

AUGUST TERM 2013
No. 13-1753-cv

Plaintiffs-Appellants,

HARLEQUIN ENTERPRISES LIMITED, HARLEQUIN BOOKS S.A.,
HARLEQUIN ENTERPRISES B.V.,
*Defendants-Appellees.*¹

Appeal from the United States District Court
for the Southern District of New York.
No. 12-cv-5558 — Harold Baer, Jr., *Judge*.

ARGUED: NOVEMBER 21, 2013
DECIDED: MAY 1, 2014

Before: KEARSE, JACOBS, AND PARKER, *Circuit Judges*.

¹ The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 subsidiaries Harlequin Enterprises B.V. (“HEBV”) and Harlequin
 2 Books S.A. (“HBSA,” and together with HEBV, “Harlequin
 3 Switzerland”). Plaintiffs contend that the Harlequin entities
 4 breached agreements with them and other authors (the “Publishing
 5 Agreements”) by paying them artificially low royalties on the sales
 6 of digitized versions of their books.

7 The United States District Court for the Southern District of
 8 New York (Baer, J.) concluded that plaintiffs’ allegations failed to
 9 state claims and dismissed the amended complaint pursuant to
 10 Federal Rule of Civil Procedure 12(b)(6). *See Keiler v. Harlequin*
 11 *Enters. Ltd.*, No. 12-5558, 2013 WL 1324093 (S.D.N.Y. Apr. 2, 2013).
 12 For the reasons set forth below, we hold that plaintiffs’ claims based
 13 on agency, assignment, and alter ego theories cannot serve to modify
 14 the terms of the Publishing Agreements and were properly
 15 dismissed. We also conclude that the amended complaint set forth
 16 sufficient facts to plead a breach of the Publishing Agreements on
 17 the theory that defendants calculated their e-book royalties based on
 18 an unreasonable license fee. Accordingly, we affirm the judgment in
 19 part, reverse it in part, and remand for further proceedings
 20 consistent with this Opinion.

21 I. BACKGROUND

22 This case arises in the context of a meteoric rise in e-book sales
 23 over the last several years.² Defendant Harlequin Enterprises is the
 24 world’s largest publisher of romance novels. Prior to 1983,
 25 Harlequin Enterprises directly contracted with authors for the
 26 publication of their works under the *Harlequin* (and related) imprints
 27 using a standard agreement which Harlequin Enterprises signed as
 28 the “Publisher.” (Am. Compl. ¶ 34).

² Amici note that from 2008 to 2012, e-book sales grew from \$64 million annually to over \$3.0 billion annually—an increase of over 4,700 percent. *Amici Curiae Br.* at 5, Dkt. No. 51.

1 Beginning in 1983, Harlequin Enterprises changed this
2 arrangement, ostensibly “for tax and related purposes.” (*Id.* ¶ 31). It
3 registered a subsidiary HEBV, a Dutch company, in Fribourg,
4 Switzerland. Thereafter, Harlequin Enterprises required authors to
5 enter into publishing agreements substantially similar to its previous
6 agreements, but with HEBV signing the agreements as the
7 “Publisher” and with Harlequin Enterprises included in the
8 agreements’ definition of a “related licensee.” (*See id.* ¶ 35).
9 Notwithstanding this change, Harlequin Enterprises continued to
10 draft, negotiate, and administer the publishing agreements, as well
11 as to edit, publish, and promote the authors’ novels. (*See id.* ¶¶ 3, 40,
12 41). HEBV, however, sent out royalty statements and payments to
13 the authors. (*See id.* ¶¶ 41, 42). Harlequin Enterprises advised
14 authors that the purpose of the change was to “rationalize business
15 procedures.” (*Id.* ¶ 35).

16 In 1994, Harlequin Enterprises registered HBSA, a Swiss
17 company, as the successor of HEBV, again “for tax and related
18 purposes.” (*See Am. Compl.* ¶ 31). Thereafter, HBSA signed the
19 agreements as the “Publisher” and Harlequin Enterprises continued
20 to be defined in the Publishing Agreements as a “related licensee.”
21 Harlequin Enterprises continued to publish, and promote the
22 authors’ novels while HBSA sent out royalty statements and
23 payments. (*Id.* ¶ 36). Harlequin Enterprises advised authors that the
24 change to having HBSA sign as the “Publisher” was a name change
25 that “would not affect” them. (*Id.*).

