also the agent.

14 THE COURT: So Mr. Stegmaier's argument is it's a
15 12(b)(6) motion. I imagine what he would say in
16 response to that is that's a summary judgement argument
17 and for this purpose all he has to do is allege it.

18 MR. DUFFY: And that's incorrect, with all due
19 respect. On a personal jurisdiction -- on a personal
20 jurisdiction hearing the judge is entitled and the
21 parties are entitled to present affidavits that
22 demonstrate we don't do business here. We're not
23 involved and unless the plaintiff can make a specific
24 factual showing that convincing and overcomes that then
25 you don't have jurisdiction.

1 Your Honor, I argued the last time -- may be the
2 last time I argued in York County, but certainly a
3 jurisdictional motion, it's Hawker Beechcraft
4 (phonetics) we represented a party. They did an appeal
5 the order from, Sullivan v Hawker Beechcraft. That's
6 exactly what happened there. The lawyer said, look, I
7 alleged it just how the long-arm statute says. And the
8 Court said you can't just do that and create
9 jurisdiction. These entities are showing they're not
10 involved in South Carolina. You can't say that they are
11 and make that true. You have to have something more
12 that is convincing that shows that. And that is a
13 12(b)(2) analysis.

14 THE COURT: That was going to be one of my
15 questions to Mr. Stegmaier about the actual act that he
16 alleges created jurisdiction was the requirement that
17 their bar sell the liquor, but that was a contract with
18 someone else.

19 MR. DUFFY: Right. They agreed to do it. They
20 weren't required. They agreed to do it in a contract
21 with a co-promoter of an event. They could have done
22 that with Budweiser and that doesn't bring Budweiser in.
23 In fact Bud Light was one of the things they claim
24 Fajita Mike was waving around. They're not in here.

25 The suggestion that the promoters -- I mean, you

1 can just read the allegations. They were the managing
2 members of the co-promoting L.L.C. they contracted with
3 and were at the event. And then they say, well, they're
4 also at the event for something else. No, you can't
5 just say that and create jurisdiction for non-resident
6 defendants. And the clearest cases on that Power
7 Products and the Sullivan v Hawker Beechcraft, Your
8 Honor, where conclusory allegations are insufficient to
9 overcome the objections of the defendants in a 12(b)(2)
10 analysis for personal jurisdiction.

11 Your Honor, there was a reference to apparent
12 authority language in the order. It's interesting the
13 idea with a apparent authority. How are they suggesting
14 that these other entities are involved? It wasn't
15 declarative apparent authority and so the Court's order
16 recognized that. You're not even saying they were
17 apparent agents. The truth is they're not even making
18 an apparent authority argument. They're making an
19 apparent principle argument. They're saying, hey, the
20 people we contracted with were really being controlled
21 by a different person, a different entity. That's an
22 apparent principle argument that doesn't exist as far as
23 I know.

24 In fact, as Your Honor I am sure knows the basic
25 principals that even if they were a parent and

1 subsidiary company, the parent is not liable to what the
2 subsidiary does as to some special circumstance, and
3 Carroll v. Smith-Henry case, which is 281 S.C. 104 says
4 that. The sibling companies, of course, affiliated
5 companies with common members are liable for what
6 happens with another company unless your piercing and
7 can do something through that. They don't even allege
8 that. They just say, yeah, they were there on their
9 behalf to. The case on the sibling companies Temporary
10 Services Inc. versus versus American International Group
11 Inc., which is a District Court case in South Carolina,
12 2008 Westlaw, 113-66-365.

13 THE COURT: 200. What is the second number?

14 MR. DUFFY: 113-66-365. And that's just an
15 example where the Court says, look the siblings aren't
16 in privity. They may have common people but they're not
17 in privity with you. You can't bring these claims
18 against them because -- just because they have a common
19 member. And that's basic -- basic law. And just saying
20 that you can doesn't mean you can. Those are
21 conclusionary allegations that don't satisfy the
22 jurisdictional analysis.

23 Let's see, Your Honor, I want to reply directly.
24 Let me check my notes if I may. Part of the argument
25 was, we relied on them to do the right thing. Well

1 them, is the contract party and the managing members of
2 the contract party. If you were a relying on a company
3 in South Dakota to do the right thing at your event, at
4 your place in Myrtle Beach, you know, then your not
5 reasonably relying on something:

6 THE COURT: What about the Statute of Limitations?
7 Mr. Stegmaier says literally the first his client heard
8 of this incident was October 2016 when they got letter
9 of rep. How can the statute run for them prior to that
10 date?

11 MR. DUFFY: Well, as an initial matter, the claims
12 against our clients all failed for multiple reasons
13 before you even get to the Statute of Limitations. The
14 Statute of Limitations argument, the point of is as Your
15 Honor brought out, they're not bringing a claim for the
16 accident. They're not saying, hey, we have damages from
17 this accident that occurred that we didn't find out
18 about until whatever date -- October, whatever year.
19 They say, you didn't do things under the contract. You
20 didn't get the right insurance. You were doing
21 promotions. You weren't controlling -- whatever the
22 allegations are in the breach of contract action are
23 things that happened at the House of Blues during this
24 event. And so, the point is, if you knew or if you
25 think these are breaches of contract they were happening

1 right there on your property. You knew or should have
2 known about it at that time. Those are the breaches
3 you're complaining about.

4 Your Honor makes a good point which is, really
5 aren't your claims really an indemnification claim which
6 is different than a contract claim in the Statute of
7 Limitations. And so, in the indemnification claim
8 there's of course no contract indemnification even
9 though they allege it. Addition even noncontract
10 parties, there is no contract indemnification claim with
11 my client and there certainly can not be an equitable
12 indemnification claim. It's just absurd to suggest that
13 the entity who was a co-promoter of the event, in charge
14 of all the alcohol at the event, posted the event, has
15 zero fault with what happened, which is what would be
16 required for an equitable indemnity case to move
17 forward. It would have to be completely the fault of
18 our out of state entity, which to be honest is just a
19 fantasy. So that claim can't go forward against us as
20 well.

21 So, Your Honor, a couple of things that I mentioned
22 earlier but want to talk about a little bit more just to
23 have on the record is that the effort to bootstrap
24 contract claims into tort claims is barred by the
25 economic loss rule the *Duc v Orkin* case, (Phonetics),

1 729 F. Supp. 1533 is a good example. When you have a
2 cause of action under contract you can't claim it's a
3 tort and try to get around your limitations of contract.
4 And -- let's see. The other part of that is when you
5 can maintain an action. The question whether plaintiff
6 may maintain an action in tort for purely economic loss
7 turns on the determination of the source of the duty the
8 plaintiff claims the defendant owed. All of these
9 alleged duties are based on the contract. And the point
10 is -- and another case Kennedy Lumber versus Columbia
11 Manufacturing Company, which is 299 S.C. 335, the
12 economic loss bars a negligence action where the duties
13 are created solely by the contract.

14 Now the suggestion that the parties -- the other
15 defendants then undertook -- voluntarily undertook or
16 however they suggest that they did these things and
17 created some tort duty for themselves, the law doesn't
18 permit that either. The case of Rumbaugh versus First
19 Financial Insurance Company, which is another District
20 Court case 2015 Westlaw 128,17,166 and here's the quote,
21 "The South Carolina courts have squarely addressed and
22 refuse to recognize an extension of the voluntary
23 assumption of duty cause of action to a claim for
24 economic loss. The claim for economic loss from the
25 defendant to the third-party defendant and that you can

1 not base that on some suggestion of voluntarily assumed
2 court duty, which didn't happen here anyway because it
3 all goes back to the suggestion that you can say that
4 the people who were there on behalf of Throttlefest were
5 really there on behalf of all these nonresidents
6 defendants which are conclusory allegations that don't
7 justify a finding of jurisdiction in this matter.

8 Let's see. For what it's worth, the voluntary
9 undertaking is based on the restatement, second of torts
10 for South Carolina as adopted. It limits it to what
11 they say the majority view is voluntary assumption of
12 duty cause of action may not be asserted for a claim of
13 economic loss.

14 So Your Honor, as I mentioned, the House of Blues
15 is asking you to disregard corporate formalities,
16 jurisdictional lines, economic loss rule, the rule of
17 voluntary assumption of duties. When you look at the
18 scenario of what the defendants are trying to create to
19 absolve themselves of some liability doesn't make sense
20 giving that they were co-promoters of an event which is
21 entity that is here in the lawsuit or at least involved
22 in the lawsuit and who people were there as they had
23 contracted to be for the Throttlefest. For that entity.

24 I want to share with you just another example of
25 what they're alleging that our defendants did wrong.

1 This is in there motion -- I'm sorry, this is in their
2 response to the motion to dismiss on page 17, American
3 Outlaw Spirits which by the way who was just
4 manufacturing of liquor out of state -- "Wreaked havoc
5 by failing to procure the proper insurance coverage for
6 the festival held in Myrtle Beach, South Carolina and
7 failing to properly train and supervise its' employee
8 and agent, Fajita Mike, resulting in the alleged over
9 service of alcohol to a bike week patron."

10 What duty does the out-of-state manufacturer have
11 to procure insurance in this scenario. It's a complete
12 -- it's trying to jump over legal hurdles in a single
13 bound and the law doesn't allow it.

14 I am happy to entertain other questions. I'm
15 trying to respond to what has been addressed by Your
16 Honor here this morning. To make sure I covered
17 everything...

18 I want to -- well, I did address that. If Your
19 Honor has any questions I would be happy to...

20 THE COURT: Thank you Mr. Duffy you have fee. Mr.
21 Stegmaier, I will give you a five-minute reply.

22 MR. STEGMAIER: Thank you, Your Honor.

23 THE COURT: Yes, sir.

24 MR. STEGMAIER: Just going back to this motion of
25 agency and responsibility and again, we just crave

1 reference to the memorandum we filed in opposition to
2 the motion to dismiss, pages eight through 17 where we
3 had extensive testimony by Robert Simeone among others
4 about Ballard and about Dupree and the relationship with
5 Fajita Mike. We know this -- or this is what we allege,
6 is that Fajita Mike was promoting these products. Sloon
7 Shine and then the American Outlaw Spirits product. Our
8 allegation is that Fajita Mike as testified to by Robert
9 Simeone was operating under the direction of these
10 gentleman. Especially Mike Ballard. We know this too
11 as well, just based on our investigation and we've
12 alleged the same is that Fajita Mike traveled the
13 country promoting this product, in a similar way, in a
14 similar style. And in all those other instances
15 Throttlefest, the entity, didn't have anything to do
16 with that.

17 I don't believe -- our assertion is, our argument
18 is that Jesse James Dupree -- one of two things exist.
19 Either Throttlefest was an agent of these entities or
20 these guys were wearing a second hat. And our position
21 is if that they've come down to South Carolina. They
22 animated this Fajita Mike person to the extent where
23 he's promoting there product and he does so in such a
24 way as to cause injury, they should be answerable for
25 that. And our assertion is that Fajita Mike was an

1 agent of these companies and by virtue of that agency,
2 by virtue of that representation they should be
3 answerable for that conduct. That's about as straight
4 forward as we can make it and we've talked at length
5 about personal jurisdiction argument. I've laid that
6 out as best I can as far as that goes. We think that
7 his actual activity, Fajita Mike's actual activity on
8 behalf of these companies as we have alleged at the
9 House of Blues satisfied the power prong.

10 With regard to the statute of limitations argument,
11 there was some discussion about the breach of contract
12 and the negligent misrepresentation, and the assertion
13 that the Statute of Limitation runs contemporaneous with
14 the event. Well, it can't. And I think we've already
15 established this between the questioning you and I had
16 where if the breach, if the negligent misrepresentation
17 of all those things don't actually manifest themselves
18 until some time after then that some time after is when
19 the trigger is created. So, you know, as far as like
20 the insurance fees, not having the right insurance,
21 negligent misrepresentation, breach of contract, all of
22 the things that we've asserted, all of these breaches,
23 all of these wrong doings weren't known to and didn't
24 manifest themselves until two years later when they got
25 the letter of representation.

1 There was some discussion about some of our causes
2 of action including equitable indemnity and some
3 commentary about there is no way you could ever recover
4 from any of that. That kind of claim. Okay, well we
5 can appreciate that argument, but counsel isn't the
6 factfinder in this case and respectfully in a Rule 12
7 motion the Court isn't either. That's ultimately a jury
8 issue about whether or not I satisfied or at the very
9 least it's something under rule 56 versus Rule 12.

10 As it relates to the interplay between contract and
11 torts, we've already discussed with the Court the fact
12 we were going to make the causes of action we believe
13 that were available to us. Will they all survive, will
14 they all go to the jury, perhaps not. But we think the
15 rules permit us to assert alternative theories and
16 obviously if there are causes of action that are
17 incongruent with one other the Court would require us to
18 elect what we are going to pursue. What would go to the
19 jury. But as far as trying to assert this case law
20 that's been cited creating a bar for us to pursue it at
21 this stage, Rule 12, we think that's premature and we're
22 permitted to argue these alternative theories in this
23 case. And that's about the sum of it just based on
24 listening to what counsel had to say.

25 THE COURT: That you. Mr. Stegmaier.

1 MR. STEGMAIER: Thank you, sir.

2 THE COURT: Counsel, thank you all. I will take
3 this under advisement.

4 MR. STEGMAIER: Thank you, sir.

5 MR. DUFFY: Thank you, Your Honor.

6 (END OF TRANSCRIPT)

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the 16th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 23rd day of July, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 19, 2020

S/ *Aileen Butler*

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2017-CP-26-03008

Douglas Kelsey,)

Plaintiff,)

vs.)

HOUSE OF BLUES MYRTLE)
BEACH RESTAURANT)
CORPORATION, ET AL,)

Defendants.)

Transcript of Record

FEBRUARY 5, 2020

B E F O R E:

Honorable William A. McKinnon
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Christian Stegmaier, Esquire
Attorney for Defendant House of Blues

Rutledge Young, Esquire
Kara Shea Grevey, Esquire
Attorneys for Defendants American Outlaw Spirits, Inc., Full Throttle, LLC & Full Throttle Sloon Shine, LLC

Jeffrey Michael Bogdan, Esquire
Attorney for Defendant Throttlefest, LLC

Sallie Beth Todd
Circuit Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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(THERE WERE NO WITNESSES CALLED DURING THIS HEARING.)

Certificate of Court Reporter 30

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>
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(THERE WERE NO EXHIBITS MARKED DURING THIS HEARING.)

1 **THE COURT:** All right. That brings us to number 23,
2 Kelsey versus House of Blues, several motions.

3 **MR. YOUNG:** Good afternoon, Your Honor.

4 **THE COURT:** Good afternoon.

5 **MR. YOUNG:** It's Rutledge Young and Kara Grevey for, it's
6 actually the next three motions, I think, on your roster.

7 **THE COURT:** Yes, sir.

8 **MR. YOUNG:** It's our clients, for ease of reference, one
9 of them is called Full Throttle, LLC.

10 **THE COURT:** Uh-huh (affirmative response).

11 **MR. YOUNG:** The other one is called Sloon Shine and one
12 of them is called American Outlaw.

13 **THE COURT:** Okay.

14 **MR. YOUNG:** And, Your Honor ---

15 **THE COURT:** And tell me your name again, sir?

16 **MR. YOUNG:** Yes, sir, it's Rutledge Young.

17 **THE COURT:** Okay.

18 **MR. YOUNG:** And those are our three clients there.

19 **THE COURT:** And, Mr. Young, is it three identical motions
20 on behalf of each client; is that the ---

21 **MR. YOUNG:** More or less. They're all motions to dismiss
22 and I think as I start to explain, you'll see.

23 **THE COURT:** All right.

24 **MR. YOUNG:** There's a little bit different to one.

25 **THE COURT:** Okay.

1 **MR. YOUNG:** Your Honor, I'm going to hand up an order
2 that was signed yesterday, entered by Judge Culbertson.

3 **THE COURT:** Okay.

4 **MR. YOUNG:** Relating to a co-defendant and Mr. Brogdan is
5 here and represents the co-defendant and they argued that
6 motion about 30 days ago, thereabouts.

7 **THE COURT:** Okay.

8 **MR. YOUNG:** So, Your Honor, let me do my best to try to
9 sort of lay the facts out. This case arises out of a
10 motorcycle accident and the plaintiff was hit by an
11 intoxicated motorcycle driver; two motorcycles wrecked.

12 **THE COURT:** Motorcycle versus motorcycle?

13 **MR. YOUNG:** Yes, sir.

14 **THE COURT:** Okay.

15 **MR. YOUNG:** And the allegations are that the defendant
16 was overserved, intoxicated at the House of Blues in Myrtle
17 Beach. So, the House of Blues is one of the primary
18 defendants in the case.

19 There's a long procedural history, but among that
20 procedural history, one of my clients, American Outlaw, was an
21 original party to the case. Plaintiff had a claim against
22 American Outlaw. The plaintiff or rather a Judge dismissed
23 that claim on a motion to dismiss back in 2018. For important
24 -- for the Court's benefit, so it's some important dates that
25 are going to be important as Judge Culbertson ---

1 **THE COURT:** How is your client back in -- how is American
2 Outlaw back in the case?

3 **MR. YOUNG:** That's why we're here on a motion to dismiss.
4 The House of Blues has brought us in as an alleged third-party
5 defendant, even though the plaintiff has no claims against us;
6 does that make sense?

7 **THE COURT:** Yeah, okay, so just to make sure I'm
8 understanding. So, the direct claim by the plaintiff was
9 dismissed by the Court against American Outlaw Spirits, but
10 House of Blues has brought them back in as a third-party
11 defendant?

12 **MR. YOUNG:** That's correct.

13 **THE COURT:** Okay.

14 **MR. YOUNG:** Okay. And so, Your Honor, for -- for frame
15 of reference, all of this arises out of an event at the House
16 of Blues back in 2014; many, many years ago, way more than
17 three years ago, which you'll see in a minute. And so, this
18 event is something that is arranged by contract. And there's
19 a contract between the House of Blues and outfit called
20 Throttlefest, LLC. The order that I just handed up to you is
21 Judge Culbertson's recent order dismissing Throttlefest, LLC.
22 In other words, the counter party to the only written
23 agreement in this entire case was just dismissed by Judge
24 Culbertson for various reasons. But one of the main reasons
25 was that the incident occurred back in 2014 and Throttlefest,

1 House of Blues didn't bring in Throttlefest as a defendant
2 until sometime in 2019 and they missed the statute of
3 limitations as detailed in Judge Culbertson's order in a very
4 specific ruling about that.

5 **THE COURT:** Okay.

6 **MR. YOUNG:** The House of Blues has alleged all kinds of
7 different claims, but as I said, there's one written contract
8 and it's between House of Blues and Throttlefest. As I
9 understand the claims against my three clients, who I'll give
10 you a little background about them.

11 These are all -- it's all well-briefed and we've got
12 exhibits and so forth, a couple of affidavits from the -- the
13 primary players, the main folks and our three clients. But,
14 there's a personal jurisdiction issue that's a threshold issue
15 that I want to go to deep into. One of my clients, American
16 Outlaw, is exclusively based in Georgia and it makes a liquor
17 that wasn't even in existence until 2018, four years after
18 this motorcycle injury. That's in my affidavit from a
19 gentleman named Michael Ballard.

20 **THE COURT:** Okay. So, Full Throttle makes liquor and
21 they did not manufacture the liquor at all until 2018.

22 **MR. YOUNG:** That's actually American Outlaw.

23 **THE COURT:** Okay. American Outlaw.

24 **MR. YOUNG:** Full Throttle ---

25 **THE COURT:** Did they manufacture any spirits prior to

1 2018?

2 **MR. YOUNG:** No, sir. American Outlaw makes one product
3 and it didn't start making it until 2018. That's in there
4 from an affidavit from a man named Jesse James Dupree, the
5 sole owner of American Outlaw.

6 **THE COURT:** All right.

7 **MR. YOUNG:** Okay. And, Your Honor, the next client of
8 mine is an outfit called Full Throttle, LLC. This is a real
9 estate holding company that exists in South Dakota and I think
10 owns a bar in South Dakota. Full Throttle, LLC doesn't do any
11 business in South Carolina, doesn't transact any business in
12 South Carolina. It's a South Dakota entity and that's the
13 only place it does business. It owns a piece of property
14 there. That's in the record through an affidavit of Michael
15 Ballard.

16 **THE COURT:** What is the claim asserted against that
17 client?

18 **MR. YOUNG:** I'll have to let him speak to what the claims
19 are, but generally, the claims ---

20 **THE COURT:** It's a real estate LLC in South Dakota?

21 **MR. YOUNG:** Yes, sir.

22 **THE COURT:** Does it own -- does it own any property ---

23 **MR. YOUNG:** It owns the third defendant.

24 **THE COURT:** Okay.

25 **MR. YOUNG:** It is the corporate owner of the third

1 defendant, which is the Sloon Shine Spirits.

