Lineage Logistics, LLC v. Primus Builders, Inc., 2024 NCBC 9.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF IREDELL	21 CVS 2372

LINEAGE LOGISTICS, LLC,

Plaintiff,

v.

PRIMUS BUILDERS, INC. and REPUBLIC REFRIGERATION, INC.,

Defendants.

REPUBLIC REFRIGERATION, INC.,

Third-Party Plaintiff,

v.

P3 ADVANTAGE, INC.,

Third-Party Defendant.

ORDER AND OPINION ON PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND THIRD-PARTY DEFENDANT'S MOTION TO DISMISS

1. **THIS MATTER** is before the Court on Plaintiff Lineage Logistics, LLC's ("Lineage") Motion to Strike Affirmative Defenses (the "Motion to Strike") under Rule 12(f) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), filed 27 November 2023,[1] and Third-Party Defendant P3 Advantage, Inc.'s ("P3") Motion to Dismiss the Third-Party Complaint (the "Motion to Dismiss"; together with the Motion to Strike,

[1] (Pl. Lineage Logistics, LLC's Mot. Strike Affirmative Defenses [hereinafter "Mot. Strike"], ECF No. 177.)

the "Motions") under Rules 12(b)(2), (4), (5), and (6), filed 1 December 2023, in the above-captioned case.[2]

2. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the arguments of counsel at the hearing on the Motions, and other appropriate matters of record, the Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion to Strike and **GRANTS** the Motion to Dismiss as set forth below.

> *McGuireWoods LLP, by Alec Covington, Dylan M. Bensinger, Anthony Tatum, Shelby Guilbert, and Zachary L. McCamey, for Plaintiff Lineage Logistics, LLC.*
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> *Hedrick Gardner Kincheloe & Garofalo, LLP, by David L. Levy and Kristy M. D'Ambrosio, and Robinson Elliot & Smith, by William C. Robinson and Dorothy M. Gooding, for Defendant Republic Refrigeration, Inc.*
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> *Gallivan, White, & Boyd, P.A., by Christopher M. Kelly and Shivani Shah, and Taylor English Duma, LLP, by Ryan M. Arnold, Stephen L. Wright, and Gregory G. Schultz, for Defendant Primus Builders, Inc. and Third-Party Defendant P3 Advantage, Inc.*

Bledsoe, Chief Judge.

I.

FACTUAL BACKGROUND

3. The Court does not make findings of fact on the Motions. Rather, the Court recites the allegations asserted and documents referenced in the pleadings that are relevant to the Court's determination of the Motions.

[2] (Third-Party Def. P3 Advantage, Inc.'s Mot. Dismiss Third-Party Compl. [hereinafter "Mot. Dismiss"], ECF No. 182.)

4. Lineage operates a cold-storage facility in Statesville, North Carolina that stores temperature-controlled food products for customers (the "Facility").[3] Lineage assumed ownership of the Facility after it merged with Millard Refrigerated Services, LLC ("Millard").[4]

5. Defendant Primus Builders, Inc. ("Primus") is a general contractor specializing in the construction of large, refrigerated buildings.[5] Primus contracted with Millard (the "Primus Contract") to design and construct six blast cells at the Facility (the "Project").[6] Primus entered a subcontract with Defendant Republic Refrigeration, Inc. ("Republic") to perform services on the Project (the "Republic Subcontract").[7]

6. In the Primus Contract, Primus promised to name Lineage and Millard as additional insureds under several insurance policies and to indemnify Lineage against claims and damages that arose out of Primus's performance on the Project.[8] Similarly, under the Republic Subcontract, Republic promised to name Lineage as an

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[3] (Pl. Lineage Logistics, LLC's Second Am. Compl. and Cross-Cl. ¶ 1 [hereinafter "Lineage Second Am. Compl."], ECF No. 121.)

[4] (Lineage Second Am. Compl. ¶ 2; Pl. Primus Builders, Inc. and P3 Advantage, LLC's Second Am. Compl. ¶¶ 10–11 [hereinafter "Primus Second Am. Compl."], ECF No. 122.)

[5] (Primus Second Am. Compl. ¶ 1.)

[6] (Lineage Second Am. Compl. ¶ 5.)

[7] (Lineage Second Am. Compl. ¶¶ 7, 25; Primus Am. Compl. ¶¶ 12–13.)

[8] (Lineage Second Am. Compl. ¶¶ 27–29; Lineage Second Am. Compl. Ex. A Guaranteed Maximum Sum Contract 44, ECF No. 121.1.)

additional insured under several insurance policies and to indemnify Lineage against any claims or damages that arose out of Republic's performance on the Project.[9]

7. Primus hired its affiliate P3 "to furnish labor for the demolition and removal of IMP walls in the old blast cells including old blast cell 9 of the Project."[10] On 10 January 2020, two P3 employees—Anthony Lamattina ("Lamattina") and Carson Brandon Drawdy ("Drawdy")—were using a scissor lift to work on one of the blast cells at the Facility.[11] Lineage alleges that after Lamattina and Drawdy completed their initial task, a Republic employee requested that they remain on the lift and remove ice from an evaporator on one of the blast cells.[12] While removing the ice, Lamattina inadvertently punctured a coil containing liquid anhydrous ammonia, releasing nearly 1,000 pounds of ammonia into the Facility (the "Incident").[13] Lamattina was exposed to the ammonia and died at the scene. Drawdy was also

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[9] (Lineage Second Am. Compl. ¶¶ 7, 30–31; Lineage Second Am. Compl. Ex. B Design/Build Subcontract 18, ECF No. 121.2.)

