UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

KEVIN FOLTA, PhD., **Plaintiff,** **v.** **THE NEW YORK TIMES COMPANY, and ERIC LIPTON,** **Defendants.**	**CASE NO.: 1:17-cv-246-MW-GRJ**

PLAINTIFF'S AMENDED RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO THE FINAL MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS NEW YORK TIMES COMPANY AND ERIC LIPTON

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The Plaintiff, Kevin Folta, Ph.D., is a Professor and former Chairman of Horticulture at the University of Florida. The Defendants published an article in the Sunday New York Times newspaper on September 6, 2015, which characterized Dr. Folta as having sacrificed his scientific integrity for personal financial gain. Specifically, and in context,[1] the Article stated that Dr. Folta was "*a tool of the industry*" who was "*brought in for the gloss of impartiality*" with "*supposedly unbiased research"* after he received an "*undisclosed amount in special 'unrestricted' grants*" so that he could "*travel more extensively*" "*to defend or promote its products*" as part of a agreement where he "*swaps grants for lobbying clout*."

Plaintiff brought an action for defamation against the newspaper and its author, Eric Lipton. The Defendants filed a Motion to Dismiss on grounds that the statements in the Article were not defamatory and that such statements were subject to the fair reporting privilege of public documents. The Court denied that motion.

Defendants now move for summary judgment on the same grounds of fair report privilege and lack of defamatory meaning, and additionally assert the defenses of truth/substantial truth, opinion, and several miscellaneous arguments

[1] To determine whether a statement is defamatory, it must be considered in the context of the publication. Smith v. Cuban Am. Nat'l Found., 731 So. 2d 702, 705, 1999 Fla. App. LEXIS 851, *6, 27 Media L. Rep. 2499, 24 Fla. L. Weekly D 329.

that seek to bar Plaintiff's claims as a matter of law. They do not challenge whether, based on the evidence adduced in discovery, Dr. Folta has established a *prima facie* case of defamation — they scarcely even mention any evidence adduced in discovery, for the simple reason that discovery is still ongoing; indeed, none of the Parties have appeared for deposition.

The Motion similarly seeks to have the Court prematurely decide whether the Article's defamatory characterizations and descriptions of the 4,500 documents, produced by The University of Florida, were "fair and accurate," where Defendants have still only attached the very same 178 documents (ECF 64-9) to their instant Motion for Summary Judgment as they did to their Motion to Dismiss (ECF 28-2). The same Motion repeatedly invokes the legal dictate that the Article be read as a whole, the alleged defamatory statements read in context — that they not be "cherry-picked" with "strained interpretations" and so forth. Yet, as will also be shown, it is these precise precepts that the Defendants' Motion has violated, as the very predicate of its sundry attempts to obscure the due conclusion that the case before this Court presents a plethora of genuine issues of material fact to be determined by a jury.

And still, relying on the same pleading-stage materials as their prior Motion (the Amended Complaint, Defendants' Article, and the emails purportedly relied on therein), Defendants again posit this Court must grant judgment in their favor as

a matter of law based primarily on Dr. Folta's own words in those very emails for a claimed defense of truth. Not only is the Motion premature, that core position is particularly untenable, and hypocritical, as those very words were among the matter willfully distorted by Defendants that defamed Dr. Folta in the Article,[2] and those that continue to be distorted in their Motion at bar.

This is one of multiple reasons, reviewed infra, why the Motion must be denied.

MEMORANDUM OF LAW

I. COUNTER STATEMENT OF 'UNDISPUTED' MATERIAL FACTS

1. Undisputed.

2. Undisputed. By way of further response, Plaintiff describes himself as an expert in strawberry genomics, lighting for indoor agricultural environments, the genetic basis of strawberry flavor, and science communication and outreach. See ECF 73-1 at ¶ 2.

3. Undisputed.

4. Undisputed. By way of further clarification, the cited exhibits further describes Plaintiff's responsibilities under the "Science Communication" category

[2] Such matter is particularly damaging when presented by the media as coming from Plaintiff's ***own mouth***. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 512 (1991) ("[a] self-condemnatory quotation may carry more force than criticism by another. It is against self-interest … and so all the more easy to credit when it happens.").

to "promote public understanding of biotechnology" and to "train scientists to discuss biotech[nology] with concerned audiences. See, ECF 64-4.

5. Undisputed, in part. In that same breath, Plaintiff also stated "I'm glad to speak for **any** company[.] If a company invites me to talk, they cover my expenses. I've taken great heat in the press for being reimbursed for travel, but this is normal and customary. . . . Despite the hostile words and libelous claims of others, I can say that I always told the truth and **did my job as a land-grant scientist**. See ECF 64-6, p.2.

6. Undisputed, in part. Plaintiff has made resoundingly clear that his duties as a land-grant scientist required him to "work from an established set of rules and scientifically-vetted information." And, per *this* requirement, his research regarding "reflect[ed] the best science we have, and the basis of substantial scientific consensus." See ECF 64-6.

7. Disputed in part. As represented by Defendant Lipton himself, he did not interview Mr. Folta ***for*** an article regarding "Financial Ties between Food Industry and Academics. Industry Swaps Grants for Lobbying Clout"[3] Instead, Defendant Lipton informed Dr. Folta he would be interviewed ***for*** a piece

[3] This text refers to Defendant-NYT's sub-heading including in the article's Sunday print-edition. See ECF 64-8.

involving a materially different topic of Dr. Folta's expertise: "the debate over transgenic (GMO) technologies." ECF 73-11

8. Undisputed.

9. Undisputed.

10. Disputed. It is disputed that Defendants' Article was "largely based" upon Mr. Lipton's emails. UF's response to the subject FOIA requests included roughly 4,593 pages. See ECF 64:16-17. *Only 4% (178 pages) of those documents were referenced* in support of Defendants' subject Article, see ECF 64-9. Of even *those* documents, only a small minority of comprised e-mails sent by Dr. Folta. See id. Disputed further to the extent Defendants' asserted "fact" attempts to characterize: (1) the subject emails as a public record, and, (2) the subject article(s) as a fair and accurate representation of those emails.

11. Undisputed with clarification. By way of additional response, Gary Ruskin founded the U.S. Right to Know in roughly January 2014, and identifies as someone acutely familiar "with how the exercise of corrupt power is often ugly or almost ugly." ECF 73-14 at 20:2-13. To this end, Mr. Ruskin's 2015 FOIA requests specifically targeted Mr. Folta's employer, UF, and no other Florida Universities. *Id* at 39:3-8. Moreover, Mr. Ruskin's stated purpose for the FOIA requests was to "expose the food industry," *Id* at 49:7-8 for the purpose of public

education. He did not submit any FOIA requests to individuals linked to the organic industry. *Id* at 53.

12. Undisputed, with clarification. Defendant Lipton's own FOIA request was prompted by an email sent by Gary Ruskin on July 18, 2016. See, ECF 73-10. In the email's subject-line, Mr. Ruskin wrote "[S]tory [I]dea: Monsanto allies subverting the FOIA at its 50th Anniversary." *Id*. In the email's body, Mr. Ruskin characterized Dr. Folta's educational-initiative, funded by a $25,000 Monsanto grant, as a "**boot camp[] to train scientists and journalists to promote GMOs**. . . . **Kevin Folta netted $25k from Monsanto.**" *Id*. The language of the actual proposal noted, "There is no salary compensation for Folta. The work is voluntary, and part of the expectations of his role as a public scientist." See, ECF 73-4.

13. Undisputed with clarification. Mr. Lipton received 4,593 pages of documents and "thousands" of emails. See, *ECF* 64:16-17 and ECF 64-14 at p. 3.

14. Disputed. It is undisputed that the University of Florida has responded to many FOIA requests related to Dr. Folta. Dr. Folta's words speak for themselves. It is disputed as to what documents certain 'media outlets' received. It is also disputed what documents Defendants received.

15. Undisputed.

16. Undisputed, with clarification. In that same publication, Dr. Folta further remarked: "Within weeks [of providing the requested documents,]

completely false interpretations began to spread quickly throughout the internet. False stories were generated from my words. Sentences were misinterpreted with the interest of causing the most damage. Even the *New York Times* joined in, publishing a story on the front page of the Sunday edition." See ECF 64-18. Plaintiff reserves all arguments with respect to the inapplicability of Florida's Fair Report privilege as to those same emails.

17. Undisputed, with clarification. It is undisputed that the Defendants accurately cite this single slide of Plaintiffs' 6,500 produced.

18. Disputed in part. It is undisputed that Defendants accurate cited Plaintiffs Blog Post. It is disputed that Plaintiff's blog post is cited in context or that Plaintiff's statement could ever be considered a legal admission with respect to the inapplicability of Florida's Fair Report privilege as to those same emails.

19. Disputed. To address each numbered point in turn:

(1) A critical portion of the grant's language consistently omitted by Defendant in both its: (i) online and print articles and (ii) filings in this matter, notes that [t]here is **no salary compensation** for Folta. The work is voluntary, and part of the expectations of his role as a public scientist." See ECF 64-21. Additionally, Mr. Folta's proposal endeavored to engage others in a discussion of "the realistic **benefits and limitations to [transgenic crop varieties**]." See ECF 64-21, p. 1.The same proposal sought to immerse

participants in "the typical arguments posed by those positioned against biotechnology, [who will] then learn the **actual information** and where to **find additional resources**, including the primary literature." See ECF 64-21. The "products" referenced in the proposal, did not encompass Monsanto or industry products-for-purchase, but instead, the technological solutions developed by scientists. See ECF 73-1 a ¶ 20

(2) Dr. Folta did not appear before government bodies as a proponent of GMO-policies, but as a proponent of the **science** substantiating certain aspects of the safety and efficacy of GMOs and transgenic crops. See ECF 64-9 ("Over the past twelve years, I have been visiting public forums to discuss how the process works, **what are the actual risks**, and what are the benefits" to the science.").

(3) Dr. Folta did not engage industry representatives **to provide lobbying strategy**. Defendants continually attempt to conflate the term "lobbying" with "public education." Dr. Folta's job as a land grant scientist required him to educate the public. To this end, he was not concerned with "lobbying" on behalf of a company, but—consistent with his land grant affiliation, educate the public beyond the misinformation pertaining to GMO science and transgenic crops. See ECF 64-11 ("it's not about the science, its about how the science is communicated.").

(4) Undisputed, with clarification. Dr. Folta was not concerned with "lobbying" on behalf of a company, but—consistent with his land grant affiliation, he was primarily concerned with educating the public beyond the misinformation pertaining to GMO science and transgenic crops. See ECF 64-11 ("it's not about the science, its about how the science is communicated.").

(5) Undisputed, with clarification. Dr. Folta never netted any income as a result of his speaking engagements. ECF 73-1 at ¶¶17-18, 25.

20. Undisputed, with clarification. A critical portion of the grant's language consistently omitted by Defendant in both its: (i) online and print articles and (ii) filings in this matter, notes that "[t]here is **no salary compensation** for Folta [under the proposal]. The work is voluntary, and part of the expectations of his role as a public scientist." See ECF 64-21. Any characterization of the proposal, which is a writing that speaks for itself, is specifically denied.

21. Undisputed, with clarification. The "products" referenced in the proposal, did not encompass Monsanto or industry products-for-purchase, but instead, the technology solutions from scientist "span[ing] many new concepts from immunotherapy and chemotherapy, to high-vitamin crops for the Developing World." See ECF 73-1 at ¶20.

22. Undisputed, with clarification. The "products" referenced in the proposal, did not encompass Monsanto or industry products-for-purchase, but instead, the technology solutions from scientist "span[ing] many new concepts from immunotherapy and chemotherapy, to high-vitamin crops for the Developing World." See ECF 73-1 ECF 73-1 at ¶20.

23. Disputed in part. It is undisputed that the letter speaks for itself. This was not a grant, but a gift to University of Florida. By way of further response, Plaintiff incorporates the Affidavit of Kevin Folta as if set forth at length herein. See ECF 73-1 at ¶¶6-12 ("a grant is a contract of research or activities with tangible deliverables. A research grant with a company is known as a Sponsored Research Agreement (SRA) between the university and the company. There are specific activities outlined, specific deliverables and specific deadlines…The outreach activities of "bio-talk-knowledge-y" were not a research grant. An unrestricted gift means a "no-strings-attached" donation that goes to the University Foundation, and the donor has no control over how the funds are used. The $25,000 from Monsanto to The University Foundation was an Unrestricted Gift[.]

"Unrestricted grant" was boilerplate language that Monsanto used in its letter dated August 6, 2014. []This was not a grant; it was to be an unrestricted gift to the University of Florida. I ripped up and threw away the check shortly after

opening the letter. These funds were not handled as a grant; there was no research performed and there were no deliverables.)" Id.

Furthermore, the work he did pursuant to the grant was voluntary, and part of the expectations of his role as a public scientist. See ECF 64-21. Plaintiff incorporates the Affidavit of Dr. Folta, as if set forth at length herein in response. See, ECF 73-1 at ¶17.

24. Undisputed in part. It is undisputed that other small media outlets, including Nature magazine publicized (falsely) the "$25,000 grant." Any characterization of that article is specifically denied as a writing that speaks for itself. By way of further response in support of dispute, Plaintiff incorporates the Affidavit of Dr. Folta. See, ECF 73-1 at ¶¶22-23.

25. Undisputed in part. It is undisputed that wrote an editorial in the Gainesville Sun. Any characterization of that writing, which speaks for itself is specifically denied. By way of further response in support of dispute, Plaintiff incorporates the Affidavit of Dr. Folta. See, ECF 73-1 at ¶¶22-23.

26. Disputed. Dr. Folta made this out of context concession recognizing that the activists' misconception and fueled rhetoric relating to his industry gift would likely prevent the public from recognizing what the $25,000 gift was actually intended for: communication of science. Again, a gift which provided **no**

salary compensation for Dr. Folta, no research funding, no deliverables, and no requirements. See ECF 73-1 at ¶¶6-12.

27. Disputed. The degree to which Mr. Folta was subject to these enflamed, baseless allegations markedly increased as a result of Defendant's article, to the point he was receiving death threats. As Dr. Folta explains:

> "When scientists analyze evidence and come to an informed conclusion, and that conclusion runs counter to activist dogma, activists are ill prepared to attack that conclusion using evidence. Instead, they engage in *ad hominem* attacks on the scientist. However, social-media attacks from misinformed individuals never resulted in a presentation being cancelled, threats to my life and the safety of my staff, and never had a fellow scientist ever accused me of being a shill until after the NYT Article. I had never been accused of being a "tool of the industry" until my interview with Mr. Lipton. The attacks invariably cite the *New York Times* Article. While most of the time those allegations of "shill" by activists are easily brushed aside by reputable academics or reasonable citizens, when they are made by a Pulitzer Prize winning reporter in a leading newspaper, they become catastrophic. So while these "shill" allegations have been levied before the Article, they came from dubious sources with zero credibility. That changed when the *New York Times* drove those false allegations."

See ECF 73-1 at ¶¶22-23.

28. Disputed. Any characterization of Plaintiffs writings, which speak for themselves, is specifically denied. Plaintiff incorporates his response to Paragraph 27 as if set forth at length herein. See, ECF 73-1 at ¶¶22-23.

29. Disputed. Any characterization of Plaintiffs writings, which speak for themselves, is specifically denied. Plaintiff incorporates his response to Paragraph 27 as if set forth at length herein. The degree to which Mr. Folta was subject to

these enflamed, baseless allegations markedly increased as a result of Defendant's article, to the point he was receiving death threats. See, ECF 73-1 at ¶¶22-23 and 69-7.

30. Disputed. Disputed as a conclusion of law to which no response is required. By way of further response, and without waiver, Plaintiff incorporates from his memorandum of law all arguments with respect to *how* the Defendants' Article characterized, or mischaracterized, information included in the FOIA disclosures, and, information derived from separate, independent sources.

31. Disputed. Disputed as a conclusion of law to which no response is required. By way of further response, and without waiver, Plaintiff incorporates from his memorandum of law all arguments with respect to *how* the Defendants' Article characterized, or mischaracterized, information included in the FOIA disclosures, and, information derived from separate, independent sources. Any characterization of the Defendants "reliance" is specifically denied.

32. Disputed. Disputed as a conclusion of law to which no response is required. By way of further response, and without waiver, Plaintiff incorporates from his memorandum of law all arguments with respect to *how* the Defendants' Article characterized, or mischaracterized, information included in the FOIA disclosures, and, information derived from separate, independent sources. Any characterization of the said emails is specifically denied.