2 **THE COURT:** Okay.

3 **MR. YOUNG:** Which makes a liquor in Tennessee and only
4 does business in Tennessee selling that liquor to a
5 distributor in Tennessee. So, I want to make sure the record
6 preserves all of our ---

7 **THE COURT:** Okay.

8 **MR. YOUNG:** --- arguments on lack of minimum contacts
9 with the State of South Carolina. It's well-detailed in our
10 papers and supported by those affidavits. But I will say that
11 I think Judge Culbertson's order is a little more direct and
12 gives us a way to grant our motion on the merits on the exact
13 same arguments that were heard right in this courtroom about
14 30 days ago.

15 And Judge Culbertson dismissed the party to the contract.
16 In other words, as I said, House of Blues has a promotion
17 agreement with this outfit called Throttlefest. There is no
18 written agreement whatsoever with American Outlaw or Full
19 Throttle or Sloon Spirits. My three clients are not a party
20 to that agreement. There's some allegations that my three
21 clients are a third-party beneficiary of that agreement. I
22 believe that's the nature of the House of Blues' allegations.

23 **THE COURT:** When were your clients sued?

24 **MR. YOUNG:** I want to say, Your Honor, it was in 2019,
25 Kara? Yes, in 2019. And I believe all those dates are well

1 detailed in Judge Culbertson's order.

2 **THE COURT:** Okay. Well what -- so, your argument is all
3 three claims are -- are long past the statute of limitations
4 for those claims?

5 **MR. YOUNG:** That's one of the arguments, Your Honor.

6 **THE COURT:** Okay.

7 **MR. YOUNG:** This happened in 2014. The plaintiffs had to
8 know about it in 2014; House of Blues knew about it in 2014.
9 Judge Culbertson ruled that that's the law of this case and my
10 folks were added in 2019. So, it's time barred.

11 **THE COURT:** Okay.

12 **MR. YOUNG:** That was one of the basis of his ruling.

13 **THE COURT:** Okay. Before I let you go on, let -- let --
14 let me hear from House of Blues on that issue.

15 **MR. STEGMAIER:** Well, I'll say this respectfully as it
16 relates to Judge Culbertson's order. Respectfully, we don't
17 believe that order was issued. We believe that there's error
18 -- there's substantial error with regard to that order. So,
19 we don't -- we don't believe there's any sort of binding
20 effect as it relates to this order that Judge Culbertson
21 signed as to Throttlefest as it relates to these particular
22 entities.

23 I'll say this just to kind of create some clarity,
24 because I hear the Court's questions. First and foremost, I
25 do have hard copies of the briefing that we had emailed the

1 Court?

2 **THE COURT:** That would be great. Hand me those.

3 **MR. STEGMAIER:** And let me preface this too as well, I
4 had an argument in the Court of Appeals yesterday and I was
5 thinking on the way over here, whatever went on in Columbia,
6 was lightyears a lot easier than this case. You will -- you
7 will see through the briefing, both from the third-party
8 defendants, as well as us, there are a lot of complex issues
9 in this case. It's not so cut and dry as it relates to
10 statute of limitations and the other things that have been
11 presented.

12 With regard to the statute of limitations issue, the
13 recitation was correct that this event happened in May of
14 2014. But House of Blues, nobody, no agent, no attorney, no
15 risk manager, no anybody, knew anything about this case until
16 October of 2016, when the lawyer for the Kelsey plaintiff in
17 the first party claim wrote a letter of representation to
18 House of Blues in California. That was the first time anybody
19 knew anything about this accident. Because the Court might be
20 familiar with the House of Blues, it's in North Myrtle Beach.
21 This accident happened way down the beach sometime after Mr.
22 Wagner, who was the tortfeasor driver, had left the House of
23 Blues. There wasn't any law enforcement investigation that
24 involved the House of Blues. There wasn't any letter of
25 representation. There wasn't any communication whatsoever as

1 it relates to this incident or the fact that any sort of cause
2 of action had arose where any of these entities that had been
3 named in either the first party case or the third party case
4 would be on notice of a potential claim.

5 So, first and foremost, our position is, as it relates to
6 the third-party claim was, it was timely brought within the
7 three years that our client knew about the existence of the
8 case. That's the first -- that's the first thing.

9 The other thing I would say, respectfully, is, you know
10 sometimes, statute of limitation issues or I'd say most of the
11 time, statute of limitations issues are very cut and dry. The
12 lady fell down in the Belk then or whatever. In this case,
13 again, the accident happened, and our folks didn't know
14 anything about it.

15 **THE COURT:** When do you say -- when do you admit that you
16 learned about the accident; a letter was received when?

17 **MR. STEGMAIER:** I believe October 20; that's in our
18 briefing, sir.

19 **THE COURT:** Okay. October 20th, 2016?

20 **MR. STEGMAIER:** Correct.

21 **THE COURT:** Okay.

22 **MR. STEGMAIER:** And the way the action got initiated is
23 with regard to the third party action got initiated is, at the
24 beginning of October, the first party -- the first party
25 plaintiff in this case amended his answer, which -- which

1 created the situation -- I'm sorry, amended his complaint,
2 which created a situation where we were able or given the
3 opportunity to file an answer, which included these third
4 party claims.

5 So, procedurally, we did this all correctly and I'd say
6 too as well, as it relates to the indemnification claims, as
7 it relates to contribution claims, I think there's -- there's
8 case law that exists in this state that supports the
9 proposition that a cause of action for contribution doesn't
10 begin to run until the defendant, who is becoming the first
11 party plaintiff, has incurred some sort of obligation to pay.

12 So, again, respectfully, as it pertains to Judge
13 Culbertson's order, that's -- that's -- that's an issue that
14 we think was an error that we don't believe should be binding
15 in this situation. We -- we -- we raised that issue when we
16 argued this and -- and in oral argument as well as our
17 briefing, and unfortunately it was disregarded, but I'd say it
18 again today. You know, we have brought numerous causes of
19 action, including breach of contract, negligent
20 misrepresentation, negligence, equitable indemnification and
21 contractual indemnification. And so, there's a multitude of
22 different theories as to why we believe these entities are
23 involved.

24 And let me say this, I don't want to steal all the
25 thunder because I know -- I know he's got a motion to

1 prosecute, but I think this involves -- I think this is good
2 context as we go forward in this argument, is that there's a
3 man, who is by the name of Fajita Mike ---

4 **THE COURT:** Well, let me -- let me let the defendants --
5 I appreciate it, but that's ---

6 **MR. STEGMAIER:** Yes, sir.

7 **THE COURT:** Okay. Let me ask you one more question
8 though.

9 **MR. STEGMAIER:** Yes, sir.

10 **THE COURT:** Why is Judge Culbertson's order not binding
11 on me. I mean, assuming that I -- that I go the way you want
12 me to go, you're going to have conflicting orders in this case
13 on the issue of the statute of limitations.

14 **MR. STEGMAIER:** Yeah, and we've tried -- well, number
15 one, I don't think there's an estoppel effect here.
16 Respectfully, I think -- I don't think one Circuit Judge's
17 order is binding on the other. So, I guess that's my response
18 as far as that goes.

19 The other thing is this, is that while the causes of
20 action are similarly stated or similarly defined, there is
21 different factual circumstances that exists that are separate
22 and distinct between the allegations against Throttlefest and
23 these entities, American Outlaw Spirit, Full Throttle and Full
24 Throttle Sloon Shine. Long story short is the man who is
25 alleged to have overserved, we believe, was a co-employee,

1 agent, anything, however you want to define it, of these
2 entities American Outlaw Spirits, Full Throttle Sloon Shine
3 and that at the time of the service, while he was inside the
4 House of Blues serving, we believe an argument could be made,
5 a tenable argument could be made, because he traveled around
6 the country with this group, liquor stores, other festivals,
7 where he was giving out samples and that's what he did that
8 day; he gave a sample to this man -- two samples to this man
9 Wagner, who is alleged to have caused this accident.

10 **THE COURT:** Okay.

11 **MR. STEGMAIER:** And so, our position is, take
12 Throttlefest, LLC and put it aside, there are different
13 theories factually that we believe exists that bring these
14 folks into the action that could be asserted that are tenable.

15 **THE COURT:** Thank you. All right. Mr. Young, if you
16 don't mind, let me hear from you about their statute of
17 limitations argument that they didn't know about the case
18 until 2016; how does that impact the statute of limitations?

19 **MR. YOUNG:** Sure. Your Honor, Judge Culbertson addressed
20 that directly. And the point that Judge Culbertson made and I
21 think it's the same as would apply here, is that many of their
22 theories are based on misconduct by these folks on the day
23 that this happened, which was back in 2014. Negligent
24 supervision, failure to procure insurance, various misdeeds
25 and misconduct. Part of their claim is certainly based on

1 that and what Judge Culbertson reasoned is that because your
2 claims are based on things that happened back in 2014, you
3 can't come forward in 2019 and say, you're not basing your
4 case on anything that happened back in 2014.

5 What he's trying to say is we didn't ---

6 **THE COURT:** Wait. Okay. Well that's a statute of repose
7 argument, isn't it?

8 **MR. YOUNG:** I don't think so, sir.

9 **THE COURT:** I mean, if they're saying that they either
10 didn't know about the incident, that's not statute of
11 limitations. If you're saying -- I think what your argument
12 is whether they knew about it or not, the clock starts in
13 2014. That's a statute of repose argument, isn't it?

14 **MR. YOUNG:** I don't mean to phrase it that way or make
15 that argument.

16 **THE COURT:** Okay. Well, how can -- how can the clock
17 start on them in 2014 if they didn't know about what happened?

18 **MR. YOUNG:** The clock starts on them when you knew or
19 should have known about your cause of action.

20 **THE COURT:** But they weren't, I mean they weren't -- they
21 weren't involved in the wreck. I mean how would -- how would?

22 **MR. YOUNG:** Well, and that's right and Judge Culbertson
23 addressed these exact arguments and said, just because you
24 don't know about the damages, which is really what he's
25 saying, we didn't get notice about an injury until sometime in

1 2016. I think he's conceding all this stuff certainly
2 happened when it happened, but we didn't get notice about the
3 injuries until 2016. Judge Culbertson ruled and I disagree
4 with him that two Circuit Judges can make different rulings in
5 the same case, could be a big problem for the orderly
6 transition of cases. But nonetheless, Judge Culbertson ruled
7 very specifically on these exact arguments, that just because
8 you learned about the injuries or the damages on a certain
9 date, doesn't mean that your cause of action accrued on that
10 date. Your cause of action accrued when these things
11 happened, which was back in 2014.

12 **THE COURT:** Okay. I -- I've not read Judge Culbertson's
13 order, but I don't see how that's possible. You mean, you're
14 telling me their cause of action accrued literally before they
15 knew there was an injury?

16 **MR. YOUNG:** No, sir. I'm saying their cause of action in
17 the law in South Carolina is your cause of action accrues when
18 you knew or should have known about the ---

19 **THE COURT:** Of the injury, right?

20 **MR. YOUNG:** --- well-formed claim that you could bring
21 against somebody.

22 **THE COURT:** Right, but how would they know about a claim
23 if they don't know there's an injury; I mean, I don't ---

24 **MR. YOUNG:** Well, they are House of Blues they are the
25 defendant of where this occurred.

1 **THE COURT:** Okay. But let's -- the action didn't occur
2 in the House of Blues, right?

3 **MR. STEGMAIER:** No, sir, it did not.

4 **THE COURT:** Okay. I mean, I'll read Judge Culbertson's
5 order, but I -- I am really struggling with how you can argue,
6 I mean -- I mean -- I mean how do you believe that they should
7 have known about it?

8 **MR. YOUNG:** Well, maybe I'm doing a poor job of
9 articulating what I'm trying to say. Their cause of action is
10 for breach of contract.

11 **THE COURT:** Right.

12 **MR. YOUNG:** And they're saying that the contract was
13 breached in May of 2014 when this event occurred. There's no
14 way that they can have a cause of action for breach of
15 contract and not know about it.

16 **THE COURT:** I don't think that's true. I mean, doesn't
17 happen all the time and you have a contract and until you find
18 out, I mean, you may -- you may find out sometime after the
19 breach occurred that it, I mean, that that's what, I mean ---

20 **MR. YOUNG:** I respect their arguments and I do understand
21 their arguments and I understand the Court's questioning and I
22 -- I've put it in argument as best as I can. I don't believe
23 ---

24 **THE COURT:** Okay. All right. Well, I'll read Judge
25 Culbertson's order.

1 **MR. YOUNG:** Yes, sir. Thank you.

2 **THE COURT:** Okay.

3 **MR. YOUNG:** When it comes to a couple of the other
4 defendants and these are moving now to different arguments.
5 The statute of limitations is one; I've articulating the
6 personal jurisdiction is one and I can certainly hand up the
7 affidavits for the Court's convenience. Let me move on to a
8 more substantive one.

9 Two of my clients, not American Outlaw; they were
10 dismissed as I mentioned earlier by Court order. But the
11 other two clients have been released by the plaintiff and we
12 have a signed settlement agreement with the plaintiff. The
13 plaintiff has released Sloon Spirits and Full Throttle, LLC.
14 There will never be an indemnity claim or anything like that.
15 In the statute in South Carolina it says when you release one
16 of the contributions tortfeasors, you therefore release the
17 rest of them. There's a Supreme Court case in South Carolina
18 also relied upon by Judge Culbertson called Smith versus
19 Tiffany, where it says, once you've released somebody as a --
20 under the contribution statute, you've also released them from
21 all liability.

22 So, as to two of my clients, the next argument in favor
23 of granting our motion to dismiss is that they've already been
24 released by the plaintiff. And you'll notice the plaintiff's
25 lawyer is not here today. The plaintiff's lawyer doesn't have

1 any claims against my clients directly. He's already resolved
2 all of them. So, I believe that's an independent ground that
3 would justify dismissing these two. And as I mentioned, when
4 it comes to American Outlaw, they don't have a release;
5 they've been previously dismissed.

6 **THE COURT:** That's what you said.

7 **MR. YOUNG:** They don't manufacture a liquor that was even
8 in existence at the time that any of this happened.

9 **THE COURT:** Okay. So, talk me through again, I
10 apologize, I didn't really follow you. The plaintiff has
11 released Full Throttle and the Full Throttle entities, the two
12 defendants. How does that prevent a third-party claim from
13 the House of Blues?

14 **MR. YOUNG:** Yeah, there's a South Carolina statute that,
15 I believe, we cited in our papers and if you'll bear with me a
16 second, I'll give you the exact cite. I think it's 15 -- 15,
17 I want to say 15-38. Yeah, 15-38-50, Your Honor. It's called
18 Contribution Among Tortfeasors Act.

19 **THE COURT:** Right.

20 **MR. YOUNG:** And there's a South Carolina case I'd cite
21 you too called Smith versus Tiffany. And that's 799 S.E. 2d
22 479 decided in 2017. And this is detailed somewhat in Judge
23 Culbertson's order. It's section 1, starting on page 5.

24 **THE COURT:** So, you -- you're going under subparagraph 2
25 of the statute; it discharges a tortfeasor from any liability

1 for contribution to any other tortfeasor?

2 **MR. YOUNG:** That's correct, Your Honor.

3 **THE COURT:** Okay. But I'm -- they have claims that
4 aren't tort claims for contribution, don't they?

5 **MR. YOUNG:** I think -- I don't think they should have any
6 tort claims at all because they have contractual based claims,
7 but that's a separate argument I haven't gotten to yet.

8 **THE COURT:** Okay. But that was my question. They are
9 contractual arguments, which will ---

10 **MR. YOUNG:** And that's ---

11 **THE COURT:** --- okay. But then the tortfeasors -- the
12 contribution among tortfeasors statute is not going to cover
13 those claims, right?

14 **MR. YOUNG:** It wouldn't cover any contractual claims, no,
15 sir.

16 **THE COURT:** Okay.

17 **MR. YOUNG:** It would only cover tort-based claims, that
18 like I say, have already been released by the plaintiff.

19 **THE COURT:** Okay.

20 **MR. YOUNG:** So, I don't think they can be rejuvenated by
21 the fact that a third-party defendant wants them in.

22 **THE COURT:** Okay.

23 **MR. YOUNG:** So, Your Honor, as to those two defendants, I
24 would respectfully request it would be dismissed on those
25 grounds, in addition to the statute of limitations grounds, in

1 addition to the personal jurisdiction grounds. And I think
2 that that may be the gist of it, if you'll bear with me, Your
3 Honor. And Judge Culbertson as I said, spoke to the
4 contribution claims and when it came to these tort-based
5 claims, there's a section in Judge Culbertson's order, section
6 2, section 3, rather, where he basically says all of the tort-
7 style claims; negligent misrepresentation, negligent
8 supervision and so forth are barred because of the existence
9 of this written contract. If any rights and responsibilities
10 between the parties to that contract which was Throttlefest,
11 who is the subject of the order and House of Blues are
12 controlled by that contract and you can't convert them to tort
13 claims by just pleading them as tort claims. And we would
14 argue that the same thing applies here. Our clients are not
15 even parties to those contracts. The allegations are that our
16 clients are third party beneficiaries of those contracts. We
17 believe that the contractual claims for indemnity, whatever
18 they may or may not be, would be contained within that
19 document between Throttlefest and House of Blues and this
20 Court has already ruled that there is no liability there.
21 (Inaudible) to grant a motion to dismiss.

22 And as counsel indicated a minute ago, as odd as this may
23 seem, there is conceivably some future where there might be a
24 claim, but I've heard them loud and clear, until there is some
25 liability, there is no kind of contractual indemnity claim or

1 couldn't have an equitable indemnity claim if you had any
2 liability to the plaintiff. We think those are additional
3 reasons we think that the dismissal should be granted.

4 **THE COURT:** Okay. Tell me which -- which of your three
5 defendants was already dismissed once?

6 **MR. YOUNG:** That was the first one, American Outlaw, Your
7 Honor.

8 **THE COURT:** Okay.

9 **MR. YOUNG:** And he was dismissed by a court order in
10 January or it was dismissed by court order of January of 2018.

11 **THE COURT:** That's the same one that you say did not
12 produce any liquors at all until 2018?

13 **MR. YOUNG:** 2018, yes, sir.

14 **THE COURT:** Okay. All right. On that issue, what about
15 that defendant?

16 **MR. STEGMAIER:** As I understand it, as I recall it and
17 counsel can correct me if I'm wrong. I think my recollection
18 is, the plaintiff's lawyer just cut him loose. And we --
19 because of Smith versus Tiffany, before there was even a Smith
20 versus Tiffany, that statute has screwed everything up as far
21 as being able to allocate fault to non-parties. And so, we
22 weren't going to voluntarily let anybody out of this case in
23 the off chance we could keep them on a verdict form for a jury
24 to be able to allocate fault. I don't -- I don't remember --
25 I think the plaintiff's lawyer just cut them loose and we just

1 contested that. That's my recollection. I can be corrected
2 as far as that goes, but ---

3 **MR. YOUNG:** Your Honor, I think that's probably fair.

4 **MR. STEGMAIER:** Yeah.

5 **MR. YOUNG:** The plaintiff's lawyer doesn't have any claim
6 against American Outlaw. They didn't have any claim against
7 American Outlaw.

8 **THE COURT:** So, was it a judicial determination or was --
9 -

10 **MR. YOUNG:** They wouldn't consent to the dismissal, so we
11 had to come before the judge, argue the motion and get an
12 order granting dismissal of American Outlaw.

13 **MR. STEGMAIER:** So, let's talk about that a little bit
14 more. That was in the very early stages of the case and that
15 was prior to Jesse James Dupree being deposed, and that was
16 before Michael Gardner, Fajita Mike, was deposed. And as
17 explicated within our briefing to this Court today, where
18 we've inserted their deposition testimony, which completely
19 contradicts the affidavits that they provided. That this --
20 the product from American Outlaw Spirits, this bourbon, was
21 available at -- at the Throttlefest in 2014. And so, that's a
22 reason or a basis why this entity is involved, irrespective of
23 whatever affidavit testimony he wants to put up.

24 **THE COURT:** Okay. Before we get to -- this is a motion
25 to dismiss anyways. I'm certainly not going to get into

1 competing affidavits or deposition testimony. But they have
2 an argument that there's a preclusive effect that that party
3 was dismissed back in 2018. How can you bring back in a --
4 bring him back in as a third-party defendant?

5 **MR. STEGMAIER:** Okay. I guess there are two reasons I
6 would say is mainly, as it relates to contribution -- mainly
7 as it relates to contribution. But as we've outlined to the
8 Court, there are other causes of action that we believe that
9 we directly possess as it relates to these entities. It goes
10 back to the conduct that we discovered in October 2016, Fajita
11 Mike overserving these folks, sampling, you know, giving out
12 samples of this product under our roof without our knowledge.

