



January 23, 2014

**VIA UPS NEXT DAY AIR**

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Clerk of Court  
Supreme Court of South Carolina  
1231 Gervais St.  
Columbia, SC 29201

**Re: *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc. v. Ross Development Corp. et al.*, Appellate Case No. 2013-001766.**

Dear Clerk of Court:

Pursuant to Rule 244(d) and Rule 211(a), please find enclosed 15 copies of the Reply Brief of PCS Nitrogen, Inc. in the above captioned case. Rule 244(d), SCACR; Rule 211(a), SCACR. Also enclosed is one additional copy of the brief that can be file-stamped and returned to Wm. Howell Morrison, Esq., at Haynsworth, Sinkler & Boyd, P.A., using the enclosed envelope, which has been addressed to Mr. Morrison with postage pre-paid.

If any questions arise with regard to this filing, please contact Mr. Morrison at (843) 720-4405.

Sincerely,

COZEN O'CONNOR

By: Kelli E. Hall  
Paralegal

Enclosures

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JAN 24 2014

**S.C. SUPREME COURT**

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JAN 24 2014

Appellate Case No. 2013-001766

**S.C. SUPREME COURT**

Ashley II Of Charleston, L.L.C., ..... Plaintiff,

v.

PCS Nitrogen, Inc., ..... Defendant/Third-Party Plaintiff,

v.

Ross Development Corporation, Koninklijke DSM N.V., DSM Chemicals of  
North America, Inc., James H. Holcombe, and J. Holcombe Enterprises, L.P. ,  
J. Henry Fair, Jr., Allwaste Tank Cleaning, Robin Hood Container Express,  
and The City Of Charleston, ..... Third-Party Defendants.

REPLY BRIEF ON CERTIFIED QUESTION OF DEFENDANT/THIRD-PARTY  
PLAINTIFF

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**TABLE OF CONTENTS**

	<b>Page</b>
I. THE JOINT TORTFEASOR RULE IS NOT RELEVANT TO THE CERTIFIED QUESTION BECAUSE IT APPLIES TO EQUITABLE CLAIMS, AND NOT CONTRACTUAL INDEMNIFICATION CLAIMS. ....	4
A. The District Court Already Found The Joint Tortfeasor Rule Does Not Apply Here And Has Not Sought This Court’s Input On That Decision.....	4
B. Equitable Concerns That Gave Rise To The Joint Tortfeasor Rule Are Not Relevant To The Question Of Contract Interpretation Before This Court. ....	6
C. Ross’s Efforts To Draw A Comparison Between Joint Tortfeasors Under The Common Law and CNC Fail Because Liability Under CERCLA Is Strict. ....	9
II. ROSS’S ARGUMENTS AGAINST INDEMNIFICATION MISSTATE LEGAL PRINCIPLES RELEVANT TO THE CERTIFIED QUESTION.....	12
A. No Rule Of South Carolina Law Requires The Letter Agreement To Be Interpreted Against The Indemnitee.....	12
B. The Use Of Broad and Comprehensive Terms In An Indemnification Provision Convey Clear and Unequivocal Intent To Indemnify. ....	14
C. The Parties To The Letter Agreement Had Ample Reason To Negotiate Indemnification For Liability Arising From Ross’s Site Operations.....	17
III. THE DISTRICT COURT FOUND THAT PCS WAS INDEMNIFIED FOR LITIGATION COSTS AND EXPENSES RESULTING FROM ROSS’S ACTS AND OMISSIONS. ....	22

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Addy v. Bolton</i> , 257 S.C. 28, 183 S.E.2d 708 (S.C. 1971) .....	7
<i>Andrade v. Johnson</i> , 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001).....	13, 14, 19
<i>Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.</i> , 791 F. Supp. 2d 431 (D.S.C. 2011).....	<i>passim</i>
<i>Atlantic Coast Line R.R. Co. v. Whetstone</i> , 243 S.C. 61, 132 S.E.2d 172 (S.C. 1963) .....	7, 19
<i>Beazer East, Inc. v. Mead Corp.</i> , 34 F.3d 206 (3d Cir. 1994).....	16
<i>Carlsen v. Global Client Solutions, LLC</i> , 171 Wash.2d 486, 256 P.3d 321 (Wash. 2011) .....	5
<i>Chrysler Corp. v. Ford Motor Corp.</i> , 972 F. Supp. 1097 (E.D. Mich. 1997).....	21, 22
<i>City of Gallatin v. Cherokee County</i> , 563 F. Supp. 940 (D. Tex. 1983) .....	20
<i>Cray v. Deloitte Haskins &amp; Sells</i> , 925 P.2d 60 (Okla. 1996).....	4
<i>Davis v. Four Seasons Hotel Ltd.</i> , 122 Hawai'i 423, 228 P.3d 303 (Hawaii 2010).....	5
<i>Environmental Defense Fund, Inc. v. Costle</i> , 657 F.2d 275 (D.C. Cir. 1981).....	20
<i>Fed. Pac. Elec. v. Carolina Prod. Enterprises</i> , 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989).....	13
<i>Fina v. ARCO</i> , 200 F.3d 266 (5th Cir. 2000) .....	15
<i>Frost v. Berkeley Phosphate Co.</i> , 42 S.C. 402, 20 S.E. 280 (S.C. 1894) .....	20

