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INTRODUCTION

Penguin is entitled to a stay of discovery because: (1) Penguin's motion to dismiss is likely to result in dismissal of all claims against Penguin with prejudice; and (2) in light of the probability that Plaintiffs have failed to state viable claims against Penguin, it would be unfair to order Penguin to engage in expensive and burdensome discovery when Plaintiffs suffer no prejudice from a stay. Plaintiffs agree with Penguin in principle: "*Obviously, if Plaintiffs cannot state viable claims, there should be no discovery.*" Dkt. 128 at 7 (emphasis added). Plaintiffs nevertheless argue that this motion should be summarily denied and discovery allowed to proceed for three primary reasons, none persuasive.

First, Plaintiffs argue that a pending motion to dismiss can never be grounds to stay discovery. Dkt. 128 at 2. Plaintiffs are simply wrong as a matter of law. In *Twombly* and *Iqbal*, the United States Supreme Court emphasized that, when a complaint is deficient, the plaintiff is not entitled to discovery. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Plaintiffs do not even cite *Twombly* or *Iqbal*, and they describe the *Twombly-Iqbal* pleading standard established by the Supreme Court as "utter nonsense." Dkt. 128 at 19.

Second, Plaintiffs argue that Penguin has “virtually no chance” of prevailing on its Rule 12 motion. Dkt. 128 at 6. But Plaintiffs fail to rebut – or seemingly even to have read – the cases that Penguin cited in its opening brief.

Third, Plaintiffs argue that staying discovery is inappropriate because it would prejudice them more than commencing discovery would burden Penguin. But Plaintiffs make *no showing whatsoever* of prejudice, and they fail to rebut Penguin’s evidence of burden.

In sum, Plaintiffs’ opposition brief is as conclusory and unfounded as their allegations against Penguin. Discovery should therefore be stayed until the Court determines, if ever, that Plaintiffs have stated viable claims.

ARGUMENT

I. PLAINTIFFS PRETEND *TWOMBLY* DOES NOT EXIST

Plaintiffs argue that motions to stay discovery are “generally disfavored,” but they fail to cite, much less acknowledge, *Twombly* or *Iqbal*. *Twombly* noted that “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’” *Twombly*, 550 U.S. at 558. *Iqbal* went further and stated that when “a complaint is deficient under Rule 8,” the plaintiff “is not entitled to discovery, cabined or otherwise.”

Iqbal, 129 S. Ct. at 1954; accord, *Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002); *Rutman Wine Co. v. E&J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987).

This Court has regularly granted motions to stay discovery pending the outcomes of dispositive motions. *E.g.*, *West v. State Farm*, No. CV 10-132, 2011 WL 2559966 at *23 (D. Mont. Jun. 28, 2011); *Smith v. Salish Kootenai College*, No. CV 02-55, 2003 WL 24868920 at *3 (D. Mont. Feb. 25, 2003); *Kennerly v. United States*, 534 F.Supp. 269, 270 n.5 (D. Mont. 1982).¹ “Despite the lenient nature of notice pleading standards, federal courts do not ‘unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.’” *Glick v. Eleventh Jud. Dist. Ct. of Montana*, at *2 (D. Mont. Mar. 26, 2010).

Plaintiffs ignore *Twombly* and *Iqbal* and characterize this Court’s cases as “a few outlying district court decisions.” Dkt. 128 at 8. Instead, Plaintiffs cite four cases, none from this district, and three of which pre-date *Twombly* by more than 15 years.² Plaintiffs’ cases thus fail to establish that discovery stays are “generally disfavored,” especially where, as here, the scope of discovery is broad and burdensome and Plaintiffs fail to meet required pleading standards.

¹ *Kennerly* was reversed in part on other grounds. *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983).

² Plaintiffs cite a 2011 District of Nevada case, but only for the proposition that a party seeking to stay discovery must make a “strong showing.” Dkt. 128 at 7.

II. PLAINTIFFS FAIL TO REBUT PENGUIN'S DISPOSITIVE ARGUMENTS

Plaintiffs argue that (1) the First Amendment does not “immunize” publishers from liability for fraud or breach of contract, (2) Plaintiffs suffered cognizable damages when they were induced to buy the Books, and (3) their allegations need not be plausible under Rule 8. These arguments fail for the following reasons:

A. **The First Amendment Does, Indeed, Immunize Publishers from Plaintiffs' Claims, and Plaintiffs Fail to Allege Actionable Commercial Speech by Penguin**

Plaintiffs argue that no case absolutely immunizes publishers from generally applicable causes of action, like fraud or breach of contract; but this statement is both non-controversial and inapplicable here. Penguin did not invoke any such absolute immunity from liability; rather, Penguin argued that Plaintiffs fail to state a claim in their Fourth Amended Complaint.

