

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV15-09386 JAK (KSx)

Date May 12, 2017

Title Hiroshi Horiike, et al. v. Humane Society of the United States, et al.

Present: The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANT’S MOTION TO EXCLUDE EXPERT REPORT AND TESTIMONY OF JAMES G. TOMPKINS (Dkt. 92); PLAINTIFFS’ MOTION TO EXCLUDE TESTIMONY OF PLAINTIFFS’ FORMER COUNSEL, DANIELLE LOWY (Dkt. 94); DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT (Dkt. 95); DEFENDANT’S MOTION TO MODIFY SCHEDULING ORDER (Dkt. 109)

I. Introduction

On October 20, 2015, Hiroshi Horiike (Genlin) (“Genlin”) and World Dog Alliance, Ltd. (“WDA”) (Genlin and WDA collectively, “Plaintiffs”) brought this action in Los Angeles County Superior Court against The Humane Society of the United States (“HSUS”) and President and Chief Executive Officer of HSUS, Wayne Pacelle (“Pacelle”) (collectively, the “Defendants”). Complaint, Dkt. 1-2. On December 4, 2015, Defendants removed the action on the basis of diversity jurisdiction. Dkt. 1. This Order addresses several motions brought by the parties.

The First Amended Complaint (“FAC”) advanced 12 causes of action. Dkt. 32. Six of them were previously dismissed. Dkt. 44. Thus, the remaining six causes of action, which are identified by their respective numeric titles in the FAC, are as follows: (i) breach of contract; (ii) breach of the implied covenant of good faith and fair dealing; (iii) intentional fraud; (v) accounting; (ix) untrue or misleading statements in violation of Cal. Bus. & Prof. Code § 17500; and (xi) unfair competition in violation of Cal. Bus. & Prof. Code § 17200. Dkt. 32.

On February 24, 2017, Defendants moved to exclude the expert report and testimony of Plaintiffs’ expert James G. Tompkins (“Motion to Exclude Tompkins”). Dkt. 92. Plaintiffs opposed (“Opposition to Motion to Exclude Tompkins,” (Dkt. 99)), and Defendants replied (“Reply to Motion to Exclude Tompkins,” (Dkt. 103)). On March 3, 2017 Plaintiffs moved to exclude the testimony of Plaintiffs’ former counsel, Danielle Lowy (“Motion to Exclude Lowy,” (Dkt. 94)). Defendants opposed (“Opposition to Motion to Exclude Lowy,” (Dkt. 105)), and Plaintiffs replied (“Reply to Motion to Exclude Lowy,” (Dkt. 107)).

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Also on March 3, 2017, Defendants moved for summary judgment or, in the alternative, partial summary judgment (“Motion for Summary Judgment”). Dkt. 95. Plaintiffs opposed (“Opposition to Motion for Summary Judgment,” (Dkt. 102)), and Defendants replied (“Reply to Motion for Summary Judgment,” (Dkt. 108)).

On April 3, 2017, Defendants moved to modify the scheduling order (“Motion to Modify Scheduling Order”). Dkt. 109. Plaintiffs opposed (“Opposition to Motion to Modify Scheduling Order,” (Dkt. 110)), and Defendants replied (“Reply to Motion to Modify Scheduling Order,” (Dkt. 111)).

A hearing on all of these motions was held on May 1, 2017, at the conclusion of which they were taken under submission. Dkt. 114. For the reasons stated in this Order, the Motion to Exclude Lowy is **DENIED**, and the Motion for Summary Judgment is **GRANTED**. As a result, the Motion to Modify Scheduling Order and the Motion to Exclude Tompkins are **MOOT**.

II. Factual Background

A. Development of Relationship Between HSUS and Genlin

In December 2014, Peter Li, China Policy Advisor at Humane Society International (“HSI”), which is affiliated with HSUS, attended the Genlin Conference in Hong Kong. Ex. 10 to Declaration of Laura R Washington (“Washington Decl.”), Dkt. 95-19 at 89 (Deposition of Peter Li (“Li Depo.”)). Li had been invited to attend on behalf of HSI. *Id.* at 90. The conference was associated with the launch of Genlin’s documentary *Eating Happiness*, which is critical of dog meat trading and consumption. *Id.*

Throughout the winter of 2015, Li and Kelly O’Meara, Director of Companion Animals and Engagement at HIS, discussed the possibility of partnering with Genlin on the promotion of *Eating Happiness*. *Id.* at 90-91. On February 19, 2015, Li provided O’Meara with some information about the documentary. Ex. FF to Declaration of Matthew Baldwin (“Baldwin Decl.”), Dkt. 102-35. He stated that Genlin wanted to reach primarily Western audiences, that the film was intended for informational purposes and “to bid the Oscar [sic] and other major movie festivals.” *Id.* O’Meara forwarded the e-mail to others and stated, “Seems award showering [sic] is what they are after, and they are misguided on this and how to pursue it.” *Id.*

In a February 25, 2015 e-mail to HSUS employees who were involved in fundraising for the organization, O’Meara described Genlin as the “very wealthy and very involved CEO” of the Genlin Foundation. Ex. A to Baldwin Decl., Dkt. 102-4. The e-mail also stated that Genlin was seeking HSI’s involvement in editing and promoting *Eating Happiness*. *Id.* Her email then stated: “We see it as an opportunity to get closer to this wealthy foundation and possibly benefit from a significant donation towards our campaign in Asia down the line.” *Id.*

Early reactions by those within HSUS and HSI who viewed the film were mixed. On March 2, 2015, Andrew Rowan, the President and Chief Executive Officer of HSI and the Chief Scientific Officer and Chief International Officer at HSUS, sent an e-mail to several recipients, including Li and O’Meara. It stated,

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We have typically not been particularly good at promoting films and books but we should try to make this film an exception to our typical track record. It will mean communicating not only with the HSI online file but also with The [sic] HSUS online file and seeing what we can do to stimulate media interest.

Ex. OO to Baldwin Decl., Dkt. 102-45.

On March 5, 2015, Kitty Block, who is the Vice President of HSI, sent an e-mail to Pacelle reporting on the screening. Ex. B to Declaration of Matthew Baldwin (“Baldwin Decl.”), Dkt. 102-5. It stated, “[t]he 90 minute documentary needs a ton of work. Editing is an understatement. Not because of its graphic nature -- but because it is poorly put together and filled with many confusing and unhelpful issues and persons of non interest.” *Id.* Another HSI employee replied to the e-mail by stating, “The backer has money, but he is an eccentric. But the fact is that they have recorded an extraordinary cultural turmoil around dog eating in Asian nations. It was remarkable to see it.” *Id.*

On May 21, 2015, Rowan sent an e-mail to several recipients, including Pacelle and Block. It stated that, “Genlin wants to partner with HSUS/HSI (15% of the film proceeds to go to HSI for the dog meat campaign -- he projects possible income in the \$30-50 million range).” Ex. C to Declaration of Matthew Baldwin (“Baldwin Decl.”), Dkt. 102-6. Block replied to Pacelle, but not to Rowan, with her “two cents.” *Id.* She stated that the “film was awful,” and that “I’m no Siskel and Ebert but the film will not make any money.” *Id.* Her email continued,

That said this guy has more money than he knows what to do with it. And he loves dogs. IF [sic] he gives us money for our dog meat campaign and he edits the film we could host a showing in dc. [sic] I wouldn't promote this film as is -- or with just a promise of proceeds.

Id.

Pacelle later replied to Rowan stating, “I doubt that a film like this can generate proceeds. Even the most successful documentaries like the Cove and Food, Inc., don't generate net income. It's almost unheard of, and this one seems to have some serious defects, even though it is enormously well-intentioned.” Ex. D to Baldwin Decl., Dkt. 102-7.

Rowan replied:

The version I saw is very different (and much improved) over the one that Kitty saw (according to Peter). Some of the footage is very compelling. I do not believe it will win an Oscar but it will most certainly generat [sic] buzz. . . . I would not be surprised if it added tens of thousands of people to our online file.

I am also skeptical of the power of a documentary to change behavior but we need to be engaged with this fellow. He will end up supporting HSI directly and has millions available to give (he has a

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Chateau in Fontainebleu, a house in Malibu, his daughter lives in the US and is a graduate of Purdue and she reportedly approves of him leaving 85% of the family fortune to animal causes).

Id.

