UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA KEILER, MONA GAY THOMAS, and LINDA BARRETT, on behalf of themselves and all others similarly situated, Plaintiffs, v. HARLEQUIN ENTERPRISES LIMITED, a Canadian corporation, HARLEQUIN BOOKS S.A., a Swiss company, and HARLEQUIN ENTERPRISES B.V., a Dutch company, Defendants.	No. 12 Civ. 5558 (HB) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

Jay Cohen
Daniel J. Leffell
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. (212) 373-3000
Fax (212) 757-3990
jaycohen@paulweiss.com
dleffell@paulweiss.com

Attorneys for Defendants Harlequin Enterprises Limited, Harlequin Books S.A., and Harlequin Enterprises B.V.

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RULES AND STATUTES

Defendants Harlequin Enterprises Limited ("Harlequin Enterprises"), Harlequin Books S.A. ("HBSA"), and Harlequin Enterprises B.V. ("HEBV") respectfully submit this memorandum of law in support of their motion to dismiss the Complaint, in its entirety and with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6).

Preliminary Statement

This is a putative class action for breach of contract by three authors of romance novels who entered into Publishing Agreements between 1990 and 2004, first with HEBV and, subsequently, with its successor HBSA. Under each of their Publishing Agreements, the "Publisher," defined as HEBV or HBSA, was granted and assigned "on a sole and exclusive basis all the rights in and to [the author's works] in any country throughout the world under various imprints and trade names during the full term of copyright." (¶ 32.)[1] In addition, the Publisher was granted "the sole and exclusive right to execute, sell, license or sublicense said rights subject to the sharing of net proceeds with Author as provided herein." (*Id.*) Accordingly, HEBV and HBSA entered into license agreements with their parent Harlequin Enterprises, in which they licensed the rights they obtained under Publishing Agreements with plaintiffs and other authors in exchange for specified license fees.

For most sales of paperback and hardcover editions of works published pursuant to the Publishing Agreements, plaintiffs were entitled to receive a royalty based on a percentage of the "Cover Price," generally ranging from 6% to 10% — and there is no claim that defendants failed to pay all such royalties fully and in a timely manner. Rather, plaintiffs challenge the royalties they have been paid on sales in the new medium of e-books, which are subject to the "All Other Rights" clause of the Publishing Agreements. Under that provision, "on all other

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[1] Citations in the form "¶ __" refer to paragraphs in the Complaint.

rights exercised by Publisher and its Related Licensees," plaintiffs' royalties were based not on a percentage of the "Cover Price" of the e-books but, rather, were specified as 50% of "net amount received by Publisher for the license or sale of said rights." "Publisher" was defined as either HEBV or HBSA, and "Related Licenses" was defined to include Harlequin Enterprises.

Plaintiffs do not and cannot dispute that HEBV and HBSA were legally and contractually entitled to license to Harlequin Enterprises the rights they obtained under the Publishing Agreements. Nor do they allege that their royalties on e-book sales were in any way short of the agreed 50% of the "net amount received" by HEBV or HBSA "for the license . . . of said rights" to Harlequin Enterprises — alleged in the Complaint to be "6% to 8% of the cover price of the e-books" (¶ 50) — or that the licensing arrangements with Harlequin Enterprises were entered into in bad faith or with any purpose to deny plaintiffs any part of the royalties to which they are entitled on sales of e-books. To the contrary, plaintiffs allege that these licensing arrangements were adopted "for tax purposes" (¶ 6), and they do not allege — as they cannot — that the alleged "tax purposes" created any incentive for defendants to set the license fees paid by Harlequin Enterprises at an artificially low level.

Rather, plaintiffs contend that the express contractual language to which they agreed should be ignored, and that their "e-book royalties should . . . be computed on *Harlequin Enterprises'* net receipts from the exercise, sale, or license of e-book rights" (*id.* (emphasis added)), rather than the "net amount received by Publisher," as expressly set forth in the Publishing Agreements with respect to "rights exercised by [a] Related Licensee" such as Harlequin Enterprises under a license from HEBV or HBSA. On plaintiffs' view, their royalties on e-books would be approximately 25% of the cover price (*see* ¶¶ 3) — considerably more than the royalties they agreed to accept on first-run print editions.

Neither the law nor the unambiguous terms of the Publishing Agreements permit such a result.

First, whether or not the Complaint adequately alleges a breach of the Publishing Agreements — and it clearly does not — it cannot state a contract claim against Harlequin Enterprises, which was not a party to any of the Publishing Agreements.

Second, the Complaint does not state a claim for breach of contract against any defendant by virtue of calculating royalties based on the Net Amount Received by HEBV or HBSA, rather than Harlequin Enterprises, because that is precisely what the plain language of the Publishing Agreements provides.

Third, while plaintiffs assert that Harlequin Enterprises, rather than HEBV or HBSA, "should be recognized as the 'Publisher'" because it "performed the functions provided in the Publishing Agreements for the 'Publisher'" (¶¶ 6, 41), that assertion and others like it provide no grounds whatsoever to deem Harlequin Enterprises a party to the Publishing Agreements, or to "recognize" Harlequin Enterprises as the "Publisher" for purposes of calculating royalties. To the contrary, each Publishing Agreement expressly provided that "Publisher may assign this Agreement to any related legal entity," and also "may delegate any of its editorial, administrative and/or other responsibilities pursuant to this Agreement to its parent company or to an affiliate, subsidiary or other related legal entity." (¶ 33.) None of the agreements contains any provision suggesting that such assignment or delegation would result in a "parent company," "affiliate," "subsidiary" or "other related legal entity" being deemed a party to the agreement or being deemed the "Publisher" for purposes of royalty calculations.

Plaintiffs' attempts to get around the dispositive contract language — with conclusory assertions that the Publishers' obligations were "assigned" or "assumed," or that HEBV and HBSA were "agents" of, or "dominated by," Harlequin Enterprises — are futile.