Numerous courts have already concluded, contrary to Plaintiffs' argument, that the First Amendment does indeed immunize publishers from fraud or contract liability *based on the contents of nonfiction books*.

For example, the courts in both *Lacoff* and *Keimer* agreed that the First Amendment immunizes publishers from claims based on the contents of nonfiction books that they offer to the general public. *Lacoff v. Buena Vista Publishing, Inc.*,

183 Misc.2d 600, 605 (N.Y. Sup. Ct. 2000) (“it is clear that the [book’s content] is protected under both the Federal and New York Constitutions for its truthful, as well as erroneous, statements of facts.”), and *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App.4th 1220, 1231 (Cal. App. 1999) (“no one involved in modern jurisprudence can reasonably dispute [that] the content of *The Bearstown Ladies’* books is entitled to the full protection of the First Amendment.”). Other courts agree.³

Likewise, courts have long barred contract claims against the publishers of nonfiction information. In *Jaillet v. Cashman*, 115 Misc. 383 (N.Y. Sup. Ct. 1921), an investor lost money after he sold securities in reliance on an inaccurate report on a stock ticker and sued the ticker’s publisher. The investor’s claims were dismissed with prejudice on the ground that there is “no contract or fiduciary relationship” between a publisher and “one of a public to whom all news is liable to be disseminated.” *Id.* at 384. The Ninth Circuit has followed *Jaillet*. See *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991) (breach of warranty).

³ See also *Gorran v. Atkins Nutritionals, Inc.*, 464 F.Supp.2d 315 (S.D.N.Y. 2006) (First Amendment bars claims under Florida Deceptive and Unfair Trade Practices Act against publisher of Atkins diet book); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (First Amendment bars claims against broadcaster for intentional trespass based on content of television show); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. Ct. 1989) (First Amendment bars fraud claims against publisher of diet book by representatives of decedent whose death was allegedly caused by the diet).

While some courts have recognized at least the theoretical possibility that a publisher could incur fraud liability for intentional falsehoods in a nonfiction publication, *e.g.*, *McMillan v. Togus Regional Office, Dept. of Veterans Affairs*, 120 Fed. Appx. 849, 2005 WL 78785 (2d Cir. Jan. 7, 2005) (unpublished), no court has ever imposed such fraud liability on a publisher, and it is virtually impossible to imagine a scenario in which a plaintiff could establish every element of fraud against a publisher when, as here, the publisher offered an autobiography to the general public. Certainly, Plaintiffs do not, and cannot, do so here.

Penguin recognizes there is no First Amendment immunity from liability for false *commercial speech* when selling a product, but Plaintiffs do not allege such speech here. The only statements Penguin allegedly made *about* the Books – namely, that they are “nonfiction” or “true” – are “inextricably intertwined” with the constitutionally protected content to which they refer, *see Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796 (1988), are not statements that can be proven true or false, and are not alleged to have been made in the course of proposing a commercial transaction. Plaintiffs’ claims based on these allegations therefore fail as a matter of law. *See* Dkt. 135 at 15-17.

Penguin also recognizes that it has no First Amendment immunity from liability for breach of contract when, in fact, Penguin enters into a contract. But no

facts supporting a cognizable contract claim are alleged here. Courts have repeatedly and unanimously concluded that no such contractual duty exists between a publisher and the general public to whom it sells nonfiction. *Winter*, 938 F.2d at 1034; *Pittman v. Dow Jones & Co.*, 662 F.Supp. 921, 923 (E.D. La. 1987); *Gale v. Value Line, Inc.*, 640 F.Supp. 967, 970 (D. R.I. 1986); *Cardozo v. True*, 342 So.2d 1053, 1057 (Fl. App. 1977); *Jaillet, supra*. Plaintiffs cite cases acknowledging the viability of contract claims against publishers who ***assumed express contractual duties***, Dkt. 128 at 14-17 (citing *County of Orange, Anderson, WDIA Corp.* and *CompuWare*), but those cases are plainly inapplicable.

B. Plaintiffs Fail to Distinguish the “No Cognizable Duty” Cases

Plaintiffs try to distinguish the “no cognizable duty” cases, *Rice* and *Small*, based on facts that do not matter. Plaintiffs claim *Rice* cannot be controlling because the alleged misrepresentations about the authorship of the book at issue were actually disclosed within the book. Dkt. 129 at 5. But *Rice* did not turn on that fact.⁴ *See Rice v. Penguin Putnam, Inc.*, 289 A.D.2d 318, 319 (N.Y. App. Div. 2001).