On or about May 25, 2015, Rowan travelled to Hong Kong to visit with Genlin and the Genlin Foundation. Ex. J to Baldwin Decl., Dkt. 102-13. Rowan provided Genlin with advice on *Eating Happiness* at that time. Ex. 7 to Declaration of Laura R. Washington (“Washington Decl.”), Dkt. 95-19 at 57 (Deposition of Andrew Rowan (“Rowan Depo.”)). For example, he recommended that Genlin narrate the movie himself, rather than using a professional narrator. *Id.* He also recommended that some of the scenes be cut. *Id.* Many of his suggestions were later adopted. *Id.*

On June 5, 2015, Genlin hosted a screening of *Eating Happiness* at the French Cultural Center in Washington, D.C. Ex. 6 to Washington Decl., Dkt. 95-19 at 34 (Deposition of Lewis Bollard (“Bollard Depo.”)). The day before the screening, Rowan sent an e-mail to Pacelle that stated that it was “very important that you spend at least some time with Genlin tomorrow.” Ex. H to Baldwin Decl., Dkt. 102-11. The e-mail included information about Genlin’s wealth and attached an article about his mansion in Malibu, California. *Id.* Rowan stated that Genlin “could easily give us \$500K to \$1 million.” *Id.*

Genlin was present at the screening. Ex. 6 to Washington Decl., Dkt. 95-19 at 35 (Bollard Depo.). Also there were some of his staff members, including Simon Kwok. *Id.* at 35, 37. Representatives from HSUS and HSI were also present. They included Pacelle, Li, Rowan, Block, Lewis Bollard -- Policy Advisor and International Liaison to the CEO at HSUS, Betsy Liley -- Chief Development Officer at HSUS, Adam Parascandola -- Director of Animal Cruelty at HSUS, Bruce Fogle -- Chair of the HSI Board and Chad Sisneros -- Managing Director of the Creative Department at HSUS. *Id.* at 35, 37. After the screening, Genlin and the members of his staff who were present, went out to lunch with several HSUS and HSI employees. *Id.* at 37.

Genlin met with Pacelle at HSUS headquarters that afternoon. Genlin later stated that the impression Pacelle gave him at their meeting

is that he deals with the heavyweight people, the politicians and the media in the U.S. So the impression he gave me is that as long as he wants to get -- as long as it is something about protecting animals in the U.S., it will get done. Therefore, I had a lot of expectations on him.

Ex. 1 to Washington Declaration, Dkt. 95-19 at 7 (Deposition of Genlin (“Genlin Depo.”), Vol. I). That night at dinner, Genlin testified, Pacelle “said to have legislation done in the U.S., it is fast.” Genlin asked, “How fast? How fast?” He said, ‘Oh, three months.’” *Id.*

The following day, Block sent an e-mail to Bollard. It stated, “[I]’ll shake off my skepticism of working with [Genlin] since all seem onboard.” Ex. E to Baldwin Decl., Dkt. 102-8. The e-mail then continued:

We need a solid plan of action. This guy will not be pleased with a few tweets or mentions. He

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wants full court press on his movie. Speaking of movie -- it is greatly improved over the version I saw in March. That said i [sic] still don't think it will have any commercial success -- but that is irrelevant i [sic] guess if it gets some notice and becomes part of a bigger dialog. [sic]

Id. Block also sent an e-mail to Liley stating:

okay. last thing I'll say on this .. even though the cove won an oscar [sic] .. it still had no impact on the dolphin slaughter. Only thing that is making a difference is working in country .. not a big drum beat in the US. okay -- i'm done .. i'm getting myself on board. thanks for your thoughts.

Ex. PP to Baldwin Decl., Dkt. 102-46.

Bollard stated that in mid-June, Kwok asked HSUS to provide formal endorsement letters for the submission of *Eating Happiness* to judges at the Venice and Toronto Film Festivals and the British Academy of Film and Television Arts awards. Ex. 6 to Washington Decl., Dkt. 95-19 at 40. Bollard drafted a letter, which was signed by Pacelle and Block and sent to about 20 judges identified by Kwok. *Id.*; see also Ex. 1 to Declaration of Lewis Bollard ("Bollard Decl."), Dkt. 95-11 at 2; Exs. 3-4 to Declaration of Wayne Pacelle ("Pacelle Decl."), Dkt. 95-17 at 7-11. No response was received. *Id.*

On Sunday, June 21, 2015, Pacelle sent an e-mail to Simon Kwok and Ken So that provided a bullet-pointed list of things Defendants could do to help Plaintiffs. Ex. 2 to Washington Decl., Dkt. 95-19 at 14 (Deposition of Wayne Pacelle ("Pacelle Depo.")). The list included the following:

1. Host a screening of Eating Happiness for the U.S. Congress. . . .
2. Persuade elected officials to introduce a bill in the U.S. Congress to ban the dog meat trade in the United States. . . . We will therefore work to introduce and pass a bill in the U.S. Congress to ban the sale of dog meat anywhere in the United States. We will also work to include language in the bill condemning the international dog meat trade, to send a powerful message that the entire U.S. government is opposed to the sale of dog meat anywhere in the world.
3. Host screenings of Eating Happiness in key American cities, and mobilize our supporters to attend these screenings. We will work with you to host screenings of the movie in Los Angeles, San Francisco, New York, Washington D.C., and other key American cities so that the movie's message can reach the most influential people in the United States. We will work to mobilize our supporters and the supporters of several key local animal groups to get viewers to these screenings.
4. Publicize Eating Happiness. We will look for opportunities to publicize the release of the movie to our online audiences. Although we have very limited experience with, and connections to, film festival judges, we will reach out to the judges you can help us identify, in support of the movie.
5. Support your petition. We will support your petition to end the dog meat trade to build a big

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global following urging a complete end to the sale of all dog meat.

Ex. 3 to Washington Decl., Dkt. 95-19 at 22-23. The e-mail continued:

I hope that you will join us in this campaign and financially support these efforts as well as our broader anti-dog meat campaign. I understand that you will cover costs associated with promoting the film, and I hope that you will also commit to our anti-dog meat campaigns worldwide, becoming a leading sponsor of our substantial efforts to end the dog meat trade globally.

Id. at 23.

This e-mail was a later version of a draft Bollard had developed earlier that month and circulated to others including Block and Liley. Ex. F to Baldwin Decl., Dkt. 102-9. In response to the draft, Block commented, “love how you work in the necessary ego stroking” and stated “I’d like Genlin to fully cover our work in s. korea -- providing the funds for the dog meat farmers to transition to crops.” *Id.*

On June 30, 2015, Bollard sent an e-mail to Kwok with updates on these projects. Ex. 1 to Bollard Decl., Dkt. 95-11 at 2. With regard to the legislation, Bollard’s email stated,

We have drafted legislation to ban the dog meat trade in the US. We are now working with some important legislators on when to introduce this bill. The timing for both the introduction and screening will depend on them (since the screening will get the most attention when the bill is introduced.)

Id.

On July 1, 2015, Block sent an e-mail to another HSI employee expressing further reservations about the relationship between Genlin and Defendants. Ex. CC to Baldwin Decl., Dkt. 102-32. It stated:

we support the overall mission of the movie -- banning dog meat.. but our messaging different -- as our strategy. Peter has worked very hard to get the HSUS/HSI to support Genlin. He feels he will have a tremendous effect in China[.] I have my doubts that Genlin is focused on anything other than his ego.. but that’s my two cents.

Id.

In a telephone call between Pacelle and Genlin on July 14, 2015, Genlin told Pacelle of his plan to establish an annual holiday on September 26 to celebrate dogs. Ex. 1 to Washington Decl., Dkt. 95-19 at 8-9. Genlin stated that the date, 9/26, was significant because in Cantonese, those numbers are a homonym for the phrase “happy dogs.” *Id.* at 4. Genlin said that he proposed calling the holiday World Dogs Day or Dog Lovers’ Day. *Id.* at 9. Pacelle said that the second proposal was better. *Id.*

On July 17, 2015, Kwok sent an e-mail to Bollard stating that a press conference and private screening of

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Eating Happiness had been scheduled in New York for July 31, 2015. Ex. 2 to Bollard Decl., Dkt. 95-11 at 5. Kwok suggested that HSUS and HSI send representatives to announce the legislation banning dog meat consumption. *Id.* Bollard replied that would not be possible because the legislation had not yet been introduced in Congress. *Id.*

On July 24, 2017, Bollard sent an e-mail to Block and Liley that included a draft of an e-mail to Genlin regarding a formal donation schedule. Ex. K to Baldwin Decl., Dkt. 102-14. Bollard provided the following notes on the draft:

1. We want Genlin to pony up funds before we commit to do more work for him. Thus the sooner you can review this, the better -- so we can send his way soon, and force his hand . . .
3. This proposal is very short and full of flattering [sic] because both Wayne and I think that Genlin will respond better to that than a longer more normal proposal.

Id.

On July 30, 2015, Pacelle sent the finalized e-mail to Kwok and Thomas Yuen. Ex. 5 to Pacelle Decl., Dkt. 95-17 at 13. It stated:

With the release of your powerful motion-picture, *Eating Happiness*, and the increasing global publicity, we have a real chance to end the dog meat trade forever. I am committed to helping you succeed in that goal. To speed up the end of the dog meat trade, and to help draw attention to your movie, I think now is the time to invest boldly in a redoubled campaign to end the dog meat trade.

I am recommending that you invest \$500,000/year this year and next in our work to assist you in focusing the world's attention on the dog meat trade, which will also draw attention to your movie:

1. An investment in a global publicity campaign against the dog meat trade (\$250,000/year to HSI).

To create the atmospherics for the movie's success, we need to build the social and cultural climate that makes the movie relevant. We will engage in a global publicity campaign focused on the cruelty of the dog meat trade. We will help organize events in major cities in the United States (Washington D.C., New York, Los Angeles) for the movie. We will also increase global publicity on the cruelty of the trade throughout the year. We will do this by mobilizing our resources to shine a spotlight on the cruelty of the trade.

