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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Tom Bean, et al.,	)	CV 11-8030-PCT-PGR
Plaintiffs,	)	
v.	)	<b>ORDER</b>
Pearson Education, Inc.,	)	
Defendant.	)	

Before the Court is Defendant’s Motion to Dismiss Case. (Doc. 26.) Plaintiffs filed a response in opposition (Doc. 41) and Defendant filed a reply (Doc. 42). Defendant contends that Plaintiffs’ Complaint, which alleges copyright infringement and common law fraud, fails to state a claim for which relief may be granted. For the reasons set forth below, Defendant’s motion is granted in part and denied in part.

**BACKGROUND**

Plaintiffs Tom Bean and Dennis Kunkel Microscopy, Inc., are professional photographers who license their photographs to publishers, including Defendant Pearson Education, Inc., a publisher of textbooks and other educational materials. On February 25, 2011, Plaintiffs filed a Complaint alleging that Defendant used their photographs in excess of the print quantities stated in the invoices. (Doc. 1.) Plaintiffs contend that Defendant intentionally misrepresented the print quantities in order to obtain lower license fees. (*Id.*, ¶¶ 13–17.)

1 **DISCUSSION**

2 Defendant has filed a motion to dismiss Plaintiffs’ Complaint for failure to state a  
3 claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 27.) The Rules  
4 require a pleading to contain a “short and plain statement of the claim showing that the  
5 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss under  
6 Rule 12(b)(6), a pleading must allege facts sufficient “to raise a right to relief above the  
7 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). A claim must be  
8 plausible, allowing the court to draw the reasonable inference that the defendant is liable for  
9 the conduct alleged. *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1949 (2009). “The  
10 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a  
11 sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at  
12 557.)

13 “[A]ll well-pleaded allegations of material fact are taken as true and construed in a  
14 light most favorable to the nonmoving party.” *Wylter Summit Partnership v. Turner Broad.*  
15 *Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, “[a] pleading that offers ‘labels and  
16 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.*  
17 (quoting *Twombly*, 550 U.S. at 555); see *Spreewell v. Golden State Warriors*, 266 F.3d 979,  
18 988 (9th Cir. 2001) (“Nor is the court required to accept as true allegations that are merely  
19 conclusory, unwarranted deductions of fact, or unreasonable inferences.”). “[T]he tenet that  
20 a court must accept as true all of the allegations contained in a complaint is inapplicable to  
21 legal conclusions.” *Iqbal*, 129 S. Ct. at 1949.

22 **I. Count 1: Copyright Infringement**

23 Defendant argues that the Complaint fails to establish Plaintiffs’ ownership of valid  
24 copyrights in the photographs at issue or that Defendant infringed on any copyrighted  
25 images. As set forth below, the Court finds that with respect to Claim 1 the Complaint  
26 satisfies the pleading requirements of Rule 8 by setting forth a short and plain statement of  
27 a plausible claim.

1           The Copyright Act of 1976 provides that “the owner of copyright under this title has  
2 the exclusive rights to do and to authorize any of the following: (1) to reproduce the  
3 copyrighted work in copies or phonorecords; . . . (3) to distribute copies or phonorecords of  
4 the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease,  
5 or lending . . .” 17 U.S.C. § 106. “‘Anyone who violates any of the exclusive rights of the  
6 copyright owner,’ that is, anyone who trespasses into his exclusive domain by using or  
7 authorizing the use of the copyrighted work . . . ‘is an infringer of the copyright.’” *Sony*  
8 *Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (quoting 17 U.S.C.  
9 § 501(a)). One who exceeds the scope of a license to reproduce a copyrighted work likewise  
10 is an infringer. *See Jacobsen v. Katzer*, 535 F.3d 1373, 1379–80 (Fed.Cir. 2008) (“If . . . a  
11 license is limited in scope and the licensee acts outside the scope, the licensor can bring an  
12 action for copyright infringement.”).

13           To establish infringement, a copyright plaintiff must prove two elements: “(1)  
14 ownership of a valid copyright, and (2) copying of constituent elements of the work that are  
15 original.” *Feist Publ’ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see Funky*  
16 *Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006).  
17 Therefore, to prevail on their claim of copyright infringement, Plaintiffs must show that they  
18 owned a valid copyright for their photographs, that the licenses they issued to Defendant  
19 were limited in scope, and that Defendant exceeded that scope. *See Wood v. Houghton*  
20 *Mifflin Harcourt Pub. Co.*, 589 F.Supp.2d 1230, 1239 (D.Colo. 2008).

