

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

JUDY CODDING,
Plaintiff,
v.
PEARSON EDUCATION, INC.,
Defendant.

Case No. 18-cv-00817-LB
ORDER GRANTING MOTION TO DISMISS
Re: ECF No. 37

INTRODUCTION

This is a breach-of-contract case regarding bonus payments under an employment agreement — with a twist.

In 2010, plaintiff Judy Codding, an education professional, entered into an employment agreement (“Employment Agreement”) with Pearson plc, an education and information company that provides curriculum assessment and other services to schools, school districts, and students. In 2016, Dr. Codding and a subsidiary of Pearson plc — Pearson Education, Inc. — entered into a release agreement (“Release Agreement”), which, among other things, (1) memorialized the termination of Dr. Codding’s employment, (2) released Pearson Education and its affiliates, including Pearson plc, regarding any matter or event occurring before the signing of the Release Agreement (other than some exceptions not relevant here), and (3) modified the bonus provisions under the Employment Agreement, which were to survive after Dr. Codding’s employment ended.

1 The Employment Agreement, as modified by the Release Agreement, provided that Dr.
2 Codding would receive certain monetary bonuses in the event that sales of the “Pearson System of
3 Courses” (“PSoC”) course offerings, which Dr. Codding helped to develop, exceeded a certain
4 threshold dollar amount (“Threshold Amount”) by the end of 2019. As of today, sales of PSoC
5 course offerings have not exceeded that Threshold Amount. Dr. Codding alleges that Pearson plc
6 and Pearson Education have failed to adequately promote and sell PSoC and that, had they done
7 so, PSoC sales would have hit the Threshold Amount and she would be entitled to receive her
8 bonuses. Dr. Codding alleges that Pearson plc and Pearson Education breached the implied
9 covenant of good faith and fair dealing that attaches to the Agreements by not adequately
10 promoting and selling PSoC.

11 The twist is that while Dr. Codding makes allegations against Pearson plc and Pearson
12 Education, she is not actually suing Pearson plc — she is suing only Pearson Education. Her
13 allegations grouping Pearson plc and Pearson Education together do not adequately plead that
14 Pearson Education — the only defendant in this case — breached the Agreements in a way that
15 caused her injury. The court therefore dismisses Dr. Codding’s complaint, with leave to amend.

16
17 **STATEMENT¹**

18 **1. The Parties**

19 Dr. Codding is an education professional who, among other things, was the award-winning
20 principal of Pasadena High School in Los Angeles County, was a charter principal of the Coalition
21 of Essential Schools (a national high-school reform effort), was an education consultant to the
22 Ministry of Education in the People’s Republic of China and the U.S. Department of Defense
23 Schools, and was a commissioner on the California Commission for the Establishment of
24 Academic Content and Performance Standards.²

25 _____
26 ¹ Unless otherwise noted, the facts recited in the Statement are allegations from the Amended
Complaint (“AC”).

27 ² AC – ECF No. 31-3 at 3 (¶¶ 9–10). Citations refer to material in the Electronic Case File (“ECF”);
28 pinpoint citations are to the ECF-generated page numbers at the top of documents.

1 Dr. Coddling served as Chief Operating Officer and Vice President of the National Center on
2 Education and the Economy (“NCEE”), a nonprofit policy and school reform company.³ In 1998,
3 in her capacity as COO and Vice President of NCEE, Dr. Coddling co-founded America’s Choice,
4 Inc., as a nonprofit subsidiary of NCEE (that later became a for-profit entity) and served as its
5 Chief Executive Officer and President.⁴ NCEE launched America’s Choice to implement a school-
6 improvement model that features standards-based instructional materials, coaching and
7 professional development for teachers, and catch-up programs for struggling students.⁵ America’s
8 Choice worked with 2,000 schools in 38 states, including California.⁶ America’s Choice personnel
9 were involved in writing the new Common Core State Standards in English language arts and
10 math that have been adopted by 42 states, including California, and the District of Columbia,
11 Puerto Rico, and other U.S. territories.⁷

12 Defendant Pearson Education is a wholly owned subsidiary of non-party Pearson plc, a British
13 education and publishing company.⁸ Pearson plc provides curriculum assessment and other
14 services to schools, school districts, states, and directly to students.⁹ In 2010, Pearson plc acquired
15 America’s Choice for \$80 million.¹⁰

16
17 **2. The Employment Agreement**

18 In December 2010, following Pearson plc’s acquisition of America’s Choice, Pearson plc and
19 Dr. Coddling entered into a letter Employment Agreement, whereby Pearson plc hired Dr. Coddling
20 as its Managing Director for the Common Core System of Courses.¹¹ In December 2012, Pearson

21 _____
22 ³ Id. at 2 (¶ 6).

