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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

GEORGE AND SUSIE PFAU, DAN DONOVAN, and DEBORAH NETTER, individually and on behalf of all others similarly situated, Plaintiffs, v. GREG MORTENSON, DAVID OLIVER RELIN, CENTRAL ASIA INSTITUTE (CAI), a foreign Corporation, PENGUIN GROUP (USA), INC., a Delaware corporation, and MC CONSULTING, INC., a Montana corporation, Defendants.	Cause No. CV-11-72-SEH Judge: Sam E. Haddon

BRIEF IN SUPPORT OF
PENGUIN GROUP (USA) INC.'S MOTION TO DISMISS
PLAINTIFFS' FOURTH AMENDED COMPLAINT

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INTRODUCTION

At issue here is a publisher's First Amendment right to publish autobiographies without a requirement that it verify the truth or accuracy of their contents. No court has ever upheld claims, like Plaintiffs' claims here, that a publisher should be liable for non-defamatory inaccuracies or falsehoods in an autobiography.[1]

Over the years, numerous cases have been brought by purchasers of nonfiction books against the publishers of those books, like Defendant Penguin Group (USA), Inc. ("Penguin") here, on the theory that the publisher was responsible for non-defamatory inaccuracies or outright lies in the books themselves. In most of those cases, plaintiffs alleged only that the publisher was negligent by failing to verify the accuracy of the author's words; but plaintiffs in some of those cases, like Plaintiffs here, alleged that the publisher engaged in fraud because it actually ***knew*** the allegedly nonfiction books' contents were false. None of those plaintiffs prevailed on their claims, and Plaintiffs here cannot prevail for the same reasons.

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[1] This brief characterizes the books at issue as autobiographies, although they might also be characterized as biographies or memoirs. The books collectively purport to narrate the experiences of Greg Mortenson over a period of approximately 15 years. *Three Cups of Tea* employs third-person narration ("he"), but *Stones Into Schools* employs first-person narration ("I"). The arguments in this brief do not turn on any differences in meaning between "autobiography," "biography," or "memoir."

It is black-letter law in the United States that (1) publishers are protected from liability for non-defamatory false statements in books that they publish – particularly books that are memoirs or autobiographies – by the First Amendment to the United States Constitution, and (2) a publisher owes no duty to verify the accuracy of non-defamatory statements in a nonfiction book it publishes.[2] If a publisher were required to guarantee or insure the truth and accuracy of everything an author says, the costs of publishing books would be prohibitive. Imposing such a duty would deep-freeze publishing and, with it, free speech. Neither the First Amendment nor common law would tolerate it.

Plaintiffs' claims have substantially less merit than similar claims rejected in prior cases. All prior cases involved publications that purported to provide practical advice. None of those cases involved, as here, memoirs or autobiographies. All prior cases involved personal or financial injuries suffered in reliance on the accuracy or truthfulness of the publication. None involved mere claims for refunds based on disillusionment.

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[2] By dropping their negligence claims from the Fourth Amended Complaint, Plaintiffs acknowledge they cannot possibly prevail on a more conservative and plausible theory (i.e., that Penguin was unaware of any falsehoods in the Books when it published them), and must allege a more radical and implausible theory (i.e., that Penguin deliberately engaged in a massive conspiracy to publish intentional falsehoods) to avoid dismissal. For the reasons stated herein, this attempt to plead a more radical and implausible theory fails.

In sum, Plaintiffs' claims against Penguin should be dismissed with prejudice because they are not viable under the First Amendment or common law. Penguin cannot be liable for the contents of the books at issue, nor for its alleged statements that the books were "true" or "nonfiction;" and, moreover, Plaintiffs have failed to allege cognizable injuries.

The Fourth Amended Complaint also fails to meet the pleading standards of both Rule 9(b) – because Plaintiffs allege virtually no facts specific to Penguin, but instead lump Penguin into an undifferentiated "enterprise" – and Rule 8(a)(2) – because their slender factual allegations specific to Penguin do not support the implausible conclusion that Penguin was engaged in a fraudulent conspiracy.