Fourth, plaintiffs assert in the alternative that their royalty payments on e-books were too low when measured by a provision in the All Other Rights clause requiring that "[t]he Net Amount Received for the exercise, sale or license of said rights by Publisher from a Related Licensee shall, in Publisher's estimate, be equivalent to the amount reasonably obtainable by Publisher from an Unrelated Licensee for the license or sale of the said rights." (¶¶ 83-84.) But there is no allegation that the amount established by HEBV and HBSA for use in their licensing agreements with Harlequin Enterprises was adopted in bad faith or was anything less than the amount that "in Publisher's estimate," was "equivalent to the amount reasonably obtainable by Publisher from an Unrelated Licensee for the license or sale of the said rights." In any event, the sole factual allegation on which plaintiffs base this claim is the bald assertion that the amount "reasonably obtainable" by some unspecified "publisher" from an unrelated licensee "for the license or sale of said rights is at least 50% of the cover price of the works." (¶ 85.) And that assertion is implausible on its face, as plaintiffs also allege that Harlequin Enterprises itself received 50% of the cover price of e-books (¶ 49) — so that plaintiffs' claim presumes that a licensee would pay over *all* of its e-book revenues in license fees.

Fifth, undoubtedly recognizing that they cannot plead a breach of the Publishing Agreements, plaintiffs assert a claim for unjust enrichment against Harlequin Enterprises alone. It is well settled, however, that a claim for unjust enrichment is not viable where a contract expressly governs the matter at issue — and that principle applies where, as here, the party against whom the claim is asserted was not a signatory to the contract. Plaintiffs do not contest that their claims are governed by the Publishing Agreements, and therefore their claim for unjust enrichment fails as a matter of law.

In short, plaintiffs cannot state, and have not stated, a cognizable claim. They have been compensated for the sale of digital editions of their works in precisely the manner that was plainly and unambiguously set forth in the Publishing Agreements. Accordingly, plaintiffs' claims should be dismissed with prejudice.

Statement of Facts[2]

A. The Parties

Harlequin Enterprises is a Canadian corporation with its principal place of business in Toronto, Canada. (¶ 13.) As alleged in the Complaint, it is the publisher of *Harlequin* books and the world's largest publisher of romance fiction. (¶¶ 1, 24.) HBSA is a Swiss company located in Fribourg, Switzerland, owned by Harlequin Enterprises, and registered by Harlequin Enterprises under the laws of the Canton of Fribourg in Switzerland in about 1994, "for tax purposes." (¶¶ 14, 25.) HEBV, the predecessor to HBSA, was a Dutch company owned by Harlequin Enterprises and registered by Harlequin Enterprises under the laws of the Canton of Fribourg in Switzerland in about 1983, "for tax purposes." (¶¶ 15, 25.)

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[2] As required on a motion to dismiss under Rule 12(b)(6), the facts recited are drawn from the well pleaded allegations in the Complaint, as well as documents referenced in the complaint and authentic documents upon which plaintiffs' claims are based. *See Roth* v. *Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (noting ability to take judicial notice of public records); *Cortec Indus., Inc.* v. *Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (holding that district court was entitled to rely on "documents plaintiffs had either in its possession or had knowledge of and upon which they relied in bringing suit.").

Plaintiffs Barbara Keiler, Mona Gay Thomas, and Linda Barrett are authors who entered into a total of 53 Publishing Agreements with HEBV and HBSA between 1990 and 2003. (¶¶ 10-12.)

B. The Publishing Agreements

From about 1983 to 1994, authors of *Harlequin* books entered into Publishing Agreements with HEBV. (¶¶ 27-29.) Thereafter, the Publishing Agreements were entered into with HEBV's successor, HBSA. (¶ 29.) In each of the Publishing Agreements that plaintiffs entered into, they granted and assigned to the "Publisher" on a "sole and exclusive basis all the rights in and to [their Works] in any country throughout the world under various imprints and trade names during the full term of copyright." (¶ 32.) Although plaintiffs' claims are predicated on the notion that "Harlequin Enterprises should be recognized as the 'Publisher'" for purposes of the Publishing Agreements (¶ 6), the term "Publisher" is expressly defined in each of the agreements as "Harlequin Enterprises B.V." or "Harlequin Books S.A." — not Harlequin Enterprises. (*See, e.g.*, Ex. 1, Author's Agreement between Harlequin Books S.A. and Barbara Keiler, Sept. 11, 2003, Preamble at 1; Ex. 2, Author's Agreement between Harlequin Books S.A. and Mona Gay Thomas, July 31, 2002, Preamble at 1; Ex. 3, Author's Agreement between Harlequin Books S.A. and Linda Barrett, Dec. 6, 2001, Preamble at 1.)[3] Harlequin Enterprises was not a party to any of the Publishing Agreements,

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[3] Citations in the form "Ex. __" refer to exhibits attached to the Declaration of Jesse S. Crew in Support of Defendants' Motion to Dismiss the Complaint. In order to avoid burdening the Court with all 53 contracts identified in the Appendix to the Complaint, defendants have submitted one representative sample of the Publishing Agreements for each of the plaintiffs, specifically, a 2003 contract entered into by Ms. Keiler, a 2002 contract entered into by Ms. Thomas, and a 2001 contract entered into by Ms. Barrett. Some other agreements contain slightly different language in certain provisions but no differences that are material for purposes of plaintiffs' claims or the present motion.

and none of the agreements was signed by an employee or agent of Harlequin Enterprises. (*See* Ex. 1 at 21, Ex. 2 at 21; Ex. 3 at 20, 23.)

The Publishing Agreements provided that "Publisher may assign this Agreement to any related legal entity," and that "Publisher may delegate any of its editorial, administrative and/or other responsibilities pursuant to this Agreement to its parent company or to an affiliate, subsidiary or other related legal entity." (¶ 33.) In neither case did the agreements provide that such assignment or delegation would in any way affect the agreed contractual definition of "Publisher" as HEBV or HBSA.