33. Disputed. Dr. Folta did not engage industry representatives to provide lobbying strategy. ECF 73-1 at ¶16. Defendants continually attempt to conflate the term "lobbying" with "public education." It is illegal as a public employee to lobby. ECF 73-1 at ¶19. Dr. Folta's job as a land grant scientist required him to educate the public. To this end, he was not concerned with "lobbying" on behalf of a company, but—consistent with his land grant affiliation, educate the public beyond the misinformation pertaining to GMO science and transgenic crops. See ECF 64-11 ("…it's about how the science is communicated.")

34. Disputed. Disputed as a conclusion of law to which no response is required. By way of further response, and without waiver, Plaintiff incorporates from his memorandum of law all arguments with respect to *how* the Defendants' Article characterized, or mischaracterized, information included in the FOIA disclosures, and, information derived from separate, independent sources. Any characterization of "what" the Article did is specifically denied.

35. Disputed. Any characterization of the *Huffington Post* editorial is specifically denied. While Defendant provides an accurate quotation of an excerpt derived from Mr. Folta's *Huffington Post* article, Plaintiff disputes any implication that Mr. Folta "lacked transparency." Plaintiff incorporates all arguments set forth in this regard contained in his memorandum of law as if set forth at length herein.

See, also, ECF 73-3 (Plaintiff's Highlights in Opposition to the Huffington Post Article).

36. Disputed. Dr. Folta did not address these "products" to endorse their use or promote industry sales; instead, all references to any "products" were meant as an objective, science-backed explanation of technology solutions. ECF 73-1 at ¶ 20. Furthermore, the two blog posts and single tweet cited by Defendants actually show the opposite of their contention. (ECF 64-30-32). As a preliminary matter, Plaintiff has written over thirty one thousand (31,000) tweets related to horticulture and biotechnology, which are publically available online.[4] Similarly, Dr. Folta has written one thousand blogs as part of his "talking biotech" program, which were available to Defendants.[5] The Defendants have pointed to a single tweet (1/31,000) and two blog posts (2/>1000).[6] Defendants claim that Dr. Folta "has specifically defended the safety of Monsanto's Roundup brand herbicide-and other Monsanto products," drawing the Court's attention to the tweet and blog posts. (ECF 65 at 43.)

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[4] https://twitter.com/kevinfolta?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

[5] https://kevinfoltacom.wordpress.com/

[6] Dr. Folta has also published approximately two hundred peer-reviewed articles to date. The Defendants have attached none in support of their statements that he advocates or promotes genetic modification technology.

This tweet from Dr. Folta was actually in response to an attack tweet by the activist group called "GMWatch" calling him "stupid" because he "guzz[les]" glyphosate. Dr. Folta's response is a link to a blog post with a response (again, cited by Defendants). The blog's reference to RoundUp is only setting up the underlying story, which apparently prompted the "stupid" attack from GMWatch. This is hardly promoting a product or company.

The second blog cited by Defendants is self-defeating because Dr. Folta actually criticizes the science set forth in opposition to the non-GMO activists. (ECF 64-32). In other words, Dr. Folta argues against the scientist the Defendants make him out to be. It is titled "Glyphosate: Deadly Microbial Poison or Life Enhancer?" In this blog post, Dr. Folta cites the misinformation campaign of activists who have no knowledge of gyphosate's mechanism of action or how it could cause a problem. He then discusses a new peer reviewed article that asserts Glyphosate not only kills bacteria, but actually helps them survive. Dr. Folta criticizes the new paper – even though it refutes the non-GMO misinformation campaign – because "the relevance [of the findings] to antibiotic therapies is a stretch." *Id*. He further explains, "this is a case where some good data are over-interpreted to support a conclusion, and that's a science no-no." *Id.* Thus, this blog post actually shows Dr. Folta as truly independent, not advocating for any product

or technology, but critical of both sides where their conclusions do not match the science.

The arguments related Dr. Folta's PowerPoints are unavailing. Dr. Folta has produced all of the slides to his PowerPoint presentations for the years 2013 through 2017. See, ECF 73-8. The slides total six thousand three hundred and nineteen (6,319) pages. Id. The Defendants point to forty-two (42) slides, roughly .6%, to suggest that Plaintiff traveled the country defending (advocating) and promoting (sales) Monsanto or industry products.

The slides speak for themselves – he is explaining the technology and how it works. See, ECF 64-33, p 2 (a gene is inserted that allows plants to survive in the presence of herbicide. Farmers can spray to kill non-transgenic plants.) Yet, Defendants omitted the slides from their attachment showing these slides are anything but an independent review of the science. See, ECF 73-6. Dozens of examples of "strengths" and "limitations" appear in the same presentations as those cited by Defendants.

II. ADDITIONAL STATEMENT OF FACTS

Plaintiff incorporates all averments set forth in the Affidavit of Kevin Folta, Ph.D., ECF 73-1, as if set forth at length herein. Plaintiff also incorporates all facts

and arguments set forth in his Chronological Summary of the 178 emails produced by the University of Florida as if set forth at length herein. ECF 73-9.

III. ARGUMENT

A. Summary Judgment Standard for Defamation Claims

Summary Judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Ave. CLO Fund, Ltd. v. Bank of Am., N.A., 723 F.3d 1287, 1294 (11th Cir. 2013). The trial court may not weigh the credibility of witnesses or resolve disputed issues of fact. Jones v. Stoutenburgh, 91 So. 2d 299, 302 (Fla. 1957); Arce v. Haas, 51 So. 3d 530 (Fla. 2d DCA 2010). Summary judgment should be granted sparingly, so as not to infringe on the constitutional right to a jury trial. Axelrod v. Califano, 357 So. 2d 1048, 1051 (Fla. 1st DCA 1978).

Thus, where the evidence creates a fact issue as to whether the challenged statements were false and defamatory, these questions are properly submitted to the jury. Lipsig v. Ramlawi, 760 So. 2d 170, 183 (Fla. 3rd DCA 2000); accord Glickman v. Potamkin, 454 So. 2d 612, 613 (Fla. 3d DCA 1984), review denied, 461 So. 2d 115 (Fla. 1985) (summary judgment not proper where there are disputed issues of fact regarding truth or falsity of defamatory statement).

B. Applicable Substantive Defamation Law and Plaintiffs' Responses to Defendants' Defenses

1. Elements of Defamation

To determine whether a statement is defamatory, it must be considered in the context of the publication. Smith v. Cuban Am. Nat'l Found., 731 So. 2d 702, 705 (Fla. 3d DCA 1999); see also Carroll v. The Street.com, Inc., 2014 U.S. Dist. LEXIS 156499, *29 (S.D. Fla. 2014) ("Viewing the defamatory statements in isolation, [the media Defendants'] arguments are compelling. However, the Court cannot view the defamatory remarks in a vacuum. It must view the Article as a whole."); Florida Medical Center, Inc. v. New York Post Co., 568 So. 2d 454, 459 (Fla. 4th DCA 1990) ("Nevertheless, when considered in the context of the article, there is no question that the article accuses the hospital of dishonesty in connection with it billing system and business. Thus, since it imputes conduct incompatible with plaintiff's lawful business, it is actionable").

2. The Fair Reporting Privilege Is Precluded Procedurally and, In Any Event, Substantively Unavailing

Defendants seek summary judgment based on the fair report privilege affirmative defense, relying on some 178 pages of the 4500 that the Defendants received in response to their August 2015 FOIA request directed to The University of Florida (ECF 64-9). The fair report privilege is an affirmative defense and the burden of proof remains with the Defendant. See, e.g., Miami Herald Pub. Co. v.

Ane, 423 So. 2d 376, 385 (Fla. 3d DCA 1982). This defense fails for multiple reasons set forth below.

Instantly, the defense is infirm at the very threshold — the requirement the report be on "public records" has not been met here. Additionally, the Defendants have not met their burden of showing fair and accurate reporting because the requisite analysis of the aggregate documents has not occurred, with only 178 of the 4,500 that the Defendants purport to rely on being shown. Finally, the requisite analysis of those selectively attached documents confirms numerous examples of inaccuracies, unfairness, editing, deletion, omissions, and other manipulations that misrepresent the documents.

i. A Professor's Emails at a Public University are Not Government Records

Defendants acknowledge Florida's fair report privilege would require, here, at the threshold, that they published fair and accurate accounts of the contents of government records. See Def's Mot. for Summ. J., p. 21. The privilege specifically requires a substantially correct account of information contained in *public records*, that is "reasonably accurate and fair in describing the contents of the [public] records." Woodard v. Sunbeam Television Corp., 616 So. 2d 501, 502 (Fla. 3d DCA 1993). They summarily posit this is met by Dr. Folta's e-mail communications *because*, as a UF employee, he was a public employee and public employee e-mails related to *official business* qualify as public records. See Def.'s

Mot. for Summ. J., p. 22. Although Defendants unfurl a blanket presumption that all the e-mails on which they purport to have reported are public records, that is simply inaccurate — and may not, in any event, be sustained here as a matter of law.

Florida's Public Records Law "defines public records" essentially as all "material … *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency*." State v. City of Clearwater, 863 So. 2d 149, 152 (Fla. 2003) (quoting Fla. Stat. § 119.011(1) (2002)) (emphasis in original). The Florida Supreme Court rejected a construction that it "applies to almost everything generated or received by a public agency" as "too broad," and rather held it "is any material **prepared in connection with *official agency business*** which is intended to perpetuate, communicate, or formalize knowledge of some type." Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 640 (Fla. 1980) (emphasis added). The Court further held it must also be "**intended as final evidence of the knowledge to be recorded.**" Id.; see also, Braddy v. State, 219 So. 3d 803, 820-21 (Fla. 2017). Thus, it is axiomatic that "***not* all documents in possession of the State are public records**." Pietri v. State, 885 So. 2d 245, 268 (Fla. 2004) (emphasis added).

On this matter of public employee e-mails, precisely, the Florida Supreme Court's decision in City of Clearwater, affirming that ***not* all e-mails sent or**

received by public employees on government-owned computer systems are public records, is on point. Id. at 152. Instantly, the Court reiterated the "official business" requisite; and noted "the connection between public records and official business was established well before the Legislature enacted the first public records statute." Id. at 152. It then "agree[d] with the Second District's conclusion that 'private' or 'personal' e-mails 'simply fall[] outside the current definition of public records.'" Id. at 153 (quoting City of Clearwater, 830 So. at 847). "Further," the Court rejected, "Times Publishing's argument that the placement of e-mails on the City's computer network automatically makes them public records." Id. at 154. "Rather, **the e-mails *must* have been prepared** "**in connection with *official agency business***" **and** "**be intended to perpetuate, communicate, or formalize knowledge of some type**." Id. (quoting Shevin, 379 So. 2d at 640). "**The determining factor**," in sum, "**is the *nature* of the record**, ***not*** **its physical location**." Id.[7]

Here, the Defendants' suggestion the emails were prepared in connection ***with official agency business*** is belied by the very Article itself, which characterizes the emails as evidence of some sort of *side-relationship* between Dr. Folta and the pro-GMO industry. Thus, even according to Defendants, Dr. Folta's

[7]See, e.g., Becker v. Univ. of Cent. Fla. Bd. of Trs., 2014 Fla. Cir. LEXIS 51242 (Fla. Cir. Ct. Apr. 17, 2014), affirmed without op., 181 So. 3d 504 (Fla. 5th DCA 2015) (e-mails on UF computer server concerning publication of article in Social Science Journal ***not*** public records).

emails are not official business of the University and, hence, not public records. This additional threshold infirmity is relevant also relevant to the more substantive issue of alleged fairness and accuracy addressed *infra*. Furthermore, the e-mails cannot be intended to be considered final evidence of knowledge to be recorded.

ii. Fairness And Accuracy Cannot Be Determined By Reviewing Only Four Percent Of The Aggregate Purportedly Public Documents

Assuming *arguendo* that the FOIA documents constitute "public records," the devious and calculated manner in which Defendant reported on same bars the privilege's application. To this point, qualifying the subject document(s) as a "public record" operates only as the first condition Defendant must satisfy for the privilege to attach. The privilege's standard requires either: (1) an accurate **and complete** or (2) fair abridgement of the reported occurrence. Restatement (Second) of Torts § 611 (Am. Law. Inst. 1975).[8]

The Article repeatedly references some never-particularized trove of e-mails and other documents, of likewise indefinite quantum, as the aggregate "record" source for various assertions. See, e.g., Pl.'s Third Am. Compl. Ex. A., ECF 19 ("Emails Reveal…"), ("…emails obtained through open record laws show"),

[8] Defendant's Motion for Summary Judgment mischaracterizes the Fair Reporting standard. Per Defendant, the privilege applies to a fair and accurate report of a public record. *See*, ECF 65 at 19. But, notably absent from Defendant's proposed standard is the word "complete," which is expressly included in the Restatement's authoritative definition. In this specific case, the word "complete" is of particular import.

("[t]he emails provide a rare view…"), ("[t]he moves by Monsanto…are detailed in ***thousands*** of pages of emails…first requested by the nonprofit group U.S. Right to Know"), ("The New York Times separately requested ***some*** of these documents, then ***more*** additional requests in several states"), ("Dr. Folta, the emails show …"). Defendants' submission at bar contains similar allusions.

In support of their Motion, Defendants have attached a certified statement from the University of Florida that the records they provided in response to a discovery subpoena were those that the University sent to Lipton in response to his FOIA request. See ECF 64-17, p. 2. Yet that same certification states that the FOIA production "compris[ed] approximately 4,593 pages." Id. The Defendants have attached only 178 of those documents – roughly 4%. The Defendants cannot meet their burden at summary judgment to show a fair and accurate reporting of the "complete" aggregate documents by only appending ***4% of the documents*** to their Motion at bar. Such a Motion may not even be coherently considered, let alone determined as they request. Without the entirety of that "record" established and the putative source of assertions in the article particularized to that record, it cannot possibly be determined, for this reason, too, to be a ***public*** **record**, as a matter of law.

Nor can Defendants' purported reporting on that complete aggregate record possibly be determined to meet the further substantive strictures of the fair report

privilege without that still-absent foundation. This is equally true for those assertions that did not invoke the documents generally, but did purport to rest on a specifically identified document; as even then, unless and until this due foundation is forthcoming there were other – unidentified – documents in that same 'record,' relevant to the same topic, and to the fairness and accuracy of Defendants' reporting thereon, that were ignored.

Defendants' Motion wholly fails to engage in the comparative analysis required to substantiate its claim to privilege. See Heekin v. CBS Broadcasting, Inc., 789 So. 2d 355, 360 (Fla. 2d DCA 2001) (fair report analysis requires a comparison between: (i) the publication and (ii) the public record substantiating same). Defendants have offered no real analysis as far as the fair report privilege is concerned. They failed to point out specific evidence **in** the record that could satisfy its defense. Issues referenced in a perfunctory manner, **unaccompanied** by **some effort** at **developed argumentation**, are deemed waived. EGI-VSR, LLC v. Mitjans, 2018 U.S. Dist. LEXIS 92714, *9-10 (S.D. Fla. June 1, 2018); see also Phillips v. Hillcrest Medical Ctr., 244 F.3d 790, 800 n.10 (10th Cir. 2001) (internal quotation omitted) (a "litigant who fails to press a point by supporting it with pertinent authority [ ] forfeits the point. The court will not do his research for him.") (citing McPherson v. Kelsey, 125 F.3 989, 995-96 (6th Cir. 1997). A party may not mention a possible argument in the most skeletal way, **leaving the court**

to put flesh on its bones. Id. at 995-96 (emphasis added). The record, then, has not been sufficiently developed to determine **as a matter of law**, whether Defendant's article fairly and accurately conveyed the substance of the FOIA disclosures. See Heekin, 789 So. 2d at 360 (denying summary judgment, in a defamation action, where parties failed to sufficiently develop the record); see also Straub v. Lehtinen, Vargas, Riedi, P.A., 980 So. 2d 1085 (denying motion to dismiss, in a defamation action, as empty-record prevented court from determining whether defamatory statements were fair and accurate).

Here, Defendants' motion simply provides an explanation of the fair report privilege's legal framework, but neglects to present a *developed* argument as to its application. More specifically, a proper fair report analysis requires Defendants to engage in a nuanced comparison between: (1) the assertions in its article and (2) the public record providing the basis for that assertion. But, when referencing the record, Defendants' motion points this court to vague, over-broad and generalized record citations, and then fails to specifically explain how those cited-records substantiate the article's assertions. Without providing the specific record-basis for specific article-assertions, this Court must parse through the abundant, generalized record-citations to surmise for itself: (i) what specific record(s) support a challenged assertion, and more problematically, (ii) *how* specifically that record

does so. This is an impossible exercise, particularly where it is Defendant's burden and all facts and inferences must be drawn in Plaintiff's favor.

