

**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ALACHUA COUNTY, FLORIDA
CIVIL ACTION**

US RIGHT TO KNOW,

Plaintiff,

v.

CASE NO: 01-2017-CA-2426

THE UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Defendant.

and

DREW KERSHEN,

Intervener.

**PLAINTIFF'S OPPOSITION TO
INTERVENER'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, US Right to Know, by and through undersigned counsel, respectfully submits this opposition to Intervener Kershen's Motion for Summary Judgment. The Intervener's motion must be denied because: (1) Kershen is not authorized to seek summary judgment in this action; (2) Summary judgment is not available in this public record proceeding; (3) Kershen has not satisfied his initial burden of demonstrating the non-existence of a genuine issue of material fact; and (4) There is a genuine issue of disputed fact.

1. Kershen is not authorized to seek summary judgment in this action.

a. Plaintiff makes no claim against Kershen.

Pursuant to Florida Rule of Civil Procedure 1.510(b), the only parties authorized to move for summary judgment are (1) a claimant; or (2) a "defending party," identified as "[a] party

against whom a claim . . . is asserted or a declaratory judgment is sought.” Plaintiff makes no claim against Kershen. Plaintiff brought this action to enforce Florida’s public record laws against the Defendant University of Florida, a public agency. Kershen sought to intervene to express his interest in protecting the records from disclosure. Plaintiff does not contend that Kershen, a private individual from out-of-state, is subject to the public records law. Because Kershen is not a “party against whom a claim . . . is asserted or a declaratory judgment is sought,” he lacks authority to bring a Motion for Summary Judgment and it must be denied.

b. Kershen is an intervener.

Additionally, Kershen is an intervener who must take the case as he finds it. “[I]ntervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.” Fla. R. Civ. P. 1.230. “[A]n intervener is bound by the record made at the time he intervenes and must take the suit as he finds it. He cannot contest the plaintiff’s claim against the defendant . . . [or] challenge sufficiency of the pleadings or the propriety of the procedure” *Krouse v. Palmer*, 179 So. 762, 763 (Fla. 1938).

Plaintiff filed this action on July 11, 2017. The Court promptly issued an Order to Show Cause Why Complaint for Writ of Mandamus Should Not Be Granted, on July 13, 2017. The order stated “[a]n expedited hearing is hereby ordered pursuant to § 119.11, Fla. Stat. The date, time, expected duration and location of the hearing will be set in a separate order.” Accordingly, the main proceeding is to be decided by evidentiary hearing conducted pursuant to Section 119.11. Kershen’s intervention, granted on August 16, 2017, cannot change this, as his role as intervener is subordinate to the main action.

The University of Florida has not moved for summary judgment. As an intervener, Kershen cannot challenge the Plaintiff's claim against the main defendant, yet that is exactly what he seeks to do. Accordingly, Kershen's summary judgment motion must be denied.

2. It would be error to dispose of this case without the hearing provided by Section 119.11, Fla. Stat.

Florida public records law provides a statutory entitlement to a hearing. § 119.11, Fla. Stat. It is well settled that if the petition for public records and the answer raise disputed factual issues, the trial court must hold an evidentiary hearing pursuant to this section to resolve the disputed issues of fact. *E.g., Holley v. Bradford County Sheriff's Dept.*, 171 So. 3d 805 (Fla. 1st DCA 2015); *Clay County Educ. Ass'n v. Clay County Sch. Bd.*, 144 So. 3d 708, 709 (Fla. 1st DCA 2014). The purpose of this hearing is to "resolve any dispute as to whether there are public records responsive to the request and whether an exemption from disclosure applies in whole or in part to the requested records." *Kline v. Univ. of Fla.*, 200 So. 3d 271 (Fla. 1st DCA 2016). It is error to rule on the petition without the benefit of a hearing. *Id.* at 271 (reversing trial court's denial of petition based upon court's *in camera* review of documents produced by defendant). "Absent waiver, an order issued without the statutorily-required hearing is premature." *Id.* at 272.

Plaintiff has not waived its right to the evidentiary hearing that has been set in this case since July 13, 2017. Accordingly, for this additional reason, summary judgment is not appropriate in this proceeding and Kershen's motion must be denied.

3. The Intervener has failed to satisfy his initial burden of demonstrating the non-existence of a genuine issue of material fact.

