IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC08-1920

HOWARD CURD, et al.,

Petitioners,

v.

MOSAIC FERTILIZER, LLC,

Respondent.

RESPONDENT'S ANSWER BRIEF

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF CASE AND FACTS

Mosaic Fertilizer, LLC ("Mosaic") accepts the Statement of Case and Facts set forth by Petitioners in their Initial Brief to the extent that it accurately states the course of proceedings below. In addition, because this case is being reviewed in this Court as a result of a dismissal on the pleadings, the facts as alleged in Petitioners' Fourth Amended Complaint are generally accepted as true. However, to the extent that Petitioners have drawn unsupported inferences and legal conclusions from the facts alleged, or have relied on facts that have no bearing on the legal issues presented in this appeal, those facts, inferences, and conclusions should be disregarded by the Court.

SUMMARY OF ARGUMENT

Petitioners seek to convince this Court that it should drastically depart from established jurisprudence in this state and create new, and indeed, unprecedented law. There is no dispute that a breach in Mosaic's phosphogypsum stack during Hurricane Frances caused acidic wastewaster to enter Hillsborough Bay, resulting in the loss of fish (the "Release"). What is very much in dispute, however, is whether Florida law permits commercial fishermen and others[1] to recover solely economic damages (*i.e.*, lost income) allegedly resulting from the loss of fish in

[1] In their Fourth Amended Complaint, Petitioners describe themselves as "members of the fishing industry" who seek to "represent a proposed class of all fishermen and those persons engaged in the commercial catch and sale of fish, bait, and related products in the Tampa Bay area. . . ." [R. 158-174] (emphasis added).

Hillsborough Bay, which (a) were never Petitioners' property, and, instead (b) might otherwise have been harvested at some point in the future.

The Court should decline review of the District Court's decision. In the Second District's convincing and thorough analysis, the court persuasively articulated the reasons against opening a common law Pandora's Box with a new cause of action for commercial fishermen, or modifying the legislative intent by judicial fiat by importing into an existing statute a private right of action for Petitioners. There is no reason for this Court to reformulate this sound analysis, particularly when this case involves a "narrow subset of people" with unique facts. Therefore, the Court should decline to exercise jurisdiction over this case and allow the well-reasoned decision of the district court to stand. The drastic changes in Florida law advocated by Petitioners should come, if at all, from the Florida Legislature.

If this Court does not find that it improvidently granted jurisdiction, both of the certified questions should be answered in the negative. Negligence and strict liability claims are aimed at protecting against harm to plaintiffs' person or property, and consequently, are not designed to protect against economic losses. Thus, Florida courts have historically barred tort claims for solely economic losses because these claims are simply not within the "zone of risk" that the law was intended to protect. Here, Petitioners have not demonstrated, and cannot demonstrate, that their property suffered actual contamination as a result of the

discharge, and that Mosaic owed a duty to them to protect against their solely economic losses.

Without Florida precedent supporting Petitioners' tort claims, this Court would have to create a special tort cause of action in order to answer the certified question in the affirmative. However, there is no compelling reason for this Court to do so absent legislative guidance. Such a drastic change in Florida common law would undoubtedly prompt others to claim that their indirect or remote injuries should likewise be compensated. This would force the courts to address potentially limitless common law liability. Indeed, other courts interpreting state law similar to Florida jurisprudence have flatly rejected the invitation to create such a special cause of action for commercial fishermen who claim purely economic damages.

Petitioners also brought a statutory claim under section 376.313, Florida Statutes, found in the Water Quality Assurance Act ("the Act"). The Act was intended to protect the state's lands and waters by providing a mechanism for the Department of Environmental Protection to ensure that prohibited discharges are promptly contained and removed, including the ability to sue polluters to force the clean up of contaminated sites. In addition, private parties can sue for "damages" caused by these discharges under section 376.313. In a significant decision, this Court held that, based on the clear language of the Act, this provision departs from the common law by imposing liability on parties for releases absent proof of

causation. *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 21 (Fla. 2004).

Petitioners are now asking this Court to further depart from common law by permitting private parties to sue for damages for solely economic losses allegedly resulting from a prohibited discharge. Petitioners make this unprecedented request when there is no language in the statute that even remotely alludes to the possibility that this was the legislature's intent. If Petitioners' position is adopted by this Court, Mosaic and others would essentially become insurers of the economic interests of those who claim any monetary losses as a result of a discharge. Such a result is directly contrary to the legislature's goal when it enacted the statute -- to protect and restore the environment from damages caused by these discharges. The legislature has not created a broad cause of action for persons who have collateral and incidental loss of income.

