

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2022

5 (Argued: May 2, 2023 Decided: November 6, 2024)

6 Docket No. 22-2650

7 _____
8 SEAN FLYNN, DEAN KARLAN, JONATHAN MORDUCH, DAVID
9 MYERS, and JEAN TWENGE, individually and on behalf of all others
10 similarly situated,

11 *Plaintiffs-Appellants,*

12 - v. -

13 MCGRAW HILL LLC and MCGRAW HILL EDUCATION, INC.,

14 *Defendants-Appellees.**
15 _____

16 Before: KEARSE, JACOBS, and MENASHI, *Circuit Judges.*

* The Clerk of Court is instructed to amend the official caption to conform with the above.

1 Appeal by plaintiff authors from so much of a judgment of the United
2 States District Court for the Southern District of New York, Lorna G. Schofield, *Judge*,
3 as dismissed their amended consolidated putative class action complaint ("Complaint")
4 alleging that defendants breached publishing agreements by ceasing or reducing
5 royalty payments on certain revenues generated from defendants' online platform that
6 hosts and delivers plaintiffs' electronic textbooks and related course materials. The
7 district court granted defendants' motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss
8 the breach-of-contract causes of action for failure to state a claim, (a) ruling that the
9 contract definitions of "net receipts" unambiguously foreclosed plaintiffs' claims of right
10 to royalties on sales of any products other than their textbooks, and (b) ruling that
11 defendants' reduction of royalties on textbooks sold through the online platform did
12 not violate the contracts' requirement that the publishers distribute the textbooks at
13 their "own expense." On appeal, plaintiffs contend that the court erred in interpreting
14 the contracts' "net receipts" and "own expense" clauses, or at least erred in finding the
15 "net receipts" clauses unambiguous. We reject plaintiffs' challenge to the dismissal of
16 their claims based on alleged breach of the "net receipts" clauses; however, we find
17 merit in their challenge to the ruling that the Complaint failed to state a breach-of-

1 contract claim based on the "own expense" clauses. *See Flynn v. McGraw Hill LLC*, No.
2 21 Civ. 614, 2022 WL 103537 (S.D.N.Y. Jan. 11, 2022).

3 Vacated in part, and remanded.

4 ALEXANDER W. AIKEN, Seattle, Washington (Susman
5 Godfrey, Seattle, Washington; Daniel L. Berger, Grant &
6 Eisenhofer, New York, New York; Chanler A. Langham,
7 Susman Godfrey, Houston, Texas, on the brief), *for*
8 *Plaintiffs-Appellants*.

9 SAUL B. SHAPIRO, New York, New York (Stephanie
10 Teplin, Andrew I. Haddad, Patterson Belknap Webb &
11 Tyler, New York, New York, on the brief), *for*
12 *Defendants-Appellees*.

13 KEARSE, *Circuit Judge*:

14 Plaintiff textbook authors Sean Flynn, Dean Karlan, Jonathan Morduch,
15 David Myers, and Jean Twenge (collectively "Plaintiffs" or the "Authors") appeal from
16 so much of a judgment of the United States District Court for the Southern District of
17 New York, Lorna G. Schofield, *Judge*, as dismissed their amended consolidated putative
18 class action complaint ("Complaint") alleging that defendants McGraw Hill LLC and
19 McGraw Hill Education, Inc. (collectively "McGraw Hill" or the "Publisher"), breached
20 publishing agreements by ceasing or reducing royalty payments on certain revenues

1 generated from McGraw Hill's online platform that hosts and delivers electronic
2 textbooks and related course materials. The district court granted McGraw Hill's
3 motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiffs' breach-of-contract
4 causes of action for failure to state a claim, ruling (a) that the contract definitions of "net
5 receipts" unambiguously foreclosed Plaintiffs' claim of right to royalties on sales of any
6 products other than their textbooks, and (b) that McGraw Hill's decision to reduce
7 royalties on sales through the platform did not violate the contracts' requirement that
8 the Publisher distribute the textbooks at its "own expense." On appeal, Plaintiffs
9 contend that the court erred in interpreting the contracts' "net receipts" and "own
10 expense" clauses, or at least erred in finding the "net receipts" clauses unambiguous.
11 For the reasons that follow, we reject Plaintiffs' challenge to the dismissal of their claims
12 based on the "net receipts" clauses but find merit in their challenge to the ruling that
13 the Complaint failed to state a breach-of-contract claim based on the "own expense"
14 clauses. Accordingly, we vacate so much of the judgment as dismissed the claims of
15 breach of contract and remand for further proceedings.