[10] (Republic Refrigeration, Inc.'s Mot. Dismiss, Am. Answer Pl.'s Second Am. Compl. and Third-Party Compl. [hereinafter "Republic's Answer" or "Third-Party Compl."] ¶ 15, ECF No. 172.) Republic's Answer and Third-Party Complaint are located in different sections within ECF No. 172, with Republic's Third-Party Complaint beginning on page fifteen of the document. The Court's references to "Republic's Answer" or "Third-Party Compl." will refer to the applicable section in ECF No. 172.

[11] (Lineage Second Am. Compl. ¶ 57; Primus Second Am. Compl. ¶¶ 22–26.) Primus's Second Amended Complaint does not identify Drawdy by name.

[12] (Lineage Second Am. Compl. ¶ 58.) Primus's Second Amended Complaint does not allege that a Republic employee requested Lamattina to remain on the scissor lift or remove ice. (Primus Second Am. Compl. ¶¶ 22–26.)

[13] (Lineage Second Am. Compl. ¶ 59; Primus Second Am. Compl. ¶ 22.)

exposed, but he was able to jump to the floor and escape the building. He was later hospitalized with significant injuries from the exposure.[14]

8. In addition to the human cost, the release of ammonia caused Lineage to incur massive cleanup and investigation costs, disruption to its business operations, and significant loss of products that were destroyed or rendered unusable because of the ammonia exposure.[15] Lineage and Primus allege that they have been named as defendants in numerous lawsuits related to the Incident, including a wrongful death action by Lamattina's estate and suits from customers seeking to recover for damage to property stored at the Facility (each an "Underlying Action").[16] Lineage and Primus also allege that they face claims from property owners who have not yet brought lawsuits.[17]

II.

PROCEDURAL BACKGROUND

9. This action began as an insurance coverage dispute. On 26 August 2021, Lineage filed its original complaint, asserting a single claim against National Union

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[14] (Lineage Second Am. Compl. ¶ 60; Primus Second Am. Compl. ¶ 26.)

[15] (Lineage Second Am. Compl. ¶¶ 62–63.)

[16] Each amended complaint identifies three pending lawsuits: *Stone ex rel. Estate of Lamattina v. Lineage Logistics, LLC*, Case No. 20-CVS-3109 (N.C. Super. Ct. 2020); *DFA Dairy Brands, LLC v. Primus Builders, Inc.*, Case No. 5:21-cv-00025-KDB-DSC (W.D.N.C. 2021); and *Equatorial Seafood, LLC v. Lineage Logistics, LLC*, Case No. 21-CVS-1960 (N.C. Super. Ct. 2021). (Lineage Am. Compl. ¶ 64; Primus Am. Compl. ¶ 27.) Primus's Second Amended Complaint also names a separate action brought by Lineage against Primus, *Lineage Logistics, LLC v. Primus Builders, Inc.*, Case No. 23-CVS-62 (N.C. Super. Ct. 2023). (Primus Am. Compl. ¶ 27.)

[17] (Lineage Second Am. Compl. ¶ 29; Primus Second Am. Compl. ¶ 33.)

Fire Insurance Company of Pittsburgh, PA ("National Union"), Travelers Property Casualty Company of America ("Travelers"), and Hartford Fire Insurance Company ("Hartford") for a declaratory judgment that Lineage was an additional insured under these insurers' relevant policies and entitled to coverage up to the combined limits of liability under those policies.[18]

10. The Court permitted Primus to intervene in this action on 29 November 2021, and Primus filed its original Complaint the following day.[19] After Hartford filed an answer to Primus's Complaint on 15 December 2021,[20] Primus filed an amended complaint ("Primus's Amended Complaint") later that same day adding claims against Hartford.[21]

11. Lineage filed an amended complaint and crossclaim on 5 January 2022, adding claims against Hartford, National Union, Primus, and Republic.[22] Lineage and Primus reached a settlement with National Union on 1 September 2022[23] and

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[18] (Lineage Compl. ¶¶ 47–53, ECF No. 3.)

[19] (Order Primus Builders, Inc.'s Mot. Intervene as Pl., ECF No. 31; Pl. Primus Builders, Inc.'s Compl. [hereinafter "Primus's Original Compl."], ECF No. 36.)

[20] (Def. Hartford Fire Insurance Company's Answer Pl. Primus Builders, Inc.'s Compl., ECF No. 41.) Hartford filed its answer to Primus's Original Complaint, but it was not until Primus's Amended Complaint that Primus actually named Hartford as a defendant.

[21] (Pl. Primus Builders, Inc.'s Am. Compl., ECF No. 42.) Before Lineage filed its Amended Complaint, National Union and Travelers filed motions to dismiss or stay Primus's Original Complaint, (ECF Nos. 48, 50), which this Court declared moot by an order dated 19 January 2022, (ECF No. 60).

[22] (*See generally* Pl. Lineage Logistics LLC's First Am. Compl. and Cross Claim, ECF No. 55.)

