

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ANDREW P. MALLON,)	
)	
Plaintiff/counter-defendant,)	CIVIL ACTION NO.
v.)	4:14-CV-40027
)	
JOHN MARSHALL and)	Judge Timothy S. Hillman
DENNIS J. GOEBEL,)	
)	
Defendants/counter-plaintiffs.)	

**DEFENDANTS' MEMORANDUM IN SUPPORT
OF MOTION FOR ATTORNEYS' FEES**

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RULES

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In granting summary judgment and rejecting Plaintiff Andrew P. Mallon's claim that he somehow intended to be a co-author of a paper he declared a fraud, this Court determined that Dr. Mallon appeared to use his copyright claim as a "litigation device." The summary judgment record compelling this conclusion, however, doesn't tell half the story. Not only did Dr. Mallon use the existence of this lawsuit to mislead the press and public into believing this Court would rule on his false claims of academic misconduct, he cherry picked nearly 200 pages of private emails and manuscripts produced in discovery to gin up or resurrect bogus misconduct claims against both Defendants and third parties. (By contrast, he used almost none of Defendants' documents in the actual litigation before this Court.) Simply put, long before this Court had the chance to dispose of his baseless copyright claim, Dr. Mallon exploited this lawsuit and the discovery process to cast a pall on important research and smear scholarly reputations.

None of the university investigations prompted by Dr. Mallon's use of discovery materials have actually resulted in a finding of academic misconduct, but that doesn't mean Dr. Mallon's actions didn't have other very real costs. Not only did the individual scientists he accused have to endure the distraction and protracted indignity of responding to his false charges, the academic institutions invested substantial faculty resources chasing down Dr. Mallon's delusions. And, of course, Defendants—individuals on academic salaries—were forced to fund a costly defense in this lawsuit or risk a court-ordered retraction that not only would wreak havoc on their academic careers, but would jeopardize millions of dollars in existing and potential research grants and any scientific advancements resulting from that research. On top of that, a retraction would suppress discussion of an important scientific discovery from public discourse, an action wholly inconsistent with U.S. copyright law.

In short, Dr. Mallon misused this case, this process and this Court to try to settle his own

petty scores, unrelated to any legitimate copyright claim. Such conduct should not go unaddressed and this Court should award Defendants their attorney's fees. While what happened here violates the standards of both Fed. R. Civ. P 11 and 28 U.S.C. § 1927, the Court need not go that far. The Copyright Act gives the Court discretion to award attorneys' fees to a prevailing party. 17 U.S.C. § 505. As the Supreme Court recently clarified in *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979 (2016), in awarding fees, a court shouldn't just look at the objective unreasonableness of a party's position, but also consider the losing party's motivation, litigation conduct and the potential for future deterrence. Dr. Mallon's claim and conduct fires on all cylinders, clearly establishing Defendants' right to their attorneys' fees.

BACKGROUND

The following highlights some of Dr. Mallon's most egregious conduct, underscoring just how improper this lawsuit was from the start.

I. His Initial Retraction Claim Shot Down, Dr. Mallon Files A Federal Lawsuit.

As discussed in Defendants' Motion for Summary Judgment, when Dr. Mallon learned of the PLOS Biology Paper, he lodged a complaint with *PLOS Biology*, demanding that his name be added to the paper and accusing the authors of academic misconduct. (Dkt. #49, ¶99). As is standard, *PLOS Biology* referred investigation to the principal research institution, here, Brown University, which concluded "no misconduct has occurred." (Dkt. #49, ¶100-101).

That wasn't good enough for Dr. Mallon. He went out, found a lawyer and a few months later filed this lawsuit. Even though copyright law doesn't have anything to do with policing academic misconduct or, outside visual art, provide the right of attribution, the complaint was rife with allegations of scientific wrongdoing and repeatedly emphasized that Dr. Mallon's name

had improperly been omitted from the paper.¹ The complaint also specifically prayed for:

“Republication of the PLOS Biology Paper listing Dr. Mallon as the first author.” *Id.* at 13.

Given the claims for attribution littering the complaint and the relief sought, Defendants moved to dismiss, largely addressing the attribution claims. (Dkt. #21) After devoting considerable resources to the motion, Defendants and their counsel were stunned a year and a half later when they learned it was all wasted money, because, as Dr. Mallon casually testified under oath, seeking attribution was a mistake, he never wanted his name on the paper and he told all this to his counsel Brian O’Reilly “immediately after” the complaint was filed:

I detected the mistake almost as soon as this had been filed. I knew there had been a mistake. So it was immediately after it had been filed, I noticed the mistake and contacted Brian, yeah.