1 I. BACKGROUND

2 The Authors entered into their respective publishing contracts with
3 McGraw Hill or its predecessors-in-interest ("Publishing Agreement" or "Contract") at
4 various times dating back to 1979. This action centers on McGraw Hill's distribution
5 of Plaintiffs' textbooks in electronic form ("ebooks"). The following description of the
6 controversy accepts the factual allegations in the Complaint as true, as required with
7 respect to a Rule 12(b)(6) motion to dismiss, and includes terms of the agreements
8 relied on by Plaintiffs in the Complaint.

9 *A. Publishing Agreement Provisions as to Royalties and Expenses*

10 Each Publishing Agreement pertained to a textbook with a tentative title
11 (subject to replacement with "such other title as may be mutually agreeable to the
12 Publisher and the Author"), which was referred to in the Contract as the "'Work.'" The
13 Author or Authors agreed to prepare and deliver to the Publisher a manuscript for the
14 Work; the Publisher agreed to publish the textbook and remit royalty payments to the
15 Author(s).

1 The Contract sections at issue in this action, exemplified by the 1989 Flynn
2 Contract, include the provision that
3 [a]fter giving written notice to the Author that it has accepted the
4 Work as being in form and content satisfactory for publication, *the*
5 *Publisher shall publish the Work at its own expense*

6 (Complaint ¶ 57 (quoting, with emphasis, Flynn Contract § 6.)) Section 7 of the
7 Contract governs the Publisher's obligation to pay the Author royalties ("Royalty
8 Clause" or "Royalty Contract"). It provides that "[a]s full payment to the Author, the
9 Publisher shall pay to the Author" various specified "percentage[s] of the *Publisher's*
10 *net receipts* for each copy of the Work sold by the Publisher" (the "Royalty
11 Percentage"), depending on, *inter alia*, whether the copies are sold for use within or
12 outside of the United States (Complaint ¶ 58 (quoting, with emphasis, Flynn Contract
13 § 7(a)(1))); and it defines "[t]he term 'Publisher's net receipts'" to "mean the Publisher's
14 *selling price*, less discounts, credits, and returns, or a reasonable reserve for returns"
15 (Complaint ¶ 59 (quoting, with emphasis, Flynn Contract § 7(c))).

16 The Contracts of the other Plaintiffs contain definitions of "net receipts"
17 that are "substantially similar" to that in the Flynn Contract. (McGraw Hill brief on
18 appeal at 7 n.3.) And all of the Plaintiffs' Contracts provide that "the Publisher" is to
19 "publish the Work" "at its own expense." (*See, e.g.*, Complaint ¶¶ 7, 57, 64, 70, 71.)

1 The Complaint alleged that "[i]n or around 2006, McGraw Hill amended
2 older Royalty Contracts to include a new provision making clear that the domestic
3 royalty rate also applies to electronic sales of the works." (Complaint ¶ 61.) For
4 example, the Flynn Contract "was amended on May 11, 2006 to state that the 'Royalty
5 for electronic rights to the work is the same as the domestic royalty rate'" (*id.*); and in
6 the Contract entered into by Plaintiffs Karlan and Morduch in 2008, the "Publisher's . . .
7 own expense" clause states that "**the Publisher will publish the Work in book and/or
8 electronic form at its own expense**" (*id.* ¶ 64 (quoting, with emphasis, Karlan &
9 Morduch Contract § 10(A))).

10 B. *The Original Application of the Royalty Clauses to eBooks*

11 In 2009, McGraw Hill launched a platform called "Connect, a Content
12 Management System . . . for hosting ebooks and course materials." (Complaint ¶ 34.)