23 ⁴ Id. (¶ 7).

24 ⁵ Id. (¶ 8).

25 ⁶ Id.

26 ⁷ Id.

27 ⁸ Id. at 3 (¶ 11).

28 ⁹ Id.

¹⁰ Id. at 3–4 (¶ 13).

¹¹ Id. at 5 (¶ 14); Employment Agreement – ECF No. 31-1 at 28–30.

1 plc and Dr. Codding slightly amended the Employment Agreement by a written exchange of
2 emails (“Email Amendment”).¹² Marjorie Scardino, Pearson plc’s then-CEO, signed the
3 Employment Agreement on behalf of Pearson plc.¹³ Pearson Education was not a signatory to the
4 Employment Agreement.¹⁴

5 The Employment Agreement assigned Dr. Codding responsibility for overseeing two separate
6 programs.¹⁵ First, the Employment Agreement tasked Dr. Codding with “applying [her]
7 knowledge and support in integrating and helping [Pearson plc] learn to operate [America’s
8 Choice], and [her] helping to sign up several customers, such as LA Unified School District and
9 others.”¹⁶ The second program was described in the Employment Agreement as follows: “For
10 comprehensive K-10/12 mathematics and literacy courses designed to apply the philosophy of the
11 Common Core State Standards: These courses will cover approximately 150 days of instruction,
12 use multi-media delivery platforms, and have the distinction of being a system of learning through
13 the grades, of engaging students and of being easy for teachers to use.”¹⁷ For her services, Dr.
14 Codding was paid a salary and given specified employment benefits.¹⁸

15 Under the Employment Agreement, Dr. Codding was entitled to bonus amounts “based on the
16 amount of sales Pearson [plc] made of the products for which for which Dr. Codding was
17 responsible as Managing Director, referred to as the ‘Pearson System of Courses’ or ‘PSoC.’”¹⁹
18 Paragraphs 2(b) and 2(c) of the Employment Agreement (as amended) set out Dr. Codding’s
19 bonuses.²⁰ Dr. Codding acknowledges that Pearson plc paid her the bonuses set out in paragraphs

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21 ¹² AC – ECF No. 31-3 at 5 (¶ 15); Email Amendment – ECF No. 31-3 at 31.

22 ¹³ AC – ECF No. 31-3 at 5 (¶ 14); Employment Agreement – ECF No. 31-1 at 30. Ms. Scardino also
23 wrote and sent Dr. Codding the Email Amendment. Email Amendment – ECF No. 31-3 at 31.

24 ¹⁴ See Employment Agreement – ECF No. 31-3 at 30.

25 ¹⁵ AC – ECF No. 31-3 at 5 (¶ 16).

26 ¹⁶ Id. (¶ 17).

27 ¹⁷ Id. (¶ 18).

28 ¹⁸ Id. (¶ 19).

¹⁹ Id. (¶ 20).

²⁰ Employment Agreement ¶ 2(b), 2(c) – ECF No. 31-3 at 29; see also Email Amendment – ECF No.
31-3 at 31 (amending paragraph 2(c)(ii)).

1 2(b) and 2(c)(i), and hence this action relates solely to the bonuses set out in paragraphs 2(c)(ii)
2 and 2(c)(iii).²¹

3 Paragraph 2(c)(ii) provides that once PSoC sales exceed a certain specified Threshold Amount,
4 Dr. Codding would receive a set bonus amount.²² Paragraph 2(c)(iii) provides that Dr. Codding
5 would additionally receive a percentage royalty as an additional bonus for all PSoC sales over the
6 Threshold Amount, up to a specified ceiling.²³

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8 **3. The Release Agreement**