(Ex.C 46:22-47). Nobody, however, ever lifted a finger to amend the complaint or alert Defendants or the Court to the so-called error. As a direct result, Defendants spent substantial resources addressing an issue both black letter law and Dr. Mallon say never should have been before the Court in the first place.

This Court denied the motion to dismiss, relying on Dr. Mallon’s after-the-fact arguments that he wasn’t really seeking attribution after all. The Court also ruled that Dr. Mallon’s joint authorship claim survived, relying, in part, on Dr. Mallon’s statement at Paragraph 29 of the complaint that the PLOS Biology Paper was the Neuron Paper with “minor alterations.”² As Defendants’ highlighted comparison of the two papers graphically showed at summary

¹ (See heading, Dkt.31 at 5 “Submission of Dr. Mallon’s work to PLOS Biology without attribution”). *See also*, ¶¶ 44-46, ¶47 claiming “Dr. Mallon wrote PLOS Biology informing them of that authorship on the PLOS Biology Paper...” and ¶52: “The absence of Dr. Mallon’s name on the paper constitutes an improper publication of the paper because Dr. Mallon’s work was published without his acknowledgment or permission.”

²“Defendants Marshall and Goebel made additional changes and revisions to the paper, however the core of the paper remained Plaintiff’s work related to CN 2097. [Complaint]¶ 27 & 28.” Dkt. # 30 at 2.

judgment, the statement in Dr. Mallon's complaint was objectively false. *See* Dkt.# 48-5. Likewise, at summary judgment, untethered by Dr. Mallon's pleadings in this case, the Court, too, was able to reject the notion of near identity. Dkt. #57 at 3. Nevertheless, Dr. Mallon's insistence throughout the litigation that the papers were virtually identical would continue to bedevil Defendants and dramatically increase the cost of defending this case.

II. Dr. Mallon Spins The Court's Order As A Misconduct Inquiry.

When the Court denied the motion to dismiss, it also granted Dr. Mallon leave to file an amended complaint seeking a full retraction. That was all Dr. Mallon needed to start contacting the press, conflating copyright with academic misconduct and retraction issues. His lawyer, he says, contacted the *Boston Globe* reporter (Ex. C, 275:9-276:5) cited in this Court's Opinion (Dkt. # 57, at 7, fn. 4) and Dr. Mallon immediately tied the complaint's retraction request to his claims of misconduct, contacting the editor of a blog called "Retractionwatch.com," which describes itself as "Tracking retractions as a window into the scientific process." Shrugging off his express representation to the Court that he wasn't seeking attribution, Dr. Mallon told RetractionWatch Defendants failed to credit him because of his misconduct claims, all of which he said would be addressed by this Court:

The professors I work with **published my work without citing me as an author**. There [sic] reasons for doing so are perhaps not stated explicitly in the complaint **but I have become an impediment to publishing data that was unsound due to scientific misconduct**.

* * *

We sued the two professors in Massachusetts District Court under copyright law for taking **my work** and publishing it without my permission. We briefed the issue on a Motion to Dismiss and the Court heard oral argument on the motion. Today the Court ruled, denying the professors motion to dismiss and finding that Dr. Mallon's claims can proceed.

Ex. D (bold added; underline in original).

RetractionWatch, in turn, ran a story (Ex. E) stating, among other things, "The lawsuit

does not go into many details, but does say Mallon ‘detected fabrication and falsification of data’ by Cao, and ‘Dr. Marshall excluded Dr. Mallon from submission of the PLOS Biology Paper so he would not insist on proper standards of integrity of the data.’” A few days later, the story was picked up by *Science* (Ex. F), which repeated the misconduct allegations and pointed out that Dr. Mallon was seeking a “full retraction.” Just a few weeks ago, *The Scientist* cited the RetractionWatch article and repeated the same allegations against Dr. Marshall. (Ex.G)

RetractionWatch’s editor, Ivan Oransky, also appears to have posted a link to his story under the abstract for the PLOS Biology Paper on PubMed, stating, “This paper has become the focus of a lawsuit” along with a link to the RetractionWatch story and full headline. (Ex. H) (Copyright isn’t mentioned.) PubMed is the free search engine for the United States National Library of Medicine, the largest medical library in the world. Under federal regulations, *all* articles reflecting research funded by NIH grants *must* be posted on PubMed. Ex. B, ¶ 4. In short, PubMed is where the scientific community accesses scholarly articles. *Id.* Anyone retrieving the PLOS Biology Paper could easily be misled into believing that Dr. Mallon’s irrelevant misconduct charges were the proper subject of this copyright lawsuit.