STANDARD OF REVIEW

Mosaic agrees with Petitioners that review in this Court is *de novo*.

ARGUMENT

I. THE COURT SHOULD DECLINE TO EXERCISE ITS REVIEW JURISDICTION.[2]

The Florida Constitution provides that the Court "may" review a district court decision, which passes on a question certified to be of great public

[2] Justice Canady participated in the Second District's decision when he was a member of that court. *See Curd v. Mosaic Fertilizer, LLC*, 993 So. 2d 1078, 1086 (Fla. 2d DCA 2008).

importance. Art. V, § 3(b)(4). Therefore, the Court has no obligation to review such a decision and has frequently declined to do so. *E.g.*, *Anderson v. Gannett Co.*, 994 So. 2d 1048, 1051 (Fla. 2008) (declining to answer a certified question about a cause of action which never existed at common law). The Court should likewise decline to do so here. The well-reasoned district court's decision, authored by Judge Altenbernd, does not provide a basis upon which this Court should exercise its discretion in order to answer the certified questions.

Petitioners have sought review in order to convince this Court that their class action for solely economic losses based on common law tort and statutory claims should be allowed to proceed. The extraordinary nature of their requested relief is premised on a mere expectation that they would have profited from fish they did not own and had not caught when wastewater from Mosaic's phosphogypsum stack was accidentally released into Hillsborough Bay during Hurricane Frances.

Because Florida law does not recognize a common law tort that would allow the recovery that Petitioners request, this Court would have to newly create such a cause of action. However, in the Second District's convincing and thorough analysis, it articulated why the courts should not use the common law method to establish "a special theory for a narrow subset of the people who are indirectly or remotely injured by pollution." *Curd*, 993 So. 2d at 1086. The court was appropriately circumspect when it presciently observed that it could not create a carefully tailored and limited theory of recovery for a special group such as fishermen "without creating more problems than it solves." *Id*. at 1085.

Petitioners offer the Court no valid reason either to open a common law Pandora's Box with a new common law cause of action for commercial fishermen.

Alternatively, Petitioners ask the Court to import an unexpressed meaning into an existing statute which does not and did not intend to provide tort recovery to commercial fishermen who claim lost income from pollution in the state's water. Petitioners' legislative claim is based on a contention that the Second District applied unexpressed reasoning to defeat a legislative intent they claim inheres in the Act.[3] Petitioners are incorrect. The Second District carefully analyzed the statutory scheme of the Act and was unable to find an intent by the legislature to create a private cause of action concerning property over which a person has neither an ownership nor a possessory interest. *Curd*, 993 So. 2d at 1084. The court appropriately observed, as this Court has on more than one occasion, that the legislature is open for commercial fishermen to seek the special rights which to date the legislature has not provided. *Id*. at 1085.

The district court's certification of its decision as having passed on questions of great "public" importance was a kindly gesture to Petitioners, but an overly-broad interpretation of the constitutional standard. This case was brought by Petitioners solely for their narrow self-interest, in pursuit of relief which only the legislative branch can create and define in a way which provides a truly public dimension. *See Dade County Prop. Appraiser v. Lisboa*, 737 So. 2d 1078, 1078 (Fla. 1999) (certified question should not be based on narrow issue with unique

[3] Petitioners' Initial Brief at 7, 23-27.

facts); *Star Casualty v. U.S.A. Diagnostics, Inc.*, 855 So. 2d 251, 252 (Fla. 4th DCA 2003) (question should be certified where it will affect a large segment of the public). Accordingly, the Court should deny review and simply allow the well-reasoned decision of the district court to stand, rather than attempting to reiterate or reformulate the sound analysis made below.

II. FLORIDA SHOULD NOT RECOGNIZE A COMMON LAW THEORY FOR PETITIONERS TO RECOVER PURELY ECONOMIC LOSSES ALLEGEDLY CAUSED BY THE NEGLIGENT RELEASE OF POLLUTANTS, ABSENT DAMAGE TO PROPERTY OWNED BY THEM.

