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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 IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Re: ECF No. 53

INTRODUCTION

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

In 2010, plaintiff Judy Coddling, an education professional, entered into an employment agreement (later amended by two other agreements) (collectively, the "Agreements") with Pearson plc, an education and information company that provides curriculum assessment and other services to schools, school districts, states, and students. The Agreements provided that Dr. Coddling would work for a subsidiary of Pearson plc, defendant Pearson Education, Inc., to develop education-course offerings known as the "Pearson System of Courses" or "PSoC." The Agreements further provided that Dr. Coddling would be paid certain monetary bonuses if PSoC sales met or exceeded a certain threshold dollar amount ("Threshold Amount") by the end of 2019. As of today, PSoC sales have not met or exceeded that Threshold Amount.

1 Dr. Codding alleges that Pearson Education failed to adequately promote and sell PSoC and
2 that, had it done so, PSoC sales would have hit the Threshold Amount and she would be entitled to
3 receive her bonuses. Dr. Codding brings claims for (1) breach of contract, arguing that Pearson
4 Education breached the implied covenant of good faith and fair dealing that attaches to the
5 Agreements by not adequately promoting and selling PSoC, and (2) anticipatory breach of
6 contract, arguing that Pearson Education breached by refusing to fulfill its contractual duties and
7 making performance impossible.

8 The court previously dismissed Dr. Codding’s original complaint and amended complaint
9 (“AC”). The court dismissed the original complaint because (among other things) Dr. Codding did
10 not support her conclusion — that Pearson Education, had it adequately promoted and sold PSoC,
11 would have made enough in PSoC sales to earn Dr. Codding her bonus — with sufficient factual
12 allegations. *Codding v. Pearson Educ., Inc.*, No. 18-cv-00817-LB, 2018 WL 2298598 (N.D. Cal.
13 May 21, 2018) (Codding I).¹ The court dismissed the AC because (among other things) Dr.
14 Codding grouped defendant Pearson Education with non-party Pearson plc, and her grouped
15 allegations against Pearson plc did not sufficiently plead a claim against Pearson Education.
16 *Codding v. Pearson Educ., Inc.*, No. 18-cv-00817-LB, 2018 WL 3609027 (N.D. Cal. July 27,
17 2018) (Codding II).² Dr. Codding has now filed a second amended complaint (“SAC”) in which
18 she includes additional factual allegations regarding potential PSoC sales and makes allegations
19 against Pearson Education without grouping it with Pearson plc.

20 Pearson Education moves again to dismiss. The court can address the motion without a new
21 hearing. N.D. Cal. Civ. L.R. 7-1(b).³ The court denies Pearson Education’s motion to dismiss Dr.
22 Codding’s breach-of-contract claim but grants its motion to dismiss Dr. Codding’s anticipatory-
23 breach claim.

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25 ¹ Order – ECF No. 30. Citations refer to material in the Electronic Case File (“ECF”); pinpoint
26 citations are to the ECF-generated page numbers at the top of documents.

27 ² Order – ECF No. 47.

28 ³ The court previously held a hearing on July 19, 2018, for Pearson Education’s motion to dismiss the
AC.

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STATEMENT⁴

1. The Parties

Dr. Codding is an education professional who, among other things, was the award-winning principal of Pasadena High School in Los Angeles County, was a charter principal of the Coalition of Essential Schools (a national high-school reform effort), was an education consultant to the Ministry of Education in the People’s Republic of China and the U.S. Department of Defense Schools, and was a commissioner on the California Commission for the Establishment of Academic Content and Performance Standards.⁵

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

⁴ Unless otherwise noted, the facts recited in the Statement are allegations from the SAC.

⁵ SAC – ECF No. 50 at 3 (¶¶ 9–10).

⁶ Id. at 2 (¶ 6).

⁷ Id. (¶ 7).

⁸ Id. (¶ 8).

⁹ Id.

¹⁰ Id.

1 Defendant Pearson Education is a wholly owned subsidiary of non-party Pearson plc, a British
2 education and publishing company.¹¹ Pearson plc provides curriculum assessment and other
3 services to schools, school districts, states, and directly to students.¹² In 2010, Pearson plc
4 acquired America’s Choice for \$80 million.¹³

5

6 **2. The Employment Agreement**

7 In December 2010, following Pearson plc’s acquisition of America’s Choice, Pearson plc and
8 Dr. Codding entered into a letter Employment Agreement, whereby Pearson plc hired Dr. Codding
9 to be Pearson Education’s Managing Director for the Pearson System of Courses.¹⁴ In December
10 2012, Pearson plc and Dr. Codding slightly amended the Employment Agreement by a written
11 exchange of emails (“Email Amendment”).¹⁵ Marjorie Scardino, Pearson plc’s then-CEO, signed
12 the Employment Agreement on behalf of Pearson plc.¹⁶

13 Dr. Codding alleges that while the Employment Agreement was signed by Pearson plc, she
14 was employed by Pearson Education and PSoC was to be a product of Pearson Education.¹⁷ Dr.
15 Codding’s salary was paid by Pearson Education.¹⁸ Her W-2 forms were prepared by Pearson
16 Education.¹⁹ Her initial stock bonus was in the form of Pearson plc American Depository
17 Receipts, but all her other bonuses were paid by Pearson Education.²⁰ Her health and medical
18 insurance benefits were paid for and administered by Pearson Education.²¹

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¹¹ Id. at 3 (¶ 11).

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¹² Id.

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¹³ Id. at 3–4 (¶ 12).