26 Under the terms of the Publishing Agreements, the authors
27 granted to the “Publisher” on a “sole and exclusive basis all the
28 rights in and to [their Works] in any country throughout the world
29 under various imprints and trade names during the full term of
30 copyright.” (*Id.* ¶ 49 (brackets in original)). The Publishing
31 Agreements additionally provided that HEBV or HBSA as the

1 Publisher had “the sole and exclusive right to execute, sell, license or
2 sublicense . . . rights subject to the sharing of net proceeds.” (*Id.*).
3 The Publishing Agreements also detailed how authors were to be
4 compensated in connection with the sales of various editions of their
5 works. Specifically, author royalties on U.S. sales of mass market
6 paperback and hardcover copies were based on a percentage of the
7 cover price.

8 Moreover, the Publishing Agreements contained two umbrella
9 clauses covering the potential sale, license, or distribution of the
10 authors’ works in other media. Under the “All Other Rights” clause,
11 the Publishing Agreements provided that the authors’ royalties
12 would be calculated as follows:

13 On all other rights exercised by Publisher or its Related
14 Licensees fifty percent (50%) of the Net Amount Received by
15 Publisher for the license or sale of said rights. The Net
16 Amount Received for the exercise, sale or license of said rights
17 by Publisher from a Related Licensee shall, in Publisher’s
18 estimate, be equivalent to the amount reasonably obtainable
19 by Publisher from an Unrelated Licensee for the license or sale
20 of the said rights.

21 (*Id.* ¶ 52). The Other Rights clause provided:

22 If Publisher licenses, sublicenses or sells to an Unrelated
23 Licensee any of the following rights to the Work anywhere in
24 the world, in any language, Author’s and Publisher’s share of
25 net amount received by Publisher for said license, sublicense
26 or sale shall be apportioned as follows . . .

27 [Author’s share] 50% [Publisher’s Share] 50%.

(Am. Compl. ¶ 53 (brackets in original)). In addition, the Publishing Agreements provided that the Publisher could “assign this Agreement to any related legal entity,” and could “delegate any of its editorial, administrative and/or other responsibilities pursuant to this Agreement to its parent company or to an affiliate, subsidiary or other related legal entity.” (*Id.* ¶ 49). Consistent with this provision, Harlequin Enterprises performed many of the responsibilities of the Publisher under the agreements. (*See, e.g., id.* ¶¶ 3, 39, 41-48).

As the market for e-books expanded, Harlequin Enterprises sold and licensed e-books and e-book rights directly to consumers on its website and to e-book licensees such as Amazon. (*Id.* ¶ 55). In 2011, Harlequin Enterprises informed authors that it believed that author royalties for e-books were covered by the All Other Rights clause in the Publishing Agreements and accordingly advised the authors that their royalty payments would be calculated based on the net amount received by Harlequin Switzerland from a license to publish e-books that Harlequin Switzerland purportedly granted to Harlequin Enterprises. Harlequin Enterprises claimed that the net amount received by Harlequin Switzerland was 6 percent to 8 percent of the cover price of the e-books, and that, consequently, the royalties owed to the authors were 50 percent of that amount, or 3 percent to 4 percent of the cover price of the e-books. (*Id.* ¶ 56).

Plaintiffs commenced this putative class action seeking to represent authors who entered into Publishing Agreements with Harlequin Switzerland between 1990 and 2004. In their amended complaint, plaintiffs asserted three claims for breach of contract grounded in agency, assignment, and alter ego liability. The common contention was that, under the Publishing Agreements, Harlequin Enterprises rather than Harlequin Switzerland should be recognized as the “Publisher” when calculating royalty payments. (*Id.* ¶ 11). Under this reading, plaintiffs contended they are entitled

1 to 50 percent of the amount received on e-books by Harlequin
 2 Enterprises (which is upwards of 50 percent of the cover price),
 3 rather than the far lower 50 percent of the “Net Amount Received”
 4 by Harlequin Switzerland. (Am. Compl. ¶¶ 6, 55).

