

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANNE PEARSE-HOCKER,)	
)	
Plaintiff,)	
)	
v.)	Case No. 10-269C
)	Judge Edward J. Damich
UNITED STATES)	
)	
Defendant.)	
)	

JOINT PRELIMINARY STATUS REPORT

Pursuant to Appendix A of the Rules of the Court of Federal Claims (RCFC) and the Court’s September 23, 2010, Special Procedures Order (SPO), Plaintiff Anne Pearse-Hocker and Defendant, the United States (the government), hereby submit this Joint Preliminary Status Report (JPSR). Where Plaintiff’s and Defendant’s positions differ, the respective positions are set forth *seriatim* below.

Several conferences between counsel were held, and the Parties discussed the below-listed topics (as required by Appendix A or the Court’s SPO) and arrived at the following positions.

I. Paragraph 4 (Appendix A) Topics

The following topics are provided in paragraph 4 of Appendix A and, in some instances, further supplemented by the SPO.

- (a) ***Does the court have jurisdiction over the action? Provide the jurisdictional statute(s) upon which plaintiff relies, and plaintiff’s detailed justification for invoking the court’s jurisdiction.***

The Parties agree that this Court has jurisdiction over Plaintiff’s claims of copyright infringement (Count I of the amended complaint) under 28 U.S.C. § 1498(b).

The Parties disagree as to whether this Court has jurisdiction over Plaintiff's claims for breach of contract (Count II of the amended complaint) under 28 U.S.C. § 1491(a). Under this provision of the Tucker Act, this Court is granted jurisdiction over certain claims for breach of contract based on an "express or implied contract with the United States." In this case, Plaintiff alleges that the Deed of Gift [Dkt. 1 at Ex. B], by which Plaintiff's photographs were transferred to the Smithsonian Institution ("Smithsonian"), is the contract upon which the Court's jurisdiction can be based.

Apart from jurisdiction, the Parties also disagree as to whether this Court has jurisdiction to order a return of the photographs as an appropriate remedy. Specifically, Plaintiff's amended complaint seeks to compel "the Smithsonian to immediately return Pearse's entire collection of photographs . . . and to permanently delete all electronic copies of Pearse's photographs in the Smithsonian's possession, custody, or control." [Dkt. 17 at 11 ¶ B.]

The Parties' positions regarding the disputed jurisdictional issues are briefly discussed below.

Plaintiff's Position

Plaintiff contends that this Court properly has jurisdiction over Plaintiff's claim for breach of contract pursuant to 28 U.S.C. § 1491(a). While Plaintiff will reserve its full argument in support of its position for any summary judgment motion on this point, Plaintiff strongly disagrees with the government's contention that the Deed of Gift does not constitute a contract because of a purported lack of consideration. In brief, the Smithsonian clearly provided consideration to Plaintiff in exchange for the photographs in question, as the Smithsonian accepted the photographs subject to the explicit condition that "[r]equests by people or entities outside the Smithsonian to reproduce or publish the photographs shall be directed to the donor."

The government's assertion that these conditions "pertain only to the transfer of the copyright, and not to the transfer of the photographs themselves," strike Plaintiff as inapposite, as the copyright itself was not transferred, but retained by Plaintiff, and the condition was inextricably intertwined with the transfer of the photographs themselves. The evidence will clearly show that, absent such a condition on the use of the photographs, Plaintiff would never have executed the Deed of Gift or transferred the photographs. In summary, it is Plaintiff's position that the government's contention that there is a lack of consideration amounts to nothing more than impermissible over-parsing of the Deed of Gift.

Defendant's Position

The government contends that this Court does not have jurisdiction over (1) Plaintiff's breach of contract claim under the Tucker Act or (2) her claim for return of the photograph collection (and deletion of all of the Smithsonian's electronic copies). For a breach of contract claim, this Court only has jurisdiction where the alleged contract mandates compensation by the federal government. *United States v. Navajo Nation*, 129 S.Ct. 1547, 1551-52 (2009). While a contract need not contain specific language indicating that money damages are available, the contract's language must support a "fair inference" that such damages are available. *Holmes v. United States*, 92 Fed. Cl. 311, 318 (2010). This Court has previously ruled that money damages are principally available when the government "engages in the purchase and sale of goods, lands, and services," which are akin to the activities of private entities. *Kania v. United States*, 227 Ct. Cl. 458, 464 (1981). The alleged contract in this case is not a goods or services contract and, therefore, not money mandating and not subject to Tucker Act jurisdiction; it is a Deed of Gift that does not typically imply compensation by the government by its nature.

