

IN THE CIRCUIT COURT OF THE 8th JUDICIAL CIRCUIT  
IN AND FOR ALACHUA COUNTY, FLORIDA

Case No.: 01 2017 CA 002426

US RIGHT TO KNOW,

Plaintiff,

v.

UNIVERSITY OF FLORIDA  
BOARD OF TRUSTEES,

Defendant.

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**MOTION TO INTERVENE AS PARTY DEFENDANT**  
**BY DREW KERSHEN, INDIVIDUALLY AND AS A PARTICIPANT IN**  
**AGBIOCHATTER**

Drew Kershen, Ph.D. ("Dr. Kershen") individually and as a member of the list-serve AgBioChatter, the **Intervener**) pursuant to Rule 1.230, Florida Rules of Civil Procedure ("FRCP"), moves to intervene in the above-styled matter as a party defendant. In support of this motion, Intervener states the following:

**I. Introduction and Factual Background.**

1. On July 11, 2017, Plaintiff, US Right to Know ("**Plaintiff**") filed a Complaint seeking a Writ of Mandamus against defendant, University of Florida Board of Trustees ("**Defendant**"), seeking, among other things, the Intervener's private communications [the "**Complaint**"].

2. On July 13, 2017, this Court entered an Order providing Defendant twenty (20) days in which to show cause why the relief Plaintiff sought should not be granted.

3. The Defendant, University of Florida, does not oppose this Motion. Plaintiff's counsel has authorized the undersigned to represent that they neither agree nor disagree with this Motion.

4. Plaintiff's Complaint for Writ of Mandamus identifies AgBioChatter e-mails as the source of the documents it seeks production of. Upon information and belief, e-mails created by Kevin Folta have been produced although there is no agreement that such e-mails are public documents.

5. Dr. Kershen is a now-retired professor at the University of Oklahoma (the "University"), and is a participant in AgBioChatter. He retired from the University in 2012. The records being sought are his personal and private records; even if his previous status as a professor at the University were sufficient to trigger a records obligation (which it decidedly is not), his retirement ended that argument and his emails are private.

6. Dr. Kershen remains active in his field, and thus as a private individual, participates in AgBioChatter. His personal emails are being sought and without this intervention, the risk to her personal, private affairs and to AgBioChatter will increase substantially.

7. The following are AgBioChatter's participation rules:

Welcome to the AgBioChatter group at Yahoo! Groups. Please take a moment to review this message, and then to send a message to the group introducing yourself.

AgBioChatter is a private forum for invited members. Its purpose is to provide a private forum for brainstorming and information exchange, and provide an arena whereby members can have candid and open debates without fear their conversations will become public. Only members can see who else is a member and what has been posted.

Never use public email addresses (e.g., .edu [except private universities], .gov). Best use an e-mail never used for work purposes.

To maintain this integrity, the rules of conduct as follows:

- No comments appearing on AgBioChatter will be released to the press or public for a
- NEVER forward any Chatter email under any circumstance
- Non-sensitive information may be extracted and shared, but only with the author's permission, and after removing all references to Chatter.
- Chatter sanctity is important enough that any violators of these policies will be removed from the group immediately.
- In addition, in order to maintain the usefulness and integrity of AgBioChatter members agree that:
  - All personal conversations are to be off the group
  - Short answers like 'thanks,' 'got it,' etc. are to be avoided or limited to the sender, not the entire group.

We thank all participants in advance. The information and insights from AgBioChatter have empowered us to be far more pro-active and effective than we all would have been acting as individuals.

Regards,

C. S. Prakash and Wayne Parrott, Moderators

8. Dr. Kershen has abided by, and relied upon, the above rules in deciding to participate in AgBioChatter.

9. Plaintiff does not merely seek a declaration that the documents it seeks from this private association and private scholars are public, but instead seeks the extraordinary writ of mandamus, in an attempt to deprive the Intervener of his personal privacy rights.

10. Specifically, Plaintiff seeks: "all e-mail to or from Professor Folta that is to, from, CC or BCC to the email address AgBioChatter . . . from July 1, 2012 to the present."

11. E-mails submitted to AgBioChatter are private e-mails. It is these emails, submitted by persons outside the jurisdiction of Florida, which are intended for members of this private group, which Interveners seek to protect.

12. AgBioChatter was at one time an association with multiple hundreds of participants, throughout the world. Previous actions by Plaintiff in obtaining what had originally been intended to be private and free exchanges of scientific ideas, have resulted in prison sentences and express threats of bodily harm from those countries, persons, and entities to whom free speech is not respected (including, apparently, Plaintiff).

13. For example:

- a. Dr. Ernesto Bustamante from Peru, a scientist of great repute and once a student of Dr. Jim Watson (of Watson & Crick DNA fame), faced serious prison time, which he avoided only with the help of others, for simply contesting alleged facts relating to GMO issues (<http://www.scidev.net/global/policy/news/scientists-rally-round-convicted-peruvianresearcher.>);
- b. Dr. Tony Trewavas, a highly reputed scientist from the University of Edinburgh in Scotland, was taken to court by Greenpeace and GM Watch in UK for alleged claims of defamation arising from comments he made in an AgBioChatter discussion group called AgBioView. Dr. Trewavas lost his case, was forced to publicly apologize for his writings, and ultimately completely retreated into seclusion, not participating in any open discussion on science anymore;
- c. Mike Adams of Natural News called for murder of GM scientists after Prof. Kevin Folta episode. (<https://geneticliteracyproject.org/2014/07/24/naturalnews-huckster-mike-adams-asks-antigmoers-to-kill-scientists-supporters-of-crop-biotech>); and
- d. Ernesto Bustamante Donayre, a molecular biologist and vice-president of the Peruvian College of Biologists, was convicted of defamation after criticizing research by Antonietta Ornella Gutierrez Rosati which purported to find evidence of such crops.