21           Defendant first contends that Plaintiffs have failed to allege that they are the owners  
22 and copyright holders of the photographs at issue. The Court disagrees. The Complaint states  
23 that “Plaintiffs are the owners and exclusive copyright holders of the attached photographic  
24 images (“Photographs”), whose registration status with the United States Copyright Office  
25 is set forth in Exhibits A-1 and A-2 (Bean) and B (Kunkel).” (Doc. 1 at ¶ 9.) The Complaint  
26 alleges that the photographs are either registered or pending registration with the Copyright  
27 Office, and lists the registration numbers and dates. (*Id.*, ¶¶ 9-10; Ex’s A1-B.) These  
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1 allegations are sufficient to satisfy Rule 8(a)(2). At the complaint stage, Plaintiffs are not  
2 required to prove ownership of the copyrights. *See Imageline, Inc. v. CafePress.com, Inc.*,  
3 No. CV 10-9794 PGS (MANx), 2011 WL 1322525, \*2–3 (C.D.Cal. April 6, 2011) (finding  
4 sufficient, for purpose of withstanding motion to dismiss, allegation that “[e]ach Image is  
5 owned by Plaintiff, contains copyrightable subject matter under the laws of the United States,  
6 and has been registered with the United States Copyright Office”); *Robert Kubicek Architects*  
7 *& Associates, Inc. v. Bosley*, No. CV-09-0145-PHX-MHM, 2009 WL 3188391, \*2 (D.Ariz.  
8 September 29, 2009) (finding Rule 8 satisfied where complaint “alleges present ownership  
9 of the copyright by the plaintiff,” “identifies the copyright registrations that were obtained  
10 for some of the works at issue,” and “alleges infringement of the copyright by Defendants.”).

11 Defendant also argues that Plaintiffs have not sufficiently alleged that all of the  
12 images are properly registered as individual photographs rather than compilations. (Doc. 27  
13 at 4–5.) For this proposition Defendant cites a parallel case from this district in which the  
14 court found that only the compilations of images, rather than Bean’s individual photographs,  
15 were properly copyrighted. *Bean v. Houghton Mifflin Harcourt Publishing Co.*, CV 10-8034-  
16 PCT-DGC, 2010 WL 3168624 (D.Ariz. August 10, 2010). The six compilations, each of  
17 which contained thousands of images taken by numerous photographers, were registered by  
18 Corbis Corporation, a stock photography agency to which Bean had transferred the rights to  
19 150 of his photographs. *Id.*, at \*1. Bean, who claimed that the defendant had exceeded the  
20 terms of the licenses issued by Corbis, argued that Corbis’s registration of the compilations  
21 was sufficient to register his individual photographs. *Id.*, at \*3. The court disagreed,  
22 explaining that “Corbis’s six compilation registrations, although valid for purposes of  
23 copyrighting the compilations themselves, did not copyright the individual photographs  
24 within the compilations. As a result, none of the . . . images at issue in this case is properly  
25 registered under the Copyright Act.” *Id.*, at \*4.<sup>1</sup>

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27 <sup>1</sup> Citing the requirements of 17 U.S.C. § 409, the court noted that Corbis, in registering  
28 the compilations, “failed to provide the titles of any of the individual photographs, largely

1 Plaintiffs acknowledge that six of the registration certificates at issue in this matter  
2 were those involved in the prior case.<sup>2</sup> (Doc. 41 at 5.) With respect to images contained in  
3 these compilations, the Court adopts the ruling in *Bean* and concludes that Plaintiffs have  
4 failed to allege that the images are properly registered.

5 According to Plaintiffs, the remaining certificates register photographs by a single  
6 author who is named on the certificate and are properly registered as compilations of  
7 photographs contributed by Plaintiffs Bean or Kunkel. (*Id.* at 6.) The district court in  
8 *Imageline*, faced with a similar scenario, denied a motion to dismiss. The court explained that  
9 it was “unable to conclude that Imageline has not registered the individual images for  
10 copyright protection, or that the registration for a compilation does not satisfy the pre-suit  
11 registration requirement in the Copyright Act . . . While CafePress may, or may not,  
12 ultimately succeed on this theory, it is inappropriate for resolution at this stage of litigation.”  
13 2011 WL 1322525, at \*3, n.2. Similarly, Plaintiffs have sufficiently alleged, for purposes of  
14 surviving Defendant’s motion to dismiss, that the remaining images are properly are  
15 registered under the Copyright Act.

