

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANNE PEARSE-HOCKER)	
)	
Plaintiff,)	
)	No. 10-269C
v.)	Judge Lynn J. Bush
)	
THE UNITED STATES,)	
)	
Defendant.)	

UNOPPOSED MOTION TO NOTICE THIRD PARTY

Pursuant to the provisions of Rule 14(b) of the Rules of Court of Federal Claims (RCFC) and 41 U.S.C. § 114(b), defendant, the United States (the government), moves this Court to issue a notice to Firelight Media, Inc. (Firelight) to appear, if it so desires, as a third party and assert whatever interest they may have in this action:

Firelight Media, Inc.
324 Convent Avenue
New York, New York 10031

Defendant has informed plaintiff of this motion, and plaintiff has indicated, through counsel, that she does not oppose it.

Statement In Support Of Motion

In this lawsuit, plaintiff, Anne Pearse-Hocker, is seeking relief against the government for breach of contract and copyright infringement under 28 U.S.C. § 1498(b) based on an alleged unauthorized use and distribution of three photographs, which are part of a copyrighted collection of plaintiff's photographs taken during the siege of Wounded Knee, South Dakota in

1973. *See* Docket No. 1 at ¶1, ¶10, ¶21, Exhibit (Ex.) A.¹ This collection was subsequently donated to the Smithsonian Institution in 1997.² *Id.* at Ex. B. The three photographs-at-issue were subsequently used in "Episode 5: Wounded Knee" (Wounded Knee documentary) of the five-part documentary mini-series "We Shall Remain," which was first broadcast in 2009 on public broadcast stations as part of the "American Experience" series. *See* Ex. 2 (available at <http://www.wgbh.org/programs/programdetail.cfm?programid=43>). By plaintiff's calculations, these three photographs were shown for a total of 30 seconds in the documentary. Docket No. 1 at ¶21.

Firelight, a independent production company that specializes in documentary films, produced the Wounded Knee documentary. *See* Ex. 3 (available at <http://firelightmedia.org/about/about-firelight-media>); Ex. 4 (available at <http://firelightmedia.org/films/wounded-knee>). During production, Firelight received permission to use the three photographs-at-issue in the film from the National Museum of American Indian (NMAI), Smithsonian Institution. Docket No. 1 at Ex. C, Ex. D. Based on these activities, Firelight clearly has an interest in the present litigation.

¹In support of this motion, the government cites frequently to the allegations of fact made in defendant's complaint, Docket No. 1, and the exhibits attached thereto. The government, however, does not agree with all allegations of fact in the complaint (including some factual allegations in the cited paragraphs that are irrelevant to the present motion). Thus, unless specifically stated otherwise in this motion, citation to the complaint does not indicate such agreement.

²The collection donated to the Smithsonian Institution included Wounded Knee photographs as well as other unrelated photographs. Nevertheless, plaintiff acknowledges that the collection of Wounded Knee photographs consists of "hundreds of photographs." Ex. 1 at ¶17. More specifically, the government believes that there over 2,000 Wounded Knee photographs in the collection.

The invoice associated with the reproduction rights request indicates that Firelight paid a total of \$150.00 (\$50 per photograph) for its rights subject to a series of conditions. *Id.* at Ex. C.

Most notably for purposes of this motion, paragraph 7 in that list of conditions reads:

Certain works of art, as well as the photographs of those works of art, may be protected by copyright[,] trademark, privacy, or publicity rights, or other interests not owned by NMAI. It is the applicant's responsibility to ascertain whether any such rights exist, and to obtain any other permission necessary necessary to reproduce and publish the image. Applicant hereby *agrees to indemnify and hold NMAI harmless from and against any and all costs, claims, liabilities, or damages incurred*, including without limitation all attorney's fees expended *as a result of any violation by applicant of any copyright, trademark, privacy or publicity right, or other interests relating to the subject matter hereof.*

Id. at Ex. C (page 2) (emphases added). Thus, this provision may require Firelight to reimburse the government for any liability resulting from the alleged unauthorized use of plaintiff's photographs.

Moreover, on May 5, 2010, the plaintiff filed suit against Firelight in federal district court, Pearse-Hocker v. Firelight Media, Inc. (E.D. Va. Case No. 1:10cv 458), further evidencing Firelight's interest in the outcome of this litigation. Similar to the present action, plaintiff's complaint alleges that Firelight has infringed plaintiff's copyrights based on its use of plaintiff's three photographs in the Wounded Knee documentary. *E.g.*, Ex. 1 At ¶1, ¶¶37-41. In fact, plaintiff concedes that it separately sued Firelight because it could not legally join the Smithsonian Institution, under 28 U.S.C. § 1498, as a defendant in that case. *Id.* at ¶34.

Based on this district court litigation and the contractual terms on which it obtained the photographs-in-question, Firelight clearly has an interest in the present litigation within the meaning of RCFC 14(b)(1), because a judgment against the government might affect Firelight as both a litigant in its district court litigation and as a potential indemnitor to the government. The

requested notice will provide early formal notice of this action and afford Firelight an opportunity to assert any interest that it might have in the subject matter of this action.

Conclusion

The issuance of the requested notice conforms to the established practice of the United States Court of Federal Claims, as exemplified by *Rockwell International Corp. v. United States*, 31 Fed. Cl. 536 (1994); *Myrtle Beach Pipeline Co. v. United States*, 6 Cl. Ct. 363 (1984); *Carrier Corp. v. United States*, 534 F.2d 250 (Ct. Cl. 1976); and *Bowser, Inc. v. United States*, 420 F.2d 1057 (Ct. Cl. 1970). Thus, for the reasons stated above, defendant respectfully requests that this motion be granted and the requested notice be issued.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JOHN FARGO
Director

Dated: June 25, 2010

s\Walter W. Brown
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