Even if the Court were to consider the Intervener's Motion for Summary Judgment, it would find the motion falls far short of meeting the movant's burden. "The burden of proving

the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried.” *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). The movant must “conclusively” prove the absence of a genuine issue of material fact, and the movant’s proof must be “such as to overcome all reasonable inferences which may be drawn in favor of the opposing party.” *Id.*

In support of his motion, the Intervener provided two “Verifications,” one of the factual allegations in his “Response to Complaint for Writ of Mandamus” and the second of the factual allegations in his Motion for Summary Judgment. Notably absent from these verifications is the assertion that they are “made on personal knowledge;” nor do they “show affirmatively that the affiant is competent to testify to the matters stated therein” as required by Florida Rule of Civil Procedure 1.510(e).¹ These omissions are fatal to Kershen’s Motion for Summary Judgment. *Florida Dep’t of Financial Servs. v. Associated Indus. Ins. Co.*, 868 So. 2d 600, 602 (Fla. 1st DCA 2004) (trial court erred in granting summary judgment based upon affidavit not based upon affiant’s personal knowledge). Indeed, Kershen puts forth no facts from which it could be determined that as a former professor at the University of Oklahoma, he has personal knowledge of the official business activities of University of Florida Professor Kevin Folta.

¹ Moreover, Kershen’s verifications do not even address the operative pleadings in the case. After filing his initial “Response to Petition for Writ of Mandamus” (“Response”) on August 28, 2017, Kershen filed an “Amended Response to Petition for Writ of Mandamus” on September 1, 2017, which presumably was intended to replace his initial response. Kershen did not verify the contents of his amended response. Additionally, Plaintiff filed a Supplemental Complaint for Writ of Mandamus on October 13, 2017, alleging that the University of Florida failed to comply with a public record request for a broader time period than that alleged in the initial complaint. Kershen responded to the Supplemental Complaint on November 13, 2017, but did not verify the contents of this response in support of his summary judgment motion. Therefore, Kershen submitted no evidence in support of summary judgment as to Plaintiff’s Supplemental Complaint.

Furthermore, some of Kershen’s “verified” allegations are susceptible of a reasonable inference that Professor Folta’s email communications with the AgBioChatter discussion group related to his work for the University of Florida. For example, Kershen states that the discussion group includes “[i]ndividuals who share similar interests in the field of agricultural biotechnology” and that it was formed to afford its members a forum to “share scientific ideas and thoughts in the field of agricultural biotechnology.” (Response 2, 3; Motion 1-2). Kershen further alleges, “[f]rom a review of Dr. Folta’s credentials it is obvious that he has some interest in the AgBioChatter list-serve.” (Response 4). And although Kershen repeatedly contends that the communications within the AgBioChatter group were of a personal nature, the guidelines provided by Kershen instruct that “[a]ll personal conversations are to be off the group.” (Motion Ex. A). From these statements, it is reasonable to infer that the email discussions between Professor Folta and the AgBioChatter group consist of communications pertaining to the participants’ scientific ideas in the area of agricultural biotechnology, the very area in which Professor Folta is employed by the University of Florida.

In light of the foregoing, Kershen falls woefully short of meeting his obligation to submit evidence based upon his personal knowledge to prove conclusively the absence of a genuine issue of material fact. Accordingly, the burden is not shifted to Plaintiff and the summary judgment motion must be denied on its face.²

4. There is a genuine issue of material fact.

Although Plaintiff respectfully submits that it has no obligation to demonstrate that issues remain to be tried, it has done so. Plaintiff submits the Declaration of Gary Ruskin (Exhibit A to

² The Court need not consider the Intervener’s contention that “the importance of academic freedom and privacy substantially outweigh the production of the emails” (Motion 6), as this bold contention has no support in Florida law and the Intervener cites no factual or applicable legal authority.

this motion), which contains an email obtained from the University of Florida showing an exchange between Professor Folta and members of the AgBioChatter group. It appears from this email exchange that Professor Folta offered to conduct a study at the University of Florida in response to claims made by an anti-GMO advocate. Professor Folta states “I’m going to try to get donated kits for glutathione measurements and do it all with HS and undergrad students here at UF.”

Viewed in the light most favorable to Plaintiff, this email suggests that Professor Folta engaged in discussions with the AgBioChatter group about activities he intended to conduct using University of Florida students. This rebuts the Intervener’s contention that the discussions on the AgBioChatter group never pertained to Professor Folta’s work at the University of Florida. This is sufficient to create a genuine issue of material fact.

Conclusion

The Intervener’s Motion for Summary Judgment must be denied because the Intervener is not authorized to seek summary judgment in this action; summary judgment is not available in this public record proceeding; the Intervener has failed to demonstrate the non-existence of a genuine issue of material fact; and in the alternative, Plaintiff has demonstrated that there is a genuine issue of material fact.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order DENYING Kershen's Motion for Summary Judgment and granting such further relief as the Court deems appropriate.

