UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHELLE IRIZARRY; VALERIE WILLIAMS; JOANN NIXON; JOANN ROBINSON; and BRANDON LITT,

Plaintiffs,

v.

ORLANDO UTILITIES COMMISSION; LENNAR CORPORATION; LENNAR HOMES, LLC; U.S. HOME CORPORATION; AVALON PARK GROUP MANAGEMENT, INC., d/b/a/ AVALON PARK GROUP; BEAT KAHLI; BORAL RESOURCES, LLC; and PREFERRED MATERIALS, INC.,

Defendants.

Case No. 6:19-cv-00268-RBD-TBS

DEFENDANT ORLANDO UTILITIES COMMISSION'S
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Pursuant to Federal Rule of Civil Procedure 12(c), Defendant Orlando Utilities Commission moves for judgment on the pleadings on Count I of the Amended Class Action Complaint and Demand for Jury Trial.

SUMMARY

This is a toxic tort action brought on behalf of thousands of putative class members who live in communities near OUC's Stanton Energy Center. Plaintiffs claim that operations at Stanton have diminished the value of their homes and caused other damages, and they seek to hold OUC strictly liable under Section 376.313(3) of the Water Quality Assurance Act ("WQAA").

But OUC is a public entity presumptively entitled to sovereign immunity, and nothing in the WQAA reflects a "clear and unequivocal" legislative intent to waive that immunity. To the contrary, the WQAA's liability provisions were modeled after analogous provisions in CERCLA that the U.S. Supreme Court found insufficient to evince a waiver. Under several longstanding principles of statutory construction, this Court should afford the WQAA the same construction. Indeed, it seems that no Florida court has ever permitted Section 376.313(3) claims against a state agency, and the only federal judge to address the issue concluded that "[n]othing in § 376.313 clearly or unequivocally shows a waiver." *Miller v. City of Ft. Myers*, No. 2:18-cv-195-FtM-38UAM (M.D. Fla. Apr. 1, 2019) (Doc. 61) (Chappell, J.). This Court, too, should adhere to the presumption in favor of sovereign immunity and enter judgment in OUC's favor on Count I. Doing otherwise would subject OUC to unprecedented and unwarranted liability, the effect of which would ripple well beyond this case, dramatically expanding the exposure of public entities—and ultimately the public treasury—without clear and unequivocal evidence of the Legislature's intent to do so.

BACKGROUND

Viewing the pleadings in the light most favorable to Plaintiffs, the facts of this case are as follows: OUC is a public utility established in 1923 by a special act of the Florida legislature. (Doc. 43 ¶¶ 26–27.) It provides electric, water, and lighting services to more than 264,000 customers in Orlando, St. Cloud, and unincorporated parts of Orange and Osceola counties. (*Id.* ¶26; Doc. 51 ¶26.)

As part of its duties, OUC partially owns and operates two coal-fired electric generating units at the Curtis H. Stanton Energy Center ("Stanton Power Plant"). (Doc. 43 ¶ 55; Doc. 51

¶ 1.) Working together with engineering consultants, OUC began planning for the development of these two units in the late 1970s and 80s, with the goal of accommodating, among other things, the rapid growth of the greater Orlando area, new environmental regulations, and the need for fuel diversity. (*Id.* ¶¶ 59–61.)

Plaintiffs—Michelle Irizarry, Valerie Williams, Joanne Nixon, Joann Robinson, and Brandon Litt—are residents of various planned communities that were constructed in the 1990s or later within a five-and-a-half-mile radius of the Stanton Power Plant. (*Id.* ¶¶ 21–25, 116, 252.) As relevant to OUC, Plaintiffs allege that after the Stanton Power Plant burned coal to generate electricity, the residual coal "ash" was carried by the wind into areas surrounding the Plant, including the Plaintiffs' residences. (*Id.* ¶88, 353.) According to Plaintiffs, the ash contained a variety of airborne particles that increase the risk of serious health problems in adults and children. (*Id.* ¶¶ 156–250.) Plaintiffs do not assert that this purported risk has caused them or their children any personal injury. Instead, they aver that the "contamination" from the Stanton Power Plant has diminished the value of their respective properties and otherwise interfered with their use and enjoyment of the properties. (*Id.* ¶ 6.)

Plaintiffs originally brought this action in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida. (Doc. 1-1.) In the original Class Action Complaint, Plaintiffs asserted, among other things, a cause of action for statutory strict liability based on Section 376.313(3) of the WQAA. (*Id.* ¶¶ 93–98.) The Class Action Complaint did not allege any waiver of OUC's sovereign immunity. On February 8, 2019, OUC removed the case to this Court pursuant to its original jurisdiction under the Price-Anderson Act. (Doc. 1 ¶¶ 9–19.)