9 On July 15, 2016, Dr. Codding and Pearson Education entered into a Release Agreement.²⁴

10 The Release Agreement's first paragraph states that it "set[s] forth the agreement between [Dr.
11 Codding] and Pearson Education, Inc. and its affiliates (collectively, the 'Company') regarding
12 [Dr. Codding's] separation from the Company."²⁵ It then states, "[a]s an initial matter, we
13 acknowledge that you and Pearson are parties to an employment agreement dated December 16,
14 2010, as amended on December 21, 2012 (the 'Employment Agreement')."²⁶ It recites that it
15 "contemplates the survival of certain terms under the Employment Agreement, and [] amend[s]
16 certain terms of the Employment Agreement, as . . . described . . . below."²⁷ Among other things,
17 the Release Agreement covers three areas relevant to this dispute:

- 18 1. First, "[t]he parties acknowledged that [Dr. Codding's] work under the Employment
19 Agreement is finished, and [her] employment with the Company terminated on
20 October 16, 2015 ('Separation Date')."²⁸

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22 ²¹ AC – ECF No. 31-3 at 7 (¶ 25).

23 ²² Id. at 6 (¶ 25); Employment Agreement ¶ 2(c)(ii) – ECF No. 31-3 at 29; Email Amendment – ECF
24 No. 31-3 at 31.

25 ²³ AC – ECF No. 31-3 at 6–7 (¶ 25); Employment Agreement ¶ 2(c)(iii) – ECF No. 31-3 at 29.

26 ²⁴ AC – ECF No. 31-3 at 6 (¶ 21); Release Agreement – ECF No. 31-3 at 33–43.

27 ²⁵ Release Agreement – ECF No. 31-3 at 33.

28 ²⁶ Id.

²⁷ AC – ECF No. 31-3 at 6 (¶ 22); Release Agreement – ECF No. 31-3 at 33.

²⁸ Release Agreement – ECF No. 31-3 at 33 (¶ 1).

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2. Second, “the parties agree[d] on [certain] amendments and clarifications of the terms and conditions of [the] Employment Agreement.”²⁹ Among other things, the Release Agreement extended the time period that PSoC sales would count for the purposes of calculating Dr. Codding’s bonus through to the end of 2019.³⁰
3. Third, the parties stated that “[t]he consideration [Dr. Codding] receive[d] under this Agreement and Release is in complete discharge, release, and satisfaction of all obligations and liabilities [other than certain exceptions not relevant here] of Pearson Education, Inc. and its affiliates, including but not limited to Pearson, Inc., Pearson plc, Pearson Education Holdings, Inc., Pearson Education and Assessment, Inc., The Pearson Charitable Foundation, NCS Pearson, Inc., and all of their respective officers, directors, employees, bonus and/or compensation plans (collectively, the ‘Release Parties’) with regard to any matter or event whatsoever that occurred or happened up to the date of this Agreement and Release, including but not limited to matters regarding [her] employment with the Company and its termination.”³¹

The Release Agreement uses the term “Pearson” (without a suffix) in a number of places. (For example, it recites that Dr. Codding and “Pearson” were parties to an Employment Agreement³² and that “Pearson” would be invoicing and including various PSoC sales for the purposes of calculating Dr. Codding’s bonus.³³) It does not expressly define the term “Pearson.”

²⁹ Id. at 34 (¶ 2).

³⁰ AC – ECF No. 31-3 at 8 (¶ 26); Release Agreement – ECF No. 31-3 at 36 (¶ 2.c).

³¹ Release Agreement – ECF No. 31-3 at 37 (¶ 7.a).

³² Id. at 33.

³³ Id. at 34–36 (¶ 2).

1 **4. Pearson plc’s and Pearson Education’s Efforts to Sell the Pearson System of Courses**

2 **4.1 Selling PSoC**

3 Dr. Codding alleges that “[t]he United States K–12 comprehensive-curriculum market spends
4 some \$3 billion each year” and the K–12 English language arts (“ELA”) and math curriculum
5 market spends approximately \$2 billion each year.³⁴ California alone spends approximately \$520
6 million per year on curriculum materials, and approximately 75% of this for math and ELA.³⁵

7 California and New Mexico adopted the PSoC ELA and math curricula, which were on both
8 states’ approved lists.³⁶ Once adopted, curricula remain on the adoption list for a typical five- to
9 seven-year adoption cycle.³⁷ Dr. Codding alleges that after July 15, 2016 and through to the
10 present, Pearson plc and Pearson Education have done virtually nothing to sell PSoC in California
11 or New Mexico.³⁸ Dr. Codding claims that Pearson plc has falsely stated that it does not have an
12 ELA product approved in California and that this is the reason for its lower textbook revenue over
13 the past several years.³⁹ In fact, Pearson plc does have an approved ELA product — PSoC, the
14 only Pearson plc ELA product that was adopted in California in the current adoption cycle — and
15 could have sold PSoC in California beginning in August 2016.⁴⁰