13 **THE COURT:** Isn't that the same claim the plaintiff
14 asserted and that the Court's dismissed, that -- that ---

15 **MR. YOUNG:** Yes, Your Honor, that is the same claim the
16 Plaintiff's asserted and the Plaintiff is not pursuing that
17 claim. There's no merit to it.

18 **THE COURT:** I mean, I'm struggling how you can revive a
19 claim that's been dismissed. I mean, I know you're saying
20 they overserved and all that, but isn't that the exact same
21 claim the plaintiff ---

22 **MR. STEGMAIER:** So, I want to make sure with regard to
23 this line of questioning, we're only talking about American
24 Outlaw?

25 **THE COURT:** Correct, American Outlaw. Okay.

1 **MR. STEGMAIER:** I guess my response would be, you know,
2 again, procedurally where that case was at the time, this
3 would be my initial argument, that where the case was at that
4 time, they just let him out, and the subsequent discovery has
5 yielded that much more information that revealed to us that
6 they were arguably, at least to a jury, if we make the
7 argument to a jury, that they were culpable at whole or in
8 part for this claim.

9 **THE COURT:** Okay. But it wasn't a consent dismissal
10 without prejudice; it was a judicial determination, a judicial
11 order dismissing them?

12 **MR. STEGMAIER:** As I understand -- I mean, to answer your
13 question directly, yes, sir.

14 **THE COURT:** Okay.

15 **MR. STEGMAIER:** As I understand it. We did not consent
16 to that dismissal.

17 **THE COURT:** Okay. Well, let's turn to the other two, to
18 what I'm calling the Full Throttle entities; what about those?

19 **MR. YOUNG:** Yes, sir, Your Honor. Those people, those
20 two of my clients, I believe, are covered by the Smith versus
21 Tiffany situation, that Supreme Court case that says once
22 you've been released, a third party can't bring a claim
23 against you. I think if we focus our arguments, we may agree
24 that that's the substance of where that analysis needs to be
25 made; is that correct?

1 **MR. STEGMAIER:** I understand that's your position.

2 **THE COURT:** Yes, sir, go ahead?

3 **MR. STEGMAIER:** So, as it relates to Full Throttle and to
4 the Sloon Shine entities, you know, they were dismissed
5 because of this payment. And as we've outlined in our
6 briefing, you know, number one, it does not have a preclusive
7 effect. I think the Court's already observed this. This does
8 not have a preclusive effect as to the other causes of action
9 that may exist in this case.

10 The other thing is this, and this is -- this is what
11 we've outlined on page 20 -- 19 and 20 of our arguments is,
12 this statute only kicks in where there's a good faith
13 settlement between the first party, the plaintiff, and the --
14 and the tortfeasor. We've never seen any of these settlement
15 agreements. We don't know anything about them. We don't know
16 anything about the context. We don't know if they were in
17 good faith or not in good faith. So, that's number one, as
18 far as that goes. So, I don't think they get the absolute
19 protection of the statute without such a showing.

20 The second is this, is that if there was a good faith
21 showing, it would only operate admittedly, it would only
22 operate to bar a contribution action only.

23 The third point we'd want to make is this, and this goes
24 back to Smith versus Tiffany. And listen, this was probably
25 one of the most important decisions, I know at least on the I

1 defense side, that's been decided by the Supreme Court in a
2 long time. So, a lot of folks have read that opinion very
3 carefully and the thing that we would argue to the Court is,
4 the Supreme Court's opinion did not preclude a filing of a
5 third party action, declaratory judgment or any motion
6 pursuant to Rule 14 or 19 of the Rules of Civil Procedure
7 against the selling or the tortfeasor for the sole purpose of
8 allocation of fault under section 15-38-15 on the grounds of
9 due process and equal protection.

10 You might remember from reading from that case, they
11 dropped down in the footnote saying, you know, that issue was
12 abandoned; we're not going to even touch it. We're arguing
13 it; we're asserting it, that this statute is violative of due
14 process and equal protection. And I know there are a lot of
15 motions behind this and we can spend the entire afternoon
16 talking about this. And I guess what I would say is this,
17 Judge, we crave reference to our briefing, because we've spent
18 a lot of time briefing this as it relates to the due process
19 and equal protection arguments of stating that this statute is
20 violative of the same and, you know, potentially is one that
21 the Supreme Court has to take back up.

22 **THE COURT:** All right. Mr. Young, I'll give you a couple
23 more minutes.

24 **MR. YOUNG:** Yeah, thank you, Your Honor. And I'll be
25 respectful of the Court's time and all the other lawyers.

1 Judge Culbertson addressed those exact arguments; I mean,
2 those literal exact arguments and I believe when the Court
3 reads his order, you'll see how he resolved those.

4 First of all, the issue on good faith is not part of
5 their complaint. There's no allegation that this wasn't done
6 in good faith and as you know, they don't get a copy of the
7 settlement agreement until after the verdict form. Settlement
8 agreements between prior tortfeasors don't typically get
9 produced to the other party. So, the allegation of some sort
10 of bad faith settlement is not supported by any evidence; it's
11 not even part of the record. It's just an argument they're
12 making in light of the Smith versus Tiffany.

13 And secondly, Your Honor, Judge Culbertson addressed this
14 idea that their due process rights are violated and made very
15 clear in his written order that I've handed up that they have
16 every right at trial and their due process rights are
17 protected by their ability to make an empty chair argument,
18 that they would be entitled to make at trial and that's been
19 recognized by the Supreme Court, discussed in Smith versus
20 Tiffany, and certainly, Judge Culbertson said that's the
21 proper way that they can enjoy their due process rights.

22 We'd ask that you'd just adopt Judge Culbertson's ruling,
23 Your Honor.

24 **THE COURT:** All right. Counsel, I appreciate it. It's
25 well argued on both sides. I'm going to take this under

1 advisement.

2 **MR. STEGMAIER:** Thank you, sir. I appreciate your
3 patience.

4 **THE COURT:** Yes, sir.

5 **(COURT ADJOURDED)**

6

7

8

C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Douglas Kelsey versus House of Blues Myrtle Beach Restaurant Corporation, et al held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on February 5, 2020.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Sallie Beth Todd, CVR

Official Reporter

April 6, 2020.

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

2 COUNTY OF HORRY)

3

4

5 January 8, 2020

6 **BEFORE:** The Honorable Benjamin Culbertson

7

8 DOUGLAS KELSEY, et al.,

9 Plaintiffs,

10 vs.

11 HOUSE OF BLUES MYRTLE BEACH RESTAURANT CORPORATION,
12 et al.,

13 Defendants.

14

15

16 APPEARANCES:

17

James Rainsford, Esq.

18 Appearing for the Plaintiff Douglas Kelsey.

19 **Jeffrey Bogdan, Esq.**

20 Attorney for the Defendant Throttle Fest, LLC

21 **Christian Stegmaier, Esq.**

Attorney for the Defendant House of Blues MB

22 **Blake McKie, Esq.**

23 Attorney for the Defendants American Alcohol
24 Spirits, Inc., Full Throttle, LLC, and Full
Throttle Saloon Shine, LLC.

25

Official Court Reporter
Natalie Dahl, RPR

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: 2017-CP-26-3008, Douglas Kelsey and
3 others versus House of Blues Myrtle Beach Restaurant
4 Corporation and others.

5 According to my roster, the matter is before the
6 Court on a motion to dismiss and a motion to sever.
7 Please give the court reporter your name and who you
8 represent.

9 MR. BOGDAN: Your Honor, Jeff Bogdan. I
10 represent Throttle Fest, LLC, third-party defendant.

11 MR. STEGMAIER: Good morning, sir. Christian
12 Stegmaier, Collins and Lacey. We're here representing
13 the defendant, House of Blues Myrtle Beach Restaurant
14 Corporation.

15 THE COURT: Any of these -- who else do we have?

16 MR. McKIE: Blake McKie on behalf of American
17 Alcohol Spirits, Inc., Full Throttle, LLC, and Full
18 Throttle Saloon Shine, LLC.

19 THE COURT: Can you spell your last name, please?

20 MR. McKIE: M-C-K-I-E.

21 MR. RAINSFORD: I'm James Rainsford, Your Honor,
22 on behalf of the plaintiff, Douglas Kelsey. Last name
23 is R-A-I-N-S-F-O-R-D.

24 MR. STEGMAIER: Sir, before we get started, I do
25 have hard copies of our responses. I don't know if

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1 the Court printed anything off.

2 THE COURT: They were so voluminous I didn't
3 print it off, but if you filed it, I have it on the
4 E-file.

5 MR. STEGMAIER: Whatever your preference is, sir.
6 For both the motion to dismiss and motion to sever, I
7 have.

8 THE COURT: All right. Are any of these motions
9 dispositive of the other?

10 MR. BOGDAN: They would be, Your Honor -- well,
11 no, I don't think they would be, because my motion to
12 dismiss is just on behalf of one of the third-party
13 defendants, so it wouldn't sever all of the
14 third-party claims, and the plaintiff's motion is to
15 sever all of the third-party claims from his case.
16 But I do think that they are very much related, such
17 that it might make sense to hear the motion to sever
18 first, even though it was filed second.

19 THE COURT: Is that agreeable with everyone?

20 MR. STEGMAIER: That suits.

21 MR. BOGDAN: I feel like you would get a better
22 feel for the case.

23 THE COURT: All right. So the motion to sever is
24 plaintiff's motion?

25 MR. STEGMAIER: Well, you know what, to think

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1 about it, by virtue of the fact that this is a Rule
2 12(b) motion, and not a 56 motion, for what it is
3 worth, I think my preference would be for the motion
4 to dismiss to go forward.

5 THE COURT: Motion to dismiss was filed first,
6 we'll hear that first.

7 MR. BOGDAN: That's fine.

8 Thank you, Your Honor. May it please the Court.
9 Your Honor, I represent the third-party defendant,
10 Throttle Fest, LLC, and I'll give you kind of the real
11 eye-level overview of the case.

12 On May 16, 2014, a gentleman named Travis Wagner
13 was a patron at the House of Blues in Myrtle Beach and
14 was consuming alcohol at the House of Blues Myrtle
15 Beach. He left the House of Blues in Myrtle Beach on
16 his motorcycle. He got into an accident with another
17 motorcycle, which was driven by the plaintiff, and the
18 plaintiff was injured.

19 The plaintiff and another gentleman, who was with
20 the plaintiff at the time, the two of them initially
21 filed this lawsuit. When they initially filed it,
22 they named the House of Blues Myrtle Beach, they named
23 a couple other entities, but they did not name my
24 client. Shortly after they filed their original
25 complaint, they filed an amended complaint, which

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1 named my client, Throttle Fest, LLC, claiming that
2 they just had -- didn't understand the name of the
3 defendant. So they substituted Throttle Fest, LLC, in
4 for another defendant.

5 The reason that they named Throttle Fest, LLC, as
6 a party, along with the House of Blues, was that they
7 believed that a gentleman named Michael Garner, who
8 was serving alcohol at the House of Blues that night,
9 was an employee or agent of both the House of Blues
10 and my client, so we did some discovery in the case.
11 The plaintiff took Michael Garner's deposition. The
12 plaintiff took my client's 30(b)(6) deposition, and
13 the plaintiff took many depositions of House of Blues.
14 The plaintiff determined that that was not the case,
15 that Michael Garner was only an employee of House of
16 Blues. So settled -- the plaintiff settled with my
17 client, Throttle Fest, LLC. I thought that would get
18 us out of the case. I tried to get House of Blues'
19 consent for a stipulation of dismissal since we no
20 longer had any liability to the plaintiff, and House
21 of Blues would not agree to Throttle Fest's dismissal
22 from the case. I had to file a motion to dismiss to
23 get my client out of the case. House of Blues opposed
24 that motion to dismiss, and we came in front of this
25 court, Judge Seals, and House of Blues simply argued

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1 that I want Throttle Fest, LLC, to be on the verdict
2 form along with the House of Blues. I said, well,
3 Your Honor, Throttle Fest already settled with the
4 plaintiff, it can't be on the verdict form. It has no
5 liability to the plaintiff. The judge granted my
6 motion to dismiss. That was in December of 2018, so
7 over a year ago. My client has been out of this case
8 for over a year now.

9 Then, in October of this year, 2019, House of
10 Blues filed a third-party complaint to bring my client
11 and others, represented by Mr. McKie, back into the
12 very lawsuit that my client has already settled and
13 been dismissed from.

14 Backing up even further, I'll explain to you
15 quickly the relationship between Throttle Fest, LLC,
16 and House of Blues. There was a contract that was
17 signed in 2014 between Throttle Fest and House of
18 Blues, which governs the parties' relationship for
19 this week-long event that would take place at House of
20 Blues, which was called Throttle Fest. It was an
21 event that was designed to get the Myrtle Beach
22 bike-week crowd up to the House of Blues to hang out,
23 see some concerts, spend money, eat food, have them
24 there as patrons.

25 That contract governed the relationship between

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1 Throttle Fest, LLC, and House of Blues. In fact, the
2 contract specifically says: The parties shall not
3 have any obligations, whatsoever, to each other
4 outside of the contract itself. So that is where --
5 that is how my client is involved in the case.

6 Now, I filed this motion to dismiss the
7 third-party complaint on three separate grounds. The
8 first ground is that my client has settled with the
9 plaintiff so, therefore, it has no liability to House
10 of Blues, and there is a case, Smith versus Tiffany --

11 THE COURT: Excuse me for interrupting. What are
12 the third-party complaint allegations against your
13 client?

14 MR. BOGDAN: So the causes of action are breach
15 of contract, negligent misrepresentation, negligence,
16 equitable indemnification, contractual indemnification
17 and contribution.

18 THE COURT: Okay.

19 MR. BOGDAN: So the first ground that I'm going
20 to argue is that the settlement agreement and release
21 I obtained from the plaintiff absolves my client of
22 all liability, not only to the plaintiff, but also to
23 the House of Blues, and that argument has two prongs
24 to it. First is South Carolina Code 15-38-50, which
25 is part of the Contribution Act. What it says is that

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1 when a release or a covenant not to sue or not to
2 enforce judgment is given in good faith to one of two
3 or more persons liable in tort for the same injury or
4 wrongful death, it discharges the tortfeasor to whom
5 it is given from all liability for contribution to any
6 other tortfeasor.

7 So that plain language of the statute absolutely
8 severs the contribution claim that House of Blues has
9 filed against Throttle Fest.

10 Now, the Smith versus Tiffany case, and I have a
11 copy of that if you would like it?

12 THE COURT: Just tell me what it says.

13 MR. BOGDAN: So what it says -- it interpreted
14 this statute. It went a bit further than just saying
15 it would absolve my client of liability for
16 contribution. What it says is: Rule 14 provides a
17 defending party as a third-party plaintiff may cause a
18 summons and complaint to be served upon the non-party
19 to the action who is or may be liable to him for all
20 of the plaintiff's claim against him.

21 It goes on to say: Thus, by terms of the
22 covenant not to execute, Mizzell -- who was the
23 third-party defendant in that case -- has no
24 additional liability to Smith -- who was the plaintiff
25 in that case -- and Mizzell is also immune from any

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1 liability, it says, to non-settling alleged
2 tortfeasors, Tiffany -- who, in this case, would be
3 the House of Blues -- by virtue of Section of
4 15-38-50. So according to the supreme court language,
5 15-38-50 not only absolves my client of contribution
6 liability, but any liability to the House of Blues.

7 So because of the release, I would ask that the
8 Court grant the motion to dismiss on all of the causes
9 of action, but certainly on the contribution cause of
10 action. I have a copy of the release. There is a
11 confidentiality provision in it, so House of Blues has
12 not seen it yet.

13 MR. STEGMAIER: Well, it is a Rule 12 motion, so
14 the Court is only looking at the pleadings.

15 THE COURT: Yeah. But the question is -- all
16 right. I understand. Go ahead.

17 MR. BOGDAN: And, Your Honor, in response to
18 that, there is case law that says on a 12(b)(6)
19 motion, that the Court can go outside of the pleadings
20 under certain circumstances, and I think those
21 circumstances are met in this case, specifically just
22 with regards to the release and the agreement between
23 House of Blues and the Throttle Fest. Because those
24 two documents are so germane to the case and to the
25 pleadings, that I think they can be looked at here.

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1 My second argument, Your Honor, is based on
2 well-established South Carolina case law, that if an
3 action is based on breach of contract, it cannot also
4 sound in tort. So, Your Honor, I explained that the
5 causes of action that have been filed against my
6 client by the House of Blues are breach of contract,
7 negligent misrepresentation, negligence, equitable
8 indemnification, contractual indemnification and
9 contribution.

10 Now, Throttle Fest and House of Blues entered
11 into this contract governing the entire relationship
12 between the parties during the event in question, and
13 it specifically said there are no other duties owed to
14 each other.

15 THE COURT: But, I mean, what are the
16 allegations? What are they saying you breached under
17 the contract?

18 MR. BOGDAN: So the breaches under the contract
19 are that we didn't get -- didn't name them as
20 additional insureds under the contract, is one.
21 Another was -- bear with me for a second -- we failed
22 to use due care in providing the talent and
23 personalities during the event. We engaged in
24 prohibited alcoholic beverage sponsorships during the
25 event, and we failed to comply with state and local

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1 laws during our performance of the event. So,
2 basically, all things that would be based on the
3 contract itself, nothing outside of the contract.

4 So I think that their causes of action that sound
5 in tort should certainly be dismissed because they are
6 succumbed by the breach of contract and contractual
7 indemnification causes of action.

8 Similar, with the equitable indemnification cause
9 of action, there is a case of Town of Winnsboro versus
10 Wiedeman-Singleton that says a right to indemnity may
11 arise by contract or by operation of law as a matter
12 of equity between the first and second party. The
13 very nature of equitable indemnification is a contract
14 for indemnity is unnecessary. The contract between my
15 client and the House of Blues has crossed
16 indemnification duties, so the equitable
17 indemnification cause of action is unnecessary and
18 inappropriate here.

19 My final ground, Your Honor, is a statute of
20 limitations defense, which I would argue would dismiss
21 the entire case. This event happened in May of 2014,
22 over, I think, seven or eight days in early May.
23 House of Blues did not file its third-party claims
24 against my client until October of 2019, and these
25 claims, Your Honor, were certainly known, or should

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1 have been known, to the House of Blues back in 2014
2 when the event in question took place. Particularly,
3 they claim that my client engaged in prohibited
4 alcoholic beverage sponsorships during the event.
5 This is on House of Blues' premises. And if my client
6 was, in fact, engaging in prohibitive alcoholic
7 beverages sponsorships during the event, House of
8 Blues would have known that right then and would have
9 had three years from that date to file suit against
10 Throttle Fest.

11 They are also claiming that my client failed to
12 name House of Blues as an additional insured on an
13 insurance policy. Surely, House of Blues did or
14 should have known that right around the time of the
15 event.

16 So for those reasons, Your Honor, I feel like
17 this case was filed long past the statute of
18 limitations. It was over five years after.

19 THE COURT: All right. Any arguments for or
20 against?

21 MR. McKIE: No, Your Honor.

22 MR. RAINSFORD: No, Your Honor.

23 THE COURT: All right. I'll hear from you.

24 MR. STEGMAIER: Good morning, again, sir. As was
25 relayed by counsel for Throttle Fest, there are

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1 several causes of action including breach of contract,
2 negligent misrepresentation, negligence, equitable
3 indemnification, contractual indemnification and
4 contribution. With regard to this Court's review of
5 what is before it, this is a Rule 12(b)(6) motion, and
6 the standard is the standard. This is not a Rule 56
7 motion. I would suggest, and I would assert, that the
8 flaw in this motion today, if what Throttle Fest has
9 in the way of difficulty as it relates to, at least,
10 the contract that existed between the two parties,
11 that they would be better situated in a Rule 56
12 motion.

13 Our suggestion is based on the case law and the
14 rules as they have been enunciated by the supreme
15 court, that this Court's review with regard to this
16 dispositive motion is relegated to the pleadings as
17 they have been found in the answer and the third-party
18 complaint. Our position is that we have asserted
19 tangible causes of action, and that they should be
20 allowed to go forward. If there is additional
21 discovery, if whatever occurs from here on out, if
22 Throttle Fest remains aggrieved by what has been pled
23 in whole or in part, they could file a Rule 56 motion
24 where, at that point in time, the circuit court can
25 take up the matter of what the release says, of what

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1 the contract says, and make whatever decisions are
2 appropriate under that standard as it relates to the
3 duties and responsibilities one owed to another.

4 So with that, we're back to according to standard
5 review that we know the Court is well acquainted with.
6 As well, the dismissal, in whole or in part, of the
7 claims that have been asserted would require findings
8 of fact by this Court that are not evident on the face
9 of the pleadings. Again, the Court -- in order to do
10 what Throttle Fest wants to have happen, they would
11 have to look at the release, would have to look at the
12 contract.