16 Defendant next argues that Plaintiffs have offered only conclusory, unsupported  
17 allegations that it copied images in excess of the permitted quantity or used Plaintiffs’  
18 photographs without permission. (Doc. 27 at 5–6.) Defendant contends that Plaintiffs’  
19 allegations constitute legal conclusions and lack any factual support, and are therefore  
20 inadequate to state a claim of copyright infringement. (*Id.*) Defendant also notes that rather  
21 than specifically identifying which images were infringed, “the exhibits to the Complaint  
22 include *every image directly licensed by Pearson since 1992* that has not already been the  
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24 failed to identify the authors of the photographs, and failed to connect any author with any  
25 individual photograph.” *Bean*, 2010 WL 3168624, at \*4.

26 <sup>2</sup>The six compilations are identified as VA 863-783, VA 863-785, VA 1-115-519, VA  
27 1-132-628, VA 1-288-586, and VA 1-408-166. (*See* Doc. 1, Ex’s. A-1, A-2 & B; Doc. 41 at  
28 5, n.14.)

1 subject of a settlement agreement between the parties.” (Doc. 42 at 2.) (Emphasis in  
2 original.) Although the issue is close, the Court concludes that Plaintiffs have sufficiently  
3 alleged infringement.

4         The Complaint alleges that the licenses issued to Defendant “were expressly limited  
5 by number of copies, distribution area, language, duration, and media” and that “Plaintiffs  
6 granted the limited use licenses in response to Pearson’s representations that the use of the  
7 Photographs would not exceed the limitations contained in its solicitations.” (Doc. 1, ¶¶ 11,  
8 12.) The Complaint further alleges that “[u]pon information and belief, Pearson exceeded the  
9 permitted uses under the terms of the limited licenses granted by Plaintiffs” and “[u]pon  
10 information and belief, Pearson used the Photographs without any permission in certain  
11 publications.” (*Id.*, ¶¶ 16, 17.)

12         Plaintiffs contend that the Complaint adequately “sets out the scheme Pearson used  
13 to obtain licenses at a reduced price by misrepresenting its intended uses, and its copyright  
14 infringement by exceeding the limited permissions photographers granted.” (Doc. 41 at 8.)  
15 They state that the exhibits attached to the Complaint “specified . . . exactly which of their  
16 photographs have been infringed and which of Pearson’s textbooks and other products  
17 contain infringements” and “set[] out a sufficiently specific time period of Pearson’s  
18 infringements.” (*Id.*) The Court agrees that this information is sufficient to properly allege  
19 infringement.

20         The cases cited by Defendant are distinguishable, in that the courts found that the  
21 plaintiffs failed to allege *any* facts in support of their claims. In *Marvullo v. Gruner & Jahr*,  
22 105 F.Supp.2d 225, 228 (S.D.N.Y. 2000), for example, the court granted the defendant’s  
23 motion to dismiss on the grounds that the “plaintiff’s unadorned allegation in paragraph nine  
24 that defendants have published the McNeely photograph ‘beyond the scope . . . of the limited  
25 license,’ absent any factual support, merely states a legal conclusion insufficient to withstand  
26 a motion to dismiss.” Similarly, in *Universal Surface Technology, Inc. v. Sae-A Trading*  
27 *America Corp.*, 2011 WL 281020, \*6 (C.D.Cal. 2011), the court noted that “the complaint  
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1 alleges no facts indicating what acts constitute the alleged infringement, and which  
2 copyrights have allegedly been infringed. Rather, the complaint only contains the conclusory  
3 allegation that defendants ‘have infringed, and continue to infringe plaintiff’s exclusive  
4 copyrights by reproducing, preparing derivative works of, and distributing infringing copies  
5 of’ plaintiff’s copyright.” *See also Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-1531  
6 RS, 2009 WL 2972374, \*2 (N.D.Cal. Sept.14, 2009) (dismissing claim that “consists of  
7 nothing more than a bare assertion, made ‘on information and belief’ that Elan ‘has been and  
8 is currently, directly and/or indirectly infringing . . . the specified patents.’”).