16 Dr. Codding alleges that Pearson plc has abandoned any meaningful efforts to sell the PSoC
17 math and ELA programs.⁴¹ Pearson plc’s 2016 and 2017 annual reports state that, among other
18 things, Pearson plc made a “decision not to compete for the California Grades K–8 English
19 Language Arts (ELA) adoption with a core basal programme.”⁴² Additionally, after July 15, 2016

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21 ³⁴ AC – ECF No. 31-3 at 13 (¶ 44).

22 ³⁵ Id.

23 ³⁶ Id. at 12 (¶ 37). California has adopted PSoC only for grades K–8 because it does not have an
adoption process for high schools. Id. at 13 (¶ 45).

24 ³⁷ Id. at 12 (¶ 37).

25 ³⁸ Id. (¶ 40).

26 ³⁹ Id. (¶ 38).

27 ⁴⁰ Id. (¶¶ 38–39).

28 ⁴¹ Id. at 16 (¶ 75).

⁴² Id. at 16–18 (¶¶ 76, 80).

1 and through to the present, Pearson plc and Pearson Education have done nothing to have the
2 PSoC math and ELA curriculum adopted in any of the other 15 “adoption states,” which (along
3 with California and New Mexico) represent approximately 48% of “the total market.”⁴³ For
4 example, Texas is a major market for school textbooks.⁴⁴ It is currently going through an adoption
5 process for textbooks.⁴⁵ Pearson plc has not done anything to have Texas adopt PSoC.⁴⁶

6 Dr. Codding additionally alleges that PSoC goes from grades K–12 in ELA and K–11 in math,
7 matched to the grades in the Common Core State Standards.⁴⁷ PSoC was a finalist in an
8 international design competition in Denmark and in another in the United States.⁴⁸ At no time after
9 July 15, 2016 did Pearson plc or Pearson Education submit PSoC to EdReports, a national
10 nonprofit organization that reviews educational materials for alignment to the Common Core
11 Standards.⁴⁹ Pearson plc and Pearson Education have, however, submitted other Pearson
12 curriculum material to EdReports.⁵⁰

13 Dr. Codding additionally alleges that Pearson plc maintains a nominal website for PSoC but
14 that the website is “moribund” and has not been updated since 2015.⁵¹ The opening webpage for
15 Pearson plc’s current website for its “Math Curriculums and Textbooks” does not show PSoC at
16 all (unless the viewer clicks on a “show more” button, after which PSoC appears at the very
17 bottom of Pearson plc’s list).⁵² Additionally, since this lawsuit began, Pearson plc has deleted
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21 ⁴³ Id. at 13 (¶ 41).

22 ⁴⁴ Id. (¶ 42).

23 ⁴⁵ Id.

24 ⁴⁶ Id.

25 ⁴⁷ Id. (¶ 46).

26 ⁴⁸ Id. (¶ 47).

27 ⁴⁹ Id. (¶ 48).

28 ⁵⁰ Id.

⁵¹ Id. at 21 (¶ 100).

⁵² Id. (¶¶ 101–02).

1 pages on its website that referenced Dr. Coddling and the value of PSoC’s math and ELA
2 curricula.⁵³

3 **4.2 Sales Force Incentives**

4 Dr. Coddling alleges that after July 15, 2016 and through the present, Pearson plc and Pearson
5 Education have incentivized their sales force to sell other Pearson products and disincentivized
6 their sales force from selling PSoC.⁵⁴

7 With respect to Pearson plc, Dr. Coddling alleges that Pearson plc’s sales personnel have
8 received no credit for selling PSoC in connection with their evaluations and consideration for
9 promotion within the company.⁵⁵ After the adoption of the PSoC ELA courses in California,
10 Pearson plc did no marketing or sales for the 2016–2017 or 2017–2018 school years.⁵⁶ Since July
11 15, 2016, Pearson plc has sold less than \$2 million of PSoC nationwide, none of which were the
12 result of any affirmative sales activity by Pearson plc.⁵⁷ Since July 15, 2016, Pearson plc has
13 responded to hundreds of requests for proposals (“RFPs”) for course materials but has included
14 PSoC in fewer than five responses to these RFPs.⁵⁸ Additionally, Pearson plc has used elements of
15 both the content and pedagogical design from PSoC, has embedded them in its other core course
16 products, and is marketing and selling those other core products and including them as part of its
17 sales force’s quotas, without counting those sales towards Dr. Coddling’s bonus targets.⁵⁹

18 With respect to Pearson Education, Dr. Coddling alleges that Pearson Education has not
19 included PSoC within its core products.⁶⁰ Pearson Education’s sales team leaders in general have
20 instructed their sales force not to present or sell PSoC and instead to sell Pearson’s other products
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22 ⁵³ Id. at 22 (¶¶ 109–11).