[23] (Lineage Second Am. Compl. ¶ 72.)

with Hartford in December 2022.[24] Lineage and Primus ultimately dismissed their claims against National Union on 6 October 2022,[25] and against Hartford on 1 February 2023.[26]

12. After dismissing their claims against these two insurers and with leave of court, Lineage and Primus filed new complaints on 24 and 28 February 2023, respectively.[27] While these new complaints continued to seek relief against Travelers as the remaining insurer defendant, Lineage also brought claims for:

a. a declaratory judgment against Primus that Primus must defend and/or indemnify Lineage for losses sustained as a result of the Incident under the Primus Contract;[28]

b. breach of the Primus Contract against Primus for failure to indemnify Lineage for its losses as required by the Primus Contract;[29]

c. a declaratory judgment that Republic must indemnify Lineage under the Republic Subcontract;[30]

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[24] (Lineage Second Am. Compl. ¶ 84.)

[25] (Lineage Second Am. Compl. ¶ 72; Voluntary Dismissal With Prejudice All Claims Made Against Def. National Union Fire Insurance Company Pittsburgh, PA, ECF No. 104; Stipulation Dismissal, ECF No. 105.)

[26] (Lineage Second Am. Compl. ¶ 87; Voluntary Dismissal With Prejudice All Claims Made Against Def. Hartford Fire Insurance Company, ECF No. 111; Notice Voluntary Dismissal, ECF No. 112.)

[27] (Lineage Second Am. Compl.; Primus Second Am. Compl.)

[28] (Lineage Second Am. Compl. ¶¶ 133–38.)

[29] (Lineage Second Am. Compl. ¶¶ 139–46.)

[30] (Lineage Second Am. Compl. ¶¶ 147–52.)

d. tortious interference with contract against Republic;[31] and

e. breach of the Republic Subcontract against Republic for failure to indemnify Lineage as required by the Republic Subcontract.[32]

13. Travelers and Republic thereafter moved to dismiss these new Complaints,[33] and in an Order dated 10 August 2023, the Court dismissed all claims against Travelers without prejudice but permitted Lineage's claims against Republic for declaratory judgment concerning Lineage's rights to indemnity under the Republic Subcontract and for breach of the indemnity obligations under that contract to proceed to discovery.[34] Lineage's claims against Primus for declaratory judgment concerning Lineage's rights to indemnity under the Primus Contract and for breach of the indemnity obligations under that contract remain in the case as well.

14. On 2 October 2023, the Court entered a Consent Order realigning the parties.[35] That same day, Primus dismissed its declaratory judgment claims against Republic without prejudice.[36]

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[31] (Lineage Second Am. Compl. ¶¶ 122–32.)

[32] (Lineage Second Am. Compl. ¶¶ 153–60.)

[33] (Def. Travelers Property Casualty Company America's Mot. Dismiss the Second Am. Compl. Lineage Logistics, LLC, ECF No. 132; Def. Republic Refrigeration, Inc.'s Mot. Dismiss Pl. Lineage Logistics, LLC's Second Am. Compl. Pursuant Rule 12(b)(6), ECF No. 134.)

[34] (Order and Op. Travelers Property Casualty Company America's Mots. Dismiss Pls.' Am. Compls., Republic Refrigeration, Inc.'s Mot. Dismiss Lineage Logistics, LLC's Am. Compl., and Republic Refrigeration, Inc.'s Mot. Stay, ECF No. 155; *Lineage Logistics, LLC v. Nat'l Union Fire Ins. Co.*, 2023 NCBC LEXIS 97 (N.C. Super. Ct. Aug. 10, 2023).) In this order and opinion, the Court also denied Republic's Motion to Stay, (ECF No. 135).

[35] (Consent Order Realignment the Parties, ECF No. 166.)

[36] (Notice Voluntary Dismissal Without Prejudice, ECF No. 165.)

15. On 25 October 2023, Primus filed an amended answer to Lineage's Second Amended Complaint and included a crossclaim against Republic for express indemnification ("Primus's Answer").[37]

16. On 1 November 2023, Republic also filed an amended answer to Lineage's Second Amended Complaint ("Republic's Answer") and, at the same time, asserted a third-party complaint against P3 (the "Third-Party Complaint") alleging that P3 was responsible for the Incident and liable to Republic should Republic be ordered to pay Lineage on its claims.[38] Republic asserted claims against P3 for (i) negligence (Count I), (ii) common law indemnification (Count II), and (iii) contribution (Count III).[39]

17. Lineage filed its Motion to Strike on 27 November 2023, seeking to strike certain of Republic's and Primus's affirmative defenses in their Answers to Lineage's Second Amended Complaint.[40] P3 filed the Motion to Dismiss the Third-Party Complaint on 1 December 2023, seeking the dismissal of Republic's third-party claims against it.[41]

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[37] (Def. Primus Builders, Inc.'s Am. Answer Lineage Logistics, LLC's Second Am. Compl. and Cross-Cl. and Primus Builders, Inc.'s Cross-Cl. Against Republic [hereinafter "Primus's Answer"], ECF No. 171.)

[38] (Third-Party Compl.)

[39] (Third-Party Compl. ¶¶ 26–36.)

[40] (Mot. Strike.)

[41] (Mot. Dismiss.)

18. After full briefing, the Court convened a hearing on the Motions on 18 January 2024, at which all parties were represented by counsel (the "Hearing"). The Motions are now ripe for resolution.

III.

ANALYSIS

A. Lineage's Motion to Strike

19. Under Rule 12(f), a trial court "may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C.R. Civ. P. 12(f). "Rule 12(f) motions are viewed with disfavor and are infrequently granted." *Daily v. Mann Media, Inc.*, 95 N.C. App. 746, 748–49 (1989) (cleaned up). A decision to grant or deny a Rule 12(f) motion to strike is within the trial court's sound discretion. *Reese v. City of Charlotte*, 196 N.C. App. 557, 567 (2009).

