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.

_____/

DEFENDANT, THE FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES', MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

COMES NOW Defendant, THE FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES, (hereinafter "FAU"), by and through undersigned counsel, and pursuant to *Fed. R. Civ. P. 12(b)(6),* requests that this Court Dismiss Counts I, II, and III of Plaintiff's Amended Complaint, and states:

1. This lawsuit arises from the alleged use by employees of FAU of Plaintiff's course materials without his consent.
2. Plaintiff claims in Count I Copyright Infringement in violation of 17 U.S.C. § 106 *et seq*. and 17 U.S.C. §501, Count II Alteration of Copyright Management Information in violation of 17 U.S.C. §1202(a), and Count III violation of the Due Process Clause of the Fourteenth Amendment.

3. Plaintiff has failed to state valid causes of action against FAU in Counts I, II, and III of his Amended Complaint

MEMORANDUM OF LAW

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a Motion to Dismiss will be granted if the Plaintiff fails to state a claim for which relief can be granted. In pleading a proper lawsuit, Plaintiff only must state "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. When considering a Rule *12(b)(6)* motion to dismiss, the Court accepts as true all factual allegations in the Complaint. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A Plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). "A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 664. A Court may grant a motion to dismiss when, "on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action". *Marshall Cnty. Bd. of Educ. V. Marshall Cnty. Gas Dist.*, 992 F. 2d 1171, 1174 (11th Cir. 1993)

I. Count I and II: Sovereign Immunity has not been waived by FAU for causes of action for Copyright Infringement or for Alteration of Copyright Management Information

In Count I of Plaintiff's Amended Complaint, Plaintiff contends that Defendant infringed on his copyright for teaching materials. *17 U.S.C. §106* speaks of the exclusive

rights of copyrighted works. The owner of a copyright has exclusive rights to do and authorize reproduction of the copyrighted work and for the preparation of derivative works based on the copyrighted work. *Id.* *17 U.S.C. §501* speaks of the actual infringement of a copyright by anyone who violates any of the exclusive rights of the copyright owner or infringes on the rights of the copyright of the author. This section also indicates that "anyone" includes 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." *Id.* at (a). Despite, this contention, it is clear by the binding case law on this issue that there has not been abrogation of State's sovereign immunity to bring such a suit against a State entity like Defendant.

17 U.S.C. §511, also known as the Copyright Remedy Clarification Act (CRCA), attempted to "clarify" that a violation of *17 U.S.C. §106* by a governmental entity shall not be immune under Eleventh Amendment or any other doctrine of Sovereign Immunity. However, this part of the CRCA has been struck down as unconstitutional by the 11th Circuit as well as many other federal appeals courts.

In Count II of Plaintiff's Amended Complaint, he claims that Defendant violated 17 *U.S.C. §1202* as it relates to Copyright Management Information. Specifically, Plaintiff claims that FAU removed the copyright notice placed at the bottom of nearly every page in Plaintiff's materials.[1]

[1] Defendant does not waive any additional arguments that Plaintiff does not have a valid copyright or that Defendant used/misused Plaintiff's copyrighted materials.

a. Defendant is a state of Florida agency and is entitled to sovereign immunity.

Plaintiff contends that "Defendant is the governing body of a public university and state entity". *Plaintiff's Amended Complaint* ¶3. FAU is a state agent for Eleventh Amendment immunity purposes. *See Beaulieu v. Board of Trustees of the University of West Florida*, 2007 WL 2900332, at 81 (N.D. Fla. Oct. 2, 2007); see also *Fla. Stat. § 1000.21 (6)(e)* (2012) ("State university…includes…The Florida Atlantic University"); *Fla. Stat. § 768.28 (2)* (2012) ("state agencies or subdivisions" for purposes of sovereign immunity includes state university boards of trustees).