<i>Haley v. University of Tennessee-Knoxville</i> , 188 S.W.3d 518 (Tenn. 2006).....	5
<i>Henry-Davenport v. School Dist. of Fairfield County</i> , 391 S.C. 85, 705 S.E.2d 26 (S.C. 2011) .....	5
<i>Jones-Hamilton Co. v. Kop-Coat, Inc.</i> , 750 F.Supp. 1022 (N.D. Cal. 1990).....	18, 19
<i>Joslyn Mfg. Co. v. Koppers Co., Inc.</i> , 40 F.3d 750 (5th Cir. 1994) .....	17
<i>Kerr-McGee Chemical Corp. v. Lefton Iron &amp; Metal Co.</i> ; 14 F.3d 321 (7th Cir. 1994) .....	<i>passim</i>
<i>Laurens Emergency Med. Specialists, PA v. M.S. Bailey &amp; Sons Bankers</i> , 355 S.C. 104, 584 S.E.2d. 375 (S.C. 2003).....	1, 13, 14
<i>Marrogi v. Howard</i> , 805 So.2d 1118 (La. 2002) .....	5
<i>McCain Mfg. Corp. v. Rockwell Intern Corp.</i> , 695 F.2d 803 (4th Cir. 1982) .....	7
<i>Municipal Ass'n of South Carolina v. AT &amp; T Communications of the Southern States, Inc.</i> , 361 S.C. 576, 606 S.E.2d 468 (S.C. 2004) .....	5
<i>Murray v. Texas</i> , 172 S.C. 399, 174 S.E. 231 (1934) .....	13, 17, 19
<i>N.C. Elec. Power Co. v. French Broad Mfg. Co.</i> , 180 N.C. 597, 105 S.E. 394 (N.C. 1920).....	7
<i>Nat'l Union Fire Ins. Co. v. Wuerth</i> , 122 Ohio St. 3d 594, 913 N.E.2d 939 (Ohio 2009) .....	5
<i>Nurad, Inc. v. William E. Hooper &amp; Sons Co.</i> , 966 F.2d 837 (4th Cir. 1992) .....	10
<i>Peck v. AT &amp; T Mobility</i> , 174 Wash.2d 333, 275 P.3d 304 (2000).....	5
<i>Rodenbeck v. Marathon Petroleum Co.</i> , 742 F. Supp. 1448 (N.D. Ind. 1990) .....	17
<i>Scott by McClure v. Fruehauf Corp.</i> , 302 S.C. 364, 396 S.E.2d 354 (S.C. 1990) .....	8

<i>South Carolina Electric &amp; Gas Co. v. Utilities Construction Co.</i> , 244 S.C. 79, 135 S.E.2d 613 (S.C. 1964) .....	7, 13
<i>State v. American Agr. Chemical Co.</i> , 118 S.C. 333, 110 S.E. 800 (S.C. 1922) .....	20
<i>State v. American Agricultural Chemical Co.</i> , 125 S.C. 270, 118 S.E. 535 (S.C. 1923) .....	20
<i>The President Coolidge</i> , 101 F.2d 638 (9th Cir. 1939) .....	20
<i>Town of Winnsboro v. Wiedeman-Singleton, Inc.</i> , 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992) .....	8, 14
<i>Train v. Natural Resources Defense Council, Inc.</i> , 421 U.S. 60 (1975) .....	21
<i>United States v. American Cyanamid Co.</i> , 354 F. Supp. 1202 (D.N.Y. 1973) .....	20
<i>United States v. Bishop Processing Co.</i> , 287 F.Supp. 624 (D. Md. 1968) .....	21
<i>United States v. Hardage</i> , 985 F.2d 1427 (10th Cir. 1993) .....	16, 17
<i>United States v. Hollis</i> , 424 F.2d 188 (4th Cir. 1970) .....	13
<i>United States v. Seckinger</i> , 397 U.S. 203 (1970) .....	13
<i>United States v. Standard Oil Co.</i> , 384 U.S. 224 (1966) .....	21
<i>Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.</i> , 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999) .....	7, 8
<b>Statutes</b>	
33 U.S.C. §411 .....	20
CERCLA Section 107 .....	<i>passim</i>
CERCLA Section 113 .....	10, 11
Clean Air Act of 1963 .....	20

Contribution Among Tortfeasors Act (“UCATA”).....	14
Federal Rivers and Harbors Act, 33 U.S.C. §407.....	20
Illinois Pollution Act.....	18
Solid Waste Disposal Act of 1965.....	20
Water Quality Act of 1965.....	20
<b>Other Authorities</b>	
Rule 59, Fed. R. Civ. P. ....	1
Rule 244, SCACR.....	2, 4, 5

## ARGUMENT

The district court has sought this Court's assistance with a question of contract interpretation. In *Laurens Emer. Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d. 375 (S.C. 2003), this Court affirmed "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." (Entry 749 at 5.)<sup>1</sup> The district court's question to this Court is whether that rule should be expanded to encompass claims for indemnification for loss that results, in part, from an indemnitee's strict liability acts. (*Id.*)

Ross does not provide a basis for expanding the negligence rule in that manner. Ross's primary argument to this Court is that PCS cannot obtain indemnification from Ross because, with Ross, it is jointly responsible for the contamination at the Columbia Nitrogen Superfund Site ("Site"). According to Ross, under South Carolina law, joint tortfeasors are not entitled to indemnification. (Ross Opp. Br. at 14-16.) Ross's argument fails for several reasons.

First, the district court has already held that South Carolina's joint tortfeasor rule has no bearing on PCS's indemnification claim, and the court's decision on that matter is not before this Court. After judgment was entered in favor of PCS on its indemnification claim, Ross filed a motion under Rule 59 of the Federal Rules of Civil Procedure, asking the court to void its judgment on the same grounds presented here. (Entry 694.) The district court found that South Carolina's joint tortfeasor rule, which is set forth in the case law cited by Ross, governs equitable indemnification claims and does not apply to

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<sup>1</sup> Citations to "Entry" refer to numbered docket entries in the district court docket in *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, Case No. 2:05-cv-02782-MBS (D.S.C.). The entries are available at <http://www.scd.uscourts.gov>.

PCS's contractual indemnification claim. (Entry 705.) The district court has not asked this Court for assistance with that South Carolina doctrine. Further consideration of Ross's argument here is beyond this Court's authority in certification proceedings, as it would have the effect of reopening the federal court's judgment. Rule 244(a), SCACR.

Second, if this Court were to consider Ross's argument, it would find that the joint tortfeasor rule does not provide guidance on the certified question. This rule addresses concerns that arise when a court uses its equitable authority to grant indemnification rights. Equitable considerations dictate that the party given rights by the court cannot bear any responsibility for the loss for which it seeks indemnification. That concern is distinct from any concerns that are applicable to the question of contract interpretation that is before this Court. When indemnification rights are created by an agreement, it is the terms of that agreement that dictate whether an indemnitee must prove that its own conduct did not contribute to the losses that are the basis of its claim. As such, it is the parties' agreement that determines the scope of the indemnitee's rights, and not, as Ross suggests, equitable considerations.