9 Plaintiffs’ Complaint contains specific, albeit unadorned, allegations identifying the  
10 copyrighted images at issue and the nature of the alleged infringement. These allegations are  
11 sufficient to survive Defendant’s Rule 12(b)(6) motion. In *Wu v. Pearson Educ., Inc.*, No.  
12 09 Civ. 6557 (RJH), 2010 WL 3791676, \*6 (S.D.N.Y. September 29, 2010), the district court  
13 held that the plaintiff’s allegations of copyright infringement satisfied the pleading  
14 requirements of Rule 8(a)(2), notwithstanding the complaint’s excessive reliance on  
15 qualifiers such as “upon information and belief” and “as best as Plaintiff can determine,”  
16 because use of such phrases “does not impede the reader’s ability to understand the  
17 allegations made or how those allegations satisfy the elements of a copyright claim.” *Id.* The  
18 court distinguished *Elan Microelectronics v. Apple*, noting that the California district court  
19 dismissed Apple’s claims “not because they were excessively qualified but because Apple  
20 failed to allege sufficient facts to make the complaint plausible on its face.” *Id.* Here, as in  
21 *Wu*, Plaintiffs’ allegations that Defendant exceeded the print limits is plausible

22 Taking their allegations of material fact as true and construing them in a light most  
23 favorable to Plaintiffs, the Court finds that the claim of copyright infringement is plausible  
24 and rises above the speculative level. Therefore, it meets the pleading requirements of Rule  
25 8 and Defendant’s motion to dismiss with respect to Claim 1 is denied.

## 26 **II. Count 2: Fraud**

27 Plaintiffs allege that Defendant intentionally misrepresented print quantities in order  
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1 to obtain lower license fees and failed to disclose unauthorized uses of Plaintiffs' images.  
2 Defendant contends that the fraud count should be dismissed because "Plaintiffs fail to  
3 support these allegations with particularized facts" and therefore "their claim does not meet  
4 the heightened pleading requirements of Rule 9(b)." (Doc.27 at 7.)

5 Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n alleging fraud or  
6 mistake, a party must state with particularity the circumstances constituting fraud or mistake.  
7 Malice, intent, knowledge, and other conditions of a person's mind may be alleged  
8 generally." Thus, "allegations of fraud must be 'specific enough to give defendants notice  
9 of the particular misconduct which is alleged to constitute the fraud charged so that they can  
10 defend against the charge and not just deny that they have done anything wrong.'" *Bly-Magee*  
11 *v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Neubronner v. Milken*, 6 F.3d  
12 666, 672 (9th Cir. 1993)). Statements of the time, place, and nature of the alleged fraudulent  
13 activities are sufficient, provided the plaintiff sets forth "what is false or misleading about  
14 a statement, and why it is false." *In re GlenFed, Inc. Secs. Litig.*, 42 F.3d 1541, 1548 (9th  
15 Cir. 1994). As the 9th Circuit has explained:

16 In order for a complaint to allege fraud with the requisite particularity, "a  
17 plaintiff must set forth more than the neutral facts necessary to identify the  
18 transaction . . . In other words, the plaintiff must set forth an explanation as to  
19 why the statement or omission complained of was false or misleading."

20 *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999) (quoting *GlenFed*, 42 F.3d at  
21 1548).

22 To prevail on a fraud claim under Arizona law, a claimant must show: 1) a  
23 representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of the  
24 representation's falsity or ignorance of its truth; 5) the speaker's intent that it be acted upon  
25 by the recipient in the manner reasonably contemplated; 6) the hearer's ignorance of its  
26 falsity; 7) the hearer's reliance on its truth; 8) the right to rely on it; and 9) his consequent  
27 and proximate injury. *See Van Weelden v. Hillcrest Bank*, No. 2:10-CV-1833, 2011 WL  
28 772522, \*7 (D.Ariz. February 28, 2011) (citing *Echols v. Beauty Built Homes*, 132 Ariz. 498,

1 647 P.2d 629, 631 (1982)).

2 In their Complaint Plaintiffs allege the following:

3 13. Upon information and belief, at the time Pearson represented to Plaintiffs  
4 in its license solicitations that it needed specified, limited permission to use the  
5 Photographs, Pearson knew its actual uses under the licenses would exceed the  
6 permission it was requesting and paying for.

7 14. Upon information and belief, Pearson intended by its misrepresentations  
8 to obtain access to the Photographs at a lower cost than it would have paid had  
9 it been honest in its dealings with Plaintiffs and to conceal the copyright  
10 infringements that followed. Pearson's false and misleading representations  
11 did deceive Plaintiffs, and did conceal the copyright infringements that  
12 followed.