Defendants cannot ask this Court to "put flesh" on the bones of its own arguments. See, e.g., McPherson. Defendants failed to properly develop their privilege arguments. Pointing to the fair reporting privilege, and citing to wide-swaths of page ranges **amounting only to 4% of purported public record** without providing any measured analysis of *how* those cites meld into the privilege is simply a "perfunctory" analysis, lacking "developed argument[s]." Id.

On such a callow record, this Court cannot determine as a matter of law that Defendants' Article provided a "fair and accurate" interpretation of the 4,500+ documents disclosed per the FOIA requests and Defendants' Motion for Summary Judgment in that regard should be denied.

iii. A Substantive Review Of Those Selective Records Shows The Article Was Neither Fair Nor Accurate

When evaluating the privilege's application to official documents and statements, a court must compare the media's report to the official documents or statements in question. See Heekin, 789 So.2d at 360. Here, this court must compare the assertions made in Defendant's article to the information purportedly used to substantiate those assertions. Engaging in this comparative analysis bears out two important points: first, the defamatory assertions within the article and its

headlines are either entirely devoid of record support—or, second, Defendant exploits certain documents by manipulating their content, and manipulating how that content presents to a reader – so as to render its portrayal both unfair and inaccurate. This method of unsubstantiated and/or inaccurate and unfair reporting defeats Defendant's claims to privilege.

According to Defendants, this qualified privilege requires their purported report on governmental actions or proceedings be accurate and fair. Under Section 611 of the Restatement (Second) of Torts:

> The publication of defamatory matter concerning another in a report of an official action or proceeding … is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

Huszar v. Gross, 468 So. 2d 512, 516 (Fla. 1st DCA 1985). And, as noted in another decision cited by Defendants, Ortega v. Post-Newsweek Stations, Florida, Inc., 510 So. 2d 972 (Fla. 3d DCA 1987), this qualified privilege "is limited in Florida," as "the press … will nevertheless be liable if the private plaintiff shows that the press failed to take reasonable measures to insure that the report . . . accurate." Id. at 975. The Comment on "[a]ccuracy and fairness" in the source Restatement provision cited in both cases is also instructive:

> *f. Accuracy and fairness of report*.
> …
> Not only must the report be accurate, but it must be fair. **Even a report that is accurate so far as it goes may be so *edited* and *deleted* as to misrepresent the proceedings and thus be *misleading***. Thus, although it is unnecessary that the report be exhaustive and

> complete, **it *is* necessary that nothing be *omitted* or *misplaced* in such a manner as *to convey an erroneous impression*** to those who hear or read it, as ***for example*** a report of the discreditable testimony in a judicial proceeding and a **failure to publish the exculpatory** evidence, or the use of **a defamatory *headline*** in a newspaper report, **qualification of which is found only in the text** of the article. The reporter is ***not*** privileged under this Section to make **additions** of his own **that would *convey a defamatory impression***, nor to ***impute corrupt motives*** to any one, nor to **indict expressly or by innuendo the *veracity or integrity*** of any of the parties.

Restatement (Second) of Torts § 611 cmt. f (1975); see also Woodward v. Sunbeam Television Corp., 616 So. 2d 501, 502-03 (Fla. 3d DCA 1993).

Notwithstanding the record's above-noted deficiencies regarding what documents Lipton actually reviewed, analysis confirms numerous examples of both *in*accuracy and *un*fairness in Defendants' purported accounts; numerous examples of editing, deletion, omission, juxtaposition and other manipulations that misrepresent the documents *are* misleading, and *do* convey erroneous impressions; the *in*accurate and *un*fair defamatory import of the headline for which Defendants would not be immune if qualification thereof was found only in the text of the article — and how in fact it is not qualified even there, but is *amplified*; and numerous examples of their own assertions, overlaid language and other additions that *do* convey defamatory impressions, *do* impute corrupt motives to Plaintiff, and *do* indict expressly and by innuendo his veracity and integrity.

Section C, infra, explains why the Fair Report Privilege does not attach to Defendant's specifically challenged statements. Plaintiff has provided a

chronological summary of the FOIA documents that Defendants cited in support of their assertion, and then explains why those same documents do not fairly and accurately convey the meaning assigned to them by Defendant. See ECF 73-9.

3. There is No Truth or Substantial Truth to the Statements

Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the "gist" or the "sting" of the statement is true. Smith v. Cuban Am. Nat'l Found., 731 So. 2d 702, 706 (Fla. 3d DCA 1999) (citation omitted). A statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed. Jews for Jesus v. Rapp, 997 So. 2d 1098, 1108 (Fla. 2008). In determining whether a publication is substantially true, a court must look to the context in which the statement is made, as literally true statements may be conveyed in a way that creates a false impression. Id. at 1108. Put another way, the statement is considered false if would have a different effect on the mind of the reader from that which the pleaded truth would have produced. Masson, 501 U.S. at 517 (1991).

The Carroll Court articulated "the crux" of that case to be "whether labeling Plaintiff a 'convicted felon' is false or substantially true." Carroll v. The Street.com, Inc., 2014 U.S. Dist. LEXIS 156499, *27 (S.D. Fla. 2014). That sister Court found reasonable minds could disagree as to whether the phrase "convicted felon" is a substantially true description of the facts where Plaintiff was arrested

for and charged with felony insurance fraud and grand theft and where he submitted a sworn statement under oath admitting to the factual basis for those charges with a *nolle prosequi* plea. Id. at *29. The media defendants argued that (1) whether Plaintiff was "indicted" rather than prosecuted under the criminal information is a distinction of criminal law which a reasonable person would not understand, or care to know, (2) that as a media defendant, it could not be held to a technically precise standard when writing about criminal justice or legal matters, and (3) "in the mind of an ordinary reader, if Carroll did it, he did it; it makes no difference whether he was convicted." Id.

In denying the media defendants' motion for summary judgment, the Court reasoned that the article did not explain the time lapse between the felony charges and the time the article was written; and the fact his charges were related to false statements made to his insurance company concerning Plaintiff's personal electronic equipment, not in the context of an alleged insurance fraud scheme by a publically-traded company ("The Article did not clarify these facts, rather it labeled [Plaintiff] a 'convicted felon,' 'con artist,' and 'troubling character' as it related to then-suspected Arthrocare and PBLSC medical insurance fraud." Id. at *29. Similarly, here, context to the statements shows the truth would have a different effect on the reader's minds than the Article's contents and characterizations.

4. The Statements Were Capable of a Defamatory Meaning

Published matter is defamatory when its "gist" or "sting" is defamatory. Greene v. Times Publishing Co., 130 So. 3d 724, 729-30 (Fla. 3d DCA 2014). A defamatory statement is one "that tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt or injures his business or reputation or occupation." Rapp, 997 So. 2d at 1109. Words are also defamatory when they tend to subject one to distrust or injure one in one's business or profession. Spiral v. Univ. of Miami, 509 Fed. Appx. 924 (11th Cir. 2013) (citing Am. Airlines, Inc. v. Geddes, 960 So. 2d 830, 833 (Fla. 3d DCA 2007)). The statement is defamatory per se when it facially degrades a plaintiff, brings him into ill repute, or causes similar injury with innuendo. See Mid-Florida Televisions Corp. v. Boyles, 467 So. 2d 282, 283 (Fla. 1985). A statement that is defamatory per se does not require the aid of extrinsic proof. Id.

The Court in Carroll held that a published statement about the plaintiff, characterizing him as a "troubling character" and labeling him a "suspected con artist" was injurious on its face and required no extrinsic evidence to establish its defamatory meaning – it was defamatory per se. Carroll, at *45-46; see also Campbell v. Jacksonville Kennel Club, 66 So. 2d 495, 498 (Fla. 1953) (statements

which attribute conduct or characteristics to a Plaintiff which are clearly incompatible with its business are libelous per se).

In Greene, the Court of Appeals of Florida looked to the entirety of the article in question to determine the defamatory "gist." It explained that "references in [the article] to a 'raucous party boat,' 'the Love Boat,' and 'Sexcapades' make it clear that [Plaintiff] was being accused of participating in, or at the very least condoning, unlawful and immoral behavior." Greene, 130 So. 3d at 729. It was inconsequential to the Court that the author did not say verbatim that Plaintiff "participated in" or "condoned" the behavior – the gist was "clear" and it was defamatory. Id.

i. A Defamatory Meaning Was Implied From the Context of Any True Statements

Florida recognizes defamation by implication, which may arise "where literally true statements are conveyed in such a way as to create a false impression." Rapp, 997 So. 2d at 1108. The elements of defamation by implication are: (1) a juxtaposition of a series of facts so as to imply a defamatory connection between them, or (2) the creation of a defamatory implication by omitting facts. Id. at 1106. In Rapp, the Florida Supreme Court noted:

> [I]f the defendant **juxtaposes a series of facts so as to imply a defamatory connection between them**, or **creates a defamatory implication by omitting facts**, he may be held liable for the

> defamatory implication . . . even though the particular facts are correct.

Id. (quoting Prosser and Keeton on the Law of Torts Section 611 (5th ed. supp. 1988)); see also Lipsig v. Ramlawi, 760 A.2d 170, 183 (Fla. 2001) (in light of "omission of facts that would have eliminated the defamatory implication" and fact issues as to defamatory meaning and falsity, matter was properly submitted to jury). That is exactly what Defendants did here, in addition to the Defendants' false defamatory statements published in the Article. They juxtaposed a series of statements and quotes and omitted others to imply such defamatory connections and create such defamatory implications.

5. Couching Statements as "Opinion" is Not A Defense

There is no "wholesale defamation exemption from anything that might be labeled 'opinion.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). There is a distinction between pure expression of opinion and missed expression of opinion. Hay v. Independent Newspapers, Inc., 450 So.2d 293, 295 (Fla. 2d DCA 1984). Pure opinion is based upon facts that the communicator sets forth in a publication, or that the communicator sets forth in a publication, or that are otherwise known of available to the reader of the listener as a member of the public. Florida Medical Center, Inc. v. New York Post Co., 568 So. 2d 454, 457 (Fl. App. 1990) (citing Hay, 450 So. 2d at 295. Mixed opinion, however, is based

upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication. Id. Rather, the communicator implies that a concealed or undisclosed set of defamatory facts would confirm his opinion. Id. Pure opinion is protected under the First Amendment, but mixed opinion is not. Hay, 450 So. 2d at 293.

In determining whether an alleged libelous statement is pure opinion, the court ***must construe the statement in its totality***, examining not merely a particular phrase or sentence, but all of the words used in the publication. Florida Medical Center, Inc., 568 So.2d at 457. The rule of non-actionable opinion does not relieve the writer from being subject to suit if the disclosed facts upon which he bases his opinion are defamatory and false, even though there is no suggestion or implication that the writer is relying on undisclosed facts. Id. at 458. Florida has adopted the rule that only statements which do not contain a provably false factual connotation will be considered opinion to receive constitutional protection. Id. ("Thus, in the instant case[,] if the statements are capable of being proved false, they are not protected.").

The U.S. Supreme Court, in Milkovich, explained why, even couching a statement as an opinion, is an impermissible defense where the speaker implies knowledge of objective fact:

> … Even if the speaker states that facts upon which he bases his opinion, **if those facts are either incorrect or**

> **incomplete or if his assessment of them is erroneous, the statement may still imply a false assertion of fact**. Simply couching such statements in terms of opinion does not dispel those implications; and the statement, "in my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Milkovich ,497 U.S. at 11.

In Florida Medical, the Appellate Court examined the full context of the article, including its location within the paper itself. Although the article in that case was written in the first person and contained 'cautionary words' such as "I would conclude" and "something that truly stunned me," the court found that the statements contained therein were more likely to be taken as fact by the reader merely because of the location within the paper in the business section, than if the same article had appeared on the editorial page. Id. at 459 ("a business column entitled 'Your Business," which was written in a New York newspaper about a Florida hospital[,] situated as it was above other business news stories [ ] are more likely to be taken as fact.").

> While the author includes cautionary terms, [] the remainder of the article contains no such equivocations to alert the reader that the statements made are merely opinion. Instead the author sets forth what appear to be specific factual observations about the hospital's service which clearly, if unture, would damages its reputation.

Id.

Furthermore, the suggestion of additional defamatory facts known to the author also precludes any claim of opinion. Id. The use of "another" implied the existence of at least two experiences with hospitals in Florida. The author's wife had been a patient at the hospital, but that fact is not revealed in the article. Because of the omission, the Court explained it "cannot assume that the statements "cannot reasonably (be) interpreted as stating actual facts" about the hospital. Id.

If statements are provable as being true or false, they do not receive the protection of an opinion. "***The import of the statements*** is that the hospital performs and charges for unnecessary tests and medications; that it makes major profits by leaving patients in intensive care an extra day whenever possible; that its facilities are dirty; and it provides unhealthy foods to it patients. These are statements which are provable as being true or false[.] They are also defamatory to the hospital's reputation." Id.

While Plaintiff will rebut each claim of opinion in Section III(C), *infra*, it bears noting now that this Article was never even couched as opinion. It was on the front page of the Sunday newspaper, not the editorial section. There were no phrases of "I think...", "It appears…", or "the emails suggest." The title speaks for itself, "Emails Show [ ] Industry Swaps Grants for Lobbying Clout." Lipton took only 4% of the emails he received and then selectively omitted portions of the email that refuted his accusations against Plaintiff, who he then called "a tool of

the industry" in a personal interview with Dr. Folta and in the article. Lipton sets forth what appeared to be specific factual observations about the Dr. Folta which clearly, if unture, (and they are) would damages his reputation.

6. The Statements and Article Were 'Of and Concerning" Plaintiff

The "of and concerning" requirement of a defamation claim is generally a question of fact for the jury. Thomas v. Jacksonville TV, 699 So. 2d 800, 805 (Fla. 1 DCA 1997). Only where the statements "are incapable of supporting a jury's finding that the allegedly libelous statements refer to a plaintiff" can it be decided as a matter of law. Id. To satisfy the "of and concerning" element, it suffices that the statements at issue lead the reader to conclude that the speaker is referring to the plaintiff by description, "even if the plaintiff is never named or is misnamed." Croixland Props. Ltd. Pshp. v. Corcoran, 174 F.3d 213, 216 (D.C. Cir. 1999)

The Carroll court explained, that "while it is true that the Article does not use Carroll's name in the sentence, which contain the words 'con artists' and 'troubling characters,' The media defendants completely ignore the fact that the article expressly refers to Carroll, without use of any 'cautionary words,' as one of two convicted felons linked to the Arthocare insurance fraud scheme. The Article also expressly states that Carroll was previously convicted of insurance fraud." Id. at *45.

Plaintiff will readily concede that some of the at issue statements identified as defamatory do not specifically name Plaintiff in isolation. That is of no consequence to the analysis. In context of the entire article, the Defendants compare Plaintiff to others in the "food war." Plaintiff will address the Defendants' "of and concerning" defenses for the specific statements where it has been asserted in greater detail, infra. However, the two examples below show the general hollowness of the defense.

For instance, Defendants have asserted the "not of and concerning" defense to Statement 17 (J.R. ¶¶ 7, 8; Compl. ¶ 40). Plaintiff readily admits his name does not appear in this sentence. However, in context, when Benbrook is quoted as saying "if you spend enough time with skunks, you start to smell like one," that statement is intended to refer to Plaintiff. Plaintiff's photo is directly next to the captioned quote of his purported adversary. In the text of the Article, the quote comes immediately after describing academics who have "accepted special 'unrestricted grants'" and have helped push corporate agendas on Capitol Hill – actions that the Defendants (falsely) attributed to Dr. Folta later in the Article.

Similarly, Statement 31, (J.R. ¶19) describes how the industry paid Benbrook for his studies concerning organic milk and so he could lobby against a federal ban on G.M.O labels, before Benbrook lost his academic position at Washington State. Immediately thereafter, the Article states that Organic

companies turned to Benbrook "for the same reasons Monsanto and others… support Dr. Folta directly." The context cannot be ignored.

7. The "Time-Barred" Defense Is Equally Infirm

None of the statements that Plaintiff identified to be defamatory in the Joint Report are time-barred from the Court's consideration.