The Florida legislature declared many years ago that Florida vests ownership of saltwater fish in the State in its sovereign capacity for the benefit of all its people in common. § 370.10, Fla. Stat. (2003) (renumbered as § 379.244 by Laws 2008, c. 2008-247, § 76, eff. July 1, 2008); *State ex rel. Gray v. Stoutamire*, 179 So. 730, 732 (Fla. 1938) (citing 11 R.C.L. 1015; *Ex Parte Powell*, 70 So. 392 (Fla. 1915)). Therefore, no particular individual has a property right in the fish before they are harvested. *State v. Perkins*, 436 So. 2d 150, 152 (Fla. 2d DCA 1983); *Stoutamire*, 179 So. at 732; *see also Powell*, 70 So. at 396. This Court has held, and Petitioners do not dispute, that commercial fishermen are no exception to this rule. *See Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997) (constitutional limit on fishing nets does not constitute a taking of property with regard to commercial fishermen and others).

Consequently, the fish purportedly lost as a result of the Release were <u>never</u> Petitioners' property. At best, some of these fish <u>might</u> otherwise have been

harvested at some point in the future. It is based on these undisputed facts that Petitioners seek to convince this Court that it should drastically depart from established Florida jurisprudence and find that commercial fishermen and others who derive income from the fishing industry are entitled to pursue recovery for such economic losses. There are, however, no exceptional circumstances or compelling public policy reasons to do so, particularly when such an expansion of Florida law would create more problems than it would solve. *Curd*, 993 So. 2d at 1085.

A. Under traditional tort principles, plaintiffs must demonstrate damage to their person or property in order to recover economic losses.

Negligence law evolved from the intentional tort of trespass on the case, which only protected property damage or injury to persons. *Monroe v. Sarasota County Sch. Bd.*, 746 So. 2d 530, 534 (Fla. 2d DCA 1999). Therefore, "[f]or reasons both historical and practical, the duties imposed under the law of negligence typically require the protecting party to exercise reasonable care to safeguard only the physical well-being of the protected party and the physical security of the protected party's property."[4] *Rivers v. Grimsley Oil Co.*, 842 So. 2d 975, 976 (Fla. 2d DCA 2003). Claims for purely intangible economic injury are simply not the type of claims that Florida places within the "zone of risk," utilized

[4] This principle is recognized in jurisdictions throughout the country. *See, e.g., Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 543 (Mass. 2003) (negligence claim); *Prospect High Income Fund v. Grant Thornton, LLP*, 203 S.W.3d 602, 609 (Tex. Ct. App. 2006) (negligence claim).

to define the general standards in negligence cases. *Monroe,* 746 So. 2d at 538. For this reason, "bodily injury or property damage is an essential element of a cause of action in negligence" under Florida law. *Id.* at 531.

The doctrine of strict liability is no different. By its express language and traditional application, strict liability "is aimed at protecting against harm to ***person or property*** which arises from the dangerous activity." *Rosenblatt v. Exxon Co., U.S.A.*, 642 A.2d 180, 188 (Md. Ct. App. 1994) (emphasis in original). Therefore, like negligence claims, "[i]t is not designed to protect against economic losses." *Id.* Indeed, the Restatement (Second) of Torts, which has been adopted in Florida, provides as follows:

> . . . one who carries on an abnormally dangerous activity is subject to liability for harm to the **person, land or chattels of another resulting from the activity.**

Restatement (Second) of Torts § 519 (emphasis added); *see also Lewis v. Gen. Elec. Co.,* 37 F. Supp. 2d 55, 57-58 (D. Mass. 1999) (dismissing strict liability claim involving soil contamination where landowner claimed solely economic losses); *St. Joe Co. v. Leslie,* 912 So. 2d 21, 24 n.1 (Fla. 1st DCA 2005) (noting the requirement of physical harm in connection with strict liability claims); *Great Lake Dredging & Dock Co. v. Sea Gull Operating Co.*, 460 So. 2d 510, 513 (Fla. 3d DCA 1984).

Therefore, whether couched as the "economic loss rule"[5] or simply as an application of common law principles that limits all negligence and strict liability claims to injuries to persons and their property, Florida courts have historically barred tort claims for solely economic losses. This Court's decision in *Indemnity Insurance Co. of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), reaffirmed that this principle is firmly entrenched in Florida jurisprudence.[6] *American Aviation* involved tort claims for solely economic losses arising out of the alleged negligent maintenance of an aircraft, which resulted in the aircraft sustaining significant property damage during a landing. *Id*. at 535. The purported improper maintenance occurred before the aircraft was purchased by the plaintiff and, therefore, no contract existed between parties to the lawsuit. *Id*.