13 The Complaint alleged that

14 [e]lectronic textbooks ("ebooks" or "smartbooks") are the central
15 element of the Connect platform and represent electronic versions
16 of the authors' works. Corresponding features offered on Connect
17 ("Core Connect Content" or "CCC") are designed based on the
18 authors' works themselves and are exclusively offered in
19 conjunction with their works.

1 (Id. ¶ 6.) According to the Complaint,

2 [t]he Connect platform is a single online location where teachers
3 and students can access electronic textbooks and course materials,
4 complete assignments and track performance. The electronic
5 textbooks, or "ebooks," are delivered through . . . Connect, which,
6 among other things, allows the books to be viewed online and
7 includes certain course materials.

8 (Complaint ¶ 37.) "Each Connect offering consists of an ebook" along with Core
9 Connect Content (or "CCC"); the ebook is "sold together with CCC for a single unitary
10 price"; and "CCC cannot be purchased exclusive of an ebook." (Id. ¶ 38.)

11 39. The ebook component of a Connect textbook is an online
12 copy of the book identical to its print form. Many Connect ebooks
13 also have a digital overlay including clickable links and videos, and
14 adaptive study reviews that provide questions based on students'
15 mastery of relevant topics. . . .

16 40. CCC includes features intended to aid instructors in
17 teaching courses and content like PowerPoint lesson plans and test
18 banks. The majority of CCC is textbook-specific, meaning that it is
19 designed to be used in conjunction with particular textbooks. The
20 online course materials typically include guides, presentations, and
21 question and answer banks, as well as other aides, and commonly
22 draw directly from the associated textbooks. The textbook authors
23 themselves have a significant role in developing those materials.

24 41. Textbooks are the necessary component of the Connect
25 platform. Not only do educators and students continue to seek
26 high-quality textbooks for their courses, but the books also form the
27 basis of the courses and CCC built around them. Simply put, if the
28 authors did not produce the textbooks, McGraw Hill would not be

1 able to market Connect: it would be an empty, useless platform.
2 All of the other purposes or applications available on Connect
3 require a textbook; without the textbook, the other applications of
4 the platform are useless.

5 42. . . . Each Connect course is specific to one textbook; it is
6 impossible to launch a course on Connect or access CCC without
7 selecting a textbook to serve as the basis for the course or to select
8 multiple textbooks for use in the same course, further underscoring
9 that textbooks are the necessary component of the Connect
10 platform.

11 (*Id.* ¶¶ 39-42.)

12 The Complaint alleged that "Connect," in other words, "is a
13 content-delivery platform that is functionally equivalent to the paper on which
14 electronic copies of textbooks are printed" (*id.* ¶ 81), and serves "in essence [as] a
15 replacement for paper versions of books" (*id.* ¶ 5). The Core Connect Content is
16 "designed based on the authors' works themselves and [is] exclusively offered in
17 conjunction with their works." (*Id.* ¶ 6.) The Connect platform and CCC are "not
18 commodities in their own right," and "have little to no market value when sold separate
19 and apart from the textbook." (*Id.* ¶ 82.)

20 For the first decade after Connect was introduced, McGraw Hill had an
21 "established . . . practice of paying the Royalty Percentage on the entire net receipts of
22 textbooks on the Connect platform." (*See* Complaint ¶¶ 74-75.)

1 C. McGraw Hill Changes the Royalties Formula

2 In November 2020, McGraw Hill informed its authors that it had "changed
3 how it calculates and pays royalties on Connect textbook sales." (Complaint ¶ 75.) In
4 an email to Flynn, McGraw Hill stated that

5 "effective with the current royalty period, the royalty for sales of
6 the ebook within the Connect product will be paid on the revenue
7 attributed to the ebook component, determined proportionally
8 based on the stand-alone list price of the ebook of corresponding
9 duration to the Connect product divided by the list price of the
10 Connect product. In addition, a permissions fee attributed to the
11 [course materials] component will be paid for the re-use of the
12 ebook content in McGraw Hill's SmartBook technology and other
13 tools within the same Connect product. The revenue *attributed* to
14 the [course materials] component will be any revenue not *attributed*
15 proportionally to the ebook or *platform components*."