/s/Lynn C. Hearn

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CERTIFICATE OF SERVICE

Pursuant to Rules 2.516(b)(1) and (f) of the Florida Rules of Judicial Administration, I certify that the foregoing document has been furnished to the following individuals by email via the Florida Courts e-filing Portal this 16th day of January, 2018, to:

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DECLARATION BY GARY RUSKIN

1. My name is Gary Ruskin. I am over the age of 18 and have personal knowledge of the facts set forth in this declaration.

2. I am the co-director of U.S. Right to Know, a California nonprofit corporation working for transparency and accountability in the nation's food system.

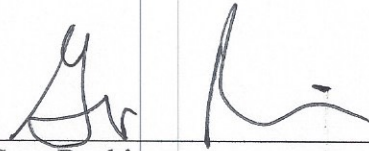
3. On September 3, 2015, I made a public record request to the University Florida for all emails between University of Florida Professor Kevin Folta and AgBioChatter@yahoogroups.com from July 1, 2012 to the date of the request.

4. On March 7, 2016, I received 24 pages of documents in response to my request. Among the pages provided to me by the University is a three-page email chain dated July 27, 2015, with the subject line: "Chatter: Re: Event: GMO Free News hosts Shiva Ayyadurai and

Ray Seidler at online 'live stream' discussion on changed GMO safety standards for flawed FDA system." A copy of this email chain is attached to this declaration.

Under penalties of perjury, I declare that I have read the foregoing and the facts stated in it are true.

Dated this 14th day of January, 2018.



Gary Ruskin

From: "Folta, Kevin M." kfolta@ufl.edu [AgBioChatter] <AgBioChatter@yahoogroups.com>

Date: Mon, 27 Jul 2015 12:26:47 EDT

To: "AgBioChatter@yahoogroups.com" <AgBioChatter@yahoogroups.com>

CC:

BCC:

Subject: Chatter: Re: Event: GMO Free News hosts Shiva Ayyadurai and Ray Seidler at online "live stream" discussion on changed GMO safety standards for flawed FDA system

Here's the status. I'm receiving soy and corresponding isolines this week. I'm also going to solicit samples from the field for transgenic, conventional and organic soy.

If anyone can help source more samples, I'd appreciate it.

I'm going to have the formaldehyde levels measured in a for-fee core-lab service at U Minnesota, all blinded, in triplicate. I'm going to try to get donated kits for glutathione measurements and do it all with HS and undergrad students here at UF. I'm not sure how this will be paid for, but I may need to run a kickstarter, etc. Right now it will be out of pocket.

I could have data back fast. All will be public, open access, and published. I'm hoping to bring this to Science/Nature as an exhibition of why predatory publishing and no science standards are harmful, and misrepresent science for activist causes.

Kevin

Kevin M. Folta
Professor and Chairman
Horticultural Sciences Department
Plant Molecular and Cellular Biology Program and
Plant Innovation Program
University of Florida
Gainesville, FL 32611

352-273-4812

"Don't tell me what can't be done. Tell me what needs to be done, and let me do it." – Norman Borlaug.

Illumination (blog) <http://kfolta.blogspot.com>

Twitter @kevinfolta

Podcast: www.talkingbiotechpodcast.com

From: AgBioChatter@yahoogroups.com <AgBioChatter@yahoogroups.com> on behalf of Jay Byrne jay.byrne@v-fluence.com

[AgBioChatter] <AgBioChatter@yahoogroups.com>

Sent: Monday, July 27, 2015 11:37 AM

To: AgBioChatter@yahoogroups.com

Subject: Chatter: Event: GMO Free News hosts Shiva Ayyadurai and Ray Seidler at online "live stream" discussion on changed GMO safety standards for flawed FDA system

V.A. Shiva Ayyadurai is on the road shilling his glyphosate formaldehyde claims – last week he was in Washington, DC “hosted” by Food Democracy Now, this week he’ll appear online “hosted” by GMO Free News” (neither group has the resources to host or sponsor his research or these events and it’s much more likely this is being paid for by someone like the organic food industry lobby group Organic Voices headed by Gary Hirshberg. The DC event was run by Hirshberg’s PR agency Fenton Communications, GMO Free News is a virtual organization with no defined leadership/members but appears to be supported by Dr. Bronner’s Magic Soaps’ Lisa Bronner. Bronner is a key organic industry funder of the anti-GMO and mandatory labeling movements. The “GMO Free News” hosts are Kathleen Hallal – who is affiliated with Mom’s Across America, and Rachel Linden – who is affiliated with GMO-Free USA (an affiliate of MAA and linked to Henry Rowland’s GMO-Free Global campaign).