2. An investment in passing U.S. federal legislation to end the dog meat trade (\$250,000/year to HSUS).

We will organize a campaign to introduce legislation in the U.S. Congress to ban the dog meat trade in the United States. To ensure the passage of this bill, we will need to invest in publicity, awareness building, and making this an issue in the animal protection caucus. This will also give

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us a platform to discuss the international dog meat trade to U.S. audiences.

Id.

On August 7, 2015, both Pacelle and Rowan signed a document titled “Agreement for a Donation to Fight the Dog Meat Trade” (“Agreement”). It provided that HSUS and HSI accepted a pledge of \$500,000/year for two years from Genlin to fight the dog meat trade. Ex. 4 to Washington Decl., Dkt. 95-19 at 25. The Agreement largely repeated the terms of the July 30, 2015 e-mail. It provided that \$250,000 of the first donation from Genlin would be used for a global publicity campaign focused on the cruelty of the dog meat trade, and that the other \$250,000 would be used to advance U.S. federal legislation to end the dog meat trade. *Id.*

On August 21, 2015, HSUS received the first payment of \$500,000 from Genlin. Ex. 4 to Bollard Decl., Dkt. 95-11 at 11. Also on that day, a Memorandum of Understanding (“MOU”) was signed by Genlin and Pacelle. Ex. 1 to Washington Decl., Dkt. 95-19 at 3, 7 (Genlin Depo., Vol. I). Genlin testified that he drafted the MOU by dictating it to Kwok, who also translated it. Ex. 5 to Washington Decl., Dkt. 95-19 at 28-29. (Genlin Depo., Vol. II). The MOU provided that HSUS would “organize global publicity campaigns and events for the promotion of ‘*Eating Happiness*’”, and “lobby, write and promote legislation banning dog meat consumption in the United States.” Ex. A to FAC. It also stated:

Both parties desire to become partners in the collaborative project called “End Eating Dog Meat.” This project includes the launch of a global publicity campaign relating to the Asian dog meat trade, specifically through the use of the movie “*Eating Happiness*” as well as concurrent legislation banning dog meat consumption in the United States.

Id.

The MOU also included the following clause: “The parties to this MOU agree that this is an exclusive arrangement and neither party shall, without the prior written consent of the other party, enter into any agreement or arrangement relating to a similar project to the project outlined in this MOU.” *Id.*

On August 27, 2015, during a series of meetings in Washington, D.C., WDA employees Danielle Lowy and Kwok were shown copies of draft legislation banning dog meat. Ex. 6 to Washington Decl., Dkt. 95-19 at 41 (Bollard Depo.); Declaration of Jessica Feingold-Lieberson (“Feingold-Lieberson Decl.”), Dkt. 95-8 at ¶ 3. Lowy stated that HSUS employees told her that such a bill would have to be presented carefully to Congress to avoid alienating representatives who were typically adverse to HSUS on matters concerning animal rights. Ex. 9 to Washington Decl., Dkt. 95-19 at 69 (Lowy Depo.). Lowy also stated that she was told that passage of the bill could take up to a year and a half to two years. *Id.* at 70. The bill provided only for civil penalties and not criminal ones. *Id.* at 75-76. The minutes from that meeting reflect that HSUS believed the bill would likely pass by December 2016. *Id.* at 75.

The August 27, 2015 meeting also included a discussion of World Dog Lovers’ Day events. *Id.* at 66. At that meeting, Bollard agreed to contact the San Francisco Society for Prevention of Cruelty to Animals

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("SPCA") about its potential interest, and to ask whether its venue could be used for a World Dog Lovers' Day event. *Id.* at 73.

B. World Dog Lovers' Day Events

A press release issued by HSUS stated that events celebrating World Dog Lovers' Day would be held in Hong Kong, London, Milan, San Francisco and Washington, D.C. Declaration of Geoffrey Handy ("Handy Decl."), Dkt. 95-6 at ¶ 5. In addition, HSI attempted to organize a screening of *Eating Happiness* in Toronto. That screening was cancelled as requested by Genlin. Ex. 7 to Washington Decl., Dkt. 95-19 at 52 (Rowan Depo.).

Lowy took primary responsibility for organizing the event in San Francisco. *Id.* at 81-82. Invitations were sent during September. Ex. 9 to Washington Decl., Dkt. 95-19 at 82 (Lowy Depo.). A "major social media campaign" was prepared for the San Francisco event, including Tweets and e-mails. Ex. 6 to Washington Decl., Dkt. 95-19 at 46 (Bollard Depo.). HSUS e-mailed an invitation to the San Francisco event to more than 800 supporters in the Bay Area. Handy Decl., Dkt. 95-6 at ¶ 3.

On September 18, 2015, Genlin cancelled the San Francisco event due to concerns about the size of the SPCA venue. Ex. 9 to Washington Decl., Dkt. 95-19 at 80 (Lowy Depo.). An e-mail that Kwok sent to Bollard stated that, "the venue in SPCA is not suitable for a movie screening," and that "it will embarrass HSUS, as guests will be angry with it!" Ex. 6 to Bollard Decl., Dkt. 95-11 at 17. The other planned events went forward.

A screening of *Eating Happiness* took place on September 26, 2015 in Washington, D.C. at the annual meeting of HSUS. Ex. 7 to Washington Decl., Dkt. 95-19 at 55 (Rowan Depo.). Lowy testified that HSUS took primary responsibility for organizing this screening and the panel discussion that followed. Ex. 9 to Washington Decl., Dkt. 95-19 at 77-78 (Lowy Depo.). About 75 people, including Rowan, attended that screening. Ex. 7 to Washington Decl., Dkt. 95-19 at 55 (Rowan Depo.); see also Declaration of Andrew Rowan ("Rowan Decl."), Dkt. 95-2 at ¶ 3; Ex. 1 to Rowan Decl., Dkt. 95-3 at 2. Bollard stated that Genlin had promised that HSUS would be reimbursed for the Washington, D.C. event, but that he did not fulfill that commitment. Ex. 6 to Washington Decl., Dkt. 95-19 at 44-45 (Bollard Depo.).

Claire Bass, the Executive Director of HSI United Kingdom, organized a screening of *Eating Happiness* at the Mayfair Hotel in London. Declaration of Claire Bass ("Bass Decl."), Dkt. 95-4 at ¶ 4. Approximately 25-30 people attended the event, which was invitation-only. *Id.* at ¶¶ 9, 12. In an e-mail to Bollard, O'Meara, Rowan and Bollard following the event, Bass suggested having the WDA fund an investigation "to look at which international supermarket brands are selling dog meat in China (apparently Carrefour does, for example), and to film the canning companies." Ex. R to Baldwin Decl., Dkt. 102-21 at 1-2. Bollard replied that he did not think WDA would be interested in the supermarket project "given their focus on the movie and legislation, but this could be a good project for the Genlin funds we've already received." *Id.* at 1.

There was also an event in Hong Kong, which Li attended. Ex. 10 to Washington Decl., Dkt. 95-19 at 93

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(Li Depo.). He also gave a brief talk as to the importance of *Eating Happiness*. *Id.*

In addition to the foregoing, HSI sponsored World Dog Lovers' Day events in Bhutan, Nepal, India and the Philippines that included health checkups for dogs and free "Doggy Care Kits" with a feeding bowl, leash, flea powder and shampoo. Declaration of Rahul Segal ("Segal Decl."), Dkt. 95-14 at ¶ 5; see also Ex. 3 to Handy Decl., Dkt. 95-7 at 9 (advertisement for free health checkups for dogs in Jamshedpur and Hisar, India in celebration of World Dog Lovers' Day). HSUS posted several articles on Facebook, Twitter and its own website marking World Dog Lovers' Day. Handy Decl., Dkt. 95-6 at ¶¶ 5-10; see also Exs. 1-6 to Handy Decl., Dkt. 95-7 at 3, 6, 9, 12, 15, 18.

Finally, on October 1, 2015, HSUS sent a Tweet promoting the New York theatrical release of *Eating Happiness*. *Id.* at ¶ 11; Ex. 7 to Handy Decl., Dkt. 95-7 at 21.

C. Lobbying Efforts

Jessica Feingold-Lieberson, an employee in the Federal Affairs department of the Legislative Affairs group of HSUS, stated that in the summer of 2015, HSUS began drafting, lobbying for, and promoting legislation banning dog meat consumption in the United States. Feingold-Lieberson Decl., Dkt. 95-8 at ¶ 2. Feingold-Lieberson communicated about the legislation by e-mail with John Goldberg, a staff member on the U.S. House of Representatives Committee on Agriculture. *Id.* She exchanged e-mails with Goldberg throughout September. *Id.* at ¶¶ 4-5; see also Exs. 1-2 to Feingold-Lieberson Decl., Dkt. 95-9.

On September 30, 2015, Yuen sent an e-mail to Bollard. It asked if it would be possible to announce the proposed legislation to the media on October 29, 2015. Ex. 9 to Bollard Decl., Dkt. 95-11 at 30-31. Bollard responded, "[I]t's very important that we only publicly announce our support after the legislation has first made it ways [sic] through the House Agriculture Committee." *Id.* at 30. He continued: "We thus can't commit to the Oct. 29 date." *Id.*

On October 2, 2015, Yuen sent an e-mail to several HSUS employees. It asked, "When will the legislation pass through the House Agriculture Committee? Is there a more particular schedule?" Ex. 2 to Rowan Decl., Dkt. 95-3 at 8-9. The e-mail also requested more information about promotional efforts for a screening of *Eating Happiness* on October 29, 2015 at the Grove, which is a shopping center in Los Angeles. *Id.* at 9.