16 (*Id.* ¶ 76 (quoting November 23, 2020 email from McGraw Hill to Flynn (emphases
17 ours)).) Thus,

18 over 10 years after the introduction of Connect, McGraw Hill
19 announced that "[e]ffective with this current royalty period," July
20 through December 2020, it would no longer pay royalties to
21 authors based on the entire sales price of an electronic textbook
22 sold for use on Connect. Instead, McGraw Hill said it would only
23 pay royalties on "the revenue attributed to the ebook component,"
24 a term nowhere defined or even mentioned in its Royalty
25 Contracts.

1 (Complaint ¶ 77.) In short, McGraw Hill would "unilaterally determine the 'relative
2 value[s]' of the (1) ebook, (2) the Connect platform and (3) the CCC, and pay royalties
3 only on the portion of the electronic textbook that [McGraw Hill] attributes to the
4 ebook." (*Id.*)

5 *D. The Dismissal of the Present Action*

6 The Complaint alleged, as Plaintiffs' first cause of action, that McGraw
7 Hill's unilateral "reduction" of the sales on which royalties would be paid breached the
8 Publishing Agreements (1) by injecting "new terms that are not present in the Royalty
9 Contracts[]" definition of "net receipts"; and (2) by deducting from revenues on which
10 royalties are to be paid the cost of publishing ebooks, costs that contractually should
11 be borne by McGraw Hill. (Complaint ¶¶ 78-82, 104-06.) As a second cause of action,
12 the Complaint alleged that McGraw Hill breached an implied covenant of good faith
13 and fair dealing ("breach of covenant"):

14 The change in the way McGraw Hill allocates royalties also
15 constitutes a breach of McGraw Hill's duty of good faith and fair
16 dealing. By re-defining the "price" of the Connect-platform
17 textbooks as only a fraction of the net receipts of those books,
18 McGraw Hill has arbitrarily reduced the amounts on which
19 royalties are due. This definitional gamesmanship deprives

1 authors of the benefit of their bargains with McGraw Hill, and
2 improperly lines the pockets of McGraw Hill.

3 (*Id.* ¶ 85; *see id.* ¶¶ 109-114.)

4 McGraw Hill moved to dismiss the Complaint for failure to state a claim.

5 As to Plaintiffs' breach-of-contract claim, McGraw Hill argued principally that the
6 Contracts' definitions of "net receipts" and the "Work" precluded any claim that an
7 Author was entitled to royalties for the sale of any product other than his or her
8 "Work." In addition, McGraw Hill argued--contrary to the allegations of the
9 Complaint--that Connect is not merely an ebook delivery platform lacking inherent
10 value, as it "is also sometimes sold as a standalone product (devoid of any content) that
11 teachers can populate with their own or third-party materials" and therefore is a
12 distinct product. (Memorandum of law in support of McGraw Hill's motion to dismiss
13 at 4-5, 16.) McGraw Hill argued that Plaintiffs' breach-of-covenant claims should be
14 dismissed as duplicative of their breach-of-contract claims or as conclusory.

15 In an Opinion and Order dated January 11, 2022, the district court granted
16 so much of McGraw Hill's motion to dismiss as challenged Plaintiffs' claims of breach-
17 of-contract. *See Flynn v. McGraw Hill LLC*, No. 21 Civ. 614, 2022 WL 103537 (S.D.N.Y.
18 Jan. 11, 2022) ("D.Ct.Op."). The court rejected Plaintiffs' claim that McGraw Hill,

1 pursuant to its new policy, failed to pay royalties on the entire "net receipts" of the
2 "Work," ruling that the "plain text of the Royalty Contracts[] . . . define[s] the 'Work' by
3 title as the textbook itself." *Id.* at *3. The court stated that the Authors thus "are entitled
4 to royalties from net receipts on the textbook and no more"; they "are not entitled to
5 royalties for additional content that Defendants sell with the Work"--including the CCC
6 and access to Connect. *Id.*

7 The district court also rejected Plaintiffs' contention that McGraw Hill's
8 new royalty payment policy breached the Publishing Agreements' provision that the
9 Publisher is to publish the textbooks at its "own expense." The court stated:

10 This argument fails because Connect is more than a publishing
11 platform and includes content in addition to the author's textbook,
12 for example, PowerPoint lesson plans and tests. Connect is
13 therefore *not akin to the ink and paper required to publish a hardcopy*
14 *textbook* as Plaintiffs assert.