Such instances of criminal prosecution for scientific beliefs demonstrates the need keep the Intervener's privacy rights sacrosanct.

14. Thereafter, AgBioChatter revised its process to protect the lives of those participating in its online group, and now operates in what is clearly a private chat group.

15. There is no basis under Fla. Stat. Ch. 119 to violate the Intervener's privacy rights under the guise of that act.

16. The Intervener's rights will be adjudicated without his participation if this Court rules on the Complaint and/or orders that any of the AgBioChatter private forum communications be made public. Moreover, allowing for intervention will prevent duplicitous litigation and avoid potentially conflicting results.

17. Undersigned counsel for the Intervener has consulted with the attorneys for the Defendant, and has emailed the Plaintiff's counsel, and is authorized to state that Defendant does not object to this Motion. Plaintiff has not responded as of the time of this filing.

18. Consistent with Fla. R. Civ. P. 1.230, the Intervener specifically acknowledges his intervention will be in subordination to, and in recognition of the propriety of the main proceeding. The Intervener agrees to be bound by the pleadings filed by the parties in this case prior to the instant motion.

## **II. Legal Argument**

Leave to intervene should be liberally allowed. *See National Wildlife Fed'n. Inc. v. J.T. Glisson*, 531 So. 2d 996, 997 (Fla. 1st DCA 1988). Moreover, the intent of Fla. R. Civ. P. 1.230 is to provide for a single, efficient, forum, that protects the rights of all interested and should be construed to effectuate that purpose. Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, the main proceeding, unless otherwise ordered by the court. *See Fla. R. Civ. P. 1.230; see also e.g., Grimes v. Walton County*, 591 So. 2d 1091, 1094 (Fla. 1st DCA 1992) (Rule 1.230 should be "liberally construed"); *Citibank, N.A., v. Blackhawk Heating & Plumbing Co., Inc.*, 398 So. 2d

984, 985 (Fla. 4<sup>th</sup> DCA 1981) (denial of intervention reversed; pledgee of stock had a interest and would gain or lose by the judgment). Where, as is alleged here, the particular interests of the interveners are at stake, and Intervener's personal interests will gain or lose by the judgment, intervention falls squarely within the rule, and the Florida Supreme Court's interpretation thereof: "[T]he interest which will entitle a person to intervene . . . must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof. *Morgareidge v. Howey*, 78 So. 14, 15 (1918).

Here, the Intervener's interest self-evident. The sought after documents consist solely of private group communications, formed to create a sanctuary where discussions may be freely held. Given this sensitive arena is at risk, this Court should permit intervention. The Interveners have a direct and immediate interest in the outcome of this proceeding that mandate intervention. If this Court grants the relief requested by Plaintiff, and makes the private discourse of AgBioChatter public, grave consequences will follow (see examples above). Because the Intervener's private emails are at risk of being produced, and those of others on the AgBioChatter listserv, he will "lose by the direct legal operation and effect of the judgment." *Union Central Life v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992).

The issuance of a Writ in this case, for private documents not belonging to the public, will also violate the AgBioChatter agreement – thereby subjecting its members to harassment, litigation, or even, as has happened in the past, the threat of prison. Clearly therefore, intervention should be granted. Compare *Godheim v. City of Tampa*, 426 So. 2d 1084, 1085-86 (Fla. 2d DCA 1983), (court allowed contract awardee to intervene in an action over the award). *Id.* at 1085-86. There is a considerable basis for contending that Dr. Kershen, as a participant in AgBioChat is a necessary party to the litigation because "[a person] whose rights and interests

are to be affected by a decree and whose actions with reference to the subject matter of litigation are to be controlled by a decree is a necessary party to the action and the trial court cannot proceed without that person." *Tobin v Vasey*, 843 So. 2d 376, 377 (Fla. 2d DCA 2003) (citations omitted); *see also e.g., Bernard v. Rose*, 68 So. 3d 946, 948 n. 3 (Fla. 3d DCA 2011) (recognizing that a trial court's failure to grant a necessary party's motion to intervene is a type of defect that could render a judgment void); *Hartford Fire Ins. Co. v. School Bd.*, 661 So. 2d 111 (Fla. 3d DCA 1995) (intervention is appropriate where it will not cause delay or disruption).

### **III. Conclusion**

In summary, the Intervener has a direct, immediate, and significant interest in the outcome of this proceeding. Based on the facts and law set forth above, the Interveners respectfully request this Court grant their motion to intervene as party defendants.

Dated: August 2, 2017.

#### **AKERMAN LLP**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished in the manner indicated below this 2<sup>nd</sup> day of August, 2017, to:

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