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¹⁴ Id. at 5 (¶ 13); Employment Agreement – ECF No. 50 at 37–39.

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¹⁵ SAC – ECF No. 50 at 5 (¶ 20); Email Amendment – ECF No. 50 at 40.

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¹⁶ SAC – ECF No. 50 at 5 (¶ 13); Employment Agreement – ECF No. 50 at 39. Ms. Scardino also wrote and sent Dr. Codding the Email Amendment. Email Amendment – ECF No. 50 at 40.

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¹⁷ SAC – ECF No. 50 at 5 (¶¶ 13–14).

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¹⁸ Id. (¶ 16).

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¹⁹ Id. (¶ 17).

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²⁰ Id. (¶ 18).

²¹ Id. (¶ 19).

1 The Employment Agreement assigned Dr. Codding responsibility for overseeing two separate
2 programs.²² The first program was described in the Employment Agreement as follows: “It
3 involves [Dr. Codding] applying [her] knowledge and support in integrating and helping [Pearson
4 plc] learn to operate [America’s Choice], and [her] helping to sign up several customers, such as
5 LA Unified School District and others.”²³ The second program was described in the Employment
6 Agreement as follows: “For comprehensive K–10/12 mathematics and literacy courses designed to
7 apply the philosophy of the Common Core State Standards: These courses will cover
8 approximately 150 days of instruction, use multi-media delivery platforms, and have the
9 distinction of being a system of learning through the grades, of engaging students and of being
10 easy for teachers to use.”²⁴ Pearson Education paid Dr. Codding a salary and employment benefits
11 for her services.²⁵

12 Under the Employment Agreement, Dr. Codding was entitled to bonus amounts “based on the
13 amount of sales Pearson Education made of the products for which for which Dr. Codding was
14 responsible as Managing Director, referred to as the ‘Pearson System of Courses’ or ‘PSoC.’”²⁶
15 Paragraphs 2(b) and 2(c) of the Employment Agreement (as amended) set out Dr. Codding’s
16 bonuses.²⁷ Dr. Codding acknowledges that Pearson Education paid her the bonuses set out in
17 paragraphs 2(b) and 2(c)(i), and hence this action relates solely to the bonuses set out in
18 paragraphs 2(c)(ii) and 2(c)(iii).²⁸

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²² Id. at 6 (¶ 21).

²³ Id. (¶ 22).

²⁴ Id. (¶ 23).

²⁵ Id. (¶ 24).

²⁶ Id. (¶ 25).

²⁷ Id. at 7 (¶¶ 30–31); Employment Agreement ¶ 2(b), 2(c) – ECF No. 50 at 38–39; see also Email Amendment – ECF No. 50 at 40 (amending paragraph 2(c)(ii)).

²⁸ SAC – ECF No. 50 at 8 (¶ 32).

1 Paragraph 2(c)(ii) provides that once PSoC sales exceed a certain specified Threshold Amount,
2 Dr. Codding would receive a set bonus amount.²⁹ Paragraph 2(c)(iii) provides that Dr. Codding
3 would additionally receive a percentage royalty as an additional bonus for all PSoC sales over the
4 Threshold Amount, up to a specified ceiling.³⁰

5
6 **3. The Release Agreement**

7 On July 15, 2016, Dr. Codding and Pearson Education entered into a Release Agreement.³¹

8 The Release Agreement’s first paragraph states that it “set[s] forth the agreement between [Dr.
9 Codding] and Pearson Education, Inc. and its affiliates (collectively, the ‘Company’) regarding
10 [Dr. Codding’s] separation from the Company.”³² It then states, “[a]s an initial matter, we
11 acknowledge that you and Pearson are parties to an employment agreement dated December 16,
12 2010, as amended on December 21, 2012 (the ‘Employment Agreement’).”³³ It recites that it
13 “contemplates the survival of certain terms under the Employment Agreement, and [] amend[s]
14 certain terms of the Employment Agreement, as . . . described . . . below.”³⁴ Among other things,
15 the Release Agreement covers three areas relevant to this dispute:

- 16 1. First, “[t]he parties acknowledged that [Dr. Codding’s] work under the Employment
17 Agreement is finished, and [her] employment with the Company terminated on
18 October 16, 2015 (‘Separation Date’).”³⁵
- 19 2. Second, “the parties agree[d] on [certain] amendments and clarifications of the terms
20 and conditions of [the] Employment Agreement.”³⁶ Among other things, the Release

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22 ²⁹ Id. at 7 (¶ 31); Employment Agreement ¶ 2(c)(ii) – ECF No. 50 at 38; Email Amendment – ECF No. 50 at 40.

23 ³⁰ SAC – ECF No. 50 at 7 (¶ 31); Employment Agreement ¶ 2(c)(iii) – ECF No. 50 at 39.

24 ³¹ SAC – ECF No. 50 at 6 (¶ 27); Release Agreement – ECF No. 50 at 42–52.

25 ³² Release Agreement – ECF No. 50 at 42.

26 ³³ Id.

27 ³⁴ SAC – ECF No. 50 at 7 (¶ 28); Release Agreement – ECF No. 50 at 42.

28 ³⁵ Release Agreement – ECF No. 50 at 42 (¶ 1).

³⁶ Id. at 43 (¶ 2).