13 THE COURT: Not if I do it on the statute of
14 limitations. How do you get around the statute of
15 limitations?

16 MR. STEGMAIER: I appreciate you asking, as far
17 as that goes. As was relayed to the Court -- and I'll
18 skip ahead to the statute of limitations since you
19 brought it up, as far as that goes. With regard to
20 the statute of limitations, as was relayed to the
21 Court, this accident happened in May of 2014. The
22 first notice of this incident to House of Blues --
23 because this accident happened well off House of
24 Blues' premises, way down on Highway 17, there wasn't
25 any contemporaneous notice to House of Blues of this

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1 accident --

2 THE COURT: Of the accident, but you certainly
3 knew of the contract and whether or not they secured
4 insurance under the contract or whether or not there
5 was a breach of the contract by illegally selling
6 alcoholic beverages on the premises back in 2014.

7 MR. STEGMAIER: Respectfully, sir, I think that
8 would require a finding of fact about what the House
9 of Blues did know or didn't know, what Throttle Fest
10 disclosed or didn't disclose. Our position is this,
11 as has been testified -- and, again, there is no
12 testimony in front of the Court as it relates to a
13 12(b) motion, but the testimony is we didn't know
14 anything about what Mike Garner -- known as Fajita
15 Mike -- was doing or not doing in the music hall on
16 the night in question where these alleged drinks were
17 served.

18 THE COURT: But it was on your premises.

19 MR. STEGMAIER: Yes, sir, but that doesn't
20 mean -- respectfully, that doesn't mean we are
21 omnipotent. There are restaurants and hotels and all
22 sorts of businesses that exist here in Horry County
23 where something might happen where a patron gets
24 injured, where the business doesn't know about it.
25 We've heard motions today where it's relayed to the

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1 Court -- the premises liability case that was argued
2 ahead of us, counsel for the dealership in that case
3 said we didn't know about this for a year. Same thing
4 in this circumstance. We didn't know there was any
5 alleged tortious conduct by this man, Fajita Mike. We
6 didn't know anything about the accident until nearly
7 three years later, two-and-a-half years later. So
8 within that three years of our notice, we did, in
9 fact, file the third-party complaint alleging all of
10 these different causes of action.

11 THE COURT: So all of your causes of action are
12 related to the accident, and not specifically to the
13 contract? Because of that accident is the reason you
14 are seeking a breach of contract, negligent
15 misrepresentation and all of that, is because of the
16 accident -- motorcycle accident?

17 MR. STEGMAIER: I've broken it down a little bit
18 to answer your question directly, as far as that goes.
19 As it relates to negligence, for instance, Robert
20 Simeone, who is the general manager of House of
21 Blues -- and, again, we are getting into evidence that
22 has been deduced at discovery for purposes of a 12(b)
23 motion, which, respectfully, we don't think is
24 appropriate. But just for an instance, he states that
25 this festival occurs in 2014. There was a prior year

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1 of festivals in 2013. There had been a course of
2 dealing, arrangement, understanding between House of
3 Blues and Throttle Fest, and all of the personnel that
4 they were bringing with them, including the act,
5 Fajita Mike, their own bartenders. The understanding
6 was this, that Throttle Fest would manage its own
7 people. He testified to that. Again, that is getting
8 into testimony in a 12(b) motion.

9 But our position is that we didn't know anything
10 about this accident until merely two-and-a-half years
11 after it occurred and so, therefore, we didn't know
12 anything about the alleged tortious conduct, which is
13 purportedly the proximate cause of the injuries
14 alleged by the plaintiff.

15 So, you know, we can all be back here again
16 arguing this motion with Throttle Fest asserting what
17 it is asserting, but it would be most properly
18 captured as a Rule 56 motion versus a Rule 12 motion.
19 Because, again, we keep getting back into, well, what
20 does the contract say, what does the release say, what
21 do they say in depositions as it relates to what House
22 of Blues knew or didn't know as it pertains to any of
23 these causes of action.

24 All I can tell you is that the House of Blues did
25 not have any notice of this claim until after

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1 October 20th, 2016, which was the date of the letter
2 sent by Mr. Rainsford to House of Blues alerting them
3 to this claim, that it existed. So our claims that
4 were asserted in the third-party complaint were
5 asserted within the three years that they say is the
6 statute of limitation in this case.

7 I'll say this, too, as well, this third-party
8 complaint was brought because the plaintiff amended
9 their complaint to allege two new theories of
10 recovery, two new causes of action, which obviously
11 requires us to file an answer, and it created an
12 opportunity for us at that time to answer and assert
13 our third-party complaint.

14 Our position is this, is that -- it kind of goes
15 into the motion to sever, inasmuch as our defenses in
16 this case as it relates to the liability and
17 allocation and apportionment of responsibility, our
18 defenses are so intertwined and so commingled with the
19 allegations of the third-party complaint, all the
20 causes of action that are asserted is that these
21 parties need to be in the case. These causes of
22 action need to be asserted for purposes of giving a
23 jury the complete opportunity to understand exactly
24 what happened, as well as appropriately allocating
25 fault.

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1 As it relates to Smith versus Tiffany, there are
2 a couple important things that this Court needs to
3 know as far as that goes. One, Smith versus Tiffany
4 was an automobile accident case where the appellants
5 in that matter conceded that Mizzell did not breach
6 any duty of care to them. This was just a third-party
7 car that allegedly had caused some sort of issue or
8 circumstance that created this accident, and the
9 defendant had been sued. They wanted the jury to be
10 able to allocate fault to this entity, but the
11 appellant acknowledged that there wasn't any duty of
12 care owed between the two of them.

13 Well, Throttle Fest and House of Blues are not in
14 the same boat. They had a business relationship.
15 They had a partnership. There were duties owed by
16 Throttle Fest that we say existed, including their
17 supervision, their control over the personnel that
18 they brought to this event. Fajita Mike, Mike Garner,
19 is one of the people that they brought to this event.

20 The other thing I would assert as well is Smith
21 versus Tiffany was a summary judgment case; it wasn't
22 a Rule 12 case. Again, we're getting into
23 circumstances and instances where this Court is having
24 to examine materials and facts outside the pleadings.
25 Again, respectfully, we assert and suggest that the

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1 Court is relegated to what has been pled in the
2 pleadings and determine yes or no, up or down, whether
3 or not they're cognizable causes of action, and we
4 believe, based on the rules of pleading, that we have
5 done that.

6 As it relates to the Throttle Fest's argument or
7 assertion that this breach of contract precludes the
8 opportunity to assert the negligent misrepresentation
9 or the negligence cause of action, we reject that just
10 based on Rule 8. As this Court well knows, we're
11 entitled to -- parties are entitled to assert
12 alternative theories, alternative bases for recovery.
13 We certainly don't believe that we are entitled to any
14 sort of double recovery, but we believe at this point
15 in time we are able to assert the breach of contract
16 action, as well as negligence -- negligent
17 misrepresentation based on what we believe to be a
18 duty of care that is owed to us.

19 Again, I think I've already stated this, but with
20 regard to the merits of the claims, we're not only
21 limited to what was in the contract, but the
22 relationships that existed, the course of dealing.
23 Again, that is going outside of the pleadings.

24 Last thing I want to say is this with regard to
25 Smith versus Tiffany, is that we've asserted that the

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1 settlement was not made in good faith, was not made in
2 good faith. That is what we have alleged. The reason
3 why all of these parties weren't in the case or don't
4 remain in the case, candidly, sir, is that they didn't
5 procure the right coverage. They didn't procure the
6 right alcohol liability related coverage for the
7 plaintiff to be able to recover under their Title 61
8 theory of liability.

9 The plaintiff in this case has only one cause of
10 action, and that relates to Title 61. In order to --
11 in order to recover meaningfully, there has to be
12 insurance for that. Throttle Fest, notwithstanding
13 what was in the contract, again, outside of the
14 pleadings, they didn't procure the right coverage. So
15 when it became abundantly clear that there wouldn't be
16 any recovery, they let them go. The plaintiff let
17 them go. We don't have any idea -- we don't have any
18 understanding as to what that settlement amount was,
19 but we have an understanding that it was minimal, and
20 in light of what was asserted as alleged damages in
21 this case, we think that far outweighs -- whatever got
22 paid far outweighs what Throttle Fest actually owes.

23 In our briefing, which we invite the Court to
24 take a look at, as it relates to what constitutes a
25 good faith settlement, there is all sorts of analysis,

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

5 The other thing, too, is that we've asserted the
6 settlement agreement between the parties was violative
7 of due process. And I don't necessarily have to get
8 into that whole argument -- it is contained within our
9 briefings -- but what is important about Smith versus
10 Tiffany is this, is that there was no finding, there
11 was no ruling as it related to whether or not the
12 settlement agreement in that case violated due process
13 because the appellant didn't argue it. By virtue of
14 the fact that the appellant didn't argue it with any
15 sort of meaningfulness, the supreme court held it to
16 be a summary argument and disregarded it and stated
17 that they wouldn't rule on that. So there is a due
18 process argument that exists that hasn't been passed
19 on by the supreme court with regard to Smith versus
20 Tiffany.

21 So, for these reasons, hopefully I've been
22 responsive to the Court's questions, but for these
23 reasons we believe that the motion to dismiss should
24 be denied. Again, we would create reference to the
25 return that was filed in this court. I don't think

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1 this is necessarily altogether that simple or that
2 easy that it can be necessarily disposed of just at
3 oral argument. We would invite the Court's review of
4 what was written and asserted. But, again, I just
5 keep going back to Rule 12 versus Rule 56, and what
6 Throttle Fest wants this Court to do is a lot of
7 looking at things that are outside of the pleadings.
8 Thank you, sir.

9 THE COURT: Anything in reply?

10 MR. BOGDAN: Very briefly, Your Honor. I do
11 believe that under South Carolina law you can consider
12 both the settlement agreement as well as the contract
13 between the House of Blues and Throttle Fest. I've
14 cited the case law to support this, and it is in
15 Footnote 2 of my brief, but I'll quickly recite some
16 of it to you.

17 Generally, in considering a 12(b)(6) motion, the
18 trial court must base its ruling solely on the
19 allegations set forth on the face of the complaint.
20 That is the Doe v. Marion case. However, the Court
21 may consider documents outside of the pleadings in
22 determining whether to dismiss a complaint where the
23 documents are integral to the complaint, explicitly
24 relied on in the complaint, and where the plaintiff
25 does not challenge their authenticity.

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1 Now, the contract between Throttle Fest and House
2 of Blues was actually quoted in House of Blues'
3 third-party complaint. I have not heard any argument
4 that House of Blues challenges the authenticity of the
5 document; in fact, they produced a copy of it in
6 discovery. So I think that that can certainly be
7 relied on by the Court at this stage.

8 But even if the Court decides it does not want to
9 look at the actual contract, if you stick to the House
10 of Blues' third-party complaint, Paragraph 97 says
11 that Throttle Fest, LLC, and House of Blues entered
12 into a co-promotion agreement, which is the contract,
13 within an effective date of March 19, 2014, quote,
14 concerning the functions and acts necessary for --
15 necessary for promoting and conducting the Throttle
16 Fest event to be held May 9 through 17th, 2014 at
17 the House of Blues location in Myrtle Beach, South
18 Carolina.

19 So according to the complaint itself, this is the
20 contract that governed the duties between the two
21 parties, and for that reason, the causes of action --
22 contract not in tort. As to the Rule 8 -- I don't
23 think that is dispositive of the contract versus tort
24 issue. The South Carolina courts have ruled over and
25 over again that under South Carolina law, if the cause

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1 of action is predicated on the alleged breach, or even
2 negligent breach of a contract between the parties, an
3 action will not lie in tort. All those cases are
4 cited in my brief.

5 Finally, there is no allegation in the
6 third-party complaint that the settlement between
7 Throttle Fest and the plaintiff was not in good faith.
8 So this is the first -- besides for the House of
9 Blues' reply brief, this is the first time I heard
10 that they are challenging that that settlement was
11 done in good faith. There is also nothing in the
12 third-party complaint about Throttle Fest not getting
13 alcohol liability coverage, and I don't think it is in
14 the reply brief, but I just received that last night,
15 so perhaps I missed it, but that is the first I'm
16 hearing of that.

17 Finally, Your Honor, just kind of backing
18 everything up, you know, House of Blues -- all of
19 these parties were all involved in litigation together
20 two years ago. House of Blues never filed any
21 crossclaims against Throttle Fest. That was discussed
22 numerous times, but they never did. Instead, they
23 opposed a motion to dismiss and still didn't assert
24 any crossclaims against Throttle Fest.

25 Now what they are doing is they are unhappy with

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1 the Court's ruling from one year ago that Throttle
2 Fest was not going to be on the verdict form, so they
3 are trying to get us back in the case, which I think
4 just from an overarching standpoint is inappropriate
5 here.

6 THE COURT: All right. All right. If I could
7 get you to prepare an order, I'll grant the motion to
8 dismiss. As I understand it, as I look through this,
9 the breach of contract, negligent misrepresentation
10 and the negligence cause of action are barred by the
11 statute of limitations. Likewise, the equitable
12 indemnification, contractual indemnification and the
13 contribution are barred by 15-38-50 since there is a
14 release and they did get a settlement. Based upon
15 those grounds, I'll grant your motion to dismiss. If
16 you would prepare an order to that effect.

17 MR. BOGDAN: Thank you, Your Honor.

18 THE COURT: Hold for one second. I'm sorry, your
19 name again?

20 MR. BOGDAN: My name is Jeff Bogdan, Your Honor.

21 THE COURT: Bogdan, that's right.

22 MR. BOGDAN: I have a card.

23 THE COURT: No, I have it right here, I just have
24 the list of these attorneys and I couldn't keep it
25 straight who was representing who.

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1 MR. BOGDAN: Do you want me to e-mail that
2 proposed order, or E-file it?

3 THE COURT: Whatever is easy for you. It doesn't
4 matter. It is just as easy one way as the other.

5 All right. Let's hear the motion to sever.

6 MR. STEGMAIER: Let me ask this from a procedural
7 standpoint. You might recall last week there was an
8 inquiry about arguing the other motions to dismiss
9 today when the Court said, you know -- the roster said
10 we can't add anything together. That roster has come
11 out for, I think, the first week of February; is that
12 right?

13 MR. McKIE: That's correct.

14 MR. STEGMAIER: Based in the light of what the
15 Court has ruled as it relates to the motion to dismiss
16 as to the one defendant, this is my request -- and I
17 don't know how this will hit Mr. Rainsford -- I would
18 ask that this motion be continued until --
19 contemporaneous with the second motion to dismiss.

20 THE COURT: I don't have a problem with that if
21 that is agreeable to everyone.

22 MR. STEGMAIER: I think that makes logical sense.

23 THE COURT: But if you want to go forward. This
24 is the problem, this is why we have such a backlog of
25 motions in this county. I mean, when I became chief

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1 administrative judge for the first time about ten
2 years ago, it took six months, and it dealt with
3 continuing motions and granting expedited motions. If
4 you were caught in that middle, you could never get
5 your motion heard. Now we have cured that problem
6 where you can get that motion heard within 60 days, so
7 I hesitate to continue or grant expedited hearings
8 because it keeps -- what it does -- it doesn't affect
9 those who have the motion, it affects everyone else
10 whose motion is on the docket. It is ready to go
11 forward -- I'll continue it, but only if it is with
12 consent. If you want to go forward....

13 MR. STEGMAIER: We have a slot.

14 MR. RAINSFORD: Your Honor, I'm about as an
15 agreeable a person that you'll meet, but I cannot
16 agree to this, and I'll tell you --

17 THE COURT: That's fine. That's fine. You don't
18 need -- motions are scheduled for hearing in the order
19 of priority based upon the date they are filed, and if
20 you go by that rule and stick by it, then that is the
21 rule and you don't have to explain why you are going
22 with the rule, all right.

23 So this is the plaintiff's motion?

24 MR. RAINSFORD: Yes, Your Honor.

25 THE COURT: I'll hear from you.

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1 MR. RAINSFORD: Certainly. I filed the original
2 action on May 12, 2017. I admitted complaint on
3 July 7, 2017, a little over two months later to add
4 Mr. Bogdan's client, Throttle Fest. At that time,
5 there were numerous defendants that I named, including
6 all of the third-party defendants.

7 During the course of discovery, what I realized
8 was that the only person who had a permit to sell
9 alcohol in the state of South Carolina was the House
10 of Blues. At that point, I needed to determine
11 whether there was an agency relationship with the
12 other defendants that I had named, because if not,
13 then these other entities -- I would not have a viable
14 cause of action against them, because under South
15 Carolina law, the liability for the service of alcohol
16 is premised on you having a license to sell alcohol or
17 as being the agent of someone who has the license.

18 Discovery was served on the House of Blues, and
19 the House of Blues, when asked whether the Throttle
20 Fest, LLC, was its agent for the purposes of selling
21 alcoholic beverages on the night in question, the
22 House of Blues answered the discovery by denying there
23 was an agency relationship for the purposes of selling
24 alcohol. At that point, I wasn't pleased about it,
25 but I had no viable cause of action against Throttle

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1 Fest, LLC, at that point because there was no agency
2 relationship, and Throttle Fest, LLC, did not have a
3 license to sell alcohol in South Carolina, then I had
4 no viable theory against them.

5 What else that I learned in the discovery is that
6 the person that served the last two drinks to my
7 client, Douglas Kelsey, who lost his left leg as a
8 result of this crash, was an employee at the House of
9 Blues. At the beginning of the case, I did not know
10 that. Through the discovery of this case, I found
11 out. I attached to the memorandum of law, submitted
12 all of the documents that clearly show he was an
13 employee of the House of Blues. There was a W2. He's
14 got an employee ID number. The deposition testimony
15 from the 30(b)(6) deponent, Mr. Simeone, who was
16 previously referenced by my fellow counselor, is the
17 general manager of the House of Blues and he agreed
18 Mr. Garner was our employee for that week. Therefore,
19 my claim, my focus, is on the House of Blues because
20 it was their employee who sold or gave alcohol to the
21 drunk driver, the defendant, Travis Wagner, shortly
22 before he left the House of Blues.

23 Mr. Wagner, the drunk driver, also testified at
24 his deposition that he consumed all of his alcoholic
25 beverages inside of the House of Blues music hall.

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1 That is important because, during the course of
2 discovery, the House of Blues through its 30(b)(6)
3 deponent -- sorry, I have a cold and it sounded like I
4 said opponent -- agreed that this Throttle Fest
5 promotion did not occur inside the music hall at the
6 House of Blues, it only occurred on the deck. So that
7 further defeated any theory I had against someone like
8 Throttle Fest, even if I could have come up with some
9 other agency relationship.

10 At that point in discovery, it was clear that all
11 of the actions being complained of that affected my
12 client had occurred in the House of Blues music hall.
13 At that point, having no viable cause of action
14 against any of the other defendants, other than the
15 drunk driver, the House of Blues and the House of
16 Blues Entertainment, I dismissed any and everybody
17 else. In fact, people earlier in the litigation had
18 gotten out. American Spirits, Incorporated, was
19 dismissed in January of 2018.

20 When the House of Blues responded to my complaint
21 and to my amended complaint back in 2017, both times
22 they asserted as affirmative defenses that the actions
23 of others, including, at that point, codefendants,
24 that that was their defense, that these other people
25 were responsible. It was clear the House of Blues was

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1 on notice that it could have served crossclaims in
2 2017; they chose not to. Why it did so? I don't
3 know, maybe it wanted a lot of bad actors on the stage
4 at trial; not a bad idea.

5 As the litigation went along and people started
6 getting dismissed, the House of Blues took no actions,
7 as Mr. Bogdan argued. The House of Blues challenged
8 the dismissal of Throttle Fest all the way up to a
9 hearing in front of Judge Seals and could have kept
10 them in the case, and they did not do so.

11 That dismissal occurred in December, I believe,
12 of 2018. Since all of these defendants have been
13 dismissed, and probably over the last six months, we
14 have conducted about 15 depositions in this case, many
15 of them expert depositions of witnesses that live out
16 of state, doctors that were as easy to get to depose
17 as doctors are in plaintiff cases. My client had
18 about 15 surgeries as a result of this, and I had to
19 depose surgeons all over the county who perform
20 procedures as part of my case.

21 On the eve of trial, unfortunately, it got
22 continued, and the House of Blues filed these
23 third-party claims. When I filed my second amended
24 complaint, I did it for a couple of reasons. One, I
25 didn't want the threat of prior pleadings used against

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1 my client at trial. I wanted clarity in the
2 pleadings, and I wanted the pleadings to conform with
3 the evidence that we had learned in the discovery, so
4 that is exactly what I did. I made clear what the
5 allegations were, and I tracked what we learned in the
6 depositions and written discovery.