13 15. Plaintiffs relied to their detriment on the truthfulness of the express  
14 limitations contained in the license solicitations in establishing their license  
15 fees.

16 (Doc. 1, ¶¶ 13–15.) In their response to Defendant's motion to dismiss, Plaintiffs clarified  
17 that they are alleging fraud only with respect to claims they have supported with  
18 documentary evidence. (Doc. 41 at 10; *see* Doc. 1, Ex. C.) Exhibit C to the Complaint  
19 consists of five billing requests. According to Plaintiffs, these documents "set forth the  
20 identity of the persons making the misrepresentations, the time, place and content of the  
21 misrepresentations, and the method by which the misrepresentations were communicated to  
22 Plaintiffs or their agents." (Doc. 1, ¶ 12)

23 Defendant asserts that the Complaint does not specifically identify any statement that  
24 "could plausibly be characterized as a misrepresentation." (Doc. 27 at 8; *see* Doc. 42 at 9.)  
25 Plaintiffs respond that their Complaint, supported by the attached documents, specifically  
26 alleges Defendant's "fraudulent scheme of requesting licenses with certain limits on copies,  
27 geographic distribution area, language, duration, and media, all the while intending to exceed  
28 those limits, in order to obtain licenses at a lower cost than if it were honest with licensors."  
(Doc. 41 at 11; *see* Doc. 1, ¶¶ 11–20.)

29 The billing request letters from Defendant to Plaintiffs contain specifications such as:  
30 "Languages: One Language," "Circulation: Up to 40,000," and "Distribution Regions: North  
31 America." (*See* Doc. 1, Exhibit C.) At the bottom of all but one of the letters, Defendant

1 states, “The photographs will be included in the company’s digital archive for internal  
2 storage and viewing purposes only and will not be re-used in any publication without  
3 payment of the requisite permission fee.” (*Id.*) According to Plaintiffs, this language indicates  
4 that Defendant was requesting permission only for the uses listed in the letter, with  
5 Defendant agreeing to pay an additional fee for use in excess of those limitations. The Court  
6 agrees that the documents could be construed as representations by Defendant that it would  
7 not exceed the limitations set forth in the letters. *See Wood v. Houghton Mifflin Harcourt*  
8 *Pub. Co.*, 569 F.Supp.2d 1135, 1140 (D.Colo. 2008).

9 Plaintiffs proceed to argue—“upon information and belief”—that Defendant knew at  
10 the time it issued the request letters that it would exceed the limitations set forth therein and  
11 thereby engaged in misrepresentation. Therefore, as a precondition to showing that  
12 Defendant made a false representation, Plaintiffs must allege that Defendant exceeded the  
13 terms of the agreements. As Defendant notes, however, “Plaintiffs Complaint does not allege  
14 that any one of the images in the five billing requests was printed in excess of its license  
15 limitation.” (Doc. 42 at 9.) For this reason, Plaintiffs have failed to satisfy the particularized  
16 pleading standard of Rule 9(b).

17 “Allegations of fraud based on information and belief usually do not satisfy the  
18 particularity requirements of Rule 9(b); however, as to matters peculiarly within the opposing  
19 party’s knowledge, allegations based on information and belief may satisfy Rule 9(b) if they  
20 also state the facts upon which the belief is founded.” *Buena Vista, LLC v. New Resource*  
21 *Bank*, 2010 WL 3448561, \*7 (N.D.Cal. 2010) (citing *Wool v. Tandem Computers, Inc.*, 818  
22 F.2d 1433, 1439 (9th Cir. 1987)). Here, the Complaint merely states that Defendant falsely  
23 represented its intention to abide by the print limitations described in the five billing requests.  
24 This is not sufficient. *See Van Weelden v. Hillcrest Bank*, No. 2-CV-1833-PHX-JAT, 2011  
25 WL 772522, \*7 (D.Ariz. February 28, 2011) (“simply asserting that a statement was false,  
26 and offering no other evidence, other than the fact that the money was not repaid, does not  
27 meet the burden to set forth what is false or misleading about the statement”) (citing *Yourish*,

1 191 F.3d at 993). The Complaint puts forward no particularized facts showing that Defendant  
2 actually exceeded the print limits provided in the billing requests. *See Nuebronner*, 6 F.3d  
3 at 672 (“a plaintiff who makes allegations on information and belief must state the factual  
4 basis for the belief”).