On March 18, 2019, OUC filed its original Answer and Affirmative Defenses, asserting sovereign immunity as its fifteenth defense. (Doc. 39 at 17.) Ten days later, Plaintiffs filed their Amended Complaint, which included, among other revisions, a page-long paragraph asserting that the WQAA contains a waiver of sovereign immunity and, therefore, Count I is not subject to sovereign immunity protection. (Doc. 43 ¶306.) OUC reasserted its sovereign immunity in its Answer and Affirmative Defenses to the Amended Complaint. (Doc. 51 at 41.)

All Defendants have now answered the Amended Complaint (Docs. 51, 73, 74, 85, 86, 87), and the pleadings have closed.

STANDARD

Federal Rule of Civil Procedure 12(c) states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014) (quoting *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001)). "In determining whether a party is entitled to judgment on the pleadings, [the Court] accept[s] as true all material facts alleged in the non-moving party's pleading, and . . . view[s] those facts in the light most favorable to the non-moving party." *Id.*; *see also Gallaher v. Estates at Aloma Woods Homeowners Ass'n, Inc.*, 316 F. Supp. 3d 1358, 1361–62 (M.D. Fla. 2018) (applying this standard).

Although Rule 12(c) neither provides for nor prohibits motions for partial judgments on the pleadings, this Court routinely considers such motions. *See, e.g., Dickinson v. Exec.*

Bus. Grp., Inc., 983 F. Supp. 1395, 1397 (M.D. Fla. 1997) (considering a motion for partial judgment on the pleadings).

ARGUMENT

I. OUC is a public entity protected by sovereign immunity absent a waiver by the Florida Legislature that is "clear and unequivocal."

The doctrine of sovereign immunity "provides that a sovereign"—including a state and its agencies—"cannot be sued without its own permission." *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). The doctrine has been a part of Florida law since the State's foundation, and it serves three important interests: "preservation of the constitutional principle of separation of powers," "protection of the public treasury," and "maintenance of the orderly administration of government." *Id.*

In recognition of these interests, "sovereign immunity is the rule rather than the exception." *See Pan–Am Tobacco Corp. v. Dep't of Corr.,* 471 So.2d 4, 5 (Fla. 1984). Only the Florida Legislature may abrogate sovereign immunity. *See* Art. X, § 13, Fla. Const.

In recognition of the Legislature's exclusive power, Florida courts will not construe a statute as having waived sovereign immunity unless the waiver is "clear and unequivocal." *See Am. Home Assur. Co.*, 908 So. 2d at 472. "Moreover, waiver will not be found as a product of inference or implication." *Id.* Federal courts apply essentially identical standards. *See Sossamon v. Texas*, 563 U.S. 277, 284 (2011) ("A State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute." (citation omitted)).

OUC is a state entity presumptively protected by sovereign immunity. It was "created in 1923 by a special act passed by the Legislature, chapter 9861, Laws of Florida (1923), and took effect after the affirmative vote of a majority of the freeholders of the City [of Orlando]."

Lederer v. Orlando Utils. Comm'n, 981 So. 2d 521, 523 (Fla. 5th DCA 2008). It is "purely a creation of the Florida Legislature," and while it "may be a public utility designated as part of [Orlando's] government, it remains a distinct legal entity that operates mostly independently of the City." *Id.* Thus, as a legislatively created state entity, OUC is protected by sovereign immunity under Florida law unless the Legislature has clearly and unequivocally waived that immunity, which it has not. *See Hodge v. Orlando Utils. Comm'n,* No. 6:09-cv-1059-ORL-19DAB, 2009 WL 4042930, at *10 (M.D. Fla. Nov. 23, 2009) (holding that "[i]f OUC is not a municipality," then it must be a "state agency or subdivision" presumptively entitled to sovereign immunity).

II. The Florida Legislature has not "clearly and unequivocally" waived sovereign immunity from strict-liability claims brought under Section 376.313(3).

Here, Plaintiffs argue that the Florida Legislature has waived sovereign immunity from strict-liability claims brought under Section 376.313(3), and that it expressed its intent to do so in two separate sections of the WQAA. (Doc. 43 ¶ 306.) The first is Section 376.301(29), which defines the term "person" to include "any governmental entity." The second is Section 376.308, which limits the defenses available to a "governmental body" in "any suit instituted by the department"—that is, any enforcement action brought by the Florida Department of Environmental Protection. *See* § 376.308(1), (2)(b), Fla. Stat. Notably, Section 376.313(3) itself makes no mention of "government entities" or "government bodies"—nor, for that matter, does it explicitly authorize suits against "persons." Nevertheless, Plaintiffs contend that the limitation of defenses to "those specified in s. 376.308," coupled with the imposition of liability on "persons" in other sections of the WQAA, is sufficient to waive sovereign immunity. (*See* Doc. 43 ¶ 306.)