The Publishing Agreements also provided that HEBV or HBSA had "the sole and exclusive right to execute, sell, license or sublicense said rights subject to the sharing of net proceeds" with plaintiffs. (¶ 32.) Accordingly, HEBV and HBSA licensed to Harlequin Enterprises the rights obtained in the Publishing Agreements. (¶ 50.)

The Publishing Agreements also detailed how authors were to be compensated in connection with the sales of various versions of their works. Specifically, author royalties on U.S. sales of mass market paperback and hardcover copies were based on a percentage of the "cover price," typically between 6% and 10% for English language editions. (*See* Ex. 1 § 16, at 9-13; Ex. 2 § 16, at 9-14; Ex. 3 § 16 at 9-13.) In addition, the agreements each contained an "All Other Rights" clause, which provided that:

> On all other rights exercised by Publisher or its Related Licensees: fifty percent (50%) of the Net Amount Received by Publisher for the license or sale of said rights. The Net Amount Received for the exercise, sale or license of said rights by Publisher from a Related Licensee shall, in Publisher's estimate, be equivalent to the amount reasonably obtainable from an Unrelated Licensee for the license or sale of the said rights.

(¶ 45.) Thus, in the case of "all other rights" exercised by a "Related Licensee," such as Harlequin Enterprises,[4] the agreements expressly provided that plaintiffs and other authors would receive 50 % of the "Net Amount" received by the "Publisher" — defined as HEBV or HBSA — *not* the "Related Licensee."

C. Defendants' Sale of E-Books

As alleged in the Complaint, "[s]everal years ago, Harlequin Enterprises began to exercise, sell, or license e-book rights to the works that are the subject of the Publishing Agreements." (¶ 43.) The Publishing Agreements, however, did not contain royalty provisions specific to e-books. Thus, it is common ground that royalties on sales of e-books are governed by the "All Other Rights" clause in the Publishing Agreements. (*See* ¶¶ 44-45.)[5]

As alleged in the Complaint, "the net amount received" by HBSA under its license to Harlequin Enterprises "was 6% to 8% of the cover price of the e-books." (¶ 50; *see also* ¶¶ 4, 84.)[6] As a result, the Complaint alleges that the authors' royalties on e-book sales under the "All Other Rights" clause have equaled 3% to 4% of the cover price. (¶ 50.)

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4 The Publishing Agreements defined "Related Licensees" as "Harlequin Enterprises Limited, its parents, affiliates, subsidiaries or any other venture in which Harlequin Enterprises Limited or any of the foregoing, directly or indirectly, has a portion of corporate control and has been licensed to execute any of the rights provided herein." (Ex. 1 § 2(a) at 2; Ex. 2 § 2(a) at 2; Ex. 3 § 2(a) at 2.)

5 The Complaint also refers to an "Other Rights Clause, which applies if "Publisher licenses, sublicenses or sells to an Unrelated Licensee" certain specified rights, including a catch-all for "[a]ny other rights." (¶ 46.) That provision is inapplicable here, because the Complaint does not allege any license, sublicense, or sale by the "Publisher" to an "Unrelated Licensee."

6 Harlequin Enterprises had no sales of e-books prior to 1994, when HEBV would have been the licensor.

D. Plaintiffs' Complaint

Plaintiffs commenced this putative class action on July 19, 2012, seeking to represent a class of authors who entered into Publishing Agreements with HEBV and HBSA between 1990 and 2004. (¶¶ 1, 16.) Plaintiffs assert five claims for breach of contract, asking the Court to ignore the express contractual definition of "Publisher" in the Publishing Agreements and rule that "Harlequin Enterprises should be recognized as the 'Publisher'" based on the most conclusory assertions of "assignment, agency, assumption, and alter ego liability" (¶ 6), so that plaintiffs would then be entitled to 50% of the amount received on e-books by Harlequin Enterprises, alleged to be 50% of the cover price (¶ 3), rather than the "Net Amount Received" by the defined "Publisher" under the contracts that plaintiffs signed (First through Fifth Claims for Relief) — thereby obtaining a windfall in royalties equal to 25% of the cover price. Plaintiffs also assert a claim for breach of contract based on the conclusory assertion that the license fees paid to HBSA do not comply with the provision of the "All Other Rights" clause that "[t]he Net Amount Received for the exercise, sale or license of said rights by Publisher from a Related Licensee shall, in Publisher's estimate, be equivalent to the amount reasonably obtainable by Publisher from an Unrelated Licensee for the license or sale of the said rights." (Sixth Claim for Relief.) Finally, the Complaint asserts a claim for unjust enrichment against Harlequin Enterprises. (Seventh Claim for Relief.)

Argument

On a motion to dismiss under Rule 12(b)(6), this Court must accept well-pleaded factual allegations in a complaint as true, but need not accept as true conclusions unsupported by the facts alleged, legal conclusions, bald assertions, or unwarranted inferences. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555-56 (2007) (citing cases). To withstand dismissal, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face," and not merely "conceivable." *Id.* at 570. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). When a complaint "pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557 n.3). To survive a motion to dismiss, the claims "must be 'supported by specific and detailed factual allegations,' not stated 'in wholly conclusory terms.'" *Friedl* v. *City of N.Y.*, 210 F.3d 79, 85-86 (2d Cir. 2000) (quoting *Flaherty* v. *Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983)). The Court may also disregard allegations that are contradicted by "documents incorporated into the complaint by reference" and "matters of which a court may take judicial notice." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Here, the Complaint fails to state a claim for relief. First, plaintiffs have failed to state a contract claim against Harlequin Enterprises, as it was not a party to the Publishing Agreements. Second, plaintiffs' allegations that they are entitled to a percentage of net receipts received by Harlequin Enterprises is contrary to the clear and unambiguous terms of the Publishing Agreements. Third, plaintiffs' mere assertions of legal conclusions regarding "assignment, agency, assumption, and alter ego liability" are insufficient as a matter of law to render Harlequin Enterprises a party to the Publishing Agreements or to alter the plain language of those agreements. Fourth, plaintiffs' assertion that the license fees received by HBSA on e-book sales were lower than they should have been is wholly unsupported by any well-pled factual allegations in the Complaint. Fifth, plaintiffs cannot state a claim for unjust enrichment as a matter of law, because their own Complaint establishes the existence of contracts governing the subject matter of their claims.