5 In addition, the amended complaint asserted a claim for
 6 breach of contract on the theory that the license fees paid to
 7 Harlequin Switzerland did not comply with the “All Other Rights”
 8 clause requiring that the net amount received from a related licensee
 9 be equivalent to the “amount reasonably obtainable” from an
 10 unrelated licensee. Finally, the amended complaint asserted a claim
 11 for unjust enrichment against Harlequin Enterprises.

12 Defendants moved under Rule 12(b)(6) to dismiss the
 13 amended complaint and the district court granted the motion. The
 14 court held that the first three claims failed because the contractual
 15 definition of “Publisher” under the Publishing Agreements was
 16 binding, and therefore, plaintiffs’ theories of agency, assignment,
 17 and alter ego could not recast the obligations in the contracts.
 18 *Harlequin*, 2013 WL 1324093, at *2. The court dismissed the fourth
 19 claim on the ground that the amended complaint failed to allege
 20 sufficient facts supporting plaintiffs’ assertion that the licensing fees
 21 Harlequin Enterprises paid to its subsidiaries were not equivalent to
 22 “the amount reasonably obtainable from an Unrelated Licensee.” *Id.*
 23 at *3. Finally, the district court held that plaintiffs’ contention that
 24 they were entitled to a larger share of e-book royalties fell within the
 25 scope of a written contract (the Publishing Agreement) and therefore
 26 precluded an unjust enrichment claim. *Id.* The district court entered
 27 judgment in favor of the defendants and this appeal followed.

28 II. DISCUSSION

29 To survive a motion to dismiss under Rule 12(b)(6), a
 30 complaint must allege sufficient facts which, taken as true, state a

1 plausible claim for relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 2 555–56 (2007). We review *de novo* the dismissal of a complaint under
 3 Rule 12(b)(6), accepting all factual allegations (but not legal
 4 conclusions) as true and drawing all reasonable inferences in favor
 5 of the plaintiffs. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *N. J.*
 6 *Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d
 7 109, 119 (2d Cir. 2013).

8 Plaintiffs contend that the district court erred in dismissing
 9 their breach claims because, under principles of agency, assignment,
 10 and alter ego, their amended complaint plausibly alleged that
 11 Harlequin Enterprises was the “Publisher.” They also contend that
 12 they plausibly alleged that the intra-company licensing fees were not
 13 “equivalent to the amount reasonably obtainable” from an unrelated
 14 licensee.³ We consider these matters in turn.

15 Under New York law, which governs the Publishing
 16 Agreements, the best evidence of what parties to a written
 17 agreement intend is what they say in their writing. *Greenfield v.*
 18 *Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). Consequently, a
 19 written agreement that is complete, clear, and unambiguous must be
 20 enforced according to its terms. *Id.*

21 A contract is unambiguous when the contractual language has
 22 a definite and precise meaning about which there is no reasonable
 23 basis for a difference of opinion. *Law Debenture Trust Co. of N. Y. v.*
 24 *Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010). By contrast,
 25 ambiguity exists where a contract’s term could objectively suggest
 26 more than one meaning to one familiar with the customs and
 27 terminology of the particular trade or business. *See id.* at 466; *Fox*
 28 *Film Corp. v. Springer*, 273 N.Y. 434, 436 (1937). Whether a contract is

³ In their briefs, plaintiffs also challenged the district court’s dismissal of their unjust enrichment claim. At oral argument, plaintiffs withdrew this claim.

1 ambiguous is a question of law. *See Bailey v. Fish & Neave*, 8 N.Y.3d
2 523, 528 (2007); *Greenfield*, 98 N.Y.2d at 569.

3 Based on our review of the Publishing Agreements, we
4 conclude that plaintiffs' first through third claims are not viable
5 because the Publishing Agreements unambiguously provide that
6 HEBV or HBSA is the "Publisher" and Harlequin Enterprises is a
7 "Related Licensee" for purposes of computing royalty payments.
8 The fact that Harlequin Switzerland may have delegated certain
9 publishing and administrative duties to Harlequin Enterprises does
10 not modify this relationship. The Publishing Agreements expressly
11 contemplate that the "Publisher" could assign or delegate
12 publishing duties "to any related legal entity," including "to its
13 parent company or to an affiliate [or] subsidiary." (*See Am. Compl.*
14 ¶ 49). These provisions are unambiguous and enforceable.