Neither the Florida Supreme Court nor Florida's district courts of appeal have addressed whether Chapter 376 abrogates sovereign immunity. Federal courts, however, routinely reject the type of definitional arguments that Plaintiffs make here, including in the context of the CERCLA provisions on which the WQAA's liability provisions were based. This Court should do the same here, for the same reasons.

A. Federal courts presume that including a state within the definition of those who can be sued does not clearly and unequivocally waive sovereign immunity.

There are at least two plausible interpretations of statutory schemes that include states within the definition of those who can be privately sued and also allow for enforcement actions by government agencies. One interpretation takes the act's "literal language" at face value as conclusive evidence of a sovereign immunity waiver. *See Employees of Dep't of Pub. Health & Welfare, Missouri v. Dep't of Pub. Health & Welfare, Missouri,* 411 U.S. 279, 283 (1973) (considering and rejecting this approach in the context of the Fair Labor Standards Act). The other, more sensible interpretation recognizes that words have different meanings in different contexts—a point the definitional section of the WQAA expressly recognizes[1]—and the inclusion of states within the general definition of those who can be sued might only reflect legislative intent for the state to be subject to enforcement actions by government agencies. *See id.* at 286–87 (adopting this interpretation of the FLSA even though the FLSA provided for recovery against "employers" and defined "employer" to include "any State or political subdivision of a State"). Because both interpretations are plausible, such statutory schemes do

[1] The WQAA's definitional section opens by cautioning that the definitions do not apply if "context clearly requires otherwise." § 376.301, Fla. Stat.

not, in and of themselves, clearly and unequivocally waive sovereign immunity. *See id.* at 285; *see also Sossamon*, 563 U.S. at 287 ("[W]here a statute is susceptible of multiple plausible interpretations, including one preserving immunity, we will not consider a State to have waived its sovereign immunity").

There is a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 766 (2000). The presumption is "particularly applicable" where inclusion of the sovereign would subject states "to liability to which they had not been subject before," *id.* (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)), and it "applies even when 'person' is elsewhere defined by statute," *Robinson v. United States Dep't of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019) (holding that the Fair Credit Reporting Act does not waive sovereign immunity even though the Act imposes liability on "persons" and defines that term to include governmental agencies); *see also Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 769 (9th Cir. 2018) (same). Although the presumption against interpreting "person" to include the sovereign is not a "hard and fast rule," it should be followed unless the "purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring state or nation within the scope of the law." *Int'l Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 82–83 (1991) (citations omitted).

B. The presumption against definitional waivers of sovereign immunity applies to the WQAA, which mirrors CERCLA liability provisions that do not abrogate states' sovereign immunity.

Thus, whether the WQAA reflects a "clear and unequivocal intent" to waive sovereign immunity requires consideration of what the Florida Legislature intended of the Act's liability

provisions. This, in turn, requires consideration of the analogous liability provisions in CERCLA because "Florida courts have held that when Florida legislation is modeled upon federal law, the state courts should give the Florida legislation the same construction as the federal courts give the federal legislation." *State Dep't of Envtl. Prot. v. Allied Scrap Processors, Inc.*, 724 So. 2d 151, 152 (Fla. 1st DCA 1998). "The language of the operative liability provisions in the [WQAA] closely mirrors comparable provisions in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)," and so federal interpretations of whether CERCLA's provisions waive sovereign immunity inform whether the WQAA's parallel provisions do too. *See id.*; *see also Gen. Dynamics Corp. v. Brottem*, 53 So. 3d 334, 338 n.4 (Fla. 5th DCA 2010) (turning to CERCLA to help interpret the WQAA because the "WQAA is modeled after CERCLA").

Critically, the WQAA's liability provisions, including the pertinent definitions, are modeled after the CERCLA liability provisions that existed *before* the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). This distinction matters because the pre-SARA provisions did *not* abrogate states' sovereign immunity, but the post-SARA provisions do.