This Court held that under Florida law plaintiffs cannot recover in tort for solely economic losses based on the economic loss rule when (a) the parties have negotiated remedies for nonperformance pursuant to a contract, or (b) a product

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[5] The central purpose of the economic loss rule is meant to "protect the integrity of the contract" and prevent contract and warranty law from "drowning in a sea of tort." *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 538, 544 (Fla. 2004). However, over the years the economic loss rule has been applied in some contexts "simply as a restatement of the common law principle that the law regarding negligence generally protects interests in the safety of person and property." *Curd*, 993 So. 2d at 1082.

[6] In *American Aviation*, the federal district court concluded that the tort claims were barred by the economic loss rule, and the plaintiffs appealed to the Eleventh Circuit. *Id*. at 535. Because interpretation of the economic loss rule was determinative of the issues before the court, and there was no controlling precedent, the Eleventh Circuit certified the issue to the Florida Supreme Court. *Id*. at 534.

malfunctions or damages itself and the parties' remedies against the manufacturers and distributors are limited by the express warranty in the contract. *Id*. at 542; *see, e.g., Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987) (plaintiff limited to recovery under express warranty for leaks in nuclear generators); *Vesta Constr. & Design, L.L.C. v. Lotspeich & Assocs., Inc.*, 974 So. 2d 1176, 1180 (Fla. 5th DCA 2008) (economic loss rule barred claim against employee where plaintiff had contract with employer and tort claim was not independent of contract). Neither of these theories applied under the facts pled, and, consequently, the plaintiffs' claims were not barred by the economic loss rule. *Am. Aviation*, 891 So. 2d at 534.

The significance of *American Aviation* here is that the Court expressly held that the case **"should be decided on traditional negligence principles of duty, breach, and proximate cause,**" and remanded it to the district court to determine if defendant owed a duty to plaintiff under Florida law. *Am. Aviation*, 891 So. 2d at 543-44 (emphasis added). Based on this holding, claims for solely economic losses can be barred under either the economic loss rule **or** based on traditional negligence principles. Petitioners ignore this holding and instead advocate that the decision mandates that all claims for solely economic losses not barred by the economic loss rule now state a tort cause of action under Florida law. There is, however, no language or logic in the decision that supports this interpretation, which would effectively overrule long-standing tort jurisprudence in this state. If this Court had intended such a dramatic change in Florida law, it would have

expressly done so. It did not. In fact, as Justice Cantero stated, the Court's decision "merely ensure[d] that deserving claims for purely economic recovery in tort -- **exceptional though they may be** -- will not be swallowed by an over-inclusive rule." *Id*. at 548 (Cantero, J., concurring) (emphasis added). Thus, Petitioners' position is simply wrong. *American Aviation* did not drastically alter well-established Florida tort law: it simply limited the application of the economic loss rule. It "cannot be read as broadly as the fishermen suggest." *Curd*, 993 So. 2d at 1083.

B. Petitioners' tort claims are no exception to Florida tort jurisprudence.

There is no exception to these long-standing principles of Florida tort jurisprudence when plaintiffs seek recovery for damages resulting from a pollution discharge. Instead, plaintiffs seeking such damages must meet the same threshold requirements. Plaintiffs must demonstrate that <u>their</u> property was contaminated as a result of the discharge, and that the defendant owed them a duty to protect against their solely economic losses. *St. Joe*, 912 So. 2d at 24 n.1 (class representatives could not prove their claims without evidence of actual contamination of **their** property as a result of St. Joe's dumping activities).

Petitioners have not met and cannot meet these basic threshold requirements. They seek to recover solely economic losses for the loss of fish that were <u>not</u> their property. Therefore, Petitioners face a significant hurdle: convincing the Court to expand the duty imposed on Mosaic to include the protection of the mere economic

expectation that they might have successfully harvested such fish at some point in the future. This Court should reject Petitioners' argument for such an unwarranted change in Florida jurisprudence. As stated by the Second District, Mosaic simply "did not owe an independent duty of care to protect the fishermen's purely economic interests -- that is, their expectation of profits from fishing for healthy fish." *Curd,* 993 So. 2d at 1083.