20. Significantly for present purposes, "[a] motion under Rule 12(f) is a device to test the legal sufficiency of an affirmative defense," *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 601 (2002), and "[t]he requirements for pleading a defense are no more stringent than the requirements for pleading a claim for relief." *Vernon v. Crist*, 291 N.C. 646, 653 (1977). As a result, a Rule 12(f) motion to strike affirmative defenses is considered under the same standard as a motion to dismiss claims under Rule 12(b)(6). *See, e.g.*, *Mozingo v. N.C. Nat'l Bank*, 31 N.C. App. 157, 163 (1976) (noting that Rule 12(f) is an "analogue to" Rule 12(b)(6) and that "the same tests

apply" to both rules); *see also* N.C.R. Civ. P. 8(a)–(c) (setting forth pleading requirements for both claims for relief and defenses).

21. This Court has recognized that "defenses may be stricken from pleadings, if they are insufficient as a matter of law." *Nat'l Fin. Partners Corp. v. Ray*, 2014 NCBC LEXIS 50, at *18 (N.C. Super. Ct. Oct. 13, 2014) (quoting *Palmer v. Oakland Farms, Inc.*, 2010 U.S. Dist. LEXIS 63265, at *4 (W.D. Va. June 24, 2010)).

22. As this Court has explained:

> [T]o survive a motion to strike, a defendant must offer more than a "bare-bones conclusory allegation which simply names a legal theory but does not indicate how the theory is connected to the case at hand." *Villa v. Ally Fin., Inc.*, 2014 U.S. Dist. LEXIS 25624, at *6 (M.D.N.C. Feb. 28, 2014) (citation omitted); *see also Johnson v. Clark*, 2013 U.S. Dist. LEXIS 95492, at *4–6 (E.D.N.C. July 9, 2013) (striking "conclusory defenses" that failed to allege sufficient facts to provide the plaintiff with sufficient notice of the affirmative defenses in question); *Koehler v. United States*, 2012 U.S. Dist. LEXIS 163816, at *3–4 (E.D.N.C. Nov. 15, 2012) (providing that "conclusory defenses, presented without any factual support, should be stricken"); *Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC,* 752 F. Supp. 2d 721, 726 (W.D. Va. 2010) (explaining that "dismissal under Rule 12(f) is appropriate where the defendant has not articulated its defenses so that they are contextually comprehensible"). "When a court strikes a defense, the general practice is to grant the defendant leave to amend." *Banks v. Realty Mgmt. Serv.*, 2010 U.S. Dist. LEXIS 7501, at *3 (E.D. Va. Jan. 29, 2010).

Nat'l Fin. Partners Corp., 2014 NCBC LEXIS 50, at *18; *see also Staton v. N. State Acceptance, LLC*, No. 1:13-CV-277, 2013 U.S. Dist. LEXIS 105599, at *7 (M.D.N.C. July 29, 2013) ("At a minimum, therefore, a statement of an affirmative defense must give notice to an opponent of its basis and go beyond conclusions.").

23. Thus, as Judge Robinson of this Court has summarized: "a defense that is conclusory, contextually incomprehensible, not well-grounded in fact, speculative, or

otherwise devoid of any factual support may be stricken pursuant to Rule 12(f), since such a defense will ordinarily fail to give a party sufficient notice of the nature of the defense as required by Rule 8." *Merrell v. Smith*, 2020 NCBC LEXIS 126, at *7 (N.C. Super. Ct. Oct. 22, 2022); *see, e.g.*, *Carpenter v. Carpenter*, 189 N.C. App. 755, 761 (2008) (reversing striking of answer containing defenses that could have "a possible bearing on the litigation"); *Daily*, 95 N.C. App. at 749 (affirming the striking of a defense that had "no possible bearing upon the litigation").

24. Lineage's Motion to Strike seeks to strike certain affirmative defenses from Republic's and Primus's Amended Answers to Lineage's Second Amended Complaint. The Court will consider each challenge in turn.

1. Republic's Affirmative Defenses

25. In response to Lineage's Motion to Strike, Republic has agreed to withdraw the following affirmative defenses: (i) adoption of any and all contractual defenses, limitations, exclusions, and language (Third Defense); (ii) justification (Fourth Defense); (iii) adoption of defenses (Fifth and Sixth Defenses); (iv) a purported motion to strike (Seventh Defense); (v) collateral estoppel and res judicata (Eighth Defense); (vi) waiver (Ninth Defense); (vii) laches (Tenth Defense); and (viii) accord, satisfaction, and compromising settlement (Eleventh Defense).[42] Accordingly, the Court will strike these defenses.[43]

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[42] (*See* Mem. Opp'n Pl.'s Mot. Dismiss [sic] Strike Affirmative Defenses 5 [hereinafter "Republic's Br. Opp'n Mot. Strike"], ECF No. 190.)

[43] The Motion to Strike also seeks to strike Republic's thirteenth affirmative defense, which states that "[Lineage's] claims are barred in whole or in part to the extent they have been raised in a prior pending action." (Republic's Answer 14; Pl. Lineage Logistics, LLC's Mem.