Third, Ross is incorrect when it argues that parties found liable under CERCLA are responsible for the losses that arise from CERCLA liability, such as the litigation costs and expenses that PCS seeks to recover. Liability under CERCLA is not imposed on a defendant for failing to act with due care. While in this particular case, the district court found that both Ross and PCS disposed of lead and arsenic at the Site at issue, the specific facts of this case should not and do not drive resolution of a question of South Carolina law that will apply generally to all future litigants. What is important to that question are the contours of CERCLA's liability scheme. As PCS explained in its opening brief, CERCLA imposes liability on former site owners and operators without

regard for whether they themselves are responsible for the disposal of hazardous substances. (PCS Br. at 12-18.) Thus, liability is imposed under CERCLA without regard to whether a defendant caused actual harm. For that additional reason, fault-based doctrines like the joint tortfeasor rule are inapplicable to the question presented here.

Ross also urges the Court to deny PCS indemnification on other bases including that provisions of South Carolina law require the Court to interpret the Letter Agreement narrowly to exclude indemnification for CERCLA claims. According to Ross, cases that gave rise to the negligence rule require all indemnification agreements to be construed against indemnification, and, under that rule, PCS cannot be indemnified given that the Letter Agreement does not specifically reference “CERCLA,” and the statute could not have been anticipated when the agreement was executed. (Ross. Opp. Br. at 13-14, 16-20.) Ross’s argument misconstrues the law. The negligence rule cases do not establish a general rule of South Carolina law that requires strict interpretation of all indemnification agreements. The cases govern claims for indemnification of an indemnitee’s negligence and the question before this Court is whether it makes sense to expand the negligence rule to claims for indemnification for loss arising from an indemnitee’s strict liability acts. For the reasons set forth in PCS’s opening brief, expanding the rule to CERCLA claims would not serve the rule’s purpose of deterrence. (PCS Br. at 17-19.) Assuming that the rule is applied here, contrary to what Ross suggests, it does not have to be applied in a manner that requires express reference to “CERCLA,” which would, of course, prohibit indemnification for CERCLA claims in any pre-CERCLA indemnification agreement. Indeed, the circumstances surrounding execution of the Letter Agreement demonstrate why the Ross and CNC had every incentive to allocate financial responsibility for strict liability claims in the general terms used in their agreement.

Finally, Ross asks the Court to deny PCS indemnification for litigation costs and fees on the grounds that the Letter Agreement does not expressly authorize PCS's recovery of attorneys' fees and South Carolina law does not authorize second-party claims. (Ross Opp. Br. at 22-23.) In making those arguments, Ross disregards the fact that the district court already entered judgment in favor of PCS, granting it indemnification for litigation costs and expenses. The question before this Court is intended to assist the district court in quantifying the fees due to PCS, not to reopen the court's judgment. As set forth in PCS's opening brief, PCS's recovery of attorneys' fees is well supported by South Carolina law. (PCS Br. at 22-23.) Moreover, with regard to the facts at issue, Ross misconstrues the nature of PCS's indemnification claim. PCS seeks to recover fees and expenses that it incurred when it was sued by Ashley II of Charleston, LLC under CERCLA Section 107, and not fees and expenses incurred pursuing its indemnification claim against Ross.

**I. THE JOINT TORTFEASOR RULE IS NOT RELEVANT TO THE CERTIFIED QUESTION BECAUSE IT APPLIES TO EQUITABLE CLAIMS, AND NOT CONTRACTUAL INDEMNIFICATION CLAIMS.**

**A. The District Court Already Found The Joint Tortfeasor Rule Does Not Apply Here And Has Not Sought This Court's Input On That Decision.**

Under Rule 244 of the South Carolina Rules of Appellate Procedure, this Court has the authority to answer a question of South Carolina law submitted to it by the district court. *See* Rule 244(a), SCACR. That is the Court's only role.

The Court is careful not to adjudicate the claims in the case, because, if it were to do so, it would upset the balance of power between the district court and this Court.<sup>2</sup>

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<sup>2</sup> *See generally Cray v. Deloitte Haskins & Sells*, 925 P.2d 60, 62 (Okla.1996) ("Where the question certified has been adjudicated by the certifying federal trial court, jurisdiction to review the trial court's ruling ultimately lies with the federal appellate

Indeed, in responding to the certified question, the Court does not even apply its answer to the facts of the case. Instead, it refers the answer back to the district court for that court's consideration. *See, e.g., Henry-Davenport v. School Dist. of Fairfield County*, 391 S.C. 85, 705 S.E.2d 26 (2011) (answering certified question and referring answer back to district court for its consideration). Similarly, the Court does not address legal issues that are beyond the certified question because to do so would intrude too far into claims that are before the district court. *Mun. Ass'n of South Carolina v. AT & T Commc'ns of the Southern States, Inc.*, 361 S.C. 576, 580-81, 606 S.E.2d 468, 471 (2004) ("We also note that although the issues of reasonableness and constitutionality of such a fine are apparently at issue in this case, we are limited to answering only the certified question before us.").<sup>3</sup>

Disregarding the dictates of Rule 244, Ross urges this Court to deny PCS indemnification on the grounds that South Carolina's joint tortfeasor rule bars PCS's claim. In Ross's view, because both Ross and PCS contributed to the harm at the Site, they are joint tortfeasors, and South Carolina law prohibits joint tortfeasors from seeking indemnification from one another. (PCS Opp. Br. at 14-16.)

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court."); *Marrogi v. Howard*, 805 So.2d 1118, 1123 (La. 2002) (declining to review issue of personal jurisdiction already decided by federal court).

<sup>3</sup> *See generally Peck v. AT & T Mobility*, 174 Wash.2d 333, 275 P.3d 304 (2000) ("Applying the legal principles announced by this court when answering a certified question from a federal court is a matter for that federal court, which retains jurisdiction over all matters except the local question that is certified."); *Haley v. Univ. of Tennessee-Knoxville*, 188 S.W.3d 518, 522 (Tenn. 2006) ("Answering a certified question does not finally dispose of the cause; it merely informs the district court, which retains jurisdiction over the cause, how to interpret the state law at issue."); *Carlsen v. Global Client Solutions, LLC*, 171 Wash.2d 486, 495, 256 P.3d 321, 325 n.2 (2011) (declining to address issue beyond scope of certified question); *Davis v. Four Seasons Hotel Ltd.*, 122 Hawai'i 423, 428, 228 P.3d 303, 308 n.12 (2010) (same); *Nat'l Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 601, 913 N.E.2d 939, 946 n.3 (2009) (same).