Pennsylvania v. Union Gas Co. controls this issue. *See* 491 U.S. 1, 5 (1989).[2] *Union Gas* came to the U.S. Supreme Court from the Third Circuit, which had initially affirmed a

[2] The Supreme Court has partially receded from *Union Gas* on inapposite grounds. *Union Gas* presented two questions: whether SARA's amendments to CERCLA permit "a suit for monetary damages against a State in federal court and, if so, whether Congress has the authority to create such a cause of action when legislating pursuant to the Commerce Clause." 491 U.S. at 5. The Court held that the "answer to both questions is 'yes.'" *Id.* Later, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court reversed itself on the second question only. The portion of *Union* gas regarding legislative intent, as opposed to legislative authority, remains good law. *See Bank One of Ohio Tr. Co. v. Spring Indus., Inc.*, No. 5:94-cv-2208, 1997 WL 1038870, at *3 (N.D. Ohio May 7, 1997), *aff'd*, 162 F.3d 1161 (6th Cir. 1998) ("The majority of the Supreme Court concluded that 'the language of CERCLA, as amended by SARA, clearly evinces an intent to hold States liable in damages in federal court.' The overruling of *Union Gas* by *Seminole Tribe* does not alter this conclusion." (citation omitted)).

district court's conclusion that sovereign immunity barred Union Gas Company's alleged CERCLA contribution claim against the State of Pennsylvania. *See United States v. Union Gas Co.*, 792 F.2d 372 (3d Cir. 1986). The district court and the Third Circuit held as much despite the fact that the "liability section of CERCLA" allowed recovery against "any person" and defined "person" to include any "State, municipality, commission, [or] political subdivision of a State." *Id.* at 379. They did so for the reasons expressed above, finding it equally plausible that Congress included states within the definition of "person" to enable agency enforcement actions rather than private lawsuits. *See id.* ("[W]e are bound by *Employees* to find that the inclusion of 'states' within the class of potential defendants is insufficient to abrogate Pennsylvania's immunity." (citing 411 U.S. at 279)). Notably, the Third Circuit observed that CERCLA has a separate provision expressly waiving the sovereign immunity of the federal government, but not states, by providing that the federal government is subject to CERCLA "'in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity.'" *See id.* at 379 n.7 (quoting 42 U.S.C. § 9607(g)).[3]

Shortly after the Third Circuit's initial decision, Congress enacted SARA. Most significantly, "Section 101 of SARA, entitled 'Amendments to Definitions,' add[ed] a new paragraph to CERCLA which define[d] 'owner or operator,'" a subcategory of persons. *See United States v. Union Gas Co.*, 832 F.2d 1343, 1348 (3d Cir. 1987). That new definition not only included states and local governments, but also tracked the language from CERCLA's

[3] SARA amended and recodified the federal waiver of sovereign immunity, which now appears in 42 U.S.C. § 9620(a)(1).

standalone federal sovereign immunity waiver to specify that a "*State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity.*" *Id.* (quoting 42 U.S.C. § 9601(20)(D)). Based on this new explicit language, the Third Circuit changed course and reversed the district court. *See id.* at 1350. It emphasized, however, its continuing belief that "mere enumeration in a definitional section remains insufficient as evidence of congressional intent to abrogate." *Id.* at 1348. What made the difference post-SARA was that the waiver language in Section 9601(20)(D), although "found in a definitional section, [was] not definitional in character; it far exceed[ed] the bare enumeration" that existed prior to SARA. *See id.* at 1348–49.

On certiorari review, the U.S. Supreme Court agreed. Specifically, a five-justice majority reasoned that the Section 9601(20)(D) language inserted by SARA abrogated states' sovereign immunity with "unmistakable clarity," and that it could "be no coincidence" that Section 9601(20)(D)'s language mirrors that of the separate provision expressly waiving the federal government's sovereign immunity. *See Union Gas Co.*, 491 U.S. at 8, 10. Further, in response to the four dissenting justices who felt that the majority was employing an inappropriately definition-driven analysis, the majority tacitly conceded that CERCLA's pre-SARA provisions would not have abrogated states' sovereign immunity, noting: "We do not say that CERCLA's definition of 'persons' alone overrides the States' immunity, but instead read CERCLA and SARA together, and argue that SARA's wording must inform our understanding of the other definitional sections of the statute." *See id.* at 8 n.2. In particular, it was only "SARA's more specific language" that kept the case from being controlled by

Employees and its tenet that inclusion of a state within an enumerated definition does not clearly convey a waiver. *See id.* (citing *Employees*, 411 U.S. at 297). Hence, but for SARA's insertion of Section 9601(20)(D), the Court could have "held that CERCLA did not subject the States to suits brought by private citizens," and that interpretation would not have "rendered meaningless" the "inclusion of States within CERCLA's definition of 'persons.'" *See id.* at 11. As the availability of that immunity-preserving interpretation reflects, CERCLA's pre-SARA language would not have been clear and unequivocal enough to abrogate states' sovereign immunity. *See, e.g.*, *Sossamon*, 563 U.S. at 287 (affirming that the Court "will not" construe statues as waiving sovereign immunity if the statute is susceptible to an immunity-preserving interpretation).