This conclusion is supported by other courts which have flatly rejected similar economic-loss-only tort claims filed by commercial fishermen who, like Petitioners here, have no proprietary interest in the fish or other wildlife. *See Barasich v. Shell Pipeline Co., LP*, 2006 WL 3913403 (E.D. La. Nov. 20, 2006); *Louisiana Crawfish Producers Ass'n-West v. Amerada Hess Corp.*, 935 So. 2d 380 (La. Ct. App. 2006). In *Amerada Hess,* a group of commercial fishermen alleged that oil and gas exploration destroyed an aquatic ecosystem and diminished their ability to catch crawfish. 935 So. 2d at 381-82. Rejecting their tort claims, the court held that the commercial fishermen and others do not have a proprietary interest in the fish and, therefore, have no basis to claim damages. *Id*. at 385; *see also Dempster v. Louis Eymard Towing Co.*, 503 So. 2d 99, 102 (La. Ct. App. 1987) (dismissing claims of commercial fishermen on the basis that they have no proprietary interest in fish). Likewise, in *Barasich,* commercial fishermen sought to hold Shell Pipeline and others liable for their alleged economic losses when an oil pipeline ruptured during Hurricane Katrina and impacted certain estuaries. 2006 WL 3913403, at *1. The court found that the commercial fishermen had no

property right in the fish under state law, and, therefore, could not state a common law cause of action. *Id*. at *7. No different result should be reached here.

Petitioners did not advise the Court of these decisions, which completely undermine Petitioners' argument that this Court should overrule well-established Florida precedent merely to accommodate their economic expectations. Instead, Petitioners attempt to rely on other decisions that also undermine, if not defeat, their argument for a tort law recovery. These decisions involve either (a) riparian owners who have **special property rights** as result of their ownership of land that borders on navigable waters or (b) commercial fishermen or others that have a **proprietary interest** in the natural resource at issue. *J.H. Miles & Co. v. McLean Contracting Co.*, 180 F.2d 789, 794 (4th Cir. 1950) (riparian owner had proprietary interest in oyster beds that he had been assigned); *Shaughnessy v. PPG Indus., Inc.*, 795 F. Supp. 193, 197 (W.D. La. 1992) (economic damages to fishing business combined with damage to a riparian estate was actionable); *see also Jurisic & Sons, Inc. v. TransTexas Gas Corp.*, 2005 WL 2488433, at *3 (S.D. Tex. Oct. 7, 2005) (commercial fishermen had no state law claim unless they established on remand that they had a proprietary interest in the oyster beds); *Carson v. Hercules Powder Co.*, 402 S.W.2d 640, 641-42 (Ark. 1966) (fisherman had possessory interest from riparian landowner and could therefore recover under public nuisance theory). These facts are not present here. Petitioners neither have special property rights nor a proprietary interest in the fish lost as a result of the Release. These cases, therefore, support the position Mosaic has advocated from the inception of

this case – and with which the trial court and the Second District agree: Petitioners' tort claims are not cognizable under Florida law.

C. No special cause of action should be created under Florida law for Petitioners.

Because Florida law does not allow Petitioners' tort claims, this Court would have to create a special tort cause of action for commercial fishermen in order to answer the certified question in the affirmative. However, tort claims should not be judicially created to protect economic interests unless "the need to provide the protection is so clear that no legislative guidance is required." *Monroe*, 746 So. 2d at 535. Here, there is no compelling reason for this Court to create a special theory of recovery for a "narrow subset of people who are indirectly or remotely injured" by pollution discharges, *i.e.*, Petitioners. If this Court were to do so, it would undoubtedly prompt others to claim that their indirect or remote injuries should likewise be compensated. *Id.* at 1084. Indeed, the definition of the putative class invites that very form of expansiveness.[7] No court has adopted such potentially limitless common law liability that the Petitioners advocate here.

The only circumstance in which courts have taken the drastic measure of creating a basis for common law recovery for commercial fishermen is in federal maritime cases. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) (plaintiff is barred from recovering solely economic losses in maritime cases when

[7] The putative class is defined as "all fishermen and those persons engaged in the commercial catch and sale of fish, bait, and related products in the Tampa Bay area. . . ." [R. 158-174] (emphasis added).

he has no propriety interest in the property damaged). In some of these cases, commercial fishermen have been permitted to recover economic losses as a result of major releases into navigable waters.[8] However, because the exception is recognized as a clear departure from established tort jurisprudence, courts have construed it very narrowly. *See, e.g., In re Exxon Valdez,* 1994 WL 182856, at *1 (D. Alaska Mar. 23, 1994); *aff'd,* 104 F.3d 1196 (9th Cir. 1977); *Golnoy Barge Co. v. M/T Shinoussa,* 1993 WL 726819, at *1 (S.D. Tex. Aug. 19, 1993).