1 Agreement extended the time period that PSoC sales would count for the purposes of
2 calculating Dr. Codding’s bonus through to the end of 2019.³⁷
3 3. Third, the parties stated that “[t]he consideration [Dr. Codding] receive[d] under this
4 Agreement and Release is in complete discharge, release, and satisfaction of all
5 obligations and liabilities [other than certain exceptions not relevant here] of Pearson
6 Education, Inc. and its affiliates, including but not limited to Pearson, Inc., Pearson plc,
7 Pearson Education Holdings, Inc., Pearson Education and Assessment, Inc., The
8 Pearson Charitable Foundation, NCS Pearson, Inc., and all of their respective officers,
9 directors, employees, bonus and/or compensation plans (collectively, the ‘Release
10 Parties’) with regard to any matter or event whatsoever that occurred or happened up to
11 the date of this Agreement and Release, including but not limited to matters regarding
12 [her] employment with the Company and its termination.”³⁸

13
14 **4. Pearson Education’s Efforts to Sell the Pearson System of Courses**

15 **4.1 Selling PSoC**

16 Dr. Codding alleges that “[t]he United States K–12 comprehensive-curriculum market spends
17 some \$3 billion each year” and the K–12 English language arts (“ELA”) and math curriculum
18 market spends approximately \$2 billion each year.³⁹ California alone spends approximately \$520
19 million per year on curriculum materials, with 75% of this going to math and ELA.⁴⁰

20 California and New Mexico adopted the PSoC ELA and math curricula, which were on both
21 states’ approved lists.⁴¹ Once adopted, curricula remain on the adoption list for a typical five- to
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24 ³⁷ SAC – ECF No. 50 at 9 (¶ 33); Release Agreement – ECF No. 50 at 45 (¶ 2.c).

25 ³⁸ Release Agreement – ECF No. 50 at 46 (¶ 7.a).

26 ³⁹ SAC – ECF No. 50 at 14 (¶ 51).

27 ⁴⁰ Id.

28 ⁴¹ Id. at 13 (¶ 44). California has adopted PSoC only for grades K–8 because it does not have an adoption process for high schools. Id. at 14 (¶ 52).

1 seven-year adoption cycle and are eligible to be sold in every school district in the state.⁴² Dr.
2 Codding alleges that Pearson Education has done virtually nothing to sell PSoC in California or
3 New Mexico.⁴³ Dr. Codding claims that Pearson Education has falsely stated that it does not have
4 an ELA product approved in California and that this is the reason for its lower textbook revenue
5 over the past several years.⁴⁴ In fact, Pearson plc does have an approved ELA product — PSoC,
6 the only Pearson plc ELA product that was adopted in California in the current adoption cycle —
7 and could have sold PSoC in California beginning in August 2016.⁴⁵

8 Dr. Codding alleges that Pearson Education has abandoned any meaningful efforts to sell the
9 PSoC math and ELA programs and has pushed its other proprietary Pearson programs instead.⁴⁶
10 Pearson plc’s 2016 and 2017 annual reports (which include financial information for Pearson
11 Education) state that Pearson Education’s North American sales operations made a “decision not
12 to compete for the California Grades K–8 English Language Arts (ELA) adoption with a core
13 basal programme.”⁴⁷ This was despite the fact that Pearson Education applied for PSoC to be
14 “adopted” in California and that PSoC was in fact adopted there.⁴⁸ Additionally, after July 15,
15 2016 and through to the present, Pearson Education has done nothing to have the PSoC math and
16 ELA curriculum adopted in any of the other 15 “adoption states,” which (along with California
17 and New Mexico) represent approximately 48% of “the total market.”⁴⁹ Because Pearson
18 Education has not done anything to have the PSoC math and ELA curriculum adopted in other
19 states, it is virtually guaranteed that schools or school districts in those states will not buy PSoC
20 products.⁵⁰ For example, Texas is a major market for school textbooks.⁵¹ It is currently going

21 _____
22 ⁴² Id. at 13 (¶ 44).
23 ⁴³ Id. at 14 (¶ 47).
24 ⁴⁴ Id. at 13 (¶ 45).
25 ⁴⁵ Id. (¶¶ 45–46).
26 ⁴⁶ Id. at 18 (¶ 82).
27 ⁴⁷ Id. at 18–20 (¶¶ 83–84, 88).
28 ⁴⁸ Id. at 18–19 (¶ 84).
⁴⁹ Id. at 14 (¶ 48).
⁵⁰ Id. (¶ 50).

1 through an adoption process for textbooks.⁵² Pearson Education has not done anything to have
2 Texas adopt PSoC.⁵³

3 Dr. Codding alleges that Pearson Education maintains a nominal website for PSoC but that the
4 website is “moribund” and has not been updated since 2015.⁵⁴ The opening webpage for Pearson
5 Education’s current website for its “Math Curriculums and Textbooks” does not show PSoC at all
6 (unless the viewer clicks on a “show more” button, after which PSoC appears at the very bottom
7 of Pearson Education’s list).⁵⁵ Additionally, since this lawsuit began, Pearson Education has
8 deleted pages on its website that referenced Dr. Codding and the value of PSoC’s math and ELA
9 curricula.⁵⁶

10 **4.2 Sales Force Incentives**

11 Dr. Codding alleges that after July 15, 2016 and through the present, Pearson Education has
12 incentivized its sales force to sell other Pearson Education products and disincentivized its sales
13 force from selling PSoC.⁵⁷

14 Dr. Codding alleges that Pearson Education has not included PSoC within its core products.⁵⁸
15 Pearson Education’s sales team leaders in general have instructed their sales force not to present or
16 sell PSoC and instead to sell Pearson’s other products that count toward their sales quotas.⁵⁹
17 Pearson Education sales personnel receive incentives to sell Pearson products.⁶⁰ After July 15,
18 2016 and through the present, Pearson Education has never counted PSoC toward sales quotas.⁶¹

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20 ⁵¹ Id. (¶ 49).

