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'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S 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 files its Reply to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Amended Complaint, and states:

1. This lawsuit arises from the alleged use by employees of FAU of Plaintiff' course materials without his consent.
2. On August 23, 2016, Plaintiff filed his Amended Complaint [DE 9].
3. On September 8, 2016, Defendant filed its Motion to Dismiss Plaintiff's Amended Complaint [DE 20].
4. On October 11, 2016, Plaintiff filed his Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Amended Complaint [DE 23].

5. In this Reply, Defendant continues to rely on the case law and argument as cited and referenced in its Motion to Dismiss.

6. Plaintiff contends in his response that Defendant has waived sovereign immunity in Counts I and II because it has violated his constitutional due process rights. This argument places the cart before the horse by pre-supposing that there was a violation of Plaintiff's constitutional rights that somehow allows sovereign immunity to be waived. As stated in Defendant's Motion to Dismiss, there must be expressed language that sovereign immunity has been waived. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990).

7. Plaintiff makes note of two other cases filed in the US District Court for the Southern District of Florida against Defendant for claimed copyright infringement. What Plaintiff does not note is that both cases were dismissed against Defendant with no finding that Defendant did anything wrong. In one case cited by Plaintiff, *Campinha-Bacote v. Gibson et al*, Case No. 9:10-cv-80671-KAM (S.D. Fla. 2010), defendant cites to the same litany of cases as Defendant did in its Motion to Dismiss that stand for the position that a state university is sovereignly immune from copyright suits 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). In his response to the motion, Plaintiff fails to address the litany of cases that have ruled against the argument that he makes in his response.

8. What Plaintiff does cite to is the *Nat'l Ass'n of Bds. Of Pharm. V. Bd. of Regents,* 633 F3d 1297 (11th Cir. 2011) and claims that this case stands for the proposition that 11th Amendment immunity of a state agency is waived when there is a claimed violation of constitutional rights. Plaintiff however does not rectify the argument made by the court in footnote 32 of this case when it stated:

> In *Georgia*, the identical conduct that violated the Americans with Disabilities Act also violated the Eighth Amendment. 546 U.S. at 157, 126 S.Ct. at 880–81. Here, the action necessary to infringe a copyright is arguably distinct from the conduct constituting NABP's procedural due process claim. In its simplest form, one infringes a copyright by copying or distributing a work; no amount of process absent the owner's consent avoids liability under the statute. See, e.g., 17 U.S.C. § 106. NABP's due process claim argues that it should have received a pre-deprivation hearing before its copyright was infringed. This alleged conduct—failing to provide a hearing—is not identical to copyright infringement. Therefore, NABP's argument that it was owed a pre-deprivation hearing is not implicated by a strict understanding of what it is to infringe a copyright and thus arguably not covered by *Georgia*. We need not discuss this argument further, however, because it is clear that NABP has not shown an actual denial of procedural due process.

This footnote was also discussed more recently in *American Shooting Center, Inc. v. International*, 2016WL3952130 (S.D. Cal. July 22, 2016) where the Court held that *Georgia* is distinguishable and inapplicable. In another recent case from this year, the court in *Campinha-Bacote v. Regents of University of Michigan*, 2016 WL 223408 (S.D. Ohio Jan. 19, 2016), rejected the argument similarly made by Plaintiff in the

subject case. As the court stated, just because the alleged conduct also violated due process, it does not validly abrogate state sovereign immunity as the existence of a constitutional due process violation is a distinct inquiry from whether a copyright was infringed. *Id.*

9. As for Count III, Plaintiff contends that there is an established state procedure that intended to deprive Plaintiff of his rights. Plaintiff claims this by arguing that Defendant allowed other professors to access and disseminate Plaintiff's materials. Again, these are bare conclusions without more. Plaintiff cannot point to any written policy or communication that would establish such a procedure that intended to deprive Plaintiff, and any other similarly situated professor, of their rights. Plaintiff takes issue with Defendant's discussion in its Motion that a Common Law Tort Suit could be an adequate post-deprivation remedy. When Plaintiff's cause of action can be hinged on whether there is an adequate remedy in common-law for the alleged constitutional infringement, it is incumbent upon Plaintiff to address this issue rather than dismiss it. If there is an adequate remedy, there is no cause of action for due process violation and Count III must then be dismissed.

10. Finally, there is no reason or justification for Plaintiff to point out that Defendant has been sued in the past for copyright infringement. Plaintiff claims there is an "established history" of copyright infringement by Defendant. As pointed out previously, both cases cited by Plaintiff were dismissed by Plaintiff against Defendant. Bare accusations are insufficient and disingenuous for Plaintiff to claim "established history". The only reason Defendant can think of as to why Plaintiff would include this in his Response to the Motion is to place this in front of the Court

to say, they infringed on copyrights in the past, so the court should allow Plaintiff's case to move forward.

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: November 10, 2016

s/ Philip B. Wiseberg, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 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.

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