First, the exception has been limited to commercial fishermen. *See TESTBANK,* 752 F.2d 1019, 1032 (5th Cir. 1985) (claims of individuals who were not commercial fishermen dismissed); *Nautilus Marine, Inc. v. Niemela, Inc.,* 989 F. Supp. 1229, 1237 (D. Alaska 1996), *aff'd,* 170 F.3d 1195 (9th Cir. 1999) (refusing to extend the exception to those in the salmon tendering and processing business); *In re Exxon Valdez,* 1994 WL 182856, at *6 (stating that other than commercial fishermen, "no other claimant has that option.") Here, the putative class is not so limited, but instead extends to "all fishermen and those persons engaged in the commercial catch and sale of fish, bait, and related products in the Tampa Bay area." This invites exactly what Judge Altenbernd was concerned about when he noted the difficulty of a common law court to create a "carefully

[8] The commercial fishermen exception has historically been applied to major releases (often oil pollution) in states where commercial fishing is a significant part of the economy. *See, e.g., Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974); *State of La. ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985); *Curd*, 993 So. 2d at 1085. This exception has not been recognized by the United States Supreme Court.

tailored and limited theory of recovery for a special group of fishermen." *Curd*, 993 So. 2d at 1085

Second, the commercial fishermen seeking recovery have almost uniformly been required to hold licenses in the areas affected and the areas affected must be closed to fishing as a result of the spill. *See TESTBANK*, 752 F.2d at 1021 (affirming dismissal of claims of fishermen allegedly affected in areas other than those specifically closed by the Coast Guard); *In re Exxon Valdez*, 1994 WL 182856, at *6 (commercial fishermen's claims dismissed in areas which were neither contaminated nor closed to fishing); *Jurisic & Sons, Inc.*, 2005 WL 2488433, at *2 (plaintiffs must have a license to conduct fishing activities in the waters impacted). There is no allegation that areas in which the commercial fishermen were licensed to fish, or any part of Hillsborough Bay, were closed to them for fishing.

Third, Petitioners have not cited a decision in which a court has expressly held that this exception applies to common law strict liability claims involving alleged ultrahazardous activities. *See Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia S.A.*, 988 F.2d 559 (5th Cir. 1993) (sole issue before the court was whether the case was properly removed from state court to federal court), *abrogated by Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998), *rev'd*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *Pruitt v. Allied Chem. Corp.*, 523 F.Supp. 975 (E.D. Va. 1981) (defendants admitted exception applied to commercial fishermen).

Thus, even if the Court narrowly crafted a cause of action for commercial fishermen, Petitioners would fail to meet its requirements. And, even if Petitioners could meet its requirements, state courts have, as discussed above, flatly rejected requests to adopt it. In doing so, courts have refused to ignore established state law precedent that requires tort claims be brought by those who have a proprietary interest in the property allegedly damaged as a result of the release. *See, e.g.*, *Amerada Hess*, 935 So. 2d at 385; *Dempster*, 503 So. 2d at 102. Additionally, these courts have concluded that the exception should be strictly limited to maritime cases. *See Amerada Hess*, 935 So. 2d at 383 (rejecting the commercial fishermen exception under Louisiana law because the case did not arise under admiralty); *Barasich*, 2006 WL 3913403, at *3 (refusing to apply commercial fishermen exception where wrongful conduct occurred on land and maritime law did not apply). The exception should likewise not be adopted in Florida based on well-established precedent.

III. THE PRIVATE CAUSE OF ACTION RECOGNIZED IN SECTION 376.313, FLORIDA STATUTES DOES NOT PERMIT COMMERCIAL FISHERMEN WHO SUFFERED NO PROPERTY DAMAGE FROM POLLUTION TO RECOVER FOR THEIR LOSS OF INCOME.