Bollard's response stated that it was "critical" to lobby Congress "strategically," and that "even getting a bill through Congress in a year would be a tremendous accomplishment, given the vast majority of bills never make it through Congress." *Id.* Rowan also responded to Yuen's e-mail, stating:

I would add that successful bills (a very small %) being pushed by groups outside the main parties at the Federal level usually take from 4 to 6 years to pass, assuming they get that far. Usually, one introduces a bill in either the Senate or the House. One spends the rest of the congressional term (from 1-2 years) lining up cosponsors and support. The new Congress is elected and the bill is reintroduced -- usually in both the House and the Senate. One spends another two years building

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support in both chambers. Then, sometime in the third congress (from 4-6 years), the bill passes. A major scandal or lots of public attention can shorten this time period and, if no commercial or political interests are being significantly affected, it is also possible to slip a bill through the system quickly. We suspect this is the situation with the proposed dog meat bill which is why Jessica is suggesting such a rapid timeline!

Id. at 7.

Yuen sent the following reply:

1. You mentioned some campaigns you have been involved in took at least five to ten years.

Who will push the House Agriculture Committee to pass the bill?

How many members does the House Agriculture Committee have?

What process does it have to go through to pass the bill?

What information do we have to provide them?

2. Wayne mentioned he will give a speech in the Congress, was he referring to the House Agriculture Committee?

When will the speech take place?

3. Wayne also mentioned showing the documentary in the Congress, how is the plan going now?

4. For the House Agriculture Committee to pass the bill, we think public opinion is requisite.

The best way is to organize events to let the people know.

This is why Genlin made the movie in the first place, since movie is the most powerful weapon to change the world.

We still have not seen any particular plan from the HSUS.

Id. at 6.

Rowan responded with a point-by-point reply to these questions and comments. Ex. 6 to Feingold-Lieberman Decl., Dkt. 95-9 at 22. Rowan sent a different e-mail to Feingold-Lieberman, which stated, "Unfortunately, I cannot tell Thomas (and Genlin) that films have rarely if ever led to changes in public policy. Only Blackfish (of the many animal advocacy films that have been made since world war two [sic]) has had a significant policy impact and it has yet to end orca shows." Ex. XX to Baldwin Decl.,

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Dkt. 102-56.

On October 8, 2015, Jason Pang, who was an employee of WDA, expressed further frustration with the pace of the legislative process. He sent an e-mail that stated, “Per a conversation with Wayne in July, he said the bill could be sent to Congress within three months.” Ex. 6 to Feingold-Lieberman Decl., Dkt. 95-9 at 21. Bollard replied, “We certainly share your desire to pass legislation on dog meat as swiftly as possible in the U.S., and understand your frustration at how slow the legislative process in Congress is right now.” *Id.* at 19. Bollard explained that HSUS’s strategy of “stealth and then noise” was “far, far more likely to succeed” in passing the bill. *Id.* at 20. Bollard’s e-mail also stated: “When Wayne said that we could send a bill to Congress within three months, he didn’t mean that we could pass it within three months. He meant that we could introduce it in a committee in this timeline, which is the timeline that we are on track to follow.” *Id.* at 18.

On October 9, 2015, Him Lo, an assistant to Genlin, sent a reply to Bollard stating, “Our final goal is not to pass the bill in the US Congress, but in China and other Asian countries. The campaign in the US is just for making noise so we can draw the media’s attention.” *Id.* at 19. Bollard replied,

[B]ecause we had been told by others that Genlin’s goal was to actually ban the dog meat trade in the US, we have been pursuing a more complicated and difficult strategy to pass a bill. This is the reason that our legislative expert Jessica has recommended this strategy of being quiet now followed by noise later. Now that we have embarked on this strategy of passing a bill, I think it will be tough to switch to a strategy of a messaging only bill.

Id. at 18.

Also on October 9, Rowan sent an e-mail to Li expressing his concerns about the relationship with Genlin. Ex. U Baldwin Decl., Dkt. 102-24. Rowan’s e-mail stated, “Our main challenge at the moment is the question of US Legislation. Wayne had indicated we would have legislation introduced within three months but the process is taking much longer than expected, in part because of the chaos in Congress at the moment.” *Id.* The e-mail went on to state:

There is also a serious misreading of what the movie might accomplish. The showing in Washington had around 75 people present even though we had 400 HSUS staff and volunteers in the hotel that night. Most people did not come to see it because they were afraid of the content (and I must admit that watching it for the third time was the toughest yet for me). I suspect that, even if it were a better movie, it would still be tough to get people to come and watch it. The movie is important to have underpinning the campaign but it is not going to launch a mass movement like the Yulin campaign already has.

Id.

On October 15, 2015, an HSUS employee sent an e-mail to Feingold-Lieberson. It stated that she wanted HSUS out of the relationship with Genlin “asap.” Ex. X Baldwin Decl., Dkt. 102-27. Feingold-Lieberson

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replied, “if they start doing anything with the Hill they could destroy a very delicate relationship with the R staff on House Ag Comm. So dangerous!” *Id.*

D. Additional Screenings

On September 16, 2015, Lowy sent an e-mail to Rachel Query, the Senior Director of Communications and Marketing at HSUS. It asked for assistance promoting screenings of *Eating Happiness* in New York City and Pasadena in the upcoming months. Ex. N to Baldwin Decl., Dkt. 102-17. Query replied, “[o]ur typical approach with something like this would likely be to do social media promotion, but not to email.” *Id.* However, she offered to “check with the channels” to get input. *Id.* In response to an e-mail from Query, Bollard wrote that the promotion request was “important, but not worth hurting other campaigns over.” Ex. P to Baldwin Decl., Dkt. 102-19. On September 30, 2015, Query sent an e-mail to several persons, including Bollard and Rowan, asking if the plan to promote the screenings on Twitter only “cause[d] any concern.” Ex. O to Baldwin Decl., Dkt. 102-18.

On October 8, 2015, Him Lo sent an e-mail to Pacelle in which the following statement from Genlin was set forth: “I am asking you for a favor, for you it is just a small thing, make a phone call, but for me and for the movie, it is a big big thing. As you know, if we don’t get the article which is written by New York Times critics by 20th October, we will be disqualified for the Oscars.” Ex. 8 to Pacelle Decl., Dkt. 95-17 at 23. Pacelle later testified that he did not know any *New York Times* critics. Ex. GGG to Baldwin Decl., Dkt. 102-67 (Deposition of Wayne Pacelle (“Pacelle Depo.)). On October 14, 2015 Him Lo sent another e-mail with the subject line “Horrible Numbers.” Ex. 9 to Pacelle Decl., Dkt. 95-17 at 25. The e-mail stated that *Eating Happiness* had been screening at a movie theater in New York City since October 2, 2015, but that a total of only 48 tickets had been purchased for the screenings despite an audience capacity of more than 10,000. *Id.* Him Lo’s e-mail then continued:

The agreement between WDA and HSUS clearly states that the HSUS is responsible to promote Eating Happiness to its members and supporters, in which at least half million members must be around New York area. If the HSUS really did any promotion campaign as you promised, this situation would not have happened.

Id. The e-mail also requested Pacelle’s assistance with promoting a movie theater run in Pasadena, which was scheduled for October 30, 2015 to November 5, 2015. *Id.* The e-mail stated, “This is a very good chance for the HSUS to make up for the fail [sic] promotion in New York.” *Id.*

Meanwhile, Bollard worked with other HSUS employees, including Michelle Cho, Vice President of Celebrity and Entertainment Outreach at HSUS, to plan the October 29, 2015 screening at the Grove. In a request to the Communications Assignment Desk of HSUS, Bollard stated:

We’re mindful of the disaster around the San Fran screening. As a result, we’ve stopped processing most of the requests for help from Genlin and his movie team. But this is a particularly important event because both Wayne and Genlin will be present. We also think that supporters will particularly like receiving this invitation, since it’s inviting them to a free cocktail party and

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movie screening at one of the top venues in LA.

Ex. 10 to Bollard Decl., Dkt. 95-11 at 40.

Cho stated that HSUS had contacted several celebrities to see if any would be available to attend the screening. Declaration of Michelle Cho (“Cho Decl.”), Dkt. 92-12 at ¶ 4. Jason Pang sent an e-mail to Cho and representatives of the public relations firm, Much and House, which had been retained to help facilitate the event. That e-mail stated that “top class celebrities should be invited such as George Clooney, Brad Pitt, Leonardo DiCaprio and similar top class celebrities.” Ex. 1 to Cho Decl., Dkt. 92-13 at 2. Pang’s e-mail also suggested Bill or Hillary Clinton. *Id.* An employee of Much and House responded that “it would be wise to stick to someone media friendly who is known for their work in this area such as Lena Dunham or Lea Michelle [sic].” *Id.* Cho sent e-mails to the representatives of Lea Michele and Adrien Brody, but each declined. Exs. 2-3 to Cho Decl., Dkt. 92-13 at 8-12. Lea Michele’s representative suggested Carrie Ann Inaba instead. Ex. 2 to Cho Decl., Dkt. 92-13 at 8. On October 7, 2015, Cho sent Pang an e-mail stating that Ian Somerhalder and Nikki Reed were considering whether to host the event. Ex. 4 to Cho Decl., Dkt. 92-13 at 14.