Thus, by the end of April 2015, even though Dr. Mallon had struck out with his peers—the people actually qualified to determine the scientific validity of his academic misconduct claims—this lawsuit gave him a much larger forum to peddle false associations about copyright, scientific misconduct and court-ordered retractions.³ Even more would come later.

III. The Stakes Change Dramatically With The Retraction Request.

Dr. Mallon’s baseless request for a “full retraction” was a game-changer. Not only could

³ This Court already has referenced Dr. Mallon’s email communications with Carolyn Johnson, a reporter from the *Boston Globe*. Attached as Ex. I. are emails to both Ms. Johnson and Mr. Oransky in which Dr. Mallon emphasizes that the Court was entertaining his retraction request.

he publicly bandy about the fact that this Court was considering a retraction, the Defendants had to face the very real possibility of that happening if they didn't defend the lawsuit. Quite frankly, had Dr. Mallon simply sought a declaration of joint authorship, the case likely could have been resolved long ago. Naming Dr. Mallon a joint owner would simply mean he could use the paper's text and illustrations. While Defendants might not have liked that result, the denial of the motion to dismiss was a prime opportunity to swallow their pride, cut their losses and move on with their lives. Even if Dr. Mallon wouldn't settle, if all they faced was a declaration of joint ownership, they could have defaulted without significant consequence.

Dr. Mallon's unwavering insistence that he was entitled to a retraction, however, rendered a quick resolution impossible. Retraction of an academic paper can have devastating effects on a scholar's career and jeopardize pending and potential grant funding, the lifeblood of scientific researchers. Ex. B, ¶ 4. Indeed, Dr. Marshall recently was awarded a \$350,000 million grant from the National Institute of Health, which was based solely on the research disclosed in the PLOS Biology Paper. He a received a \$2.4 million grant relating to some of the PLOS Biology Paper discoveries. Ex. B, ¶ 4. A Court-ordered retraction would have sounded the death-knell for that and future related grants, especially if Defendants had defaulted. Recall, the amended complaint didn't just seek retraction; it was filled with baseless attacks on the integrity of the underlying research. Even though these irrelevancies never should have ended up in a copyright complaint, a default would have the effect of accepting their truth.

That left Defendants with a very hard choice: fight or settle. Settlement was out of the question, though, because Dr. Mallon made it clear there'd be no settlement without a retraction. *See*, Settlement Demand, ExJ; Ex. A¶ 7. With the amended complaint, Defendants faced a very expensive fight. Dr. Mallon did what he could to ramp up the costs.

IV. Dr. Mallon's Actions During Discovery Further Evidence His True Motives.

If Dr. Mallon's motives weren't already apparent, his conduct during discovery made clear this case was never about copyright and all about Dr. Mallon's personal grievances.

A. Dr. Mallon's Discovery Had Little To Do With the Case.

The bulk of Dr. Mallon's written discovery requests bore no legitimate relationship to joint authorship issues and, instead, reflected a wish list of material relating to his grudges. For instance, he included an interrogatory asking what Defendants did to "...investigate any acts of academic, civil or criminal misconduct by Cao Cong" (Int. No. 6). He also asked that Defendants describe all efforts to "...investigate any acts of academic misconduct related to the investigation of CN2097 and related compounds..." (Int. No. 5). In addition, he tried to use document requests to get all documents concerning "investigations of academic or criminal misconduct regarding Dr. Marshall or Cao Cong" and documents concerning "...any government, police, or law enforcement investigation into Dr. Marshall and Cao Cong." None of this requested material is remotely related to joint authorship and, as reflected in Exs. K and L Defendants objected and refused to produce it.⁴

Dr. Mallon also tried to get his hands on every one of Drs. Marshall's, Goebel's and Cao's lab books, no matter what subject (Req. No. 7), and every scrap of paper or email relating to CN 2097, the drug at issue in the PLOS Biology Paper. (Reg. No. 2) Defendants objected to the overbroad requests, but still produced documents relating to either of the papers, including the underlying experimental materials, manuscripts and emails discussing any of the work at all. Defendants produced about 20,000 pages of documents, the vast majority of which were

⁴ To make the litigation even more burdensome and expensive, Dr. Mallon asked Defendants to identify the author of every single sentence in the PLOS Biology Paper (Ex. K, , Int. 2) which, of course was nonsense. The issue here was Dr. Mallon's new contributions to the paper.

responsive to Dr. Mallon's requests but unrelated to the copyright issues in this lawsuit.

