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September 8, 2014

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Re: Ashley II of Charleston v. PCS Nitrogen v. Ross Development Corp.
Appellate Case No. 2013-001766

Dear Mr. Shearouse:

Enclosed please find the original unbound and six copies of Ross Development Corporation's Reply to Return to Petition for Rehearing of Defendant/Third Party Plaintiff, PCS Nitrogen, with Certificate of Service.

With kindest regards, I am,

Sincerely,

PRATT-THOMAS WALKER, P.A.

G. Trenholm Walker

GTW/njd
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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2013-001766

Ashley II of Charleston, LLC, ... 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, J. Holcombe Enterprises, LP, J. Henry Fair, Jr., Allwaste Tank Cleaning, Robin Hood Container Express, and The City of Charleston ....Third-Party Defendants.

ROSS DEVELOPMENT CORPORATION'S REPLY TO RETURN TO PETITION FOR REHEARING OF DEFENDANT/THIRD-PARTY PLAINTIFF, PCS NITROGEN, INC.

Third-Party Defendant Ross Development Corporation ("Ross") hereby replies to the Return of Defendant/Third-Party Plaintiff, PCS Nitrogen, Inc., ("PCS") to Ross's Petition for Rehearing and Motion to Supplement the Record.

I. Contrary to what the Court apparently understood, PCS seeks to recover fees and costs associated with PCS's CERCLA liability occurring after the 1966 closing. The district court has determined that *all* of PCS's fees and costs are associated in part with PCS's CERCLA liability occurring after the 1966 closing.

This Court premised its decision on its understanding of the category of fees and costs for which PCS is seeking indemnity. Because this fundamental premise was incorrect, the Court should grant a rehearing or issue a modified opinion.

The Court rested its decision on its observation "that PCS seeks to enforce the indemnification provision in strict accordance with its terms by limiting its claim to fees and costs associated with Ross's CERCLA liability incurred because of its ownership and operation

of the Site prior to the 1966 closing." **Opinion, p.5.** The Court's footnote to this sentence elaborates on the Court's fundamental supposition, in pertinent part, as follows: "Because PCS does not seek to recover its fees and costs associated with CERCLA liability attributed to contamination occurring after the 1966 closing, PCS is not seeking 'contractual indemnification for costs and expenses resulting in part from its own strict liability acts,' as the certified questions suggests." **Opinion, p.5 n. 4.** In fact, *all* the fees and costs for which PCS is seeking contractual indemnification resulted in part from PCS's own acts and omissions.

In its Order of Certification, the district court expressly determined that all fees and costs incurred by PCS were associated with PCS's CERCLA liability for contamination occurring after the 1966 closing: "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 litigations expenses are *jointly* attributable to the acts and omissions of PCS and Ross, which acts together led to the Site's Superfund designation." **Order of Certification, p.4 (emphasis added).** For this reason, the district court did not misstate the certified question as suggested by this Court in footnote 4 of its Opinion. PCS seeks contractual indemnification for costs and expenses resulting in part from PCS's own acts and omissions. **Order of Certification, p.6.** The district court has already determined that all of PCS's fees and costs are associated with "liability attributed to contamination occurring after the 1966 closing."

PCS's return does not address this critical finding of the district court. Rather than address this dispositive determination of the district court, PCS attempts to describe its claim for fees and costs in various ways that suggest PCS is seeking only those fees and costs solely attributable to Ross's conduct prior to the 1966 closing:

> "PCS seeks to recover only costs that it has incurred developing evidence to account for Ross's fertilizer plant operations." **Return,**

p. 2.