As expressed above, the liability provisions in the WQAA, which was enacted in 1983, track those that existed in CERCLA before SARA was enacted in 1986. Both statutory schemes impose liability on "persons" responsible for various environmental misconduct, including a polluting facility's "owner" or "operator." *See* §§ 376.301(27), (28), Fla. Stat. (defining "owner" and "operator"); 42 U.S.C. § 9601(20) (same). Both also limit a person's fault-focused defenses[4] to acts of God, acts of war, and certain acts or omission of third parties. *See* § 376.308(2), Fla. Stat.; 42 U.S.C. § 9607(b). And both define the term "person" to include governmental entities. *See* § 376.301(29), Fla. Stat. ("'Person' means any individual, partner, joint venture, or corporation; any group of the foregoing, organized or united for a business purpose; or any governmental entity."); 42 U.S.C. § 9601(21) ("The term 'person' means an

[4] Section 376.308 limits only "fault-focused" defenses and not other "defenses such as improper venue, lack of personal jurisdiction, *res judicata,* and the statute of limitations." *Gen. Dynamics Corp. v. Brottem*, 53 So. 3d 334, 338 (Fla. 5th DCA 2010)

individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.").

But unlike the post-SARA CERCLA, the WQAA does not have any provision that explicitly waives or even references sovereign immunity. There is no counterpart to CERCLA's waiver of federal sovereign immunity in Section 9620(a)(1), and the Florida Legislature has never added language to the WQAA's definitional section that would, however phrased, hold the State liable "to the same extent, both procedurally and substantively, as any nongovernmental entity." *Compare* 42 U.S.C. § 9601(20)(D), *with* § 376.301, Fla. Stat.

Thus, the WQAA does not clearly and unequivocally waive sovereign immunity from Section 376.313(3) claims. To the contrary, this Court must presume that the Florida Legislature was aware of the U.S. Supreme Court's decision in *Union Gas* and that the pre-SARA CERCLA did not waive states' sovereign immunity. *See Winn-Dixie Stores, Inc. v. Reddick*, 954 So. 2d 723, 728 (Fla. 1st DCA 2007) (reiterating that the Florida Legislature must be presumed to know of the effect that interpretations of federal statutes will have on their state statutory counterparts). And because the Florida Legislature has amended Chapter 376's liability and definitional sections many times since *Union Gas* but has never inserted SARA's sovereign immunity waivers, this Court should also presume that the Florida Legislature intended to maintain the status quo and keep the State's sovereign immunity intact. *See Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996) (explaining that "'in reenacting a statute the legislature is presumed to have an awareness of the judicial construction placed

upon the re-enacted statute, and to have adopted this construction, absent a *clear* expression to the contrary'" (citation omitted)).

Three additional points support this conclusion. *First*, interpreting Sections 376.301(29) and 376.308(2) as subjecting "governmental" entities only to FDEP enforcement actions comports with the WQAA's express legislative intent. As Section 376.30(3) makes clear, "[t]he Legislature intend[ed] by the enactment of ss. 376.30–376.317 to exercise the police power of the state by conferring upon the Department of Environmental Protection the power to" effectuate the Act's purposes. This, of course, is consistent with this Court's recent observation that "'the general enforcement of the state's pollution laws' . . . is tasked to DEP." (Doc. 80 at 13 (quoting *Sher v. Raytheon Co.*, Case No. 8:08-cv-889-T-TGW, 2008 WL 2756570, at *3 (M.D. Fla. July 14, 2008)).)

Second, declining to interpret the WQAA as waiving sovereign immunity is especially appropriate here because Section 376.313(3) claims would subject the State to a form of "super strict" liability to which it has not been previously exposed. At least some fault-based defenses, such as comparative fault, remain available to defendants under traditional strict-liability schemes. *See N. Miami Med. Ctr., Ltd. v. Miller*, 896 So. 2d 886, 890 n.5 (Fla. 3d DCA 2005) (collecting cases). But Section 376.313's cross-reference to Section 376.308 strips WQAA defendants of "fault-focused defenses or, put another way, strict liability exceptions." *Gen. Dynamics Corp.*, 53 So. 3d at 337. Again, the presumption against definitional waivers of sovereign immunity is "particularly applicable" to statutes that would impose new forms of liability on the State, *see Stevens*, 529 U.S. at 766, and Florida courts understandably hesitate to impose "super-strict" liability by interpretation on any defendant, *see N. Miami Med. Ctr.*,

896 So. 2d at 890 (declining to read a "super-strict" liability cause of action into Section 458.320, Florida Statutes, and reasoning that the court was "not free to ascribe such a presumptuous legislative intent").