B. Dr. Mallon Uses Discovery For Everything But This Lawsuit.

The access Dr. Mallon obtained under the pretext of discovery in this lawsuit helped him renew his academic misconduct claim with *PLOS Biology* and Brown and assert new claims of misconduct at Wayne State University (Dr. Goebel's institution), Chapman University (against non-parties Parang and Tiwari) and Soochow University (non-party Dr. Cao's institution). With each of his complaints, he appended his amended complaint to *PLOS Biology* and attached a little under 200 pages of documents obtained in discovery. (Ex. M) His cover letter to *PLOS Biology* emphasized this Court's involvement: "I continue to pursue MARSHALL and GOEBEL in Federal court for their abuse of my copyright and authorship of this work."

Dr. Mallon's email to Chapman was typical of his other communications:

I was the first author of this research project and **was improperly removed by my fellow authors** because I stated that I would not allow a paper containing scientific misconduct to be published. After I was removed in this manner and I discovered that my paper had been published with **fabricated results I sued in Federal District court in Massachusetts under Copyright law. During pre-trial discovery we subpoenaed documents from Dr. Goebel and Dr. Marshall and deposed them under oath. This revealed extensive evidence of scientific misconduct.** Please find attached a more detailed letter that I have sent to PLOS Biology that independently evidences all of my allegations⁵

Ex. N (emphasis added); *see also*, Exs. N-Q.

Dr. Mallon's slander notwithstanding, Chapman University investigated and found no evidence of scientific misconduct. (Ex.R) *PLOS Biology* again referred the investigation to Brown which consolidated its investigation with Wayne State.). Ex. B, ¶ 4. A few weeks ago, the head of Brown's Inquiry Committee reported to Dr. Marshall its recommendation ". . . . that there be a finding of **no research misconduct** with respect to all of the allegations that the

⁵ Interestingly, the same Dr. Mallon who testified under oath in the fall of 2015 that he didn't want his name on the PLOS Biology Paper was complaining about its omission once again.

complainant, Dr. Mallon, raised about the 2013 PLOS Biology Paper.” Ex. S (emphasis added).

To be absolutely clear, Defendants are not suggesting that Dr. Mallon may not pursue legitimate claims about academic misconduct through legitimate means. What is improper, however, is using this lawsuit to gain access to documents for purposes wholly unrelated to the claims before the Court. To put matters in context, Dr. Mallon’s counsel did not use a single document in Dr. Goebel’s deposition and only four with Dr. Marshall. In Dr. Mallon’s summary judgment response, he used only two documents (about 40 pages) (Dkt. #53-7). Certainly, counsel are free to determine what evidence they will or won’t use in any case, but here, minimal use by counsel combined with flagrant use by Dr. Mallon outside this litigation is compelling evidence that this case was never about a good faith claim for copyright joint-authorship.

C. Dr. Mallon’s Refusal to Acknowledge Basic Facts Causes Costs to Soar.

The only true joint authorship issues were: 1) whether the two papers were different; 2) whether Dr. Mallon contributed to the second paper; and 3) whether the parties intended those contributions to be part of an indivisible whole. They could have been resolved quickly with minimum discovery if Dr. Mallon acknowledged the obvious fact that the PLOS Biology Paper had many different words and pictures than the Neuron Paper and that people other than Dr. Mallon created those words and pictures. If that weren’t already abundantly clear to Dr. Mallon, it should have been obvious after Defendants spelled it out in their counterclaim.

The narrative in and attachments to the counterclaim reflected exactly what this Court found in its Opinion: “. . . [I]n response to reviewer comments, new experiments were conducted, new data and figures were generated, and new text was drafted and included with the resubmissions.” (*Compare, e.g.*, Dkt. No. 43, ¶¶ 39,40, 48, 50, 51 and 58). Even though he never disputed these facts with evidence at summary judgment, until then Dr. Mallon insisted he wrote

almost all of the PLOS Biology Paper, even though the work it discussed occurred long after he left Brown and after all of the authors decided they didn't want to work with him.⁶ As a result, Defendants' counsel spent hours trying to figure out just what Dr. Mallon claimed he added to the PLOS Biology Paper. Dr. Mallon's failure of candor even when faced with objective facts rendered efforts to pin down his claimed contributions very difficult. And very expensive.

For example, at his deposition, Dr. Mallon insisted the PLOS Biology Paper consisted of only "minor alterations" (Ex. C, 73:18-74:0). Defendants' counsel pointed Dr. Mallon to several paragraphs of the PLOS Biology Paper and asked him to find them in the Neuron Paper. Of course he couldn't, but confronted with this reality, more than once, Dr. Mallon simply stared at the two papers for more than ten minutes, flipping through the pages, trying in vain to justify his false claims. (See, generally, Ex. C, 73:2- 92:6; specifically, 91:10-19; 83:14-19).