15 Plaintiffs contend that they have set forth sufficient facts
16 regarding the parties' course of dealing tending to show that
17 Harlequin Enterprises was actually the Publisher. But New York
18 law is well settled that a written agreement that is complete and
19 unambiguous is to be interpreted without the aid of extrinsic
20 evidence and that industry practice may not be used to vary the
21 terms of such a contract. *See Law Debenture Trust Co. of N. Y.*, 595
22 F.3d at 467-48; *Croce v. Kurnit*, 737 F. 2d 229, 238 (2d Cir. 1984).

23 Plaintiffs rely on *Nolan v. Sam Fox Pub. Co., Inc.*, 499 F.2d 1394
24 (2d Cir. 1974) for the proposition that, in keeping with the course of
25 dealings between the parties, this Court could supplant the
26 definition of Publisher in the Publishing Agreements. This reliance,
27 however, is misplaced. In *Nolan*, the district court interpreted the
28 word "Publisher" to cover its assignee where the named publisher in
29 the agreement at issue had been dissolved. *See Nolan v. Williamson*
30 *Music, Inc.*, 300 F. Supp. 1311, 1319 (S.D.N.Y. 1969). Accepting the

1 defendant's interpretation of the contract, the court reasoned, would
2 have meant that only the dissolved publishing company would have
3 been liable for the payment of royalties due to the plaintiff. *Id.* To
4 avoid this impossible situation, the district court elected to define
5 "Publisher" with reference to another provision of the contract
6 which referred to the duties of the "Publisher, its successors and
7 assigns." *Id.* In affirming, we observed: "Our construction of the
8 contract [did] not reform the agreement in any way, but [wa]s more
9 likely in keeping with the intentions of the parties." *Nolan*, 499 F.2d
10 at 1399.

11 Here, however, the Publishing Agreements explicitly provide
12 for the allocation of royalty payments between the Publisher
13 (Harlequin Switzerland) and the authors where the Publisher
14 engages the services of a related licensee such as Harlequin
15 Enterprises. Substituting Harlequin Enterprises as the Publisher, as
16 urged by the plaintiffs, would, in effect, require redrafting
17 significant provisions of the contract while ignoring other express
18 ones.

19 Moreover, as the district court observed, plaintiffs' theories of
20 agency, assignment, and alter ego are not, strictly speaking, theories
21 of contract interpretation, but rather theories of vicarious liability.
22 Such theories, however, cannot displace the express terms of the
23 Publishing Agreement. Consequently, we hold that the first three
24 claims were properly dismissed.

25 The fourth claim alleged that defendants breached the
26 Publishing Agreements because the licensing fees Harlequin
27 Enterprises paid to Harlequin Switzerland—the figure on which
28 plaintiffs' royalties were based—were not "equivalent to the amount
29 reasonably obtainable . . . from an Unrelated Licensee." The district

1 court dismissed this claim on the ground that the factual allegations
2 supporting it were insufficient. We disagree.

3 As we have previously observed, Federal Rule of Civil
4 Procedure 8(a)(2) requires only a short and plain statement of the
5 claim showing that the pleader is entitled to relief, in order to give
6 the defendant fair notice of what the claim is and the grounds upon
7 which it rests. *See Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 323
8 (2d Cir. 2011); *see also Twombly*, 550 U.S. at 555. Consequently, to
9 survive a motion under Rule 12(b)(6), a complaint does not need to
10 contain detailed or elaborate factual allegations, but only allegations
11 sufficient to raise an entitlement to relief above the speculative level.
12 *See Ideal Steel Supply Corp.*, 652 F.3d at 323-24.