21 ⁵² Id.

22 ⁵³ Id.

23 ⁵⁴ Id. at 23 (¶ 111).

24 ⁵⁵ Id. at 23–24 (¶¶ 112–13).

25 ⁵⁶ Id. at 30–31 (¶¶ 142–44).

26 ⁵⁷ Id. at 15 (¶ 57).

27 ⁵⁸ Id. at 17 (¶ 79).

28 ⁵⁹ Id. (¶ 80).

⁶⁰ Id. at 14 (¶ 58).

⁶¹ Id. (¶ 59).

1 Pearson Education sales personnel can sell PSoC outside of their quotas but receive only a 4%
2 commission instead of the (unspecified) larger commission awarded for other Pearson Education
3 products, creating a disincentive for them to sell PSoC products.⁶² Pearson Education’s sales
4 personnel have received no credit for selling PSoC in connection with their evaluations and
5 consideration for promotion within the company.⁶³

6 After the adoption of the PSoC ELA courses in California, Pearson Education did no
7 marketing or sales for the 2016–2017 or 2017–2018 school years.⁶⁴ Since July 15, 2016, Pearson
8 Education has sold less than \$2 million of PSoC nationwide, none of which were the result of any
9 affirmative sales activity by Pearson Education.⁶⁵ Since July 15, 2016, Pearson Education has
10 responded to hundreds of requests for proposals (“RFPs”) for course materials but has included
11 PSoC in fewer than five responses to these RFPs.⁶⁶

12 **4.3 Showing PSoC at National Education Conferences**

13 Every year, including years after July 15, 2016, all of the national education associations have
14 national conferences.⁶⁷ Many also have regional and state conferences.⁶⁸ Thousands of people
15 attend each of these conferences, and Dr. Coddling alleges that these conferences are one of the
16 best ways to reach educators.⁶⁹ All of the major education suppliers, including Pearson Education,
17 participate and have booths to showcase their products and services.⁷⁰ The publishers include all
18 their textbooks and instructional materials and often invite the authors to be there to talk with
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21 _____
22 ⁶² Id.

23 ⁶³ Id. (¶ 60).

24 ⁶⁴ Id. (¶ 61).

25 ⁶⁵ Id.

26 ⁶⁶ Id. at 18 (¶ 81).

27 ⁶⁷ Id. at 16 (¶ 64).

28 ⁶⁸ Id.

⁶⁹ Id. (¶ 65).

⁷⁰ Id. (¶ 66).

1 customers.⁷¹ The publishers frequently make sure their authors are on panels and make
2 presentations at these conferences.⁷²

3 Before joining Pearson Education, Dr. Codding attended many of these conferences, keynoted
4 several of them, and spoke at many of them.⁷³ After joining Pearson Education, Dr. Codding and
5 her team offered on numerous occasions to attend these conferences and present on PSoC.⁷⁴
6 Pearson Education never invited or asked any of them to attend any of the conferences, including
7 never inviting or asking them to attend any conference after July 15, 2016.⁷⁵ Dr. Codding
8 identifies nine organizations that would have been the most important to which to show and
9 demonstrate PSoC.⁷⁶ After July 15, 2016 and through to the present, Pearson Education has rarely
10 if ever presented or showcased PSoC at any of these conferences.⁷⁷

11 **4.4 Meeting the Threshold Amount**

12 Dr. Codding alleges that if Pearson plc had devoted the same efforts after July 15, 2016 toward
13 selling PSoC that it had devoted to its other course products, PSoC sales would have reached the
14 Threshold Amounts necessary for her bonuses to be awarded to her.⁷⁸ Dr. Codding advances six
15 separate bases for her conclusion.

16 First, Pearson plc's 2017 annual report (which included reporting on Pearson Education's
17 North American operations) reflects that Pearson Education sold £418 million in school
18 courseware in North America during 2016 and £394 million in school courseware in North
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20 ⁷¹ Id. (¶ 67).

21 ⁷² Id. (¶ 68).

22 ⁷³ Id. (¶ 70).

23 ⁷⁴ Id. (¶ 71).

24 ⁷⁵ Id. (¶ 72).

25 ⁷⁶ Id. at 16–17 (¶ 73) (listing the National Council of Teachers of English, the National Council of
26 Teachers of Mathematics, the Association of Supervision and Curriculum Development, the National
27 Education Association, the American Federation of Teachers, the National Title I Association, the
28 School Superintendents Association, the Council of Great City Schools, and the International Society
for Technology in Education).

⁷⁷ Id. at 17 (¶ 74).

⁷⁸ Id. at 21 (¶ 96).