RELEVANT ALLEGATIONS

Plaintiffs are consumers who allegedly purchased either *Three Cups of Tea*, a book co-authored by Defendants Greg Mortenson and David Oliver Relin and published by Penguin in 2006, or *Stones Into Schools*, a book authored by Mortenson and published by Penguin in 2009 (collectively, "the Books"). 4th Am. Compl., ¶¶ 1-5; 7. Plaintiffs make the following allegations that are specific to Penguin:

- Penguin "published" the Books and "played a significant role in writing, promoting and selling" the Books, *id.*, ¶ 8;
- Penguin "knew that the two books contained falsehoods, or should have known;" *id.*, ¶ 31;

- Penguin described the Books on its website as "nonfiction" or "true," *id.*, ¶ 16;
- Penguin sold the Books within the United States and profited from them, *id.*, ¶ 16, 31;
- Penguin "is liable for all the conduct of Mortenson, Relin, CAI and MC, as it was their principal and they were acting within the scope of their agency relationship at all pertinent times," *id.*, ¶ 50;
- On April 18, 2011 – in response to "media reports" that the Books were "falsified" – Penguin issued a public statement that it planned to "carefully review" the "veracity of Mortenson's books," *id.*, ¶ 16.

Plaintiffs also allege that Penguin participated in a "massively widespread pattern of racketeering activity" by an "enterprise" comprising not only Penguin, Mortenson, and Relin, but also Defendants Central Asia Institute ("CAI")[3] and MC Consulting, Inc.[4] *Id.*, ¶ 12. Plaintiffs claim that the "enterprise's fraudulent scheme was to make Mortenson into a false hero, to sell books representing to contain true events, when they were false, to defraud millions of unsuspecting purchasers out of the purchase price of the books, and to raise millions of dollars in charitable donations for CAI." *Id.* The "enterprise" – but not any particular Defendant – is alleged to have made a variety of false statements in the Books, *id.*,

[3] Plaintiffs allege that CAI is "a charity that was founded and run by Mortenson." 4th Am. Compl., ¶ 12.

[4] Plaintiffs allege that MC Consulting is a "Montana corporation, owned and controlled by Mortenson." 4th Am. Compl., ¶ 8.

¶ 13(A)-(M); to have made false statements about the Books, namely that the Books are "true" or "nonfiction," *id.*, ¶ 16; and to have caused CAI to misuse funds, engage in fraudulent accounting, and misrepresent Mortenson's contributions, its own use of funds, and its accomplishments, *id.*, ¶ 13(N)-(Q), (S), (U)-(Z).

Plaintiffs allege claims against Penguin for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO claims"), based on predicate acts of mail and wire fraud; fraud; deceit; unjust enrichment; breach of express and implied contract; liability as principal; and accounting and injunctive relief. Plaintiffs seek class relief on behalf of "[a]ll consumers throughout the United States who purchased and paid for *Three Cups of Tea* or *Stones Into Schools* in any form or media (e.g., hardcover, paperback, audio book, audio download, e-book download) from January 1, 2006, to the date of judgment." *Id.*, ¶ 64.

Plaintiffs want their money back, punitive damages, attorneys' fees and interest. *Id.*, Prayer for Relief.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT VIABLE UNDER THE FIRST AMENDMENT AND COMMON LAW

Over the past century, purchasers of nonfiction publications have brought many claims against publishers, like Penguin here, based on injuries allegedly suffered in reliance on the accuracy or truthfulness of nonfiction publications. A

handful of those cases, as here, involved allegations that publishers intentionally published non-defamatory false statements of fact. All of those claims, without exception, have been rejected under the First Amendment or common law.

No court has ever imposed liability for fraud or breach of contract on a publisher of any nonfiction book, much less an autobiography (like the Books here) (a) based on the contents of a book; or (b) based on statements that the contents of a book are "true" or "nonfiction." First, publishers are protected from liability for non-defamatory false statements ***in*** books that they publish – particularly autobiographies or memoirs – by the First Amendment to the United States Constitution. Second, while publishers do not generally enjoy the same level of First Amendment protection for statements ***about*** such books, Penguin's alleged statements at issue here – namely, that the Books were "true" or "nonfiction" – are clearly not actionable under the First Amendment or common law. Third, the purchaser of an autobiography or memoir does not suffer a cognizable injury by learning that the book contains inaccuracies or falsehoods.

A. The First Amendment and Common Law Bar Plaintiffs' Claims Against Penguin for Publishing Non-Defamatory Falsehoods or Inaccuracies in the Books

The First Amendment accords the highest protections to speech about matters of public concern. *Snyder v. Phelps*, 131 S.Ct. 1207, 1211 (2010); *Simon & Schuster v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105

(1991). The Books – bestselling autobiographies about Mortenson's efforts to build schools for children in Pakistan and Afghanistan – are clearly speech about matters of public concern, and hence entitled to maximum First Amendment protection.