I.

THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT.

A. The Complaint Fails to State a Claim for Breach of Contract Against Harlequin Enterprises.

The Complaint vaguely purports to assert all six of plaintiffs' claims for breach of contract against "Defendants," without specifying which defendants are purportedly liable on these claims. Even if the Complaint adequately pled some breach of the Publishing Agreements — and it does not, as shown below — it still has not stated any claim against Harlequin Enterprises, which simply was not a party to any of the contracts at issue.

"As a general rule, in order for someone to be liable for a breach of contract, that person must be a party to the contract." *A & V 425 LLC Contracting Co.* v. *RFD 55th St. LLC*, 15 Misc.3d 196, 204 (N.Y. Sup. Ct. Jan. 23, 2007) (citing *Smith* v. *Fitzsimmons*, 180 A.D.2d 177, 180 (N.Y. App. Div. 4th Dep't 1992)); *see also Blank* v. *Noumair*, 239 A.D.2d 534 (N.Y. App. Div. 2d Dep't 1997) (holding that "the plaintiff's breach of contract cause of action was properly dismissed inasmuch as the defendant was not a party to the agreements in question.")[7] Here, plaintiffs concede that they entered into the Publishing Agreements with HBSA and HEBV, *not* Harlequin Enterprises (¶¶ 10-12), and the Publishing Agreements themselves establish that Harlequin Enterprises was not a party to any of them.

Accordingly, plaintiffs cannot assert any claim for breach of contract against Harlequin Enterprises. Indeed, while the Complaint seeks to have Harlequin Enterprises deemed the "Publisher" under the Publishing Agreements for purposes of calculating plaintiffs' e-book royalties, it is far from clear whether the assertions plaintiffs advance in that

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7 As plaintiffs acknowledge, pursuant to the terms of the Publishing Agreements, New York law applies to their claims. (¶ 9.)

effort — conclusory statements that the Publishing Agreements were "assign[ed] to," or "assumed" by, Harlequin Enterprises (¶¶ 53-54, 66), that HEBV and HBSA were "agents" for Harlequin Enterprises (¶ 60), and that Harlequin Enterprises "dominated and controlled the business and affairs of " HEBV and HBSA (¶ 75) — are somehow intended to make Harlequin Enterprises a party to the Publishing Agreements. As detailed in Section I.C. below, those assertions are insufficient to hold Harlequin Enterprises liable under the agreements.

B. Under the Plain Language of the Publishing Agreements, E-Book Royalties are Calculated Based on the Net Amount Received by HBSA.

"Under New York law, 'an action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages.'" *First Investors Corp.* v. *Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998) (quoting *Rexnord Holdings, Inc.* v. *Bidermann*, 21 F.3d 522, 525 (2d Cir. 1994)). "In interpreting a contract, the intent of the parties governs." *Am. Express Bank Ltd.* v. *Uniroyal, Inc.*, 164 A.D.2d 275, 277 (N.Y. Sup. Ct. 1990). "Where a contract's language is clear and unambiguous, a court may dismiss a breach of contract claim on a Rule 12(b)(6) motion to dismiss." *Maniolos* v. *U.S.*, 741 F. Supp. 2d 555, 567 (S.D.N.Y. 2010); *see also Photopoint Techs., LLC* v. *Smartlens Corp., LLC*, 335 F.3d 152, 160 (2d Cir. 2003) ("[J]udgment as a matter of law is appropriate if the contract language is unambiguous."); *Crane Co.* v. *Coltec Indus., Inc.*, 171 F.3d 733, 737 (2d Cir. 1999) ("If the parties' intent is unambiguously conveyed by the plain meaning of the agreements, then interpretation is a matter of law.").

Here, plaintiffs' claims for breach of contract are contrary to the plain language of the contracts they signed and unsupported by any well pled factual allegations. As plaintiffs concede, each of their Publishing Agreements expressly provides for author royalties on "all other rights," including e-book rights, equal to "fifty percent (50%) of the Net Amount Received by Publisher for the license or sale of said rights." (¶ 45.) And plaintiffs do not dispute, as they cannot, that the Publishing Agreements specifically define "Publisher" as either HEBV or HBSA, not Harlequin Enterprises. (¶¶ 28-29.) Nor do plaintiffs dispute that they have been paid "fifty percent (50%) of the Net Amount Received" by HEBV and HBSA for the exercise, license or sale of e-book rights. (*See* ¶¶ 50-51.) Nevertheless, ignoring the plain language of the Publishing Agreements, plaintiffs assert that they are entitled to royalties equal to 50% of the net amount received by Harlequin Enterprises for the sale or license of digital copies of their books because it was effectively the publisher of those works.

The law does not permit such a claim, which is contrary to the unambiguous terms of a written contract. Rather, it is black letter law that "a contract should be construed so as to give full meaning and effect to all of its provisions," and "[r]ather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement." *Am. Express Bank*, 164 A.D.2d at 277. Significantly, in this case, as in *Quintel Communications, Inc.* v. *Federal Transtel, Inc.*, "[a]ll of the key contractual terms, the ones that require interpretation, are *defined terms*—that is, the parties set forth exactly what they meant in the body of the contract itself. This makes the job of construction particularly easy." 142 F. Supp. 2d 476, 482 (S.D.N.Y. 2001) (emphasis in original); *see also Mionis* v. *Bank Julius Baer & Co., Ltd.*, 301 A.D.2d 104 (N.Y. App. Div. 1st Dep't 2002) (reversing lower court's order compelling mediation, and holding that "the court violated a fundamental principle of contract interpretation by failing to give effect to a defined term in the" contract).