26. Republic seeks to maintain, however, three affirmative defenses which Lineage seeks to strike through its motion: (i) the defense titled "First Motion to Dismiss," a single-sentence "motion" asserted under Rule 12(b)(6) at the beginning of Republic's Answer;[44] (ii) statute of limitations (Twelfth Defense);[45] and (iii) N.C.G.S. § 22B-1 (Fourteenth Defense).[46]

a. "First Motion to Dismiss"

27. Republic's inclusion of its purported "First Motion to Dismiss" at the beginning of its amended answer reflects common practice in the North Carolina state courts. Also typical of North Carolina state court practice, Republic's purported motion is not accompanied by a supporting brief. Under Business Court Rule 7.2 (the "BCR(s)"), however, a motion to dismiss "must be set out in a separate document"—i.e., it may not be included in a party's answer—and "[a] motion unaccompanied by a required brief may, in the discretion of the Court, be summarily denied." BCR 7.2.

Supp. Mot. Strike Affirmative Defenses 12, 14 [hereinafter "Lineage's Br. Supp."], ECF No. 178.) Republic did not address Lineage's Motion to Strike this defense in its briefing or at the Hearing, and the Court agrees with Lineage that "Republic does not identify any previous litigation that might have preclusive effect on this action[.]" (Lineage's Br. Supp. 12.) Accordingly, the Court will strike this affirmative defense as well. *See also, e.g., Elhulu v. Alshalabi*, 2021 NCBC LEXIS 44, *21 (N.C. Super. Ct. Apr. 29, 2021) (granting motion as uncontested when response brief did not respond to moving party's argument); *Glover Constr. Co. v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 76, at *23 (N.C. Super. Ct. June 18, 2020) (same).

[44] (Republic's Answer 1.)

[45] (Republic's Answer 14.)

[46] (Republic's Answer 14.)

28. Rather than summarily deny the First Motion to Dismiss, however, the Court, in the exercise of its discretion and after discussion and agreement with the parties at the Hearing, elects not strike the First Motion to Dismiss but instead will consider the purported motion inoperative and take no action on it unless and until Republic files a motion in compliance with BCR 7.2. Lineage will retain all its available defenses to any such motion. Accordingly, Lineage's Motion to Strike the First Motion to Dismiss will be denied on this limited basis.

b. Statute of Limitations (Twelfth Defense)

29. Republic's statute of limitations defense asserts that Lineage's claim against Republic for breach of the Republic Subcontract, which was filed on 24 February 2023, was filed more than three years after the 10 January 2020 Incident, which was the earliest date on which the claim could have accrued, and was thus after the applicable three-year statute of limitations period had expired.[47] *See, e.g.*, *Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 301 (2009) ("The statute of limitations period for an indemnity contract is three years."); *see also, e.g.*, *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 6 (2017) ("A cause of action is complete and the statute of limitations begins to run upon the inception of the loss from the contract, generally the date the promise is broken."); *Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 180 N.C. App. 257, 267 (2006) ("North Carolina follows the general rule that a cause of action on an obligation to indemnify normally accrues when the indemnitee suffers actual loss.").

[47] (Republic's Br. Opp'n Mot. Strike 6.)

30. Lineage argues in opposition that its claim was timely because, under Rule 15(c), its claim for breach of the indemnity clause in the Republic Subcontract relates back to Lineage's First Amended Complaint, which was filed on 5 January 2022, less than two years after the Incident and thus well within the three-year statute of limitations for breach of contract. The Court agrees with Lineage.

31. Under North Carolina law, "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." N.C.R. Civ. P. 15(c). If an original complaint "gave notice under Rule 8(a)(1) of a claim based on [the same transaction or occurrence], then the amended complaint under Rule 15(c) is absorbed into the original[.]" *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 443 (1988). Lineage's indemnity claim against Republic relates back to the First Amended Complaint because Lineage's breach of contract claim in the Second Amended Complaint and its declaratory judgment claim in the First Amended Complaint are both based on Republic's alleged breach of the same indemnity provision in the Republic Subcontract. Republic was therefore on "notice of the transactions, occurrences, or series of transactions or occurrences" on which Lineage's current breach of contract claim is based upon the filing of the First Amended Complaint. The Court will therefore grant Lineage's Motion to Strike Republic's statute of limitations affirmative defense.

c. N.C.G.S. § 22B-1 (Fourteenth Defense)

32. The Court has previously rejected Republic's argument that N.C.G.S. § 22B-1 renders the Republic Subcontract's indemnity provision void,[48] and Republic has represented that this affirmative defense is asserted solely to preserve the issue for appeal.[49] Since the Court has already determined that Republic's affirmative defense fails as a matter of law, the Court will grant Lineage's Motion to Strike Republic's affirmative defense based on section 22B-1.

2. Primus's Affirmative Defenses

33. In response to Lineage's Motion to Strike, Primus has agreed to withdraw its affirmative defenses based on lack of subject matter jurisdiction (Fifth Defense) and the statute of limitations and/or repose (Seventh Defense).[50] Accordingly, the Court will strike these defenses. In addition, the parties agreed at the Hearing that Primus's unclean hands defense (Eighth Defense) should be stricken as to quantifiable past losses but remain as a defense to uncertain future losses. The Court will therefore memorialize the parties' agreement in this Order and Opinion.

34. Lineage's Motion to Strike has thus been narrowed to Primus's affirmative defenses for waiver (Third Defense) and equitable estoppel (Fourth Defense).[51] These

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[48] *Lineage Logistics, LLC v. Nat'l Union Fire Ins. Co.*, 2023 NCBC LEXIS 97, at *40–41 (N.C. Super. Ct. Aug. 10, 2023); (*see also* Lineage's Br. Supp 13–14; Republic's Br. Opp'n Mot. Strike 6).