In addition, the government contends that no contract existed between the Parties. *See*

San Carlos Irr. and Drainage Dist. v. United States, 877 F.2d 957, 959 (Fed. Cir. 1989) (finding that plaintiff has burden to establish that a valid contract existed). In particular, there was no consideration for the donation of the photograph collection in the Deed of Gift. The Deed, in the first sentence, states that “I [Plaintiff] *hereby donate* the materials described below” to the Smithsonian “to become its *permanent property . . .*” [Dkt. 1 at Ex. B.] The document later explains that the Smithsonian was granted an “irrevocable” license to use the photographs and that any third party requests to use the collection be directed to Plaintiff, who retains copyright ownership. But these provisions pertain only to the transfer of the copyright, and thus the transfer to the photographs themselves amounts to simply a gift, for which the Smithsonian provided no consideration.

Moreover, even if a valid contract claim existed, the return of the photograph collection amounts to the remedy of rescission, which is not available under the facts plead. Specifically, rescission is only available in this Court when there are allegations of mutual mistake, fraud, or illegality in the formation of the contract. *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1345 (Fed. Cir. 2000). Here, the Plaintiff is merely alleging that the Deed of Gift was materially breached. [Dkt. 17 at 10 ¶ 40.] Likewise, any right to terminate the contract does not provide jurisdiction for a claim of returning the collection. Apart from constituting relief that amounts to rescission, termination should not mandate such a result where the purported contract (the Deed of Gift) provides that the license to use is “irrevocable” and that the collection will be the “permanent property” of the government.

(b) *Should the case be consolidated with any other case and the reasons therefor?*

No. Neither party knows of any other case that should be consolidated with the present case.

(c) Should trial of liability and damages be bifurcated and, if so, why?

The Parties agree that efficiency would best be served by not bifurcating the trial of liability and damages.

(d) Should further proceedings in this case be deferred pending consideration of another case before this Court or any other tribunal and the reasons therefor? State whether there is any basis for transferring or remanding the case to another tribunal, and whether the parties are aware of any related cases in this or any other tribunal. See RCFC 40.2.

No. Further proceedings in this case should not be deferred pending consideration of any other case. A related case brought before the U.S. District Court for the Eastern District of Virginia, *Anne Pearse-Hocker v. Firelight Media, Inc.*, Case No. 1:10-cv-458, has been resolved and is no longer pending.

(e) In cases other than tax refund actions, will a remand or suspension be sought and the reasons therefor and the proposed duration?

No. At present, the Parties do not foresee any reason for seeking a remand or suspension of this matter.

(f) Will additional parties be joined and, if so, a statement describing such parties, their relationship to the case, and the efforts to effect joinder and the schedule proposed to effect joinder?

The Parties do not anticipate that any additional parties will be joined in this action. While a Rule 14 notice was served on Firelight Media, Inc., Firelight has indicated that it does not wish to join this action. [See Dkt. 22 at ¶ 5.]

(g) Does either party intend to file a motion pursuant to RCFC 12(b), 12(c) or 56 and, if so, a schedule for the intended filing?

The government intends to file a motion for partial summary judgment based on its position that this Court does not have jurisdiction over Plaintiff's claims for breach of contract and for return of the photograph collection (as well as the deletion of all electronic copies). The

government requests the following schedule for the summary judgment motion:

Summary Judgment Motion Due: December 7, 2010

Plaintiff's Opposition Due: January 7, 2010

Reply Brief Due: January 28, 2010

Plaintiff contemplates that it may file a motion for partial summary judgment on its infringement and breach of contract claims at the close of all fact discovery. Accordingly, Plaintiff believes that its motion and the government's motion would be properly filed and briefed at the same time as cross-motions following the close of all fact discovery. Plaintiff requests the following schedule for all summary judgment motions in the case:

Summary Judgment Motions Due: May 20, 2011

Oppositions Due: June 20, 2011

Reply Briefs Due: July 11, 2011

- (h) *What are the relevant factual and legal issues? Describe the material issues of fact and law that are in dispute, as well as those that are not. This statement should not be elaborate or technical, but should be sufficient, at a minimum, to explain the basis for each counsel's certification under RCFC 11 with respect to the factual allegations and legal theories upon which any claim or defense is based, and to give the court adequate opportunity to prepare for, and participate meaningfully in, the preliminary status conference (e.g. assisting the parties in focusing and narrowing issues and disputes). Mere incorporation by reference or reiteration of the answer or complaint normally will not satisfy this requirement.*

