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

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DRK Photo,

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CV 11-8097-PCT-PGR

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Plaintiff,

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ORDER

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v.

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Pearson Education, Inc., and
John Doe Printers 1-10,

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Defendants.

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Before the Court is Defendant Pearson’s (“Pearson”) Motion to Dismiss Count II of the Complaint. (Doc. 20.) Plaintiff DRK Photo (“DRK”) filed a response in opposition (Doc. 25) and Pearson filed a reply (Doc. 26).

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DRK is a stock photography agency in Sedona, Arizona. It licenses photographs to publishers, including Pearson, a publisher of textbooks and other educational materials. On June 27, 2011, DRK filed a Complaint asserting claims for copyright infringement and fraud. (Doc. 1.) The Complaint alleges that Pearson used photographs in excess of print quantities stated in the invoices and intentionally misrepresented print quantities in order to obtain lower license fees. (*Id.* ¶¶ 11-12.)

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DISCUSSION

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Pearson contends that Count II of the Complaint, alleging fraud, should be dismissed for failure to state claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure and for improper venue under Rule 12(b)(3). Because the Court concludes that the fraud claims are subject to arbitration, it will not address Pearson’s 12(b)(6) argument.

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1 As the parties note, certain of Pearson’s invoices contain terms and conditions
2 providing that:

3 Any and all disputes, with the exception of copyright claims, under or in
4 connection with this agreement, including, without limitation, the validity,
5 interpretation, performance and breach hereof, shall be settled by arbitration
6 in Arizona pursuant to the rules of the American Arbitration Association.

7 (See Doc. 20, Ex. A.)

8 Based on this provision, Pearson contends that “Plaintiff’s fraud claim must be
9 resolved pursuant to arbitration.” (Doc. 20 at 7.) DRK agrees, and “requests the Court to
10 issue an order compelling arbitration of its fraud claims.” (Doc. 25 at 11.) However, DRK
11 opposes Pearson’s motion to dismiss. (Doc. 25 at 12.) Instead, DRK asks the Court to stay
12 the fraud claims during arbitration but “retain jurisdiction over them for entry of judgment
13 based on the arbitration award.” (*Id.*) DRK requests that the copyright claims proceed in this
14 Court. (*Id.* at 14.)

15 The Federal Arbitration Act provides that an arbitration clause “shall be valid,
16 irrevocable, and enforceable . . .” 9 U.S.C. § 2. “[T]he court in which such suit is pending,
17 upon being satisfied that the issue involved in such suit or proceeding is referable to
18 arbitration under such an agreement, shall on application of one of the parties stay the trial
19 of the action until such arbitration has been had in accordance with the terms of the
20 agreement. . . .” 9 U.S.C. § 3.

21 The parties agree that pursuant to the terms and conditions of the invoices, the fraud
22 claims are arbitrable. The Court will order arbitration and the claims will be stayed. The
23 remaining questions are whether the Court will retain jurisdiction of the fraud claims or, as
24 Pearson requests, dismiss for lack of venue, and whether the copyright claims will also be
25 stayed.

26 In *Cortez Byrd v. Harbert Construction Co.*, 529 U.S. 193, 202 (2000), the Supreme
27 Court held that a court entering a stay order under 9 U.S.C. § 3 retains jurisdiction over the
28 proceedings and does not lose venue. See *Broadcom Corp. v. Qualcomm Inc.*, 2005 WL
5925585, *1 (C.D. Cal. 2005). Pursuant to this authority, the Court will retain jurisdiction
of the DRK’s fraud claims pending arbitration.