As a preliminary matter, Plaintiff first wishes to provide the procedural context to how the Defendants' have now asserted the defense of "time-barred." Defendants fault Plaintiff for including statements in the Joint report, which Plaintiff alleges to be defamatory, that Defendants claim were not specifically referenced in Plaintiffs' Amended Complaint and/or statutory notice and are thus time-barred. Simultaneously, and rather unfairly, Defendants have also criticized Plaintiffs for not "streamlining this lawsuit through the Joint Report" by reducing the amount of statements at issue. See ECF 65 at p. 2. As discussed, supra, defamatory statements are to be read in the entire context of the subject article. See Smith, 731 So. 2d at 705. To avoid any potential argument that by not listing a statement in this Joint Report that Plaintiff somehow abandoned the ability to use these statements to explain defamatory context, Plaintiff identified several statements, which, in isolation, do not amount to actionable defamation. However, in proper full context, these statements further the defamatory "sting" of the article at issue.

The recognized purpose of the statutory notice to the publisher is to enable him "to retract any allegedly false statements in order to mitigate the harm caused by those statements." Cook v. Pompano Shopper, Inc., 582 So. 2d 37, 39 (Fla. 1st DCA 1991). As the Southern district of Florida explained:

> The statute is designed to allow a defendant the opportunity to be put on notice so as to take necessary steps to mitigate the potential damages and perhaps avoid precisely the type of litigation now before the Court.

Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1475 (S.D. Fla. 1987).

It is undisputed that the retraction demand notice gave the Defendants the opportunity to retract the false implication that Plaintiff was publishing "supposedly unbiased research" for industry "under the guise of impartiality" or the false implication that Plaintiff was "swap[ping] grants for lobbying clout." The notice gave the Defendants an opportunity to withdraw any false implication that Plaintiff was a "tool of the industry:"

> Lipton's loaded question to Dr. Folta asking "how does it feel to be a tool of the industry" reveals his activist approach to this, his slant, and so does the manner in which he couched Dr. Folta's response. Dr. Folta summarily rejected that premise, and Dr. Folta's rejection of Lipton's misleading premise was not included in the article."

See ECF 64-50 at p.4.

Thus, Plaintiff sufficiently conveyed the defamatory "gist" of the Article he sought to have retracted in his statutory notice letter and fulfilled the statutory purpose.

Furthermore, Florida does not require the statements in the notice letter to be identical to those of the Complaint. See Edward L. Nezelek, Inc. v. Sunbeam Television Corp., 413 So. 2d 51, 55 (Fla. 3d DCA 1982) ("If the complaint either presently states, or upon amendment is likely to state a cause of action for defamation, then ***it is error to dismiss with prejudice those statements*** in an original complaint which constitute the defamation simply ***because the statements are not identical to the statements in the demand notice***."). Plaintiff's statutory notice letter was sufficient to notify the Defendants of all defamatory statements presently at issue. In any event, applying Nezelek, it would be error for the Court to preclude Plaintiff from arguing the defamatory nature of any contents in the Article, which were not specifically quoted verbatim in the statutory letter.

This is especially so because, despite being put on notice of the false and defamatory message their Article conveyed, Defendants chose not to retract or correct them and mitigate the harm to Dr. Folta. It is therefore evident that they would not have retracted the same message in their Article.

To preclude Plaintiff from arguing the defamatory nature of any contents in the Article would be to elevate form over substance, which Florida law abjures.

See Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 873 (Fla. 2001); May v. Illinois Nat'l. Ins. Co., 771 So. 2d 1143, 1149 (Fla. 2000); State v. S.R., 1 So.3d 221, 222 (Fla. 3d DCA 2008). It would merely serve to punish the plaintiff for not performing a futile act, which also runs counter to Florida jurisprudence. See, e.g., State ex. rel. Ashby by Haddock, 149 So. 2d 552, 553 n.6 (Fla. 1963).

Finally, it would be reversible error to deny the Plaintiff an opportunity to amend his demand notice and complaint. As stated in Nezelek, it is reversible error to dismiss any cause of action with respect to statements not contained in a demand notice, without giving plaintiff at least one opportunity to amend his demand notice and complaint:

> Applying the principal of liberality of pleadings, [citations omitted], and acknowledging our duty to protect the right of an individual to seek redress in the court for defamation, [citations omitted], a plaintiff who appears to have a cause of action for defamation **should be permitted at least one opportunity to amend his complaint and demand notice to include, if he can, all alleged grounds for the cause of action**…We recede therefore, from this court's holding in Hulander v. Sunbeam Television Corp., 364 So.2d 856 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 459 (Fla. 1979), to the extent that Hulander, supra, may bar a single amendment of a demand for retraction made pursuant to Section 770.01 after the filing of complaint. **It was error to dismiss the cause of action with prejudice as to those statements not contained in the August 9, 1979 [statutory notice] letter.**

Nezelek, 413 So.2d at 56-57 (emphasis added). Nezelek arose out of a defamatory broadcast on July 31, 1979. The trial court dismissed all causes of

action except those based on the defamatory statements in the demand notice. Over thirty-one (31) months after the broadcast and seven (7) months after the statute of limitations ran, the Court of Appeals held that plaintiff should be permitted at least one opportunity to amend his statutory demand notice to include all alleged grounds for the cause of action. Id. at 56-57; see also Commercial Carrier Corp. v. Indian River Co., 371 So. 2d 1010, 1023 (Fla. 1979) (Failure to comply with governmental notice provision "does not call for dismissal with prejudice," but "with leave to amend;" amendment allowed more than four years after accident). Although Plaintiff maintains that his statutory notice letter was sufficient to notify the Defendants of all defamatory statements presently at issue, the Court must give Dr. Folta the opportunity to amend his statutory demand letter should the Court preclude him from arguing the defamatory nature of the Article's content it finds to be otherwise insufficient otherwise.

Finally, the Federal pleading standards are well known. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair **notice** of what the [ ] claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007).

Plaintiff's Amended Complaint gave fair notice of what the grounds were going to be. See ECF 19. Plaintiff gave specific notice that he took issue with any

false suggestion that (1) he received undisclosed and unrestricted grants (id. at p. 10); (2) he worked directly with Monsanto to mislead the public (id. at p. 12); (3) he received payments by Monsanto to supports its agenda (id. at p. 14); (4) he had motivations to defend Monsanto (id. at 15); (5) he lobbied for industry (id. at p. 18). He criticized the false headlines, bylines, and juxtaposition of his photograph. (id. at p. 6).

Thus, Plaintiff sufficiently gave fair notice of the defamatory "gist" of the Article in his Amended Complaint and fulfilled the Court's notice pleading requirements.

8. Plaintiff Does Not Set Forth A Separate Action for False Light

Plaintiff does not plead a separate cause of action for false light. Plaintiff's claims related to the Article's defamatory statements, implications, and innuendos are set forth herein.

C. The Statements at Issue And Their Context

The Article characterizes Dr. Folta as having sacrificed his scientific integrity for personal financial gain. It also falsely attributes facts and innuendo to Dr. Folta accusing him of the same. This is the main defamatory sting or import of the Article in context.

The statements at issue are not of equal import in the context of the Article. Some are defamatory by themselves. Others imply a defamatory accusation. Some can only be considered as additional context of the defamatory sting of the Article. While Plaintiff will address each statement individually, he will first focus on those statements that damage Dr. Folta the most and directly support the Article's main sting – that he sacrificed his scientific integrity for personal financial gain. Specifically, and in context,[9] the Article stated that Dr. Folta was "*a tool of the industry*" who was "*brought in for the gloss of impartiality*" with "*supposedly unbiased research*" after he received an "*undisclosed amount in special 'unrestricted' grants*" so that he could "*defend or promote its products*" as part of a scheme where he "*swaps grants for lobbying clout*." These statements are false and defamatory.

Defendants have dedicated an entire section of their memorandum to accuse Plaintiff of overreaching in his Complaint with purported "strained implications" and have unfairly characterized Plaintiff's attempts to point to specific defamatory terms as "cherry picking." They repeatedly use the Court's comments of "hyperbole and editorializing" in the Complaint (ECF 35 p. 1) as a sword for their instant Motion for Summary Judgment. However, this case has moved into an

[9] To determine whether a statement is defamatory, it must be considered in the context of the publication. Smith v. Cuban Am. Nat'l Found., 731 So. 2d 702, 705 (Fla. 3d DCA 1999).

analysis of record evidence (and the lack thereof) not pleadings. They also accuse Plaintiff of "contriv[ing] a litany of extreme and sinister [and "strained"] implications." (ECF 65 at p. 71, 73). Plaintiff's arguments contained herein are not strained, contrived, or somehow overreaching. They are based on the reasonable context of the statements and the uncontested plain meaning of the Article's words. The horrific threats, accusations and attacks that Dr. Folta received, attached hereto as Exhibit ECF 73-7, also show the defamatory thrust of the Article – not a strained implication from Plaintiff but verbatim confirmation from the Article's readers.

Furthermore, the Defendants have again changed the identification system of the statements with which Plaintiff has taken issue. In an effort to make it easier for the Court to follow the Statement/Defense/Rebuttal sequence, Plaintiffs will adopt the identification system used in Defendants' Motion for Summary Judgment.[10]

1. The Article's Most Damaging Statements

Plaintiff contends that Statements 1, 8, 9, 12, 19, and 20 are the most independently defamatory and damaging. Each serves as an immediate buttress to

[10] However, the Defendants adopted a numerical identification system that is inconsistent with the chronological sequence with which the statements actually appear in the Article and one that does not correlate to the Plaintiffs' position as to the statements' defamatory import. Since the context with which these statements appear is of import, Plaintiff will address multiple statements in groups where they appear together in the Article.

the Article's defamatory characterization of Plaintiff as a scientist who has sacrificed his scientific integrity for personal financial gain.

The Defamatory Title of the Article

Statement 8: "*Industry Swaps Grants for Lobbying Clout*" J.R., ¶ 1; Compl., ¶ 29, 32, 35.

Claimed Defenses: Fair report privilege, truth/substantial truth, and opinion.

Defendants do not contest the fact that this title is capable of a defamatory meaning.

As a preliminary matter, assuming *arguendo* that Defendants' Article fairly and accurately portrays the public records as to Doctors Benbrook, Chassy, and Shaw—Defendants, in turn, cannot simply impute that same "fairness and accuracy" onto Plaintiff. The article's assertion, and supporting documents, must "stand on its own" with respect to each individual. Thus, for purposes of its privilege analysis, this Court must focus solely on whether the record supports the headline's assertion with exclusive respect to Plaintiff. Appropriately focused, the answer to that question (again), is no.

While the words speak for themselves, their meaning is clear, false, and defamatory. That is, that companies and academics (Dr. Folta) have mutually agreed to a *quid pro quo* exchange of academic grants for legislative testimony and lobbying. There is nothing fair or true about this title. It is not an opinion as it is provably false and implies the knowledge of certain defamatory facts.

First, a preliminary yet singly dispositive point bears repeating: All Dr. Folta's (falsely) alleged "lobbying" occurred before Monsanto's gift to UF, and he did not receive any compensation for his time or any research funding. There are ***no emails showing any correspondence related to Dr. Folta's congressional testimony*** after the University of Florida received the $25,000 gift from Monsanto. In other words, ***there is no evidence of any request by Monsanto*** or any GMO "industry" (1) for Dr. Folta to testify, (2) when to testify, (3) if there was reimbursement, or (4) anything pertaining to the testimony from the time the gift was made until the publication of the Article. In fact, the emails reveal that Dr. Folta was asked to appear for questioning in Pennsylvania at the request of ***a Pennsylvania State Representative***, not any industry actor. ECF 64-9 at 121.This fact alone demonstrates that "Industry Swaps Grants for Lobbying Clout" is nothing more than a provably false, unfair, and grossly inaccurate byline which defamed Plaintiff.

Additionally, Dr. Folta's proposal for the "bio-talk-knowledge-y" program speaks for itself as to where the money would go. See ECF 64-21. There's no proposed legislative meetings or testimony. There's no research funding. The budget of the $25,000 is laid out for three things: off-campus training at other universities, a two-day biotechnology communications training at the University of Florida, and a dedicated projector. There's no quid pro quo. Dr. Folta told Lipton

that the $25,000 was not an unrestricted grant to him but an unrestricted gift to the University with no deliverables, and the funds were never used, which Lipton ignored. See ECF 73-1 at ¶ 10.

The claimed fair report privilege also substantively fails. This headline does not provide either an accurate and complete, or, fair abridgment of the public records it purports to represent as applied to Dr. Folta. *See Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. 1st DCA 1985) (*citing* Rstmt. Section 611 (Am. Law Inst. 1975)). To start, the emails cited by Defendants do not establish Plaintiff received grant awards from Monsanto ***in exchange for his "lobbying" efforts***. A majority of Defendants' record-cites bear absolutely no reference to: (i) grants; (ii) grants paid to Plaintiff; (iii) or grants paid to Plaintiff conditioned on his contribution to industry lobbying efforts (as asserted in **Statement 8**). The funds went to Florida ECF 73-1 at ¶ 8. University of Florida obtained the $25,000.00, which UF – not Monsanto – specifically earmarked for educational purposes—and, expressly noted (in the language of the proposal), that the funds would not constitute Plaintiff's personal income and would not go to Plaintiff. For the privilege to "save" Defendant's defamatory headline, these emails and records (ECF 64-9) **must fairly and accurately** establish that Plaintiff **received grants in exchange for his lobbying efforts.** They clearly do not.

A fair and accurate interpretation of the general citations made by Defendants tend to show: (i) Plaintiff attending and presenting his objective, scientific findings at a variety of speaking engagements; (ii) his receipt of travel reimbursements for same (as opposed to research grants); and (iii) a consistent undertone, between all communicating parties, that Plaintiff's delivered content be driven by his own scientific research. He never affirmatively volunteers to endorse Monsanto and/or partner products, nor is he ever asked to do so.

Indeed, with respect to the range of citations relied on by Defendants to substantiate the headlines, the **only** records regarding an awarded grant between Plaintiff and Monsanto exists on pages 77 through 87. In summation, those citations include: (i) A copy of Plaintiff's educational initiative proposal, sent to Monsanto, entitled "Bio-talk-knowledgey: Training Scientists How to Teach Concepts in Transgenic Crop Improvement." *See* J.R., pp. 78-86, and (ii) Emails from Monsanto representatives, accepting Plaintiff's request for initiative funding in the amount of $25,000. *See* J.R., 77, 87.

These records should arguably exist as Defendants' strongest claim to the fair-support privilege. But, instead, when viewed in conjunction with Defendants' unfair and inaccurate rendering of them, the records provide the decisive end-blow to its privilege claims. Again, Defendants must show that the above-cited records **fairly** and **accurately** support its headline's assertion: "Industry Swaps Grant for

Lobbying Clout." But, to rebut this premise, an *accurate* and *fair* reading of Plaintiff's proposal prompts several conclusions:

First, when viewed in relation to the entire article, the headlines falsely impute a *quid pro quo* dynamic onto Plaintiff, Monsanto, and its industry partners. Simply, it states that Monsanto conditioned its grant to Plaintiff on his continued "lobbying" efforts, or conversely, that Plaintiff made his "lobbying" efforts contingent on payment and receipt of grant funding. With respect to Plaintiff's proposal and emails indicating Monsanto's acceptance of same: **nothing exists to suggest that performance on either side was tied to any future obligation** extraneous to the terms in Plaintiff's proposal.

Second, in a narrower vein: to the extent Defendant attempts to frame Plaintiff's educational initiative as *itself* a lobbying mechanism – this also is an unfair and inaccurate rendering of the document.[11] Turning to the actual proposal, its described-purpose **aims to teach scientists how to engage public audiences about** transgenic crop technology. It makes clear that, under the proposal, there is **no** compensation paid to Dr. Folta, **no** funding of research, **no** advocacy for a particular biotechnology, **nor** any promotion for a particular Monsanto product. The proposal's stated mission (i.e., education), coupled with its lack of product

[11] As stated, *supra*, neither Plaintiff nor (more importantly) this Court should be made to put the "flesh on the bones" of Defendant's argument. Here, Defendant's failure to adequately develop its privilege argument with proper factual application is particularly pronounced.

endorsements and financial incentives, highlights Defendant's unfair and inaccurate allusion to it as a proxy for lobbying.

Claiming Dr. Folta was a "Tool of the Industry"

Statement 1: "But he also conceded in an interview that he could unfairly be seen as a ***tool of industry***, and his university now intends to donate the Monsanto grant money. 'I can understand that perception 100 percent' he said, 'and it bothers me a lot." Joint Report ("J.R."), ¶ 10.

Claimed Defenses: time-barred, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Plaintiff fully incorporates his arguments in Section III(B)(7), supra, in support of any time-barred defense. None of the statements at issue are time-barred. In any event, it is undisputed that the retraction demand notice gave the Defendants an opportunity to withdraw any false implication that Plaintiff was a "tool of the industry:"

> "Lipton's loaded question to Dr. Folta asking 'how does it feel to be a tool of the industry' reveals his activist approach to this, his slant, and so does the manner in which he couched Dr. Folta's response. Dr. Folta summarily rejected that premise, and Dr. Folta's rejection of Lipton's misleading premise was not included in the article."