When First Amendment protection is at its maximum, it bars liability for both the non-defamatory "intentional lie" and for the "careless error" because both are inevitable consequences of free debate and expression. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 341; *accord*, *Sullivan*, 376 U.S. at 271-72; *State v. Woods*, 221 Mont. 17, 23 (1986) ("The defendant's right to speak is not limited to speaking the truth."). If a bookseller were held liable for the content of his books, "he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as [unprotected] literature." *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).[5]

[5] The same principle applies to civil litigation between private parties. *E.g.*, *Snyder v. Phelps*, 580 F.3d 206, 217 (4th Cir. 2009), *aff'd*, 131 S.Ct. 1207 (2011) ("It is well established that tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment.").

This rule particularly applies to publishers, and even more so when, as here, they are publishing nonfictional works containing (at least hypothetically) verifiable statements of fact, such as autobiographies.

> A nonfiction work often details events that are long past and describes people who are unavailable to verify the author's statements. To require a book publisher to check, as a matter of course, every potentially defamatory reference might raise the price of nonfiction works beyond the resources of the average man. This result would, we think, produce just such a chilling effect on the free flow of ideas as First Amendment jurisprudence has sought to avoid.

Geiger v. Dell Publishing Co., Inc., 719 F.2d 515 (1st Cir. 1983). Consequently, the Supreme Court has never recognized any rule that "compels a publisher . . . to guarantee the accuracy of [its] factual assertions" on the ground that such a rule "may lead to intolerable self-censorship." *Gertz*, 418 U.S. at 340; *see also Montana Right to Life Ass'n v. Eddleman*, 999 F.Supp. 1380 (D. Mont. 1998) (quoting *Gertz*).

1. The First Amendment Bars Fraud Claims Based on Statements Within Nonfiction Books

Relatively few plaintiffs have alleged what Plaintiffs' allege here – that a publisher intentionally published non-defamatory false statements of fact – but all of those claims have been rejected on First Amendment grounds. *See, e.g., 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).

The cases most directly on point are *Lacoff v. Buena Vista Publishing, Inc.*, 183 Misc.2d 600, 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000), and *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App.4th 1220 (Cal. App. 1999). In those cases, consumers brought fraud class actions against the publishers of a book entitled *The Beardstown Ladies' Common-Sense Investment Guide* based on alleged statements that the Beardstown Ladies' investment secrets had achieved a 23.4% annual return when an audit had demonstrated that their annual returns had actually been 9.1% during the relevant period. *Lacoff*, 183 Misc.2d at 602; *Keimer*, 75 Cal.App.4th at 1224. The courts in both cases agreed that the statements ***in*** the books themselves were not commercial speech, were fully protected by the First Amendment, and were not actionable. *See Lacoff*, 183 Misc.2d at 605 ("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."); *Keimer*, 75 Cal.App.4th at 1231 ("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.").[6]

The results in these cases are consistent with the Supreme Court's observation that a "[f]alse statement alone does not subject a [person] to fraud liability." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). "Exacting proof" of each element of fraud must be proved by "clear and convincing evidence." *Id.* Under Montana law, there are nine elements of fraud. *E.g., C. Haydon Limited v. Montana Mining Properties, Inc.*, 864 P.2d 1253, 1256 (Mont.1993)). Plaintiffs do not allege ***facts*** showing that:

> (a) any allegedly false statements in the Books were material (element 3);
>
> (b) Penguin knew of the falsity of such statements (element 4);[7]
>
> (c) Penguin intended any Plaintiff to rely on information in the Books (element 5);
>
> (d) any Plaintiff, in fact, read the Books or relied on such information (element 7);
>
> (e) any Plaintiff was justified in relying on such information (element 8); or

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[6] *Lacoff* and *Keimer* reached different conclusions as to whether the same statements, when printed on the book's cover and flyleaf, were commercial speech about the books. *Lacoff* said "no"; *Keimer* said "yes."

[7] Plaintiffs do indeed ***allege*** that Penguin "knew that the two books contained falsehoods," 4th Am. Compl., ¶ 31, but they allege no facts from which it is plausible to infer that Penguin had any such knowledge.

(f) any Plaintiff was injured by relying on such information (element 9).

