

NO. 2017-84942

Jim Olive Photography,  
d/b/a Photolive, Inc.,

Plaintiff,

v.

The University of Houston System,

Defendant.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

295TH JUDICIAL DISTRICT

**PLAINTIFF'S FIRST AMENDED PETITION**

COMES NOW Jim Olive Photography d/b/a Photolive, Inc., Plaintiff, and files this First Amended Petition complaining of Defendant The University of Houston System, and would respectfully show the Court as follows:

**DISCOVERY CONTROL PLAN**

1. Plaintiff intends to conduct discovery in this case under Level 2 of the Texas Rule of Civil Procedure 190.4.

**CLAIM FOR RELIEF**

2. Plaintiff seeks monetary relief over \$100,000 but not more than \$200,000. Tex. R. Civ. P. 47(c)(3). Plaintiff affirmatively pleads that this suit is not governed by the expedited-actions process in Tex. R. Civ. P. 169 because Plaintiff seeks monetary relief over \$100,000.

## **PARTIES**

3. Plaintiff Jim Olive Photography d/b/a Photolive, Inc. ("Plaintiff" or "Olive") is a domestic for-profit corporation organized under the laws of Texas with its principal place of business in Harris County, Texas.

4. Defendant The University of Houston System ("Defendant" or "UH") is an agency of the executive branch of the State of Texas, and has an address at 128 Ezekiel Cullen Building, 4302 University Drive, Houston, Texas 77204-6001. Defendant has answered and appeared herein.

## **JURISDICTION AND VENUE**

5. Plaintiff seeks a sum in excess of the minimum jurisdictional limits of the court.

6. Venue is proper in Harris County, Texas pursuant to Section 15.002(a)(1) of the Texas Civil Practice and Remedies Code because all or a substantial part of the events giving rise to Plaintiff's claims occurred in Harris County.

## **BACKGROUND**

7. This is a suit for recovery of damages for violation of Plaintiff's rights under Article I, Section 17 of the Texas Constitution and the Fifth Amendment to the United States Constitution's prohibition against the taking of private property without just compensation.

8. Plaintiff is a long-time, Houston-based photographer, specializing in difficult to obtain aerial and cityscape photographs.

9. In 2005, Plaintiff took a series of aerial photographs of the City of Houston at dusk. These photographs were taken at great expense and risk to Plaintiff, as they required renting a helicopter, hiring a pilot, utilizing special photography equipment, and Plaintiff being suspended from the helicopter by a harness. In other words, these were no ordinary photographs of Houston.

10. Shortly after obtaining these photographs, Plaintiff registered them with the United States Copyright Office under the name of the website on which they appeared: www.stockyard.com. The effective date of registration is November 18, 2005. Among these photographs was a photograph numbered “SKDT1082” (hereinafter “The Cityscape”). **Exhibit A.** Plaintiff owns all rights associated with the photographs, including The Cityscape.

11. On January 14, 2016, Plaintiff entered a contractual relationship with ImageRights International, an online provider of copyright enforcement services for photographers. Through this relationship, Plaintiff became aware that Defendant had been displaying The Cityscape on several webpages associated with the University of Houston and promoting the University of Houston’s C.T. Bauer College of Business—without providing any compensation to Plaintiff or otherwise obtaining the right to display The Cityscape—since as early as June 30, 2012. **Exhibit B.**

12. There is no doubt that the photograph displayed on Defendant’s website was The Cityscape. *See Exhibit C.* There is also no doubt that Defendant, without any independent verification of the rights to The Cityscape photograph, placed Plaintiff’s copyrighted image into circulation with no attribution or other protections whatsoever.

Indeed, upon information and belief, Defendant intentionally or knowingly removed identifying material from The Cityscape before uploading it onto its webpages.

13. Upon realizing that Defendant was utilizing The Cityscape to publicly promote itself, Plaintiff contacted Defendant to inform it of its unauthorized use and to demand that it immediately cease and desist this use. **Within days, Defendant removed all uses of The Cityscape from its websites.**

14. The damage, however, had already been done. In addition to utilizing Plaintiff's property on its own website for over three years, without compensating Plaintiff, Defendant's failure to attribute the photograph to Plaintiff led to a third-party—Forbes Magazine—publishing The Cityscape on forbes.com.mx from September 15, 2014 through April 3, 2017. **Exhibit D.**

## **CAUSES OF ACTION**

### **Count I**

#### **Unlawful Taking in Violation of the Texas Constitution**

15. For the reasons set forth in this petition, Defendant's publication of Plaintiff's property is unconstitutional and illegal, in that it constitutes an intentional act or acts performed by a government entity that resulted in a taking of Plaintiff's property for public use and without compensation, in violation of Article I, Section 17 of the Texas Constitution.

### **Count II**

#### **Unlawful Taking in Violation of the United States Constitution**

16. For the reasons set forth in this petition, Defendant's publication of Plaintiff's property is unconstitutional and illegal, in that it constitutes an intentional act or acts

performed by a government entity that resulted in a taking of Plaintiff's property for public use and without compensation, in violation of the Fifth Amendment to the United States Constitution. Should this Court, applying state law, find adversely to Plaintiff's claims, Plaintiff hereby reserves the right to bring his federal constitutional claims in federal court. *See Jennings v. Caddo Par. Sch. Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976).

#### **Attorney's Fees**

17. Plaintiff has been required to obtain legal counsel to prosecute this action. Plaintiff is, therefore, entitled to recover reasonable and necessary attorneys' fees for services rendered by counsel in the trial of this suit.

#### **Prayer**

WHEREFORE, Plaintiff Jim Olive Photography d/b/a Photolive, Inc., prays that Defendant University of Houston be cited to appear and answer, and that on final trial, that the Plaintiff have the following:

- (1) Judgment against the Defendant for actual damages and a sum within the jurisdictional limits of the court;
- (2) pre-judgment and post-judgment interest as allowed by law;
- (3) cost of suit; and
- (4) such other and further relief, both general and special, at equity and at law, to which Plaintiff may be justly entitled.

Respectfully submitted,

BECK REDDEN LLP

By: /s/ Joe W. Redden Jr.

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**ATTORNEYS FOR PLAINTIFF  
JIM OLIVE PHOTOGRAPHY d/b/a  
PHOTOLIVE, INC.**

**CERTIFICATE OF SERVICE**

This document was served in compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure on April 6, 2018.

/s/ Owen J. McGovern

OWEN J. MCGOVERN