Ross made exactly the same argument citing many of the same cases that appear in its brief to the district court, (Entry 694-1 at 10-11), and the court held that the joint tortfeasor rule only applies to claims for equitable indemnification and is inapplicable here. (Entry 705 at 8) (“[T]he joint tortfeasor rule is not a principle of contract law but rather a limitation on the right to equitable indemnification. As such it does not apply.”). Ross’s arguments have already been rejected by the district court and should not be considered in this proceeding.

**B. Equitable Concerns That Gave Rise To The Joint Tortfeasor Rule Are Not Relevant To The Question Of Contract Interpretation Before This Court.**

If the Court disagrees and finds that it has the authority to consider Ross’s argument regarding the joint tortfeasor rule, it should find the rule irrelevant to the certified question. Ross cites broad language from joint tortfeasor rule case law out of context to suggest that as a general matter “joint tortfeasors are *not* entitled to contractual or equitable indemnification” (Ross Opp. Br. at 14) (emphasis in original), but in doing so, Ross misstates South Carolina law. As discussed above, the district court has examined this issue, and found the doctrine only applies to equitable indemnification claims. (Entry 705.)

Ross points out here, as it did to the district court, that in *Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) this Court held that indemnification for “reasonable attorneys’ fees” is proper “where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury[.]” (*Compare* Ross Opp. Br. at 14-15 *with* Entry 694-1 at 10.)

As the district court found, that statement in *Addy* does not create a rule of law in South Carolina that joint tortfeasors should be denied the right to make contractual

indemnification claims. (Entry 705 at 7-10.) First, as the district court found, when it considered this issue, *Addy* itself involved only an equitable indemnification claim, and in its decision, the Court does not cite any authority in support of the proposition that the joint tortfeasor rule should be applied to contractual indemnification claims. “The authorities upon which the *Addy* court relied stand for the rule that there is no indemnity among at-fault parties under equitable principles, not that indemnification contracts are unenforceable if they attempt to allocate risk between at-fault parties.” (*Id.* at 9.) The cases cited by this Court in *Addy*—*Atlantic Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963) and *N.C. Elec. Power Co. v. French Broad Mfg. Co.*, 180 N.C. 597, 105 S.E. 394 (1920), *Addy*, 257 S.C. at 34, 183 S.E.2d at 710—involved equitable and not contractual indemnification claims. (*Id.*)

Second, as the district court observed, in *South Carolina Elec. & Gas Co. v. Util. Constr. Co.*, 244 S.C. 79, 135 S.E.2d 613 (1964), a case not discussed in *Addy*, this Court expressly limited the scope of the joint tortfeasor rule. (*Id.*) In *South Carolina Elec. & Gas Co.*, this Court considered whether the joint tortfeasor rule articulated in *Whetstone* governed a contractual indemnification claim. The Court found *Whetstone* “not at all controlling.” *Id.* at 88, 617. *Whetstone* articulates rules that govern “in cases where there was no contractual or legal relationship exists among tortfeasors.” *Id.* at 87-88, 616-17. *See also McCain Mfg. Corp. v. Rockwell Intern Corp.*, 695 F.2d 803, 805 (4th Cir. 1982) (finding that in *South Carolina Elec. & Gas Co.* this Court “held that the *Whetstone* decision is not applicable in cases where a contractual or legal relationship exists between joint tortfeasors”). (Entry 705 at 9.)

Case law cited by Ross is not to the contrary and does not support disturbing the district court’s decision that the joint tortfeasor rule does not apply here. *Vermeer*

*Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (S.C. Ct. App. 1999); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992); and *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990) (Ross Opp. Br. at 14-15), all address application of the joint tortfeasor rule to equitable indemnification claims. Indeed, in *Vermeer*, the South Carolina Court of Appeals noted “[w]ith certitude” that “this case does not involve any application or analysis of contractual indemnity.” 336 S.C. at 63, 518 S.E.2d at 307. And in *Scott by McClure*, this Court “hold[s] *common law indemnification* does not apply among joint tortfeasors.” 302 S.C. at 371, 396 S.E.2d at 358 (emphasis added). The “principle” that Ross characterizes as generally applicable to all indemnification claims, in fact, only applies to equitable indemnification claims.

Thus, this Court should reject Ross’s suggestion that the negligence rule should reach losses arising from strict liability acts simply because the joint tortfeasor rule applies to losses arising from such acts. Concerns specific to claims arising in equity caused this Court to apply the joint tortfeasor rule to strict liability acts in *Scott by McClure*. Equitable indemnification is allowed when a third party sues an indemnitee to redress harm that was actually caused by the indemnitor:

For a party to recover under a theory of equitable indemnification, three things must be proven: (1) the indemnitor was liable for causing the [third party’s] damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the [third party’s] claims against it which were eventually proven to be the fault of the indemnitor.

*Vermeer Carolina's, Inc.*, 336 S.C. at 63, 518 S.E.2d at 307. If the indemnitee also caused the harm, then the indemnitee cannot qualify for equitable indemnification. “[H]e comes to the court without equity and has no right to indemnity.” *Id.* Because equitable considerations are the source of the legal right, “[t]he most important requirement for the

finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.” *Id.*

Those concerns are irrelevant when indemnification is sought under the terms of an agreement. A party seeking equitable indemnification asks the court to find that equity gives rise to such a right. But that is not the posture of a party seeking the court’s assistance in enforcing a contract. The right to contractual indemnification arises from the terms of the agreement. The court’s role is limited to considering how to best give effect to the parties’ intent and the allocation of risk reflected in the agreement’s terms.

**C. Ross’s Efforts To Draw A Comparison Between Joint Tortfeasors Under The Common Law and CNC Fail Because Liability Under CERCLA Is Strict.**

Ross seems intent on shoe-horning the joint tortfeasor line of decisions into this proceeding, despite their irrelevance. Ross does so to try to attribute significance to the fact that PCS’s predecessor, CNC, disposed of some lead and arsenic contamination at the Superfund site at issue. That fact is irrelevant to the certified question.