1 America during 2017, which equate to approximately \$560 million and \$528 million,
2 respectively.⁷⁹ If a fraction of those sales were attributed to PSoC, those sales would have met the
3 Threshold Amount necessary to trigger Dr. Codding’s bonus payments.⁸⁰

4 Second, Pearson Education has represented that it receives 20% to 33% of state adoption
5 funds.⁸¹ There are roughly 6.2 million students in California.⁸² California allocates the equivalent
6 of one new textbook for every student in an adoption cycle in a core subject matter.⁸³ The average
7 price of a textbook is \$70, which means there is approximately \$420 million allocated for the 6.2
8 million students receiving an ELA textbook (not including replacement materials that are
9 purchased every year).⁸⁴ The only Pearson Education product adopted in California for ELA is
10 PSoC, so any ELA sales in California would necessarily have been generated by PSoC sales.⁸⁵ If
11 Pearson Education received its lower-end prediction of 20% of ELA textbook sales, it would have
12 generated \$84 million in PSoC sales, which is more than the Threshold Amount necessary to
13 trigger Dr. Codding’s bonus payments.⁸⁶

14 Third, the \$84 million figure is only for sales in one state, California, in one content area,
15 ELA. Dr. Codding alleges that had Pearson Education devoted any meaningful effort to selling
16 PSoC math or ELA courses in other states, it would have achieved PSoC sales that met the
17 Threshold Amount necessary to trigger Dr. Codding’s bonus payments.⁸⁷

18 Fourth, Dr. Codding draws a comparison to another education-course company and its sales.
19 An unrelated science company, Accelerate Learning-AI, has one science-education product,
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21 ⁷⁹ Id. (¶¶ 98–99).

22 ⁸⁰ Id. at 22 (¶ 102).

23 ⁸¹ Id. (¶ 103).

24 ⁸² Id.

25 ⁸³ Id.

26 ⁸⁴ Id.

27 ⁸⁵ Id.

28 ⁸⁶ Id.

⁸⁷ Id. (¶ 104).

1 StemScopes, for grades K–12.⁸⁸ Accelerate Learning began selling products in 2015 and has had
2 revenue in excess of \$135 million between then and now (a figure greater than the Threshold
3 Amount).⁸⁹ The K–12 curriculum market in the United States is about \$3 billion a year on core
4 products: of those, ELA makes up 48%, math 28%, science 8%, and humanities 8%.⁹⁰ With one
5 product (StemScopes) in a subject area that has only 8% of the core-curriculum-market revenue
6 (science), Accelerate Learning has made more in sales than the Threshold Amount necessary for
7 Dr. Codding to receive her bonus. Additionally, Accelerate Learning has not sold courses in
8 California — the largest market in the country — because California had not adopted a science
9 curriculum before this year.⁹¹ Dr. Codding implies that PSoC sales — which would have been in
10 subject areas that have a greater share of the core-curriculum-market revenue (ELA and math) and
11 would have included a larger market (California) — likewise would have exceeded the Threshold
12 Amount necessary for trigger her bonus.⁹²

13 Fifth, Dr. Codding alleges that a former Pearson Education senior sales executive is prepared
14 to testify that had Pearson Education devoted reasonable best efforts to selling PSoC, rather than
15 its other courses, PSoC sales would have exceeded the Threshold Amount necessary to trigger Dr.
16 Codding’s bonus payments.⁹³

17 Sixth, the Agreements provide that if (1) PSoC material is combined with and sold as part of
18 other Pearson Education products of services and (2) the PSoC material makes up at least a certain
19 set percentage (“Combination Percentage”) of the total Pearson Education products or services
20 with which PSoC is sold, sales of that PSoC material will count towards Dr. Codding’s bonus
21 targets.⁹⁴ Dr. Codding alleges that Pearson Education has used key elements of both the content
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23 ⁸⁸ Id. (¶ 105).

24 ⁸⁹ Id.

25 ⁹⁰ Id. at 23 (¶ 106). The SAC does not specify what makes up the remaining 8%.

26 ⁹¹ Id. at 22 (¶ 105).

27 ⁹² See id. at 23 (¶ 106).

28 ⁹³ Id. (¶ 107).

⁹⁴ Id. at 9 (¶ 33); Release Agreement – ECF No. 50 at 44 (¶ 2.b).

1 and pedagogical design from PSoC and has embedded them in its other core course products,
2 including its myPerspectives ELA program for grades 6–12 and its enVisionMATH Common Core
3 for grades K–8.⁹⁵ Dr. Codding alleges that PSoC material makes up considerably more than the
4 Combination Percentage threshold of those two courses.⁹⁶ Pearson Education has stated that the
5 potential revenue stream for enVisionMATH is over \$2 billion a year.⁹⁷ Multiplying those potential
6 enVisionMATH sales by the Combination Percentage results in sales attributable to PSoC that
7 would exceed the Threshold Amount necessary to trigger Dr. Codding’s bonus payments — even
8 without including sales from other Pearson Education programs that also contain PSoC material,
9 such as the MyPerspectives program.⁹⁸

10
11 **STANDARD OF REVIEW**

12 A complaint must contain a “short and plain statement of the claim showing that the pleader is
13 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon
14 which they rest. See Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
15 A complaint does not need detailed factual allegations, but “a plaintiff’s obligation to provide the
16 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
17 recitation of the elements of a cause of action will not do. Factual allegations must be enough to
18 raise a claim for relief above the speculative level[.]” *Twombly*, 550 U.S. at 555 (citations
19 omitted).

20 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which
21 when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
22 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility
23 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
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25 _____
⁹⁵ SAC – ECF No. 50 at 25 (¶ 119).

26 ⁹⁶ *Id.* at 28 (¶ 126).

27 ⁹⁷ *Id.* at 24 (¶ 116).

28 ⁹⁸ *Id.* at 28 (¶¶ 129–30).

1 the defendant is liable for the misconduct alleged.” Id. “The plausibility standard is not akin to a
2 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
3 unlawfully.” Id. (quoting *Twombly*, 550 U.S. at 557). “Where a complaint pleads facts that are
4 merely consistent with a defendant’s liability, it stops short of the line between possibility and
5 plausibility of ‘entitlement to relief.’” Id. (quoting *Twombly*, 550 U.S. at 557) (internal quotation
6 marks omitted).