[49] (Republic's Br. Opp'n Mot. Strike 6.)

[50] (Primus Builders, Inc.'s Mem. Opp'n Pl.'s Mot. Strike Affirmative Defenses 10–11 [hereinafter "Primus's Br. Opp'n"], ECF No. 189.)

[51] (Mot. Strike; Primus's Answer 24–25.)

defenses are related, and through them, Primus alleges that Lineage has waived or is otherwise equitably estopped from seeking indemnity from Primus because of Lineage's own negligence.[52] Although Lineage argues that Primus has failed to allege facts showing each of the required elements for waiver[53] or equitable estoppel[54], necessitating that each defense be stricken, the Court finds, upon a review of all of the allegations of Primus's amended answer, including those incorporated into these two defenses, that Primus has satisfied its pleading burden under Rule 8 to put Lineage on notice of the facts supporting these affirmative defenses. The Court further concludes that each asserted defense could have "a possible bearing on the litigation." *Carpenter*, 189 N.C. App. at 761; *see also Daily*, 95 N.C. App. at 749. As a result, the Court will deny the Motion to Strike Primus's affirmative defenses of waiver and equitable estoppel.

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[52] (Primus's Br. Opp'n 12–13.)

[53] (Lineage's Br. Supp. 3–4.) *See, e.g.*, *Fetner v. Rocky Mount Marble & Granite Works,* 251 N.C. 296, 302 (1959) ("The essential elements of waiver are (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit.").

[54] (Lineage's Br. Supp. 4–5.) *See, e.g.*, *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33–34 (2007):

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; [and] (3) knowledge, actual or constructive, of the real facts.

Id. (cleaned up).

B. P3's Motion to Dismiss

35. P3 seeks to dismiss all claims in Republic's Third-Party Complaint for insufficiency of process under Rules 12(b)(4) and 12(b)(5) and resulting lack of personal jurisdiction under Rule 12(b)(2) as well as for failure to state a claim upon which relief can be granted under Rule 12(b)(6). P3 also moves to dismiss Republic's negligence claim on statute of limitations grounds (N.C.G.S. § 1-52) under Rule 12(b)(6).

1. Insufficiency of Process/Lack of Personal Jurisdiction

36. P3 contends that Republic failed to "submit a summons for issuance by the Court" and "failed to properly serve the Third-Party Complaint,"[55] requiring the dismissal of the third-party action against P3 for insufficient process under Rules 12(b)(4) and 12(b)(5) and for lack of personal jurisdiction under Rule 12(b)(2).[56]

37. It is undisputed that Republic filed its Third-Party Complaint against P3 on 1 November 2023 but did not cause a summons to be issued until 5 December 2023 and effect service upon P3 until 10 January 2024.[57] P3 argues that the Third-Party Complaint should be dismissed because the delay in issuing the summons caused Republic's action against P3 to abate under Rule 4(a), which provides that "[u]pon

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[55] (Mem. Supp. P3 Advantage, Inc.'s Mot. Dismiss The Third-Party Compl. 10 [hereinafter "P3's Br. Supp."], ECF No. 183.)

[56] (P3's Br. Supp. 9–11.)

[57] The relevant summons documents are appended to the end of Republic's brief opposing the Motion to Dismiss. (Mem. Opp'n P3 Advantage, Inc.'s Mot. Dismiss Third-Party Compl. 9–16 [hereinafter "Republic's Br. Opp'n Mot. Dismiss"], ECF No. 191.)

the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C.R. Civ. P. 4(a). P3 further argues that dismissal for lack of personal jurisdiction must follow, citing *Thomas & Howard Co. v. Trimark Catastrophe Servs., Inc.*, 151 N.C. App. 88, 91 (2002) ("Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." (citation omitted)).[58]

38. The Court of Appeals, however, has held that while an "action abate[s] upon failure to issue proper summons within five days of filing the complaint, [ ] the action revive[s] upon the issuance and service of summons on defendant." *Roshelli v. Sperry*, 57 N.C. App. 305, 308 (1982). In *Roshelli*, as here, a complaint abated and was subject to dismissal under Rule 4(a) after a summons was not issued within five days after the complaint's filing. And again like here, a second summons was issued and served more than five days after the complaint was filed. The Court of Appeals held on these facts that "the effect of the second summons . . . was to revive and commence a new action on the date of issue." *Id.* The Court, therefore, affirmed the trial court's denial of the defendant's motion to dismiss for insufficiency of process and lack of personal jurisdiction.

39. *Roshelli* is controlling. Although Republic's third-party action against P3 abated and was subject to dismissal under Rule 4(a) after Republic failed to cause a summons to be issued within five days after the Third-Party Complaint was filed, *Roshelli* provides that the issuance and service of a second summons thereafter

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[58] (P3's Br. Supp. 10.)

revived the action. Accordingly, P3's Motion to Dismiss under Rules 12(b)(2), 12(b)(4), and 12(b)(5) is without merit and shall be denied. *See also, e.g., Morton v. Blue Ridge Ins. Co.*, 250 N.C. 722, 724–25 (1959) (concluding that issuance of a second summons instituted a new action at the time of issuance of the second summons).