Third, as mentioned above, there is a presumption that the word "person" does not include the sovereign, and that presumption applies even where the word "person" is defined by the statute to include government entities. This is particularly true when applying the same definition of "person" across every portion of a statute leads to "implausible results." *Robinson* 917 F.3d at 805; *Daniel*, 891 F.3d at 770. The courts in both *Robinson* and *Daniel* held that FCRA did not waive sovereign immunity—even though FCRA's civil liability provisions applied to "persons" and FCRA defined "persons" to include government entities—because reading the term "person" as having precisely the same definition in every context could lead to absurd consequences. *Robinson* 917 F.3d at 806; *Daniel*, 891 F.3d at 773.[5] The same reasoning applies to the WQAA.

For instance, reading the word "person" to include the government in both FCRA and the WQAA leads to the strange conclusion that the government has subjected entire agencies, not just individual employees, to criminal prosecutions. *See* § 376.302(4), Fla. Stat. ("*Any person* who commits a violation specified in paragraph (1)(c) shall be guilty of a misdemeanor of the first degree . . . ." (emphasis added)); *Robinson*, 917 F.3d at 804–05 (concluding that such an "awkward" reading of the FCRA suggests that the word "person" does not have its

[5] One federal appellate court seemingly came to a different conclusion than *Robinson* and *Daniel*, but has since retreated from the consequences of its holding. *Compare Bormes v. United States*, 759 F.3d 793, 795–966 (7th Cir. 2014), *with Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 823–27 (7th Cir. 2016).

defined meaning everywhere the statute); *Daniel*, 891 F.3d at 773 (explaining that criminal penalties against government agencies would be "patently absurd" (citation omitted)).

Such a reading also leads to the odd conclusion that FCRA and the WQAA authorize the government to impose fines—as opposed to nonmonetary obligations—against itself, *see* §§ 376.302(2)–(3), without applying "a more collaborative procedure that recognizes the unique posture of one agency punishing another." *Daniel*, 891 F.3d at 770–71 & n.5 (explaining that it "makes little sense" for the government to recover civil penalties from itself, and contrasting FCRA with RCRA, which requires the head of the EPA and a violating agency to "confer" before an enforcement order becomes final); *see also Robinson*, 917 F.3d at 805 ("It would be anomalous for the federal government to expose its fisc to the suits of state attorneys general in such an offhanded manner.").

Finally, the word "person" in FCRA and the WQAA does not distinguish between different government entities, which means that any government entity—including foreign and tribal—would be swept into the ambit of Section 376.313, regardless of whether its immunity could even be lawfully waived. *Cf.* § 376.301(29) (emphasis added) ("'Person' means . . . any governmental entity"); *Robinson*, 917 F.3d at 805 ("Robinson's arguments equally would expose 'any government' to liability, including foreign, tribal, and state governments.").

Ultimately, in OUC's review, no Florida court has ever read the WQAA as waiving Florida's sovereign immunity from private strict-liability claims brought under Section 376.313(3). What is more, the only federal judge who has considered the question concluded that the WQAA does not contain such a waiver. *See Miller*, No. 2:18-cv-195-FtM-38UAM (M.D. Fla. Apr. 1, 2019) (Doc. 61) (Chappell, J.). Specifically, U.S. District Judge Chappell

correctly reasoned that "[n]othing in § 376.313 clearly or unequivocally shows a waiver," and this is true despite the fact that "'any governmental entity' is a 'person'" within the statutory scheme. *Id.* at 22. Moreover, Judge Chappell rejected the same argument Plaintiffs make here regarding Section 376.308(2). "At best," Judge Chappell observed, "this subsection implies a waiver by specifying that an 'act of government' defense is unavailable to the government body that acted. But an implication is not a clear and unequivocal waiver of sovereign immunity under Florida Law." *Id.* at 23 (citing *Florida Dep't of Transp. v. Schwefringhaus*, 188 So. 3d 840, 846 (Fla. 2016)); *see also Becker v. City of Fort Myers*, No. 2:18-cv-195-FtM-38UAM, 2019 WL 2929326, at *3 (M.D. Fla. July 8, 2019) (Chappell, J.) (reaffirming, on subsequent pleadings, that "waiver cannot be found by inference or implication" and thus sovereign immunity still applies to Section 376.313(3) claims). Judge Chappell correctly applied Florida law, and this Court should follow suit.

