UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ANDREW P. MALLON	)	
	)	
Plaintiff,	)	ECF CASE
	)	
v.	)	
	)	Case No. 4:14-cv-40027-TSH
JOHN MARSHALL, and DENNIS J. GOEBEL	)	
	)	
	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS FOR RECONSIDERATION

Dr. Mallon submits this Opposition to Defendants' Motion for Reconsideration. (D.I. 32.)

INTRODUCTION

Defendants have not cited any manifest errors of law or fact; therefore, the Court should deny their request for reconsideration.

Defendants have presented three arguments in their Motion for Reconsideration. First, Plaintiff cannot ask for attribution for his work. Second, Plaintiff cannot seek retraction of the PLOS Biology Paper. Third, Plaintiff did not adequately allege copyrightable contribution to the PLOS Biology Paper. Defendants are wrong. Plaintiff is not seeking attribution, can seek retraction, and did properly plead copyrightable contribution to the PLOS Biology Paper.

A. Plaintiff Is Not Seeking Attribution

Defendants incorrectly argue that Plaintiff's counsel refused to drop the request for attribution and that "his client wants his name on the paper." (Memorandum in Support of

Motion for Reconsideration, D.I. 33, pg. 1.) There was likely a misunderstanding during the conversation. To clarify and reiterate the record, Plaintiff is not seeking attribution. Plaintiff's proposed amended complaint has dropped this request for relief. (Opp. to Motion to Dismiss, Exhibit 2, D.I. 27-2, pg. 16.) Defendants' counsel asked that Plaintiff not file its Amended Complaint until after Defendants had filed and the Court had ruled on their Motion for Reconsideration. Plaintiff is not seeking attribution.

B. Plaintiff's Request for Retraction is Proper and Not Relevant for a Motion to Dismiss

Plaintiff's request for retraction of the PLOS Biology Paper is a proper remedy, and in any event, Defendants' Motion to Dismiss is not the proper vehicle to strike this request for remedy.

Defendants rightfully state that co-authors are in essence tenants in common with respect to ownership of the PLOS Biology Paper. (Mot. for Reconsideration, D.I. 33, pg. 6 (citing *Warren Freedenfeld Associates, Inc.* v. *McTigue,* 531 F.3d 38, 47 (1st Cir. 2008)).) As such, if Plaintiff is a co-author, he is akin to a tenant in common with Defendants for ownership of the PLOS Biology Paper copyright. With Plaintiff's status as a joint author, Plaintiff and Defendants will have all the rights and responsibilities of tenants in common.

Here, as the Court noted, Defendants signed a creative commons license granting anyone free use of the PLOS Biology Paper in return for citing them as the authors of the paper. (Court Order and Opinion Denying Motion to Dismiss, D.I. 30, pg. 2.) If Plaintiff proves he is a co-author of the PLOS Biology Paper, then the Court will need to address what rights he has and what remedies are available to him as a tenant in common. Because Defendants have arguably dedicated Plaintiff's work to the public in return for the public citing them as the authors of Plaintiff's work, retraction may be the only potential remedy.

Addressing this issue is premature, however. It is not disputed that the Court can grant Plaintiff relief for his claim; it can declare him a joint author of the PLOS Biology Paper. Therefore, by definition, there is a claim for which the Court can grant relief.

C. Plaintiff Has Adequately Pled That He Made Independently Copyrightable Contribution to the PLOS Biology Paper

The Court correctly found that Plaintiff adequately pled that he made copyrightable contributions to the PLOS Biology Paper. (D.I. 30, pgs. 2 and 5 (citing Plaintiff's Complaint, D.I. 1, ¶ 23).)

Defendants argue that the Court misunderstood their argument. Defendants argue that the Court understood their argument to be that if the "PLOS Biology Paper didn't qualify for copyright protection because it discusses Mallon's alleged underlying experiments." (D.I. 33, pg. 7.) Defendants are wrong. The Court properly understood Defendants' arguments and rejected them.

The Court held that Plaintiff adequately pled copyrightable contribution to the PLOS Biology Paper, irrespective of the scientific contribution. (D.I. 30, pg. 5.) A fair—and accurate—reading of Plaintiff's Complaint is that actual sentences that he drafted were added to and included in the PLOS Biology Paper, sentences that where drafted by Plaintiff after completion of Neuron Paper. (D.I. 1, ¶ 23.) Even under Defendants' overly rigid view of copyright law, Plaintiff's contributions would make him a co-author of the PLOS Biology Paper.

The Court should also reject Defendants' request for a more detailed allegations. Plaintiff has provided a short plain statement of his claim. Defendants—as current professors at their respective Universities—have access to the drafts of the papers and emails related to the drafting of the PLOS Biology Paper. As discovery progresses, Plaintiff will seek documents showing the exact copyrightable contributions he made to the PLOS Biology Paper. A detailed

line-by-line comparison of the PLOS Biology Paper and the Neuron Paper that requires access to drafts and emails is premature.

* * *

Because Defendants cite no manifest error of law or fact, Plaintiff asks the Court to deny Defendants' Motion for Reconsideration.

Dated: April 21, 2015

Respectfully submitted,

/s/ Brian D. O'Reilly

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CERTIFICATE OF SERVICE

I, Brian D. O'Reilly, hereby certify that on April 21, 2015 a true copy of the attached document was filed through the ECF system and will be sent electronically to all counsel of record, as identified on the Notice of Electronic Filing.

/s/ Brian D. O'Reilly

Brian D. O'Reilly