And Plaintiffs will ***never*** be able to allege such facts because the Books were offered as autobiographies. While it is possible (and perhaps even common) for autobiographies to contain intentional falsehoods,[8] it is impossible that such intentional falsehoods can amount to fraud because ***nobody can justifiably rely on the contents of such a book***.[9]

2. Penguin Owed Plaintiffs No Duty to Publish Accurate or Truthful Information in the Books

Based on the Supreme Court precedent summarized above, and with one exception not relevant here,[10] no lower court has ever imposed a duty on publishers

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[8] "Speaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks [liability] if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all." *See United States v. Alvarez*, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing petition).

[9] No class should ever be certified in this case because there are too many individualized issues as to causation and damages. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-68 (9th Cir. 2004).

[10] Publishers of inaccurate aeronautical charts may be liable on product liability theories, e.*g.*, *Brocklesby v. United States*, 767 F.2d 1288, 1294-95 (9th Cir. 1985), although at least one court has limited any such liability to the government, not private publishers. *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148 (5th Cir. 1971). Plaintiffs here do not allege that the Books were defective products, and the Books are simply not analogous to aeronautical charts. Rather, they are expressions of intellectual content concerning matters of public concern.

to publish accurate or truthful information in nonfiction publications. The leading case is *Jaillet v. Cashman*, 115 Misc. 383 (N.Y. Sup. Ct. 1921), in which an investor lost money after he sold securities in reliance on an inaccurate report on a stock ticker. The investor sued the publisher of the stock ticker to recover his losses, but the court granted the publisher's demurrer to the complaint with prejudice. *Id.* at 384-85. The court found no basis for recognizing a legal duty because (1) there is "no contract or fiduciary relationship" between a publisher and "one of a public to whom all news is liable to be disseminated," and (2) recognizing a duty of care would improperly expose a publisher to liability "to every member of the community who was misled by the incorrect [information]." *Id.* at 384.

The Ninth Circuit approved *Jaillet's* holding in a case where two mushroom enthusiasts sustained serious injuries in reliance on information in *The Encyclopedia of Mushrooms*. *See Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991). The Ninth Circuit concluded the publisher was not liable on claims of breach of warranty, negligence, negligent misrepresentation and false representations "because ***a publisher does not have a duty to investigate the accuracy of the text it publishes***." *Id.* (emphasis added). "[T]here is nothing inherent in the role of a publisher or the surrounding legal doctrines to suggest that

such a duty should be imposed on publishers. Indeed the cases uniformly refuse to impose such a duty." *Id.* at 1037.

Numerous other courts have likewise dismissed common-law claims against publishers for false or inaccurate statements in nonfiction publications. *See First Equity, supra*; *Gorran, supra*; *Barden v. HarperCollins Publishers, Inc.*, 863 F.Supp. 41 (D. Mass. 1994); *Jones v. J.B. Lippincott Co.*, 694 F.Supp. 1216 (D. Md. 1988); *Lewin v. McCreight*, 655 F.Supp. 282 (E.D. Mich. 1987); *Pittman v. Dow Jones & Co.*, 662 F.Supp. 921 (E.D. La. 1987); *DeFilippo, supra*; *Tumminello v. Bergen Evening Record, Inc.*, 454 F.Supp. 1156, 1160 (D. N.J. 1978); *Gutter v. Dow Jones*, 490 N.E.2d 898, 901-02 (Ohio 1986); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263 (Ill. App. 1985); *Cardozo v. True*, 342 So.2d 1053, 1056 (Fl. App. 1977); *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. 1974); *Langworthy v. Pulitzer Publ. Co.*, 368 S.W.2d 385, 390 (Mo. 1963); *Curry v. Journal Publ. Co.*, 68 P.2d 168 (N.M. 1937). Even courts that relied purely on common sense (because the parties provided them no legal authority) have reached the same conclusion. *E.g., Gale v. Value Line, Inc.*, 640 F.Supp. 967 (D. R.I. 1986).

Two rationales guide these decisions: (1) the "burden placed upon publishers to check every fact in the books they publish is both impractical and outside the

realm of their contemplated legal duties," *Barden*, 863 F.Supp. at 45,[11] and (2) "actions based on a defendant's allegedly false speech must be reconciled with the First Amendment, for [c]onstitutional protection does not turn upon the truth . . . of the ideas and beliefs which are offered." *Gorran*, 464 F.Supp. at 326.[12]

Winter noted that, although a publisher is generally not a "guarantor of the accuracy of an author's statements of fact," a publisher may "assume such a burden." *Winter*, 938 F.2d at 1037 fn. 7, *citing Hanberry v. Hearst Corp.*, 276 Cal.App.2d 680, 683-84, 81 Cal.Rptr. 519, 521 (1969). In *Hanberry*, the publisher of *Good Housekeeping* magazine was held liable for injuries caused by a defective product it had advertised because the publisher had inspected and tested the product and imprinted the "Good Housekeeping's Consumer's Guaranty Seal" on the advertisement. Here, in contrast, Plaintiffs do not allege that Penguin verified all of Mortenson's personal experiences and guaranteed their accuracy.