See ECF 64-50 at p.4; see also Complaint ¶¶83-85.

What Defendants hid from their readers, first, is that this gravely disparaging "tool of the industry" language was not Dr. Folta's, as *falsely* conveyed by the article, it was Lipton's. In that interview, Lipton put this loaded question to Dr. Folta: 'how does it feel to be a tool of the industry?" ECF 73-1 at ¶ 22. And the

article further distorts what was allegedly "conceded" — as in fact "Dr. Folta swiftly and summarily rejected Lipton's premise." Id. at ¶ 26. The only attacks on Dr. Folta as being a "shill" came from uninformed activists, not a globally recognized newspaper. Id. at ¶¶ 22-23.

The Defendants point to Dr. Folta's editorial article of August 30, 2015, which appeared in the Gainesville Sun newspaper (ECF 64-6) to suggest that Dr. Folta had already conceded he could be considered or "unfairly considered" a "tool of the industry." They also rely on Dr. Folta's blog post after the NYT Article was published to suggest the same (64-30). Both positions are inconsistent with those two cited editorials. Dr. Folta has written approximately 1,000 blog posts and editorials, which the Defendants had available to them in choosing these two. See, e.g., https://kevinfoltacom.wordpress.com/.

As for Dr. Folta's Huffington Post blog, he wrote it ***over a year after*** the Defendants published their Article in a (failed) effort to mitigate the harm caused by the Defendants' Article. Here, Dr. Folta is advocating for an even higher standard of disclosure even though he has "been more transparent than just about anyone else in the GMO dialog. "My presentations are online, I freely provide any reference. I have followed every convention for proper disclosure and conflict of

interest." ECF 73-2.[12] He even included links to his presentations that were posted online. The Defendants' position that Dr. Folta conceded he could unfairly be seen as a tool of the industry, over a year after they published the Article, when it was Lipton himself who manufactured that defamatory label is without merit. There is no equivalence between Dr. Folta stating that he underestimated the importance of a Monsanto donation to his science communication program on public perception and implying he was a tool of the industry.

Furthermore, Dr. Folta's August 30, 2015 editorial in the Gainesville Sun was in fact something he wrote *in response to an editorial*. The Defendants did not attach that editorial. In his article, however, Dr. Folta identifies the accusation to which he is responding – "the article [falsely] accused me of 'failing to disclose' a donation from Monsanto." There was no suggestion he was a tool of the industry. In fact, Dr. Folta's editorial provides significant insight into the falsity of any accusation that he was a "tool of the industry." The title is "Kevin M. Folta: A Record of GMO Honesty." See ECF 73-2 .

It is absurd to suggest Dr. Folta is somehow a tool of the industry when the most Defendants can cite is some travel and hotel reimbursements to speak on the science. He earns his (modest) livelihood through research and publishing, not public speaking. The emails show he was even willing to travel to Pennsylvania

[12] Plaintiff has identified his counter designations of that editorial using blue highlight.

from Florida ***at his own expense***, because of his independent loyalty to science, when he asked BIO for reimbursement. ECF 73-12 at 122.

This statement is certainly capable of a defamatory meaning. As a "tool of the industry" it casts doubt on the impartiality of his scientific work, research, and publications. Dr. Folta has been publishing and researching for close to thirty years with no industry funding. His scientific findings before this article were never challenged on their merits. Now, as a "tool of the industry," accused of swapping grants for lobbying clout, the entire collection of his work becomes challenged as bias and fake. Consider as an analogous example between the perception of credibility between the following testimony: (1) the testimony of a pathologist who determined the cause of death two years before there was a lawsuit or (2) the same pathologist who was retained as an expert for litigation to determine the cause of death and relay those findings to a jury. Of course there would be a difference in trustworthiness, even if the science and testimony were the same.

This is not a mere opinion entitled to protection. Context is required for a claim that a statement is an opinion. The import of Statement 1 is that Dr. Folta unnecessarily performs scientific work and lobbying for companies; that he is not acting on his own fruition but rather at their request; that he admits to this behavior and regrets his conduct; and that he never disclosed it previously, despite an ethical

and legal obligation to so. These are statements which are provable as being true or false. They are also defamatory to Dr. Folta's reputation.

Plaintiff's Impartiality is Not a Gloss

Statement 9: "So Monsanto, the world's largest seed company, and its industry partners retooled their lobbying and public relations strategy to spotlight a rarefied group of advocates: academics**, brought in for the gloss of impartiality** and weight of authority that come with a professor's pedigree." J.R., ¶ 2.

Claimed Defenses: Time-barred, fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Plaintiff fully incorporates his arguments in Section III(B)(7), supra, in support of any time-barred defense. The Defendants' other defenses miss the mark substantively as well.

First, with respect to the claimed defense of truth/substantial truth, the Defendants have not pointed to any source and argued that Plaintiff was brought in "for the gloss of impartiality." Their truth/substantial truth arguments center around whether industry collaborated, in any respect with academics. There is no debate that the industry collaborated with academics. It is false, however, that Dr. Folta was used to create a "gloss" of impartiality and independence.

The Defendants do not argue that the statement "brought in for the gloss of impartiality" is not defamatory nor do they argue it is a "fair and accurate" reporting of the emails. These claimed defenses substantively focus on lobbying and advocacy. By themselves those words may not be defamatory. But in context,

accusing an academic scientist of either advocating or lobbying a position, where their impartiality is just a gloss, i.e. a concealer, is defamatory. It's the equivalent of being dishonest. That is, but for Dr. Folta's credentials, no one would believe that he makes his statements, whether in the form of lobbying or advocating, impartially or truthfully.

The only defense actually argued for the "gloss of impartiality" phrase is opinion. The statement must be viewed in totality and context to determine if it is an opinion. Florida Medical, 568 So.2d at 457. In looking at the statement in its totality, this statement clearly suggests that the reviewed emails show as a fact that Dr. Folta collaborated with industry to create a "gloss of impartiality." It's a provably false statement. The emails clearly show that Dr. Folta was appreciated for his independence and impartiality, not as some concealer or gloss. Rather than showing any use of a 'gloss of impartiality' for lobbying, the email correspondence shows Dr. Folta felt ***independently*** compelled to counter fear-driven misinformation with science, e.g. "It is the classical fear campaign. Her words reinforce a flawed viewpoint and it is good to show that … It puts in place ***a solid example of science v. misinformation***." The Defendants do not point to a single document suggesting that this phrase is true/substantially true for Lipton to even opine. Furthermore, "the suggestion of additional defamatory facts known to the author also precludes any claim of opinion." Florida Medical, 568 So.2d at 459.

Lastly, with specific respect to Lipton's use of the word "lobbying," an **immense** difference exists between: (i) ***lobbying*** for an entity's corporate, fiscal, and reputational interest(s) and (ii) utilizing speaking opportunities that provide a greater platform to further one's scientific research and findings. Defendant's heading unfairly and inaccurately conflates these two distinct concepts. Plaintiff is not a lobbyist. He is a scientist, and an academic. It would be illegal for Plaintiff to lobby. ECF 73-1 at ¶ 19. The records bear this distinction out— and the only time the word "lobby" appears in Dr. Folta's cited FOIA emails is in reference the waiting area of a hotel.[13] See Restatement (Second) of Torts § 611 cmt. f. (1975) (explaining "misleading headlines that do not fairly reflect the text [are not privileged]."). Instead, Lipton unilaterally interjected this defamatory term into Defendant's headline. See id. ("the interpolation of defamatory matter, or a one-sided account . . . forfeit[s] the privilege.").[14]

[13] In fact, Lipton uses the word "lobby" in his commentary on the emails (ECF 6 69-11) and his Article fifteen different times where as Dr. Folta's email correspondence is wholly devoid of the word.

[14] Despite Defendant's request, this Court cannot rationalize Lipton's mischaracterization as "editorial license," nor excuse it as a small/inconsequential discrepancy between the headline's assertion and the record on which it is based— particularly where that record is utterly fails to establish any direct industry grant payments to Plaintiff.

The "Supposedly Unbiased Research" Directly Attacks Plaintiff's Scientific Integrity

Statement 12: *The use by both sides of third-party scientists, and their* ***supposedly unbiased research****, helps explain why the American public is often confused as it processes the conflicting information.*" J.R., ¶ 4; Compl., ¶ 74.

Claimed Defenses: Fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

The Oxford English Dictionary defines "supposedly" as "according to what is generally assumed or believed (often used to indicated that the speaker doubts the truth of the statement.)"[15] That is exactly how a reasonable person would read this statement in context – that Lipton believes, based on the documents he reviewed and implying additional facts, that he doubts Dr. Folta's research is unbiased. The claimed defense of opinion is precluded where Lipton sets forth what appears to be specific factual observations about Dr. Folta's research, which clearly would damage his reputation. See Florida Medical, 568 So.2d at 459. Furthermore, he suggests additional defamatory facts known to him, which precludes any claim of opinion. See id.

This is not a mere opinion by Lipton simply suggesting that Dr. Folta is in "a classic conflict of interest," which Defendants argue to be the case and non-actionable. See ECF 65. It is an accusation that Lipton doubts Dr. Folta's research is unbiased – a devastating accusation to make against a scientist. Moreover, Dr.

[15] En.oxforddictionaries.com/definition/supposedly, last viewed 8/12/18.

Folta does not do research on GMOs. He never received any research funding from industry related to GMO. His research involves non-GMO strawberry taste, which is federally funded. Thus, even assuming the accusations of having biased research and operating under a conflict of interest are the same (and they are not), there is no *prima facie* conflict of interest for Dr. Folta's research and the statement is provably false. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 769 (1986).

These same facts, which show a lack of funding to Dr. Folta's research, completely undermine any defense that this statement was fair and accurate reporting. Dr. Folta's research is not discussed anywhere in those FOIA documents and Defendants do not point to where it was. As Defendant's motion gloatingly notes: Lipton is a two-time Pulitzer prize-winning journalist – one endowed with sufficient savvy, skill, and aforethought to avoid lodging blatant insults and attacks. Lipton instead utilizes more subtle, nuanced pokes and jabs—like the statement addressed herein. Certainly, a statement indicating that Lipton doubts Dr. Folta was publishing unbiased research or did research in a conflict of interest is neither fair nor accurate when the documents relied on to make such claims show the exact opposite – that Dr. Folta never received funding for his research from industry and that he does not do research on GMOs.

All "Grants" Were Fully Disclosed and Known to Lipton

Statement 19: "*Monsanto and its industry partners have also passed out* ***an undisclosed amount in special grants*** *to scientists like Kevin Folta….*" J.R., ¶ 9. Plaintiff received an "*undisclosed amount in special grants.*" Compl., ¶52.

Claimed Defenses: fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

The Defendants have allocated a single paragraph to defending Statement 19, which is also incompletely cited. The Defendants did not include the entire sentence in its identification. That cannot be ignored. The entire sentence in the Article actually reads:

> Monsanto and its industry partners have also passed out an ***undisclosed amount in special grants*** to scientists like Kevin Folta, *the chairman of the horticultural sciences department at the University of Florida,* ***to help with "biotechnology outreach" and to travel around the country to defend genetically modified foods.***

Moreover, the sentence that ***immediately precedes*** Statement 19 (identified by Defendants as **Statement 20**) is:

> "This is a great 3rd party approach to developing the advocacy that we've been looking to develop.' Michael Lohius, the director of crop biometrics at Monsanto, wrote last year in an email as the company considered giving Dr. Folta an ***unrestricted*** grant."

The two paragraphs alone are replete with falsehoods evinced by the very documents purportedly at issue: (1) the gift to UF was fully disclosed and documented; (2) there is no mention anywhere in the emails of "undisclosed" grants to other scientists — this was manufactured to support the narrative; (3) "biotechnology outreach" likewise appears nowhere in the documents; (4) the gift

was to "Train Scientists How to Teach Concepts in Transgenic Crop Improvement" not to advocate for anything. Moreover, when Statement 19 is read in context with Statement 20 that precedes it, it clearly implies that "undisclosed" and "unrestricted grants" to Dr. Folta were the "great 3rd party approach" mentioned by Monsanto. Yet, the emails cited by Defendants shows this rather refers to the outreach of teaching communication skills. See 69-12. at 105. Additionally, that Defendants make no mention here of the grant amount further shows the intention was to falsely convey it had no apparent limits.

Defendants also tellingly ignore the "Rationale and Justification" of Dr. Folta's proposal: "It is about how the science is communicated**.** Using this starting point, the activities in this proposal seek to teach scientists how to engage public audiences about transgenic crop technology." Id. at 96. It makes clear there is **no** compensation for Dr. Folta, **no** funding of research, **no** advocacy for a particular biotechnology, **no** promotion of any product. Id. at 96-104. For these reasons, too, the slander that Dr. Folta was "swap[ped]" a grant for lobbying clout is, to say the least, neither true nor a fair interpretation. Dr. Folta even told Lipton that there was no unrestricted grant to him but an unrestricted gift to the University with no deliverables. See 69-1 at ¶ 8. Dr. Folta ripped up the check enclosed with that letter from Monsanto and immediately contacted them to make a correction, which is why no funds until October, 2014. Id. In addition to Monsanto, other groups and

individuals donated to UF for the "Bio-talk-knowledge-y" program, including the farm bureau, the pork industry, and the dairy industry, which have nothing to do with genetic engineering. Id. at ¶ 10. They donated because the talks were about how to communicate science across a broad spectrum. Id. at ¶ 10.

Defendants do not argue that the $25,000 gift *was actually fully disclosed*. Instead they point to a single line in the "Bio-talk-knowledge-y" proposal to suggest that the contribution was a type that "is not publicly noted." (ECF 73-12 at p. 104). Grants have deliverables unlike an unrestricted gift, which is simply a donation and does not have independent reporting requirements. See ECF 73-1 at ¶ 11. A donation to the SHARE fund is to further the general purpose or work of the organization (UF), rather than for a specific purpose or project. Id. A gift to SHARE does not have the same reporting requirements for the very reason that it lacks even the appearance of a potential conflict of interest because there are no deliverables by the scientist or University. Id. Furthermore, Lipton took Monsanto's boilerplate language and not University language explained by Dr. Folta. Id. at 9.

In any event, the Article does not say that the funds were donated to The University of Florida in a SHARE account, where contributions are not publically noted by the scientist himself, which would have been the truth – it says the opposite. The Article claims that Monsanto "passed out" an undisclosed amount of

these special unrestricted grants to Dr. Folta. Furthermore, it also implies that the amount given to Dr. Folta is still undisclosed, as if it had been so concealed that Lipton has yet to determine the total amount. The defamatory meaning of these false statements is obvious – Dr. Folta is dishonest because he did not disclose the amount he received from Monsanto. It also directly supports the defamatory main gist of the Article.

The defense of truth/substantial truth fails. There's a material difference between these two statements:

(1) Monsanto gave $25,000 to The University of Florida to allow Dr. Folta to "teach scientists how to engage public audiences about transgenic crop technology."

(2) Monsanto and its industry partners have also passed out an undisclosed amount in special grants to scientists like Kevin Folta … to travel around the country to defend genetically modified foods."

The first statement is true. The second is false. But, even assuming its truth, reasonable minds could determine that the statement in the Article would have a different effect on the reader from that which the truth would have produced. See, Masson.

Plaintiff Did Not Travel Around The Country To Defend GMOs or Promote Products

Statements 2-7 Related to Defending and Promoting GMOs

Statement 2: Plaintiff was given a grant "*to help with 'biotechnology outreach' and to travel around the country to defend genetically modified foods.*" J.R., ¶ 9; Compl., ¶ 53.

Statement 3: "*Dr. Folta said that he joined the campaign to publicly defend genetically modified technologies because he believes they are safe and that it is his job to share his expertise.*" J.R., ¶ 10; Compl., ¶ 82.

Statement 4: "*In August 2014, Monsanto decided to approve Dr. Folta's grant for $25,000 to allow him to travel more extensively to give talks on the genetically modified food industry's products*." J.R., ¶ 15; Compl., ¶ 65.

Statement 5: "*Dr. Folta is one of many academics the biotech industry has approached to help it defend or promote its products, the emails show.*" J.R., ¶ 15; Compl., ¶ 100.

Statement 6: "*By the middle of 2014, Dr. Folta and Monsanto had taken steps to formalize their relationship, with Dr. Folta planning a trip, at the company's expense, to its headquarters and the company considering a grant to Dr. Folta for helping promote G.M.O. technologies.*" Compl., ¶ 78.

Statement 7: *"[Dr. Folta] has a doctorate in molecular biology and has been doing research on the genomics of small fruit crops for more than a decade. Monsanto executives approached Dr. Folta in the spring of 2013 after they read a blog post he had written defending industry technology.*" Compl., ¶ 97.

Claimed Defenses: Fair report privilege, truth/substantial truth, and opinion.

Plaintiff has never promoted any "product" for an industry. See ECF 73-1 at ¶¶ 16, 20. His "Bio-talk-knowledge-y" program was not to "defend genetically modified foods" (Statement 2), "give talks on the [] industry's products" (Statement 4), or help "Monsanto defend or promote its products" (Statement 5) or "G.M.O technologies" (Statement 6). The goal was clear – "It is not about the science. It is about how the science is communicated. Using this starting point, ***the activities in this proposal seek to teach scientists how to engage public audiences about transgenic crop technology***." ECF 73-4.

Dr. Folta never "joined the campaign to publicly defend genetically modified foods" and certainly never stated such to Lipton as he wrote in Statement 3. In fact, all of Dr. Folta's seminars do the opposite – they discuss the risks and limitations of everything. ECF 73-6. The difference is not immaterial. One requires an agenda and the other requires transparency and independence – the very traits that Plaintiff argues the Defendants unfairly attacked.

The purportedly public documents do not show Dr. Folta testified in Hawaii "at the behest of industry" as Defendants claim. In fact he was asked to do so by a Hawaiian farming society and industry did not fund his travel. See ECF 73-12. The emails show this. Id. This was not a fair and accurate representation of those documents. Additionally, this testimony was over a year before Dr. Folta ever even discussed the potential proposal of his bio-talk-knowledge-y workshop. Moreover, the Defendants' selectively ignored the testimony from Dr. Folta where he states, "I will conclude by saying that I do not really wear a red shirt or a blue shirt. I am not here being pro or anti but I am here because of science. Science is not a democracy. It's not about how many people stand up for it or against it. It is about what the facts and the truth really are." (ECF 73-15).

The same ilk of false distortion pervades any statement suggesting purported promotion of Monsanto's products. Defendants cannot point to a single email that identifies **any** product or that ***anything*** he did was **ever** intended for Monsanto's

commercial benefit – that is not a fair and accurate characterization of the emails. Again, the overwhelming theme of the correspondence, is his loyalty to **independent science**.

The word "products" in the context of the Article implies that Dr. Folta is the equivalent of a salesman with an agenda as opposed to an independent scientist reporting evidence. Dr. Folta explained this to Lipton. ECF 73-1 at ¶ 25. The Defendants meant for the reader to appreciate the difference between "technology" and "products."[16] While being characterized as a salesman may not be defamatory in and of itself, it is devastating to an independent scientist whose profession depends on publishing and presenting objective research, particularly when the rest of the Article states his behavior was the "quo" that was "swapped" for a grant.

In an attempt to defend the above statements as true, the Defendants have pointed to select words in Plaintiff's "Bio-talk-knowledge-y" proposal and several tweets and blog posts. Context, not "cherry-picking," shows these apparent support are in fact self-defeating.

First, "products" in horticultural terms does not equate to inventory on the shelves to be sold; it means laboratory technologies, which is confirmed by the additional usage of the word in the proposal, which Defendants ignored. ("What

[16] Defendants own arguments admit such, differentiating "technologies" and "products." ("Again, Plaintiff's own words and actions, … show he has promoted and defended ***not only industry technologies, but, indisputably, also actual products and companies***.") (ECF 65 at p. 42).

are some of the products generated in academic labs that could solve major world issues…" ECF 73-1 ¶ at 20. The reference to the "Basics of Regulation" in the proposal is self-explanatory and not a discussion on how to lobby. That is, in order to effectively communicate the issues surrounding the use of biotechnology, "it is critical to understand the fundamentals of the regulatory process," which is a far cry from promoting lobbying skills. This is necessary for the participant to learn because questions related to the regulation of the technology are invariably levied to scientists and a basic understanding is required in order to know how to effectively communicate that understanding. Id. at ¶ 11.

Secondly, the two blog posts and single tweet cited by Defendants actually show the opposite of their contention. (ECF 64-30,-32). As a preliminary matter, Plaintiff has written over thirty one thousand (31,000) tweets related to horticulture and biotechnology, which are publically available online. Similarly, Dr. Folta has written several thousand blogs as part of his "talking biotech" program, which were available to Defendants. The Defendants have pointed to a single tweet (1/31,000) and two blog posts (2/>1000), to suggest the substantial truth of their statements.[17] Defendants claim that Dr. Folta "has specifically defended the safety

[17] Dr. Folta has also published approximately two hundred peer-reviewed articles to date. The Defendants have attached none in support of their statements that he advocates or promotes genetic modification technology.

of Monsanto's Roundup brand herbicide-and other Monsanto products," drawing the Court's attention to the tweet and blog posts. (ECF 65 at 43.)

This tweet from Dr. Folta was actually in response to an attack tweet by the activist group called "GMWatch" calling him "stupid" because he "guzz[les]" glyphosate. Dr. Folta's response is a link to a blog post with a response (again, cited by Defendants). Defendants' mischaracterization of the bog post is telling – there is no advocacy for RoundUp, generally or 'specifically' as claimed:

> "Of course when you do a stunt like this everyone goes completely unhinged, screaming that a scientist endorses drinking weed killer. As usual, it's not about thinking – it is about harming a scientists's credibility. My demo is not about drinking weed killer – it is about demonstrating empirically-derived biological thresholds, physiological fates of well-characterized chemicals, and understanding a herbicide's mechanism of action. But that's nuance and science, so don't expect [twitter activists] to understand that."

ECF 73-12. The blog's reference to RoundUp is only setting up the underlying story, which apparently prompted the "stupid" twitter attack from GMWatch. This is hardly promoting a product or company and certainly not substantially true.

The second blog cited by Defendants is self-defeating because Dr. Folta actually criticizes the science set forth in opposition to the non-GMO activists. (ECF 64-32). In other words, he argues against the scientist that the Defendants make him out to be. It is titled "Glyphosate: Deadly Microbial Poison or Life Enhancer?" In this blog post, Dr. Folta cites the misinformation campaign of

activists who have no knowledge of gyphosate's mechanism of action or how it could cause a problem. He then discusses a new peer reviewed article that asserts Glyphosate not only kills bacteria, but actually helps them survive. Dr. Folta criticizes the new paper – even though it refutes the non-GMO misinformation campaign – because "the relevance [of the findings] to antibiotic therapies is a stretch." ECF 73-5. He further explains, "this is a case where some good data are over-interpreted to support a conclusion, and that's a science no-no." Id. Thus, this blog post actually shows Dr. Folta as truly independent, not advocating for any product or technology, but critical of both sides where their conclusions do not match the science.[18] Dr. Folta is no promoter or salesman, he is independent and critical of those who "over-interpret[] to support a conclusion" even if that means making points beneficial to the agenda of those who attack him as "stupid."

The arguments related Dr. Folta's power points do not "repeatedly discuss Roundup-ready [or] the safety of Monsanto's glyphosate products," as Defendants claimed. Several observations need to be addressed here. Dr. Folta has produced all of the slides to his PowerPoint presentations for the years 2013 though 2017. See, Plaintiff's Production Index as ECF 73-8. The slides total six thousand three

[18] The Defendants had thousands of blog posts and tens of thousands of tweets at their disposal to attempt to support their claimed defense of truth. They selected these three, which actually help Plaintiff. The reasonable inference that must be drawn for purposes of summary judgment is that those remaining blogs and tweets do not suggest truth of Defendants' Article nor substantial truth.

hundred and nineteen (6319) pages. Id. The Defendants point to forty-two (42) slides, roughly .6%, to suggest that it is substantially true that Plaintiff traveled the country defending (advocating) and promoting (sales) Monsanto or industry products. Additionally, the Defendants omitted the context of the slides in the entire form.

Nonetheless, even the fraction of the slides selected by Defendants do not amount to what they claim. Dr. Folta used the term "roundup ready products" because that's the most recognized type of gene. The slides do not feature a Monsanto label or the photo of a RoundUp bottle. There's no price tags or promotion of the products. The slides speak for themselves – he is explaining the technology and how it works. See, ECF 64-33, p 2 (a gene is inserted that allows plants to survive in the presence of herbicide. Farmers can spray to kill non-transgenic plants.) Yet, Defendants omitted the slides from their attachment showing these slides are anything but an independent review of the science. See, ECF 73-6. Dozens of examples of "strengths" and "limitations" appear in the same presentations as those cited by Defendants.

Finally, these statements are not protected opinion for several reasons. Any claimed opinion must be viewed in context. The words "defended" and "promoted" are in the context of the *quid pro quo* title, the claim he received an undisclosed and unrestricted grant to do so. All of the testimony or regulatory

appearances occurred before the gift of $25,000, a fact Lipton omitted, which completely undermines the *quid pro quo* title and the idea that he defended their products and technologies for the grant. See Milkovich, 497 U.S. at 19 ("Even if the speaker states that facts upon which he bases his opinion, if those facts are either incorrect or incomplete or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.") Lipton never claimed this was opinion piece. It was reporting claimed to be on fact from the emails. Yet, he omitted the single most critical fact that undermines the very defamatory and false premise of his article. Quite simply, there can be no *quo* if there is no *quid*; any remotely fair description of Dr. Folta's conduct as "lobbying" occurred before any swap of grants.

2. Additional Statements Supporting Those Most Defamatory, in Context

Plaintiff Is Not an Ivory Tower Elite Transformed Into a Powerful Player, an Industry Consultant, Lobbyist, or Executive for Monsanto

Statement 11: "*The emails provide a rare view into the strategy and tactics of a lobbying campaign that has transformed ivory tower elites into powerful players.*" J.R., ¶ 3; Compl., ¶ 74.

Claimed Defenses: Time-barred, fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Statement 24: *"Dr. Folta, the emails show, soon became part of an inner circle of industry consultants, lobbyists and executives who devised strategy on how to block state efforts to mandate G.M.O. labeling and, most recently, on how to get Congress to pass legislation that would pre-empt any state from taking such a step."* J.R., ¶ 13; Compl., ¶ 102.

Claimed Defenses: fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Defendants argue that Statement 11 and Statement 24 are privileged and substantially true because Plaintiff's emails purportedly show Plaintiff helping industry "how to combat anti-GMO labeling campaigns." (ECF 65 at p. 50) and "how best to block various state GMO labeling" (ECF 65 at p. 62), respectively. First, they cite no language from any email saying such, despite their burden to do so. Instead, it is a back-door request for the Court to improperly "put flesh" on the bones of Defendants own arguments. *See, e.g. Straub,* 980 So. 2d 1085.

Simply repeating the Article's false claims and citing to a vague, over-broad and generalized record of forty miscellaneous emails is not the nuanced comparison between: (1) the assertions in its Article and (2) the public record providing the basis for that assertion. Without providing the specific record-basis for specific article-assertions, this Court must parse through the abundant, generalized record-citations to surmise for itself: (i) what specific record(s) support a challenged assertion, and more problematically, (ii) *how* specifically that record does so.

In any event, the forty or so emails generally cited say the opposite. For example, the only emails even remotely on point to Dr. Folta make plain that hef had absolutely no position on labeling itself but rather a continued effort to stand up to the anti-GMO misinformation campaigns ***about science***. He was asked to consider signing a petition that refuted science, not debate whether a label is a good or bad thing. Furthermore, Defendants continue to falsely suggest that Plaintiffs interaction with "industry" ultimately led to briefing Congressional staff. (ECF 65 at p. 62). It's simply false and there's no emails showing that, which is why Defendants cannot point to any specific email or language saying such.

The knowingly false and defamatory thrust of Statement 11 and Statement 24 is staggering. Dr. Folta is labeled an "ivory tower elite" and "powerful player[]" using his "***supposedly unbiased*** research" to confuse the public on conflicting information. There could be no deeper smear of a lifelong independent scientist. Again, the emails rather show he was volunteering his time to counter fear and misinformation as part of his truly unbiased loyalty ***to*** science. Nowhere is there even a hint of funding for his research — on strawberries, not biotechnology — or that he ***ever*** responded to the misinformation with anything but science; they uniformly show the opposite. As Dr. Folta himself succinctly put it, "**that's why I am a science goof and *not* a pollster**" (ECF 73-12 at ¶ 138) — much less an "***industry* consultant**, **lobbyist** [**or**] **executive.**" See, e.g., ECF 73-1 at ¶ 19.

Defendants also have argued that calling Dr. Folta a lobbyist is not defamatory. However, it is illegal for a public employee to lobby – a fact understood by professional academics at public University. Id. On several occasions, Dr. Folta would contact his immediate supervisors to determine if any proposed speaking engagements would be considered lobbying. Id. Most importantly, so long as he did not encourage a change in policy, it was not considered lobbying. Id. at ¶ 16. Dr. Folta's discussions were limited to how scientists and industry could better understand the risks and benefits of scientific technologies – never arguing a change in policy or promoting a product. Id. Thus, the statement that Dr. Folta as a public employee lobbied for Monsanto and industry, is an accusation of criminal conduct.

Yet, context provides the defamatory knock-out of these statements. Dr. Folta's purported transformation from an *ivory-tower elite* to a *powerful player* within *an inner circle of industry consultants, lobbyists and executives who devised [lobbying] strategy* was the price he had to pay in exchange for a grant with industry.

This is not a discretionary opinion. The court ***must construe the statement in its totality***, examining not merely a particular phrase or sentence, but all of the words used in the publication. See, Florida Medical, 568 So.2d at 457. Lipton is not relieved from being subject to suit when the disclosed facts upon which he

bases this purported opinion are defamatory and false. He sets forth what appeared to be specific factual observations that were untrue – that's not protected opinion. See Milkovich 497 U.S. at 18.

Statement 15: "*Emails Reveal Financial Ties Between Food Industry and Academics*" J.R., ¶ 6.

Claimed Defenses: time-barred, fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

This headline must be read in context with its subheading: "[Statement 8] *Industry Swaps Grants for Lobbying Clout.*" Defendants do not, and cannot, claim Statement 8 lacks a defamatory meaning. In context, "financial ties" was clearly intended to refer to research grants or income – not reimbursed airfare while Plaintiff is volunteering his time.

This headline does not provide either an accurate and complete, or, fair abridgment of the public records it purports to represent as applied to Dr. Folta. See Huszar, 468 So. 2d at 516. To start, the emails cited by Defendants do not fairly and accurately evidence **any "financial ties."** The funds went to Florida. ECF 73-1 ¶¶ 8-12. University of Florida obtained the $25,000.00, which UF – not Monsanto – specifically earmarked for educational purposes—and, expressly noted (in the language of the proposal), that the funds would not constitute Plaintiff's personal income and would not go to Plaintiff. For the privilege to "save" Defendant's defamatory headline, these emails and records (ECF 64-9) **must fairly**

and accurately establish that Plaintiff **received grants in exchange for his lobbying efforts,** and, **maintained "financial ties" with industry - i.e. grants and income -**. They clearly do not.

Neither is this headline substantially true. The statement is considered false "if would have a different effect on the mind of the reader from that which the pleaded truth would have produced." See Masson, 501 U.S. at 517. Here, there would be a difference in the readers' mind if the Article truthfully reported that the only "financial ties" were (1) that Dr. Folta never testified at the request of any industry, (2) that UF, not Dr. Folta, received the gift of $25,000, (3) that Dr. Folta was reimbursed for travel where he otherwise volunteered his time, or (4) that the "grant" was actually to "Train Scientists How to Teach Concepts in Transgenic Crop Improvement" not to advocate for anything. Furthermore, Dr. Folta told Lipton that the $25,000 was not an unrestricted grant to him but an unrestricted gift to the University with no deliverables, and the funds were never used, which Lipton ignored. Finally, "reasonable minds could disagree" as to whether "financial ties" and "swap grants for lobbying clout" is a substantially true description of the facts. Dr. Folta did not lobby or give any regulatory testimony after receiving the $25,000 from UF nor did industry ever fund his research—he was never compensated, and made no promises. See ECF 73-1 at ¶ 18.

3. The Article's Defamatory Implications

Statement 4: "*In August 2014, Monsanto decided to approve Dr. Folta's grant for $25,000 to allow him to travel more extensively to give talks on the genetically modified food industry's products*." J.R., ¶ 15; Compl., ¶ 65.

Claimed Defenses: Fair Reporting privilege, truth/substantial truth, and opinion

Statement 4 does reference $25,000, but in context the false implication is Dr. Folta himself received this — and for the purpose of testifying in Pennsylvania only to advocate for the "genetically modified food industry's products:"

> Your email made my day!" wrote Cathleen Enright, an executive vice president of the Biotechnology Industry Organizations, after Dr. Folta gave her a written update on the October 2014 legislative hearing in Pennsylvania. "Please send all receipts to us whenever you get around to it. No rush.

See ECF 73-12.

In fact, the emails reveal Dr. Folta was asked to appear at the hearing by ***a Pennsylvania State Representative***, not any industry actor. Id. Certainly, the suggestion "Monsanto decided to approve Dr. Folta's grant for $25,000," even if considered substantially true (which is independently false), for testimony by him in Pennsylvania to advocate for "genetically modified food industry's products" is inaccurate. Finally, there are ***no emails showing any correspondence related to Dr. Folta's congressional testimony*** on June 25, 2015. In other words, ***there is no evidence – spanning five (5) months – of any request by Monsanto*** or any GMO "industry" (1) for Dr. Folta to testify, (2) when to testify, (3) if there was

reimbursement, or (4) anything pertaining to the testimony. This fact alone demonstrates that "Industry Swaps Grants for Lobbying Clout" is nothing more than a provably false, unfair, and grossly inaccurate byline designed to defame Plaintiff.

The Skunk Smear and Juxtaposition to Benbrook

Statement 16: "'*Nobody tells me what to say, and nobody tells me what to think.' Kevin Folta An aggressive biotech proponent with financial ties to Monsanto*" J.R., ¶ 7; Compl., ¶¶ 37, 39.

Claimed Defenses: fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Statement 17: "'*If you spend enough time with skunks, you start to smell like one.' Charles M. Benbrook A proponent of labels on G.M.O. foods, backed by the organic industry*" J.R., ¶¶ 7, 8; Compl., ¶ 40.

Claimed Defenses defamatory meaning, not "of and concerning" Plaintiff, and opinion.: fair report privilege, truth/substantial truth, not capable of a

Statement 18: "*But even some of the academics who have accepted special "unrestricted grants" or taken industry-funded trips to help push corporate agendas on Capitol Hill say they regret being caught up in this nasty food fight.*" J.R., ¶ 8; Compl., ¶ 44.

Claimed Defenses: fair report privilege, truth/substantial truth, not capable of a defamatory meaning, not "of and concerning" Plaintiff, and opinion.

Statement 16 and Statement 17 are the quotes captioned beneath photos of Dr. Folta and Dr. Benbrook, respectively. They each appear again within the body of the Article.

Statement 16 is the quote captioned underneath Dr. Folta's photo. However, a more damning version of the quote appears in the body of the Article. It must be read in context with Statement 3 and Statement 1("tool of the industry"). In the body of the Article, it reads:

> Dr. Folta said that he had joined the campaign to publicly defend genetically modified technologies because he believes they are safe, and that it is his job to share his expertise. (Statement 3) "Nobody tells me what to say, and nobody tells me what to think," (Statement 16) he said, adding, "Every point I make is based on evidence."
>
> But he also conceded in an interview that he could unfairly be seen as a tool of industry, and his university now intends to donate the Monsanto grant money to a food pantry. "I can understand that perception 100 percent," he said, "and it bothers me a lot."(Statement 1)

Statement 17 (the "skunk smear") must also be read in context with Statement 18, which appears immediately before it. The Article features the "skunk smear" twice. It appears in the body of the Article, immediately preceding Statement 18 as follows:

> *But even some of the academics who have accepted special "unrestricted grants" or taken industry funded trips to help push corporate agendas on Capitol Hill say they regret being caught up in this nasty food fight.*
>
> *"If you spend enough time with skunks, you start to smell like one," said Charles M. Benbrook, who until recently held a post at Washington State University. The organic foods industry funded his research there and paid for his trips to Washington, where he helped lobby for labels on foods with genetically modified ingredients.*

This skunk smear is clearly intended to describe those "academics who have accepted special 'unrestricted grants' or taken industry-funded trips to help push

corporate agenda on Capital Hill," actions later attributed to Dr. Folta in the subsequent paragraph.

The skunk smear appears a second time adjacent to a picture of Dr. Folta side-by-side with one of Charles Benbrook that is also pervaded by distortions and falsehoods, the most conspicuous and damaging of which are that Dr. Folta is again falsely identified here as "[a]n aggressive biotech proponent with financial ties to Monsanto," while Benbrook is merely "[a] proponent of labels on G.M.O. foods, [that are] backed by the industry," and, even more egregiously, the quote under Benbrook's photo, "[i]f you spend enough time with skunks, you start to smell like one," is obviously framed to refer ***to*** Dr. Folta, and to refute his profession of independence. The defense that the skunk smear is not of and concerning Dr. Folta is refuted by its very placement within the Article. Clearly, Dr. Benbrook, an advocate against GMOs and a proponent of the organic industry, was not saying the organic industry is comprised of skunks, which have left him smelling like one also. The damning import of the statement needs no further elucidation. While Defendants argue "skunk" is not defamatory, they fail to recognize it is not literal. The skunk smear implies he is one with the industry – not independent.

Statement 21: "'*Misinformation campaign in ag biotech area is more than overwhelming,' Yong Gao, then Monsanto's global regulatory policy director, explained in an April 2013 email to Dr. Folta as the company started to work closely with him. 'It is really hurting the progress in translating science and knowledge into ag productivity.'*" .R., ¶ 11; Compl., ¶ 88.

Claimed Defenses: fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Statement 22: "*Dr. Folta is among the most aggressive and prolific biotech proponents, although until his emails were released last month, he had not publicly acknowledged the extent of his ties to Monsanto.*" J.R., ¶ 11; Compl., ¶ 93.

Claimed Defenses: fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Statement 21 must be read in context with Statement 22, which immediately follows it.

Defendants contend 'first contact' was a 4/17/13 e-mail from Keith Reding of Monsanto after reading a post by Dr. Folta, "trying to explain the science." ECF ECF 73-12. Dr. Folta's response noted he was on an email with someone "who still thinks those numbers" —the ones his post corrected — "are legit," was "blown away that people could be so incredibly gullible and lack any scientific scrutiny," and for Reding to "[k]eep me in mind if you ever need a good public interface, with ***no* corporate ties**, that knows the subject inside and out and can think on his feet." Id. at 7. Reding's reply let Dr. Folta know "[w]e really **appreciate *independent scientists* working to educate the public**." Id.

Dr. Folta received a like e-mail that evening from Yong Gao of Monsanto – out of the blue. See, id at 8. Defendants did not include those portions of the email, which undermined the *quid pro pro* sting of the Article:

Cited in Article:	**Full Email:**
Misinformation campaigns in ag biotech area is more than overwhelming, it is really hurting the progress of translating science and knowledge into ag productivity	Misinformation campaigns in ag biotech area is more than overwhelming, it is really hurting the progress of translating science and knowledge into ag productivity *improvement to produce more (while conserve more per unit basis)* ***to feed the world. I am grateful that academics like you are willing to speak out on the science*** *in this area to the public, as I know how tough it is to do because everyone is already too busy and* ***because there are people there who do not like to hear the truth of science*** *for all kinds of reasons.* ***Thank you for supporting science and for educating those who are open to science****."*

Dr. Folta did not even respond. He had not received an email from Monsanto previously. Hardly accurate to say this was when Monsanto "started to work closely with him." Lipton omitted why the email was sent – as a thank you. He omitted the reason for the thank you – Dr. Folta supported science and educated those open to science. The omissions are glaring as the thrust of the statements. The omissions change the email from a complete stranger's gratitude for Dr.

Folta's scientific independence to a Monsanto executive emailing an "aggressive and prolific biotech proponent" with whom Monsanto has begun to "work closely."

Specifically, the Article then immediately goes on further calls Dr. Folta the "most aggressive and prolific biotech proponent," and states that "until his emails were released" he "had not publically acknowledged the extent of his ties to Monsanto." This, too, is contradicted ***by*** the emails, which rather show he volunteered his time for all public speaking and there were ***never*** any "ties," let alone financial ones, as suggested, let alone (again) hidden ones. In fact, the only instance where Monsanto even reimbursed Dr. Folta for any expenses was when he visited their headquarters, long after he had been appearing at public hearings and contributing to GMOanswers – ***yet only his hotel*** and not his flight. ECF 73-1 at ¶ 17.

The material difference cannot be categorized as non-defamatory or opinion. Quite simply, the true quote does not support the "swap" falsely claimed to have occurred, while the Article's version does – one is defamatory and one is not. Accusing Dr. Folta of not disclosing his financial ties to Monsanto – when none existed – is not an opinion. It is provably false – as shown above and in Dr. Folta's affidavit. The context of these statements clearly imply (falsely) that Dr. Folta is a

prolific and aggressive biotech proponent because of the extent of financial ties to Monsanto, which he had not disclosed until after his emails were released.

Defendants further falsely claim that Dr. Folta was coordinating with Monsanto to respond to anti-GMO statements in Elle magazine, again not citing to any specific email but generally suggesting twelve emails support that position (ECF 64-9, pp. 10-22). See, ECF 65, pp. 59-60. Yet the only email related to Elle magazine shows that in July, 2013 (a year before any purported unrestricted grant) Keith Reding asked Dr. Folta, "have you seen this," with only a link. It was ***Dr. Folta*** who responded, "This needs a strong response. Thanks for the heads up." Id. at 21. This is not "coordinating with Monsanto" as argued or "work[ing] closely with him" as written. It is evidence that Dr. Folta is so passionate about the science, he feels compelled to respond to misinformation. Yet – he wrote only a paragraph response in a Facebook comment. Hardly fair to argue this was a "coordinated" effort with Monsanto.

Statement 23: *"A few weeks later, the Council for Biotechnology Information—controlled by BASF, Bayer, Dow Chemical, DuPont and Monsanto—asked Dr. Folta and other prominent academics if they would participate in a new website, GMOAnswers, which was established to combat perceived misinformation about their products. The plan was to provide the academics with questions from the public, such as, 'Do GMOs cause cancer?' 'This is a new way to build trust, dialogue and support for biotech in agriculture that will help explain in an independent voice what GMOs are,' an executive at Ketchum wrote to Dr. Folta. But Ketchum did more than provide questions.* ***On several occasions, it also gave Dr. Folta draft answers, which he then used nearly verbatim, a step that he now says was a mistake****. 'It was absolutely not the right thing,' he said, adding that he now insists that he write his own responses.*" J.R., ¶ 12.

Claimed Defenses: time-barred, fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

In further support of their assertion of a "formal[] relationship" with Monsanto, Defendants point to Dr. Folta's willingness to respond to questions on GMOAnswers. Yet, GMOAnswers is ***not*** run by Monsanto and Monsanto had ***no*** communication with him about his responses. ECF 73-1. The unavoidable truth of the emails, and confirmed in Dr. Folta's affidavit, is Dr. Folta ***volunteered*** his time for this, ***never*** received ***any*** compensation for his many articles and comments Id.; Monsanto ***never*** arranged or asked him to participate Id.; and he was doing this long before he gave Monsanto the proposal for "Bio-Talk-Knowledge-y." Id. In fact, the only instance where Monsanto even reimbursed Dr. Folta for any expenses was when he visited their headquarters, long after he had been appearing at public hearings and contributing to GMOanswers – ***yet only his hotel*** and not his flight because he was already in the area for a speaking arrangement at a local University. ECF 73-1 at ¶ 17..

The claim that Dr. Folta used the Ketchum answers nearly verbatim is false and it neither fair or accurate to gather that from the emails. Additionally, Dr. Folta refuted this to Lipton in their interview. Id. What Lipton omitted was the fact that the only two instances where pre-drafted answer were supplied to Dr. Folta was in the beginning when he was curious as to the appropriate scope and the

length of his answers. He has written close to a thousand responses – for free. Dr. Folta explained to Lipton that the pre-draft answer was scientifically accurate and that there were changes, not "nearly verbatim." The revisions to that post are attached as Id. Furthermore, Dr. Folta's suggesting his behavior was unethical is taken out of context. Dr. Folta specifically told Lipton that "Even though the answer was spot on scientifically, it was ***absolutely not the right thing,*** because of the potential for activists to run with it." Id. The characterization that "he now insists he write his own responses" is also false – he has never been asked to use a draft answer. Id. Dr. Folta picks and chooses which questions to answer, if any, which have totaled in the thousands. Id.

In context with Lipton's commentary on the emails, the defamatory implication that Plaintiff was providing false, paid, statements on GMOAnswers is exacerbated because Lipton spun additional emails as evidence of "**Planting Material on WedMD**" – manifestly unfair and inaccurate. T***he emails show the exact opposite***, even by Defendant Lipton's own commentary: "[b]ut that was the plan." Id.

Statement 25: "*While Dr. Folta was not personally compensated, biotech companies paid for his trips to testify in Pennsylvania and Hawaii. 'I should state upfront that I have not been compensated for any testimony,' he said at a public hearing in Hawaii, before adding, 'The technology is safe' and is used because it helps farmers compete.*"
Dr. Folta routinely gave updates on his travels—and his face-to-face encounters with opponents of genetically modified crops—to the ***industry executives who were funding his efforts***." J.R., ¶ 14.

"*'Your email made my day!' wrote Cathleen Enright, an executive vice president of the Biotechnology Industry Organization,* ***after Dr. Folta gave her a written update*** *on the October 2014 legislative hearing in Pennsylvania. 'Please send all receipts to us whenever you get around to it. No rush.'*" J.R., ¶ 14.
Claimed Defenses: time-barred, fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

Statement 26: "*'I am grateful for this opportunity and promise a solid return on the investment,' Dr. Folta wrote in an email to one Monsanto executive.*" J.R., ¶ 15.

Claimed Defenses: time-barred, fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

Statement 25 must be considered in context with Statement 24 ("inner circle"), which immediately precedes it, and Statement 26, which follows. These statements attack the integrity of Plaintiff's scientific and academic integrity. Even if the Defendants have accurately quoted the correspondence—it still frames these documents unfairly. Thus, the fair reporting privilege and substantial truth defense do not apply.

As adopted by Florida courts, the Restatement (Second) of Torts does not extend the fair reporting privilege to published statements that may *accurately* summarize public records, but still fail to portray those same records in a fair light. Of most relevance, Comment F of the Restatement notes that, irrespective of an article's accuracy, "[a] reporter is not privileged . . . to make additions of his own that would [defame] or indict . . . the veracity . . . of any of the parties." *Id.*

Defendants juxtapose Dr. Folta's true transcribed statements that he was not compensated with his statement that the technology is safe. The defamatory implication is clear, Dr. Folta was not candid with his testimony. Yet, the testimony in its entirety shows Dr. Folta explained "he was asked to come (by a Hawaiian farmer's organization) to talk about biotechnology, immediately before his 'not been compensated' statement. He even stated, "I will conclude by saying that I do not really wear a red shirt or blue shirt. ***I am not here being pro or anti but I am here because of science. Science is not a democracy. It is not about how many people stand up for it or against it.*** It is about what the facts and the truth really are. This is a good, sound technology as evidenced by its safe use for over fifteen (15) years." Lipton's juxtaposition to imply Dr. Folta was not candid was unfair. He omitted the fact that Dr. Folta was not asked to provide that testimony by Monsanto or industry consultants. Moreover, he omitted that fact that this testimony was given more than a year before Monsanto gave UF the $25,000.

Dr. Folta did not routinely give updates in writing, which was meant to imply a formal arrangement of his services. The emails show, in context, that it this email exchange was in October, 2014, after Dr. Folta was asked by a PA State Representative to appear for testimony on biotechnology in Harrisburg. It was not Dr. Folta reporting as Lipton claimed but it was Dr. Enright who contacted Dr. Folta to state that she enjoyed his blog from the previous day and she asked how

the Pennsylvania House of Agriculture and Rural Affairs Committee hearing went. See ECF 73-12. Dr. Folta told Dr. Enright that Dr. Benbrook, who testified at the hearing, is "smart enough to know that the scam is crumbling and he has to decide if he's going to continue down the road to crazy land or settle back into reality, focusing on actual limitations of transgenic crop technology." See ECF 73-12. Dr. Folta states, "***I do hope I can some receipts forward if that's still okay,"*** a far from any assumed *quid pro quo*. Id.

Then, Lipton takes Dr. Enright's email and eliminates the one sentence that undercuts the notion that there was a "formal relationship" between Dr. Folta and Monsanto – "We so appreciate your participation in these opportunities." ECF 73-12 at 137. It's obvious that the truth – that Dr. Folta responded to a compliment and question, then 'hoped' he could still pass some receipts for reimbursement, and BIO appreciated his uncompensated participation – would get in the way of the narrative.