8 ANALYSIS

9 1. Breach of Contract

10 Dr. Codding does not allege that Pearson Education breached an express term of the
11 Agreements. Instead, she alleges that Pearson Education breached the implied covenant of good
12 faith and fair dealing.⁹⁹

13 1.1 Governing Law

14 The covenant of good faith and fair dealing is implied in every contract and prevents one party
15 from “unfairly frustrating the other party’s right to receive the benefits” of the contract. *Guz v.*
16 *Bechtel Nat’l Inc.*, 24 Cal. 4th 317, 349 (2000) (citing *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th
17 1, 36 (1995)). To allege a claim for breach of the covenant of good faith and fair dealing, a
18 plaintiff must allege the following elements: (1) the plaintiff and the defendant entered into a
19 contract,¹⁰⁰ (2) the plaintiff did all or substantially all of the things that the contract required her to
20 do or that she was excused from having to do, (3) all conditions required for the defendant’s
21 performance had occurred, (4) the defendant unfairly interfered with the plaintiff’s right to receive
22 the benefits of the contract, and (5) the defendant’s conduct harmed the plaintiff. *Qingdao Tang-*
23 *Buy Int’l Import & Export Co., Ltd. v. Preferred Secured Agents, Inc.*, No. 15-cv-00624-LB, 2016

24 _____
25 ⁹⁹ SAC – ECF No. 50 at 12–13 (¶¶ 38–41), 31–32 (¶¶ 148–53).

26 ¹⁰⁰ Dr. Codding entered into the Employment Agreement with Pearson plc, not Pearson Education.
27 (Dr. Codding entered into the Release Agreement, which modified the Employment Agreement, with
28 Pearson Education.) Pearson Education has not argued that the Employment Agreement is not
enforceable against it, see *Codding II*, 2018 WL 3609027, at *7, so the court assumes for the purposes
of the motion to dismiss that this element is satisfied.

1 WL 6524396, at *5 (N.D. Cal. Nov. 3, 2016) (citing Judicial Council of California Civil Jury
 2 Instructions § 325 (2011); *Oculus Innovative Scis., Inc. v. Nofil Corp.*, No. C 06-01686 SI, 2007
 3 WL 2600746, at *4 (N.D. Cal. Sept. 10, 2007)). Regarding the last element — that the defendant’s
 4 conduct harmed the plaintiff — “[c]ausation of damages in contract cases, as in tort cases,
 5 requires that the damages be proximately caused by the defendant’s breach, and that their causal
 6 occurrence be at least reasonably certain.” *Siqueiros v. Fed. Nat’l Mortg. Ass’n*, No. EDCV 13-
 7 01789-VAP (DTBx), 2014 WL 3015734, at *5 (C.D. Cal. June 27, 2014) (quoting *Vu v. Cal.*
 8 *Commerce Club, Inc.*, 58 Cal. App. 4th 229, 233 (1997)). “The test for causation in a breach of
 9 contract action is whether the breach was a substantial factor in causing the damages.” *Id.*
 10 (internal ellipsis omitted) (quoting *US Ecology, Inc. v. State*, 129 Cal. App. 4th 887, 909 (2005)).
 11 “[M]ere conclusory statements do not suffice’ to sufficiently state a breach of contract cause of
 12 action.” *Ketab Corp. v. Mesriani & Assocs., P.C.*, 734 F. App’x 401, 408 (9th Cir. May 2, 2018)
 13 (internal ellipsis omitted) (quoting *Iqbal*, 556 U.S. at 678); accord, e.g., *Low v. LinkedIn Corp.*,
 14 900 F. Supp. 2d 1010, 1029 (N.D. Cal. 2012).

15 **1.2 Application**

16 The parties agree that the covenant of good faith and fair dealing requires Pearson Education
 17 to use at least some efforts to sell PSoC. They dispute the standard that applies to measuring the
 18 adequacy of those efforts. Dr. Coddling argues that the covenant of good faith and fair dealing
 19 requires Pearson Education to use “best efforts.”¹⁰¹ Pearson Education argues that it is required to
 20 use only “reasonable efforts, not best efforts,” and that it is not required to take actions against its
 21 own self-interest, even if Dr. Coddling might be adversely affected.¹⁰² The court does not decide
 22 between these standards here, because Dr. Coddling has sufficiently pleaded a claim under the
 23 lower “reasonable efforts” standard.¹⁰³

24 _____
 25 ¹⁰¹ SAC – ECF No. 50 at 12 (¶ 39); Coddling Opp’n – ECF No. 55 at 3.

26 ¹⁰² Pearson Educ. Mot. – ECF No. 53 at 8, 15–16.