3. Plaintiffs' Claims Have Less Merit Than Claims Previously Rejected on the Same Legal Theories

Plaintiffs' claims here have substantially less merit than the claims rejected in the cases above for two reasons. First, the nonfiction publications at issue in virtually all the reported cases contained practical information that the plaintiffs

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[11] *Accord*, *First Equity*, 869 F.2d at 180; *Pittman*, 662 F.Supp. at 922-23; *Gutter*, 490 N.E.2d at 900-902; *Alm*, 480 N.E.2d at 721; *Yuhas*, 322 A.2d at 825.

[12] *Accord*, *Alm*, 480 N.E.2d at 721-22; *Demuth*, 432 F.Supp. at 993-94.

tried to use, for example, how to how to invest money, how to pick and cook mushrooms, or how to diet. None of those cases involved autobiographies, like the Books, on whose truth or accuracy nobody could ever justifiably rely. Second, plaintiffs in the published cases each allegedly suffered personal injury or actual financial losses in reliance on the allegedly false or inaccurate information in a nonfiction publication. None of them suffered only what Plaintiffs allegedly suffered here – namely, non-cognizable dissatisfaction upon learning that stories they thought to be true may actually be partially false. Indeed, as explained below, Plaintiffs' failure to suffer a cognizable injury is an independent basis for denying their claims with prejudice.

B. Plaintiffs Fail to Allege Any Actionable Speech by Penguin About the Books

Plaintiffs also allege that Penguin made intentional false statements ***about*** the Books – namely, that Penguin described the Books on its website as "nonfiction" or "true," despite knowing they were not, 4th Am. Compl., ¶¶ 16, 31. The alleged statements are not actionable speech. Courts distinguish between advertising statements made to summarize the contents of a book and advertising statements about a book as a product. "The former are essentially a matter of argument, to be accepted or rejected by those who read the book, while the latter might often be statements of fact that might be verifiable." *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir. 1995).

No court has countenanced claims against a publisher based on the publisher's description of a book as "nonfiction" or "true" for at least two reasons. First, to describe an autobiography (or, indeed, any publication whatsoever) as "nonfiction" or "true" is merely to summarize the books' contents in a way that is "inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 796 (1988).

Second, such statements are not actionable because they are not "susceptible of being proven true or false." *Knievel v. ESPN, Inc.*, 223 F.Supp.2d 1173, 1178 (D. Mont. 2002); *see also Clorox Co. Puerto Rico v. Proctor & Gamble Comm. Co.*, 228 F.3d 24, 38 (1st Cir. 2000) (claims that are not "specific and measurable" or that cannot be literally true or false are puffery). A nonfictional work may reasonably be based on memories or perceptions that are inaccurate, incomplete, or falsifiable but that are nevertheless "true" for the subject. No standards exist for drawing the line where "fiction" becomes "nonfiction," or vice versa; and the courts are not a proper place for developing such standards or policing that line.

Further, to state viable claims based on statements that the Books were "nonfiction" or "true," Plaintiffs must allege that those words were uttered as pure commercial speech and therefore deserve "lesser protection" than speech within the Books. *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980). Plaintiffs fail to meet that standard because "[c]ommercial

speech is 'defined as speech that does no more than propose a commercial transaction.'" *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011).

Here, Plaintiffs do not allege that Penguin described the Books as "true" or "nonfiction" in the course of proposing commercial transactions. Plaintiffs allege only that Penguin made these statements promotionally on its website, 4th Am. Compl., ¶ 16; but speech does not automatically become commercial speech simply because it promotes or sells something. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

Descriptive words such as "true" or "nonfiction" do not have the "[t]wo features of commercial speech [that] permit regulation of its content." *Central Hudson*, 447 U.S. at 564 n.6 First, such words do not reflect or imply that the speaker has "extensive knowledge" of the Books or is "well situated to evaluate the accuracy of their messages," *id.*, especially when, as here, Penguin had no duty to verify their accuracy. Second, such statements are not "a hardy breed of expression" that is likely to survive the imposition of liability *Id.* If publishers could be held liable for describing books as "true" or "nonfiction," publishers would likely stop using those words rather than incur the costs and delays of reviewing the accuracy of their authors' statements.