The Eleventh Amendment states, in relevant part, "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." A non-consenting State is immune from suits brought in federal courts. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). However, a State can consent to suit in Federal Court and Congress may abrogate a States' sovereign immunity. *Id.* Eleventh Amendment immunity is waived by a state when there is expressed language or "overwhelming implication" from the texts that there is no other reasonable construction to be made from the statement. *Id.* at 305. The State must specify that it intends to be subject to suit in federal court to waive Eleventh Amendment. *Id*. at 306. A state does not consent to suit in Federal Court by indicating that it can sue or be sued in any court of "competent jurisdiction". *Crisman v. Florida Atlantic University Bd. of Trustees*, 572 Fed. Appx. 946, 948 (11th Cir. 2014). *Fl. Stat.*

768.28(18) speaks of sovereign immunity and explicitly states that "no provision of this section, or any other section of the Florida Statutes…shall be construed to waive the immunity of the state or any of its agencies from suit in federal court…unless such waiver is explicitly and definitely stated to be a waiver of the immunity."

b. Sovereign Immunity is not waived in copyright claims.

Numerous Federal District Courts have held that Congress exceeded its Constitutional authority in purporting to abrogate state sovereign immunity for copyright claims and finding a state university immune from copyright suit for damages. *See Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga.*, 2008 WL 1805439, at *16 (M.D.Ga. Apr. 18, 2008); *Mktg. Information Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F.Supp.2d 1088, 1094 (S.D.Cal.2008); *InfoMath, Inc. v. Univ. of Ark.*, 633 F.Supp.2d 674, 680–81 (E.D.Ark.2007); *674 *DeRomero v. Inst. of Puerto Rican Culture*, 466 F.Supp.2d 410, 418 (D.P.R.2006); *Hairston v. North Carolina Agr. & Technical State University*, 2005 WL 2136923, at *8; *Salerno v. City Univ. of N.Y.*, 191 F.Supp.2d 352, 355– 56 (S.D.N.Y.2001); *see Jehnsen v. New York State Martin Luther King, Jr., Institute for Nonviolence*, 13 F.Supp.2d at 311; *see also Rainey v. Wayne State Univ.*, 26 F.Supp.2d 973, 976 (E.D.Mich.1998). Courts have applied rulings on the Patent Remedy Act, like in *Seminole Tribe*, to cases involving the CRCA. *See Jacobs v. Memphis Convention and Visitors Bureau* 710 F. Supp. 2d 663 (W.D. Tenn. 2010); *Chavez v. Arte Publico Press*, 204 F. 3d 601 (5th Cir. 2000).

In *National Ass'n of Boards of Pharmacy v. Board of Regents of University System of Georgia*, 633 F. 3d 1297 (11th Cir. 2011), action was brought against the State University Board of Regents seeking damages and injunctive relief under the CRCA for alleged misappropriation of copyrighted materials. The facts, similar to the case at bar, were that a professor at a State University used copyrighted materials and questions to prepare course materials. *Id.* The Court did cite to the CRCA for the unequivocal expression by Congress to abrogate the States' sovereign immunity for copyright infringement cases. *Id.* at 1313. However, in reliance on *Seminole Tribe of Fla. v. Fla*, the Court agreed that Congress could not rely on its authority under Article I to abrogate the States' sovereign immunity. *Id.* at 1313-1314; *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (holding that the copyright clause does not provide Congress with authority to abrogate State sovereign immunity). As such, there was no cause of action against the Board of Regents for copyright infringement or violation of the CRCA.

The rulings in *Seminole Tribe* and *Florida Prepaid* are precedent that the Court is bound by. *Id*. at 1314. The case law is clear that there is no cause of action for copyright infringement or violation of the CRCA against a state of Florida agency/entity in Federal Court. As such, the Court must deny under the controlling law Counts I and II of Plaintiff's Amended Complaint.

II. Count III: Sovereign Immunity has not been waived for Violation of the Due Process Clause of the Fourteenth Amendment

Within Count III of his Complaint, Plaintiff alleges that his Due Process rights under the 14th Amendment ("nor shall any state deprive any person of life, liberty, or property, without due process of law") were violated by Defendant by depriving Plaintiff of his property interest without notice. We turn again to *National Ass'n of Boards of Pharmacy v. Board of Regents of University System of Georgia*, 633 F. 3d 1297 (11th Cir. 2011) for a discussion of abrogation of States sovereign immunity for alleged violations of the Fourteenth Amendment.

In *National Ass'n*, plaintiff had argued that §5 of the Fourteenth Amendment ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article") supports Congress' abrogation of State's Sovereign Immunity. *633 F. 3d at 1315*. In its appeal, *National Ass'n* claimed that the copyright infringement amounted to violation of the due process clause. *Id.* at 1316. Abrogation of States' sovereign immunity through §5 can occur if Congress creates private remedies against States for actual violations of the 14th Amendment or Congress may pass which deters or remedies 14th Amendment violations even if, in the process, it prohibits conduct that is not unconstitutional and there is "congruence and proportionality" between the injury to be prevented and the "means adopted to that end". *Id.* at 1315-1316.