Plaintiffs claim *Small* is inapplicable because plaintiffs in that case tried to proceed on claims that were contingent upon claims they had abandoned, therefore

⁴ Even had it turned on that, the same facts are present here. *See* Dkt. 137 at 19 (citing Dkt. 137-1 at 1-2).

indicating they were “desperate in their pursuit of a class action.” Dkt. 129 at 5. But those details are irrelevant because Plaintiffs here, like plaintiffs in *Small*, allege they would never have bought a non-defective item but for defendants’ deceptions. *See Small v. Lorillard Tobacco Co. Inc.*, 94 N.Y.2d 43, 55-56 (N.Y. 1999). In both cases, the alleged inducement of the purchase was both the fraud and the injury – a “legally flawed” theory. *Id.*

RICO claims fail on the same basis. Allegations that the Books “are not worth what they paid for them” or that, but for Penguin’s misrepresentations, Plaintiffs “would not have bought them at all” are not cognizable RICO injuries. *In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 155 F.Supp.2d 1069, 1090 (S.D. Ind. 2001); *see also McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 228–29 (2d Cir. 2008)⁵ (misrepresentation that merely induced purchase of allegedly defective item is not a RICO injury).

C. Plaintiffs Ignore Applicable Pleading Standards

Plaintiffs fail even to acknowledge, much less rebut, Penguin’s arguments that “Rule 9(b) does not allow a complaint to merely lump multiple defendants together but ‘require[s] plaintiffs to differentiate their allegations when suing more than one defendant.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2006)

⁵ Part of *McLaughlin* not relevant here was subsequently abrogated by *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008).

(citation omitted); *accord, Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991).

Instead, Plaintiffs characterize as “utter nonsense” Penguin’s argument that Rule 8 requires a plaintiff to state plausible claims. Dkt. 128 at 19. Plaintiffs clearly have not read *Twombly* or *Iqbal* or the cases interpreting or applying those landmark decisions. *Twombly*, 550 U.S. at 570; *Iqbal*, 129 S.Ct. at 1948, 1950; *Hydrick v. Hunter*, --- F.3d ----, 2012 WL 89157 (9th Cir. Jan. 12, 2012).

III. THE EVIDENCE COMPELS A CONCLUSION THAT A STAY OF DISCOVERY IS APPROPRIATE

Penguin met its burden to introduce evidence of the substantial burden discovery would impose, but Plaintiffs introduced no evidence to establish prejudice. *E.g., Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002); *GTE Wireless, Inc. v. Qualcomm, Inc.*, 192 F.R.D. 284, 289-90 (S.D. Cal. 2000). The record therefore compels the conclusion that a stay is proper.

A. Penguin Introduced Evidence of the Substantial Burdens Discovery Would Impose

The *only evidence* in the record is that commencing discovery would impose substantial burdens on Penguin. Ralph Decl., ¶ 2. Penguin has multiple employees who were involved in editing, publishing and/or marketing the Books and who may have relevant documents. *Id.* These documents include voluminous electronically-stored information, such as emails, computer files and raw data. *Id.*

It will require substantial effort and cost to identify all potentially relevant documents, collect them, review them for relevance and responsiveness to Plaintiffs' requests, identify and withhold any documents that are protected from disclosure due to the attorney-client privilege or work-product doctrine, and process the remaining files for production.⁶ *Id.*

Plaintiffs disparage this evidence as "hearsay" and ask that it be stricken,⁷ Dkt. 128 at 4, but this argument lacks merit. Declarations may be filed in support of motions.⁸ "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed.R.Civ.P. 56(c)(4). Penguin's declaration, Dkt. 122, is expressly based on the declarant's "knowledge of [Penguin's] documents" and his

⁶ The potential scope of discovery in this case is undeniably broad. Plaintiffs allege intentional falsehoods related to Mortenson's conduct over a period of approximately 15 years. Much of that conduct, and the witnesses to it, are located in Afghanistan or Pakistan.

⁷ Plaintiffs also fault Penguin for violating some custom never to file attorney correspondence with the Court, Dkt. 128 at 4; but Plaintiffs do not cite any rule forbidding it and, in any event, the copies of correspondence were filed to substantiate Penguin's representations that such correspondence had occurred.

⁸ Obviously every declaration is "hearsay" in the sense that hearsay is, by definition, an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c).

“experience overseeing electronic discovery in class action litigation,” and this evidence would be admissible if offered as testimony in court.⁹

B. Plaintiffs Introduced No Evidence of Prejudice

Plaintiffs, in contrast, cry prejudice based on the sheer allegation that “as long as discovery and the Rule 26(a)(1) disclosures are thwarted, Penguin and the other Defendants are working feverishly in Pakistan and Afghanistan to cover their tracks, obtain witnesses to support their positions, generate documents to support their positions” Dkt. 128 at 3. Plaintiffs introduce *no evidence* to support these allegations, which the Court has already considered and rejected. On January 12, the Court denied Plaintiffs’ motion for preservation of documents on the ground that “Plaintiffs have not shown that Defendants have destroyed, or will destroy, evidence.” Dkt. 118 at 1.