Contrary to what Ross suggests, for the former owners and operators of a Site to be held jointly and severally liable under CERCLA, it is not necessary that they engage in any “[c]onduct causing contamination.” (Ross Opp. Br. at 18.) As PCS explained at length in its opening brief, under CERCLA Section 107(a)(2), 42 U.S.C. § 9607(a)(2), an entity that owned or operated a Site when a hazardous substance was “disposed of” at the Site can be held strictly liable for all costs incurred remediating that property. (PCS Br. at 14-15.) Because CERCLA defines the term “disposal” so broadly, liability is imposed even if the owner or operator was not responsible for or not aware a disposal of hazardous substances occurred. (*Id.* at 14.) The mere passive migration of contaminants

through the soil can be the basis of joint and several liability. (*Id.* (citing *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992).)

The fact that the district court allocated a 30% share of response costs to PCS based on its predecessor's conduct does not mean that liability is imposed under CERCLA based on fault. Under CERCLA Section 113, a court quantifies the amount of costs that each liable party must bear. First, however, a party must be found liable, as is relevant here, under Section 107. The allocation of costs presupposes that liability determination, which turns on a defendant's status as a former site owner or operator. (PCS Br. at 16.)

In this case, for example, the district court determined whether each party was a CERCLA liable party under CERCLA Section 107 before determining the amount of response costs each liable party should bear. Beginning its analysis, the court noted that a Section 113 claim required proof "1) that the defendant is a responsible party under §107(a) of CERCLA; and 2) the defendant's equitable share of costs." *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 490 (D.S.C. 2011). Thus, in considering Ross's liability, the court first determined that Ross was a liable party under Section 107(a)(2):

As was previously noted, the categories of responsible parties include "any [party] who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Planters was the owner and operator of the fertilizer plant on the Site from 1906-1966. The evidence in this case shows that Planters disposed of hazardous wastes on the Site when it dumped pyrite slag on the Site and cleaned out the lead acid chambers.

*Id.* at 491. Only after finding Ross to be a liable party did the Court then allocate responsibility for response costs to Ross based on equitable considerations. After making 25 separate factual findings, (*Id.* at ¶¶ 29-54), the district court allocated a share of

response costs to Ross based on its conduct at the Site and actions taken by its directors. (*Id.* at 492, 502.)

This Court's answer to the certified question should not turn on the facts in this particular case. The district court found that both PCS's predecessor, CNC, and Ross owned and operated the Site during the time that a disposal of hazardous substances occurred and that CNC and Ross both disposed of hazardous substances at the Site. (*Id.* at 492.)<sup>4</sup> But, as the district court recognized "the court has made no finding of fault" in the CERCLA litigation. (Entry 749 at 5.) Moreover, this Court is not adjudicating PCS's claim, but rather establishing a rule of South Carolina law that will be applied beyond this case and govern claims for contractual indemnification made by any CERCLA liable indemnitee. To establish that rule, the Court must consider relevant legal principles including the CERCLA liability scheme, and cannot be limited, in its analysis by the facts at issue in this particular case.

For the same reason, the district court's comments on Site contamination, relied on so heavily by Ross in its brief, do not have the significance that Ross attributes to them. According to Ross, when the district court stated in its certification order that "all PCS's litigation expenses are jointly attributable to the acts and omissions of PCS and Ross," (*id.* at 4), the district court meant that PCS and Ross share a "common liability," and under the joint tortfeasor rule, PCS cannot be indemnified for that liability. (Ross Opp. Br. at 16.) Setting aside the fact that the joint tortfeasor rule does not apply here, the statement has been taken out of context and attributed evidentiary significance that it

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<sup>4</sup> The allocation of costs to Ross under CERCLA Section 113 does not relieve PCS of its joint and several liability under CERCLA Section 107. The fact that Ross was found responsible for a 45% share of costs means that PCS can seek a 45% contribution to costs from Ross. If Ross does not pay its share of costs, then PCS remains liable for those costs.

lacks. The district court's comment was only directed to the fact that Ross and CNC's "acts together led to the [Columbia Nitrogen] Site's Superfund designation." (Entry 749 at 4.) That is not relevant to the broader question of South Carolina law that is before the Court as it does not address how liability is imposed by CERCLA.

Importantly, Ross also suggests repeatedly and wrongly in its brief that PCS seeks indemnification for the 30% of response costs allocated to it by the district court. (Ross. Opp. Br. at 21-22.) To the contrary, PCS only seeks reimbursement from Ross for the 45% share of response costs allocated to Ross based on its sixty years of fertilizer operations. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d at 492. Pursuant to the terms of the Letter Agreement, PCS seeks to be indemnified for those costs because they "result[] from" Ross's acts and omissions.

## **II. ROSS'S ARGUMENTS AGAINST INDEMNIFICATION MISSTATE LEGAL PRINCIPLES RELEVANT TO THE CERTIFIED QUESTION.**

Ross's second argument to this Court is that under South Carolina law, the Letter Agreement must be interpreted against an indemnitee. According to Ross, such a rule would require PCS's claim to be denied because the Letter Agreement does not expressly reference "CERCLA" and the parties to the agreement could not have anticipated the statute. Ross's arguments misconstrue the relevant legal principles and the circumstances under which the Letter Agreement was executed.

### **A. No Rule Of South Carolina Law Requires The Letter Agreement To Be Interpreted Against The Indemnitee.**

Urging the Court to find the terms of the Letter Agreement do not establish a right to indemnification for CERCLA claims—an issue the district court already decided—Ross argues that South Carolina law requires all indemnification agreements to be construed against the indemnitee. But as PCS explained in its opening brief, the cases

that Ross cites for that proposition—*Murray v. Texas*, 172 S.C. 399, 174 S.E. 231 (1934) and *Fed. Pac. Elec. v. Carolina Prod. Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) (Ross. Opp. Br. at 16-18)—in reality address the evidence of intent required when indemnification is sought for loss caused by an indemnitee’s own negligence. (PCS Br. at 6-9.) The intent to indemnify for negligence must be set forth “clear[ly] and unequivocally.” *Laurens Emer. Med.*, 355 S.C. at 111, 584 S.E.2d at 379. The question certified to this Court is whether that rule should be expanded to encompass claims for indemnification for loss arising from strict liability acts. The fact that Ross mischaracterizes these cases and assumes they govern here does not assist this Court in answering that question.<sup>5</sup>

Ross also argues that the significance of *Laurens Emer. Med. Specialists, P.A. v. M.S. Bailey & Sons*, 355 S.C. 104, 584 S.E.2d 375 (2003) and *S.C. Elec. & Gas Co. v. Util. Constr. Co.*, 244 S.C. 79, 135 S.E.2d 613 (1964), is not that these cases articulate and apply the negligence rule but that they “stand for the general proposition that, in South Carolina, indemnification only applies in vicarious or imputed liability situations.” (Ross Br. at 20-21.) But the support Ross cites for that proposition does not withstand scrutiny.