On October 8, 2015, Bollard sent an e-mail to the rest of the planning team to “pause on executing” the plan to send out invitations for the event at the Grove because “Genlin has been acting increasingly crazy.” Ex. 10 to Bollard Decl., Dkt. 95-11 at 35. The following day, he sent a follow-up e-mail. It stated that the invitations to the event could be sent out whenever they were ready. *Id.* at 34. It also explained that the event was being re-framed as Pacelle launching the HSUS campaign against the dog meat trade, making the screening and the presence of Genlin secondary. *Id.*

On October 13, 2015, Him Lo sent Bollard an e-mail stating, “Since you haven’t invited anyone till [sic] today, we understand that you might have some difficulties doing so. Therefore we suggest postponing our event on 29th October.” Ex. 11 to Bollard Decl., Dkt. 95-11 at 44. Bollard responded that he “strongly recommend[ed]” against cancelling the event, as HSUS had sent out invitations to key supporters weeks ago. *Id.* at 43. He stated that HSUS intended to send out an invite to the full local supporter base within the next week, in accordance with the usual timeline. *Id.* Bollard stated that the only delay had been in sending out celebrity invites because of difficulties finding a celebrity. *Id.* Him Lo responded:

It is hard to believe that you have already sent out the invitations. In the past few weeks we have asked many times for the invitation list but received no response from your side. It should be a very simple and basic matter if you really did send out the invitations. We WDA [sic] do not feel respected as a partner or the event host. No partner would do this like the HSUS. You made this event a failure.

Id. Bollard replied, stating that HSUS could not disclose its list of key supporters and that it was in the process of assembling a final invitation list. *Id.* at 42.

On October 18, 2015, Him Lo sent an e-mail to Pacelle with the subject line “Red Card.” It expressed the WDA’s position that Pacelle had been non-responsive to requests for further information on the event at

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the Grove. Ex. 10 to Pacelle Decl., Dkt. 95-17 at 29. Him Lo stated, “You don’t know how to respect dog lovers, even though they dedicated everything to save dogs.” *Id.* at 29.

On October 19, 2015, Pacelle responded. *Id.* at 27. He gave examples of the assistance HSUS had provided to promote *Eating Happiness* and World Dog Lovers’ Day. This included the following: sending letters endorsing *Eating Happiness*; drafting and preparing to introduce legislation banning dog meat consumption; organizing screenings of *Eating Happiness*; meeting with WDA representatives; hosting events for World Dog Lovers’ Day around the world and providing staff to speak in support of *Eating Happiness* events in Hong Kong, London, Toronto and Milan. *Id.* He also stated, “we’ve been clear from the start that we are an animal protection group, not a movie promotion company, and our expertise and primary focus in this campaign is on ending the dog meat trade.” *Id.* at 28. In addition, he stated that he had reached out to his contact about the *New York Times* review but was unsuccessful. *Id.*

Him Lo responded the following day. His e-mail stated, “We received your ridiculous e-mail and have passed it to WDA board members and attorneys.” *Id.* at 27.

An e-mail from the accounting department of HSUS stated that, as of October 20, 2015, HSUS and HSI had spent \$39,000 of the donation from Genlin on the global publicity campaign against the dog meat trade and \$37,500 on lobbying efforts. Ex. RR to Baldwin Decl., Dkt. 102-49. Some of these expenditures were not directly tied to *Eating Happiness*. They included \$8,000 that was used for rabies vaccinations. Ex. QQ to Baldwin Decl., Dkt. 102-48. Rowan also stated that he was “thinking of snaffling some of The HSUS funds to cover some of the costs of the latest Korean dog operation.” Ex. II to Baldwin Decl., Dkt. 102-38. At a deposition, a representative of HSUS testified that the organization ultimately calculated expenditures specific to work with Genlin and WDA at \$17,000. Ex. CCC to Baldwin Decl., Dkt. 102-63 at 3 (Deposition of George Thomas Waite, III (“Waite Depo.”)).

On October 21, 2015, Rowan sent an e-mail to Genlin offering to refund his donation. Ex. 11 to Pacelle Decl., Dkt. 95-17 at 31. Him Lo sent a reply with the subject line “Heart Broken,” and whose text stated “What you want is just another donator [sic] to give financial support to the HSUS. You forget your promise, you broke the MOU.” *Id.* at 32.

On October 27, 2015, Him Lo sent an e-mail to Pacelle. It stated, “We formally inform you that because of your disappointing and saddening behavior, we have decided to cancel our private party Dec 3 in Mr. Genlin’s home in Malibu.” Ex. 12 to Pacelle Decl., Dkt. 95-17 at 34.

According to the testimony of Him Lo, the screening at the Grove went forward on October 29, 2015. Ex. 1 to Declaration of Robert P. Vance, Jr. (“Vance Decl.”), Dkt. 95-21 at 4. However, at the May 1, 2017 hearing, counsel for Plaintiffs and Defendants both stated that the screening had been cancelled. Him Lo also testified that since this action was filed, *Eating Happiness* has been shown at a few theaters around the world, including three in London in late 2015 and early 2016. *Id.*

III. Motion to Exclude Lowy

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A. Factual Background

Danielle Lowy was the Director of U.S. Operations for WDA when several of the events relevant to this action occurred. She first met Genlin in late July or early August, 2015. Ex. D to Declaration of Genlin (“Genlin Decl.”), Dkt. 94-5 at 5 (Lowy Depo.). She testified at her deposition that she was introduced to Genlin by Andrea Gung of the Duo Duo Project, which was also working to end the dog meat trade in Asia. *Id.* at 3, 5. Lowy had worked with Gung during law school, “helping her with various elements of her organization,” after Lowy volunteered to provide pro bono legal work for the Duo Duo Project. *Id.* at 3.

Lowy stated that she was invited to Genlin’s house in Malibu to discuss her background and qualifications as well as his commitment to ending the dog meat trade in China. *Id.* at 5-6. The following week, she returned for a second visit. *Id.* at 6-7. At that point, Genlin offered Lowy a position as a “window person . . . in the U.S. to interface between WDA and The Humane Society.” *Id.* at 7. He described these job responsibilities as to “help communications between Hong Kong WDA personnel and Humane Society personnel working on WDA issues.” *Id.* at 8. Lowy said he offered her \$4000 per month and indicated that the position would be part-time. *Id.*

Lowy accepted the position and started work for the WDA on August 11, 2015. When she was hired, Lowy entered a non-disclosure agreement (“NDA”) with WDA. Ex. C to Genlin Decl., Dkt. 94-4. The NDA concerned “certain documentary motion picture currently entitled ‘Eating Happiness’ (the ‘Picture’) and the information related to the Humane Society of the United States and Humane Society International and other organizations. (the ‘Information’).” *Id.*

Lowy said that her duties ultimately included “getting [*Eating Happiness*] submitted to the Oscars, planning events, finding and managing the whole PR and brand strategy of Eating Happiness. Getting a website up and running for Eating Happiness. All they had was the domain name, no website whatsoever. And it goes on and on.” Ex. D to Genlin Decl., Dkt. 94-5 at 9 (Lowy Depo.). She also “traveled to Washington, D.C. to meet with The Humane Society and strategize with them about tackling the promotion of this movie.” *Id.* at 10. In addition, she “[o]rganiz[ed] with the PR company, [got] screeners out to film critics and Academy voting members. . . . [and looked] for an advertising agency to get an ad campaign going for the movie.” *Id.*

In his declaration, Genlin stated that Lowy’s job duties included providing legal counsel to WDA. Genlin Decl., Dkt. 94-2 at ¶ 3. However, at his deposition, Genlin testified that Lowy’s work was “primarily” organizing events in the U.S. and “facilitating the communications with HSUS.” Ex. B to Declaration of Elizabeth A. Greenman (“Greenman Decl.”), Dkt. 105-3 at 5 (Genlin Depo., Vol. I).

Lowy testified that she was not hired to provide legal counsel to WDA, and did not do so. Ex. D to Genlin Decl., Dkt. 94-5 at 12 (Lowy Depo.). She testified that she had seen the MOU, but had not assisted in drafting or negotiating it. *Id.* She also testified that the MOU was e-mailed to her by either Kwok or another WDA employee but it was not clear why. *Id.* at 13. In response she had asked, “Do you want me to check it for legal sufficiency?” And they basically said ‘No, we just want you to correct the grammar.’” *Id.* Lowy said that, in addition to checking the grammar, she “sent back a couple of, like, notes that were just

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glaring to me.” *Id.* at 14. For example, she asked why HSI was not mentioned. *Id.* Genlin stated at his deposition that he drafted the MOU without any assistance, and that he did not have a lawyer review it. Ex. B to Greenman Decl., Dkt. 105-3 at 14 (Genlin Depo., Vol. I).