Even more bizarre, Dr. Mallon actually testified that in the summer of 2011—before the Neuron Paper was submitted and long before work on the preparation of the PLOS Biology Paper began, let alone had been completed—he already was drafting portions of the PLOS Biology Paper. *See, e.g.* Ex. C 92:8-93:11; 98: 2-103:2. When asked if a particular new figure in the PLOS Biology Paper appeared in the Neuron Paper, Dr. Mallon responded, "It would have appeared in the Neuron Paper, yes." Ex. C 101:9-10. This followed:

Q. Then can you show us where in the Neuron paper it exists?

A. I should clarify. It would have appeared in the revised Neuron paper, had I not decided to publish it in PLOS Biology instead.

Ex. C, 101:11-15. As the attached testimony reflects, Dr. Mallon falsely testified under oath that, in the summer of 2011, he was preparing figures and drafting text regarding experiments and analysis that hadn't even occurred. His habit of manufacturing a new story when confronted

⁶ For example, Dr. Mallon denied that he ". . . did not write any new material for the submission of a manuscript of a paper to *PLOS Biology*." Dkt. No. 44, ¶ 36.)

with facts caused litigation costs to rise exponentially as Defendants' counsel tried to prepare to prove a negative by locating written materials they anticipated Dr. Mallon would claim at trial constituted his copyrightable expression.

V. Additional Post-Discovery Attempts To Smear Defendants And Others.

During discovery, Dr. Mallon objected to producing his communications with third parties about this lawsuit. (Ex. T) After some back and forth he ultimately produced them, including his emails with *Boston Globe* reporter Carolyn Johnson, which this Court referenced in its Opinion. (Dkt. 57, fn. 4.) Apparently, when Dr. Mallon learned that discovery rules would subject his tirades to scrutiny, he stopped his communications until after discovery closed. He not only used the discovery to re-up his charges with the academic institutions discussed above, he again started suggesting to third parties this Court's involvement in his "fraud" investigation. For example, a colleague forwarded Dr. Marshall an April 2016 email he received from Dr. Mallon, boasting about so-called fraud and cover ups in proceedings before this Court:

...I detected scientific fraud by Drs. John Marshall, Dennis Goebel and Cong Cao. During Federal court proceedings we have found substantiating evidence that suggested they were engaged in fraud and covering it up. This case has triggered a lot of scrutiny on their papers and all that have been reviewed have discovered evidence of scientific misconduct.

Ex. U.

In January 2016, Dr. Marshall was contacted by another RetractionWatch reporter who wanted to question him about emails he'd produced in discovery that Dr. Mallon had sent to her:

I am a reporter at Retraction Watch, working on a post about Andrew Mallon's suit against you. **I understand that they obtained some email from you in the discovery period, and I'd like to talk to you about those.**

(Ex. V) (Emphasis added.) Dr. Marshall ignored the request to respond.

Around the same time, a flurry of comments also appeared on PubPeer, a blog created, ostensibly, so scientists can post anonymous comments about published scholarly articles

without fear of reprisal. Ex. B, ¶ 10 According to PubPeer’s creators, these posts are crucial to evaluating scholarship for sources of scientific funding and promotion:

Referees and members of committees for **recruitment, promotion or funding** can now give careful consideration to the scientific community’s opinions about the quality and reliability of applicants’ research. . . . **As we all know, it only takes the slightest friction in a grant committee for your application not to be funded.**...[P]latforms like PubPeer can help ensure that cheating, once discovered, has lasting consequences, tilting the balance of benefits towards honest, high-quality research.

<http://blog.pubpeer.com/?p=164> (emphasis added).

The PubPeer anonymous posts mimic Dr. Mallon’s earlier comments and complaints. For example, on March 23, 2016 a PubPeer comment appeared in connection with the PLOS Biology Paper stating Drs. Marshall and Goebel “...are Defendants in a lawsuit brought by a pharmaceutical researcher that was reported by Retraction Watch...” and repeated language about misconduct from the RetractionWatch story. (Ex. W) Another PubPeer post appeared a month later in connection with an unrelated article stating outright that Defendants were being *prosecuted* before this Court because of Dr. Mallon’s fraud claims:

Cong Cao and John Marshall were accused of committing scientific fraud by a Pharmaceutical Industry Scientist and this was covered by Retraction Watch. **A Federal court prosecution against John Marshall (Brown University) and Dennis Goebel (Wayne State) that alleges fraud and scientific misconduct is ongoing...**⁷

Ex. W (emphasis added). Later, on May 4, 2016, a similar post appeared in connection with a new article published by Defendants. (Ex.W) Just last week, another post appeared in the discussion of the PLOS Biology Paper, linking to the *Scientist* article, which references RetractionWatch’s discussion of this lawsuit and its misconduct allegations against Dr. Marshall. (Ex. W). If what the creators of PubPeer say is correct, scholars and others involved in “recruitment, promotion or funding” all have been misled into believing the Court was