IV. PLAINTIFFS’ OTHER ARGUMENTS ARE MERITLESS

A. Plaintiffs’ Argument that No Motion to Dismiss Is on File Is Moot

Plaintiffs filed their opposition to this motion eight days early in order to argue that this motion is improper because it was based on a not-yet-filed motion to dismiss. Dkt. 128 at 2. That argument is now moot and should be disregarded.

⁹ The Court may also take judicial notice of counsel’s duty of candor to the Court under Montana Rule of Professional Conduct 3.3, which bars counsel from knowingly making false statements or offering false evidence.

On January 26, as promised, Penguin moved to dismiss the Fourth Amended Complaint on substantially the same grounds that it identified in support of this motion. Dkts. 120-121.

B. Plaintiffs' New, and Procedurally Improper, Allegations Should Be Disregarded

Plaintiffs' opposition brief introduces new allegations that, according to Mortenson, (i) 440 people at Penguin played some role in publishing the Books, (ii) Penguin hired a "fact-checker," and (iii) Penguin engaged in "passionate advocacy" for the Books. Dkt. 128 at 5. These allegations do not appear in the Fourth Amended Complaint, are not supported by any evidence filed with the Court, and are procedurally improper.

The purpose of these allegations is to avert dismissal of the Fourth Amended Complaint, but new allegations contained in an opposition brief must be disregarded for Rule 12(b)(6) purposes.¹⁰ *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

¹⁰ The new allegations do not make Plaintiffs' claims more plausible because they include no facts from which it is plausible to infer that Penguin undertook to verify the accuracy of "events that are long past," to interview "people who are unavailable to verify the author's statements," or otherwise double-check all of Mortenson's stories about himself. *See Geiger v. Dell Publishing Co., Inc.*, 719 F.2d 515, 518 (1st Cir. 1983) (such measures could "raise the price of non-fiction works beyond the resources of the average man").

C. Judge Molloy Did Not Give, and Indeed Could Not Have Given, Plaintiffs an Absolute Right to Immediate Discovery

Plaintiffs also argue that Judge Molloy's June 3, 2011 Order – which allowed the parties to commence discovery immediately upon serving Rule 26(a)(1) Initial Disclosures, *see* Dkt. 12 at 2 – conferred on them an absolute right to discovery. That interpretation is wrong because the June 3 Order did not proscribe motions for protective orders to stay discovery. Further, the June 3 Order was nugatory because Judge Molloy issued it at a time when, unbeknownst to all, he was subject to mandatory disqualification. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998).

V. PLAINTIFFS WANT THE COURT TO AUTHORIZE A FISHING EXPEDITION AGAINST PENGUIN

Notwithstanding four amendments of their complaint over a period of eight months, Plaintiffs fail to allege any concrete facts that support any inference Penguin could be liable. Plaintiffs' entire case against Penguin is built on conclusory and implausible allegations that Penguin "hatched a scheme" with the other Defendants, "wrote" the Books itself, "knew" the Books contained false statements, etc. Such conclusory and implausible allegations are plainly insufficient under Rule 8(a)(2) and *Twombly*.

"Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *DM Research, Inc. v. College*

of American Pathologists, 170 F.3d 53, 55 (1st Cir.1999); accord, *Chiron Corp. v. Abbott Labs.*, 156 F.R.D. 219, 221 (N.D. Cal. 1994) (“Vague allegations of inequitable conduct” are the hallmark of a “fishing expedition” because they are designed to “allow[] the accuser to embark on wide-ranging discovery upon a thimble-full of facts. This is precisely the sort of tactical maneuvering that [pleading standards are] designed to deter.”). “*Iqbal* and *Twombly* prohibit . . . fishing expeditions.” *Valenzuela v. Culinary Training Academy*, 2011 WL 2609861, at *3 (D. Nev. Jun. 29, 2011).

Plaintiffs’ passion to “debunk” Defendants’ “monstrous lies,” *see* Dkt. 128 at 5-6, their false sense of urgency, and their belief in a paramount right to discovery regardless of “social and economic costs,” *see Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009), are all symptoms that the real issue here is not legality, but truth. Plaintiffs demand discovery for the purpose of probing the truth of Mortenson’s stories. But while Plaintiffs have deputized themselves the “truth police,” this does not entitle them to discovery if they cannot state viable claims.

CONCLUSION

Penguin respectfully requests that the Court stay discovery until such time, if ever, as the Court may rule that Plaintiffs have stated viable claims.

DATED: February 2, 2012

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CERTIFICATE OF COMPLIANCE AS TO WORD COUNT

Pursuant to Local Rule 7.1(d)(2)(E), I certify the following:

This brief complies with the word limitation of Local Rule 7.1(d)(2)(A) because this brief contains 3,250 words, excluding caption, table of contents, table of authorities, and certificate of compliance.

s/ F. Matthew Ralph
F. Matthew Ralph