Shiva Ayyadurai is now being joined by former EPA “official” [Ray Seidler](#) (bio profile article attached).

Ayyadurai’s campaign is designed to lobby and influence the Obama administration’s plans to reevaluate and update the way GMOs are regulated, particularly going after the issue of substantial equivalence.

It appears that Kavin Senapathy and some other Chatter members have signed up for this event, perhaps some will try and pose questions about Ayyadurai’s funding, like who paid for his National Press Club event in Washington and who sponsored the costs of his study... of course this would be in addition to challenging the findings and supporting [Kevin Folta’s challenge to Ayyadurai to repeat his study in a blind test at Univ of Florida](#).

EVENT:

<https://www.facebook.com/events/811607075603329/813881672042536/>

<https://plus.google.com/events/cq2mmf8d93amnp0i54oantvuanis>

Interview with Dr. Shiva Ayyadurai

Public · Talk · Hosted by GMO Free News

Tuesday, July 28

at 9:30am in PDT

<https://plus.google.com/events/cq2m...>

LIVE Stream round table discussion panel

Panel Members:

Kathleen Hallal, GMO Free News Host (West Coast)
Rachel Linden, GMO Free News Host (East Coast)
Dr. Shiva Ayyadurai, MIT Biologist
Dr. Ray Seidler, former EPA Senior Scientist

Topic of Discussion:

Systems Biology Group, International Center for Integrative Systems: **GMO Soy Accumulates Formaldehyde & Disrupts Plant Metabolism, Suggests Peer-Reviewed Study, Calling For 21st Century Safety Standards**

Study Concludes FDA GMO Approval Process is Flawed, Outdated, and Unscientific

A new study published today in the peer-reviewed journal **AGRICULTURAL SCIENCES** reveals genetic engineering of soy disrupts the plant's natural ability to control stress, and invalidates the FDA's current regulatory framework of "substantial equivalence" used for approval of genetically engineered food (GMOs).

The study, led by Dr. V.A. Shiva Ayyadurai, Ph.D., an MIT-trained systems biologist, utilizes his latest invention, CytoSolve, a 21st century systems biology method to integrate 6,497 in vitro and in vivo laboratory experiments, from 184 scientific institutions, across 23 countries, to discover the accumulation of formaldehyde, a known carcinogen, and a dramatic depletion of glutathione, an anti-oxidant necessary for cellular detoxification, in GMO soy, indicating that formaldehyde and glutathione are likely critical criteria for distinguishing the GMO from its non-GMO counterpart.

Dr. Ayyadurai stated, "The results demand immediate testing along with rigorous scientific standards to assure such testing is objective and replicable. It's unbelievable such standards for testing do not already exist. The safety of our food supply demands that science deliver such modern scientific standards for approval of GMOs."

"The discovery reported by Dr. Ayyadurai reveals a new molecular paradigm associated with genetic engineering that will require research to discover why, and how much formaldehyde and glutathione concentration, and what other cellular chemicals relevant to human and animal health, are altered. We need the kinds of standards Dr. Ayyadurai demands to conduct such research," stated Dr. Ray Seidler, a former EPA Senior Scientist. "Formaldehyde is a known class1 carcinogen. Its elevated presence in soybeans caused by a common genetic engineering event is alarming and deserves immediate attention and action from the FDA and the Obama administration. Soy is widely grown and consumed in the U.S., including by infants fed baby food products, with 94% of soy grown here being genetically engineered," declared Seidler.

The study concludes the U.S. government's current standards for safety assessment of GMOs, based on the principle of "substantial equivalence," is outdated and unscientific for genetically engineered food since it was originally developed for assessing the safety of medical devices in the 1970s. The current criteria for assessing "equivalence" considers only basic nutritional and superficial characteristics such as taste, sight, smell and touch, for declaring GMOs safe for human consumption, allowing them to be fast-tracked to market without independent scientific testing. If formaldehyde and glutathione were criteria, then the GMO would likely not be deemed "equivalent" to its non-GMO counterpart. This finding calls into question the FDA's food safety standards for the entire country.

The publication of the paper coincides with release of a bulletin by the Obama Administration on July 2, 2015, calling for "Improving Transparency and Ensuring Continued Safety in Biotechnology."

Ayyadurai shares, "This is not a pro- or anti-GMO question. But, are we following the scientific method to ensure the safety of our food supply? Right now, the answer is 'no'. We need to, and we can, if we engage in open, transparent, and collaborative scientific discourse, based on a systems biology approach."

The full study can be read here: <http://www.integrativesystems.org/systems-biology-of-gmos/>

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Jay Byrne, president

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Posted by: "Folta, Kevin M." <kfolta@ufl.edu>

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