⁷ Note the consistent use of uppercase “Federal” and lower case “court” in Dr. Mallon’s emails.

considering Dr. Mallon's false fraud charges against Defendants. At this point, whether Dr. Mallon or somebody else wrote the posts hardly matters. If Dr. Mallon wasn't behind them, it's proof positive that this meritless lawsuit and Dr. Mallon's tales about its purpose and intent have so poisoned the scientific community that others are now republishing his misinformation.⁸

VI. Dr. Mallon Continues The Pattern During Summary Judgment.

The Court already has provided the conclusions it formed based on the summary judgment record. A few points beg reemphasizing:

1. In direct contravention to Local Rule 56.1, Dr. Mallon's response to Defendants' statement of uncontested material facts at least 22 times failed to provide "references to affidavits, depositions and other documentation." As reflected on Ex. Dkt. # 55-1, when Dr. Mallon did bother to answer, on at least 40 occasions he did so based on hearsay and at least 20 other times, the cited evidence didn't support his contentions. While it might have made responding cheap and easy for Dr. Mallon, these slovenly responses exponentially added to Defendants' costs as they were forced time and again to "fact check" Dr. Mallon.
2. Apparently unhampered by legal advice or guidance, Dr. Mallon filed a rambling 30-page declaration filled with inadmissible assertions and defamatory statements directly at odds with objective facts in this case, but clearly in line with his intent.
3. In their reply, Defendants spent time and money responding to Dr. Mallon's hearsay-laden defense that he was, in fact, a Brown faculty member, despite objective evidence—a Faculty Handbook; a letter from an associate dean—stating otherwise. During the summary judgment hearing (not unlike the response to the motion to dismiss), Dr. Mallon's counsel conceded he wasn't a faculty member.
4. After repeatedly maintaining in pleadings and throughout discovery that he was an author of new, original material in the PLOS Biology Paper, Dr. Mallon scared up only a handful of sentences which, he claimed, he had independently drafted. As reflected in Dkt. No 55-4, several of his representations were objectively false.

Responding to briefs takes time; responding to briefs riddled with falsehoods takes a lot longer. While Dr. Mallon's choice to ignore his summary judgment obligations might have been cheaper for him, tracking down false and/or inadmissible evidence shifted significant expense to

⁸ If there's a question about the postings, the Court can direct an answer from Dr. Mallon.

Defendants. Indeed, it took Defendants' counsel as long to prepare the reply as the opening papers, even though they included the time-consuming Rule 56.1 Statement. (Ex. X)

The slapdash approach to this litigation and casual disregard for candor squares with Dr. Mallon's true motives here. As long as he could use this lawsuit to access private documents and suggest to the press and scientific community that Defendants committed scientific fraud serious enough to get a federal court involved, his work was done. If he ran up Defendants' legal fees and forced a default so he could snag a court-ordered retraction—even if unwarranted by existing law—all the better. Being named a co-owner of the copyright in a paper he says is a fraud would simply be a by-product. Viewed through this prism, it makes perfect sense that Dr. Mallon wouldn't bother spending the time and money need to comply with Local Court Rules, properly conducting and using discovery, or developing theories consistent with long-standing copyright law. That wasn't the point of the lawsuit.

ARGUMENT

Section 505 of the Copyright Act gives courts the discretion to award “full costs” and to “award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505. As the Supreme Court recently explained in *Kirtsaeng*, Section 505 exists to promote the purposes of copyright law: “[E]nriching the general public through access to creative works” and “[E]nhancing the probability that both creators and users....will enjoy the substantive rights the statute provides.” 136 S. Ct. at 1986-87 (citations omitted). Dr. Mallon's baseless retraction-seeking lawsuit is wholly antithetical to those goals.

In exercising its discretion, in addition to giving substantial weight to the objective unreasonableness of losing parties' positions, courts “must also give due consideration to all other circumstances relevant to granting fees,” so that even if a losing party's position was

reasonable (not the case here), a court still may award fees. *Id.* at 1983. The several “nonexclusive factors” to consider include “frivolousness, motivation...and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* at 1985. Here, given the misconduct detailed above, any single one of the factors would be sufficient to award fees to Defendants.