C. *Bifulco* and *Maggio* should not affect the Court's analysis.

Finally, Plaintiffs' reliance on *Bifulco* is misplaced. (*See* Doc. 43 ¶ 306 (citing *Bifulco v. Patient Bus. & Fin. Services, Inc.*, 39 So. 3d 1255, 1258 (Fla. 2010)).) The holding in *Bifulco* is confined to Florida's Workers' Compensation Law, which materially differs from the WQAA.

Most notably, the Workers' Compensation Law contains a one-line "Application" provision: "Every employer and employee as defined in s. 440.02 shall be bound by the provisions of this chapter." § 440.03, Fla. Stat. This simple but significant statement reflects that the Legislature considered its definitional section and intended for every enumerated "employer," including "the state," to be subject to every provision of the Workers'

Compensation Law, including the provision creating a private cause of action against employers for retaliation. *See* § 440.02(16)(a), Fla. Stat. (defining "employer"); § 440.205, Fla. Stat. (creating a retaliation cause of action). In other words, the application section bridged the gap between the definition and retaliation sections, thereby allowing the Florida Supreme Court to find a clear and unequivocal waiver of sovereign immunity. *See Bifulco*, 39 So. 3d at 1257.

In stark contrast, the WQAA does not contain an analogous application section—or any other section that explains, in concrete terms, who can be named as a defendant to a Section 376.313(3) claim. In fact, unlike Section 376.313(3)'s counterpart in the Pollutant Discharge and Control Act,[6] which affirmatively states that "any person may bring a cause of action *against a responsible party*" for damages caused by a discharge or condition of pollution, § 376.205, Fla. Stat. (emphasis added), Section 376.313(3) is silent as to potential defendants, stating only that nothing in the WQAA "prohibits any person from bringing a cause of action" for discharge- and pollution-related damages. The text and structure of Section 376.205 make clear that the Legislature could have clarified the scope of Section 376.313(3) but chose not to do so. The resulting vagueness contributed to the twenty-one-year stretch during which Florida courts struggled to determine whether Section 376.313 created a cause of action at all. *See Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 22 (Fla. 2004) (finally resolving the dispute in favor of finding a private right of action). During this

[6] The Pollutant Discharge and Control Act is the title of the first half of Chapter 376. It "is intended to protect coastal waters and adjoining lands, whereas the [WQAA] is intended to combat pollution to surface and ground waters." *Simon's Trucking, Inc. v. Lieupo*, 244 So. 3d 370, 372 (Fla. 1st DCA 2018), *review granted,* SC18-657, 2018 WL 5809833 (Fla. Nov. 6, 2018).

period of uncertainty, Judge Griffin of Florida's Fifth District Court of Appeal offered a prescient prediction: "The [WQAA] is so badly drafted that if it does intend to create a cause of action, it opens up a real can of worms in terms of who can sue, where, and for what." *Kaplan v. Peterson*, 674 So. 2d 201, 206 (Fla. 5th DCA 1996) (Griffin, J., concurring in part and dissenting in part). Time has proven Judge Griffin correct, and it should go without saying that a statutory "can of worms" cannot "clearly and unequivocally" waive sovereign immunity.

One final Florida Supreme Court case warrants distinction. *Bifulco* relies in part on *Maggio v. Florida Dep't of Labor & Employment Sec.*, a similar case in which the court found that the Legislature had independently waived sovereign immunity from Florida Civil Rights Act claims by including the State within the definition of "person" and incorporating portion of Section 768.28, Florida's limited waiver of sovereign immunity from tort claims.[7] *See* 899 So. 2d 1074, 1078–81 (Fla. 2005). There is a line in *Maggio* that, read in isolation, suggests the definition alone sufficed as a waiver. *See id.* at 1078 ("The inclusion of the State in the definition of 'person' and, hence, 'employer' evidences a clear, specific, and unequivocal intent to waive sovereign immunity."). But the cases the Court cites in support provide more complete context. *See id.* (citing *Klonis v. State, Dep't of Revenue*. *See* 766 So. 2d 1186, 1190 (Fla. 1st DCA 2000), and *Jones v. Brummer*, *see* 766 So. 2d 1107, 1107 (Fla. 3d DCA 2000)).