C. Plaintiffs' Conclusory Assertions Are Insufficient to Render Harlequin Enterprises a Party to the Publishing Agreements or to Warrant "Recognizing" Harlequin Enterprises as the "Publisher" for Purposes of Calculating E-Book Royalties.

Plaintiffs attempt to overcome the foregoing fundamental principles of contract law and substitute Harlequin Enterprises into the contractual definition of "Publisher" by invoking vague assertions of assignment, agency, assumption, estoppel, and *alter ego.* None of those attempts can support a claim against Harlequin Enterprises, or overcome the agreed contract language, as a matter of law.

1. Assignment (First Claim for Relief)

Plaintiffs seek to have Harlequin Enterprises declared the "Publisher" under the Publishing Agreements based on their assertion that it is "the assignee of the rights granted by Plaintiffs and the other class members to the 'Publisher' in the Publishing Agreements, and not a mere licensee." (¶ 54.) Such assertions provide no basis for making Harlequin Enterprises a party to the Publishing Agreements, and no basis for any claim of breach by any defendant.

First, plaintiffs have not pled facts sufficient to establish an assignment. "[A]lthough no particular formula is needed to create an assignment under New York law, there is a need for some 'act or words' that manifest an intent to assign." *Prop. Asset Mgm't, Inc.* v. *Chi. Title Ins. Co.*, 173 F.3d 84, 87 (2d Cir. 1999) (quoting *Miller* v. *Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 557 (2d Cir. 1976)). Assignments "based on unmemorialized intentions" are not permitted, as "'uncommunicated subjective intent alone cannot create an issue of fact where otherwise there is none.'" *Property Asset Mgm't*, 173 F.3d at 87 (quoting *Wells* v. *Shearson Lehman/Am. Express, Inc.*, 72 N.Y.2d 11, 24 (N.Y. 1988)). Plaintiffs do not, and cannot, allege any facts reflecting a "manifest intent to assign" the Publishing Agreements to

Harlequin Enterprises. While plaintiffs claim that Harlequin Enterprises, rather than HEBV and HBSA, "performed the functions provided in the Publishing Agreements for the 'Publisher'" (¶ 41), they plead no facts suggesting that such an arrangement is in any way inconsistent with a licensing relationship between Harlequin Enterprises and its affiliates — or a delegation of responsibilities as expressly contemplated in the Publishing Agreements — as opposed to an assignment.

Second, even if plaintiffs' conclusory assertions were sufficient to plead some sort of assignment, they are still not sufficient to make Harlequin Enterprises liable for the obligations of HEBV and HBSA under the Publishing Agreements. While plaintiffs vaguely assert that it was defendants' "operative intent" to "assign to Defendant Harlequin Enterprises all of the *right*s granted by Plaintiffs" (¶ 53 (emphasis added)), they do not assert — even in the vaguest terms — any intent to transfer to Harlequin Enterprises any *obligation* to plaintiffs, such as the obligation to pay royalties under the Publishing Agreements. To the contrary, plaintiffs concede that HEBV and HBSA — not Harlequin Enterprises — have sent out royalty statements and made royalty payments to them. (¶¶ 2, 36.)

Third, even crediting plaintiffs' assertions regarding an assignment, they are insufficient to establish that royalties should be based on amounts received by Harlequin Enterprises: it makes no difference whether Harlequin Enterprises is an assignee or a "mere licensee," because the Publishing Agreements expressly permitted the Publisher — HEBV or HBSA — either to assign or to license rights granted under the Publishing Agreements to Harlequin Enterprises, and they did not provide for any difference in the royalty formula depending on which of those structures was used. Specifically, as plaintiffs acknowledge, the Publishing Agreements authorized HEBV and HBSA to "assign this Agreement to any related legal entity" (¶ 33), but they contained no provision for a change in the definition of "Publisher" to include the assignee, or for any change in the royalty formula based on net amounts received by the Publisher in the case of such an assignment.

2. Agency (Second Claim for Relief)

Plaintiffs assert HBSA and HEBV supposedly acted as agents for Harlequin Enterprises "[a]t all times relevant herein," including their actions in "entering into the Publishing Agreements." (¶¶ 58, 60.) That assertion, however, is directly contrary to the plain language of the Publishing Agreements, which identify HEBV and HBSA as the contracting parties, not as agents for some *other* contracting party. And plaintiffs allege no facts that would justify ignoring what is plain on the face of the contracts.

To the contrary, to establish actual or implied agency, "a party must demonstrate the following elements: (1) there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principal is to be in control of the undertaking." *Maung Ng We* v. *Merrill Lynch & Co.*, No. 99 Civ. 9687 (CSH), 2000 WL 1159835, at *4 (S.D.N.Y. Aug. 15, 2000) (quotations omitted); *see also Paul T. Freund Corp.* v. *Commonwealth Packing Co.*, 288 F. Supp. 2d 357, 373 (W.D.N.Y. 2003). "For apparent authority to exist, there must be words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction on behalf of the principal." *Cromer Fin. Ltd.* v. *Berger*, 137 F. Supp. 2d 452, 486 (S.D.N.Y. 2001) (quotations omitted). Yet plaintiffs have pled no facts indicating that Harlequin Enterprises ever manifested to HEBV or HBSA its intent to authorize them to enter into contracts on its behalf — a "necessary" element of actual authority, *Maung Ng We*, 2000 WL 1159835, at *9 n.3 — or that Harlequin Enterprises made any representations regarding the role of HBSA or

HEBV on which plaintiffs could have relied, as required for apparent authority, *see, e.g.*, *Zigabarra* v. *Falk*, 143 A.D.2d 901, 902 (N.Y. App. Div. 2d Dep't 1988). Accordingly, plaintiffs have failed to provide any basis on which to find Harlequin Enterprises a party to the Publishing Agreements, or to "recognize" Harlequin Enterprises as the "Publisher," under an agency theory.