Factual Background

In December 1997, following extensive discussions between the Parties, Ms. Anne Pearse-Hocker (Hocker) and the Smithsonian executed a Deed of Gift pursuant to which Hocker turned over to the Smithsonian 2,000 photographs, including many photographs taken during the siege at Wounded Knee, South Dakota, in 1973. [Dkt. 1 at Ex. B; Dkt. 17 at 4 ¶13.] The Deed of Gift both transfers "full legal and equitable" title to the photographs to the Smithsonian and

grants an “irrevocable, non-exclusive, royalty-free” license to “use, reproduce, display, and publish, in all media, including electronic media and on-line.” [Dkt. 1 at Ex. B.] Hocker retained ownership of the copyright to the photographs. *Id.* The license to the photographs is subject to the condition that “[r]equests by people or entities outside the Smithsonian to reproduce or publish the photographs shall be directed to the donor.” *Id.* The Smithsonian paid no money in exchange for either the title to the photographs or the license to use and publish them, but explicitly accepted the photographs “under the conditions specified.” *Id.*

In February 2008, the Smithsonian approved an application by a third party, Firelight Media, Inc. (Firelight), to use three of Plaintiff’s photographs in a five-part documentary series entitled “We Shall Remain,” and charged Firelight a “permissions fee” for the use of each of the photographs. [Dkt. 1 at Ex. D.] “We Shall Remain” was broadcast in 2009 on public broadcasting stations as part of the “American Experience” series. The three photographs-at-issue were used in “Episode 5: Wounded Knee” (the Wounded Knee documentary).

After viewing broadcasts of the documentary in 2009, Hocker contacted the Smithsonian and ultimately filed this suit, alleging that she had not been contacted regarding Firelight’s use of the photographs. [Dkts. 1, 17.]

B. Plaintiff’s Legal Claims

Plaintiff contends that the Smithsonian’s actions in providing copies of the photographs to Firelight for use in the Wounded Knee documentary and charging a “permissions fee” and not obtaining authorization from Hocker amount to intentional copyright infringement.

Plaintiff also contends that these actions violate the terms of the Deed of Gift, a valid contract. Plaintiff contends that the Smithsonian has materially breached the terms of that agreement.

C. Defendant's Principal Defenses

Based on present information and belief, the government disputes several aspects of Plaintiff's claims. First, the government contends that the Smithsonian's actions do not amount to copyright infringement. For example, there is no copyright infringement because (1) only three photographs (out of over 2,000 in the collection) were shown in the PBS-broadcast documentary and (2) only for a total of approximately 30 seconds. [Dkt. 17 at 6 ¶ 21.] Also, the government contends that such limited use would amount to fair use, which is an affirmative defense. Likewise, if the Deed of Gift is deemed to be a valid contract (which is disputed by the government on jurisdictional grounds), the government contends that the Smithsonian's actions do not amount to a breach of that agreement.

D. Damages

The Parties also dispute the calculation of any potential damages in this case. Apart from the equitable relief sought, for which the government disputes jurisdiction, Plaintiff is also seeking, among other forms of relief, compensatory and/or statutory damages for its claims. Specifically, Plaintiff seeks "compensatory damages or alternatively, awarding statutory damages between \$750 and \$150,000 for infringement of each of Pearse's copyrights." [Dkt. 17 at 11 ¶ C.] Defendant disputes these valuations of any potential compensatory and/or statutory damages, and contends that the alleged copyright infringement and alleged breach of contract claims do not support the range of damages sought by Plaintiff.

- (i) ***What is the likelihood of settlement? Is alternative dispute resolution contemplated? The parties shall state whether any method of ADR, including those described in paragraph 6(d) of the Special Procedures Order, is viable. If none, they shall explain why with particularity.***

Counsel for the Parties have already held three meetings to discuss settlement and continue to be engaged in active settlement discussions. Counsel for the Parties contemplate that

there will be additional meetings prior to the next conference with the Court. At this point, should the Parties wish to proceed to some form of ADR, the Parties contemplate that the method of ADR that they would prefer would be mediation.

- (j) *Do the parties anticipate proceeding to trial? Does any party, or do the parties jointly, request expedited trial scheduling and, if so, the reasons why the case is appropriate therefor? A request for expedited trial scheduling is generally appropriate when the parties anticipate that discovery, if any, can be completed within a 90-day period, the case may be tried within 3 days, no dispositive motion is anticipated, and a bench ruling is sought. The requested place of trial shall be stated. Before such a request is made, the parties shall confer specifically on this subject.*

In accordance with paragraph 6(e) of the SPO, the Parties have not provided a specific response to this portion of the Appendix A requirements, nor to the requirements of paragraph 5. Instead, the Parties have provided the requested information as part of their responses to the paragraph 6(e) requirements, which are contained in Section III of this filing.

- (k) *Are there special issues regarding electronic case management needs?*

No.