The courts in both *Klonis* and *Jones* followed the "proper practice in reviewing the provisions of a statute," which is to look "'to the provisions of the whole law, and to its object

[7] Section 768.28(1) provides that the "state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act." § 768.28(1), Fla. Stat. Unlike the Florida Civil Rights Act, the WQAA does not incorporate Section 768.28. Moreover, Section 768.28 was enacted to waive sovereign immunity for traditional common law torts, not statutory causes of action. *See Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So.2d 912, 917 (Fla. 1985); *Hill v. Dep't of Corrections*, 513 So.2d 129, 133 (Fla. 1987).

and policy,' rather than consider various statutory subsections in isolation from one another and out of context." *Klonis*, 766 So. 2d at 1189 (citation omitted). In doing so, both courts observed that the FCRA not only defines "persons" and "employers" to include the State, but also insulates "the state and its agencies" from "liability for punitive damages" and imposes caps on recoverable compensatory damages. *See* § 760.11(5), Fla. Stat. (incorporating the limitations "set forth in s. 768.28(5)"). It was this *combination* of definitional and liability-limiting provisions that convinced the courts of the Legislature's intent to waive sovereign immunity. *See Klonis*, 766 So. 2d at 1190 (holding that "that several sections of the F.C.R.A., taken together, clearly demonstrate a legislative intent to allow suits against the State of Florida and any of its agencies," including the damages limitations reflecting "a clear, unambiguous legislative intent that agencies . . . could, and would, be named as defendants in Chapter 760 claims and would be liable for damages"); *see also Jones*, 766 So. 2d at 1107 ("[W]e believe that a fair reading of Florida's Civil Rights Act as a whole, together with section 768.28, Florida Statutes, which is cross-referenced in the Act, evidences a sufficiently clear legislative intent that sovereign immunity for public employers, such as the appellee in this case, is waived for causes of action brought in state court under the Act.").

Klonis and *Jones*—and by extension *Maggio*—accordingly confirm that definitional sections should not be read in isolation as waiving sovereign immunity. Further, by partially grounding their analyses in the damages limitations that the FCRA affords sovereign defendants, all three courts ensured that the Florida Legislature had considered "protection of the public treasury," one of the paramount interests sovereign immunity exists to safeguard. *Am. Home Assur. Co.*, 908 So. 2d at 471.

In this action, on the other hand, Plaintiffs would have this Court read Section 376.313(3) as allowing, based on a "super-strict" theory of liability, uncapped damages against OUC for a purported diminution in the value of "more than 15,000 housing units" located in an area characterized by its "carefully planned" and "luxurious" communities. (*See* Doc. 43 ¶¶ 11, 164, 263(d), and prayer for relief; *see also id.* ¶ 120 (characterizing Stoneybook East as a "prestigious golf course community offering condos, single-family homes, and paired villas"); *id.* ¶¶ 124–25 (characterizing Eastwood as a "golf course community" offering "elaborate game and entertainment rooms, and garage workshops").) The amount of such an award could be staggering, and its effect would ripple well beyond this case, dramatically expanding the exposure of public entities—and ultimately the public treasury—to a category of compensatory damages that are unavailable under the WQAA's federal counterparts. *See, e.g.*, *Miller v. D.C. Water & Sewer Auth.*, 17-CV-0840 (KBJ), 2018 WL 4762261, at *9 (D.D.C. Oct. 2, 2018) ("Therefore, CERCLA can be a vehicle for compensatory relief, *but not in the form of unspecified damages for general harms caused by past exposure to hazardous waste*; rather, plaintiffs can seek specific reimbursements for past clean-up costs that the plaintiff has incurred if the national contingency plan contemplates such expenses." (emphasis added)). This Court should decline to adopt such an unprecedented, over-reaching, and statutorily unfounded interpretation of the WQAA.

CONCLUSION

The WQAA is a complex statute that defies easy construction. This complexity was compounded by the Florida Supreme Court's 2004 holding in *Aramark* that section 376.313(3) was a standalone cause of action. Since that time, no Florida court has held that the WQAA

contains a waiver of sovereign immunity. This Court, which has already rejected one invitation to read a waiver into the statute in the *Miller* Order, should likewise reject the theories of waiver in the Amended Complaint. Neither the plain language of section 376.313(3) nor the other statutes and cases cited in the Amended Complaint satisfy the high standard for finding a clear and unequivocal waiver of sovereign immunity. Accordingly, OUC respectfully requests that this Court enter a judgment on the pleadings for Count I of the Amended Complaint because it is barred by sovereign immunity.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(j), Defendant Orlando Utilities Commission respectfully requests oral argument on its Motion for Partial Judgment on the Pleadings. Orlando Utilities Commission estimates that oral argument will require no more than one hour.

[*Attorney signatures and Certificate of Service below*.]

October 11, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 11, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ David B. Weinstein
Attorney

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