Contrary to what Ross suggests, *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), rev’d on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003), does not hold that indemnification is only allowed in “vicarious or imputed liability situations.” (Ross Br. at 20-21.) In truth, *Andrade* addressed a very narrow legal

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<sup>5</sup> In support of the proposition that indemnification agreements always must be construed against the indemnitee, Ross also cites *United States v. Hollis*, 424 F.2d 188 (4th Cir. 1970). That case applies federal common law developed in *United States v. Seckinger*, 397 U.S. 203, 209 (1970). The case does not address the contours of South Carolina’s negligence rule.

question not relevant here. The court interpreted the scope of a provision of South Carolina's Contribution Among Tortfeasors Act ("UCATA"), which provides that certain releases of claims given to one joint tortfeasor also apply to other joint tortfeasors. The language that Ross cites from the decision is from the court's consideration of whether vicariously liable parties qualify as joint tortfeasors and, as such, are entitled to claim the protection of that provision of the UCATA. To answer that question, the court compared the common law indemnification and contribution rights available to vicariously liable parties and joint tortfeasors, to determine whether they had the same rights. The court found the scope of common law rights significant to its interpretation of the UCATA because it had bearing on the recourse that a party would have if it were not released from liability. The court's analysis has no relevance to the negligence rule.

As with the joint tortfeasor rule, Ross appears to be injecting the vicarious liability rule and *Andrade* into this case in an effort to suggest that PCS's indemnification rights are driven by equitable principles. *Town of Winnsboro*, 303 S.C. at 57, 398 S.E.2d at 503 (citations omitted) (for vicariously liable parties, "[t]he right to indemnity is equitable, arising from the servant's status as a fiduciary to the master"). For the same reasons that the equitable concerns underlying the joint tortfeasor rule are not relevant here, the equitable concerns that gave rise to the vicarious liability rule are not relevant to the question of contract interpretation before this Court. *See supra* at Section I.B.

**B. The Use Of Broad and Comprehensive Terms In An Indemnification Provision Convey Clear and Unequivocal Intent To Indemnify.**

If the Court were to expand the negligence rule to claims for loss arising from strict liability acts, it is not necessary that the Court find a reference to CERCLA liability must be "express" to reflect a "clear and unequivocal" intent to indemnify for CERCLA claims under *Laurens Emergency Med. Specialists, PA*. Such reference would, of course,

be impossible in agreements that pre-date CERCLA's enactment, and the imposition of such a requirement would effectively prohibit indemnification for CERCLA-related losses under all indemnification agreements that pre-date the statute, even if they are drafted so broadly that they otherwise reflect an intent to provide indemnification for any and all claims. As Ross acknowledges, "[i]n construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." (Ross Opp. Br. at 13.) To deny indemnification under such agreements would be contrary to the intent of the parties and would have the effect of rewriting indemnification provisions. Instead of vitiating these agreements, the courts should enforce them as drafted.

*Fina v. ARCO*, 200 F.3d 266, 270 (5th Cir. 2000), which Ross cites in support of the proposition that the negligence rule should only permit indemnification if an agreement expressly references CERCLA, (*id.* at 19-20), is against the weight of the authority. In *Fina*, the court interpreted two different indemnification provisions, and based on its interpretation of Delaware and Texas law, the Fifth Circuit found that the intent to indemnify for strict liability had to be specifically and expressly set forth. Delaware law required a "clear and unequivocal" expression of intent to indemnify for negligence, but the court held that Delaware courts found this standard satisfied only when an agreement included an express reference to negligence. 200 F.3d at 270-271. Texas followed the "express negligence" test which requires the intent to indemnify for negligence be set forth in "specific terms." *Id.* at 273.

Most courts interpreting pre-CERCLA indemnification agreements have not adopted the strict standard embraced by the Fifth Circuit in *Fina*. Instead, they find that clear and unequivocal intent to indemnify for CERCLA claims can be inferred from indemnification provisions that are drafted in general terms. In *United States v. Hardage*,

985 F.2d 1427 (10th Cir. 1993), for instance, the court acknowledged that Oklahoma law required the intent to indemnify an indemnitee for its own acts be expressed in “unequivocally clear language,” but, to satisfy that standard, it did not find it necessary that every indemnified act be specifically cataloged in the indemnification agreement. *Id.* at 1434. Instead, the Tenth Circuit held that the intent to indemnify can be inferred when “the language of the indemnification is so broad and all-inclusive that it necessarily sweeps all events—including those occurring because of the indemnitee’s actions—into its coverage.” *Id.* at 1434-35. An agreement providing indemnification for “any claim of loss or damage resulting from the transporting or disposal of said materials[,]” was sufficiently broad to encompass the indemnitee’s strict liability. *Id.* at 1434. “[T]he term ‘resulting from,’” the court held, “is the type of all-inclusive and unambiguous language sufficient to exculpate [the indemnitee] for its strict generator liability.” *Id.* at 1435.

Similarly, in *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994), the Seventh Circuit found that under Illinois law a “clear and explicit” expression of intent to indemnify for negligence could be set forth in a broadly drafted indemnification provision. *Id.* at 327-328. Indemnification for “any and all claims . . . however the same may be caused, arising out of or resulting from . . . the maintenance of any action, claim or order concerning pollution or nuisance” included indemnification for CERCLA claims. *Id.* at 327; *see also Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 215-16 (3d Cir. 1994) (finding Alabama law, which required that all indemnification agreements be “expressed in clear and unequivocal language” did not require specific reference to an indemnitee’s wrongful acts as long as “the requisite intent is otherwise clear”).