I. The Objective Unreasonableness Of Dr. Mallon’s Position Is Apparent.

The mere fact that this Court felt comfortable granting summary judgment on an issue like intent is a strong indication of just how weak and unreasonable Dr. Mallon’s case was to begin with. Indeed, the inherent inconsistency in claiming that he intended to be a co-author of a paper he claimed was fraudulent is so obvious that a third party like the Boston Globe reporter to whom he tried to peddle his story called him on it. It’s not just that his basic position on intent doesn’t withstand scrutiny; it’s clear he never had a cogent legal or factual theory. First, he claimed he wanted (and was entitled to get) his name on the paper. Then, he said the first complaint was wrong and he never wanted his name on the paper. Later he again complained his name had been left off the paper. In stark contrast to the truth, he claimed in pleadings relied upon by this Court and in his sworn deposition that the Neuron and PLOS Biology Papers were virtually identical and that he wrote new parts of the PLOS Biology Paper before the experiments and data discussed even existed.⁹ Plainly, Dr. Mallon’s goal here was to air his gripes about his former colleagues in a federal court for fully extra-judicial purposes, irrespective of the relevance of his claims to the law.

Perhaps the most serious misapplication of black-letter law, though, was Dr. Mallon’s

⁹ It appears that initially filing this lawsuit, no serious consideration was given to just what copyright law governs. Beyond the baseless attribution issue, the pleadings made repeated references to stealing his work and experiments, even though such facts (as opposed to the description of them) are expressly not within the purview of copyright law. 17 U.S.C. § 102(b).

demand for a retraction. On at least three occasions—April 2015 (Dkt. 27 at 7-8); April 2015 (Dkt. 33 at 6) and December 2015 (Dkt. 49 at 20)—Defendants spelled out plainly to Dr. Mallon why joint authors have no right of retraction. Leaving aside Dr. Mallon’s independent obligation to assert only legal theories well-grounded in law, even after the law was stuck under his nose, he pretended it didn’t exist and never came up with a shred of authority suggesting otherwise.¹⁰ Instead, as explained above and in their summary judgment papers, Defendants were held hostage to a very expensive lawsuit, antithetical to the purpose of copyright law, all because Dr. Mallon stubbornly refused to conform to black-letter law.

All of this mitigates strongly in favor of an award of fees. As the Supreme Court noted: “[A] person defending against a patently meritless copyright claim has every incentive to keep fighting, no matter that attorney’s fees in a protracted suite might be as or more costly than a settlement.” *Id.* at 1986. Dr. Mallon’s claims were baseless from the start and the stakes for Defendants were immeasurable. No matter how many legal defects or factual irregularities Defendants pointed out, Dr. Mallon pressed on, running up the cost of defense. As the Supreme Court has emphasized, Congress put Section 505 to protect parties from such baseless attacks. Defendants shouldn’t be forced to bear the burden of Dr. Mallon’s lack of candor or respect for the law. On this basis alone, the Court should award the fees.

II. Dr. Mallon’s Bad Faith Is Clear.

Given Dr. Mallon’s inconsistent and incoherent legal positions and lack of candor, one thing about this lawsuit is clear: Dr. Mallon saw it as a vehicle for smearing Dr. Marshall, Dr.

¹⁰ Dr. Mallon’s song and dance about Creative Commons licenses and lost opportunities doesn’t withstand scrutiny. He was free to write what he liked using whatever data he liked. As this Court found: “Copyright law exists to encourage expression, not extinguish it. It is improper to suggest that the rights of the listed authors on the PLOS Biology Paper be abridged, and they not be allowed to publish their own expression, simply because one of the original parties in an antecedent joint work ceased to agree with them.” Dkt. 55 at 9.

Goebel and anybody else with whom he had a beef. To briefly summarize, Dr. Mallon: a) filled his complaints with false and irrelevant statements of academic misconduct; b) ran to the press and third parties suggesting this Court was hearing those misconduct charges and might order a retraction based on them; c) filed a summary judgment affidavit chock full of irrelevant and defamatory material; d) repeatedly made objectively false statements in pleadings and sworn deposition testimony; e) tried to use discovery to uncover what he thought was damaging evidence about Defendants and third parties wholly unrelated to this lawsuit; f) used what discovery he could get to (unsuccessfully) pursue his new academic misconduct claims; and g) took positions and engaged in tactics designed to add to the cost of defense.

If this Court had any lingering doubt about its conclusion that Dr. Mallon had used copyright as a “litigation device,” the intent and conduct outlined above should put it to rest. *Kirtsaeng* makes clear this kind of misconduct alone merits a fee award. *Id.* at 1989-99. *See also, Johnson, v. Storix, Inc.* No. 3:14-cv-1873, 2016 WL 4399317 at *3 (S.D. Cal. Aug. 7, 2016) (Even if the plaintiff’s claims were reasonable, emails about the litigation sent by plaintiff to third parties evidenced improper motivation justifying award of attorney fees to prevailing defendant.)

