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DISTRICT OF SOUTH CAROLINA

LARRY W. PROPES
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OFFICE OF THE CLERK
901 RICHLAND STREET
COLUMBIA, SOUTH CAROLINA 29201-2431
(803) 765-5816 FAX (803) 765-5960
www.scd.uscourts.gov

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August 19, 2013

Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Ashley II of Charleston LLC v. PCS Nitrogen, Inc., et al
Civil Action No.: 2:05-2782-MBS

Dear Mr. Shearouse:

Enclosed you will find a certified copy of an Order Certifying Questions of Law (Order for Certification) entered in the above-referenced case by the Honorable Margaret B. Seymour, Senior United States District Judge, on August 19, 2013.

Please do not hesitate to contact me at (803) 253-3921 should you have any questions or require any further information.

Very truly yours,
ROBIN L. BLUME, CLERK

Mary E. Deal

Mary E. Deal,
Deputy Clerk

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Ashley II of Charleston, L.L.C., Plaintiff, vs. PCS Nitrogen, Inc., Defendant/Third-Party Plaintiff, vs. Ross Development Corporation; Koninklijke DSM N.V.; DSM Chemicals of North America, Inc.; James H. Holcombe; J. Holcombe Enterprises, L.P.; J. Henry Fair, Jr.; Allwaste Tank Cleaning, Inc.; Robin Hood Container Express; and the City of Charleston, Third-Party Defendants.	Civil Action No. 2:05-2782-MBS **ORDER OF CERTIFICATION**

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SOUTH CAROLINA SUPREME COURT

This case arises out of the clean-up and remediation of the Columbia Nitrogen Site ("the Site"), a 43-acre parcel of land in Charleston, South Carolina, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The matter is before the court due to a dispute between PCS Nitrogen, Inc. ("PCS") and Ross Development Corporation ("Ross")—each partially responsible for the environmental harm to the Site—over the interpretation of an indemnification agreement. PCS contends that it is entitled under the agreement to recover from Ross the costs and expenses incurred litigating the matter. The dispute raises a

question of law, the answer to which is potentially dispositive and does not appear to be controlled by any precedent of the South Carolina Supreme Court.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On July 16, 2008, Ashley II of Charleston, L.L.C. ("Ashley") filed an amended complaint against PCS seeking a declaration of joint and several liability under CERCLA § 107 for environmental response costs at the Site. ECF No. 209. On August 4, 2008, PCS filed an amended answer and counterclaim. ECF No. 226. PCS asserted contribution claims under CERCLA § 113(f) against Ross and other parties alleging that they are potentially responsible parties. *Id.* PCS also asserted a claim against Ross for indemnification based on contract. *Id.*

On May 27, 2011, after a bench trial, the court issued a Second Amended Order in which a detailed recitation of the facts of this case can be found. ECF No. 627. The following findings of fact are pertinent here. Ross was formerly known as Planters Fertilizer & Phosphate Company ("Planters") and PCS is the successor-in-interest to Columbia Nitrogen Corporation ("CNC").[1] *Id.* at 3 & 9. Ross owned the Site from 1906 to 1966 and operated a phosphate fertilizer manufacturing facility on the Site during this time. *Id.* at 9. Ross's activities generated pyrite slag as a waste product, which is the source of a vast majority of the arsenic and much of the lead contamination at the site, as well as the high acidity. *Id.* at 12.

In 1966, Ross sold the Site to PCS. *Id.* at 14-15. The agreement to sell the Site included an indemnification provision stating:

> [Ross] agrees to indemnify and hold harmless [PCS] in respect to all acts, suits, demands, assessments, pr[o]ce[e]dings and cost and expenses resulting from any acts or omission[s] of [Ross] occurring prior to the closing date and pertaining herein,

[1] For the sake of simplicity, Ross and Planters will be collectively referred to as "Ross," and PCS and CNC will be collectively referred to as "PCS."

> provided [Ross] receives prompt notice in writing of such claims or demand and [Ross] shall have the right to litigate or contest such claim.

Id. at 14.

PCS owned the Site from 1966 to 1985 and operated a fertilizer granulation plant on the Site between 1966 and 1972, as well as an acid plant between 1966 and 1970. *Id.* at 9 & 17. PCS's activities caused arsenic, lead, and acid contamination at the Site. *Id.* at 17-19. Also, between 1971 and 1981, PCS performed various demolition activities on the Site that significantly disturbed the contaminated soils. *Id.* at 21-23.