2. Statute of Limitations

40. P3 next moves under Rule 12(b)(6) to dismiss Republic's negligence claim, contending that that claim is barred by the applicable three-year statute of limitations under N.C.G.S. § 1-52.[59] "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136 (1996). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.*

41. When ruling on a motion to dismiss under Rule 12(b)(6), the Court must consider "whether the allegations of the [challenged pleading], if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)).

42. Dismissal pursuant to Rule 12(b)(6) is proper when "(1) the [challenged pleading] on its face reveals that no law supports [its] claim[s]; (2) the [pleading] on

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[59] (P3's Br. Supp. 11–12.)

its face reveals the absence of facts sufficient to make a good claim; or (3) the [pleading] discloses some fact that necessarily defeats the [non-moving party's] claim." *Corwin*, 371 N.C. at 615 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166 (2002)).

43. On a Rule 12(b)(6) motion, the challenged pleading is construed liberally, viewing the allegations as true and in the light most favorable to the non-moving party, and the claim is not dismissed unless it appears beyond doubt that the non-moving party could prove no set of facts in support of his claim which would entitle him to relief. *U.S. Bank Nat'l Ass'n ex rel. C-BASS Mortg. Loan Asset-Backed Certificates, Series 2006-RP2 v. Pinkney*, 369 N.C. 723, 726 (2017). While "the well-pleaded material allegations of the [challenged pleading] are taken as true[,] conclusions of law or unwarranted deductions of fact are not admitted." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599 (2018) (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448 (2015)).

44. Under North Carolina law, a claim for negligence "accrues when the wrong giving rise to the right to bring suit is committed." *Harrold v. Dowd*, 149 N.C. App. 777, 781 (2002). Republic's negligence claim is based on P3's alleged conduct in causing the injuries suffered in the Incident.[60] P3 argues that because the Incident occurred on 10 January 2020 and the Third-Party Complaint was filed over three years later on 1 November 2023, Republic's negligence claim should be dismissed.

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[60] (Third-Party Compl. ¶¶ 17–34.)

45. Republic contends that its negligence claim is timely because the claim relates back to Lineage's claims for negligence, gross negligence, and indemnity in a lawsuit Lineage filed against P3 in January 2023 in Iredell County Superior County (Civil Action No. 23-CVS-62) (the "Iredell Action").[61] Based on those allegations, Republic contends that P3 has long been on notice of the events or occurrences giving rise to Republic's negligence claim and that relation back is therefore proper under Rule 15(c).

46. At the Hearing, the parties sparred over the application of *Crossman v. Moore*, 341 N.C. 185 (1995), and *Baldwin v. Wilkie*, 179 N.C. App. 567 (2006), to the facts of this case. In *Crossman*, the Supreme Court held that Rule 15(c) "does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party." *Id.* at 187. In *Baldwin*, the Court of Appeals looked to New York law for guidance to conclude that, for the purpose of determining venue, Rule 15(c) permitted relation back when the claim of a newly joined plaintiff was "virtually identical" to the original plaintiff's claim and the newly joined plaintiff, through its injury, was "similarly situated" to the original plaintiff. *Baldwin*, 179 N.C. App. at 571 (quoting *Key Int'l Mfg., Inc. v. Morse/Diesel, Inc.*, 536 N.Y.S.2d 792, 798 (1988)).

47. P3 was originally a plaintiff in this action asserting claims against Republic. P3 dismissed those claims on 2 October 2023[62] and was no longer a party-plaintiff in

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[61] (Republic's Br. Opp'n Mot. Dismiss 5.)

[62] (Notice Voluntary Dismissal Without Prejudice.)

the litigation.[63] Less than a month later, Republic brought P3 back into the case as a third-party defendant. While, as Republic contends, the third-party claims that Republic asserts against P3 are based on allegations very similar to those Lineage advanced against P3 in the Iredell Action, Rule 15(c) contemplates relation back to the "original pleading" in the same action, not to a pleading in a separate action. *See id.* (applying relation back to the original complaint in the same action); *see also, e.g.*, *Watkins v. Stephenson*, 57 F.4th 576, 580 (6th Cir. 2023) ("[the analogous Federal] Rule 15's text contemplates that the relevant filings will arise in the same case.").[64] Further, *Crossman* makes plain that Republic cannot get the benefit of Rule 15(c)'s relation back provision since P3 is a newly added defendant. Accordingly, since Republic's negligence claim was filed more than three years after it accrued, that claim is barred by the applicable statute of limitations. P3's Motion shall therefore be granted dismissing this claim.

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[63] (*See* Consent Order Realignment the Parties.)

[64] Numerous federal circuit decisions are to similar effect. *See, e.g.*, *Velez-Diaz v. United States*, 507 F.3d 717, 719 (1st Cir. 2007) ("Rule 15(c), by its terms, applies to amended pleadings in the *same* action as an original, timely pleading: the pleading sought to be amended may not be a pleading filed in a different case." (emphasis in original)); *Carter v. Tex. Dep't Health*, 119 Fed. Appx. 577, 581 (5th Cir. 2004) (for purposes of Federal Rule 15(c), an " 'original pleading' may not be a pleading filed in a different case"); *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270, 273 (3d Cir. 2003) ("We agree that Rule 15(c) does not permit a complaint filed in one civil action to relate back to a complaint filed in a separate civil action." (cleaned up)); *Bailey v. N. Ind. Pub. Serv. Co.*, 910 F.2d 406, 413 (7th Cir. 1990) (holding that a complaint filed in one civil action cannot relate back to a complaint filed in a separate civil action); *see also Turner v. Duke Univ.*, 325 N.C. 152, 164 (1989) ("Decisions under the federal rules are [ ] pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules.").