". . . PCS had to account for Ross's ownership of the Site in the underlying litigation precisely because Ross owned the Site." **Return, p. 2.**

"PCS's claim is limited to costs incurred developing evidence of Ross's Site operations before 1966." **Return, p. 4.**

". . . PCS is not seeking indemnification for any costs associated with its investigation of Site owners other than Ross." **Return, p. 6.**[1]

Despite PCS's representations in its return that PCS seeks only costs and expenses arising from the pre-1966 conduct of Planters, PCS argued in its 2013 filing before the district court that PCS is *not* limited to costs and expenses resulting solely from Ross's conduct. See **Ross Pet. for Rehrg., pp.5-6** (quoting PCS Br. Regarding Fees and Costs, ECF 710). Thus, PCS's various descriptions of the costs and expenses for which it is seeking indemnity are to no avail. The district court has determined that "all PCS's litigation expenses are jointly attributable to the acts and omissions of PCS and Ross." **Order of Certification, p.4.**

The pertinent question in determining whether the "negligence rule" applies is *not* whether PCS's indemnification claim against Ross is based on Planters' pre-closing conduct. Rather, the question is *whether the indemnitee's costs and expenses resulted solely from the*

[1] PCS's asserts that Ross agrees that PCS is entitled to recover its costs and expenses for bringing its third-party complaint against Ross, based on a statement of Ross's counsel at the first hearing on the question of damages under the indemnification cause of action. **PCS's Return, p.6.** Ross does *not* concede or agree that PCS is entitled to recover its costs and expenses for prosecuting the indemnification claim against Ross. It is well-recognized that an indemnitee cannot recover its fees and costs from the indemnitor for prosecution of its indemnification claim against the indemnitor. See Smoak v. Carpenter Enterprises, Inc., 319 S.C. 222, 224-25, 460 S.E.2d 381, 383 (1995) ("Consequently, as attorney's fees incurred in actions between the parties were not recoverable under the terms of Article 12 [the indemnification provision of the contract], and there was no other provision in the parties' agreement specifically dealing with the recovery of attorney's fees by Sellers in an action between the parties, such fees were not recoverable in this case.").

indemnitor's conduct or jointly from the conduct of the indemnitor and indemnitee. If the latter, the indemnitee cannot recover indemnification in the absence of an express term in the indemnification provision indemnifying the indemnitee for costs and expenses that result in part from the indemnitee's own conduct.

No matter how PCS attempts to parse its costs and expenses incurred in the CERCLA litigation, it cannot evade the finding of the district court that every dollar of those costs and expenses is attributed, in part, to PCS's acts and omissions after the 1966 closing.[2] This Court invited a rehearing petition in the event the Court misapprehended the scope of PCS's indemnification claim. **Opinion, p.5 n.4.** Because of this fundamental misunderstanding of the scope of PCS's of the costs and expenses for which PCS seeks indemnity, the Court should grant a rehearing or modify its decision to answer the certified question affirmatively.

II. The negligence rule should be applied to the indemnification provision in the 1966 Letter of Agreement, thereby barring PCS from recovering litigation costs and expenses caused jointly by the strict liability conduct of Ross and PCS.

As set forth in Ross's Petition for Rehearing, the "negligence rule" is premised on principles of contractual interpretation—not a public policy of deterrence, as PCS contends. **Pet. for Rehrg., pp 8-13.** In South Carolina, as in many other jurisdictions, the "negligence rule" constitutes a specific application of the general rule of contractual construction that an

[2] Ross advocates that there is no right to indemnification where, as here, both parties are liable for "strict liability" acts. It would be incongruous to hold Ross liable to PCS for Planters' "strict liability" acts, while simultaneously holding that PCS's own "strict liability" acts fall outside the "negligence rule." Moreover, PCS's position would place an unnecessary burden on courts, which, under the circumstances of this case, would be forced to evaluate whether and to what extent specific costs and expenses are attributable to the indemnitor's acts and omissions versus the indemnitee's acts and omissions. For instance, the district court here may be required to determine whether a subpoena to a third party witness seeking information on Ross and other potentially liable parties falls within the scope of the indemnification provision and, if so, how much of the costs and fees associated with drafting the subpoena should be borne by Ross and how much should be borne by PCS.

indemnification provision will be strictly construed against the indemnitee. See Fed. Pac. Elec. v. Carolina Prod. Enterprises, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) ("Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee's own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed."); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 378-79 (2003) ("In doing so, the Court of Appeals overlooked the rule requiring strict construction of a contract containing an indemnity provision purporting to relieve an indemnitee from the consequences of its own negligence."); Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, 232 (1934) ("[T]he provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit.").[3]