C. Plaintiffs Fail to Allege Cognizable Injuries

Plaintiffs do not allege that the Books were defective, poorly made, poorly written or contained different subject matter than represented. Plaintiffs allege they were injured only when they eventually learned that portions of the Books may have been false or exaggerated. Plaintiffs' only injury is that they were allegedly "lied to," induced to buy the Books by the lies, and would not have bought the Books had they known the truth about them.

These are not cognizable injuries under civil RICO or common law.

1. Plaintiffs Fail to Allege RICO Injuries

A RICO plaintiff must plead and prove injury to "business or property," 18 U.S.C. § 1964, which means "concrete financial loss, and not mere 'injury to a valuable intangible property interest.'" *E.g.*, *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70–71 (9th Cir.1994). Plaintiffs allege that the Books' value was diminished by the alleged falsehoods, but they do not allege that they ever realized those losses (e.g., by trying to sell the Books). Such injuries are not cognizable. *Oscar v. University Students Co–operative Ass'n*, 965 F.2d 783, 787 (9th Cir.1992) (en banc).

Further, Plaintiffs' claims that the Books "are not worth what they paid for them or that they would not have bought them at all" but for Defendants' misrepresentations do not state 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)[13] (misrepresentation that merely induced purchase of allegedly defective item is not a RICO injury).

2. Plaintiffs Fail to Allege Common Law Injuries

Courts have likewise concluded that the types of injuries alleged here are not cognizable under state law. For example, in *Rice v. Penguin Putnam, Inc.*, 734 N.Y.S.2d 98, 289 A.D.2d 318 (N.Y. App. Div. 2001), a putative class of consumers claimed they had bought a book because "the front and back cover of the book prominently announced that it had been written by the *New York Times* bestselling author William J. Caunitz," when Caunitz had died after completing only half of the novel, and the remainder was written by a lesser known author. *Id.* at 318. Plaintiffs claimed they "would not have purchased the novel had they known the true facts about its authorship," and offered an amended complaint alleging they were injured "because the defendant was able to charge a higher price for [the book] by creating a false impression that it was entirely written by a famous author," but their claims were dismissed for lack of a cognizable injury on any of these theories. *Id.*

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

Likewise, in *Small v. Lorillard Tobacco Co. Inc.*, 94 N.Y.2d 43, 720 N.E.2d 892 (N.Y. 1999), consumers sought money damages for being "lied to," alleging that "had they known that nicotine was addictive, they never would have purchased cigarettes" from the defendant tobacco company. *Id.* at 56. The only recovery plaintiffs sought was, as here, the purchase price of their cigarettes. The court rejected that theory as "legally flawed" because it alleges "***deception as both act and injury***." *Id.* (emphasis added).[14]

The absence of cognizable injury is best highlighted by an analogy. Imagine a person who subscribes to *The New York Times* believing that the newspaper – as it has proclaimed for more than 150 years – publishes "all the news that's fit to print." But the subscriber learns that, because of an alleged political bias, *The Times* may have deliberately distorted facts in certain stories. The subscriber, like Plaintiffs here, paid for the First Amendment content, "consumed" it, and enjoyed its benefits, but, post-consumption, learned some new information that altered his feelings about the value of some of the "news" reported by the newspaper. If Plaintiffs' theory of this case were correct, then subscribers – indeed, every

[14] *Accord*, *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 92-93 (S.D.N.Y. 2010) (allegations of infliction of "false beliefs and understandings" or of pecuniary loss for purchasing a product are not cognizable injuries); *Oscar v. BMW of North Am., LLC*, No. 09 Civ 11, 2011 WL 2206747, at *13 (S.D.N.Y. Jun. 7, 2011) (denying class certification of claims that consumers "would not have purchased cars had they known the tires were so susceptible to puncturing").

disappointed consumer of First Amendment content – could sue publishers for fraud without having relied on, or been injured by, any of the alleged misrepresentations. Consumers who were "lied to" would be allowed to use the courts to police the truth of protected First Amendment content.

That is not – and should not be – the law. "Courts have found that First Amendment considerations . . . argue against the liability of a publisher for a reader's reactions to a publication, absent incitement." *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802, 804 (S.D. Tex. 1983). An injury to Plaintiffs' memory of the Books, or their retrospective diminishment of enjoyment in them, is not a cognizable injury.[15] Here, as in *Small*, "Plaintiffs' cause of action . . . sets forth deception as both act and injury." *Small*, 94 N.Y.2d at 56.