Lowy was fired at the end of October 2015. Genlin stated that Lowy was terminated because “she didn’t do what she was supposed to do,” and that “for whatever she did, she didn’t do it right.” *Id.* at 6. For example, he said that Lowy did not find “PR companies who can refer movie critics to us.” *Id.* at 7.

On October 31, 2015, Lowy sent an e-mail to Cho and Crystal Moreland, another HSUS employee, stating:

I just saw the LA times [sic] article about Genlin's suit against you. He terminated my contract as well as many others over the past month in another series of inexplicable actions consistent with his previous record of actions.

I am happy to help you, to testify as to the internal workings at WDA and just how inept they are in basically everything they do. I have mountains of evidence to prove that point and help you prove that it was his actions, as opposed to yours, that have created the lackluster response to the his film.

Please let me know if I can help you at all.

Ex. B to Genlin Decl., Dkt. 94-3.

On March 23, 2016, Lowy was subpoenaed to testify at a deposition in this action. Ex. C to Greenman Decl., Dkt. 105-4 at 2; *see also* Ex A to Greenman Decl., Dkt. 105-2 at 5-6 (Lowy Depo.). The topics identified in the deposition notice were:

1. YOUR relationship with PLAINTIFFS or DEFENDANTS.
2. The relationship between PLAINTIFFS and DEFENDANTS.
3. All aspects related to the development and drafting of the MOU, including but not limited to the communications between PLAINTIFFS and any other PERSON, including DEFENDANTS and YOU, and among PLAINTIFFS.
4. All aspects related to the creation, editing, promotion, showing, screening, and audience's and critics' responses of the FILM, including but not limited to the communications between PLAINTIFFS and any other PERSON, including DEFENDANTS and YOU, and among PLAINTIFFS.
5. Communications regarding the promotion, lobbying and passage of the LEGISLATION between PLAINTIFFS and any other PERSON, including DEFENDANTS and YOU, and among PLAINTIFFS.
6. Communications regarding the use of the DONATION between PLAINTIFFS and any other PERSON, including DEFENDANTS and YOU, and among PLAINTIFFS.

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Id. at 8. Defendants also requested that Lowy produce relevant documents in connection with the subpoena. *Id.* at 15-16.

Lowy was deposed on April 5, 2016. Greenman Decl., Dkt. 105-1 at ¶ 2. At that deposition, Lowy testified that she signed the NDA. Ex. A to Greenman Decl., Dkt. 105-2 at 4 (Lowy Depo.). She testified that she had told Jacob Stettin, counsel for Plaintiffs, that morning about the NDA and offered to provide him with the opportunity to seek a protective order. *Id.* Stettin stated on the record that he had no objection to proceeding at that time with the deposition. *Id.*

On December 29, 2016, counsel for Plaintiffs stated in an e-mail that he did not have a privilege log for Plaintiffs or know of any documents that had been withheld on that basis. Ex. D to Greenman Decl., Dkt. 105-5.

B. Analysis

1. Legal Standards

“The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, . . . as well as an attorney’s advice in response to such disclosures.” *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (quoting *In re Grand Jury Investigation (Corporation)*, 974 F.2d 1068, 1070 (9th Cir. 1992)). The privilege “applies to communications “between lawyers and their clients when the lawyers act in a counseling and planning role, as well as when lawyers represent their clients in litigation.” *Id.* However, “[t]hat a person is a lawyer does not, *ipso facto*, make all communications with that person privileged. The privilege applies only when legal advice is sought ‘from a professional legal advisor *in his capacity as such*.’” *Id.* (citing 8 John H. Wigmore, *Evidence* § 2292 at 547 (McNaughton rev. ed. 1961)) (emphasis in original).

2. Application

As Defendants have noted, the purpose of Plaintiffs’ Motion to Exclude Lowy is not entirely clear. It was filed before the Motion for Summary Judgment was brought. Therefore, it did not expressly address any of the testimony of Lowy cited in support of that Motion. Plaintiffs did not file any evidentiary objections with respect to the evidence presented with the Motion for Summary Judgment, which included a declaration from Lowy, excerpts of her deposition testimony, and documents produced by her. If Plaintiffs sought to have her testimony excluded at trial, the proper means to do so would be to file a motion in limine at the appropriate time. However, the Motion to Exclude Lowy will be considered, because it is ripe in light of some of the evidence that has been presented in support of the Motion for Summary Judgment.

Plaintiffs argue that “[c]ommunication between the Plaintiffs and Ms. Lowy was, at all material times, in the course of the attorney-client relationship.” Dkt. 94 at 6. They argue that “[a]s part of her role as Director of U.S. Operations, Ms. Lowy was called upon to review legal documents, and she provided legal analysis and advice to WDA throughout her employment.” *Id.* at 6.

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The evidence does not support Plaintiffs' position. It shows that Lowy's work with WDA was focused on promotional work, not legal advice. At his deposition, Genlin testified that Lowy's work "primarily" involved organizing events in the U.S. and facilitating communication between WDA and HSUS. Ex. B to Greenman Decl., Dkt. 105-3 at 5 (Genlin Depo., Vol. I). Lowy's deposition testimony confirms this job description. She testified that her work included planning events, getting *Eating Happiness* submitted to the Oscars and managing the public relations strategy for the movie. Ex. D to Genlin Decl., Dkt. 94-5 at 9 (Lowy Depo.). The only evidence that Lowy's job was intended to include a legal component is Genlin's statement in his declaration submitted with the Motion to Exclude Lowy. In that declaration, Genlin states, "Ms. Lowy's job duties included providing legal counsel to WDA." Genlin Decl., Dkt. 94-2 at ¶ 3. However, this evidence is not persuasive and warrants no weight because it contradicts the deposition testimony Genlin gave before Plaintiffs determined that they wished to seek to exclude Lowy's testimony.

As noted above, the attorney-client privilege protects "confidential disclosures made by a client to an attorney in order to obtain legal advice." *Chen*, 99 F.3d at 1501. It applies "only when legal advice is sought 'from a professional legal advisor *in his capacity as such*.'" *Id.* (internal citations omitted). It "does not attach to an attorney's communications when the client's dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice." *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 735 (2009). Thus, "the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice." *Id.*

Defendants have submitted testimony from Lowy in connection with the Motion for Summary Judgment concerning her role in planning events, particularly movie screenings, for WDA. See Ex. 9 to Washington Decl., Dkt. 95-19 (Lowy Depo.). They have also submitted testimony from Lowy concerning a meeting she had with Kwok and HSUS at which the timeline of legislation and plans for World Dog Lovers' Day were discussed. *Id.* None of this testimony concerns any actual legal advice by Lowy.

At the hearing on the Motion, Plaintiffs conceded that the only instance in which there is evidence that Lowy may have acted in a legal capacity was when she made suggestions concerning the MOU. However, no testimony of Lowy on this topic has been presented in connection with the Motion for Summary Judgment. Thus, it is not necessary to decide definitively at this time whether Lowy had an attorney-client relationship with Plaintiffs with respect to the MOU.¹

¹ Lowy testified that she did not participate in drafting or negotiating the MOU. Ex. D to Genlin Decl., Dkt. 94-5 at 12 (Lowy Depo.). This testimony is corroborated by that of Genlin, who testified at his deposition that he drafted the MOU without any assistance and did not have a lawyer review it. Ex. B to Greenman Decl., Dkt. 105-3 at 14 (Genlin Depo., Vol. I). As noted, Lowy testified that she had been sent a draft of the MOU and asked to proofread it. Ex. D to Genlin Decl., Dkt. 94-5 at 12 (Lowy Depo.). She also testified that she offered to review the MOU for legal sufficiency, but that this offer was declined. *Id.* at 13. When she returned the MOU, she included "a couple of . . . notes" on legal issues that were "glaring." *Id.* Specifically, she asked why HSI had not been included as a party to the agreement. *Id.* However, HSI was not made a party to the final agreement.

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In their reply brief, Plaintiffs argue that, whether or not the attorney-client privilege applies, Lowy violated Cal. Bus. & Prof. Code § 6068(e) and California Bar Rules of Professional Conduct 3-100 and 5-210. Cal. Bus. & Prof. Code § 6068(e) requires that an attorney “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” California Bar Rule of Professional Conduct 3-100 pertains to the confidential information of a client and incorporates the standards of Cal. Bus. & Prof. Code § 6068(e). California Bar Rule of Professional Conduct 5-210 provides that “[a] member shall not act as an advocate before a jury which will hear testimony from the member.”

This argument is unpersuasive for several reasons. *First*, Rule 5-210 does not apply because Lowy is not an advocate, *i.e.*, an attorney with respect to the matters at issue in this action. *Second*, even if it were determined that Lowy violated Rule 3-100 or Cal. Bus. & Prof. Code § 6068(e), she is not a party to this action. Thus, this is not an appropriate forum to pursue claims against her.

Plaintiffs also briefly argue that the NDA supports exclusion of her testimony. However, as Defendants note, the NDA includes the following exception:

If Recipient or any of its Representatives is required by applicable law or a valid legal order to disclose any Confidential Information, Recipient shall, prior to such disclosure, notify Disclosing Party of such requirements so that Disclosing Party may seek a protective order or other remedy, and Recipient shall assist Disclosing Party therewith.