15 D.Ct.Op., 2022 WL 103537, at *3 (emphasis added).

16 The district court rejected Plaintiffs' contention that McGraw Hill's
17 consistent practice from 2009 through November 2020 of paying royalties on the entire
18 Connect net sales price was evidence that McGraw Hill's new policy of paying royalties
19 only on a portion of that price breached the Publishing Agreements. The court noted
20 that under New York law, which the Publishing Agreements specified should be the

1 governing law, a court cannot properly resort to extrinsic evidence to interpret a
2 contract unless the document is ambiguous. The court found that because "the Royalty
3 Contracts unambiguously define the 'Work' as the titles themselves," the Contract is
4 unambiguous on its face, and that the court thus could not consider such extrinsic
5 evidence. *See id.*

6 However, the district court denied McGraw Hill's motion to dismiss
7 Plaintiffs' second cause of action, which alleged breach of the covenant of good faith
8 and fair dealing ("breach of covenant"). It found that the Complaint plausibly alleged
9 that McGraw Hill had unilaterally and arbitrarily defined the "price" of the Authors'
10 textbooks in order to retain money to which the Authors were entitled. While McGraw
11 Hill argued that the price of the textbooks was fairly set, the court reasoned that that
12 argument suggested the presence of an issue of fact for trial, rather than a basis for
13 dismissal at the pleading stage. *See D.Ct.Op.* 2022 WL 103537, at *3-*4.

14 Following the entry of the court's order dismissing the contract claims, the
15 parties stipulated that Plaintiffs' only surviving claim, breach of covenant, would be
16 voluntarily dismissed--with prejudice--in order to permit Plaintiffs to appeal the
17 dismissal of the breach-of-contract claims. *See, e.g., Rabbi Jacob Joseph School v. Province*
18 *of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005) ("immediate appeal is unavailable to a

1 plaintiff who seeks review of an adverse decision on some of its claims by voluntarily
2 dismissing the others *without prejudice*" (emphasis in original)). Final judgment was
3 entered dismissing Plaintiffs' Complaint.

4 This appeal followed

5 . II. DISCUSSION

6 On appeal, the Authors contend that the district court misinterpreted (a)
7 the "net receipts" clauses and (b) the "own expense" clauses of the Publishing
8 Agreements, or at least erred in viewing the "net receipts" clauses as unambiguously
9 precluding their contention that the Contracts require McGraw Hill to pay royalties on
10 total net receipts from sales of products sold on the Connect platform. For the reasons
11 that follow, we agree only with Plaintiffs' contention that the court should not have
12 dismissed the Complaint for failure to state a claim that McGraw Hill breached the
13 provision that "the Publisher shall publish the Work at its own expense" (or
14 "Publisher's-own-expense" clause).

1 A. *New York Principles Governing Contract Interpretation*

2 The principles of New York law applicable to these issues are clear and
3 well established. In a contract action, the court's general objective should be to
4 "determine . . . 'the intention of the parties . . . from the language employed.'" *Hartford*
5 *Accident & Indemnity Co. v. Wesolowski*, 33 N.Y.2d 169, 171-72, 350 N.Y.S.2d 895, 898
6 (1973) (quoting 4 *Williston on Contracts* § 600, at 280 (3d ed. 1961)). A court may dismiss
7 a breach-of-contract claim "[a]t the motion to dismiss stage . . . only if," *inter alia*, "the
8 terms of the contract are unambiguous." *Edwards v. Sequoia Fund, Inc.*, 938 F.3d 8, 13 (2d
9 Cir. 2019) ("*Edwards*") (internal quotation marks omitted).