[3] Other jurisdictions also recognize the general proposition that indemnification clauses must be strictly construed against the indemnitee. See Pardee v. Consumer Portfolio Servs., Inc., 922 F. Supp. 2d 243, 256 (D.R.I. 2013) ("While indemnity agreements are strictly construed against the party seeking indemnification, they may be designed to transfer liability even from a negligent party to a non-negligent one if the language is specific and unequivocal."); Chevron U.S.A., Inc. v. Murphy Exploration & Prod. Co., 151 S.W.3d 306, 310 (Ark. 2004) ("Indemnity agreements are construed strictly against the party seeking indemnification."); George L. Smith II Georgia World Cong. Ctr. Auth. v. Soft Comdex, Inc., 550 S.E.2d 704, 705 (Ga. 2001) ("Further, the scope of a written indemnification contract is a question of law for the court, which must strictly construe the contract against the indemnitee, in this case the Authority."); Argueta v. Baltimore & Ohio Chicago Terminal R. Co., 586 N.E.2d 386, 395 (Ill. Ct. App. 1991) ("It is well settled in Illinois that indemnity contracts are to be strictly construed."); England v. Alicea, 827 N.E.2d 555, 559 (Ind. Ct. App. 2005) ("Indemnification clauses in a contract are strictly construed and the terms are required to be set forth in clear and unequivocal terms."); Otak Nevada, L.L.C. v. Eight Jud. Dist. Ct., 312 P.3d 491, 500 n.9 (Nev. 2013) ("Indemnity clauses must be strictly construed."); Gray v. Leisure Life Indus., 77 A.3d 1117, 1121 (N.H. 2013) ("We construe express indemnity agreements strictly . . . ."); Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 510 A.2d 1152, 1159 (N.J. 1986) ("When the meaning of the clause is ambiguous, however, the clause should be strictly construed against the indemnitee."); Hooper Associates, Ltd. v. AGS Computers, Inc., 548 N.E.2d 903, 905 (N.Y. 1989) ("When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed."); Hoisington v. ZT-Winston-Salem Associates, 516 S.E.2d 176, 183 (N.C. Ct. App. 1999) ("Courts strictly construe an indemnity

PCS continues to argue in its return that the basis for the "negligence rule" is to deter negligent conduct, and its application under these circumstances would not have a deterrent effect. As stated previously and discussed in more detail in Ross's Petition for Rehearing, the origin of the "negligence rule" is not a judicial policy of deterring negligent conduct but instead a rule of contractual construction; however, even if deterrence were a consideration, deterrence would be advanced in this case if the rule were invoked.

PCS argues that application of the "negligence rule" would not have a deterrent effect because PCS, through Columbia Nitrogen Corporation ("CNC"), its predecessor, was liable under CERCLA solely because of its status as a former owner of the Site and it was "not found liable, in the first incidence, for causing harm." **PCS Return, p.8.**

PCS's characterization of CNC as an innocent owner is entirely inaccurate. The district court specifically found PCS, through CNC, caused harm through activity that contaminated the Site: "[T]he subsequent actions of PCS and others, over a forty-year period, *created new pollution* and spread the existing pollution throughout the site." **Order of Certification, p.4** (emphasis added). "During the approximately twenty years PCS owned the site, *it contributed to the environmental contamination* by continuing to manufacture fertilizer and disturbing the contaminated soil during various demolition activities." **Order of Certification, p.3** (emphasis added).

Because it is undisputed that PCS's CERCLA liability was not premised merely on its status as an owner but on its operations that significantly contributed to the contamination of the Site, the principles of contract construction underlying the "negligence rule" as well as concerns

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clause against the party asserting it."); Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co., 825 N.W.2d 872, 878 (N.D. 2012) ("Unlike insurance policies, ambiguities in non-insurance indemnity provisions are strictly construed against the entity receiving indemnity.").

of deterrence apply equally to this case. Because the indemnification provision in the 1966 Letter of Agreement did not expressly include indemnification for fees and expenses resulting jointly from the acts and omissions of PCS and Ross, the "negligence rule" should be invoked to bar recovery for all of PCS's litigation costs and expenses. PCS's attempt to collect a portion of its fees and costs from Ross that necessarily resulted, in part, from PCS's contamination activities after the closing is not "in strict accordance" with the terms of the indemnification agreement, as this Court supposed. For this reason, Ross respectfully submits that the Court should grant a rehearing or modify its opinion and answer the certified question in the affirmative.