Ex. C to Genlin Decl., Dkt. 94-4.

Such notification was made on the record. Ex. A to Greenman Decl., Dkt. 105-2 at 4 (Lowy Depo.). Even now, Defendants have not sought to “claw back” any of the testimony by Lowy or other discovery she produced on the ground that it is subject to the NDA. Greenman Decl., Dkt. 105-1 at ¶ 5.

C. Conclusion

For the reasons stated above, Plaintiffs’ motion is **DENIED** as to the evidence presented that is relevant to the motions addressed in this Order.

IV. Motion for Summary Judgment

A. Analysis

1. Legal Standard

A motion for summary judgment will be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). The party seeking summary judgment bears the initial burden to show the basis for its motion and to identify those portions

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of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See *id.* Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Where the nonmoving party will have the burden of proof on an issue, however, the movant need only demonstrate that there is an absence of evidence to support the claims of the nonmoving party. See *id.* If the moving party meets its initial burden, the nonmoving party must set forth “specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); Fed. R. Civ. P. 56(e).

Only admissible evidence may be considered in connection with a motion for summary judgment. Fed. R. Civ. P. 56(c). In considering such a motion, a court is not to make any credibility determinations or weigh conflicting evidence. All inferences are to be drawn in the light most favorable to the nonmoving party. See *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631-32 (9th Cir. 1987). However, conclusory or speculative testimony in declarations or other evidentiary materials is insufficient to raise genuine issues of fact and defeat summary judgment. See *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

2. Application

a) Breach of Contract

The FAC alleges that Defendants violated the MOU by “at least,” failing “to organize the promised global publicity campaign and events” for *Eating Happiness* and failing “to lobby for and otherwise promote the passage of legislation banning dog meat consumption in the United States.” FAC ¶ 57. Defendants argue that, pursuant to the terms of the MOU, they had two years to fulfill their commitments. Dkt. 95 at 12. Plaintiffs brought this action less than ten weeks after the MOU was signed. Plaintiffs argue that the MOU required legislation to be introduced concurrently with the promotion of *Eating Happiness*, and that notwithstanding the two-year term Defendants breached the contract through their clear and unequivocal refusal to perform their duties. Dkt. 102 at 20-21.

“There can be no *actual* breach of a contract until the time specified therein for performance has arrived.” *Taylor v. Johnston*, 15 Cal. 3d 130, 137 (1975) (emphasis in original); see also *Romano v. Rockwell Int’l., Inc.*, 14 Cal. 4th 479, 488 (1996) (“A cause of action for breach of contract does not accrue before the time of breach.”). Plaintiffs argue that there was a required time frame into the project description of the MOU. It states:

Both parties desire to become partners in the collaborative project called “End Eating Dog Meat.” This project includes the launch of a global publicity campaign relating to the Asian dog meat trade, *specifically* through the use of the movie “*Eating Happiness*” as well as *concurrent* legislation banning dog meat consumption in the United States.

Ex. A to FAC at 2 (emphasis added). Plaintiffs argue that this language confirms that “[t]he parties understood that this meant the Defendants were obligated to introduce the legislation at the same time as

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the film was to be promoted worldwide in September and October.” Dkt. 102 at 19.

Generally, the interpretation of a contract seeks to “‘give[] effect to the mutual intention of the parties as it existed’ at the time the contract was executed.” *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010) (quoting *Wolf v. Walt Disney Pictures and Television*, 162 Cal. App. 4th 1107, 1125-26 (Cal. Ct. App. 2008). “Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract’s terms.” *Id.*

Under certain circumstances, evidence about communications between the parties prior to the execution of a contract can be considered to interpret its meaning. The parol evidence rule, which is codified in Cal. Civ. Code §1625 and Cal. Code. Civ. Proc. § 1856, “generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument.” *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 343 (2004). “The rule does not, however, prohibit the introduction of extrinsic evidence to explain the meaning of a written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.” *Id.* (internal citations and quotations removed); see also Cal. Civ. Proc. Code § 1856 (b) (“The terms set forth in a writing . . . may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.”). Further, the presence or absence of an integration clause may be significant evidence as to the parties’ intent in determining “whether the parties intended their writing to serve as the exclusive embodiment of their agreement.” *Grey v. Am. Mgmt. Servs.*, 204 Cal. App. 4th 803, 807 (2012).

Here, neither the language of the MOU nor the proffered parol evidence establishes that the HSUS had a duty to cause the introduction of legislation in Congress by October 2015. The responsibilities imposed on HSUS under the contract were: (i) to “organize global publicity campaigns and events for the promotion of ‘*Eating Happiness*,’” and (ii) to “lobby, write and promote legislation banning dog meat consumption in the United States.” Ex. A to FAC at 2. The term of the project was August 21, 2015 to August 20, 2017. *Id.* In light of these provisions, a reasonable interpretation of the language in the project description is not that it imposed a firm deadline of October 2015 for legislation to be introduced in Congress.

The proffered extrinsic evidence includes Genlin’s testimony that, during a dinner on June 5, 2015, Pacelle “said to have legislation done in the U.S., it is fast.” Ex. 1 to Washington Decl., Dkt. 95-19 at 7 (Genlin Depo., Vol. I). When Genlin then asked, “How fast?,” Pacelle responded, ‘Oh, three months.’” *Id.* An October 8, 2015 e-mail from Peng stated, “Per a conversation with Wayne in July, he said the bill could be sent to Congress within three months.” Ex. 6 to Feingold-Lieberson Decl., Dkt. 95-9 at 21. Bollard responded, acknowledging Pacelle’s statement but clarifying: “[H]e didn’t mean that we could pass it within three months. He meant that we could introduce it in a committee in this timeline, which is the timeline that we are on track to follow.” *Id.* at 18. Finally, Rowan sent an e-mail to Li on October 9, 2015. It stated, “Wayne had indicated we would have legislation introduced within three months but the process is taking much longer than expected, in part because of the chaos in Congress at the moment.” Ex. U Baldwin Decl., Dkt. 102-24.

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None of these communications establishes that it is reasonable to interpret the MOU to require that a proposed statute was to be introduced to Congress by October 2015, or that failing to meet that objective would constitute a breach. Indeed, based upon Genlin's own testimony, Pacelle's statement as to the timeline of legislation was not specific to the desired legislation. Rather, Pacelle stated that in general and under normal circumstances, it takes three months to introduce a bill in Congress. It is also significant that, because legislation can only be introduced by a member of Congress, there can be no certainty as to a timeline for this to occur. Among other things, timing can be affected by unforeseen circumstances such as other events and resulting priorities that have arisen, or particular matters that have occurred with respect to a particular member of Congress who was a prospective sponsor.

Plaintiffs also argue that, even if the MOU did not specify a time-frame for performance other than its general, two-year term, Defendants' conduct constituted anticipatory breach. That occurs when a party repudiates its obligations before its performance is due, either expressly through a "clear, positive, unequivocal refusal to perform," or implicitly, by "put[ting] it out of his power to perform so as to make substantial performance of his promise impossible." *Taylor*, 15 Cal. 3d at 137; *see also Gold Mining & Water Co. v. Swinerton*, 23 Cal. 2d 19, 29 (1943) ("A contract is totally breached and an anticipatory repudiation occurs when the promisor without justification and before he has committed a breach, makes a positive statement to the promisee indicating that he will not or cannot substantially perform his contractual duties.").

Plaintiffs argue that Defendants explicitly repudiated their obligations by "deliberately refusing to promote the film on their print, e-mail, primary web site, affiliate web sites, or to its social media subscribers and supporters." Dkt. 102 at 21. However, "the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be strict, unequivocal and absolute. A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient." *City of Buena Park v. Boyar*, 186 Cal. App. 2d 61, 65-66 (Ct. App. 1960); *see also Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 956 (9th Cir. 1977) ("because the doctrine of anticipatory repudiation is viewed as working harsh results, for its application there must be a 'positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties.'). Thus, "[a] party asserting express anticipatory repudiation must demonstrate that (1) the other party absolutely and unequivocally refused to perform and (2) it (the party asserting anticipatory repudiation) effectuated the other party's breach by materially changing its position and treating the repudiation as final." *Shahani v. United Commercial Bank*, 457 B.R. 775, 783 (N.D. Cal. 2011).

Plaintiffs focus on the fact that Defendants sent only one Tweet promoting a New York City screening of the film. However, as Plaintiffs conceded at the May 1, 2017 hearing, it is necessary to look at Defendants' promotional efforts as a whole in assessing whether there is a triable issue as to breach. There is undisputed evidence that these efforts included the HSUS sponsorship and organization of screenings of *Eating Happiness* in Washington, D.C. and London. It also shows that HSUS expended considerable resources on promoting screenings of the film in San Francisco and Los Angeles that Genlin cancelled. In order to promote the San Francisco screening, HSUS sent an e-mail to more than 800 supporters in the Bay Area. Handy Decl., Dkt. 95-6 at ¶ 3. Plaintiffs have stated that the planned

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venue for the screening at the SPCA facility in San Francisco was inappropriate and would have been unappealing to those attending. However, in light of the absence of a specific contractual requirement as to the nature of a venue for screening, and the limited evidence that has been offered as to the SPCA facility, Plaintiffs have not shown a triable issue of fact as to a breach of the overall obligations of Defendants. In addition, Li attended a World Dog Lovers' Day screening of *Eating Happiness* in Hong Kong, where he gave a brief speech in support of the film. Ex. 10 to Washington Decl., Dkt. 95-19 at 93 (Li Depo.). HSUS also promoted World Dog Lovers' Day through Facebook, Twitter and its own blog. Handy Decl., Dkt. 95-6 at ¶¶ 5-10; see also Exs. 1-6 to Handy Decl., Dkt. 95-7 at 3, 6, 9, 12, 15, 18. It also sponsored events linked with World Dog Lovers' Day in Bhutan, Nepal, India and the Philippines. Segal Decl., Dkt. 95-14 at ¶ 5.