In the Second Amended Order, the court held that PCS is jointly and severally liable for the harm, and that PCS is liable to Ashley for response costs pursuant to CERCLA § 107(a)(2). *Id.* at 121. The court directed entry of judgment for Ashley in the amount of $147,617.02 plus interest against PCS and declared that PCS would be liable to Ashley for 76% of future response costs. *Id.* The court also directed entry of judgment for PCS in the amount of $87,404.82 plus interest against Ross and in the amount of $1,942.32 plus interest against Robin Hood Container Express ("RHCE"). *Id.* The court declared that Ross would be liable to PCS for 45% of future response costs, and that RHCE would be liable to PCS for 1% of future response costs. *Id.* Finally, the court declared that PCS is entitled to reimbursement from Ross for PCS's costs and expenses in this litigation resulting from any acts or omissions of Ross that occurred prior to the sale of the Site to PCS. *Id.*

On June 14, 2011, PCS filed a motion for a determination of damages, requesting that the court establish a procedure to determine the amount owed by Ross to PCS under the terms of the indemnity contract. ECF No. 631. On February 24, 2012, the court issued an order holding that PCS is entitled to recover from Ross 45% of the attorney's fees, costs, and expenses that PCS spent

litigating this case. ECF No. 692. On January 15, 2013, the court issued an order vacating the February 2012 order. ECF No. 705. The court held a status conference on February 4, 2013, at which the parties agreed to submit supplemental briefing to assist the court in delineating which of PCS's litigation costs and expenses are covered under the terms of the indemnity contract. In reviewing the parties' briefs, ECF Nos. 710, 715 & 722, the court discerned a novel question of state law.

II. DISCUSSION

The question the court certifies is one of contract interpretation and controlled by South Carolina law.[2]

At the outset, the court recognizes that the trial record does not establish that remediation of the site would have been required based on Ross's conduct alone. Although most of the contamination at the Site was deposited by Ross, the subsequent actions of PCS and others, over a forty-year period, created new pollution and spread the existing pollution throughout the Site. In part because of post-1966 activity, EPA designated the Site a Superfund site. It cannot be said that PCS incurred certain litigation expenses because of Ross's conduct rather than its own, nor can it be said that the reverse is true, as all PCS's litigation expenses are jointly attributable to the acts and omissions of PCS and Ross, which acts together led to the Site's Superfund designation.

[1] In *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212 (3d Cir. 1993), the Third Circuit Court of Appeals held that state law controls the construction of indemnification contracts that affect CERCLA liability, recognizing that "[a]ll of the courts of appeals that have considered developing a federal rule of decision appear to have decided it is better to look to state law in interpreting or construing a contract's indemnification provisions vis-à-vis CERCLA." *Id.* (citing *John S. Boyd, Co. v. Boston Gas. Co.*, 992 F.2d 401, 406 (1st Cir. 1993); *Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986)); *see also United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 652 (7th Cir. 1998) ("It is well-established that state law determines the rules of contract interpretation, even in the context of CERCLA.").

Ross argues that the indemnity contract language should not be read to mean that costs jointly attributable to PCS's and Ross's actions are recoverable, as the indemnity contract does not expressly indemnify PCS, the indemnitee, for losses resulting from its own negligence. Ross's position relies on the interpretive rule that an indemnity contract will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. *See Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 584 S.E.2d 375, 378-79 (S.C. 2003) (citing *Fed. Pac. Elec. v. Carolina Prod. Enter.*, 378 S.E.2d 56 (S.C. Ct. App. 1989)). However, CERCLA is a strict liability statute, and the court has made no finding of fault in this case. Although the losses PCS incurred are partially the consequence of its own conduct, PCS correctly asserts that those losses are not the result of its own negligence. The question the parties have raised is whether the rule that courts are to construe indemnity contracts against providing for the indemnification of negligent indemnitees applies when an entity seeks contractual indemnification for its own strict liability conduct. The court finds no South Carolina authority extending the interpretive rule of "clear and unequivocal" expression to contractual indemnification for the indemnitee's own strict liability conduct.

III. CERTIFIED QUESTION

South Carolina Rule of Appellate Procedure 244 provides that the South Carolina Supreme Court in its discretion may answer questions of law certified to it by a federal court "if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of" the South Carolina Supreme Court.

Certification of a question of state law is appropriate when the federal tribunal is required

to address a novel issue of local law which is determinative in the case before it. *Grattam v. Board of School Comm'rs*, 805 F.2d 1160, 1164 (4th Cir. 1986). Therefore, the court certifies the following question to the South Carolina Supreme Court:

> Does the rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts, unless such intention is expressed in clear and unequivocal terms, apply when the indemnitee seeks contractual indemnification for costs and expenses resulting in part from its own strict liability acts?

IT IS SO ORDERED.

/s/ Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina

August 19, 2013

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

BY: Mary E. Deal
DEPUTY CLERK