II. THE FOURTH AMENDED COMPLAINT FAILS TO MEET THE PLEADING STANDARDS OF RULES 9(b) AND 8(a)(2)

A. The Fourth Amended Complaint Fails to Differentiate the Fraudulent Conduct of Each Defendant

Rule 9(b) "requires a pleader of fraud to detail with particularity the time, place, and manner of each act of fraud, ***plus the role of each defendant in each scheme.***" *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d

[15] Montana has recognized that a plaintiff may recover for "anger, chagrin, disappointment," but only when such injuries are "extreme" and only when the plaintiff sustains a claim for intentional or negligent infliction of emotional distress. *Sacco v. High Country Ind. Press, Inc.*, 271 Mont. 209, 234 (1995). Plaintiffs do not allege such claims here, nor facts sufficient to support them.

397, 405 (9th Cir. 1991) (emphasis added). "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 . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2006) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F.Supp. 1437, 1439 (M.D.Fla.1998)).

But the Fourth Amended Complaint violates this rule by alleging that the Defendants collectively, acting as an "enterprise," engaged in all the conduct that allegedly gives rise to liability. *See, e.g.*, 4th Am. Compl., ¶¶ 12-16. Plaintiffs utterly fail to "'identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme,'" as they are required to do. *Swartz*, 476 F.3d at 765 (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989)). Lest there be any doubt that this rule applies here, "the Ninth Circuit has repeatedly insisted that this rule be followed in RICO actions alleging the predicate act of mail fraud." *Lancaster Community Hosp.*, 940 F.2d at 405.

Plaintiffs also fail to plead the requisite "organizational structure or hierarchy for the alleged association-in-fact enterprise." *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 400 (7th Cir. 2009); *see also Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008). The only concrete factual allegations against Penguin are that Penguin published and sold the Books. Allegations of ordinary business

conduct are insufficient to state a RICO claim, *Crichton*, 576 F.3d at 399, as are allegations that that do not "rise to the level of direction" of the RICO enterprise. *Walter*, 538 F.3d at 1249.

B. Plaintiffs' Allegations Against Penguin Do Not Meet the Plausibility Standard of Rule 8(a)(2)

The allegations against Penguin do not even pass muster under the more lenient standards of Rule 8(a)(2), which requires a plaintiff to allege claims that are not merely conceivable, but actually plausible. *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). The "plausibility standard" applies to each element of a plaintiff's claim, including elements related to the defendant's mental state or knowledge. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948, 1950 (2009) (discriminatory intent); *Hydrick v. Hunter*, --- F.3d ----, 2012 WL 89157 (9th Cir. Jan. 12, 2012) (knowledge).

The fundamental facts alleged against Penguin in the Fourth Amended Complaint are that (1) Penguin published, sold and profited from *Three Cups of Tea* and *Stones Into Schools*; (2) the Books contained false statements; and (3) Penguin described those Books as "nonfiction" or "true." These slim alleged facts are perfectly consistent with a scenario in which Penguin published and sold the Books in the good faith belief that the Books were true, nonfictional accounts of Mortenson's personal experiences. "Conduct that is as consistent with other equally plausible explanations as with illegal conspiracy, without more, does not

support an inference of conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Plaintiffs nevertheless ask the Court to believe that these facts support the conclusion that Penguin participated in a "massively widespread pattern of racketeering activity" with Mortenson, Relin, CAI, and MC Consulting, 4th Am. Compl., ¶ 12, in which, "[s]ometime" after 1993, they "hatched" an "intricate plan to fabricate facts to make Mortenson into a false hero." *Id.*, ¶ 28. This conspiracy theory is inherently implausible. It demands additional ***factual*** allegations to support it. There are none, only conclusory allegations.

To establish Penguins' involvement in a conspiracy, Plaintiffs allege that Penguin "knew" (*id.*, ¶¶ 16, 31) or "should have known" (*id.*, ¶ 31) that the Books contained alleged falsehoods or inaccuracies. But "bald" or "conclusory" allegations of knowledge are insufficient. *Hydrick*, 2012 WL 89157 at *4. A plaintiff "must still allege sufficient facts to plausibly establish" a defendant's "knowledge." *Id.* The only fact Plaintiffs allege in support of Penguin's knowledge that the Books contained falsehoods is that, after the various allegations of falsehoods and inaccuracies were first published by *60 Minutes* in April 2011, Penguin announced that it would review the allegations and continued using its website to promote the Books as true. 4th Am. Compl., ¶ 16. Yet this alleged fact

does not create an inference that Penguin knew any statements in the Books were false when made.