23 ⁵⁴ Id. at 14 (¶ 51).

24 ⁵⁵ Id. (¶ 54).

25 ⁵⁶ Id. (¶ 55).

26 ⁵⁷ Id.

27 ⁵⁸ Id. at 16 (¶ 73).

28 ⁵⁹ Id. at 22 (¶ 108).

⁶⁰ Id. at 16 (¶ 72).

1 that count toward their sales quotas.⁶¹ Pearson Education sales personnel receive incentives to sell
2 Pearson products.⁶² After July 15, 2016 and through the present, Pearson Education has never
3 counted PSoC toward a Pearson Education salesperson’s sales quota.⁶³ A salesperson could sell
4 PSoC outside of his or her quota but would receive only a 4% commission instead of a larger
5 (unspecified) commission awarded for other Pearson products, creating a disincentive for the sales
6 force to sell PSoC products.⁶⁴

7 **4.3 Showing PSoC at National Education Conferences**

8 Every year, all of the national education associations have national conferences, and many also
9 have regional and state conferences.⁶⁵ Thousands of people attend each of these conferences, and
10 Dr. Codding alleges that these conferences are one of the best ways to reach educators.⁶⁶ All of the
11 major education suppliers, including Pearson Education, participate and have booths to showcase
12 their products and services.⁶⁷ The publishers include all their textbooks and instructional materials
13 and often invite the authors to be there to talk with customers.⁶⁸ The publishers frequently make
14 sure their authors are on panels and make presentations at these conferences.⁶⁹

15 Before joining Pearson plc, Dr. Codding attended many of these conferences, keynoted several
16 of them, and spoke at many of them.⁷⁰ After joining Pearson plc, Dr. Codding and her team
17 offered on numerous occasions to attend these conferences and present on PSoC.⁷¹ Pearson plc
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⁶¹ Id. (¶ 73).

21 ⁶² Id. at 14 (¶ 52).

22 ⁶³ Id. (¶ 53).

23 ⁶⁴ Id.

24 ⁶⁵ Id. (¶ 57).

25 ⁶⁶ Id. at 15 (¶ 58).

26 ⁶⁷ Id. (¶ 59).

27 ⁶⁸ Id. (¶ 60).

28 ⁶⁹ Id. (¶ 61).

⁷⁰ Id. (¶ 63).

⁷¹ Id. (¶ 64).

1 never invited or asked any of them to attend any of the conferences.⁷² (Dr. Codding does not
2 allege whether this alleged failure to invite or ask her and her team to participate occurred before
3 or after July 15, 2016.⁷³)

4 Dr. Codding alleges that after July 15, 2016 and through the present, Pearson plc and Pearson
5 Education have rarely, if ever, presented or showcased PSoC at any of these conferences.⁷⁴

6 **4.4 Meeting the Threshold Amount**

7 Dr. Codding alleges that if Pearson plc had devoted the same efforts after July 15, 2016 toward
8 selling PSoC that it had devoted to other course products, PSoC sales would have reached the
9 levels necessary for her bonus to be awarded to her.⁷⁵ Dr. Codding supports these allegations with
10 a number of putative analyses of Pearson plc’s reported sales figures and sales projections.⁷⁶

11 Dr. Codding does not allege that if Pearson Education had exerted efforts to sell PSoC, PSoC
12 sales would have reached the levels necessary for Dr. Codding’s bonuses to be awarded to her. Dr.
13 Codding recites a number of times that if Pearson plc and Pearson Education had devoted
14 meaningful efforts toward selling PSoC, PSoC sales would have reached the levels necessary for
15 her bonus to be awarded to her,⁷⁷ but she never makes this allegation with respect to Pearson
16 Education alone apart from Pearson plc, nor does she support this allegation with any analyses of
17 Pearson Education’s reported sales figures, sales projections, or other information.