Many other courts have taken the approach set forth in *Hardage* and *Kerr-McGee Chem. Corp.* Indemnification agreements broadly drafted to reach “all” claims or liabilities also reach CERCLA claims. *See, e.g., Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750, 754-55 (5th Cir. 1994) (broadly drafted indemnification agreements that reached “any and all liability” and “any and all claims” encompassed liability under CERCLA, a statute not in effect when agreement was executed); *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1023 (N.D. Cal. 1990) (under California law, indemnification provision does not have to list the specific laws within its scope, and indemnification for “all losses, damages, and costs resulting from any failure [to comply with all laws]” reached CERCLA claims); *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1457 (N.D. Ind. 1990) (release from “all claims and obligations of any character or nature whatsoever arising out of or in connection with said agreements” encompassed “future arising causes of action of any sort, including CERCLA liability”).

Thus, if the negligence rule is expanded to encompass PCS’s claim for litigation costs and expenses arising in the underlying CERCLA action, the Court should find that “clear” and “unequivocal” intent to indemnify for those losses may be reflected in broadly drafted terms like those used in the Letter Agreement.

**C. The Parties To The Letter Agreement Had Ample Reason To Negotiate Indemnification For Liability Arising From Ross’s Site Operations.**

Ross further discourages this Court from formulating a rule of law that would permit indemnification under the Letter Agreement by arguing that it was “impossible, as a matter of law, for the parties [to the Letter Agreement] in 1966 to have contemplated this particular liability that did not then exist.” (Ross Opp. Br. at 13.) Of course, the parties could not have specifically anticipated CERCLA, but that does not mean that they

could not have anticipated Ross's plant operations could give rise to strict liability claims and federal statutory claims. A specific reference to "CERCLA" is not necessary to demonstrate an intent to indemnify for CERCLA claims. After all, indemnification agreements are not generally drafted to list every particular statute under which either party may bear liability. Instead, the scope of the indemnification provided is generally described in broad terms.

Consistent with these principles, courts find that requiring indemnification for future claims is not unfair when contracting parties had notice of facts that formed the basis of the claim and of the emergence of environmental claims. In *Kerr-McGee Chem. Corp.*, 14 F.3d at 327, for example, the Seventh Circuit noted that because the Illinois Pollution Act had been passed before the indemnification agreement was executed, it was "completely reasonable to presume that [the indemnification provision] reflects the parties' agreement regarding who would assume the costs imposed by emerging environmental regulation." *Id.* No provision of the agreement limited the indemnification obligation to "liabilities under then existing law[.]" and the court declined to read such a limitation into a broadly drafted agreement. *Id.*

Likewise, in *Jones-Hamilton Co.*, 750 F. Supp. at 1024, the court noted that the indemnitor's knowledge of acts that later gave rise to CERCLA liability demonstrated that requiring indemnification would not impose any unfair surprise. There, a wastewater discharge permit was issued before the indemnification agreement was executed, and plaintiff subsequently violated the permit by discharging chemicals into wastewater containment ponds. *Id.* at 1023-24. Even if the plaintiff was not aware of CERCLA, the court found that it could have anticipated being required under State law to clean up hazardous waste that it disposed of illegally. *Id.* at 1028. Similarly, in *Kerr-McGee*

*Chem. Corp.*, the indemnitor knew wood preservatives that caused contamination were at the Site. 14 F.3d at 328. The indemnitor “might not have foreseen that these chemicals would one day need to be removed at a substantial price” but in accepting the property “as is” and in agreeing to a broad indemnification provision, the indemnitor “agreed to assume future costs resulting from the presence of the chemicals on the property.” *Id.*<sup>6</sup>

Here, as in *Jones-Hamilton Co.* and *Kerr-McGee Chem. Corp.*, there was reason for both Ross and CNC to be concerned regarding liability that might arise from Ross’s fertilizer operations at the time the Letter Agreement was executed. First, Ross knew that there were contaminants at the Site. As the district court held in this case, “[t]he phosphate fertilizer industry was aware that the use of pyrite caused the release of lead and arsenic since at least 1924.” 791 F. Supp. 2d at ¶ 43. At that time, Ross used pyrite slag to manufacture sulfuric acid and disposed of slag on the Site. (*Id.* at ¶ 34.) Ross also was aware that its fertilizer operations generated acidic wastewater effluent. Just before the sale of the Site, the United States Public Health Service (“USPH”) informed Ross that it was discharging contaminated effluent—with an “extremely low” pH “of 1.7 and less than zero”—into the Ashley River, where fish were dying. (*Id.* at ¶ 40.)

Second, by the time the indemnification agreement was executed, fertilizer manufacturers like Ross faced liability under both statutory and common law for the harm that their operations caused.

- Under South Carolina law, a fertilizer company could be held liable for creating a nuisance even if the company took reasonable steps to ensure that

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<sup>6</sup> Contrary to what Ross suggests, (Ross Opp. Br. at 21 n.6), at the time that the Letter Agreement was executed neither *Andrade, Murray v. Texas*, nor *Whetstone* held that private parties could not use an indemnification agreement to allocate financial responsibility for strict liability acts. South Carolina gives effect to indemnification agreements based on their terms. The scope of contractual indemnification has never been dictated by the principle that a partial shift of financial responsibility is disfavored.

its operations did not cause harm. *Frost v. Berkeley Phosphate Co.*, 42 S.C. 402, 20 S.E. 280, 283 (1894) (“[I]f one uses his own land for the prosecution of some business from which injury to his neighbor would either necessarily or probably ensue, he is liable if such injury does result, even though he may have used reasonable care in the prosecution of such business.”).

- The South Carolina criminal code also imposed liability for discharges into State waters. Section 772 of the Criminal Code provided:

Should any person or persons cause to flow into or be cast into any of the creeks, streams, or inland waters of this State, any impurities that are poisonous to fish or destructive to their spawn, such person or persons shall, upon conviction thereof, be punished with a fine of not less than five hundred dollars, or imprisonment of not less than six months in the county jail; the fine to go one-half to the informer and the other half to the County.

*State v. American Agr. Chem. Co.*, 118 S.C. 333, 110 S.E. 800, 802 (1922). The provision was enforced against fertilizer companies that discharged acidic effluent into South Carolina rivers, killing fish. *See id.* at 801; *see also State v. American Agric. Chem. Co.*, 125 S.C. 270, 118 S.E. 535 (1923).