Moreover, even if plaintiffs had adequately pled an agency relationship, that would not justify altering the agreed definition of "Publisher" in the Publishing Agreements. Rather, if plaintiffs truly believed that they were entering into contracts with Harlequin Enterprises as principal — and HEBV and HBSA merely as agents — the only relevant consequence would be, under the express definition of "Publisher" as HEBV and HBSA, that plaintiffs agreed to base their royalties for "all other uses" on the net amounts received by the agents rather than the principal.

3. Assumption (Third Claim for Relief)

While the Complaint asserts that Harlequin Enterprises "assumed the obligations of the 'Publisher'" under the Publishing Agreements (¶ 66), the only basis suggested for that legal conclusion is the alleged actions of Harlequin Enterprises "in acting as the 'Publisher' under the Publishing Agreements" (*id.*). Here, however, the Publishing Agreements expressly provided that the "Publisher may delegate any of its editorial, administrative and/or other responsibilities pursuant to this Agreement to its parent company or to an affiliate, subsidiary or other related legal entity." (¶ 33.) And the Publishing Agreements contain no language whatsoever indicating that such a delegation might render such a "parent company or . . . an affiliate, subsidiary or other related legal entity" a party to the Publishing Agreement, liable to plaintiffs for any breach thereof. Nor does the Complaint allege any facts indicating that Harlequin Enterprises ever manifested an intention to assume liability to plaintiffs under the contracts expressly entered into by plaintiffs, to which it was not a party, or that it held itself out to plaintiffs as a party to the agreements. That is sufficient to dispose of any claim that Harlequin Enterprises "assumed" any liability to plaintiffs under the Publishing Agreements. *See Centennial Energy Holdings, Inc.* v. *Colo. Energy Mgmt., LLC*, 32 Misc. 3d 1215(A), at *6 (N.Y. Sup. Ct. 2011).

Nor is plaintiffs' assertion of an assumption sufficient to justify departure from the contractually agreed definition of "Publisher," as the Publishing Agreements expressly authorized the "Publisher" to "delegate *any* of its editorial, administrative and/or other responsibilities pursuant to this Agreement to its parent company or to an affiliate, subsidiary or other related legal entity" (¶ 33 (emphasis added)) — but contained no provision requiring the substitution of the defined "Publisher" or otherwise modifying plaintiffs' royalty structure in the event of such a delegation. *See, e.g.*, *Alpine State Bank* v. *Ohio Cas. Ins. Co.*, 941 F.2d 554, 560 (7th Cir. 1991) (noting that "[i]t is well accepted" that definitions contained in a contract "are controlling," and that "[t]his is particularly true . . . when [the contract] defines terms in a manner which differs from the ordinary understanding of the terms" (quotations omitted)). The parties' decision to ascribe a special, defined meaning to the term "Publisher" disposes of plaintiffs' attempt to read in a different definition based on activities undertaken by Harlequin Enterprises.

4. Assumption by Estoppel (Fourth Claim for Relief)

Plaintiffs allege that because Harlequin Enterprises "knowingly accepted the benefits" under the Publishing Agreements, defendants "should be estopped from denying" that it "has assumed the responsibilities of the 'Publisher'" under those agreements. (¶¶ 70-71.) While the Complaint does not specify what theory of estoppel plaintiffs have in mind, it appears that they are attempting to plead equitable estoppel. The attempt fails.

"'Equitable estoppel is properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct.'" *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384, 400 (2d Cir. 2011) (quoting *Kosakow* v. *New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001)). To establish estoppel, a plaintiff must plead: "(1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regards to the acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Cular* v. *Metro. Life Ins. Co.*, 961 F. Supp. 550, 556 (S.D.N.Y. 1997) (quotations omitted).

Plaintiffs have failed to plead any facts indicating that defendants made any misrepresentations or engaged in any conduct that could have misled plaintiffs about the identity of the parties to the Publishing Agreements or the contractual definition of "Publisher" for purposes of royalty calculations. Moreover, plaintiffs have not alleged that they relied on any words or acts by defendants, or that they have thereby been injured. Because detrimental reliance on an adverse party's misrepresentations is "an essential element" of estoppel, plaintiffs have not adequately pled that defendants should be estopped from denying that it has assumed the Publishing Agreements. *Republic of Ecuador*, 638 F.3d at 400 (quoting *Lyng* v. *Payne*, 476 U.S. 926, 935 (1986)).

5. *Alter Ego* (Fifth Claim for Relief)

Despite conclusory allegations that Harlequin Enterprises "dominated and controlled" HEBV and HBSA, and that they are its "alter ego" (¶¶ 75, 79), the Complaint pleads no facts that would support a finding of liability on the part of Harlequin Enterprises, or "recognition" of Harlequin Enterprises as the "Publisher" for purposes of royalty calculations, based on a veil-piercing or *alter ego* theory.[8] Under New York law,[9] "[g]enerally, parent and subsidiary corporations are treated as separate legal entities, and a contract by one does not legally bind the other." *Maltz* v. *Union Carbide Chems. & Plastics Co.*, 992 F. Supp. 286, 300 (S.D.N.Y. 1998); *see also Int'l Customs Assocs.* v. *Ford Motor Co.*, 893 F. Supp. 1251, 1256-57 (S.D.N.Y. 1995) (declining to pierce the corporate veil in a breach of contract action where the parent corporation was not a party to the contract, and the contract did not indicate that subsidiary signed on behalf of parent). To overcome "the presumption of separateness" between a parent corporation and its subsidiary, *DeJesus* v. *Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) (quotations omitted), and therefore avoid dismissal of the parent from an action, Plaintiffs must plead facts showing that "1) the owner exercised complete domination over the corporation with respect to the transaction at issue, and 2) such domination was used