18 **STANDARD OF REVIEW**

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20 A complaint must contain a “short and plain statement of the claim showing that the pleader is
21 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon
22 which they rest. See Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

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24 ⁷² Id. (¶ 65).

25 ⁷³ See id. (¶¶ 63–65).

26 ⁷⁴ Id. (¶ 67).

27 ⁷⁵ Id. at 19 (¶ 88).

28 ⁷⁶ See id. at 19–20 (¶¶ 89–97), 21–22 (¶¶ 103–05).

⁷⁷ Id. at 14 (¶¶ 50, 56), 15–16 (¶¶ 68–69), 19–20 (¶¶ 93, 98), 22 (¶ 106), 23 (¶¶ 116–18).

1 A complaint does not need detailed factual allegations, but “a plaintiff’s obligation to provide the
2 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
3 recitation of the elements of a cause of action will not do. Factual allegations must be enough to
4 raise a claim for relief above the speculative level[.]” Twombly, 550 U.S. at 555 (citations
5 omitted).

6 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which
7 when accepted as true, “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal,
8 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility
9 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
10 the defendant is liable for the misconduct alleged.” Id. “The plausibility standard is not akin to a
11 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
12 unlawfully.” Id. (quoting Twombly, 550 U.S. at 557). “Where a complaint pleads facts that are
13 merely consistent with a defendant’s liability, it stops short of the line between possibility and
14 plausibility of ‘entitlement to relief.’” Id. (quoting Twombly, 550 U.S. at 557) (internal quotation
15 marks omitted).

16 If a court dismisses a complaint, it should give leave to amend unless the “the pleading could
17 not possibly be cured by the allegation of other facts.” Cook, Perkiss & Liehe, Inc. v. N. Cal.
18 Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990).

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ANALYSIS

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1. Breach of Contract

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Dr. Coddling does not allege that Pearson Education breached an express term of the Agreements. Instead, she alleges that Pearson Education breached the implied covenant of good faith and fair dealing.⁷⁸

⁷⁸ AC – ECF No. 31-3 at 11–12 (¶¶ 31–34), 23 (¶¶ 114–18).

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1.1 Governing Law

The covenant of good faith and fair dealing is implied in every contract and prevents one party from “unfairly frustrating the other party’s right to receive the benefits” of the contract. *Guz v. Bechtel Nat’l Inc.*, 24 Cal. 4th 317, 349 (2000) (citing *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36 (1995)). To allege a claim for breach of the covenant of good faith and fair dealing, a plaintiff must allege the following elements: (1) the plaintiff and the defendant entered into a contract; (2) the plaintiff did all or substantially all of the things that the contract required her to do or that she was excused from having to do; (3) all conditions required for the defendant’s performance had occurred; (4) the defendant unfairly interfered with the plaintiff’s right to receive the benefits of the contract; and (5) the defendant’s conduct harmed the plaintiff. *Qingdao Tang-Buy Int’l Import & Export Co., Ltd. v. Preferred Secured Agents, Inc.*, No. 15-cv-00624-LB, 2016 WL 6524396, at *5 (N.D. Cal. Nov. 3, 2016) (citing Judicial Council of California Civil Jury Instructions § 325 (2011); *Oculus Innovative Scis., Inc. v. Nofil Corp.*, No. C 06-01686 SI, 2007 WL 2600746, at *4 (N.D. Cal. Sept. 10, 2007)). Regarding the last element — that the defendant’s conduct harmed the plaintiff — “[c]ausation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant’s breach, and that their causal occurrence be at least reasonably certain.” *Siqueiros v. Fed. Nat’l Mortg. Ass’n*, No. EDCV 13-01789-VAP (DTBx), 2014 WL 3015734, at *5 (C.D. Cal. June 27, 2014) (quoting *Vu v. Cal. Commerce Club, Inc.*, 58 Cal. App. 4th 229, 233 (1997)). “The test for causation in a breach of contract action is whether the breach was a substantial factor in causing the damages.” *Id.* (internal ellipsis omitted) (quoting *US Ecology, Inc. v. State*, 129 Cal. App. 4th 887, 909 (2005)). “[M]ere conclusory statements do not suffice’ to sufficiently state a breach of contract cause of action.” *Ketab Corp. v. Mesriani & Assocs., P.C.*, ___ F. App’x ___, No. 15-56753, 2018 WL 2041424, at *5 (9th Cir. May 2, 2018) (internal ellipsis omitted) (quoting *Iqbal*, 556 U.S. at 678); accord, e.g., *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1029 (N.D. Cal. 2012).