III. A Fee Award Would Deter Further Bad Acts By Dr. Mallon And Others.

Recall that when Dr. Mallon didn’t like the results of Brown’s first misconduct investigation, he went out, filed this lawsuit and used discovery to file more claims at more universities. Dr. Mallon’s repeated (and unsuccessful) academic misconduct charges, coupled with his repeated misuse and misrepresentation of this litigation to the press and public for his own purposes, underscores the need not only to deter this type of behavior generally, but to deter repeat performances from Dr. Mallon specifically. Indeed, if Dr. Mallon finds a lawyer willing

to bypass scrutiny of the facts and law, it's no stretch to conclude that he's likely to take another shot at similar lawsuits against Defendants or others. An award of the significant fees he forced Defendants to incur could dampen his enthusiasm for misusing the federal courts to engage in this kind of game playing.

Likewise, this Court should send a clear message both in and outside the Academy that, simply because a dispute arises around a publication, slapping the word "copyright" on a lawsuit doesn't make it a legitimate claim under the law. Perhaps more importantly, a potential court-ordered retraction of core First Amendment speech (here, scholarly work) has enormous ramifications and shouldn't be treated lightly by any plaintiff, especially where, as here, no legal basis for the relief exists. As this case vividly demonstrates, the mere threat of retraction put two academics—real people with real lives—in the untenable position of risking their careers or facing insurmountable debt. But for Defendants' willingness to undertake an enormous financial burden (and, quite frankly, their counsel's willingness to write off fees to lessen the burden) the outcome here could have been far more dire. In short, two or more careers could have been destroyed and important scientific discoveries could have been unjustly tarnished or suppressed entirely. Dr. Mallon's unabashed abuse of the system and this Court should not be repeated and this Court should award Defendants their fees.

IV. Defendants Should Be Awarded At Least \$291,375.00 In Fees And Costs.

As discussed above, the possibility of retraction posed by this lawsuit not only threatened academic reputations and careers, it had dire consequences. Despite how cavalierly Dr. Mallon treated his obligations, Defendants took this case very seriously. As a result, the value of the total attorney fees time for this lawsuit ran over \$360,000. Because counsel greatly discounted

their fees, the actual fees and costs charged to Defendants were reduced to \$286,491.76.¹¹ Moreover, in preparing this motion, Defendants further eliminated fees arising out of this lawsuit, but not directly involved in defending it, resulting in a further reduction of fees to \$281,491.76. The addition of costs brings the total minimum amount sought to \$291,375.00. *See, generally*, Declaration of Kevin Tottis, Ex. A, ¶¶ 10-12; Ex. X.

In determining the reasonableness of fees, courts generally rely on the “lodestar” method, “the conventional framework that courts use in fashioning fee awards....” *Spooner v. Een, Inc.*, 664 F.3d 62, 67 (1st Cir. 2011). This method requires the Court to “ascertain the number of hours productively expended and multiple that time by reasonable hourly rates.” *Id.* at 68. Supporting documentation can include contemporaneous time and billing records and “information establishing the usual and customary rates in the marketplace for comparably credentialed counsel.” *Id.* The Court may adjust the rate up or down considering other factors, including a “significant gap between the relief requested and the result obtained.” *Id.* In cases like copyright claims, though, the law “does not demand strict proportionality between fees and damages,” especially, where, like here, non-monetary relief “may be worth considerably more than the damages recovered.” *Id.* at 69.

Here, as set forth in the Declaration of Kevin Tottis (Ex.A), counsel’s rates are reasonable in the marketplace, especially in light of the complexity of the matters involved here. Likewise, the overall time employed by Defendants’ counsel was reasonable. As discussed above, Dr. Mallon’s repeated misstatements of fact coupled with his failure to comply with basic summary judgment requirements greatly caused fees to increase. Nevertheless, the costs and

¹¹ These fees include time spent preparing this motion, marshalling evidence reflecting Dr. Mallon’s extra-judicial conduct as well as reviewing all of the work done in the case. Defendants reduced those fees to just over \$25,000.00.

fees are at or below those incurred for similar litigation.

CONCLUSION

For the reasons set forth above, Defendants request the Court award at least \$291,375.00 in fees and costs.

Dated: October 26, 2016

Respectfully submitted,

JOHN MARSHALL and DENNIS J. GOEBEL

/s/ Kevin Tottis

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CERTIFICATE OF SERVICE

I, Kevin Tottis, hereby certify that on October 26, 2016, a true copy of the attached **Defendants' Memorandum in Support of Motion for Attorneys' Fees** was filed through the ECF system and will be sent electronically to all counsel of record, as identified on the Notice of Electronic Filing, or if not identified on the Notice of Electronic Filing through other means.

/s/ Kevin Tottis (Admitted *pro hac vice*)