5 Plaintiffs explain that they “pleaded ‘upon information and belief’ because Pearson  
6 alone holds the evidence of exactly when and how it exceeded the license limits.” (Doc. 41  
7 at 9.) However, that does not excuse Plaintiffs from at least providing *some* factual basis for  
8 their allegations. *Cf. Elan Microelectronics Corp*, 2009 WL 2972374, \*4 (“regardless of  
9 what knowledge may lie exclusively in the possession of Elan or others, Apple should be  
10 able to articulate at least some facts as to why it is reasonable to believe there is  
11 infringement. Simply guessing or speculating that there may be a claim is not enough”). As  
12 this Court has noted, “plaintiffs should not be allowed to conduct a discovery fishing  
13 expedition before properly stating any fraud-based claim.” *Reiniger v. W.L. Gore &*  
14 *Associates, Inc.*, No. CV-09-8185-PCT-PGR, 2010 WL 1948588, \*3 (D.Ariz. May 12,  
15 2010).

16 Moreover, while a fraud complaint may aver condition of mind “generally” under  
17 Rule 9(b), Plaintiffs do not set out any affirmative facts that would support an inference that  
18 Defendant misrepresented its intentions regarding the number of photos it would print. *See*  
19 *Marvullo v. Gruner & Jahr*, No. 98CIV.5000 (RLC), 2001 WL 40772 (S.D.N.Y. January 17,  
20 2001) (“Rule 9(b) provides that fraudulent intent ‘may be averred generally,’” as long as the  
21 complaint provides a factual basis that gives rise to a strong inference of intent to defraud,  
22 knowledge of the falsity, or a reckless disregard for the truth.”); *Hsu v. OZ Optics Ltd.*, 211  
23 F.R.D. 615, 620 (N.D.Cal. 2002) (“Although intent can be averred generally under Rule 9(b),  
24 a plaintiff must point to *facts* which show that defendant harbored an intention not to be  
25 bound by terms of the contract at formation.”).

26 Plaintiff relies on *Wood v. Houghton Mifflin Harcourt Pub. Co.*, 569 F.Supp.2d 1135,  
27 1140 (D.Colo. 2008). In *Wood* the district court denied a motion to dismiss. The court found  
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1 that the complaint and the attached license letters sufficiently alleged a claim that the  
2 defendant, a textbook publisher, made a false representation to the copyright owner, who  
3 licensed photographs to be reproduced in a textbook. The court explained that, “[r]eading  
4 these letters in the light most favorable to Wood, these statements could be construed as  
5 representations that HMH would not exceed the licenses by printing more than 40,000  
6 copies.” *Id.* To the extent the court in *Wood* found that the existence of such an agreement  
7 was itself sufficient to allege a misrepresentation, this Court disagrees. As stated above,  
8 Plaintiffs have not offered any specific factual allegation that Defendant’s representations  
9 with respect to print quantities were intended to be, or actually were, false.

10 Plaintiffs also cite *Bergt v. McDougal Littell*, No. 06-C-4645, 2006 WL 3782919, \*4  
11 (N.D.Ill. December 21, 2006), in which the court found that the complaint adequately set  
12 forth a claim for fraud and denied the defendant’s motion to dismiss. The court noted that  
13 “the amended complaint specifically alleges that McDougal falsely represented that it sought  
14 to use the [plaintiff’s] painting in the textbook for a print run of 40,000, when in fact it knew  
15 at the time that it made that representation that its actual use would greatly exceed that  
16 number” and “that as a result of that false representation, Bergt was induced to grant  
17 McDougal a limited license for \$200.” *Id.* The court concluded that “these allegations are  
18 sufficient to state a claim for fraud as they allege both a misrepresentation of material fact  
19 and justifiable reliance.” *Id.*

20 *Bergt* is distinguishable. In support of his allegation of fraud, the plaintiff had  
21 “discovered that McDougal was still using his painting” and had “reproduced it in more than  
22 1.2 million copies of the textbook.” *Id.*, at \*1. As already noted, Plaintiffs here have not  
23 provided any specific facts in support of their claim that Defendants exceeded the print runs  
24 specified in the five request letters.