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1.2 Application

Pearson Education assumes for the purposes of its motion to dismiss that it was a party to the Employment Agreement.⁷⁹ It argues, however, that Dr. Codding does not adequately plead that its alleged breach proximately caused her injury or that causation is at least reasonably certain. The court agrees. Dr. Codding claims that had Pearson plc and Pearson Education exerted reasonable or best efforts, they would have made enough PSoC sales to meet the Threshold Amount necessary for her to receive her bonuses. These allegations fail to adequately plead causation with respect to the only defendant in this case, Pearson Education.

Dr. Codding’s complaint lumps Pearson plc and Pearson Education together.⁸⁰ “Courts consistently conclude that a complaint which lumps together multiple defendants in one broad allegation fails to satisfy the notice requirement of Rule 8(a)(2),” *Boyer v. Becerra*, No. 17-cv-06063-YGR, 2018 WL 2041995, at *7 (N.D. Cal. Apr. 30, 2018) (citations and internal quotation marks, brackets, and ellipsis omitted) — and here, of course, Pearson plc is not even a defendant. Dr. Codding does not allege that Pearson plc and Pearson Education are alter egos, disregarded their separate corporate form, or failed to distinguish between each other. Nor does Dr. Codding plead that the specifics of Pearson plc’s and Pearson Education’s interactions are unknown to her, particularly in light of the five years she worked for Pearson plc. Cf. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184–85 (N.D. Cal. 2009) (denying motion to dismiss conspiracy claims where plaintiffs grouped together corporate affiliates but also alleged that the defendants did not “distinguish between the entities within a corporate family” and “sufficiently

⁷⁹ Pearson Educ. Reply – ECF No. 41 at 7.

⁸⁰ Dr. Codding similarly conflates Pearson plc and Pearson Education in her opposition brief. For example, in her opposition, she argues that “[a]s alleged in ¶ 108, Pearson Education has used elements of both the content and pedagogical design from PSoC and has embedded them in its other core course products.” *Codding Opp’n – ECF No. 40* at 13. Her actual complaint, however, makes these allegations against Pearson plc, not Pearson Education. *AC – ECF No. 31-3* at 22 (¶ 108) (making allegations against “Pearson,” not “Pearson Education”); *id.* at 3 (¶ 11) (defining “Pearson” as “Pearson plc”).

1 allege[d] each defendant[’s] participation in that conspiracy”). Without more, allegations against
2 non-party Pearson plc do not plead a claim against defendant Pearson Education.⁸¹

3 Looking solely at Dr. Codding’s allegations against Pearson Education, the court finds that
4 they are conclusory. Among other things, Dr. Codding does not allege any sales figures, sales
5 projections, or any other facts or data that support her conclusion that had Pearson Education
6 exerted reasonable or best efforts, it would have been able to make enough PSoC sales to meet the
7 Threshold Amount. Dr. Codding includes some analyses of Pearson plc’s sales figures and sales
8 projections — but Pearson plc is not the defendant in this case, and these analyses do not support a
9 conclusion about Pearson Education.⁸² Dr. Codding does allege that Pearson Education, as distinct
10 from Pearson plc, disincentivized its sales force from selling PSoC and incentivized them to sell
11 other Pearson products. But she does not allege facts that plead that Pearson Education, had it not
12 disincentivized its sales force, would have sold enough PSoC to meet the Threshold Amount
13 necessary for Dr. Codding to receive any bonuses. In order to plead a claim against Pearson
14 Education, Dr. Codding must non-conclusory facts that plead that Pearson Education’s breach was
15 the proximate cause of PSoC sales falling short of the Threshold Amount. This she has not done.
16 The court therefore dismisses Dr. Codding’s breach-of-contract claim.

17 The court grants Dr. Codding one final opportunity to amend her complaint. Should she file an
18 amended complaint and continue to name only Pearson Education (and not Pearson plc) as a
19 defendant, she should make clear what duties Pearson Education (as opposed to Pearson plc) had
20 to her, how Pearson Education (as opposed to Pearson plc) allegedly breached the Agreements,
21 and how Pearson Education’s breach (as opposed to Pearson plc’s) caused her injury.