10 The initial question for the court is "whether the contract is unambiguous
11 with respect to the question disputed by the parties." *International Multifoods Corp. v.*
12 *Commercial Union Insurance Co.*, 309 F.3d 76, 83 (2d Cir. 2002) ("*International Multifoods*").
13 "Whether an agreement is ambiguous is a question of law for the courts," and
14 "[a]mbiguity is determined by looking within the four corners of the document, not to
15 outside sources" *Kass v. Kass*, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356 (1998); *see,*
16 *e.g., W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162-63, 565 N.Y.S.2d 440, 443
17 (1990). In conducting this inquiry, the court

1 should examine the entire contract and consider the relation of the
2 parties and the circumstances under which it was executed.
3 Particular words should be considered, not as if isolated from the
4 context, but in the light of the obligation as a whole and the
5 intention of the parties as manifested thereby. Form should not
6 prevail over substance and a sensible meaning of words should be
7 sought.

8 *Kass v. Kass*, 91 N.Y.2d at 566, 673 N.Y.S.2d at 356-57 (internal quotation marks
9 omitted).

10 An ambiguous contract is one whose relevant language is "capable of
11 more than one meaning when viewed objectively by a reasonably intelligent person
12 who has examined the context of the entire integrated agreement and who is cognizant
13 of the customs, practices, usages and terminology as generally understood in the
14 particular trade or business." *Seiden Associates v. ANC Holdings, Inc.*, 959 F.2d 425, 428
15 (2d Cir. 1992) ("*Seiden*") (internal quotation marks omitted); *see, e.g., Readco, Inc. v.*
16 *Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996) (a "contract is ambiguous where
17 reasonable minds could differ on what a term means"). But "no ambiguity exists where
18 the alternative construction would be unreasonable," *id.*, or would "strain[] the contract
19 language beyond its reasonable and ordinary meaning," *Bethlehem Steel Co. v. Turner*
20 *Construction Co.*, 2 N.Y.2d 456, 459, 161 N.Y.S.2d 90, 93 (1957), or would "produce a
21 result that is absurd[,] . . . commercially unreasonable[,] . . . or contrary to the

1 reasonable expectations of the parties," *In re Lipper Holdings, LLC*, 1 A.D.3d 170, 171, 766
2 N.Y.S.2d 561, 562 (1st Dep't 2003).

3 "A contract is unambiguous where the contract language has a definite
4 and precise meaning, unattended by danger of misconception in the purport of the
5 contract itself, and concerning which there is no reasonable basis for a difference of
6 opinion." *Edwards*, 938 F.3d at 12 (internal quotation marks omitted); *see, e.g., Breed v.*
7 *Insurance Co. of North America*, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355 (1978)). "Where
8 the terms of a contract are clear and unambiguous, the intent of the parties must be
9 found within the four corners of the contract," and "[t]he words and phrases used by
10 the parties must . . . be given their plain meaning" *Ellington v. EMI Music, Inc.*, 24
11 N.Y.3d 239, 244, 997 N.Y.S.2d 339, 342 (2014) (quoting *Brooke Group v JCH Syndicate* 488,
12 87 N.Y.2d 530, 534, 640 N.Y.S.2d 479, 482 (1996)). The contract should be "read as a
13 whole," with every part "interpreted with reference to the whole" in order, *inter alia*, "to
14 give effect to its general purpose," *Williams Press, Inc. v. New York*, 37 N.Y.2d 434, 440,
15 373 N.Y.S.2d 72, 77 (1975) (internal quotation marks omitted), "to safeguard against
16 adopting an interpretation that would render any individual provision superfluous,"
17 *International Multifoods*, 309 F.3d at 86 (internal quotation marks omitted), and to ensure

1 that particular words and phrases do not receive "undue emphasis," *Bailey v. Fish &*
2 *Neave*, 8 N.Y.3d 523, 528, 837 N.Y.S.2d 600, 603 (2007).

3 The court is to determine an unambiguous contract's meaning without
4 considering "extrinsic evidence of the parties' intent, such as their course of dealing."
5 *LaSalle Bank National Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 207 (2d Cir. 2005)
6 (internal quotation marks omitted). A party "is precluded from introducing extrinsic
7 evidence" with regard to an unambiguous contract "in order to vary the plain meaning
8 of the writing," *Investors Insurance Co. of America v. Dorinco Reinsurance Co.*, 917 F.2d 100,
9 104 (2d Cir. 1990), or "to increase [a party's] obligations" where those obligations were
10 "explicitly outline[d]" in the contract itself, *Gerard v. Almouli*, 746 F.2d 936, 939 (2d Cir.
11 1984).