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[8] "The phrases 'piercing the corporate veil' and '*alter ego* liability' generally are used interchangeably for purposes of New York law." *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 291 n.74 (S.D.N.Y. 2005)

[9] Under New York choice-of-law rules, the law of the state of incorporation is used to determine whether the corporate veil should be pierced. *Fletcher* v. *Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995). Therefore, although the parties have agreed that New York substantive law governs claims arising from the Publishing Agreements (*see supra* 12 n.8), the laws of Switzerland and the Netherlands arguably govern the question of whether the corporate form shall be disregarded. In any event, the standards for piercing the corporate veil are substantially similar under Swiss, Dutch, and New York law. *See Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 194 n.55 (2d Cir. 2010) ("Dutch law of veil piercing is similar to common law alter-ego doctrine, in that it requires a showing that the corporate form has been disregarded or abused to avoid a legal obligation."); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 687 n.107 (S.D.N.Y. 2006) (noting that with respect to determining when to pierce the corporate veil, "Dutch law bears a remarkable similarity to the law of New York"); *ADO Fin., AG* v. *McDonnell Douglas Corp.*, 931 F. Supp. 711, 716 (C.D. Cal. 1996) (noting that when deciding whether to pierce the corporate veil, Swiss courts consider inadequate capitalization, failure to observe corporate formalities, and asset stripping). Because the standards are virtually identical, and the parties have agreed that New York law applies, defendants address *alter ego* liability under New York law. *See Wm. Passalacqua Builders, Inc.* v. *Resnick Developers South, Inc.*, 933 F.2d 131, 137 (S.D.N.Y. 1991).

to commit a fraud or wrong that injured the party seeking to pierce the veil." *MAG Portfolio Consult, GMBH* v. *Merlin Biomed Group LLC*, 268 F.3d 58, 63 (2d Cir. 2001) (quotations omitted); *see also EED Holdings* v. *Palmer Acquisition Corp.*, 387 F. Supp. 2d 265, 273 (S.D.N.Y. 2004).

In determining whether there is "complete domination" of a subsidiary, courts consider many factors, including: "(1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities." *Freeman* v. *Complex Computing Co.*, 119 F.3d 1044, 1053 (2d Cir. 1997).

Thus, to avoid dismissal, a party seeking application of the veil-piercing doctrine "must come forward with factual allegations as to [all] elements of the veil-piercing claim. Furthermore, it is well established that purely conclusory allegations cannot suffice to state a claim based on veil-piercing or alter-ego liability, even under [Rule 8(a)'s] liberal notice pleading standard." *EED Holdings*, 387 F. Supp. 2d at 274 (quotations and citations omitted). Here, the Complaint does not allege any facts bearing on any of the considerations set forth in *Freeman*, let alone facts sufficient to support a finding that Harlequin Enterprises exercised the level of "complete domination" over HBSA and HEBV required to support piercing the corporate veil. Where the pleadings consist simply of conclusory allegations of domination and control — as plaintiffs have asserted here — dismissal is appropriate under Rule 12(b)(6).

See, e.g., *DeJesus*, 87 F.3d at 70; *IMG Fragrance Brands, LLC* v. *Houbigant, Inc.*, 679 F. Supp. 2d 395, 404 (S.D.N.Y. 2009).[10]

D. The Complaint Does Not Plead Facts Sufficient to Support a Claim that the License Fees Received by HBSA on E-Books Violate the "All Other Rights" Clause.

Lacking any basis for the windfall they seek by rewriting the definition of "Publisher" in the contracts they signed, plaintiffs have tacked onto their Complaint a Sixth Claim for Relief, asserting that defendants breached the Publishing Agreements because the license fees received by HBSA on e-book sales are "not 'equivalent to the amount reasonably obtainable by Publisher from an Unrelated Licensee for the license or sale of the said rights.'" (¶ 84.) As previously noted, the "All Other Rights" clause provides that "[t]he Net Amount Received for the exercise, sale or license of said rights by Publisher from a Related Licensee shall, in Publisher's estimate, be equivalent to the amount reasonably obtainable from an Unrelated Licensee for the license or sale of the said rights." (¶ 45.)

The closest the Complaint comes to a factual basis for this claim is an assertion that "the amount reasonably obtainable by a publisher from an unrelated licensee for the license or sale of the said rights is at least 50% of the cover price of the works." (¶ 85.) That is not sufficient to withstand dismissal.

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[10] Furthermore, plaintiffs' *alter ego* theory fails for the independent reason that there is no allegation in the Complaint that the corporate form was misused expressly for fraudulent purposes. *See In re Parmalat Sec. Litig.*, 375 F. Supp. at 292. Indeed, plaintiffs do not allege that defendants acted in bad faith at any time. Nor do plaintiffs allege that any purported domination by Harlequin Enterprises occurred with respect to the Publishing Agreements at issue. *Network Enterps., Inc.* v. *Reality Racing, Inc.*, No. 09 Civ. 4664 (RJS), 2010 WL 3529237, at *5 (S.D.N.Y. Aug. 24, 2010) (noting that a court evaluating an alter-ego claim "considers not whether Defendants exhibited behavior at any time that might indicate domination and control, but whether they exhibited such behavior 'with respect to the transaction at issue.'" (quoting *MAG Portfolio*, 268 F.3d at 63)). Plaintiffs' attempt to pierce HBSA's and HEBV's corporate veils, therefore, must fail.