7 It is true that I alleged new theories of
8 liability, but not new theories of liability as it
9 related to any of these other third-party defendants
10 or previous codefendants; rather, I cited the North
11 Myrtle Beach code as an alternative basis of liability
12 as violations of alcohol controlled rules, statutes or
13 ordinances. One of the issues in this case raised by
14 the House of Blues is that their employee didn't
15 charge for the last two drinks and, therefore, there
16 was not a sale of alcohol, which I don't think is a
17 valid defense, but I don't like to be waiting for a
18 jury to come back who has -- and I don't get to
19 request a charge from the judge and the jury gets
20 confused and thinks, well, there is no money, so no
21 verdict. That was the main reason to do that. It
22 didn't add any additional facts regarding the
23 third-party defendants. It didn't put anything new
24 that the House of Blues needed to have asserted
25 crossclaims -- it did nothing. In fact, I was clear

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1 in there, in the pleading itself, that I was to
2 clarify that the only defendants were these
3 individuals, and that we were under a misunderstanding
4 of facts. I mean, it is an 18-page complaint; I tried
5 to do as best as I could to set it all out. At this
6 point, almost three years into it, all I want is a
7 trial. If these claims don't get severed --

8 THE COURT: So you are asking to sever the
9 third-party claims?

10 MR. RAINSFORD: Yes, Your Honor. That is all I
11 want, and a trial.

12 THE COURT: Is there some legal authority that
13 says I can do that?

14 MR. RAINSFORD: Yes, Your Honor.

15 THE COURT: All right. And what do I have to
16 consider, and what is the standard for doing that?

17 MR. RAINSFORD: Certainly, Your Honor. The
18 standard is the sound discretion of the trial court,
19 that is pursuant to Beach v. Hudson, 298 S.C. 424.
20 The factors to be considered -- and I set this out in
21 the memorandum as well, Your Honor, that I filed in
22 this case -- there are many. They include -- factors
23 to be considered by the courts in deciding whether to
24 allow interpleader include: Prejudice to the
25 plaintiff, likelihood of delay --

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1 THE COURT: No, not interpleader. This is
2 third-party complaint.

3 MR. RAINSFORD: It's looking at the same
4 standard, and I can --

5 THE COURT: Oh, okay. So it is the same
6 standard, go ahead.

7 MR. RAINSFORD: Yes, Your Honor. And my fellow
8 counselor has that brief as well, and I don't think he
9 disagrees on the facts to be considered. The
10 likelihood of delay, timeliness of the defendant's
11 attempt to implead, whether the issues raised by the
12 impleader are unrelated to the original suit and
13 involve different issues and evidence, and whether the
14 third-party claims are unduly complicated or
15 meritorious. Those are all things the Court can
16 consider. It doesn't have to give any specific -- no
17 one factor is determinative, and I don't think my
18 fellow counselor and I disagree about that.

19 THE COURT: But, I mean, you initially had all of
20 these people in the case?

21 MR. RAINSFORD: Correct, in 2017. I did. And
22 when I realized that the facts didn't support the
23 cause of action against them, I dismissed them. So as
24 part of the arguments that -- and the reason -- number
25 one, delay itself.

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1 THE COURT: I mean, you initially had them in?

2 MR. RAINSFORD: Correct.

3 THE COURT: You let them out, so how is it going
4 to cause any further delay by letting him just assert
5 what you are initially asserting? I mean, basically
6 what he is saying is I disagree with your evaluation
7 of the case. You let them out. You shouldn't have
8 let them out.

9 MR. RAINSFORD: If he had done that back in 2018,
10 mid-2018, late 2018, early 2019, he would have a much
11 better argument, but to wait until the eve of trial,
12 after all of this discovery has taken place, that he
13 can't then go and file third-party claims and bring
14 all of these individuals back in, who are then going
15 to have the position to say, well, I need to do some
16 discovery, I've just been brought into this, I'm not
17 ready for trial.

18 THE COURT: How can they say they've just been
19 brought into this if they were in it initially?

20 MR. RAINSFORD: Because it's been two years for
21 most of these people when they were dismissed. And
22 they weren't a part of all of these things that were
23 occurring. When I filed my second amended complaint
24 for clarity, I filed it on October 15, 2019.
25 Interestingly, the answer and counterclaims were filed

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1 three days later to my second amended complaint. I
2 don't usually get an answer and third-party complaint
3 filed three days after I filed a second amended
4 complaint. I think my fellow counselor was preserving
5 his statute of limitations, which is fine, but if he
6 wants to go and fight about contractual issues, and
7 that is not even up for debate anymore. The person
8 that he had a contract with has just been dismissed,
9 and now the three people remaining on this
10 interpleader are two liquor companies, which there is
11 no contractual relationship at all. In fact, the only
12 --

13 THE COURT: What are the allegations?

14 MR. RAINSFORD: That those liquor companies were
15 agents with Mr. Bogdan's client. And so if
16 Mr. Bogdan's client was acting in some sort of agency
17 capacity, and he has a statute of limitation defense,
18 then one month from now, the same argument is going to
19 affect the other three defendants in the case. There
20 is no allegation --

21 THE COURT: But, I mean, why not just let them
22 stay in the case, and then if they get dismissed a
23 later time, that will effectuate what you are seeking
24 the Court to do now?

25 MR. RAINSFORD: If that give the defendants six

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1 more months, that is six more months I can't try a
2 case. I have a client that can't afford to buy a
3 prosthetic that he needs for his leg. This is a case
4 I gave notice of in 2016, and I tried as hard as I
5 could for pre-suit mediation, because I knew what
6 would happen if we didn't settle it, that we would get
7 into this endless litigation. Then, on the eve of
8 trial, back in November or late October, again,
9 another impediment comes up.

10 THE COURT: What was that?

11 MR. RAINSFORD: The third-party complaint that
12 gets filed. One other thing I would like to add that
13 this Court can consider, which it just considered with
14 Mr. Bogdan's motion, is meritoriousness. The Court
15 can order severance if it doesn't think the
16 third-party claims are meritorious.

17 THE COURT: See, I don't know. I can't sit here
18 at this motion hearing and say it is non-meritorious,
19 because I don't know anything about this case.

20 MR. RAINSFORD: If you can say it to Mr. Bogdan's
21 case, Your Honor, and dismiss his, and if the only
22 pleading in Mr. Stegmaier's claim is that the other
23 individuals were agents of Mr. Bogdan's --

24 THE COURT: If he stipulates to that, then he --
25 if he stipulates that because I dismissed the one,

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1 that everybody else is entitled to a dismissal, then
2 his causes of action --

3 MR. STEGMAIER: No, sir. I mean, respectfully.
4 I mean, we don't agree with the prior ruling, not that
5 you are surprised. We certainly won't stipulate that
6 everyone else gets dismissed.

7 I don't want to interrupt Mr. Rainsford, as far
8 as this goes, because I'm listening hard to what he is
9 saying, and I think you're asking all the right
10 questions. It is like I said in the earlier motion,
11 our defenses in this case, and the third-party
12 complaint, are so intertwined, the same witnesses,
13 same evidence, everything is going to be in play. You
14 know, a jury is going to hear that. Judicial economy
15 -- think about every case in Horry County --

16 THE COURT: I understand. Let him finish. Go
17 ahead.

18 MR. RAINSFORD: When he says everybody can
19 consider everything else, the remaining defendants in
20 this case -- and we're not at 12(b)(6) here, so I can
21 give more of a forecast than I think Mr. Bogdan could
22 do, but the remaining individuals in this case are two
23 liquor companies and a bar out west. So for
24 Mr. Stegmaier to say that these individuals -- and I'm
25 going from his pleadings, not mine, from his

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1 third-party complaint. The allegation is that he --
2 his client, House of Blues, had a contract with Mr.
3 Bogdan's client, Throttle Fest, LLC, that there was no
4 other contractual relationship with anyone else.
5 There is no other allegation in the third-party
6 complaint.

7 THE COURT: What defendants are you talking
8 about?

9 MR. RAINSFORD: The remaining three: American
10 Outlaw Spirits, Incorporated; Full Throttle, LLC; and
11 Full Throttle Saloon Shine, LLC.

12 THE COURT: I thought -- what is your client's
13 name?

14 MR. BOGDAN: I saw your confusion. Mine is
15 Throttle Fest, LLC.

16 THE COURT: Oh, okay.

17 MR. RAINSFORD: I'll have to deal with that with
18 a jury.

19 THE COURT: Go ahead, I'm sorry.

20 MR. RAINSFORD: So there was only one contractual
21 relationship only -- and, again, I'm only going off
22 the third-party complaint -- that was only between
23 Throttle Fest, LLC, and the House of Blues Myrtle
24 Beach. The only allegation as to any of the other
25 entities is that there was some agency capacity, some

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1 unexplained agency capacity between these other
2 defendants and Throttle Fest, LLC. There is one
3 allegation. If none of these individuals hold a
4 license to sell alcohol in South Carolina, they have
5 no ability to be joint tortfeasors, for starters.
6 Because if they don't have any sort of agency
7 relationship with House of Blues to sell alcohol, then
8 I don't have a cause of action against them. There is
9 no social host liability in South Carolina, except for
10 claims involving minors. It has to involve -- I think
11 you would....

12 MR. STEGMAIER: We don't --

13 MR. RAINSFORD: Unless there is a minor involved,
14 it all comes down to whether someone has a license to
15 sell alcohol or whether there was an agent of somebody
16 who has a license to sell alcohol. If the House of
17 Blues has an agency relationship for purposes of
18 selling alcohol, then I don't have joint tortfeasors,
19 and if don't have joint tortfeasors, there cannot be
20 contribution. Contribution is premised on joint
21 tortfeasors. So I don't think that cause of action --
22 when we talk about meritoriousness, I don't think that
23 cause of action should be allowed to stay in there
24 joined with my original complaint.

25 Obviously, the statute of limitations, motion to

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1 dismiss, asserted by the other three remaining
2 codefendants, they asserted the statute of
3 limitations, just as Mr. Bogdan did. That is why they
4 wanted it added on today. You know, I understand
5 scheduling is scheduling, but that is the same
6 argument you'll get in a month on the 5th. In the
7 meantime, if I have to -- the reason I didn't want to
8 wait until the 5th, is I want to try to get a date
9 certain for this case to be tried. But I can't do
10 that until after the motion to sever has been
11 determined one way or the other, because it wouldn't
12 be -- I can't ask the Court to do it if I don't know
13 how the Court will rule.

14 Obviously, if the Court dismisses the three
15 remaining defendants, then a motion to sever does
16 become moot. But at the same time, maybe a month from
17 now the three remaining defendants have scheduling
18 issues and it is kicked down another month or two. So
19 that is why I wanted to proceed today.

20 THE COURT: Okay. I'll deny your motion to
21 sever. If they get kicked out, they get kicked out,
22 that's it. I won't sever the cause of action. And I
23 understand these would have been better heard at the
24 same time, but that is what causes the backlog. Why
25 they delayed in filing their motion to dismiss? I

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1 don't know. But I'm denying your motion to sever. I
2 have a feeling that down the road they will be
3 dismissed, and that will solve the problem, but since
4 it is on the roster for February, we'll let it deal
5 then.

6 MR. RAINSFORD: Is Your Honor on the roster for
7 February 5 for motions?

8 (A pause in the proceedings.)

9 MR. RAINSFORD: Can I add a motion for a date
10 certain on the calendar to huddle everything together?

11 THE COURT: I'm sure -- I don't know if she
12 already published the roster or not.

13 MR. STEGMAIER: I would consent to that.

14 THE COURT: I understand you consent, but when
15 you add motions to the roster, it backs up the hearing
16 of other motions that have priority that was filed
17 before that one. So you are leap-frogging everyone,
18 and that is what throws Helter-Skelter to a motion
19 docket.

20 MR. RAINSFORD: Is this something that Your Honor
21 entertains as part of a chambers conference, date
22 certain?

23 THE COURT: If you are looking for a date-certain
24 trial, file a motion for a status conference and
25 date-certain trial, or just a motion for a

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1 date-certain trial. We don't hear those on motions,
2 I'll just schedule a status conference. I'll get
3 everybody in, and I can tell you whether or not you
4 get a date-certain trial. It is going to be based
5 upon the age of the case.

6 MR. RAINSFORD: Yes, Your Honor.

7 THE COURT: Number of witnesses from out of
8 state, number of attorneys from out of state, number
9 of experts out of state and how many trial dates are
10 available. The biggest problem here is we have so
11 much construction litigation down here, every
12 construction litigation case of a condominium involves
13 about ten attorneys, 20 experts and countless
14 out-of-state people, so they have to get date-certain
15 trials. I mean, it is now where even medical
16 malpractice cases take the backseat to construction
17 cases. It's just a number of things, but if you have
18 one expert from out-of-state, you probably are not
19 getting a date-certain case. If you have multiple
20 attorneys, some who have been added pro hac vice, and
21 multiple experts from out of state, that is generally
22 who gets the date-certain cases. 99 percent of the
23 time, down here in this county, it's going to be
24 condominium faulty construction.

25 But, file your motion. Certainly, if there is

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1 time available, then I don't mind granting the
2 date-certain case. If there is time available to do
3 it, but I have to do a balancing test between how many
4 people want a date-certain trial, and how many dates
5 are available for a date-certain trial.

6 MR. RAINSFORD: Yes, Your Honor. Thank you for
7 that.

8 (Whereupon, the proceedings concluded.)
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1 CERTIFICATE OF REPORTER

2 State of South Carolina)

3 County of Horry)

4
5 I, Natalie Dahl, Official Court Reporter for the
6 State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete Transcript
8 of Record of the evidence introduced in the hearing of
9 the above-captioned case, relative to appeal, in the
10 Court of Common Pleas for Horry County, South
11 Carolina, on the 8th day of January, 2020.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14
15 January 16, 2020
16

17 -----
18 Natalie Dahl, RPR

19 Court Reporter
20
21
22
23
24
25

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1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 Horry County

4 DEPOSITION OF TRAVIS SCOTT WAGONER

5 DOUGLAS KELSEY AND MARK SHIMMINGER,
6 Plaintiffs,

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

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

12 DEPONENT: TRAVIS SCOTT WAGONER

13 DATE: APRIL 23, 2018

14 TIME: 10:58 A.M.

15 LOCATION: TURNER PADGET GRAHAM & LANEY
16 MYRTLE BEACH, SOUTH CAROLINA
17 REPORTED BY: RONDA K. BLANTON, RPR
18 NCRA REGISTERED PROFESSIONAL
 REPORTER

19 CLARK & ASSOCIATES, INC.
20 P.O. BOX 73129
 CHARLESTON, SC 29415
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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

ON BEHALF OF THE DEFENDANT THROTTLEFEST, LLC:

11

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

14 ON BEHALF OF THE DEFENDANT TRAVIS SCOTT WAGONER:
15 TURNER PADGET GRAHAM & LANEY, PA
BY: JULIE OLIVER, ESQ.
16 2411 North Oak Street, Suite 301
Myrtle Beach, SC 29577

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1 I N D E X

2 EXAMINATION

3 BY MR. STEGMAIER 4

BY MR. BOGDAN 63

4 BY MR. RAINSFORD 82

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1 TRAVIS SCOTT WAGONER,
2 having been first duly sworn, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MR. STEGMAIER:

6 Q. Mr. Wagoner, good morning.

7 A. Good morning.

8 Q. We met briefly before we got going. Now
9 for purposes of formality, my name is Christian
10 Stegmaier. I'm with the law firm of Collins &
11 Lacy. We have the privilege of representing
12 House of Blues in South Carolina. So for
13 purposes of today, there are multiple House-of-
14 Blues-related defendants. We represent all of
15 those entities.

16 You, of course, are a codefendant in
17 this case, which is currently pending in Horry
18 County; and we have noticed your deposition.

19 Have you had the opportunity to review
20 your notice of deposition?

21 A. Yes.

22 Q. Okay. Just a couple matters to take
23 care of before we get going in earnest. We had
24 noticed your deposition starting at 11 o'clock.
25 I think we've got about two hours to take your

1 deposition today. I'm serious about that kind of
2 stuff.

3 When people notice depositions and they
4 tend to drag out for five or six hours, my
5 personal opinion is there's no reason to be
6 talking to somebody for five or six hours. I
7 think we'll be able to get things we need to be
8 done in the time that's allotted to us.

9 With that said just for purposes of me
10 knowing, have you ever had your testimony taken
11 by way of a deposition before?

12 A. No.

13 Q. Okay. Have you ever testified in open
14 court before?

15 A. Just -- just at my hearing for the --
16 for the criminal part of it.

17 Q. Okay. So that's the one and only time?

18 A. Yes.

19 Q. Okay. Well -- and the reason why I ask
20 those questions is sometimes people have varying
21 degrees of experience with this particular
22 matter, a deposition; and that's why we're here.

23 Let me outline what you can expect
24 today. By virtue of the fact that
25 Mr. Rainsford's clients have filed in Horry

1 County in the Court of Common Pleas, the parties
2 have a right to engage in what is known as
3 discovery. Discovery takes many forms.

4 There are interrogatories, which are
5 just written questions of the parties. There's
6 requests to produce, which is the production of
7 documents and subpoenas and what we're doing
8 today, which is a deposition.

9 Deposition's not unlike if we were all
10 the way down the road in Conway in the courthouse
11 down there. The two big things that are missing,
12 of course, are a judge and a jury. The lawyers
13 are here, and the court reporter's here; and the
14 reason is I'm going to ask questions of you
15 concerning this case and maybe some other
16 matters.

17 I'm going to do everything I can to make
18 today's questioning as understandable as
19 possible. I've taken similar depositions to this
20 multitude of times. I'd like to think I've got
21 it down to a science; but with that said,
22 ultimately, you're the arbiter of what's
23 understandable to you.

24 So if I ask you a question and, for
25 whatever reason, it doesn't make any sense and

1 you need some better clarification, just say,
2 "Hey, Stegmaier. Make it more clear to me or can
3 you ask the question again or can you rephrase";
4 and I'll do that.

5 What I don't want to have happen is we
6 leave today me thinking I've asked you a question
7 and gotten a certain response and you in your
8 mind thinking I've asked you something completely
9 different and your answer being premised on that
10 understanding. I want us to be on the same page
11 about things.

12 The other thing too is this: I don't
13 know what your opinions are about lawyers.
14 Everybody has a different opinion about lawyers.
15 I'll tell you I'm just interested in knowing what
16 the facts are. We've, obviously, been supplied
17 with a pretty thorough complaint. I assume that
18 you've got some knowledge as to some of the
19 allegations that have been made, and we very much
20 want to know what you have to say as far as that
21 goes.

22 So all I want and all I ask from you is
23 just answers to the question and the truth, and
24 I'm sure you understand the significance and the
25 importance of providing testimony under oath.

1 A. (Nods head.)

2 Q. Is that a yes?

3 A. Yes, sir.

4 Q. And you understand the significance of
5 providing testimony that would be contrary to the
6 truth; correct?

7 A. Yes, sir.

8 Q. And you're doing well here. As far as
9 some of the mechanism and logistics of
10 depositions, there will be time -- time to time
11 I'll ask you a question that will engender a
12 response of either yes or no. If you could make
13 every effort to say either yes or no. If we were
14 out on the street outside, I could understand
15 head shakes and head nods or uh-huhs or hu-huhs.

16 A. Right.

17 Q. The record doesn't necessarily reflect
18 that. I certainly don't want to be litigating an
19 issue down the road where Mr Rainsford says you
20 said one thing. I think you said another. So
21 definitively, with just yes's or no's, if you'll
22 make your responses verbal, that will be
23 fantastic too as well.

24 As well, by virtue of the fact that the
25 court reporter's here, she's creating something

1 known as a transcript; and what becomes very
2 difficult is if we end up talking over one
3 another. And one of the ways that we end up
4 talking over one another is where you can
5 anticipate what I'm asking you, and I can
6 appreciate and understand you hearing something
7 and being ready with a response. That's
8 fantastic.

9 But I would ask that for the purposes of
10 the record and make sure the court reporter
11 doesn't either get mad with either me or you, you
12 just let me get my question out; and you answer
13 it and vice versa. I won't talk over you either.

14 The last thing is this: I've already
15 related to you that I intend to complete this
16 deposition in the time that we've allotted; but
17 with that said, this isn't a force march. If you
18 need to take a break, you can take a break; and
19 we'll certainly accommodate you as far as that
20 goes.

21 The only preclusion or the only
22 parameter of what you can and can't do with
23 regard to taking a break during the course of a
24 deposition is have a material conversation about
25 your testimony with anybody, including your

1 lawyer. So I'm sure that's already been related
2 to you, but I just want to give you that
3 admonition too as well before we get going.