25 Plaintiffs seek leave to amend their complaint in the event the court finds their claims  
26 inadequately pleaded. (*See* Doc. 41 at 9–10.) The Court agrees that Plaintiffs should be given  
27 an opportunity to amend their fraud claim. The Ninth Circuit has stated that “dismissals for  
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1 failure to comply with Rule 9(b) should ordinarily be without prejudice. Leave to amend  
2 should be granted if it appears at all possible that the plaintiff can correct the defect.” *Vess*  
3 *v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1108 (9th Cir. 2003). The Court cannot conclude from  
4 the record before it that amendment of Plaintiffs’ fraud claim would be futile. *See Reiniger*,  
5 2010 WL 1948588, \*3.<sup>3</sup>

### 6 **III. Venue**

7 Defendant contends that the Complaint should be dismissed under Rule 12(b)(3) based  
8 on improper venue, noting that certain license agreements provide for venue in other districts.  
9 (Doc. 27 at 11.) In support of this contention, Defendant attached to its motion a document  
10 entitled “Corbis Content License Agreement,” dated June 2005.<sup>4</sup> (*Id.*, Ex. A at ¶ 21.)  
11 Plaintiffs respond that Defendant has failed to identify the licenses to which these terms and  
12 conditions apply and that the Corbis agreement covers only a small percentage of the  
13 photographs at issue. (Doc. 41 at 15.) Plaintiffs also contend that the Corbis forum selection  
14 clause is “quite narrow, and does not include Bean’s copyright or fraud claims in this suit.”  
15 (*Id.*)

16 Once the defendant challenges venue, the plaintiff bears the burden of establishing  
17 that venue is proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th  
18 Cir. 1979). When considering a Rule 12(b)(3) motion to dismiss, the pleadings need not be  
19 accepted as true, and the court may consider facts outside of the pleadings. *Richards v.*

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21 <sup>3</sup> Defendant also contends that Plaintiffs fraud claim fails because the complaint does  
22 not identify “any consequent and proximate injury they suffered as a result of the purported  
23 fraud that is independent of the harm allegedly suffered as a result of purported copyright  
24 infringement.” (Doc. 27 at 9, n.3.) The Court finds no support for this proposition in Arizona  
law.

25 <sup>4</sup> The license agreement contains the following “Choice of Law” provision: “Any  
26 dispute regarding this Agreement shall be governed by the laws of the State of New York,  
27 and by Titles 15, 17 and 35 of the U.S.C., as amended, and the parties agree to accept the  
28 exclusive jurisdiction of the state and federal courts located in New York, New York,  
regardless of conflicts of laws.” (Doc. 27, Ex. A, ¶ 21.)

1 *Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998). In “the context of a Rule 12(b)(3)  
2 motion based upon a forum selection clause, the trial court must draw all reasonable  
3 inferences in favor of the non-moving party and resolve all factual conflicts in favor of the  
4 non-moving party.” *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004).

5 In *Murphy* the court instructed that if a party raises a genuine factual issue, the court  
6 may stay the Rule 12(b)(3) motion and hold an evidentiary hearing on the disputed facts. *Id.*  
7 at 1139. “Alternatively, the district court may deny the Rule 12(b)(3) motion while granting  
8 leave to refile it if further development of the record eliminates any genuine factual issue.”  
9 *Id.*

10 Here, there are unresolved factual issues, including which photographs are subject to  
11 the venue provisions contained in the Corbis agreement. Therefore, the Court will deny  
12 Defendant’s motion to dismiss under Rule 12(b)(3) with leave to reurge the argument if  
13 warranted by future evidentiary developments.

14 Accordingly,

15 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss Case (Doc. 26) is  
16 **DENIED IN PART** with respect to Count 1, alleging copyright infringement. The motion  
17 is **GRANTED** with respect to the images contained in the compilations identified as VA  
18 863-783, VA 863-785, VA 1-115-519, VA 1-132-628, VA 1-288-586, and VA 1-408-166.

19 **IS FURTHER ORDERED** that Defendant’s Motion to Dismiss Case (Doc. 26) is  
20 **GRANTED** with respect to Count 2, alleging fraud.

21 **IT IS FURTHER ORDERED** that Plaintiff may file an amended complaint with  
22 respect to Count 2. The amended complaint must comply with Rule 8(a) and shall be filed  
23 no later than 30 days from the date of this Order.

24 **IT IS FURTHER ORDERED** that Defendant’s motion to dismiss under Rule  
25 12(b)(3) is **DENIED** without prejudice to refileing.

26 DATED this 17<sup>th</sup> day of May, 2011.

27 

28 Paul G. Rosenblatt  
United States District Judge