13 The amended complaint identified the specific contractual
14 provision at issue, (Am. Compl. ¶ 81), and alleged how defendants
15 breached that provision: “[t]he claimed “license” from Harlequin
16 Switzerland to Harlequin Enterprises, in the amount of 6% to 8% of
17 the cover price of the works, is not “equivalent to the amount
18 reasonably obtainable by Publisher from an Unrelated Licensee for
19 the license or sale of the said rights.” (*Id.* ¶ 82). Further, the
20 amended complaint alleged that “[t]he amount reasonably
21 obtainable by a publisher from an unrelated licensee for the license
22 or sale of the said rights is, upon information and belief, much
23 higher than 6% to 8% of cover price and is at least 50% of net
24 receipts.” (*Id.* ¶ 83).

25 The amended complaint provided context for these
26 allegations, contending that after Harlequin Enterprises set up its
27 subsidiaries, ostensibly for tax purposes, it continued to control the
28 publication, marketing, and distribution of plaintiffs’ works. (*See id.*
29 ¶¶ 31, 35-36, 38-41, 45, 47, 48). Moreover, the amended complaint
30 went on to allege that these actions substantially lowered the

1 plaintiffs' royalties, despite Harlequin Enterprises' assurances that
 2 its inter-affiliate licensing arrangements would not affect their rights.
 3 (*See id.* ¶¶ 7-8, 35-36). These allegations, that the amount of
 4 royalties they received were not equivalent to the amount
 5 reasonably obtainable from an unrelated licensee, nudged plaintiffs'
 6 claims across the line from conceivable to plausible. *See Twombly*,
 7 550 U.S. at 570.

8 The defendants' reliance on *Astra Media Grp., LLC v. Clear*
 9 *Channel Taxi Media, LLC*, 414 F. App'x 334, 336 (2d Cir. 2011) is not to
 10 the contrary. That case involved a predatory pricing claim, where
 11 price information is more critical. Consequently, we found the price
 12 allegations to be conclusory where "[plaintiff] provide[d] no facts to
 13 support its contention that \$170 is actually close to the standard
 14 industry cost." *Id.* Here, however, plaintiffs have provided a basis,
 15 albeit "upon information and belief," that defendants engaged in
 16 self-dealing because the industry standard is considerably higher
 17 than the 6 to 8 percent of net receipts that Harlequin Enterprises
 18 remits to its subsidiary Harlequin Switzerland (i.e. at least 50 percent
 19 of net receipts). We have observed in the past that pleading on the
 20 basis of information and belief may be appropriate under such
 21 circumstances. *See Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d
 22 Cir. 2010) (noting the *Twombly* plausibility standard does not
 23 prevent a plaintiff from pleading facts "upon information and
 24 belief" where the facts are peculiarly within the control of the
 25 defendant); *see also Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008).

26 We reach this conclusion in a context where discovery had
 27 apparently begun to adduce additional information supportive of
 28 plaintiffs' claim.⁴ In *Ideal*, we reasoned that *Twombly* would not

⁴ In their opposition to defendants' motion to dismiss, plaintiffs cited a survey of royalty rates paid by romance publishers. *Harlequin*, 12 Civ. 5558, Dkt. 22, at 23 (S.D.N.Y.). At the motion hearing, plaintiffs also purported to have discovered a sublicense agreement

1 require that a complaint be dismissed if evidence had already been
2 produced during discovery that would fill the perceived gaps in the
3 complaint because pleadings may be amended. 652 F.3d at 324-25.
4 We underscore that *Twombly* does not impose a probability
5 requirement at the pleading stage. See *Arista Records LLC*, 604 F.3d at
6 120 (citing *Twombly*, 550 U.S. at 556). It simply requires factual
7 allegations sufficient to raise a reasonable expectation that discovery
8 is likely to generate evidence of liability. See *id.* For these reasons,
9 we conclude that the fourth claim should not have been dismissed.

10 III. CONCLUSION

11 For all the foregoing reasons, we **AFFIRM** the district court's
12 dismissal of the first, second, and third claims. We **REVERSE** the
13 dismissal of the fourth claim, and we **REMAND** the case to the
14 district court for further proceedings consistent with this Opinion.

between Harlequin Enterprises and another subsidiary, Harlequin Digital Sales Corporation, that showed a license rate of 40 percent of the cover price, significantly higher than the 6 to 8 percent license fee purportedly paid to Harlequin Switzerland. Joint App'x at 162.