- The federal Rivers and Harbors Act prohibited the depositing of “any refuse matter of any kind or description” into navigable waters, 33 U.S.C. §407, and the term “refuse” was broadly interpreted to include industrial discharges. Liability under the provision was strict, and punished by fines and imprisonment. *The President Coolidge*, 101 F.2d 638 (9th Cir. 1939); *United States v. American Cyanamid Co.*, 354 F. Supp. 1202, 1205 (D.N.Y. 1973); 33 U.S.C. § 411.

Moreover, at the time the Letter Agreement was executed in 1966, federal regulation of the environment was expanding. The Water Quality Act of 1965, for instance, required states to establish minimum water quality standards. Pub. L. No. 89-234, 79 Stat. 903, s. 5 (1965); *see also Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 279 (D.C. Cir. 1981) (discussing water quality standards required by Water Quality Act of 1965). The Solid Waste Disposal Act of 1965 “authorized . . . research into techniques of solid waste disposal, and to provide financial and technical assistance to states in implementing safe solid waste disposal plans.” *City of Gallatin v. Cherokee*

*County*, 563 F. Supp. 940, 942 (D. Tex. 1983); Pub. L. No. 89-272, 79 Stat. 992, Title II (1965). “The Clean Air Act of 1963, 77 Stat. 392, authorized federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate interstate pollution in limited circumstances.” *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63-64 (1975); see also *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968) (declining to dismiss action by the United States to enjoin emissions from animal rendering plant in Maryland that crossed state lines). As the United States Supreme Court recognized, 1966 was “a time in the Nation’s history when there [was] greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well.” *United States v. Standard Oil Co.*, 384 U.S. 224, 225 (1966).

Not surprisingly given this context, Ross and CNC negotiated an indemnification agreement to privately allocate responsibility for any losses flowing from Ross’s fertilizer operations. 791 F. Supp. 2d at ¶¶ 41, 42. The risk of loss from those operations was to be borne by Ross. Ross and CNC’s agreement should be enforced as drafted.

*Chrysler Corp. v. Ford Motor Corp.*, 972 F. Supp. 1097, 1110 (E.D. Mich. 1997), cited by Ross (Br. at 14 n. 5), is not to the contrary. Instead, the case shows yet another approach that courts take to find an intent to indemnify for CERCLA claims in pre-CERCLA indemnification agreements. There, an asset purchase agreement executed in 1956 provided that the buyer would assume “all liabilities [of Seller] existing on the closing date of every nature whatsoever, whether absolute or contingent.” *Id.* at 1108. The court found that CERCLA liability was not encompassed by the agreement because its scope was expressly limited to “existing” liabilities and CERCLA liabilities did not “exist[] on the closing date.” *Id.* at 1109-1110.

In this case, of course, the Letter Agreement's indemnification provision did not limit Ross's indemnification obligation to liabilities "existing" on the closing date. To the contrary, Ross broadly indemnified PCS for "all acts, suits, demands, assessments, proceedings and cost and expenses" without regard for when they occurred. 791 F.Supp. 2d at ¶41. The fact that the contracting parties did not limit Ross's indemnification obligation to then "existing" liabilities reflects an intent to indemnify for future arising claims. *Chrysler Corp.*, 972 F.Supp. at 1109-10; *see also Kerr-McGee Chem. Corp.*, 14 F.3d at 327.

**III. THE DISTRICT COURT FOUND THAT PCS WAS INDEMNIFIED FOR LITIGATION COSTS AND EXPENSES RESULTING FROM ROSS'S ACTS AND OMISSIONS.**

Lastly, Ross argues that PCS is not entitled to indemnification for attorneys' fees. According to Ross, PCS's claim is barred under South Carolina law both because it is a second-party indemnification claim and because the Letter Agreement does not expressly authorize PCS to recover attorneys' fees. (Ross Opp. Br. at 22-23.) But the district court has already entered judgment in favor of PCS on its claim. (Entry 749 at 3; *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d at 507.) Ross's arguments are beyond the certified question, and this Court should not accept Ross's invitation to review the district court's decision. *See supra* at Section I.A.

As importantly, the Court should disregard Ross's efforts to characterize PCS's claim as a second-party claim because Ross mischaracterizes the losses PCS seeks to recover. As explained in PCS's opening brief, fees incurred by PCS pursuing indemnification from Ross are not at issue here. Instead, PCS seeks indemnification for attorneys' fees and litigation costs that it incurred when Ashley sued PCS under

CERCLA Section 107. (PCS Br. at 4.) Thus, PCS's claim is for fees and costs arising from a third-party claim.

Finally, South Carolina law permits the recovery of attorneys' fees incurred in connection with an indemnified claim. As explained in PCS's opening brief, in the underlying CERCLA litigation, PCS incurred fees and costs establishing the impact of Ross's Site operations. (PCS Br. at 4.) That evidence was relevant to PCS's defense to joint and several liability under CERCLA 107. (*Id.*) Indemnification for those losses is well supported by South Carolina law. (*Id.* at 22-23.)<sup>7</sup>

### **CONCLUSION**

For the reasons set forth above and in PCS's opening brief, this Court should answer the certified question as follows:

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, should not apply when the indemnitee seeks contractual indemnification for costs and expenses resulting in part from its own strict liability acts.

Dated: January 23, 2014

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<sup>7</sup> Ross makes a further factual argument regarding PCS's litigation costs and expenses that also is not appropriate to this certification proceeding as it does not implicate any question of law much less the question certified to this Court. According to Ross, the fees that are the basis of PCS's indemnification claim cannot be segregated from PCS's other litigation costs. (Ross Opp. Br. at 22 n.7.) PCS's evidence of fees and costs has not yet been presented to the district court. Consideration of that evidence is for the district court, not this Court.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

Appellate Case No. 2013-001766

Ashley II Of Charleston, L.L.C., ..... Plaintiff,

v.

PCS Nitrogen, Inc., ..... Defendant/Third-Party Plaintiff,

v.

Ross Development Corporation, Koninklijke DSM N.V., DSM Chemicals of North America, Inc., James H. Holcombe, and J. Holcombe Enterprises, L.P. , J. Henry Fair, Jr., Allwaste Tank Cleaning, Robin Hood Container Express, and The City Of Charleston, ..... Third-Party Defendants.

Appellate Case No. 2013-001766

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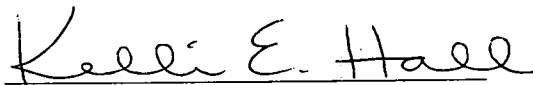
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