In 1983, the Florida Legislature enacted the Act to provide "a comprehensive statutory scheme designed to protect Florida's surface and groundwaters." *Aramark*, 894 So. 2d at 22; *see also* § 376.30(3), Fla. Stat. (2003). To facilitate the legislature's stated objective, the Act prohibits the discharge of "pollutants or hazardous substances into or upon the surface or ground waters of

the state or lands," and confers upon the DEP the authority to enact regulations and implement rules to "provide for the prompt containment and removal of damage to lands and waters by pollutant discharge." *See* §§ 376.30(3)(b), 376.302(1)(a), Fla. Stat. (2003); *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372, 1373 (Fla. 2d DCA 1993). The authority conferred upon the DEP includes the power to sue and to force the cleanup of contaminated sites. *See* § 376.308, Fla. Stat. (2003).

Because of the Act's stated intent, its provisions comprehensively address DEP's enforcement authority regarding prohibited discharges. However, the Act also contains a provision that permits private parties to sue for damages resulting from these discharges. The provision is entitled "Nonexclusiveness of remedies and individual causes of action for damages under ss. 376.30-376.319," and it provides, in pertinent part, as follows:

> Except as provided in s. 376.3078(3) and (11), nothing contained in ss. 376.30-376.319 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution. . . .

§ 376.313, Fla. Stat. (2004). This Court held that the legislature created a new cause of action when it enacted this provision because, unlike the common law which requires a plaintiff to demonstrate that the defendant caused the pollution, a party can be held liable under the provision without proof of causation. *Aramark*, 894 So. 2d at 24 (a statute creates a new cause of action if it provides a remedy unavailable under common law).

In this appeal, this Court is again being asked to interpret section 376.313 -- this time for the purpose of addressing whether a plaintiff who suffers no property damage as a result of a discharge can nonetheless recover solely economic losses under the statute. Petitioners contend that the term "all damages" was intended to provide recovery for solely economic losses. However, as discussed below, such an interpretation ignores the core purpose of the statute, its language, and Florida law.

A. There is no language in the statute that expresses an intent by the Florida Legislature to allow an individual to recover damages for solely economic losses.

This Court must determine legislative intent from the plain meaning of the statute. *See, e.g., V.K.E. v. State*, 934 So. 2d 1276, 1286 (Fla. 2006). In doing so, the phrase "all damages" must not be viewed in isolation, but instead should viewed in the context of the statute as whole. *St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 967 (Fla. 2000) (it is a cardinal rule of statutory construction that a statute must be construed in its entirety and as a whole). In fact, this is the precise analysis this Court undertook when it determined that section 376.313 created a new cause of action which did not require proof of causation. This Court relied on, among other provisions in the Act, section 376.308 which (a) allows defendants that have purchased petroleum or dry cleaning sites to defend section 376.313 claims by proving that it did not cause the prohibited discharge; and (b) limits the defendants that DEP can sue under the Act to those that caused a discharge or other polluting condition. *Aramark*, 894 So. 2d at 22, 24, 27.

In this case, section 376.30 clearly states that the Act was enacted to protect the waters and citizens of this state from the environmental hazards posed by prohibited discharges, not to protect an individual's economic expectations. Indeed, there is no language in the statute that even remotely suggests that the legislature intended to permit plaintiffs to recover for solely economic losses. It is for this reason that the Second District rejected Petitioners' section 376.313 claim stating "[w]e are unwilling to assume, in the absence of express language stating such intent, that the legislature intends the courts to use such an expansive method to measure recoverable damages under this statutory action." *Curd*, 993 So. 2d at 1084.

In fact, the Second District has previously stated, though arguably in dicta, that recoverable damages under the statute should be restricted to those connected to the cost of clean up and removal of prohibited discharge on the basis that any other result "would impact negatively on the stated purposes of the act."[9] *Mostoufi*, 618 So. 2d at 1377; *see also Italiano v. Jones Chems., Inc.*, 908 F. Supp. 904 (M.D. Fla. 1995) (damages must be connected to the clean up or removal of the prohibited discharge). This reasoning could not be more sound because it

[9] Section 376.30(5), Florida Statutes, provides that the Act should be interpreted "to support and complement applicable provisions of the Federal Water Pollution Control Act . . ." ("FWPCA"). However, because the FWPCA does not have a provision comparable to section 376.313, it provides little guidance on this issue. Federal courts have refused to find an implied right to damages in the FWPCA. Therefore, if the federal act provides guidance, it supports a very narrow construction of damages permissible under section 376.313, Florida Statutes.

limits the damages to those consistent with the purposes of the Act: to provide for the prompt containment and removal of prohibited discharges. Petitioners' unprecedented request for solely economic losses based on damage to fish that are not their property does nothing to further the purposes of the Act.