What is unconstitutional, as it relates to a due process claim, is not the deprivation by a State of a protected interest but the failure to be heard prior to the deprivation. *Zinermon v. Burch*, 494 US 113, 125 (1990). Courts have held that a copyright is a

property interest protected under the Due Process Clause however the question is, in such a situation, what process is due to the copyright holder. *National Ass'n*, 633 F. 3d at 1317. "[D]ue process d[oes] not require pre-deprivation hearings where the holding of such a hearing would be impracticable, that is, where the deprivation is the result of either a negligent or intentional deprivation of property." *McKinney v. Pate*, 20 F. 3d 1550, 1562-63 (11th Cir. 1994). The pre-deprivation process is impractical if the loss of the property is not from an established state procedure because the State cannot know when such a deprivation will occur. *Hudson v. Palmer*, 468 U.S. 417, 532-533 (1984).

Similar to *National Ass'n*, Plaintiff in the subject case has failed to allege in his Amended Complaint that FAU was acting under an established state procedure designed to deprive individuals, like Plaintiff, of their copyrights. *National Ass'n*, 633 F. 3d at 1317-18. It is incumbent on Plaintiff to "identify an established state procedure which has as its *purpose* the deprivation of a protected interest." *Id.* at 1318. It is irrelevant whether it was foreseeable that FAU would infringe on Plaintiff's copyrights. *Id.* As stated in *National Ass'n*:

> [W]e cannot imagine how a State would fashion a pre-deprivation hearing under the facts alleged here. If a hearing could ever occur, it would likely occur during the approval of [] course materials because only then does the state actor review the course materials and stand in a position to evaluate whether the materials infringe a copyright. This approval process, however, does not—and indeed, cannot-determine whether the State has violated copyright laws. Doing so would require the state actor to know the content of every relevant copyright and then compare that copyright to the proposed []course materials. *Id.*

The Court goes on to say that *National Ass'n* could only establish a due process violation if it sufficiently alleged that the state failed to provide adequate post-deprivation

remedies. *Id.* Procedural due process is not denied by granting reasonable immunity to state entities. *Rittenhouse v. DeKalb County*, 764 F. 2d 1451 (11th Cir. 1985).

In the instant action, Plaintiff does claim in ¶80 of his Amended Complaint that "the State of Florida has no statutory scheme or claims-review procedure to address either copyright infringement or federal civil rights claim". This contention is a bare conclusory statement and Defendant argues that this is not "sufficiently" alleged as required in pleading a due process violation. Plaintiff also fails to address whether a common-law tort lawsuit is available to Plaintiff. "A common-law tort lawsuit may constitute an adequate post-deprivation remedy" *Zinemon v. Burch*, 494 U.S. 113 (1990). Plaintiff does not address whether a common-law tort lawsuit is an adequate post-deprivation remedy in his Amended Complaint.

WHEREFORE, Defendant, THE FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES, requests that this Court enter an Order Dismissing with Prejudice Counts I, II, and III of Plaintiff's Amended Complaint; and such other relief as this Court may deem appropriate.

Dated: September 22, 2016

s/ Philip B. Wiseberg, Esq.
Philip B. Wiseberg, Esq. (eService@wlclaw.com)
Florida Bar No. 27233
James O. Williams, Jr., Esq.
Florida Bar No. 0614513
Attorney for Defendant The Florida Atlantic
University Board of Trustees
Williams, Leininger & Cosby, P.A.
11300 US Highway One, Suite 300
North Palm Beach, Florida 33408

Telephone No. (561)615-5666
Facsimile No. (561)615-9606

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2016, I electronically filed the foregoing document with the Clerk of Court using its CM/ECF system, and sent a copy via email to the parties listed below.

s/ Philip B. Wiseberg, Esq.
Philip B. Wiseberg, Esq.

SERVICE LIST:
Lorri Lomnitzer, Esq.
The Lomnitzer Law Firm, P.A.
7999 N. Federal Highway, Suite 200
Boca Raton, FL 33487
Lorri@Lomnitzerlaw.com