3. <u>Failure to State a Claim Upon Which Relief May Be Granted</u>

48. P3 separately argues that because Lineage's claims are grounded in contract, not tort, Republic's third-party claims for negligence, indemnity, and contribution must be dismissed.[65] The Court agrees.

49. First, the Court has already determined that Republic's negligence claim against P3 shall be dismissed on statute of limitations grounds. Even if the claim had survived that challenge, however, the Court agrees with P3[66] that Republic's failure to allege any underlying tortious injury or damages provides a separate ground for dismissal. *See, e.g., Parker v. Town of Erwin*, 243 N.C. App. 84, 110 (2015) (requiring that a negligence claim allege both that "the breach was the actual and proximate cause of the plaintiff's injury" and that "damages resulted from the injury" (quoting *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830 (2002))).

50. Moreover, while it is true that Republic will only be liable for breach of the indemnity provision in the Republic Subcontract if it is found to be negligent in connection with the Incident, Lineage's claims against Republic are in contract, not tort. And while Republic may defend against Lineage's contract claim by seeking to establish that it was not negligent (thereby avoiding liability on the contract claim), Republic's defense is a contract defense, not a basis to assert an independent negligence claim against P3. And since Republic's contribution claim is only available if Republic prevails on its negligence claim, that claim, too, must therefore be

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[65] (P3's Br. Supp. 13–16.)

[66] (P3's Br. Supp. 12–13.)

dismissed. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 470 (1989) ("[T]he right to contribution does not exist unless two or more parties are joint tortfeasors."). For each of these separate and independent reasons, Republic's negligence and contribution claims shall be dismissed.

51. Republic's indemnification claim fares no better. Republic frames the claim as "common law indemnification" and asserts that it is entitled to indemnity because "the damages alleged by Lineage were caused in whole or in part by the conduct of P3 Advantage, without any corresponding culpable conduct on the part of Republic."[67] P3 contends that this claim should be dismissed because Lineage's claims against Republic do not sound in tort, and in the absence of a tort claim, Republic cannot seek indemnification from P3.[68] The Court agrees with P3.

52. "In North Carolina, a party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law." *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 38 (2003). Republic does not allege an express contract or a contract implied-in-fact giving rise to a right to indemnity, so Republic's "common law" right to indemnity, if it exists at all, is based on a right to indemnity implied-in-law.

53. "For indemnification implied-in-law, more an equitable remedy than an action in and of itself, North Carolina law requires there be an underlying injury

[67] (P3's Br. Supp. 15.)

[68] (P3's Br. Supp. 15.)

sounding in tort. The party seeking indemnity must have imputed or derivative liability for the tortious conduct from which indemnity is sought." *Id.* at 41. Since there is no tort claim against Republic for which it seeks indemnity from P3, Republic's claim does not fit the "active-passive tort-feasor framework" required to state a claim for a right to indemnity implied-in-law. *See id.* at 47 (holding that "the parties do not fit the active-passive tort-feasor framework required to support an equitable right to indemnity implied-in-law" where the plaintiff's claim sought indemnification from a claim for breach of contract and not one sounding in tort). Since Republic failed to allege any of the three bases that permit it a right to indemnity, the Court will grant P3's Motion dismissing Republic's claim for indemnification.[69]

IV.

CONCLUSION

54. **WHEREFORE:**

a. The Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion to Strike as follows:

i. Lineage's Motion to Strike is **DENIED** as to Republic's "First Motion to Dismiss," but the Court will consider the purported

[69] Republic also raises an additional timeliness argument—contending that its claims for indemnity and contribution are timely because they did not accrue until Lineage sued Republic in January 2022. But as discussed above, claims for implied-in-law indemnity and contribution necessarily depend upon an underlying tort, and, here, Lineage has not asserted a tort claim against Republic. Therefore, Republic's accrual argument, even if correct, does not salvage its claims. *See Schenkel & Schultz, Inc.*, 180 N.C. App. at 268.

motion inoperative and take no action on it unless and until Republic files a motion in compliance with BCR 7.2. Lineage will retain all its available defenses to any such motion.

ii. Lineage's Motion to Strike is **GRANTED** as to Republic's third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth affirmative defenses, and those defenses shall be stricken **without prejudice**.[70]

iii. Lineage's Motion to Strike is **DENIED** as to Primus's third and fourth affirmative defenses.

iv. Lineage's Motion to Strike is **GRANTED** as to Primus's fifth and seventh affirmative defenses, and those defenses shall be stricken **without prejudice.**

v. Lineage's Motion to Strike is **GRANTED** as to Primus's eighth affirmative defense (unclean hands) to the extent that defense is asserted as a defense to Lineage's claims for past losses, and that defense shall be stricken to that extent **without prejudice**, but to the extent the defense is asserted as a defense to Lineage's claims for future losses, Lineage's Motion to Strike is **DENIED**.

b. The Court hereby **GRANTS** the Motion to Dismiss, and the Third-Party Complaint shall be **DISMISSED with prejudice**.

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[70] "When a court strikes a defense, the general practice is to grant the defendant leave to amend." *Nat'l Fin. Partners Corp.*, 2014 NCBC LEXIS 50, at *19 (quoting *Banks*, 2010 U.S. Dist. LEXIS 7501, at *3).

SO ORDERED, this the 23rd day of February, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge