

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:16-cv-81339-DMM

CHARLES A. NETTLEMAN III,
an individual,

Plaintiff,

vs.

THE FLORIDA ATLANTIC UNIVERSITY
BOARD OF TRUSTEES,

Defendant.

**RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS
PLAINTIFF’S AMENDED COMPLAINT [D.E. 20]**

Plaintiff, CHARLES A. NETTLEMAN III, (“Plaintiff” or “Dr. Nettleman”), by and through the undersigned counsel, hereby file this Response in opposition to Defendant THE FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES (“Defendant” or “FAU”)’s Motion to Dismiss (the “MTD”) [D.E. 20], and in support thereof state as follows:

I. PRELIMINARY STATEMENT

Plaintiff, a distinguished land surveying engineer and professor, has taught at various universities over the past decade. In 2008, he authored a full package of teaching materials (the “Materials”) which includes but is not limited to slides, laboratory exercises, homework assignments, quizzes, exams, and lists of internet resources. Plaintiff had the Materials registered with the United States Copyright Office in 2014.

After registering the Materials, Plaintiff accepted a position at Florida Atlantic University as an adjunct professor. Dr. Nettleman used the Materials to teach his course, uploading them to

the university's "Blackboard" online learning-management system. The Blackboard system allows for professors to share content and keep in contact with their students. For each university class, the content on Blackboard is accessible only by the course professor, the enrolled students, the university's internet technology support staff, and the program dean.

Plaintiff taught for one semester; he was invited to teach for a second semester but had previously accepted a full-time teaching position with a different university. When Dr. Nettleman alerted his department chair to this fact, the department chair requested continued access to the teaching Materials after Plaintiff's departure from Florida Atlantic University. Dr. Nettleman responded that he licenses the Materials to other learning institutions for a fee and that he would therefore be unable to allow the university to use the Materials free of charge. The department chair never responded.

However, the following year Defendant contacted Plaintiff to request that he teach a course for part of the semester because the instructor who had been teaching was deported. Plaintiff accepted the offer. When he logged onto the Blackboard system, he found that Defendant had been using his copyright-protected teaching Materials without authorization for at least an entire calendar year.

Defendant's infringement is made even more egregious by the fact that in the course of his employment, Plaintiff was given a copy of an intellectual property policy (the "IP Policy") propagated by FAU's Office of Technology Transfer. The IP Policy applies to all university personnel. Under the definitions given in the IP Policy, Plaintiff's Materials were correctly deemed to be his own property. The IP Policy also purports to recognize the long-standing academic tradition of treating faculty members as copyright owners of works which were created independently by the faculty member.

Given Defendant's violation of both federal copyright law and its own IP Policy, Plaintiff brought suit against Defendant for Copyright Infringement (Count I), Alteration of Copyright Management Information (Count II), and Violation of the Due Process Clause of the Fourteenth Amendment (Count III). Defendant now moves for dismissal of Plaintiff's Amended Complaint [D.E. 9]. This motion must be denied.

II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure require a pleading to provide a short and plain statement of the claim showing the pleader's entitlement to relief. Fed. R. Civ. P. 8(a). Detailed factual allegations are not required. *Hobirn, Inc. v. Aerotek, Inc.*, 787 F. Supp. 2d 1298, 1302 (S.D. Fla. 2011), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In the face of a motion to dismiss, courts are required to read the pleadings liberally. *Synergy Real Estate of SW Fla., Inc. v. Premier Prop. Mgmt. of SW Fla., LLC*, 578 F. App'x 959, 961 (11th Cir. 2014); *see also O'Donnell v. Wachovia Bank, NA*, 2010 U.S. Dist. LEXIS 34394, *6 (S.D. Fla. Apr. 7, 2010). The allegations pled in the operative document should be accepted by the Court to be true. *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents*, 633 F.3d 1297, 1301 n.3 (11th Cir. 2011), citing *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1342 (11th Cir. 2008). In the event that a pleading is inadequate, leave to amend should be granted as justice requires. Fed. R. Civ. P. 15(a)(2). *See also, e.g., Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 n.1 (11th Cir. 1984); *Teel v. United Techs. Pratt & Whitney*, 953 F. Supp. 1534, 1539 (S.D. Fla. 1997).

III. ARGUMENT

The MTD is premised entirely on FAU's purported sovereign immunity as a state entity. Defendant appears to believe that it would be able to waive sovereign immunity for certain

claims, but not others. *See* D.E. 20 at 5 (“Sovereign Immunity is not waived in copyright claims” [sic]) and 7 (“Sovereign Immunity has not been waived for Violation of the Due Process Clause of the Fourteenth Amendment” [sic]).

Defendant is incorrect in its assessment. FAU has indeed waived its sovereign immunity for the copyright claim by violating Plaintiff’s due process rights, as will be explained *infra*. As such, Defendant has opened itself up to liability for all causes of action as stated in the Amended Complaint, and its Motion to Dismiss must be denied.

a. FAU has waived its sovereign immunity pursuant to Count III due to the manner in which it deprived Plaintiff of his rights.

“A copyright is a property interest protected under the Due Process Clause.” *Nat’l Ass’n of Bds. of Pharm. v. Bd. of Regents*, 633 F.3d 1297, 1317 (11th Cir. 2011), citing *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983). *See also Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1313 (11th Cir. 2008) (noting the property interest an author has in its copyright).

By claiming copyright infringement, Plaintiff has alleged a deprivation of a constitutionally-protected property interest due to a state action. Thus, due process is implicated and it must be determined what process is due. *Bd. of Regents*, 633 F.3d at 1317, citing *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).

“Due process is a flexible concept that varies with the particular circumstances of each case.” *Id.* Such process generally requires notice and an opportunity to be heard prior to the government’s seizure or deprivation of one’s property. *Bd. of Regents*, 633 F.3d at 1317. When pre-deprivation procedures are not feasible, due process is not violated so long as the State provides adequate post-deprivation remedies. *Id.*

Defendant argues that pre-deprivation due process is impractical because the state would not know when a deprivation of such process would occur. Therefore, for Dr. Nettleman to succeed in his due process claim, “it is incumbent on Plaintiff to ‘identify an established state procedure which has as its purpose the deprivation of a protected interest.’” D.E. 20 at 8.

Plaintiff has adequately done so by asserting that “FAU has enacted multiple procedures purposed to deprive Plaintiff of his property interest in his copyrights.” D.E. 9 at ¶ 72. “Defendant intentionally and deliberately allowed other professors to access and disseminate the Materials . . .” *Id.* at ¶ 74. Further, “the limits placed on access to Blackboard . . . are designed to prevent Plaintiff and similarly-situated others from becoming aware of the infringement.” *Id.* at ¶ 75.

Thus, Defendant is incorrect. Pre-deprivation process is not impractical when there is an established state procedure such as this one which intends to deprive Plaintiff and others like him of their rights. Moreover, the State had ample opportunity to provide a pre-deprivation hearing after asking Plaintiff if it could freely use his Materials. This request had been made to Plaintiff *prior* to Defendant’s infringement.

However, supposing *arguendo* that Defendant is correct about pre-deprivation due process—which it is not—Plaintiff can establish a due process violation regardless by sufficiently alleging that the State did not provide adequate post-deprivation remedies. *Bd. of Regents*, 633 F.3d at 1319.

And Plaintiff does so sufficiently. As stated in the Amended Complaint, “FAU also failed to provide adequate remedies for the infringements after they occurred.” D.E. 9 at ¶ 77. “Defendant’s own IP Policy does not set forth any procedures or remediation scheme for when FAU infringes . . .” *Id.* at ¶78. “FAU declined to even discuss the merits of Dr. Nettleman’s

allegations when given the opportunity to take corrective action” – an opportunity that was given to FAU *after* the infringement occurred by way of cease-and-desist letters. *Id.* at ¶ 79.

Defendant completely fails to acknowledge these post-deprivation allegations in its MTD, instead zeroing in on the claim that “the State of Florida has no statutory scheme or claims-review procedure to address either copyright infringement or a federal civil rights claim,” as alleged in ¶ 80. Defendant’s arguments that these allegations are conclusory are baffling, as these are statements of fact. It is a fact that Florida does not address Plaintiff’s federal copyright claims; indeed, if the state were to propound such a statutory scheme or claims-review procedure, it would likely violate federal law. Moreover, Defendant itself points to no statutory scheme or claims-review procedure that is in place to address claims such as Plaintiff’s. If such a scheme or procedure existed, Defendant certainly would have referred to it in its MTD.

Granted, Defendant does propound the argument that “a common-law tort lawsuit may constitute an adequate post-deprivation remedy,” and that “Plaintiff does not address whether a common-law tort lawsuit is an adequate post-deprivation remedy.” D.E. 20 at 9. However, this argument is seriously flawed.

First, Defendant is improperly arguing the merits of this lawsuit at this stage of the litigation. *E.g., Andrx Therapeutics, Inc. v. Mallinckrodt, Inc.*, 2006 U.S. Dist. LEXIS 70659 at *14-15 (S.D. Fla. May 10, 2006) (noting that merit-based arguments are improper at the motion-to-dismiss stage). Second, it is not necessary for Plaintiff to have addressed whether a common-law tort lawsuit would be an adequate post-deprivation remedy. Such discussion is not required in a complaint.

Further, Defendant mischaracterizes its argument. Defendant’s cited case states that “[i]n some circumstances . . . the Court has held that a statutory provision for a post-deprivation

hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process.” *Zinermon v. Burch*, 494 U.S. 113, 128 (1990). Read in the proper context, *Burch* says that there are some circumstances in which a common-law tort may suffice, if it is the equivalent of a post-deprivation hearing.

Yet there are circumstances in which such remedy is not sufficient—“particularly . . . where . . . the State’s only post-termination process comes in the form of an independent tort action.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). “Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole.” *Id.* at 436-37. The Supreme Court’s words ring equally true in this case where Plaintiff’s federal cause of action—copyright infringement—cannot properly be addressed by a state-court tort suit. And “no amount of process absent the owner’s consent avoids liability . . .” pursuant to copyright law. *Bd. of Regents*, 633 F.3d at 1316 n.32, citing 17 U.S.C. § 106.

Defendant’s arguments regarding Dr. Nettleman’s due process claim are improper at this stage of the litigation, and moreover, they are incorrect. Plaintiff has properly alleged a violation of his due process, and Count III must not be dismissed.

b. By violating Dr. Nettleman’s due process, Defendant has waived its sovereign immunity for the copyright claims in Counts I and II of the Amended Complaint.

In 1990, Congress passed the Copyright Remedy Clarification Act (“CRCA”) to abrogate the sovereign immunity of the individual United States for copyright infringement cases. 17 U.S.C. § 511. The text of the statute at section (a) reads:

Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any

other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

The legislative history of the CRCA demonstrates that Congress intended to abrogate state sovereign immunity under its Article I powers granted by the United States Constitution. *See* H.R. Rep. No. 101-282(I), at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 3949, 3955; *Bd. of Regents*, 633 F.3d at 1313. However, in *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996), the Supreme Court found that Article I did not allow for Congress to abrogate the sovereign immunity of the individual states. Given that, various courts have since deemed the CRCA invalid. It then follows that if the CRCA is invalid, state immunity has not been waived.

Yet the inquiry does not end there because Section 5 of the Fourteenth Amendment to the United States Constitution grants Congress the authority to enforce the provisions of that Amendment. Such enforcement power includes the authority to abrogate state sovereign immunity by authorizing private suits for damages against the states. *Bd. of Regents*, 633 F.3d at 1315; *United States v. Georgia*, 546 U.S. 151, 158-59 (2006); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

“Congressional abrogation of the States' sovereign immunity is valid when the statutorily proscribed conduct simultaneously violates a constitutional guarantee protected by the Fourteenth Amendment.” *Bd. of Regents*, 633 F.3d at 1304, citing *Georgia*, 546 U.S. at 158-59. It follows, then, that “even though the CRCA deals on its face only with copyright infringement, Congress's abrogation of the States' sovereign immunity in the CRCA is valid if the copyright infringement also violated [Plaintiff]'s constitutional rights.” *Bd. of Regents*, 633 F.3d at 13,

citing *Georgia*, 546 U.S. at 158-59. *See also Black v. Wigington*, 811 F.3d 1259, 1265 (11th Cir. 2016) (noting that Congress abrogated sovereign immunity for conduct that simultaneously violated the Title II of the Americans with Disabilities Act and the Equal Protection Clause); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003) (“Congress also acted within its authority under § 5 of the Fourteenth Amendment when it sought to abrogate the States' immunity for purposes of the FMLA's [Family and Medical Leave Act of 1993] family-leave provision.”).

Thus, Defendant's argument that it is immune from suit for copyright infringement is incorrect. By violating Plaintiff's Fourteenth Amendment rights, FAU has waived its sovereign immunity pursuant to Dr. Nettleman's copyright claims. Counts I and II are properly alleged, and these causes of action must not be dismissed.

c. The circumstances of this case require Defendant to answer for its actions in federal court.

Case law and statutory law alone are sufficient to support Plaintiff's claims and this Court's jurisdiction over them. Yet, Dr. Nettleman's allegations are supported further by the premises of fairness and justice.

FAU has an IP Policy—a policy which by its very nature is grounded in federal law—to which it subjects all university faculty. D.E. 9.1 (Exhibit A to the Amended Complaint) at 1. The IP Policy purports to “support personnel in fostering all forms of intellectual property.” *Id.* at § 10.6.1. It “promotes the long-standing academic tradition . . . that treats the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative.” *Id.* The University rationalizes that “[a]dequate recognition of and incentive to potential creators of intellectual property through the sharing of financial benefits . . . encourages the creation of such intellectual property.” *Id.*

Yet in spite of this lip service, and in spite of the fact that the IP Policy actually contains provisions of the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, FAU has no procedural or remediation scheme for intellectual property infringement or ownership disputes. D.E. 9 at ¶ 78. What FAU *does* have is an established history of copyright infringement. *See Campinha-Bacote v. Gibson et al*, Case No. 9:10-cv-80671-KAM (S.D. Fla. 2010); *Fullerton v. FAU*, Case No. 9:14-cv-81021-JIC (S.D. Fla. 2014).

Defendant's egregious and ongoing practice of infringing upon the intellectual property rights of others must be stopped at the federal level. FAU should not be permitted to hide behind its state-entity status to preclude it from liability in a case where a private university could be held liable for the same actions under the same circumstances. Such uneven application of the law would not only be confounding; it would set a dangerous precedent. It would also discourage the very creation that the university purportedly wishes to promote via its IP Policy.

Plaintiff is aware of the rationale that a State should not be subjected to the indignities of being haled into federal court. Yet Plaintiff should not be forced to suffer the indignities of having to litigate this federal lawsuit in state court. This is a copyright claim in which jurisdiction only lies at the federal level. A state-court suit could never make him fully whole in regards to the federal rights upon which Defendant has infringed. The State of Florida simply does not have any state remedy to correct the wrongs suffered by Dr. Nettleman due to FAU's knowing, deliberate, and willful infringement of his federally-copyrighted Materials—Materials which took years to create.

Defendant insists that in accordance with precedent, this Court must dismiss this case. Defendant is incorrect, as precedent here dictates that the Motion to Dismiss be denied. Yet even

if Defendant were correct, stare decisis does not require adherence to prior erroneous conclusions. *See Hohn v. United States*, 524 U.S. 236, 238, 118 S. Ct. 1969, 1971 (1998).

Justice Thomas once concurred, “Principles of stare decisis do not compel us to save . . . muddled logic and armchair economics. We have not hesitated to overrule decisions when they are ‘unworkable or are badly reasoned,’ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); when ‘the theoretical underpinnings of those decisions are called into serious question,’ *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997); when the decisions have become ‘irreconcilable’ with intervening developments in ‘competing legal doctrines or policies,’ *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); or when they are otherwise ‘a positive detriment to coherence and consistency in the law,’ *ibid.* Just one of these circumstances can justify our correction of bad precedent . . .” *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2425 (2014) (Thomas, J., concurring). The instant case—in which Defendant swears via its IP Policy to be bound by federal law, then asserts its immunity from federal jurisdiction—presents several such circumstances.

IV. CONCLUSION

Florida is a notice-pleading state. Plaintiff has adequately alleged facts to put Defendant on notice as to Plaintiff’s claims and why he is bringing suit against Defendant. The allegations as stated in the Amended Complaint are sufficient to properly make out a claim of a 14th Amendment due process violation; as a result of that violation, Defendant has consented to suit in federal court for Plaintiff’s copyright claims. Plaintiff’s allegations should be heard by this Court, and Defendant’s Motion to Dismiss must be denied.

WHEREFORE, Plaintiff CHARLES A. NETTLEMAN III respectfully requests that this Court:

- 1) deny Defendant's Motion to Dismiss Plaintiff's Amended Complaint;
- 2) award Plaintiffs' attorneys' fees and costs related to the filing of this response; and
- 3) grant any further relief as the Court sees just and proper, including but not limited to an order allowing Plaintiff to amend its Amended Complaint should the Court grant Defendant's Motion to Dismiss.

Dated: October 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of October, 2016, I electronically filed the forgoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties in the CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive notices of electronic filing.

s/Lorri Lomnitzer

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SERVICE LIST

CHARLES A. NETTLEMAN III vs. FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES

CASE NO.: 9:16-cv-81339

United States District Court, Southern District of Florida

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