Plaintiffs nevertheless ask the Court to infer that Penguin is culpable because, upon learning of the allegations against Mortenson, it did not immediately and unreservedly assume them to be true. But that inference is far less plausible than the alternative inference that Penguin did not know whether the allegations were true and intended to proceed cautiously, especially in light of the fact that, as described above, Penguin has no duty to verify the accuracy of the Books' contents. "There is no authority to support Plaintiffs' argument that a publisher may be liable . . . because it fails to retract a statement upon which grave doubts are cast after publication." *D.A.R.E. America v. Rolling Stone Magazine*, 101 F.Supp.2d 1270, 1287 (C.D. Cal. 2000) (defamation).

Plaintiffs also allege, in a conclusory way, that Penguin actually "wrote" parts of the Books (4th Am. Compl., ¶ 7), but they do not allege any facts to support that inherently implausible conclusion, which contradicts common sense.

Plaintiffs also conclusorily allege that Penguin caused CAI to do various improper things, 4th Am. Compl., ¶¶ 13(N)-(W); but Plaintiffs plead no facts supporting an inference that Penguin has any relationship with, control over, or knowledge of CAI such that Penguin could be accountable for CAI's conduct. To

the contrary, such an inference is implausible because Plaintiffs allege that CAI is "a charity that was founded and run by Mortenson." 4th Am. Compl., ¶ 12.

Plaintiffs try to overcome the absence of facts supporting their theory by alleging the legal conclusion that Penguin "is liable for all the conduct of Mortenson, Relin, CAI and MC, as it was their principal and they were acting within the scope of their agency relationship at all pertinent times." *Id.*, ¶ 50. However, Plaintiffs allege no facts to support a principal-agent relationship between Penguin and any Defendant. Instead, they offer "merely a 'formulaic recitation of the elements' of a respondeat superior claim . . . [that], standing alone, does not satisfy the pleading standard of Federal Rule of Civil Procedure 8." *Bolton v. Fed. Home Loan Mortgage Corp.*, No. 2:10cv171, 2010 WL 3270022 at *4 (M.D. Ala. Aug. 17, 2010) (citations omitted).

Penguin's only alleged conduct – publishing and promoting the Books – is consistent with the inference that it was completely unaware of any falsehoods or inaccuracies in the Books. The inference that Plaintiffs ask the Court to draw – that Penguin engaged in a massive conspiracy to commit fraud – is not nearly as plausible as the alternative inference that Penguin promoted and sold the Books in the good faith belief that they were accurate, true, and nonfictional.

C. Plaintiffs Fail to Plead Necessary Elements of Their Claims

Dismissal of claims is appropriate "if there is an absence of sufficient facts alleged under a cognizable legal theory." *Capeheart v. Astrue*, No. CV 08-63, 2009 WL 902429 (D. Mont. Mar. 27, 2009). Here, Plaintiffs fail to plead facts establishing requisite elements of their claims.

As noted, Plaintiffs' RICO, fraud, and deceit claims (Counts I-II & V-VI) should be dismissed because Plaintiffs fail to allege, among other things, facts establishing injury or causation, for example, that any Plaintiff actually read the Books or accessed Penguin's website before purchasing the Books, relied on statements in the Books or Penguin's statements that the Books were "true" or "nonfiction," and suffered actual financial losses as a result.

Plaintiffs' contract claims (Counts III & IV) fail because Plaintiffs do not allege any communications between themselves and Penguin resulting in a contract. *See* M.C.A. § 28-2-102; *Kortum-Managhan v. Herbergers NBGL*, 349 Mont. 475, 480 (2009); *Royal Ins. Co. v. Roadarmel*, 301 Mont. 508, 515 (2000).

Likewise, Plaintiffs' claims that depend for their viability on the success of other claims – i.e., Plaintiffs' claims for unjust enrichment (Count VII), punitive damages (Count IX) and accounting and injunctive relief (Count XI) – should be dismissed, *inter alia*, because the underlying claims fail.

CONCLUSION

Fundamental deficiencies in a complaint 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. The Court should dismiss all claims against Penguin in the Fourth Amended Complaint, with prejudice.

DATED: January 26, 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 6,489 words, excluding caption, table of contents, table of authorities, and certificate of compliance.

s/ F. Matthew Ralph
F. Matthew Ralph