Finally, Statement 26 further implies that Dr. Folta was more than happy to "defend or promote [Monsanto] products." Immediately after Statement 26, the Article reads, "Dr. Folta is one of many academics the biotech industry has approached to help it defend or promote its products, the emails show." As previously discussed, this statement is false. Moreover, the Defendants were aware that the "opportunity" that Dr. Folta promised to "be a solid investment" was that

of teaching scientists how to communicate. See ECF 73-12. The Defendants point to this statement by Dr. Folta as some smoking gun of "swapping grants for lobbying clout." However, the Defendants were well aware that Dr. Folta was not receiving any compensation and it had nothing to do with lobbying, products, or revenue. The Defendants' imply that this was some sort of smoke screen rather than an independent scientist just expressing his gratitude for the opportunity to teach scientists how to communicate science. In context, this quote unfairly paints Plaintiff as a Monsanto product salesman with an agenda, as opposed to an independent scientist.

Statement 29: *"'What the situation requires is a suite of TV spots featuring attractive young women, preferably mommy farmers, explaining why biotech derived foods are the safest & greenest in the history of ag and worthy of support,' wrote L. Val Giddings, a senior fellow at Information Technology & Innovation Foundation, a nonprofit food policy research group in Washington, in an October 2014 email to a Monsanto lobbyist. The company was debating how to defeat labeling campaigns last year in Colorado and Oregon. Dr. Folta, included in the email chain, agreed. 'We can't fight emotion with lists of scientists,' Dr. Folta wrote to Lisa Drake, the Monsanto lobbyist. 'It needs a connection to farming mothers.'"* J.R., ¶ 18; Compl., ¶ 107.

Claimed Defenses: fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

Plaintiff contends the defamatory implication here is that Dr. Folta was actively involved with marketing and lobbying with Monsanto (i.e. he had an agenda) as opposed to being independent to the science. Furthermore, Plaintiff takes issue with this Statement in so far as it furthers the defamatory suggestion

that Dr. Folta's conduct was a result of receiving an undisclosed grant in exchange for lobbying efforts to defeat labeling. The Defendants claim this statement to be substantially true by arguing the emails show Dr. Folta was willing to "combat GMO labeling initiatives." The emails show the exact opposite. See ECF 73-12.

Ms. Drake informs Dr. Folta and another scientist, Dr. Giddings, of an upcoming labeling campaign by the anti-GMO activists. She also states, "I have asked the campaign to consider a letter that will go out in a news release ***that I hope many scientists will sign onto, to refute these safety allegations, not to debate labeling***. What are your thoughts on such an approach?" *Id.* Another example of a request to defend science, *not "debating how to defeat labeling campaigns last year in Colorado and Oregon*" per Defendants' Article.

Dr. Giddings responded to Ms. Drake that she thinks the "dishonest fearmongering needs to be addressed" and that ***she was already contacted "a while back" by a representative to connect her with "superiors" for "more concrete conversations***." *Id* at 141. Another example of the legislature contacting these experts for questions, not at the request of Monsanto. Dr. Giddings then suggests, and Dr. Folat agrees, that "***we can't fight emotion with lists of scientists***. It needs a connection to farming mothers. There are a bunch of them out there…!" *Id* at 141.

Ms. Drake dismisses the scientists' suggestion and Dr. Folta's responds (which the Defendants ignored): "***Well that's why I'm a science goof and not a***

pollster." Id. at 144. Dr. Folta also agrees to sign the letter, which "refutes [those false] safety allegations, **not to debate labelling.**" The emails clearly show a continued effort by Dr. Folta to stand up to the anti-GMO misinformation campaigns ***about science***, not "debating how to defeat labeling campaigns."

This issue of whether Dr. Folta had actually joined forces with Monsanto to "defeat labeling campaigns" is not one of semantics or a lack of defamatory meaning. It is an additional (false) implication that Dr. Folta's "financial ties" were the root of his conduct and not his independent science. This is the type of lobbying clout by the inner circle that the Article claims to have been swapped for grants.

Statement 31: "*That is why Dr. Benbrook, who had served as chief scientist at the Organic Center, a group funded by the organic foods industry, resigned his job and sought a university appointment, he said. 'I was working for an organization affiliated and funded by the industry, and people were just not listening,' he said. At Washington State, Dr. Benbrook was supported by many of the same financial backers, including Organic Valley, Whole Foods, Stonyfield and United Natural Foods Inc.* ***The companies stayed closely involved in his research and advocacy****,* ***helping him push reporters to write about his studies,*** *including one concluding that organic milk, produced without any G.M.O.-produced feed for the cows, had greater nutritional value… Dr. Benbrook, whose research post at Washington State was not renewed this year, said* ***the organic companies had turned to him for the same reasons Monsanto and others support the University of Florida or Dr. Folta directly.*** *'They want to influence the public,' he said. 'They could conduct those studies on their own and put this information on their website. But nobody would believe them. There is a friggin' war going on around this stuff. And everyone is looking to gain as much leverage as they can.'*" J.R., ¶ 19. (emphasis added).

Claimed Defenses: time-barred, not "of and concerning" Plaintiff, privileged, truth/substantial truth, not capable of a defamatory meaning, and opinion.

This statement specifically refers to Dr. Folta and the University of Florida. No further rebuttal to the claimed defense that this was not "of and concerning" Plaintiff is need.

Plaintiff takes issue with this statement as it serves for further context to the defamatory implication that Plaintiff produced "supposedly unbiased research" (Statement 12) or swapped research grants in exchange for lobbying efforts (Statement 8). Here, the Article discussed the direct funding of Dr. Benbrook's research by industry and his decision to get an academic post because he was otherwise unable to convince the public his articles were accurate. Again, Plaintiff has never had his research funded by biogenetic engineering industry. ECF 73-1 at ¶ 6. Yet, the Article equates Dr. Benbrook, his relationships with industry, and his advocacy to that of Plaintiff. Characterizing this comparison as being Benbrook's opinion is unavailing where Lipton knows that Dr. Folta has never had research funded by industry, did not have any issues with the credibility of his publications, and did not have any companies "closely involved" in his research. Lipton does not quote Dr. Benbrook's statements about Folta, but describes them. In context, Lipton clearly endorses this sentiment with the guise of additional substantiation because Lipton claims to have reviewed the emails showing such. Again, Plaintiff does not contend that this statement is actionable in and of itself, but simply

another false jab toward the implication that Plaintiff has been swapping research grants for lobbying clout under the guise of impartiality.

Statement 32: "*Keep it up!*" Compl., ¶ 71.

Claimed Defenses: fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

Statement 32 directly follows this:

> So Monsanto, the world's largest seed company, and its industry partners retooled their lobbying and public relations strategy to spotlight a rarefield group of advocates; academics, brought in for ***the gloss of impartiality*** and weight of authority that comes with a professor's pedigree.
>
> Professors/researchers/scientists have a big white hat in this debate and support in their states, from politicians to producers," Bill Mashek, a vice president at Ketchum, a public relations firm hired by the biotechnology industry, said in an email to a University of Florida professor. [Statement 32]

Defendants point to a single email, intentionally taken out of context, to falsely imply Monsanto and the GMO industry used Dr. Folta "for the gloss of impartiality" as part of a lobbying campaign. In fact, Mashek wrote Dr. Folta to let him know Ketchum enjoyed Dr. Folta's op-ed in the Orlando Sentinel (which he wrote for free):

> My favorite line: (Public Interest Research Group – ironically not doing much research, especially in science for public interest).

ECF 73-12 at p 84. Dr. Folta responded as to why he wrote the op-ed, "It is the classical fear campaign. Her words reinforce a flawed viewpoint and it is good to

show that … It puts in place ***a solid example of science v. misinformation***." Id. at 85. Rather than showing any use of a "gloss of impartiality" for lobbying, the correspondence rather shows Dr. Folta felt ***independently*** compelled to counter fear-driven misinformation with science. Defendants further mislead by suggesting he wrote at the behest of the GMO industry. In fact, the Orlando Sentinel posted a request for an op-ed by an expert in "GMO/agriculture." Ketchum recommended Dr. Folta to the paper as the leading horticultural expert in Florida. Id. at 74-75.

4. Statements Supporting the Article's Defamatory Import Only in Context

Statement 10: "*Companies like Monsanto are squaring off against major organic firms like Stonyfield Farm, the yogurt company, and both sides have aggressively recruited academic researchers, emails obtained through open records laws show.*" J.R., ¶ 3; Compl., ¶ 72.

Claimed Defenses: Fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Statement 14: "*Kevin Folta, the chairman of the horticultural sciences department at the University of Florida, is among the scientists who have been recruited in the debate over bioengineered foods.*" J.R., ¶ 5; Compl., ¶43.
Claimed Defenses: time-barred, fair report privilege, truth/substantial truth, not capable of a defamatory meaning, and opinion.

Statement 10 must be read in context with Statement 14, which appeared in the online version of the Article under Plaintiff's photograph.

Defendants contend the emails show Dr. Folta was "recruited" by the industry, which developed into a "formal[] relationship." See, Statement 6. That is not what they show.

First, they show it was ***Dr. Folta*** at 'first contact' with Monsanto who expressed frustration with misinformation and popular gullibility and said to Monsanto "[k]eep me in mind if you ever need a good public interface, with no corporate ties, that knows the subject inside and out and can think on his feet." See ECF 73-12. And they further show he thus offered his time "to engage the public," ***for free***, "as part of [his] mission" as a scientist at "a Land Grant Institution." Id. at 56.

The charge of "formal relationship" is, again, uniformly belied by the very emails Defendants purport to rely upon, which only confirm he was ***never*** affiliated (let alone contracted) with the industry, "formal[ly]" or otherwise, ***never*** received compensation, ***never*** received funding for his research (non-GMO strawberry breeding), and the $25,000 'gift' was to UF, significantly ***after*** all (falsely) alleged lobbying, and, indeed, was **not** even used. In further support of their assertion of a "formal[] relationship" with Monsanto, Defendants point to Dr. Folta's willingness to respond to questions on GMOAnswers — which, though, is ***not*** run by Monsanto and Monsanto had ***no*** communication with him about his responses. The unavoidable truth of the emails is Dr. Folta ***volunteered*** his time for

this, ***never*** received ***any*** compensation for his many articles and comments; Monsanto ***never*** arranged or asked him to participate; and he was doing this long before he gave Monsanto the proposal for "Bio-Talk-Knowledge-y."

In sum, the emails Defendants' cite to establish this "formal[] relationship" that developed from "aggressive[] recruitment" establish nothing of the sort.

Statement 13: "*The push has intensified as the Senate prepares to take up industry-backed legislation this fall, already passed by the House, that would ban states from adopting laws that require the disclosure of food produced with genetically modified ingredients. The efforts have helped produce* ***important payoffs***, ***including the approval by federal regulators of new genetically modified seeds after academic experts intervened*** *with the United States Department of Agriculture on the industry's behalf, the emails show.*" J.R., ¶ 5; Compl., ¶ 51.
Claimed Defenses: Time-barred, fair report privilege, truth/substantial truth, not capable of a defamatory meaning, not "of and concerning" Plaintiff, and opinion.

The fact that Dr. Folta's name does not appear in Statement 13 is inconsequential. He is featured as the biotech industry's lead academic and this statement readily refers to Dr. Folta in context.

In any event, Statement 13 is another buttress to the underlying sting of the Article. It claims that important payoffs *including, but not limited* to, the approval of new genetically modified seeds, were realized after academic experts intervened on industry's behalf. The implication is that Dr. Folta was an academic expert who intervened on behalf of industry. That implication is false. It also damages his reputation for being independent with no corporate ties to his research. Additionally, full context suggests that this "intervene[tion]" by Dr. Folta was

because he agreed to do so – not for the merits of his testimony – but in exchange for a research grant. It also implies there were other "important payoffs," suggesting additional defamatory facts.

The defense of opinion is inapplicable where the statements suggests additional defamatory facts know to the author. See, Florida Medical 568 So.2d at 459 (The use of "another" implied the existence of at least two experiences with hospitals in Florida but that fact is not revealed in article and because of the omission the Court "cannot assume that the statements 'cannot reasonably (be) interpreted as stating actual facts' about the hospital.")

5. Statements Related to Other Scientists Juxtaposed to the Statements Concerning Plaintiff

Plaintiff's Research Was Not "Aggressively Recruited"

Plaintiff does not argue that Statements 27, 28 and 30 references Plaintiff by name, University, or by other conduct attributed to him by the Article. Plaintiff only seeks to address these statements insofar as they are directly related to the Articles overall sting that certain academics had sacrificed scientific independence for personal financial gain; a group of people in which Plaintiff was unfairly placed by the article.

Statement 27: "*In 2013, Monsanto also **asked** David R. Shaw, the vice president for research and economic development at Mississippi State University, **to intervene with the Department of Agriculture to help persuade the agency to approve a new type of genetically modified soybean and cottonseed designed by Monsanto**. Organic farmers argued against this move, convinced that approval of the new seeds would lead to an increase in potentially harmful herbicide use. Monsanto wanted Dr. Shaw, **whom the company has supported over the last decade with at least $880,000 in research grants** for projects he helped oversee, to refute these arguments, the emails show.*" J.R., ¶ 16.

Claimed Defenses: time-barred, not "of and concerning" Plaintiff, fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

Statement 28: "*Dow Chemical made a similar pitch this year, **with one company executive first reminding Dr. Shaw in an email about the industry's financial support for the university**. Then the **executive asked Dr. Shaw to intervene with the Agriculture Department to urge it to approve Dow's new genetically modified cottonseed, which was designed to be treated with a Dow-produced herbicide**. Dow's and Monsanto's requests to the Agriculture Department have since been approved.*" J.R., ¶ 17.

Claimed Defenses: time-barred, not "of and concerning" Plaintiff, fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.

Statement 30: "*At least twice, Mr. Hirshberg's group also paid for Dr. Benbrook to go to Washington **so he could help lobby against a federal ban on G.M.O. labels**. And **his research suggesting that herbicide use in G.M.O. crops** has surged has been a central part of the organic industry's argument for mandatory labels.*" J.R., ¶ 19; Compl., ¶ 111.

Claimed Defenses: not "of and concerning" Plaintiff, fair report privilege, truth/substantial truth, and not capable of a defamatory meaning.
(emphasis added)

Consider the context of these statements in which they were made: the Article has already described Dr. Folta as the 'go-to' academic for biotech industry, who has accepted an undisclosed amount in unrestricted grants, and the

only scientist with financial ties to Monsanto to warrant a captioned photo in the New York Times.

Now, Statement 27 introduces Dr. Shaw, someone who actually received $880,000 in research grants from Monsanto over ten years and someone that Monsanto specifically asked to persuade the Department of Agriculture to approve a new Monsanto product – a modified soybean and cottonseed. Statement 28 makes the sting even more revealing. The Article describes emails of a company executive "reminding Dr. Shaw [] of industry's financial support" before asking that he urge the Agriculture Department to approve Dow's new product – a genetically modified cotton seed. In other words, Dr. Shaw needed to be "reminded" of that swap to push company products to Congress.

Yet, Plaintiff never received any research grant from industry, was never asked by Monsanto or any industry consultant to do any lobbying (his testimony was requested by elected representatives and a farming society), he did no lobbying after Monsanto gave the $25,000 gift to UF, he was never compensated for any of his time speaking or presenting, and has never pushed any Monsanto product whether to the participants of his workshops or any law enacting body.

It suggests the question, why even include Dr. Folta in the Article at all, let alone portray him as the king pin – it's not even close.

Finally, Statement 30 further discusses Dr. Benbrook's history. Dr. Benbrook's industry funded research has been the central part of the organics industry's arguments in Washington D.C. where he is paid to testify on organic industry behalf. The statements directly support the theme that academics traded independence and academia for financial personal gain and an agenda. As also described in Plaintiff's arguments related to Statement 31, the juxtaposition of Dr. Folta to Dr. Benbrook is simply unfair and a defamatory implication of Dr. Folta's motives.

IV. CONCLUSION

For the reasons set forth above, Defendants Motion for Summary Judgment should be denied.

Respectfully submitted,

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Date: August 16, 2018

LOCAL RULE 7.1(F) CERTIFICATION

I HEREBY CERTIFY that the foregoing memorandum of law contains 24,992 words, with such word count incorporating all portions of this document to subject to the limitations imposed under Local Rule 7.1(F) and ECF 68.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being electronically filed and will be furnished via CM/ECF and via electronic mail on the date set forth below to:

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