- (l) *Is there other information of which the court should be aware at this time?*

The Parties are not aware of any other information of which the Court should be apprised.

Provide a joint representation, citing the date of the meeting, that counsel have held the early meeting of counsel as required in Appendix A ¶ 3. In addition, jointly stipulate to the date of the initial disclosures set forth in RCFC 26(a)(1) or state the grounds for any party's objection that such disclosures are not yet appropriate.

Counsel for the Parties held the early meeting of counsel that is required by Appendix A ¶ 3 on September 27, 2010. The Parties stipulate that the initial disclosures set forth in RCFC 26(a)(1) shall be exchanged by December 3, 2010.

II. Additional Paragraph 7 (Appendix A) Topic

The following topic is provided in the SPO, in supplementation of paragraph 7 of

Appendix A, which relates to the Preliminary Scheduling Conference.

Propose three alternate dates (and time of day) that are mutually agreeable to counsel for the preliminary status conference. These dates should be at least 14 days, but not more than 21 days, after the filing of the JPSR.

Counsel for the Parties are available at any time after 10:00 a.m. on November 30, 2010, December 2, 2010, and December 7, 2010.

III. Additional Information Required By Special Procedures Order

These additional topics are included in Paragraph 6(e) of the SPO, which relates to the Joint Proposed Scheduling Plan:

In lieu of the requirements of ¶4(j) and Paragraph 5 of Appendix A, the parties shall set forth a proposed scheduling plan with exact dates where a date is required. The parties' joint proposed scheduling plan shall include:

- (i) The requested place of trial (and of hearings in general); the anticipated duration of trial; and the earliest date by which the case can reasonably be expected to be ready for trial;***

The Parties request that the trial and hearings in this case take place in Washington, D.C.

The Parties believe that the earliest date by which the case can reasonably be expected to be ready for trial is September 1, 2011.

- (ii) Dates for joinder of additional parties;***

The Parties do not anticipate that any additional Parties will be joined in this case.

- (iii) Whether either of the parties anticipates filing any dispositive motions. If so, the following details should be provided:***

- 1. A date by which such motion will be filed.***
- 2. The legal theory in support of such motion.***
- 3. If the motion is for summary judgment, whether either party desires that expert discovery precede the motion; if so, the grounds therefor;***

See Section I.(g), above. At this stage, neither party anticipates that expert discovery

would need to precede either of the planned summary judgment motions.

- (iv) *Whether the case should be conducted in phases. For example, it may be appropriate to delay the damages phase until after liability has been established;*

The Parties do not believe that the damages and liability phases of the case should be conducted separately. The government believes that all issues of jurisdiction raised by its summary judgment motion should be resolved prior to trial of the substantive issues. Otherwise, the Parties do not believe that any other portion of the case should be conducted in phases.

- (v) *A date by which fact discovery will be completed. Any motion to compel, after the appropriate good faith effort to resolve the dispute, should be filed on or before this date. Accordingly, counsel must plan to serve discovery requests sufficiently before this date to permit the other side to object. In addition, advise whether the case will likely involve the discovery of classified material;*

The Parties believe that fact discovery will be completed by April 29, 2010. The Parties do not believe that the case will likely involve the discovery of classified material.

- (vi) *Pursuant to RCFC 26(a)(2), the dates by which each party shall disclose its expert witnesses' identities and reports (including rebuttal reports), and the dates by which each party shall make its expert witnesses available for deposition, giving consideration to whether serial or simultaneous disclosure is appropriate in this case;*

Proponents will disclose any expert witnesses' identities and reports by May 13, 2011.

The opposing party will disclose any responsive expert witnesses' identities and reports by June 3, 2011. Proponents will disclose any rebuttal expert witnesses' reports by June 24, 2011.

- (vii) *The date by which expert discovery will be completed;*

The Parties believe that expert discovery will be completed by July 22, 2011.

- (viii) *Whether the presumptive limit of ten depositions and 25 interrogatories per party should apply in this case and, if not, the reasons for varying these limits;*

The Parties believe that the presumptive limit of ten depositions and 25 interrogatories should apply in this case.

- (ix) *Whether any physical or mental examinations of parties will be requested pursuant to RCFC 35, and, if so, by what date that request will be made and the date the examination will be completed; and*

The Parties do not anticipate that any such examinations will be requested.

- (x) *Any other matters pertinent to the completion of discovery in this case or that counsel deem appropriate for inclusion in the joint scheduling plan.*

The Parties are not presently aware of any other matters that are pertinent to the completion of discovery in the case or the joint scheduling plan that are not otherwise addressed in this status report.

Respectfully submitted,

THOMPSON HINE LLP

Dated: November 10, 2010

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