27 ¹⁰³ Because the parties have raised arguments regarding the “law of the case” doctrine in connection
 28 with the good-faith-and-fair-dealing standard, see Coddling Opp’n – ECF No. 55 at 3, Pearson Educ.
 Reply – ECF No. 57 at 6–7, the court briefly addresses that doctrine to clarify the issue. “For the
 doctrine to apply, the issue in question must have been decided explicitly or by necessary implication
 (cont’d)

1 Dr. Coddling alleges that Pearson Education, among other things, (1) made a decision to not
2 sell PSoC to California schools despite the fact that PSoC was approved in California, (2) did not
3 try to have PSoC adopted by other states, (3) disincentivized its sales force from selling PSoC by
4 paying its sales force lower commissions for PSoC sales and not counting PSoC sales towards
5 sales targets, evaluations, or promotions, (4) included PSoC fewer than five times out of hundreds
6 of customer RFPs asking for course materials, and (5) rarely or never showcased PSoC at
7 education conferences. This plausibly pleads that Pearson Education did not exert reasonable
8 efforts to sell PSoC. Cf. Citri-Lite Co. v. Cott Beverages, Inc., 721 F. Supp. 2d 912, 926–27 (E.D.
9 Cal. 2010) (holding on a motion for summary judgment that evidence that the defendant cancelled
10 product demonstrations intended to market the plaintiff’s products, and focused marketing on only
11 two customers while not allocating any funding to market products to other customers, raised a
12 triable issue as to whether the defendant breached its duty to use commercially reasonable efforts
13 to promote and sell the plaintiff’s products).

14 Dr. Coddling has also plausibly alleged causation. As an initial matter, Dr. Coddling’s
15 allegations about education-course sales generally and Pearson Education specifically plausibly
16 pleads that Pearson Education’s purported lack of reasonable efforts caused PSoC sales to be
17 lower than they otherwise would be. Cf. Citri-Lite, 721 F. Supp. 2d at 934 (holding on a motion
18 for summary judgment that evidence that conducting product demonstrations can lead to increased
19 product sales and distributions raised a triable issue as to whether the defendant’s cancellation of
20 product demos caused diminished sales and, therefore, caused injury to the plaintiff).

21 As the court previously noted, it is not sufficient for Dr. Coddling to plead that Pearson
22 Education’s lack of efforts caused PSoC sales to be diminished generally — Dr. Coddling must
23

24 in the previous disposition. A significant corollary to the doctrine is that dicta have no preclusive
25 effect.” Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 715 (9th Cir. 1990) (citations
26 omitted). The court has not explicitly or by necessary implication decided between the parties’
27 competing standards, either here or in its prior orders, see Coddling I, 2018 WL 2298598, at *5, so the
28 law-of-the-case doctrine does not apply. The parties may re-raise their arguments as between
“reasonable efforts” and “best efforts” at summary judgment or trial, where the parties and the court
will have the benefit of a full factual record.

1 plead that Pearson Education’s lack of efforts proximately caused PSoC sales to fall short of the
2 Threshold Amount. *Codding I*, 2018 WL 2298598, at *5 (“[T]he Agreements do not provide for a
3 straight commission: they set a Threshold Amount to receive bonuses, and if sales do not meet the
4 Threshold Amount, Dr. Codding is not entitled to any bonuses at all (other than the bonuses she
5 has already received). Dr. Codding therefore must allege non-conclusory facts that plead that
6 Pearson Education’s breach — limited to conduct after July 15, 2016 — was the proximate cause
7 of PSoC sales falling short of the Threshold Amount.”). The court dismissed Dr. Codding’s
8 original complaint because she did not support her claims of causation with non-conclusory facts.
9 *Id.* In her SAC, however, Dr. Codding added numerous non-conclusory factual allegations —
10 including specific facts about (1) the potential size of the market for PSoC courses, which is many
11 multiples of the Threshold Amount, (2) other education-course vendors who have sold courses in
12 smaller markets, where there is less funding available, that have nonetheless made sales that
13 exceeded the Threshold Amount, and (3) Pearson Education’s sales and sales estimates of other
14 products that it is marketing and selling in lieu of PSoC, and how those levels exceed the
15 Threshold Amount — that support her claim that PSoC’s lack of efforts were the proximate cause
16 not just of PSoC sales falling short generally but of their falling short of the Threshold Amount.

17 Pearson Education makes three general categories of arguments in support of its motion to
18 dismiss. First, Pearson Education argues that Dr. Codding improperly imposes a “best efforts”
19 standard instead of a “reasonable efforts” standard.¹⁰⁴ But Dr. Codding has pleaded a claim under
20 either standard. Cf. *Citri-Lite*, 721 F. Supp. 2d at 926 (applying reasonable-efforts standard).
21 Pearson Education also argues that “reasonable efforts” do not require it to take commercially
22 unreasonable actions or to act against its own self-interest.¹⁰⁵ Even if that standard applies, there is
23 no basis at the pleading stage for presuming that Pearson Education’s doing more to market and
24 sell PSoC would be commercially unreasonable or force it to act against its self-interest. Cf.
25 *Eastwood Ins. Servs., Inc. v. Titan Auto Ins. of N.M.*, 469 F. App’x 596, 598–99 (9th Cir. 2012).

26 _____
27 ¹⁰⁴ *Pearson Educ. Mot.* – ECF No. 53 at 15–16.

28 ¹⁰⁵ *Id.* at 16.

1 Second, Pearson Education argues that Dr. Codding’s allegations that it did not exert efforts to
2 sell PSoC are conclusory.¹⁰⁶ The court disagrees. Dr. Codding pleaded specific facts about the
3 states where Pearson Education allegedly did not market PSoC, the education conferences where
4 Pearson Education allegedly did not present PSoC, and the methods Pearson Education allegedly
5 used that disincentivized its sales force from selling PSoC. Dr. Codding’s allegations are
6 sufficiently concrete to withstand a motion to dismiss.