12 We review *de novo* both the district court's determination of whether a
13 contract is ambiguous, *see, e.g., Beth Medrash Eeyun Hatalmud v. Spellings*, 505 F.3d 139,
14 145 (2d Cir. 2007), and its interpretation of an unambiguous contract's terms, *see, e.g.,*
15 *id.; Seiden*, 959 F.2d at 429.

1 B. "Net Receipts"

2 With respect to Plaintiffs' contention that McGraw Hill breached its
3 obligation under the "net receipts" clauses of the Publishing Agreements, we see no
4 error in the district court's rejection of that aspect of the breach-of-contract claims.
5 Although the Authors argue that their Publishing Agreements "unambiguously"
6 (Plaintiffs brief on appeal at 27)--or "ambiguous[ly]" (*id.* at 40)--require the Publisher
7 to pay royalties on its "net receipts" from sales of something other than their textbooks,
8 the Agreements are unambiguously to the contrary. As set out in Part I.A. above, each
9 of the Publishing Agreements defines the Author's textbook as "the 'Work.'" For
10 preparing and delivering their respective "Work[s]" to the Publisher, the Authors
11 agreed to accept--[a]s full payment"--the specified "percentage[s] of the *Publisher's net*
12 *receipts* for each copy of the Work" sold by the Publisher. (*E.g.*, Flynn Contract § 7(a)
13 (emphases added).)

14 "Publisher's net receipts" is, in the Agreements, a defined term. It "mean[s]
15 the Publisher's selling price, less discounts, credits, and returns, or a reasonable reserve
16 for returns." (*Id.* § 7(c).) Neither the components of "net receipts" nor the phrase as a
17 whole are ambiguous. And aside from the provision for a reasonable reserve--a factor

1 not alleged to be a basis for the breach-of-contract claims--all of the elements defining
2 "Publisher's net receipts" are objectively quantifiable. There is no ambiguity.

3 As there was no ambiguity in the Contracts with respect to the scope or
4 purpose of the "net receipts" provisions, the district court properly declined to consider
5 extrinsic evidence. The court correctly concluded that the Publishing Agreements' "net
6 receipts" clauses entitle the Authors only to royalty payments that are based on the
7 sales of their textbooks, not to royalties based on sales of the Core Connect Content
8 related to their textbooks or any other product. We thus agree that the Complaint
9 failed to state a breach of the "net receipts" aspect of the Contracts.

10 *C. Publisher's-own-expense*

11 We reach a different conclusion with respect to the claim that McGraw
12 Hill breached the Publishing Agreement provision that "the Publisher" is to "publish
13 the Work" "at its own expense," interpreting it in conjunction with other parts of the
14 Contract-- including the "net receipts" clause. We note that the insufficiency of the
15 Complaint to state a claim for violation of the "net receipts" clause itself does not mean
16 that the "net receipts" clause must be disregarded in other respects. To the contrary,
17 we consider a contract as a whole; and we view the "net receipts" provision as having

1 implications for the provision that "the Publisher shall publish the Work at its own
2 expense."

3 The Publisher's-own-expense clause appears to be a simple and
4 straightforward statement of the parties' intention that the expense of publishing the
5 Author's textbook is to be borne by the Publisher. Read in conjunction with the
6 Contracts' royalty provisions, the plain implication is that, in paying the Authors
7 royalties generally in the range of 12 to 19 percent of the revenues it receives on the
8 textbooks' domestic sales (*see, e.g.*, Complaint ¶¶ 61, 65, 68, 69), the Publisher is
9 intended to cover its publishing expense from the 80-plus percent share of the sales
10 income that it retains.

11 This interpretation is supported by the precision of the Publishing
12 Agreements' "net receipts" clauses. The definition of "net receipts" is quite specific in
13 identifying the categories of items that the Publisher can properly deduct from revenue
14 before calculating an Author's royalty. It states that "[t]he term 'Publisher's net receipts'
15 shall *mean* the Publisher's selling price, less discounts, credits, and returns or a
16 reasonable reserve for returns" (emphasis added); it does not state that the deductibles
17 merely include those categories; and it does not mention publishing expense. The lack
18 of a publishing-expense element in the Publishing Agreements' precise formula for

1 determining "net receipts" is consistent with and reinforces the obligation that the
2 Publisher expressly undertook to "publish the Work" "at its own expense."