4 Everything I've related to you been
5 understandable?

6 A. Yes, sir.

7 Q. Any questions?

8 A. No.

9 Q. All right. So just basics. Your full
10 legal name is what?

11 A. Travis Scott Wagoner.

12 Q. And you live where?

13 A. In West Jefferson, North Carolina.

14 Q. And how long have you lived there?

15 A. My whole life.

16 Q. All right. So there's never been a
17 point or period in time where you have ever lived
18 in South Carolina?

19 A. No.

20 Q. Do you have any family or relations that
21 live in South Carolina?

22 A. No.

23 Q. All right. So that would, obviously,
24 include Horry County.

25 A. Right.

1 Q. All right. And your occupation is what?

2 A. Heavy equipment operator.

3 Q. And you are how old today?

4 A. I'm 35.

5 Q. And your date of birth is what?

6 A. January 27, 1983.

7 Q. Has there been a point in time, other
8 than, obviously, the subject matter that we're
9 here for relating to the May 17, 2014, incident
10 where you have ever been placed under arrest?

11 A. No.

12 Q. All right. So other than the conviction
13 ultimately that was a product of a plea in this
14 case, you've never been convicted of any other
15 crime other than --

16 A. No.

17 Q. I was going to say other than a traffic
18 offense.

19 A. Right.

20 Q. All right. As I understand it, you were
21 ultimately convicted of DUI in the first offense;
22 correct?

23 A. Yes.

24 Q. When you were initially charged with
25 felony DUI; correct?

1 A. Yes.

2 Q. And, obviously, DUI first offense is a
3 lesser included offense of the felony DUI.
4 That's been explained to you?

5 A. Yes.

6 Q. All right. And you pled guilty;
7 correct?

8 A. Yes.

9 Q. Has there ever been a period of time in
10 any other jurisdiction where you have been
11 charged with a DUI of any sort of degree?

12 A. No.

13 Q. All right. So this was your first and
14 only charge of DUI?

15 A. Yes.

16 Q. Now, I understand here looking at the
17 sentencing sheet related to your plea, again, you
18 pled guilty to DUI first offense less than .1.
19 It says here that the term -- or I guess the
20 punishment that was given to you by the circuit
21 court judge, who I understand to be Judge Hyman,
22 was 30 days in jail and a fine of \$400.

23 Did you, in fact, spend 30 days in jail?

24 A. No.

25 Q. Okay. Tell me, did you spend any time

1 in jail?

2 A. No.

3 Q. Okay. So there was never a point in
4 time where you were ever incarcerated as it
5 relates to pleading guilty to this offense?

6 A. No.

7 Q. All right. Did you pay any fines?

8 A. Yes.

9 Q. All right. Let me ask you this: If --
10 on what is on the sentencing sheet -- and I'll
11 hand you a copy of it, and it's a redacted
12 version that was forwarded to us by the
13 solicitor.

14 If what's on the sentencing sheet of 30
15 days in the county detention center and \$400
16 fine, tell me how you didn't spend any time in
17 the correction center. And I guess maybe to be
18 fair or to give better context to that question
19 is: Did you understand at the time that you pled
20 guilty before Judge Hyman that you were going to
21 spend any time at the county detention center?

22 A. It was -- I remember it being said that
23 that was -- that was being said, but he said that
24 I didn't have to spend that.

25 Q. Okay.

1 A. I remember him being -- that being said
2 in court. I don't know what the -- I don't
3 remember the exact wording.

4 Q. "He" being the circuit judge?

5 A. Yes, sir.

6 Q. Okay. So he sentenced you to 30 days,
7 but he also told you that you didn't have to
8 actually spend --

9 A. Right. I had to just pay the fine
10 and -- the fines that I had to pay.

11 Q. And, again, you'd been charged with
12 felony DUI --

13 A. Yes.

14 Q. -- based on the bodily injury sustained
15 by Mr. Kelsey; correct?

16 A. Yes.

17 Q. And you understand Mr. Kelsey's leg to
18 have been ultimately amputated --

19 A. Yes.

20 Q. -- as a product of this accident?

21 A. Yes.

22 Q. So what happened did fit the bill, fit
23 the parameters of a felony DUI as you understand
24 it; correct?

25 A. Yes.

1 Q. All right. Do you know what the typical
2 minimum sentencing for conviction on felony DUI
3 is?

4 A. Not exactly.

5 Q. Okay. With regard to the criminal
6 matter in this case, who were you represented by?

7 A. Kirk Truslow.

8 Q. Now, as I understand it, just from --
9 from beginning here, of course, Mr. Rainsford is
10 here to represent the interests of the
11 plaintiffs.

12 This is not the first time you've met
13 Mr. Rainsford; correct?

14 A. No, sir.

15 Q. On how many occasions have you met
16 Mr. Rainsford?

17 A. Twice.

18 Q. Okay.

19 A. Or -- or three times.

20 Q. Okay. In relation to today and the date
21 where the accident occurred, May 17, 2014, when
22 were those times that y'all met?

23 A. At Kirk Truslow's office.

24 Q. Okay.

25 A. At my -- or in my town at a restaurant.

1 Q. Okay.

2 A. And at the Horry County courthouse.

3 Q. Okay. So the Horry County courthouse
4 would have been the day you pled guilty?

5 A. Yes, sir.

6 Q. All right. And with regard to
7 Mr. Truslow's office, would that meeting have
8 occurred prior to you pleading guilty?

9 A. Yes.

10 Q. All right. Do you have any sort of idea
11 or estimate of the date that you would have pled
12 guilty? I'm sorry. I know that part.

13 Do you have any sort of estimate about
14 when y'all would have met at Truslow's office?

15 A. That would have been -- I want to guess
16 that that may have been somewhere around -- oh,
17 it was like -- it wasn't Christmas Eve, but it
18 was like a -- maybe somewhere right around
19 Christmas of 2014. Yes.

20 Q. Okay. So that would have been,
21 obviously, after the accident but in the same
22 year the accident occurred.

23 A. Yes, sir.

24 Q. And then subsequent to this meeting, you
25 pled guilty to DUI first offense less than .1?

1 A. Yes.

2 Q. Was there ever a period of time where
3 you met the solicitor prior to your plea?

4 A. The solicitor being?

5 Q. The prosecutor.

6 A. Oh, no.

7 Q. Okay. So the first time you ever met
8 the solicitor was at the plea hearing?

9 A. Yes.

10 Q. All right. With regard to your plea at
11 the Horry County courthouse, was there -- did you
12 participate or were you a participant in any sort
13 of meeting that would have occurred in chambers
14 prior to your plea in open court?

15 A. Can you repeat that?

16 Q. Would there have been -- was there a
17 meeting in chambers prior to your plea in open
18 court?

19 A. Like with?

20 Q. With the solicitor, with the circuit
21 judge.

22 A. Oh, no.

23 Q. Okay. And with regard to the meeting at
24 the restaurant in your hometown, when did that
25 occur, approximately?

1 A. I'm trying to remember. I think that
2 that was before -- it was before -- I think that
3 it was before -- before court date.

4 Q. Okay.

5 A. Yeah. Sorry. I was trying to remember
6 there.

7 Q. All right. So y'all -- when you met
8 with Mr. Rainsford, was it just the two of y'all?

9 A. Yes.

10 Q. Okay. But that would have been prior to
11 you pleading guilty?

12 A. Yes.

13 Q. So that would have been some time in the
14 fall or early winter of 2014?

15 A. That was in -- that was in '15 'cause
16 the court was in --

17 Q. Oh, okay.

18 A. Court was in '15, yeah.

19 Q. Okay.

20 A. Yeah, yeah. So that was --

21 Q. Okay. Well, I appreciate that.

22 So the restaurant meeting would have
23 occurred some time after the meeting at Truslow's
24 office?

25 A. Yeah. That was after the meeting, yeah.

1 Q. Okay. But before you pled guilty.

2 A. Yes.

3 Q. Okay. Now, with regard to the meeting
4 at the restaurant in your hometown before you
5 pled guilty, what was the subject matter of what
6 y'all discussed?

7 A. Just -- he was trying to get a -- just
8 statement and just trying to get a -- the
9 statement and story of what happened.

10 Q. Had you already related the story of
11 what had happened at the meeting with your lawyer
12 at -- some time during Christmas of 2014?

13 A. Yes.

14 Q. Okay. So this would have been the
15 second rendition to Mr. Rainsford of the story,
16 the statement of what happened?

17 A. Yes.

18 Q. All right. Did -- I'm assuming that you
19 had an understanding of what the plea deal looked
20 like prior to you walking into the Horry County
21 courthouse.

22 And let me be more specific. I'm
23 assuming that you knew that you were going to
24 plead guilty to something less than felony DUI.

25 A. Yes.

1 Q. All right. When did you have that
2 understanding?

3 A. Maybe about a week before --

4 Q. Okay.

5 A. -- court.

6 Q. Was the matter of your plea discussed at
7 the meeting with -- at Truslow's office?

8 A. No.

9 Q. Okay. Did you have an understanding
10 before you pled guilty that you weren't going to
11 spend any time in jail?

12 A. No.

13 Q. Okay. So it was going to be up to the
14 circuit judge?

15 A. Yes.

16 Q. But you did know prior to pleading
17 guilty that you were going to pled guilty to DUI
18 first offense?

19 A. Yes.

20 Q. All right. With regard to the first
21 offense plea, it says a .1 or below.

22 What is your understanding about your
23 blood alcohol content at the time it was tested?

24 A. That it was .10, somewhere around .10.

25 Q. Okay. So your understanding is when the

1 blood was tested -- and that would have been
2 while -- the blood was drawn at the corrections
3 center; correct?

4 A. No. It was drawn at the hospital.

5 Q. Okay. That's right. So the blood was
6 drawn at the hospital; and your understanding was
7 at the time of the blood draw that your blood
8 alcohol content would have been approximately .1,
9 something in that range?

10 A. Yes.

11 Q. All right. Okay. So we do have the
12 opportunity -- we do have in our possession the
13 amended summons and complaint that was filed back
14 in July of last year, and I want to talk a little
15 bit with you about the allegations specifically
16 as it pertains to paragraphs 50 through 59. And
17 I'll -- we can look at it together. I certainly
18 will read them to you, but I want to -- I want to
19 know more about it.

20 Obviously, Mr. Rainsford wasn't there at
21 the accident; correct?

22 A. Right.

23 Q. So is it fair to say that what got
24 incorporated in the complaint was information
25 that you had supplied to him?

1 A. Yes.

2 Q. All right. So as I understand it, this
3 is based on paragraph 51. It says on Monday --
4 I'm sorry. Strike that.

5 "On May 16, 2014, at approximately
6 7:30 p.m., Defendant Wagoner arrived at the House
7 of Blues in Myrtle Beach, South Carolina, to see
8 a concert and take part in Throttlefest."

9 That's your recollection?

10 A. Yes.

11 Q. And with regard to arriving at HOB, you
12 came by motorcycle?

13 A. Yes.

14 Q. And at the time you owned what as far as
15 the motorcycle goes?

16 A. 2008 Harley Davidson Street Glide.

17 Q. And what color was that motorcycle?

18 A. It was like a red, a burgandy.

19 Q. Now, as I understand it, this accident
20 occurred when you were driving southbound on
21 Highway 17; is that correct?

22 A. Yes.

23 Q. Where were you staying in Myrtle Beach?

24 A. I believe it was called the Patricia
25 Grand.

1 Q. Okay. Were you down in Myrtle Beach by
2 yourself?

3 A. No.

4 Q. Okay. Who were you with?

5 A. I was with several friends.

6 Q. All right. And those friends were who?

7 A. Hope and Bobby Johnson, Chad Miller and
8 Jennifer Black, Trephon (phonetic) Williams,
9 Terry Miller.

10 Q. Okay. Now, with regard to any of these
11 people that you have just outlined as far as
12 folks you were down here with, were any -- were
13 any of them with you at House of Blues?

14 A. Yes.

15 Q. Okay. Who was with you at House of
16 Blues?

17 A. All of -- all that I stated.

18 Q. All right. So was the motor
19 transportation from where you were staying the
20 House of Blues by motorcycle for everybody?

21 A. Yes.

22 Q. All right. So what was the purpose or
23 reason why y'all were in Myrtle Beach?

24 A. The bike rally.

25 Q. Okay. And if the accident occurred on

1 May 17, 2014, when had y'all gotten to Myrtle
2 Beach in relation to that date, approximately?

3 A. I think it was Wednesday. The best I
4 can recollect, it was Wednesday.

5 Q. All right. Had you during the course of
6 that week been to House of Blues before?

7 A. No.

8 Q. All right. So that -- during the course
9 of that week in 2014, that was your first visit
10 to HOB?

11 A. I'm sorry. I went there to get my
12 ticket earlier that day, I think it was.

13 Q. Okay.

14 A. Yeah. Sorry.

15 Q. So you had ridden up to House of Blues
16 and bought a ticket from the box office?

17 A. Yes.

18 Q. Okay. Was this your first bike rally
19 at -- in Myrtle Beach?

20 A. No.

21 Q. All right. Prior to 2014 how many --
22 how many bike rallies had you been to?

23 A. I want to say five.

24 Q. Had you ever been to the House of Blues
25 on any of those other visits at Myrtle Beach for

1 the bike rally?

2 A. No.

3 Q. All right. Had you ever been to the
4 House of Blues prior to that night?

5 A. No.

6 Q. All right. So this was your first visit
7 to House of Blues Myrtle Beach?

8 A. Yes.

9 Q. Have you ever been to another House of
10 Blues venue?

11 A. No.

12 Q. All right. What was the purpose -- this
13 might be a self-evident question, but what was
14 the purpose or reason why you were at House of
15 Blues that night?

16 A. To go see Jackyl.

17 Q. And so that would have been in the music
18 hall. Did you see Jackyl?

19 A. Yes.

20 Q. All right. It says here on paragraph
21 52, it says "he," being you, "was sober when he
22 arrived."

23 Was that true?

24 A. Yes.

25 Q. All right. So had you had anything to

1 drink prior to getting to the House of Blues?

2 A. One beer earlier that day.

3 Q. Okay. In relation -- all right. So if
4 you would have gotten at House of Blues Myrtle
5 Beach at 7:30 on the 16th of May, when in
6 relation to that time did you have your beer?

7 A. I think it was around 1 o'clock.

8 Q. All right. So some time. Been five
9 hours.

10 A. Yes.

11 Q. And it says here in the second sentence
12 of that paragraph, says, "He purchased a ticket
13 to Throttlefest."

14 But you just told me that you previously
15 bought the ticket to Throttlefest earlier that
16 day; correct?

17 A. Yeah.

18 Q. So what's written here -- all right.
19 Well, strike that.

20 "So he purchased a ticket to
21 Throttlefest and the concert in the House of
22 Blues, which was being put on and promoted by
23 Defendants."

24 So you were there to see Jackyl.

25 A. (Nods head.)

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 all -- now, with regard to Jesse James, you,
2 obviously, saw him during the show; correct?

3 A. Yes.

4 Q. Did you see him at any point in time
5 after the show?

6 A. No.

7 Q. The show, if you got to HOB at 7:30,
8 when did the show start in relation to your
9 arrival time?

10 A. Seems like it may have been an hour,
11 something like that.

12 Q. All right. And how long did the show go
13 on for?

14 A. Couple hours, two hours, something like
15 that. I'm sorry. It may have been three. It
16 was a pretty good duration.

17 Q. Sure. Have you ever seen Jackyl before?

18 A. No.

19 Q. Did you own any of their music prior to
20 being there, seeing them at the venue?

21 A. Like downloads.

22 Q. So you were familiar with the act?

23 A. Yes.

24 Q. All right. So the act was the purpose
25 for you being there?

1 A. Yes.

2 Q. All right. But you understood as well
3 that the Throttlefest entity and the people
4 connected with Throttlefest were going to be at
5 the venue that night?

6 A. Yes.

7 Q. All right. With regard to your party
8 that you were there with in Myrtle Beach, did
9 everybody arrive together to the venue?

10 A. Yes.

11 Q. All right. When you left ultimately --
12 we'll talk about times here in a minute -- but
13 when you left the venue, did y'all ride out
14 together? Did some of y'all ride out together?
15 Did you ride out by yourself?

16 A. No. We left as one.

17 Q. Okay. So the whole crew went out to --
18 went out together and left -- left the venue;
19 correct?

20 A. Yes.

21 Q. All right. Where were y'all headed?

22 A. From the venue?

23 Q. Yeah.

24 A. To the -- to our motels.

25 Q. Okay. So you were going back to your

1 hotel?

2 A. Yes.

3 Q. There wasn't a plan to go anywhere else?

4 A. No.

5 Q. Anything like that.

6 Was there any period of time between
7 when you left the venue and when the accident
8 occurred that you were anywhere else?

9 A. No.

10 Q. All right. So there wasn't any other
11 bar or other place that y'all had stopped at
12 prior to the accident?

13 A. No.

14 Q. So as I understand it -- and we'll jump
15 around a little bit with the complaint. Says
16 here at paragraph 57, it says, "Defendants did
17 not prevent Defendant Wagoner from leaving the
18 House of Blues around midnight and driving out of
19 its parking lot at approximately 12:15 at -- on
20 May 17, 2014."

21 So is it your recollection or
22 understanding that you had left the venue at or
23 around midnight?

24 A. Yes.

25 Q. All right. And then jumping down to

1 paragraph 59, it says, "At approximately 12:40 on
2 May 17, 2014, after leaving House of Blues,
3 Defendant Wagoner was traveling southbound on
4 North Kings Highway in Myrtle Beach, South
5 Carolina, and Plaintiffs were traveling
6 northbound on North Kings Highway in Myrtle
7 Beach, South Carolina, when Defendant Wagoner's
8 motorcycle illegally crossed the centerline, came
9 into the Plaintiffs' lane of travel, struck both
10 Plaintiffs causing injuries to both Plaintiffs."

11 So the first question I've got for you
12 is you've about a 25 -- at least a 25-minute time
13 period between when this -- this complaint says
14 you left the venue and when the accident
15 occurred. So during the course of that 25
16 minutes, what were y'all doing?

17 A. I think there was something off or
18 around the times there because we just -- we left
19 straight from the venue and rode. We rode slow.

20 Q. Yeah.

21 A. But it was just 9 miles.

22 Q. So you've answered my question. So the
23 point -- I guess the distance from where the
24 accident occurred from the venue was 9 miles;
25 correct?

1 A. Yes.

2 Q. All right. But, again, you're saying
3 there might be something off about the times.
4 But for the sake of this question, let's just
5 assume that it's not.

6 Again, it's your testimony that y'all
7 hadn't been anywhere else or done anything in the
8 interim between leaving the venue and getting to
9 the accident?

10 A. Correct.

11 Q. All right. Now, with regard to these
12 times, especially as it relates to paragraph 57
13 where it says you left the House of Blues at
14 midnight and was driving out of the venue at
15 approximately 12:15, Mr. Rainsford, obviously,
16 wasn't there; correct?

17 A. Correct.

18 Q. And you've already related to me what he
19 knows as far as this particular set of
20 circumstances would have been what you told him.

21 A. Yes.

22 Q. All right. So as we sit here now -- and
23 it's important -- is there any sort of change in
24 your mind about when you might have left the
25 venue?

1 A. No. I may be just a little off, I mean,
2 just in the little bit of time there. I mean,
3 and also just it -- going 9 miles in Myrtle Beach
4 too, I mean, it may take -- it may have taken
5 that long. I mean, there was just a little bit
6 of time -- I mean, just with the times there; but
7 we didn't -- we just didn't stop anywhere else.
8 I mean, there was just a little bit of time --
9 time there but --

10 Q. Now, with regard to the folks that you
11 hit - that you were with, that y'all had ridden
12 out together with, the Williams, Johnsons, Black,
13 Miller, did any of these individuals witness the
14 accident?

15 A. Yes.

16 Q. Okay. Who witnessed the accident?

17 A. All of them.

18 Q. All right. And as I understand it,
19 looking at the accident report, the allegation by
20 the responding law enforcement officer was that
21 you were driving southbound on Highway 17; and
22 you crossed the centerline into the lane of
23 travel that was being used by the plaintiffs in
24 this case.

25 And I'll show that to you and ask you

1 this question: Is that -- is this the first time
2 you've seen the accident report, or have you seen
3 it before?

4 A. I've seen it.

5 Q. Okay. So as far as the diagram by the
6 law enforcement officer about you crossing the
7 center lane of travel into oncoming traffic, is
8 that correct?

9 A. Not completely.

10 Q. Okay. Well, tell me about that.

11 A. Because -- well, my bike did.

12 Q. Okay.

13 A. But I was not on it.

14 Q. Okay. Tell me about that.

15 A. Okay. It was pretty bizarre -- pretty
16 bizarre accident. I was going southbound towards
17 the -- towards, you know, Myrtle Beach.

18 Q. Right.

19 A. As we were riding, we were coming
20 through the -- the red light at 35th; and as we
21 come through, I struck a pothole in the -- in the
22 road and caused my bike to kind of do like a
23 shimmy. And my bike started wobbling, and I
24 couldn't -- I was trying to save it, and I
25 couldn't save it; and the bike come down on top

1 of me and -- and I was -- was grinding me into
2 the road.