This Court's previous holding finding that section 376.313 departed from the common law by imposing statutory liability on companies for releases absent proof of causation was predicated on the clear language of the Act. Petitioners now ask this Court to depart much further from common law by permitting damages under the statute for solely economic losses from the loss of fish that were not their property.[10] However, there is an outcome-determinative difference here that renders Petitioners' position fatally flawed -- the absence of clear language in the Act mandating such a result. *See Carlile v. Game & Fresh Water Fish Comm'n,*

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[10] No reported Florida appellate decision concerning section 376.313, Florida Statutes, has allowed the unprecedented relief sought by Petitioners in this case. The reported decisions are based on claims involving damages to plaintiff's property or person – facts not present here. *See, e.g., Aramark,* 894 So. 2d at 21 (contaminated groundwater from defendant's dry cleaning operation migrated onto plaintiffs' property); *St. Joe,* 912 So. 2d at 22 (contamination of property by dumping of paper mill waste products); *Courtney Enters., Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045, 1046-47 (Fla. 2d DCA 2001) (plaintiff's property contaminated with perchloroethylene); *Morgan v. W.R. Grace & Co—Conn.*, 779 So. 2d 503, 504 (Fla. 2d DCA 2000) (plaintiff's soil on her property contaminated with uranium and other radioactive materials); *Kaplan v. Peterson*, 674 So. 2d 201, 202 (Fla. 5th DCA 1996) (plaintiff's property contaminated with petroleum from leaking underground storage tank); *Boardman Petroleum, Inc. v. Tropic Tint of Jupiter, Inc.*, 668 So. 2d 308, 309 (Fla. 4th DCA 1996) (same); *Mostoufi,* 618 So. 2d at 1373 (same); *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 94 (Fla. 1st DCA 1990) (plaintiffs sought damages for exposure to toxic substances).

354 So. 2d 362, 364 (Fla. 1977) (courts cannot interpret statutes to alter common law unless the statutory language is clear in its intent to do so). Therefore, this provision should not be interpreted to further depart from the common law by allowing claims for solely economic losses.[11]

B. As a matter of public policy, this Court should not interpret the statute to create virtually limitless liability.

Neither Mosaic nor anyone else should be deemed responsible for the purported losses of every person who can conjure up some purported economic impact from an environmental release. This is exactly what would occur if Petitioners' interpretation were adopted by the Court. Mosaic and others would essentially become insurers of the economic interests of those who claim any monetary loss, no matter how attenuated, as a result of a discharge. There is no precedent for such a rule of law. As stated by the Second District, "if this statute were given the expansive interpretation suggested by the fishermen, it would be very difficult to decide when damages were so remote that they were no longer damages." *Curd*, 993 So. 2d at 1084. This would, therefore, create a virtually limitless scope of statutory strict liability "in the absence of express language stating such intent." *Id.*

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[11] States that do allow damages for solely economic losses resulting from environmental releases have done so explicitly and under defined circumstances. *See, e.g.*, Va. Code Ann. § 62.1-44.34:18(C)(4) (2008); R.I. Gen. Laws §§ 46-12.3-2, 46-12.3-3 (2008). This clearly is not the case in Florida.

That is not to say that companies who damage the environment as a result of releases should not be held accountable. For this reason, Congress and state legislatures have enacted comprehensive natural resource damage statutes which impose responsibility for prohibited discharges on companies responsible by requiring them to restore or replace the damaged environment. *See* CERCLA, 42 U.S.C. § 9607 (2003) (allowing federal and state trustees to seek natural resource damages); § 403.727, Fla. Stat. (2003). Mosaic's accountability for the loss of natural resources will be determined in another forum in accordance with these laws. Therefore, while Petitioners cannot recover their speculative lost profits for the fish they might have harvested had the Release not occurred, a remedy exists under both federal and state law to restore the lost fish and other natural resources so that fishermen and others can continue to enjoy their benefits.

CONCLUSION

For the foregoing reasons, Mosaic Fertilizer, LLC, respectfully requests that this Court deny review of this case and allow the well-reasoned decision of the district court to stand. In the alternative, the certified questions should be answered in the negative, and the district court's decision affirmed.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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