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23 ⁸¹ At the motion hearing held on July 19, 2018, Dr. Codding stated that she could amend her complaint
24 to clarify that her allegations against Pearson plc could also be made against Pearson Education. The
25 court afforded her an opportunity to do so. Order – ECF No. 46 (“The plaintiff stated that she could
26 amend her complaint to clarify what she is alleging against Pearson Education (as opposed to Pearson
27 plc) should the court wish her to do so. The court hereby grants leave for the plaintiff to amend her
28 complaint to change allegations made against Pearson plc, or Pearson plc and Pearson Education
collectively, to allegations against Pearson Education, to the extent that she can do so consistent with
her pleading obligations.”). Dr. Codding declined to avail herself of this opportunity.

⁸² The court expresses no opinion as to whether Dr. Codding’s analyses of Pearson plc’s sales figures
and sales projections are sufficiently non-conclusory so as to plead a claim against Pearson plc.

1 **2. Anticipatory Breach**

2 To plead a claim for anticipatory breach, a plaintiff must plead that ““(1) the other party
3 absolutely and unequivocally refused to perform and (2) [the plaintiff] effectuated the other
4 party’s breach by materially changing [her] position and treating the repudiation as final.”” Clear
5 Channel Outdoor, Inc. v. Bently Holdings Cal. LP, No. C-11-2573 EMC, 2011 WL 6099394, at *8
6 (N.D. Cal. Dec. 7, 2011) (quoting Shahani v. United Commercial Bank, 457 B.R. 775, 783 (N.D.
7 Cal. 2011) (citing Guerrieri v. Severini, 51 Cal. 2d 12, 19 (1958); Wilton v. Clarke, 27 Cal. App.
8 2d 1, 4 (1938))).

9 Dr. Codding’s claim for anticipatory breach fails for at least two reasons. First, like her breach-
10 of-contract claim, her anticipatory-breach claim improperly groups Pearson Education with non-
11 party Pearson plc. Second, even setting that issue aside, Dr. Codding does not plead that either
12 Pearson Education or Pearson plc absolutely and unequivocally refused to perform under the
13 Employment Agreement. Dr. Codding argues in her opposition that “Pearson [plc] and Pearson
14 Education. . . put it out of their power to perform so as to make substantial performance
15 impossible,”⁸³ but she does not cite to factual allegations in her complaint that support this
16 conclusion. The Agreements provide that PSoC sales will count toward the calculation of Dr.
17 Codding’s bonus through the end of 2019. Dr. Codding has not alleged that either Pearson
18 Education or Pearson plc has either (1) absolutely and unequivocally refused to make more PSoC
19 sales or (2) done anything to make it impossible to make PSoC sales by then.⁸⁴ The court therefore
20 dismisses Dr. Codding’s anticipatory-breach claim, with leave to amend.

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23 ⁸³ Codding Opp’n – ECF No. 40 at 16.

24 ⁸⁴ Dr. Codding argues that “Pearson Education’s very posture before the Court confirms that it has
25 absolutely and unequivocally refused to fulfill its contractual duty to Dr. Codding.” Codding Opp’n –
26 ECF No. 40 at 15. But defending oneself in a breach-of-contract lawsuit, including making arguments
27 in that lawsuit that the contract may be unenforceable, etc., does not constitute an anticipatory breach.
28 Cf. Great Am. E & S Ins. Co. v. Kouw Pinnq Enter. Co., Ltd., No. EDCV 13-00715-VAP (DTBx),
2013 WL 5461911, at *5 (C.D. Cal. Sept. 20, 2013) (plaintiff’s filing and litigating a lawsuit to rescind
a contract does not constitute an anticipatory breach, because, among other things, the plaintiff could
lose, remain bound by the contract, and then still perform, and therefore its litigation does not qualify
as an “absolute and unequivocal” refusal to perform).

1 **CONCLUSION**

2 The court grants Pearson Education’s motion to dismiss. The court extends Dr. Codding a final
3 opportunity to amend; she may file an amended complaint within 21 days of this order. (If she
4 files a new amended complaint, she must also file a blackline of her new amended complaint
5 against her current amended complaint as an attachment.) If Dr. Codding does not do so, the court
6 will enter judgment in favor of Pearson Education and will direct the Clerk of Court to close this
7 case.

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9 **IT IS SO ORDERED.**

10 Dated: July 27, 2018

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13 LAUREL BEELER
14 United States Magistrate Judge
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