7 Third, Pearson Education argues that Dr. Codding’s analyses about how much in PSoC sales
8 Pearson Education could have achieved with more efforts are conclusory and implausible.¹⁰⁷ It
9 argues that, among other things, many products showcased at education conferences turn out not
10 to be successful and the fact that other educational products might have had sales in excess of the
11 Threshold Amount does not mean that PSoC would have sold just as well. The court disagrees that
12 Dr. Codding’s claims are conclusory or implausible as a matter of law. Dr. Codding’s analyses are
13 supported by specific factual allegations and at least plausibly suggest that Pearson Education
14 could have made PSoC sales in excess of the Threshold Amount, as it may have achieved with
15 other Pearson courses and as other education-course companies may have achieved with their
16 courses. It may of course turn out after discovery that those other courses and companies are not
17 good comparators and that PSoC would not have sold as well, even with Pearson Education’s
18 reasonable or best efforts. But the court cannot make that determination at this juncture under a
19 notice-pleading standard. Dr. Codding has plausibly pleaded a breach-of-contract claim that
20 withstands a motion to dismiss.¹⁰⁸

21 _____
22 ¹⁰⁶ Id. at 17–19.

23 ¹⁰⁷ Id. at 19–27.

24 ¹⁰⁸ Pearson Education makes several other arguments that the court cannot consider on a motion to
25 dismiss. To take one example, Pearson Education cites to PSoC sales figures from 2010 to 2015 and
26 argues that these sales figures render it implausible that PSoC sales would have increased in 2016.
27 Pearson Educ. Mot. – ECF No. 53 at 17, 21. The court cannot adopt that conclusion on a motion to
28 dismiss. Markets can change from year to year, see, e.g., SAC – ECF No. 50 at 13 (¶ 44) (discussing
how California adopted PSoC’s math curriculum in early 2014 and PSoC’s ELA curriculum in late
2015), and the court cannot say that PSoC sales figures from 2010 to 2015 render Dr. Codding’s
allegations about potential PSoC sales in 2016 and beyond implausible. To take another example,
Pearson Education acknowledges that it did not compete for California grades K–8 ELA adoption with
a core basal program but states that PSoC is not a core basal program, and it claims that it did compete

(cont’d)

1 The court denies Pearson Education’s motion to dismiss Dr. Coddling’s breach-of-contract
2 claim.

3
4 **2. Anticipatory Breach**

5 **2.1 Governing Law**

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

13 **2.2 Application**

14 Dr. Coddling’s claim for anticipatory breach in her FAC failed for at least two reasons. “First,
15 . . . her anticipatory-breach claim improperly groups Pearson Education with non-party Pearson
16 plc. Second, even setting that issue aside, Dr. Coddling does not plead that either Pearson
17 Education or Pearson plc absolutely and unequivocally refused to perform under the Employment
18 Agreement.” Coddling II, 2018 WL 3609027, at *9. Dr. Coddling’s SAC cures the first problem,
19 but not the second. Dr. Coddling does not allege that Pearson Education has absolutely and
20 unequivocally refused to perform.

21 Dr. Coddling claims that Pearson Education has failed to promote and sell PSoC and
22 disincentivized its sales force from selling PSoC.¹⁰⁹ As the court previously explained,
23 “[a]nticipatory breach must appear only with the clearest terms of repudiation of the obligation of

24
25 in California by selling PSoC. Pearson Educ. Mot. – ECF No. 53 at 20. This contradicts Dr. Coddling’s
26 allegations that (regardless of whether PSoC is a core basal program or not) Pearson Education is not
27 selling PSoC in California and has instructed its sales force not to sell PSoC in California. SAC – ECF
28 No. 50 at 14 (¶ 47), 15 (¶ 61), 19 (¶ 87). On a motion to dismiss, the court must assume the truth of
these allegations and cannot credit Pearson Education’s contrary factual claims.

¹⁰⁹ SAC – ECF No. 50 at 33 (¶ 154).

1 the contract,” Codding I, 2018 WL 2298598, at *6 (quoting Martinez v. Scott Specialty Gases,
2 Inc., 83 Cal. App. 4th 1236, 1246 (2000)), and these actions do not constitute the “clearest terms
3 of repudiation” required to give rise to an anticipatory-breach claim.

4 Dr. Codding also claims that Pearson Education “has put it out of its power to perform so as to
5 make substantial performance of its promise impossible,” because “it is impossible for Pearson
6 Education to sell PSoC in sufficient quantities to meet the sales levels for Dr. Codding to receive a
7 bonus.”¹¹⁰ She does not support this conclusion with factual allegations. To the contrary, the
8 factual allegations in her SAC discuss how many opportunities and how much in potential sales
9 there are for Pearson Education to sell PSoC and meet the Threshold Amount. She does not
10 cognizably plead that it is impossible for Pearson Education to sell PSoC and meet the Threshold
11 Amount.

12 As Dr. Codding has not sufficiently pleaded the elements of an anticipatory-breach claim, the
13 court grants Pearson Education’s motion to dismiss this claim. As Dr. Codding has had three
14 chances, has had the benefit of two prior court orders on this issue, and has nonetheless failed to
15 cognizably plead this claim, the court holds that further amendment would be futile and dismisses
16 this claim with prejudice.

17
18 **CONCLUSION**

19 The court denies Pearson Education’s motion to dismiss Dr. Codding’s breach-of-contract
20 claim but grants its motion to dismiss Dr. Codding’s anticipatory-breach claim. The dismissal of
21 the anticipatory-breach claim is with prejudice.

22
23 **IT IS SO ORDERED.**

24 Dated: September 18, 2018



25
26 LAUREL BEELER
United States Magistrate Judge

27 _____
28 ¹¹⁰ Id. (¶¶ 155–56).