3 And, finally, I -- I let go, and I went
4 rolling. They said I was like a log, and then I
5 kind of balled up and I -- I rolled over to the
6 curb and hit the curb, and I come -- they said I
7 come to my feet -- rather landed on my feet
8 somehow.

9 And then I fell over and -- and whenever
10 I kind of come back up real quick, they said that
11 I said, "Where's my bike?" And as I looked down
12 the road, I saw taillights; and from what we was
13 able to -- what we measured and all, what we were
14 able to measure ourselves and all, my bike went
15 740 feet. It -- where the throttle had locked,
16 it went down the road like with the curb and then
17 it -- it went -- as this diagram shows, turned
18 and went across and struck Mr. Kelsey.

19 Q. Yeah. So this was in -- could it be
20 argued or could it be asserted that this was just
21 a freak accident?

22 A. Yes. It was a freak accident.
23 That's --

24 Q. All right. When you left House of
25 Blues, did you think you were intoxicated?

1 A. No.

2 Q. All right. So did you knowingly and
3 intentionally get on your motorcycle to drive
4 home knowing that you were intoxicated?

5 A. No.

6 Q. All right. You had -- and you had
7 related to me, too, that your understanding is
8 that when your blood was drawn, that the -- the
9 blood alcohol content was approximately .1 or
10 something in that neighborhood.

11 I'm assuming you wouldn't hold yourself
12 out as an expert in toxicology, would you?

13 A. Oh, no.

14 Q. Okay. But you had related to me that
15 you had been served at least four can beers that
16 were 22 ounces; correct?

17 A. Yes.

18 Q. And you told me about one liquor drink.
19 What liquor drink was that?

20 A. Like a Royal Flush.

21 Q. All right. And that's something that
22 you bought or was bought for you?

23 A. I bought it, I believe.

24 Q. Okay. And then two or three liquor
25 shots, two of which were served to you by Fajita

1 Mike.

2 So as I understand your testimony, you
3 had eight -- you had eight different drinks
4 served or purchased by you during the course of
5 your visit at the House of Blues.

6 A. Yes.

7 Q. And, again, those four beers were 22
8 ounces?

9 A. Yes.

10 Q. Did you finish those beers?

11 A. Probably got down close. They were --
12 they get hot pretty quick so --

13 Q. Yeah. So if we multiply four by 80 --
14 I'm sorry. If we multiply 4 by 22, that's 88
15 ounces of beer.

16 So your testimony is, more or less, you
17 drank 88 ounces of beer while you were at the
18 House of Blues?

19 A. Yes.

20 Q. And that one liquor drink and then the
21 two other -- the three other liquor shots, two of
22 which were served you by Fajita Mike. And you
23 tell me that your blood alcohol was at or about
24 .1; and you tell me that when you left House of
25 Blues, you didn't believe or think you were

1 intoxicated.

2 A. No, sir.

3 Q. You've also told me in the course of the
4 examination today that the accident was
5 precipitated or caused by you hitting a pothole?

6 A. Yes, sir.

7 Q. Was there ever a point in time after the
8 accident where you went back to the accident
9 scene and saw the pothole?

10 A. Yes.

11 Q. All right. Did you take any photographs
12 of that?

13 A. Yes.

14 Q. All right. Have you provided those
15 photographs to your lawyer?

16 A. I did to Kirk --

17 Q. Okay.

18 A. -- Truslow, and I don't know if
19 they're --

20 Q. So my direction to you would be
21 homework. Make sure your lawyers at Turner
22 Padgett have those photographs.

23 A. Yes, sir.

24 Q. All right. Did anybody else go out
25 there with you when you visited the pothole?

1 A. Yes, sir.

2 Q. All right. Who was that?

3 A. Everybody but Chad and -- Chad Miller
4 and Jennifer Black.

5 Q. Yeah.

6 A. They -- they actually had their feet in
7 the hole that showed them being almost flush
8 after they stacked their feet in the holes of how
9 deep it was.

10 Q. And so I don't know if we can look at
11 the picture while we're talking about it; but if
12 we had estimated inches, what would that look
13 like?

14 A. That would be almost five.

15 Q. Okay. And if we talk about a distance
16 from one edge to the other, is that radius?

17 A. Length.

18 Q. Yeah. What would the length of that or
19 the size or the width of the --

20 A. The width would be -- width would be
21 probably like 4 to 5 inches, and length would be
22 like 8 or 9 inches.

23 Q. Okay.

24 A. It was like a gouge, you could say.

25 Q. All right. And without getting into any

1 sort of communications with your lawyers, either
2 your criminal lawyers or your civil lawyers,
3 you've related that story to your lawyers before?

4 A. Yes.

5 Q. All right. Was there ever a period of
6 time that you related that story to responding
7 law enforcement officers?

8 A. Yes.

9 Q. All right. So if I had asked you --
10 let's put aside the fact that there's this big
11 lawsuit going on at this point in time; but if I
12 were just to hear about this accident and I get
13 up with you and I say, "Mr. Wagoner, tell me, how
14 did this accident happen? How did this accident
15 happen?" What -- in your words, how did this
16 accident happen?

17 A. I -- I had been at the House of Blues.

18 Q. Uh-huh.

19 A. And we'd been at the concert.

20 Q. Yeah.

21 A. And we had left from there, and then I
22 went down the road; and we had went through the
23 red light, and I hit the -- I hit the pothole.

24 Q. Okay.

25 A. And then -- and then I -- after hitting

1 the pothole, lost my bike; and then after I come
2 off my bike, my bike went down the road by itself
3 and then went over.

4 Q. Is it fair to say that the actual reason
5 or the most proximate cause for the accident was
6 the fact that you hit that pothole?

7 A. I want to say yes. But at the same
8 time, I wonder if maybe the alcohol had -- where
9 I had the shots prior -- or right after the
10 concert had taken a hold right at the -- right
11 before I had wrecked.

12 Q. So not to be argumentative with you, but
13 we've already agreed that you're not a
14 toxicologist.

15 A. Right.

16 Q. And you were able to plead guilty to a
17 first offense DUI, and you spent no time in jail
18 notwithstanding the fact that the man that got
19 hit by your bike lost his leg.

20 A. Right, correct.

21 Q. So revisiting paragraph 53 -- and I'll
22 repeat it again. It says here, "Once inside,
23 Defendant Wagoner was served beer and liquor by
24 or on behalf of Defendants up to and well after
25 the point that he became visibly intoxicated."

1 And I guess my question is: Says who?

2 A. That -- that was --

3 Q. Who's the arbiter of "visibly
4 intoxicated"? I understand what's read here.

5 A. Right.

6 Q. I understand what's written here on
7 paragraph 53, but who's going to testify that you
8 were visibly intoxicated?

9 A. I don't know how that was -- I don't
10 know how that was written, you know.

11 Q. Okay. So, again, my question is who's
12 going to testify that you were visibly
13 intoxicated at House of Blues?

14 A. That I'm not sure of.

15 Q. Okay. So paragraph 54 is, "At
16 approximately 11:15 to 11:30 p.m., Defendant
17 Wagoner was approached by Fajita Mike and was
18 given approximately 2 shots of Sloon Shine liquor
19 which Fajita Mike was serving in plastic cups."

20 Did I read that correctly?

21 A. Yes.

22 Q. Now, with regard to those time frames,
23 of course, Mr. Rainsford wasn't there; correct?

24 A. Correct.

25 Q. So that information that's found on the

1 pleading would have to be given to him somehow.
2 I'm presuming it was you.

3 A. Yes.

4 Q. All right. How do you know it was 11:15
5 to 11:30?

6 A. That was -- that was just an
7 approximate -- approximate guess, sir.

8 Q. Were these the last drinks that you had
9 at the House of Blues?

10 A. Yes.

11 Q. So this is after what you say is four
12 can beers that were 22 ounces a piece and one
13 liquor drink. So you had at least five drinks at
14 that point in time before you had those two or
15 three liquor shots that were served to you by
16 Fajita Mike.

17 Fajita Mike didn't make you drink those
18 drinks, did he?

19 A. No, he didn't make us.

20 Q. He didn't force you to drink them?

21 A. No.

22 Q. So you drank them on your own volition?

23 A. Yes.

24 Q. You drank them voluntarily?

25 A. Yes.

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

1 ultimately results in this collision with the
2 plaintiffs, what happens next?

3 A. Well, I -- I heard the crash. I didn't
4 see -- I didn't see it because it was on down the
5 road. It was -- it was almost three blocks. So
6 I -- I take off across the lanes of traffic
7 and -- and go over and -- and I see Mr. Kelsey on
8 the ground and -- well, I see my bike into his
9 bike.

10 Q. Yeah.

11 A. And -- and I see Mr. Kelsey laying on
12 the ground and people around him and -- and see
13 that he's hurt very bad.

14 Q. So as far as you getting down to the
15 accident, you're either walking or running down
16 there?

17 A. Yeah.

18 Q. All right. Where's your crew?

19 A. They're scattered out. I didn't know
20 exactly where. Chad Miller and Jennifer Black
21 was with Mr. Kelsey down on the ground with him.
22 Jennifer was helping hold his leg in place and --
23 and Chad was right there talking to him and with
24 him.

25 Q. So what happens next?

1 A. What happens next is I'm -- I go and try
2 and talk to my crew. I'm like, "What happened?"
3 You know, "What happened?" And -- and talking to
4 them. And then the officer comes rushing in
5 and -- and they go straight to Mr. Kelsey to see
6 what's going on; and the officer says, "Where's
7 the other person -- where's the other people
8 involved?" I said, "Hey, sir, that's me."

9 And he comes and talks to me and asks me
10 what happened. And I was like, I -- I don't
11 know, you know, 'cause at the time I was trying
12 to, you know, put together what had happened.
13 And -- and he said, "Well, what's going on?" And
14 I said, "Well, I wrecked up here," you know.
15 Pointed up the road.

16 You know, that I wrecked up the road
17 with my bike and -- and he said, "Well, your
18 bike's right here," you know. "You were on your
19 bike." I said, "No, I was not on my bike, you
20 know. I wrecked up the road." And I -- they had
21 a hard time believing that because it's such a
22 bizarre -- a bizarre incident.

23 Q. Yeah. I want to ask what happens next,
24 but couple interim questions.

25 How fast were you going? Can you

1 estimate at the time the -- at the time the --

2 A. It was --

3 Q. Hold on for a second. Go back to
4 talking over each other; but I didn't give you a
5 good cue. I still had more to ask.

6 How fast were you going at the time your
7 bike collided with or engaged the pothole, if you
8 can estimate?

9 A. Around 35.

10 Q. Okay. So you don't believe that you
11 were in any sort of excessive speed or anything
12 along those lines?

13 A. No, sir.

14 Q. All right. And I think that you had
15 related to me when you initially detailed the
16 accident that the throttle had gotten stuck or
17 locked?

18 A. Yes.

19 Q. Is -- there's -- how -- all right. Have
20 you done anything to verify that?

21 A. I don't know what the full report was
22 from the forensics person that -- from the -- the
23 South Carolina -- I'm not sure -- with the
24 highway patrol.

25 Q. Yeah.

1 A. I'm not sure what y'all call it down
2 here, but with the highway patrol down here; but
3 they had somebody that looked over the bike. I'm
4 not sure what the full report was on that.

5 Q. Sure. Have you received the MAIT team
6 report?

7 A. No.

8 Q. Where is the bike now?

9 A. It went to a salvage yard from the
10 insurance and somebody bought -- purchased it,
11 yeah.

12 Q. All right. So was the -- was the bike
13 ever separately inspected by anybody that you
14 would have hired or your criminal defense lawyer
15 hired or anybody else you would have hired?

16 A. Not that I'm aware. I -- I'm not sure
17 if Kirk did. I don't think that Kirk did.

18 Q. So when was the bike fully disposed of?
19 Like when did it leave your possession or your
20 ownership?

21 A. It left -- well, I didn't see it again
22 after the wreck.

23 Q. Okay. All right. And I didn't ask that
24 question right.

25 There was a point in time, like I said,

1 where insurance took over; and the bike
2 ultimately gets sold to somebody else. When did
3 that happen in relation to May 2014?

4 A. Well, two months, I think. Something
5 like that. They done a -- they bought it.

6 Q. Do you remember anything about the
7 salvage yard, what salvage yard it was kept at?

8 A. Raleigh. Maybe somewhere in Raleigh.

9 Q. Oh, it was up in North Carolina?

10 A. Yes, sir. It was in North Carolina.

11 Q. One question I didn't ask you about your
12 visit to House of Blues. How did you pay for
13 your drinks?

14 A. I bought -- there was one purchase that
15 I had that was on the card, and then the others
16 was with cash.

17 Q. Okay. What did you pay for with the
18 card?

19 A. I bought a beer, and there was a girl
20 that come down; and her and her friend, a guy
21 friend, come down from -- from Ashe -- I'm saying
22 Ashe County, and they come down to hang out; and
23 I bought them a drink. And I bought them -- I
24 bought them a drink and myself a beer, and it was
25 a \$25 charge.

1 Q. When was that in relation to the evening
2 when you'd gotten to the venue?

3 A. They come after we did. That was -- I
4 want to think that was 9 o'clock or something.

5 Q. Okay.

6 A. Muriel Stevens, yes.

7 Q. That was a lady?

8 A. Yeah.

9 Q. With regard to the card that you would
10 have used, is it a card that you still have in
11 your possession?

12 A. Yes.

13 Q. Okay. And so the --

14 A. The number may have changed. I'm sorry.

15 Q. Okay.

16 A. Yeah. The number may have changed.

17 Q. We'll work after this. I'm not going to
18 ask your account number on the record. So with
19 regard to the issue or -- of that credit card,
20 who issued it?

21 A. It's -- it's a debit card from a bank.

22 Q. Okay. The bank is what?

23 A. Life Store.

24 Q. Okay. Is that a bank in North Carolina?

25 A. Yes.

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 A. Yes.

2 Q. All right. Were they bought inside the
3 music hall, or were they bought somewhere else?

4 A. Inside the music hall.

5 Q. All right. I'm really going to test
6 your memory here, but I need to know because it's
7 important.

8 As I understand it, from looking at the
9 complaint, with regard to the Fajita Mike shots,
10 that occurs some time in the neighborhood of
11 11:15 to 11:30; correct?

12 A. Yes.

13 Q. All right. And you've told me that
14 those were the last alcoholic beverages you had
15 while at House of Blues Myrtle Beach.

16 A. Yes.

17 Q. And as I understand it, you first got to
18 House of Blues at 7:30 that night?

19 A. Yes.

20 Q. So that time frame of consuming
21 beverages would have happened, roughly, about a
22 four-hour period --

23 A. Correct.

24 Q. -- as I understand it?

25 Do you have a recollection about the

1 sequence of drinks that you would have had? Were
2 they four beers plus that liquor drink, or would
3 it have been the liquor drink interspersed with
4 the beers? Let's start with that.

5 A. I'm really not sure on the sequence.

6 Q. Okay.

7 A. I really can't remember.

8 Q. So I'm interested to know this too as
9 well 'cause we've talked about the four beers
10 that totaled 88 ounces of beer plus the liquor
11 drink that I think you said was a Royal Flush,
12 and then we know about the two drinks -- two
13 shots with Fajita Mike.

14 There was a mention at the top half of
15 your -- or the top part of your testimony about
16 the possibility of a third shot. Was there two
17 shots or three shots?

18 A. That's what I've been kind of thinking
19 about. Like I've just been -- just been thinking
20 a whole lot about it and --

21 Q. So let me help you before you answer the
22 question, and I'll just give you a little story.

23 I've got a client that says, "Don't tell
24 me anything unless you're 90 percent sure that it
25 happened." And I think that's a pretty good rule

1 of thumb because a lot of times when you're not
2 sure, you end of chasing guesses or speculation.

3 So with the idea that I want you to be
4 90 percent sure at least before you tell me this,
5 did you have a third shot; or was it limited to
6 two?

7 A. Two.

8 Q. All right. So you can't be at least 90
9 percent sure that you had a third shot?

10 A. No.

11 Q. All right. But to be fair to you, we'll
12 take the 90 percent thing off. What -- what
13 gives you any sort of belief or feeling or
14 thinking that there might have been a third shot?

15 A. Just -- just thinking -- just trying
16 to -- just trying to think that -- rethinking
17 everything. That's been four years and -- and
18 just thinking it over and just, you know, just
19 trying to rethink everything, you know, just
20 trying to be honest and just trying to rethink
21 everything, you know.

22 Q. So was there ever a point in time where
23 you created maybe a diary or a journal or a
24 written statement, whether it was for your lawyer
25 or anybody else, kind of outlining that evening?

1 Because, like you said, that was four years ago;
2 but if you did something contemporaneous with the
3 accident or the criminal prosecution, I'd like to
4 know if something like that exists.

5 A. No.

6 Q. Okay. Are you married?

7 A. No, sir.

8 Q. Okay. At the time of the accident, were
9 you married?

10 A. No, sir.

11 Q. At the time of the accident, did you
12 have a girlfriend?

13 A. Yes.

14 Q. Okay. Is she still your girlfriend?

15 A. No.

16 Q. Okay. I don't know if that's a good
17 thing or bad thing.

18 A. It's a good thing.

19 Q. Let me ask this:

20 MR. RAINSFORD: He doesn't have to
21 answer that part on the record.

22 A. Sorry. I just threw that in there.

23 Q. Your girlfriend was who then?

24 A. Hope Guy.

25 Q. Was Hope on this trip?

1 A. No.

2 Q. All right. At the time that the
3 accident occurred and Hope Guy was your
4 girlfriend, were y'all living together?

5 A. No.

6 Q. All right. Was she living in the same
7 town?

8 A. Yes.

9 Q. Did you -- not to pry too much, but was
10 the relationship close?

11 A. Yes.

12 Q. All right. Well, would you have told
13 her or talked with her about this matter?

14 A. Yes.

15 Q. All right. You've already detailed for
16 us the people that were on the trip with you, and
17 we already know about your lawyers.

18 Is there anybody else in the equation,
19 like your parents, like your siblings, who you
20 might have told in -- about this accident and
21 provided detail about what you remember
22 happening?

23 A. The most -- the most would have been
24 just maybe Hope -- Hope and Bobby Johnson.

25 Q. And Bobby was on the trip?

1 A. Yeah. I keep -- I keep everything
2 private. I'm just a private person.

3 Q. Are your parents still alive?

4 A. Yes.

5 Q. Are they -- they live in the same town
6 with you?

7 A. Yes.

8 Q. Do you have any siblings?

9 A. Yes.

10 Q. Do they live in the same town?

11 A. Yes.

12 Q. Your siblings are who?

13 A. Mason Wagoner and Amanda Callaway.

14 Q. And is "Callaway" her married name?

15 A. Yes.

16 Q. And your parents are who?

17 A. Ella DePriest and I have a stepfather.
18 Al DePriest, Horton Wagoner, and Sandra Wagoner.

19 Q. Yes, sir. Do you belong to a
20 congregation?

21 A. Yes.

22 Q. What congregation?

23 A. Ball Mountain Baptist Church.

24 Q. And are you a regular congregator?

25 A. Yes.

1 Q. All right. Now, with regard to your
2 job, who do you work for?

3 A. Hearthstone Construction.

4 Q. And did you work --

5 A. And Wagoner Excavating.

6 Q. Is Wagoner Excavating your business?

7 A. No. It's my dad's, yeah.

8 Q. And with regard to those two entities,
9 were you working for them back in 2014?

10 A. Yes.

11 Q. Does anybody in either one of those work
12 places know about your trouble in Myrtle Beach,
13 your arrest, and the prosecution?

14 A. Oh, yes, yes.

15 Q. All right. Now, at the top of the
16 deposition, we talked a little bit about your
17 meetings with your lawyer and the plea and then
18 your meeting with Mr. Rainsford at that
19 restaurant up in your hometown.

20 With regard to the meeting that happened
21 at Mr. Truslow's office at Christmastime 2014,
22 was there ever a period of time or was there a
23 circumstance or an event prior to that where you
24 would have had any communication with
25 Mr. Rainsford?

1 A. Repeat. I'm sorry.

2 Q. Would you have had any communication
3 with Mr. Rainsford prior to Christmastime 2014
4 when you met with him --

5 A. No, sir.

6 Q. All right. Have you ever transmitted
7 any sort of emails or any other communication
8 with Mr. Rainsford or his firm?