III. PCS turns the "negligence rule" on its head.

In its return, PCS turns the rule of contract construction that is the basis for the "negligence rule" on its head: "If the intent was to limit indemnification in the manner suggested by Ross, the parties to the agreement would have drafted a very narrow indemnification provision that would only be effective in the event that litigation arose *solely* or *only* from Ross's conduct." **PCS's Return, p.9** (emphasis in original).

As stated by the South Carolina Court of Appeals in Fed. Pac. Elec. v. Carolina Prod. Enterprises, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989):

> Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee's own negligence, *a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed.* Annot., 4 A.L.R.4th 798 at 801 (1981). Indeed, most courts agree with the basic 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.

(Emphasis added). PCS's argument is completely at odds with this rule of construction.

Against the backdrop of this clear statement of the law, PCS argues that a contract of

indemnity should be strictly construed against the indemnitor such that, unless the parties expressly state to the contrary, an indemnification provision must be construed to indemnify the indemnitee for its costs and expenses resulting from the indemnitee's own acts and omissions. In this respect, PCS's argument completely disregards existing South Carolina law, which supports to the opposite conclusion as PCS. Since the indemnification clause in the 1966 Letter of Agreement stated it applied to ". . . costs and expenses resulting from any acts or omission of the Seller occurring prior to the closing date. . . ," the indemnification does not apply to costs and expenses resulting jointly from the acts and omissions of the Seller and the Buyer. See Kroger Co. v. Giem, 387 S.W.2d 620, 626 (Tenn. 1964) ("The Court of Appeals said, and we agree to its correctness, that it is nearly a universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by 'clear and unequivocal terms;' and general words will not be read as expressing such an intent.").

The parties were free to draft and agree upon an indemnification provision that indemnified the indemnitee for fees and expenses caused jointly by the conduct of the indemnitor and indemnitee. The parties chose not to include language requiring indemnification of fees and expenses caused in part by the conduct of the indemnitee. Requiring the indemnitor to indemnify the indemnitee under these circumstances, in the absence of this qualification, undermines, rather than promotes, freedom of contract.

IV. The record necessary to demonstrate all of PCS's costs and expenses were incurred, in part, as a result of PCS's own acts and omissions, is before the Court or readily accessible by the Court.

This Court would not reach Ross's motion to supplement the record unless it determined it could not verify the scope of PCS's indemnification claim from the Order of Certification or

the filings of PCS readily available online referenced by both Ross and PCS. Because the Order of Certification includes the district court's finding that "all PCS's litigation expenses are jointly attributable to the acts and omissions of PCS and Ross," this Court does not need to decide the motion to supplement to determine the specific litigation expenses and costs sought by PCS. All of them are jointly attributable to the acts and omissions of the indemnitor and indemnitee, which jointly "led to the Site's Superfund designation." **Order of Certification, p.4.**

CONCLUSION

For the foregoing reasons and those stated in its Petition for Rehearing, Ross respectfully submits that the Court should grant its Petition for Rehearing or, in the alternative, modify its opinion to hold that the "negligence rule" does apply in this instance and answer the certified question affirmatively.

Respectfully Submitted,

BY: 

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September 8, 2014
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2013-001766

Ashley II of Charleston, LLC, ... Plaintiff,

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CERTIFICATE OF SERVICE

I hereby certify that the Ross Development Corporation's Reply to Return to Petition for Rehearing of Defendant/Third Party Plaintiff, PCS Nitrogen, Inc. to which this certificate is affixed was served upon the parties to this action by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorneys of record for such other parties identified below, in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 8th day of September 2014, in Charleston, South Carolina.

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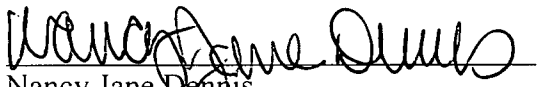

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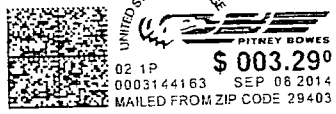

The Honorable Daniel E. Shearouse
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