3 While the Publisher's-own-expense clause does not go on to explain what
4 is meant by "expense," it must logically be read as referring to "publish[ing]" expenses.
5 In that context, such expenses can reasonably be understood to include, for example,
6 the costs of preparing an accepted manuscript for publication, of promoting interest in
7 purchasing the textbook, of arranging distribution channels, and of distributing the
8 finished product, as well as of endeavors in furtherance of, and preparation for, those
9 publishing efforts.

10 The district court found the Complaint insufficient to state a claim based
11 on the Publisher's-own-expense clause of the Contracts, stating only that this claim

12 fails because Connect is more than a publishing platform and
13 includes content in addition to the author's textbook, for example,
14 PowerPoint lesson plans and tests. Connect is therefore *not akin to*
15 *the ink and paper required to publish a hardcopy textbook* as Plaintiffs
16 assert.

17 D.Ct.Op., 2022 WL 103537, at *3 (emphasis added). Given the Complaint's well-
18 pleaded allegations of fact, which must be accepted as true on this Rule 12(b)(6) motion
19 to dismiss, we disagree.

1 As set out in Parts I.B. and C. above, the Complaint describes the nature
2 of McGraw Hill's Connect platform for distribution of the Authors' textbooks and the
3 related, Publisher-generated, Core Connect Content. The Complaint alleged that
4 McGraw Hill's Connect platform makes available "ebooks" that "are the central element
5 of the Connect platform," and that ebooks "represent electronic versions of the authors'
6 works." (Complaint ¶ 6.) It alleged that "Connect," as "[a] Content Management
7 System," is being used "to publish documents with clearly defined ownership" (*id.* ¶ 34
8 & n.1); that the "ebook" is "an online copy of the [text]book identical to its print form"
9 (*id.* ¶ 39); and that the ebook "delivered through . . . Connect . . . allows the books to be
10 viewed online" (*id.* ¶ 37). Thus, the Complaint plausibly alleged that McGraw Hill
11 publishes the Authors' textbooks through the Connect platform.

12 The availability of content other than the textbooks themselves on the
13 Connect platform does not negate the fact that McGraw Hill publishes the textbooks
14 through Connect. And that an online platform may be "more than a publishing
15 platform" does not warrant a legal conclusion that it is not a publishing platform at all.

16 Further, the Complaint plausibly alleged that McGraw Hill itself views
17 Connect as having a publishing function that is distinct from the content that is
18 available on the platform. It quoted an email received by the Authors from McGraw

1 Hill describing "the Connect product" as consisting of "*three* components," which
2 McGraw Hill identified as "the ebook, *the platform*, and the course-specific content and
3 technology accessed *through* the platform." (Complaint ¶ 87 (emphases ours).)

4 Thus, with all reasonable inferences drawn in Plaintiffs' favor, the
5 Complaint plausibly alleged that McGraw Hill provides online purchasers of the
6 Authors' textbooks with the ability to read a "copy of the book identical to its print
7 form" "through the [Connect] platform." (Complaint ¶¶ 39, 87.) The fact that the
8 platform may be used to distribute additional products does not detract from the
9 plausible allegation that it is in fact being used to distribute the Authors' textbooks.

10 Finally, the Complaint alleged that McGraw Hill receives a "single unitary
11 price" for a sale through Connect. (Complaint ¶ 38.) It alleged that in 2020, McGraw
12 Hill informed Authors by email that it had discovered a "way" to "attribute[]"
13 valuation to the "Connect" platform component separately from the value of the
14 textbooks and the value of the related course materials that are accessed "through" that
15 platform. (*Id.* ¶¶ 76, 87.) McGraw Hill advised that in calculating Authors' royalties,
16 it would deduct from the revenue it received from Connect sales the amount of
17 "revenue" that it "attributed" to the Connect "platform." (*Id.* ¶ 76.)

1 dismissed Plaintiffs' claims for breach of contract is vacated, and the case is remanded
2 for further proceedings consistent with this opinion.