9 A. Not that I recall.

10 Q. Okay. What would keep you from
11 remembering that?

12 A. Well, I just -- no. No then.

13 Q. Okay. Do you maintain an email?

14 A. Yes.

15 Q. And your email is what?

16 A. T-W-A-G -- TWAG_23@Yahoo.

17 Q. Okay.

18 A. I'm used to spelling it out. I'm sorry.

19 Q. If it's a Yahoo.com, you've had it for a
20 while; right?

21 A. Yes.

22 Q. And with regard -- do you have a cell
23 phone?

24 A. Yes.

25 Q. And your cell phone carrier is who?

1 A. Carolina West.

2 Q. And your cell phone number is what?

3 A. 336-977-0233.

4 Q. I might have a follow-up question or
5 two, but let me ask you this:

6 Have the questions I posed to you today,
7 have you understood what I've asked of you?

8 A. Yes.

9 MR. STEGMAIER: All right. I'm going to
10 turn it over to counsel for the codefendant. He
11 may have a question or two more for you.

12 THE WITNESS: Okay.

13 MR. RAINSFORD: Before we start, can I
14 just step out for two minutes and be right back?

15 MR. BOGDAN: Want to take a quick break?

16 MR. RAINSFORD: Sure.

17 (Recess taken 11:59 a.m. to 12:10 p.m.)

18 EXAMINATION

19 BY MR. BOGDAN:

20 Q. All right. Mr. Wagoner, my name's Jeff
21 Bogdan. We met before your deposition. I
22 represent one of the defendants, Throttlefest,
23 LLC, in this case; and I've got some follow-up
24 questions. I hope not to replot some of the
25 grounds, but it just might be inevitable. I

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 A. Yes.

2 Q. And you said you walked up to them?

3 A. Yeah. We were -- yeah, yeah.

4 Q. Okay. And who did you speak to? Fajita
5 Mike or to the lady?

6 A. Fajita Mike.

7 Q. And tell me about the conversation.

8 A. Well, whenever he walked up, our crowd
9 kind of moved over towards him; and we took
10 pictures -- or some -- some of the people in our
11 group took pictures with him. I had taken a
12 picture with Hope, a girl that was with us, with
13 him and -- and some of our group was talking to
14 him and things like that and then -- and then he
15 offered some liquor.

16 Q. Okay. So he offered it to you. You
17 didn't ask him for it?

18 A. Huh-uh.

19 Q. Is that a no?

20 A. Yes. No. Sorry.

21 Q. All right.

22 A. That is a no, yeah.

23 Q. All right.

24 A. My apologies.

25 Q. That's all right. It happens all the

1 time. I'm not trying to be a smart guy or
2 anything.

3 A. Yeah. That's okay.

4 Q. All right. So when he offered you the
5 liquor, how -- how was it poured and given to
6 you?

7 A. He took the jar and -- and poured it
8 into the cup and -- and said, "Here."

9 Q. Okay. So did -- so he didn't have the
10 cup in his hand previously. Did he take --

11 A. He grabbed it off the stack.

12 Q. Okay. He grabbed the cup off the stack
13 that the girl was carrying?

14 A. Yes.

15 Q. Okay. And then he poured the liquor
16 straight from the bottle into that cup?

17 A. Yes.

18 Q. In one shot?

19 A. Yeah.

20 Q. Okay.

21 A. One shot at a time.

22 Q. Okay. And then he handed the cup to
23 you?

24 A. Yes.

25 Q. All right.

1 A. And Bobby that was with me.

2 Q. Okay. All right. And this happened
3 twice?

4 A. Yeah.

5 Q. Was this twice --

6 A. Back to back.

7 Q. -- in a row?

8 A. Yeah.

9 Q. Back to back. All right. And there was
10 no payment for these?

11 A. Huh-uh.

12 MR. STEGMAIER: No?

13 A. No.

14 Q. So you were familiar with Fajita Mike
15 from the television show?

16 A. Yes.

17 Q. All right. What were -- what did you
18 know of him?

19 A. I just knew that he was kind of a --
20 kind of a goofy clown-ish, you know, type guy on
21 the show and he -- he's kind of a party-type guy
22 on the show and -- that's all that I kind of knew
23 of him.

24 Q. Okay.

25 A. I didn't watch it all the time.

1 Q. All right.

2 A. So that's kind of -- that's kind of what
3 I knew of him, you know.

4 Q. Did you have any understanding of
5 whether he was employed by anybody?

6 A. Yeah. That he was employed by Mike. I
7 think the -- the owner's name is Mike Ballard,
8 that he was employed at the Full Throttle Saloon.

9 Q. The one in South Dakota.

10 A. Yes.

11 Q. There's no Full Throttle Saloon in
12 Myrtle Beach?

13 A. No, no, no.

14 Q. And you weren't at the Full Throttle
15 Saloon that night?

16 A. No.

17 Q. And do you know what he was doing at
18 House of Blues?

19 A. Like part of the tour. Like they were
20 on -- they were, like, on a tour thing, like,
21 with Jackyl. Something to do with Full Throttle.
22 I don't really know the whole scheme of things
23 but --

24 Q. All right. Who do you mean by "they"?

25 A. "They" being Full Throttle, like some of

1 the characters from the show as in, like, the
2 little leprechauns and -- and Jesse James Dupree
3 and Mike Ballard.

4 Q. Okay. Do you know if anybody was paying
5 Fajita Mike to be there that night?

6 A. I have no -- I don't -- I don't know
7 that.

8 Q. All right. Did it appear that Fajita
9 Mike was working that night or just a patron?

10 A. I have -- I don't know.

11 Q. Okay. And I'm going to assume you don't
12 know this, but did it appear that he was working
13 for any particular person or entity?

14 A. I don't know.

15 Q. So you don't know who, if anybody, had
16 control over Fajita Mike's actions that night
17 besides himself?

18 A. I don't know that.

19 Q. All right. Were there -- were there
20 other girls that the -- the term "shot girls" has
21 been used. I don't know if that was in the
22 complaint or if that's --

23 A. Yes.

24 Q. -- somewhere else. Do you know what
25 that term is? "Shot girls"?

1 A. Yes.

2 Q. What is that?

3 A. There was a lot of girls going around
4 that had -- that was selling moonshine that was
5 carrying a jar and cups and going around selling
6 moonshine.

7 Q. Okay. And were they dressed like the
8 girl who was with Fajita Mike?

9 A. Yes. And they did have aprons on and
10 was selling it.

11 Q. Okay. Did this girl have an apron on?

12 A. Yes.

13 Q. Did she appear that she was selling the
14 moonshine?

15 A. Not at that time.

16 Q. Okay. And what -- what makes you say
17 that besides the fact that you didn't have to pay
18 for it?

19 A. Because he -- he kind of took control.

20 Q. Okay.

21 A. A that time he took control and just
22 poured it and went on over -- over her. She
23 didn't have any control at that time.

24 Q. All right. Do you know who she was
25 working for?

1 A. I don't know.

2 Q. Okay. And you don't know who had
3 control over her?

4 A. No.

5 Q. All right. Now, if after you got these
6 shots, she would have said, "That'll be 5 bucks,"
7 would you have paid it?

8 A. Do what now?

9 Q. If after you got these shots, she would
10 have said, "All right. That's 5 bucks," would
11 you have paid the \$5?

12 A. Oh, yeah. I would have, if that would
13 have been the case, yes.

14 Q. But that didn't happen?

15 A. No.

16 Q. All right. You know who Jesse James
17 Dupree is; right?

18 A. Yes.

19 Q. He's the singer of Jackyl?

20 A. Yeah. Lead singer of Jackyl.

21 Q. All right. And did you see him that
22 night besides being on stage?

23 A. No.

24 Q. Did you get the impression that he had
25 any control over what Fajita Mike was doing that

1 night?

2 A. No.

3 MR. STEGMAIER: Object to the form.

4 Q. Did you get the impression that he had
5 any control over what the shot girls were doing
6 that night?

7 MR. STEGMAIER: Same objection.

8 A. No.

9 Q. Do you -- did you get the impression
10 that he had control over anybody who was selling
11 alcohol at the House of Blues that night?

12 MR. STEGMAIER: Same objection.

13 A. Repeat.

14 Q. Sure.

15 Did you get the impression that Jesse
16 James had control over anybody who was selling or
17 giving away alcohol at the House of Blues that
18 night?

19 A. No.

20 Q. Okay. All right. Michael Ballard, you
21 said that -- I think you said you saw him there?

22 A. Yeah.

23 Q. All right. How did you see him?

24 A. He was up on the stage.

25 Q. Okay. With Jackyl?

1 A. Yeah.

2 Q. All right.

3 A. I think he made a brief appearance.

4 Q. Okay.

5 A. That I recall. It was just a brief
6 appearance.

7 Q. All right. So they called him up --
8 he's not in the band, is he?

9 A. No, no, no.

10 Q. They just called him out on the stage?

11 A. Yeah.

12 Q. Did you see him besides him being on the
13 stage?

14 A. No.

15 Q. Okay. Did you get the impression that
16 Michael Ballard had any control over what Fajita
17 Mike was doing that night?

18 A. No.

19 MR. STEGMAIER: Objection to the form.

20 Q. Did you get the impression that Michael
21 Ballard had any control over what the shot girls
22 were doing that night?

23 MR. STEGMAIER: Object to the form.

24 A. No.

25 Q. Okay. Did you get the impression that

1 Michael Ballard had any control over anybody who
2 was selling or giving away alcohol that night?

3 MR. STEGMAIER: Object to the form.

4 A. No.

5 Q. Okay. When you got there, did you spend
6 any time in the -- do you know what the deck area
7 is of the House of Blues? Are you familiar with
8 that spot?

9 A. No.

10 Q. Okay. How about anything in the parking
11 lot? Were there activities going on out there?

12 A. No. Oh, wait. The only activities was
13 at the Barefoot Landing.

14 Q. Okay.

15 A. It wasn't really in the parking lot of
16 the House of Blues. It was more in the Barefoot
17 Landing.

18 Q. Is that a separate property?

19 A. Yeah.

20 Q. Okay. So you didn't -- when you arrived
21 at the House of Blues that night, you parked the
22 motorcycle; and did you then go straight into
23 the --

24 A. Yes.

25 Q. All right. And you went to the House of

1 Blues that night for the Jackyl concert?

2 A. Yes.

3 Q. All right. If there was no --
4 regardless of Throttlefest and Fajita Mike and
5 the leprechauns guy, would you have gone to the
6 House of Blues to see Jackyl anyway?

7 A. Yes.

8 Q. Okay. You wanted to see the band.

9 A. Yeah.

10 Q. All right. And you said you were in
11 Myrtle Beach for the bike rally; right?

12 A. Yes.

13 Q. You all got in town on Wednesday?

14 A. I believe so. I think that was the day.

15 Q. The Jackyl concert was Friday; right?

16 A. Yes.

17 Q. So what did you do from -- what were the
18 bike rally events from Wednesday to Friday?

19 A. There was all kinds of stuff going on.
20 We kind of just rode around and hit different
21 spots and things like that.

22 Q. Okay. And was the bike rally -- did it
23 have a name?

24 A. It's a Myrtle Beach bike rally.

25 Q. Okay. Like Bike Week or --

1 A. Bike Week, yeah. I think that's what
2 they call it.

3 Q. So the entire thing wasn't associated
4 with the Full Throttle --

5 A. No, no.

6 Q. Okay. And the first time that you were
7 on the House of Blues property was Friday night
8 for the Jackyl concert?

9 A. To buy my ticket and then to -- and then
10 to go to the concert.

11 Q. Okay. Did you buy your ticket earlier
12 in the day?

13 A. Yeah. I want to -- I want to think that
14 it was the same day. I'm pretty sure that it was
15 the same day that I done that, yes.

16 Q. Okay. So you didn't come to Myrtle
17 Beach because of the Full Throttle Saloon.

18 A. No.

19 Q. And you didn't come to Myrtle Beach
20 because of Jesse James.

21 A. No.

22 Q. Or Mike Ballard.

23 A. No.

24 Q. Or Fajita Mike.

25 A. No.

1 Q. And you didn't go to House of Blues that
2 night because of Jesse -- well, you did because
3 of Jesse James because he's in Jackyl; right?

4 A. Right.

5 Q. You didn't go because of Mike Ballard.
6 You didn't go because of Fajita Mike; right?

7 MR. STEGMAIER: Object to form.

8 A. Right.

9 Q. Do you know what Throttlefest, LLC, is,
10 the entity?

11 A. I assume that it's some -- you know,
12 something like a promotion for concerts or
13 something like that. I -- so no.

14 Q. Why do you think that?

15 A. Because it's -- because I've seen on the
16 show where Michael -- or the lead singer of
17 Jackyl is part of the show and -- and they --
18 they have -- they're kind of in cahoots, I guess,
19 per say.

20 Q. But Throttlefest, LLC, that's a
21 different word than Full Throttle Saloon.

22 A. Right.

23 Q. Do you know the distinction?

24 A. No, no, no.

25 Q. Okay. Do you know if Fajita Mike ever

1 worked for the company Throttlefest, LLC?

2 MR. STEGMAIER: Object to the form.

3 A. No.

4 Q. Okay. Do you know if anyone that served
5 or gave away alcohol at the House of Blues that
6 night worked for Throttlefest, LLC?

7 A. No.

8 Q. Okay. Do you know if Throttlefest, LLC,
9 was ever the agent, servant, or employee of House
10 of Blues?

11 A. Can you repeat that?

12 Q. Sure. Do you know if Throttlefest, LLC,
13 was ever the agent, servant, or employee of House
14 of Blues?

15 A. No.

16 Q. Okay. I think you said earlier that you
17 knew that the Full Throttle TV show people were
18 going to be at the Jackyl concert --

19 A. Yeah.

20 Q. -- before you got there; right?

21 A. Yeah. I knew that part.

22 Q. How did you know that?

23 A. Just some friends was talking about it,
24 that, you know, just with -- with the Full
25 Throttle part, they was -- I guess they assumed

1 and we --

2 Q. Okay.

3 A. That's how I knew that, yeah.

4 Q. But regardless, you would have gone.

5 A. Oh, yeah.

6 Q. And you would have drank alcohol.

7 MR. STEGMAIER: Object to the form.

8 Q. Yes?

9 A. Yes.

10 Q. Okay. You talked a little bit about
11 this possible third shot of liquor that you might
12 have taken.

13 And I know you're not sure if you took
14 it or not; but if you did, would that have come
15 from Fajita Mike or from another source?

16 A. Another source.

17 Q. Okay. What source maybe would that have
18 been from?

19 A. House of Blues.

20 Q. Going up to the bar?

21 A. Yeah.

22 Q. Okay. Is that where you got your other
23 drinks?

24 A. Do what?

25 Q. Is that where you -- you purchased your

1 other drinks?

2 A. Yes.

3 Q. Up at the bar?

4 A. Yes.

5 Q. Okay. And I know you said that -- well,
6 correct me if I am wrong; but you did not feel
7 like you were intoxicated when you left the House
8 of Blues. Right?

9 A. Correct.

10 Q. All right. And does -- does that go to
11 say that you do not feel like you were visibly
12 intoxicated when you left the House of Blues?

13 A. Yes.

14 Q. Or any time you were at the House of
15 Blues?

16 A. Correct.

17 Q. Okay. At this time May 16, 2017 -- or
18 2014, how long had you been riding a motorcycle?

19 A. Since 2007 -- let's see. I guess since
20 '7. Somewhere around in there, you know.

21 Q. So seven years or so?

22 A. Yeah. Since 2007, yes, something like
23 that.

24 Q. Did you consider yourself a pretty
25 experienced motorcycle rider?

1 A. Yes.

2 Q. You knew how to handle your bike?

3 A. Yes.

4 Q. How long had you had that particular
5 bike?

6 A. That particular bike since '09.

7 Q. Okay. Thinking back on what happened,
8 do you think that -- with this pothole that you
9 hit, under these same circumstances, same speed
10 you were going, if you would have not have had a
11 drink of alcohol that day, would this accident
12 still have happened?

13 A. I can't really answer that. It was such
14 a bizarre thing. I -- I don't know.

15 MR. BOGDAN: Okay. All right. I
16 appreciate it.

17 THE WITNESS: Thank you.

18 MR. STEGMAIER: I'm good.

19 MR. RAINSFORD: I've got a few.

20 EXAMINATION

21 BY MR. RAINSFORD:

22 Q. What's a "Royal Flush"?

23 A. Crown Royal, cranberry juice, pineapple
24 juice, something like that. Can't remember
25 exactly.

1 Q. While you were at the House of Blues on
2 the night in question, did you have any food?

3 A. No.

4 Q. Okay. After you left the House of Blues
5 prior to the time you crashed, did you have any
6 food?

7 A. No.

8 Q. When was the last time you'd eaten prior
9 to arriving at the House of Blues on the night in
10 question?

11 A. Captain Poo's.

12 Q. Okay. What time did you eat, to the
13 best of your recollection?

14 A. I think, to the best of my recollection,
15 it was afternoon, like one.

16 Q. To the best of your recollection, what
17 did you have to eat around 1 p.m. on, I guess,
18 the 16th of May, 2014?

19 A. Everybody ordered some appetizers. I
20 think we had some nachos, maybe some battered
21 mushrooms, things like that. Something around,
22 you know, just some little finger foods.

23 Q. Okay. And after the time you left that
24 restaurant, did you have anything else after that
25 time until the crash, anything else to eat?

1 A. Not that I can recall.

2 Q. Prior to the night in question, had you
3 ever wrecked your motorcycle?

4 A. No.

5 Q. And did you ride that motorcycle in West
6 Jefferson, North Carolina?

7 A. Yes.

8 Q. How are the roads in West Jefferson?

9 MR. STEGMAIER: Object to the form.

10 A. Horrible.

11 Q. Horrible roads?

12 A. Crooked mountain roads.

13 Q. Potholes?

14 A. Oh, yeah.

15 Q. Okay. But you've never wrecked there?

16 A. No.

17 Q. Did you ride your bike from West
18 Jefferson to Myrtle Beach at this time, or did
19 you trailer them and drive down?

20 A. We rode. Or I rode.

21 Q. When you bought your ticket at the House
22 of Blues, did you come down the same highway on
23 your way back to the house that you eventually
24 had the crash on?

25 A. Repeat.

1 Q. It was a horribly-worded question.

2 Earlier in the day you bought your
3 ticket at the House of Blues; correct?

4 A. Yes.

5 Q. And when you left the House of Blues
6 after purchasing your ticket, did you drive down
7 the same highway that you ultimately had the
8 crash on?

9 A. Yes.

10 Q. Okay. Earlier you said that when you
11 got to the House of Blues that night, you went
12 straight in.

13 Was there any sort of a line to get into
14 the House of Blues?

15 A. Yes.

16 Q. Okay. And to the best of your
17 recollection, how long did it take to get inside
18 the House of Blues from the time that you arrived
19 at approximately 7:30?

20 A. I think it was about an hour. Something
21 close to that. It was a pretty good wait.

22 Q. So is it fair to say that you wouldn't
23 have purchased your first drinks until almost an
24 hour after the time you arrived?

25 A. Something like that.

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.)

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4 I, Ronda K. Blanton, a Registered
5 Professional Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness in the foregoing
8 deposition was by me duly sworn to testify to the
9 truth, the whole truth, and nothing but the truth
10 in the within-entitled cause; that said
11 deposition was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete, and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said
21 deposition and to subscribe the same.

22 Should the signature of the witness not be
23 affixed to the deposition, the witness shall not
24 have availed himself/herself of the opportunity
25 to sign or the signature has been waived.

I further certify that I am neither related
to nor counsel for any party to the cause pending
or interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal on May 1, 2018, at Charleston,
Charleston County, South Carolina.

20 Ronda K. Blanton
21 NCRA REGISTERED PROFESSIONAL
22 REPORTER, RPR
23 My Commission expires:
24 May 14, 2018.
25

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March 19, 2014

Throttlefest, LLC
 Jesse Dupree
 Via Email: jld@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 Kraeker, Blackberry Smoke, Danny "the Count"/Zoso, Steel Panther, Jamey Johnson and Jacky) 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: Shawn Simmonds

Title: General Manager

CONFIDENTIAL

HOB 001

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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 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: Giovanna 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.

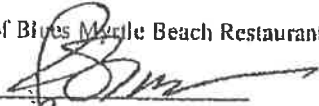
Throttletest LLC

By: 

Name: Jesse James Durre

Title: President

House of Blues Myrtle Beach Restaurant Corp.

By: 

Name: Robert Simons

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
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





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.

**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.

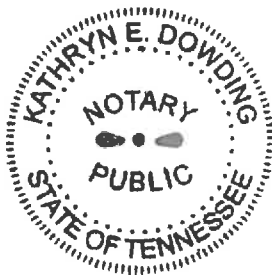
24. Michael Garner, or "Fajita Mike," was not employed by, or an agent of, Full Throttle or Sloon Shine during the Throttle Fest that took place in May of 2014.

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

RECEIVED

Aug 30 2021

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
COLLINS & LACY, P.C.

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MYRTLE BEACH RESTAURANT
CORPORATION

Columbia, South Carolina
July 9, 2021