First, plaintiffs' assertion of a "reasonably obtainable" license fee of "at least 50% of the cover price" is implausible on its face, because that is the same amount allegedly received by the *licensee*, Harlequin Enterprises. (¶ 49)[11] Thus, plaintiffs' claim rests entirely on the notion that a potential licensee would agree to pay in license fees its entire revenue gained under the license. Such a patently implausible assertion need not be credited, even on a motion to dismiss. *See, e.g.*, *Green* v. *Niles*, No. 11 Civ. 1349 (PAE), 2012 WL 987473, at *5 (S.D.N.Y. Mar. 23, 2012) (holding that plaintiff's claim "is patently implausible, and is dismissed on this basis"); *Thaxton* v. *Simmons*, No. 09 Civ. 1318 (MAD) (RFT), 2012 WL 360104, at *8 (N.D.N.Y. Jan. 5, 2012) (dismissing complaint in part because plaintiff's claims "are nothing more than conclusory, and, in light of the factual allegations, implausible"); *Associated Press* v. *All Headlines News Corp.*, 608 F. Supp. 2d 454, 464-65 (S.D.N.Y 2009) (holding that plaintiff's claim "suffers from . . . a failure to allege more than the conclusory and implausible").

Second, the Publishing Agreements expressly state that "[t]he Net Amount Received for the exercise, sale or license of said rights by Publisher from a Related Licensee shall, *in Publisher's estimate*, be equivalent to the amount reasonably obtainable by Publisher from an Unrelated Licensee." (¶¶ 45, 83 (emphasis added).) The parties to the Publishing Agreements, therefore, expressly agreed that HBSA's and HEBV's licensing fee would be comparable to that which *they* believed would be obtainable from outside licensees. Nowhere in the Complaint do plaintiffs assert that HBSA and HEBV established their license fee in bad faith or that they did not believe that their licensing agreements with Harlequin Enterprises

[11] The Complaint asserts that "Harlequin Enterprises has been paid substantial amounts of money from the exercise, sale, or license of such rights, amounting to 50% or more on the cover price of the e-books." (¶ 49.) No factual basis is alleged for the phrase "or more."

were similar to those that they could have entered into with unrelated entities. Indeed, while they allege that the license was "created for tax purposes" (¶ 6), they do not — and cannot — claim that the alleged "tax purposes" could even have been served by a license fee lower than one "reasonably obtainable by Publisher from an Unrelated Licensee," or that they created any incentive to establish a fee below that level.

II.

THE COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT AGAINST HARLEQUIN ENTERPRISES.

Because unjust enrichment is a quasi-contract claim, it is not viable where an express contract governs the subject matter of the dispute. *Clark-Fitzpatrick, Inc.* v. *Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (N.Y. 1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter."); *see also In re First Cent. Fin. Corp.*, 377 F.3d 209, 213 (2d Cir. 2004) (recognizing the rule enunciated in *Clark-Fitzpatrick* as "one of the well-settled principles of New York law" (quotations omitted)); *Ellington Credit Fund* v. *Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 202 (S.D.N.Y. 2011) ("Unjust enrichment is a quasi-contractual claim that ordinarily can be maintained only in the absence of a valid, enforceable contract" (quotations omitted)). This principle applies "even if the party seeking to dismiss the claim is not a party to the contract." *Micro Bio-Medics, Inc.* v. *Westchester Med. Ctr.*, 6 Misc.3d 1003(A), at *5 (N.Y. Sup. Ct. 2004); *see also Network Enterprs., Inc.* v. *Reality Racing, Inc.*, No. 09 Civ. 4664 (RJS), 2010 WL 3529237, at *7 (S.D.N.Y. Aug. 24, 2010) ("Today, the existence of a valid and binding contract governing the subject matter at issue in a particular case *does* act to preclude a claim for unjust enrichment even against a third-party non-signatory to the agreement" (quotations omitted));

Air Atlanta Aero Eng'g Ltd. v. *SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185, 196 (S.D.N.Y. 2009) ("[A] quasi-contractual claim against a third party must be dismissed when an undisputedly valid and enforceable written contract governs the same subject matter.")

Here, the subject matter of plaintiffs' dispute is undeniably governed by the Publishing Agreements that plaintiffs entered into with HBSA and HEBV. Because concededly valid and enforceable contracts both exist and clearly govern the matters in dispute, plaintiffs' unjust enrichment claim against Harlequin Enterprises should be dismissed.[12]

In any event, the Complaint fails to state a claim for unjust enrichment. "To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Robertson* v. *Wells*, 95 A.D.3d 862, 864 (N.Y. App. Div. 2d Dep't 2012) (quotations omitted). Plaintiffs' claim fails as they have not pled facts sufficient to show that Harlequin Enterprise was enriched at their expense.

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[12] Moreover, plaintiffs' very attempt to plead a claim for unjust enrichment is improper. "Where there is a bona fide dispute over the validity or enforceability of a written agreement, plaintiffs may plead unjust enrichment as an alternative theory of recovery." *Network Enterprises*, 2010 WL 3529237, at *7. However, unjust enrichment may not be pled "in the alternative alongside a claim that the defendant breached an enforceable contract." *Id.* (quoting *King's Choice Neckwear, Inc.* v. *Pitney Bowes, Inc.*, No. 09 Civ. 3980 (DLC), 2009 WL 5033960, at *7 (S.D.N.Y. Dec. 23, 2009)); *see also Air Atlanta*,637 F. Supp. 2d at 196 (dismissing unjust enrichment claim, and holding that plaintiff's "failure to allege that the contracts at issue are invalid or unenforceable precludes it . . . from seeking quasi-contractual recovery for events arising out of the same subject matter."). Here, plaintiffs improperly seek to have it both ways, alleging both that Defendants breached the terms of the Publishing Agreements, and that Harlequin Enterprises has been unjustly enriched.

Conclusion

For all these reasons, defendants respectfully request that the Court dismiss the Complaint in its entirety and with prejudice.

Dated: October 19, 2012
New York, New York

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

/s/ Daniel J. Leffell
Jay Cohen
Daniel J. Leffell
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. (212) 373-3000
Fax (212) 757-3990
jaycohen@paulweiss.com
dleffell@paulweiss.com

Attorneys for Defendants Harlequin Enterprises Limited, Harlequin Books S.A., and Harlequin Enterprises B.V.