Plaintiffs also note that, on October 19, 2015 Pacelle stated that HSUS is “not a movie promotion company.” Ex. 10 to Pacelle Decl., Dkt. 95-17 at 28. In the same e-mail, he wrote, “I regret . . . that we have been unable to provide everything that Mr. Genlin and the WDA has wanted in the last two weeks.” *Id.* at 27. Plaintiffs argue that these statements constitute an admission that Defendants “*could not* perform” their obligations under the MOU. Dkt. 102 at 21 (emphasis in original). However, Plaintiffs do not provide any evidence that HSUS represented that it was a movie promotion company, that it would have been reasonable for Plaintiffs to assume that it was, or that only a movie promotion company could have fulfilled the obligations required by the MOU. Nor is there evidence that the MOU required HSUS to provide “everything” that Plaintiffs requested of them. That Plaintiffs engaged Lowy to perform these functions without claiming that Defendants had not fulfilled them, confirms that a triable issue has not been shown.

What is of particular significance is that there was a two-year term to promote the film. Thus, even if it were appropriate to conclude that a reasonable jury could find that Defendants could or even should have done more to promote *Eating Happiness* in September and October 2015, the same jury could not reasonably conclude that Defendants had refused to perform their obligations to promote the film by that time, or that such refusal was “strict, unequivocal and absolute.” *City of Buena Park*, 186 Cal. App. 2d at 66. Nor could a reasonable jury find that there was a “positive statement” that HSUS would not or could not substantially perform its contractual duties. *Marr Enterprises*, 556 F.2d at 956.

Similarly, there is no triable issue of fact as to whether Defendants absolutely or unequivocally refused to perform the obligation to advance legislation banning the consumption of dog meat in the United States. HSUS presented the WDA with a draft bill on August 27, 2015, less than a week after the MOU was signed. Ex. 6 to Washington Decl., Dkt. 95-19 at 41 (Bollard Depo.). At that time, HSUS told the WDA that

this was very delicate water to be treading through, and that it had to be navigated carefully because they did have some members of the House who were very interested in sponsoring the bill, but that it had to be presented publicly with no backstory so that nobody could come out in public and oppose this bill against eating dogs and cats for the sole reason that they have an ax to grind with The Humane Society.

Ex. 9 to Washington Decl., Dkt. 95-19 at 69 (Lowy Depo.). The WDA was also told at that time that

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passage could take up to a year and a half to two years. *Id.* The undisputed evidence establishes that Feingold-Lieberson maintained contact with House Agricultural Committee staff member John Goldberg through August and September in an effort to get him to have the Committee consider the bill. Exs. 1-2 to Feingold-Lieberson Decl., Dkt. 95-9.

Plaintiffs argue that, despite this evidence, there is a triable issue as to whether Defendants violated the MOU because they “deliberately refuse[d] to introduce the legislation at the time and in the manner preferred by Plaintiffs.” Dkt. 102 at 21. Neither the MOU nor the parol evidence establishes that HSUS agreed to terms pursuant to which it was required to adopt the legislative strategy preferred by WDA. Plaintiffs’ argument that the refusal to adopt WDA’s preferred strategy was “motivated by [HSUS’s] natural desire to preserve their personal contacts on Capitol Hill and to adhere to their preferred legislative strategy” is equally unpersuasive and speculative. Dkt. 102 at 21. HSUS is a lobbying organization. Its success is predicated on its ability to maintain and use relationships with lawmakers. Common sense shows that it has an interest in preserving those relationships. Therefore, this is not a sufficient basis to establish a triable issue as to the claimed breach.

b) Breach of the Covenant of Good Faith and Fair Dealing

The FAC alleges that HSUS breached the implied covenant of good faith and fair dealing by “directly undermining WDA’s efforts to promote its campaign and the Documentary Film.” FAC at ¶ 65. For example, it alleges that HSUS “refus[ed] and fail[ed] to respond to WDA’s requests for information, guidance and assistance concerning event scheduling.” *Id.* Defendants argue that “HSUS worked faithfully to honor its contractual commitments.” Dkt. 95 at 31. Plaintiffs respond that Defendants never promoted *Eating Happiness* on their website or on Pacelle’s blog, never sent a print mailer about the film to their supporters, and never posted on Facebook or Instagram about the film. Dkt. 102 at 23.

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 371 (1992) (quotations omitted). “[T]he covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party’s rights to the benefits of the agreement.” *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36 (1995). It “is limited to assuring compliance with the express terms of the contract and cannot be extended to create obligations not contemplated in the contract.” *Racine & Laramie, Ltd. v. Dep’t of Parks & Rec.*, 11 Cal. App. 4th 1026, 1032 (1992). However, “breach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing.” *Schwartz v. State Farm Fire & Cas. Co.*, 88 Cal. App. 4th 1329, 1339 (2001). In order to establish a breach of the implied covenant of good faith and fair dealing, it is necessary to demonstrate “a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act.” *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990).

The evidence here shows that there is not a triable issue as to whether Defendants considered Plaintiffs’ requests for help. They did. For example, the Tweet that was sent to promote the New York City

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screening of *Eating Happiness* was the result of internal discussion within HSUS about the best way to allocate the resources of the organization. In an e-mail to Bollard, a marketing director at HSUS asked if promotion of the screening was: (i) something HSUS had to do; (ii) something it should do but should not prioritize over other organizational priority campaigns; and (iii) something it should do if it were in harmony with other requests. Ex. P to Baldwin Decl., Dkt. 102-19. Bollard replied that it was “important, but not worth hurting other campaigns over. I would think it's worth an email to at least a subset of our file -- e.g. if we can separate out the activist-types from the people we only email a few times a year -- and then some social media promotion.” *Id.* A few weeks later, the marketing director communicated again on this issue. That communication stated that HSUS had concluded that, based on its other obligations, the screening would be promoted on Twitter but not by e-mail. Ex. O to Baldwin Decl., Dkt. 102-18.

Notably, between the original e-mail from the marketing department to Bollard and the follow-up, Genlin had cancelled the San Francisco event. A request that Bollard submitted to the HSUS marketing department regarding the screening at the Grove, stated, “We're mindful of the disaster around the San Fran screening. As a result, we've stopped processing most of the requests for help from Genlin and his movie team.” Ex. 10 to Bollard Decl., Dkt. 95-11 at 40. However, Bollard stated that the Los Angeles event was “particularly important.” *Id.*

Plaintiffs argue that HSUS failed to promote the movie and the legislation “for its own strategic purposes.” Dkt. 102 at 23. There is some evidence to support the contention that HSUS was concerned that meeting Plaintiffs’ demands could jeopardize its relationships with its members and certain legislators. This evidence includes the aforementioned statement from Bollard that HSUS had “stopped processing most of the requests for help from Genlin and his movie team,” which was made in the context of an October 6, 2015 request for support to the HSUS communications department. Ex. 10 to Bollard Decl., Dkt. 95-11 at 40. Two days later, on October 8, 2015, Bollard told the communications department to “pause on executing” the plan to send invitations to HSUS’s 43,000 e-mail contacts in Los Angeles County because “Genlin has been acting increasingly crazy.” *Id.* at 34. As to the legislative effort, Feingold-Lieberson expressed concern on October 15, 2015 that WDA’s desired strategy of aggressively promoting the anti-dog meat legislation could “destroy a very delicate relationship with the R staff on House Ag Comm.” Ex. X Baldwin Decl., Dkt. 102-27.²

Taken in context, these statements do not show a triable issue of fact as to whether Defendants failed to perform their duties under the contract. It was reasonable and not “a failure or refusal to discharge contractual responsibilities” for Defendants to act in a way that would preserve existing relationships with

² Further, Plaintiffs argue that Defendants “refused to introduce [the bill] without the support of their desired legislator.” Dkt. 102 at 23. But, as confirmed by the website of the House of Representatives, which is subject to judicial notice under Fed. R. Evid. 502, bills are, of course, introduced by legislators, not by lobbyists or members of the public. See *How Are Laws Made? Introduction and Referral to Committee*, http://www.house.gov/content/learn/legislative_process/ (“Any member in the House of Representatives may introduce a bill at any time while the House is in session by simply placing it in the ‘hopper’ at the side of the Clerk’s desk in the House Chamber.”). Moreover, “[e]ach piece of legislation is referred to the committee that has jurisdiction over the area affected by the measure.” *Id.* Thus, “the support of [HSUS’s] desired legislator,” (Dkt. 102 at 23) and of the Agricultural Committee was prerequisite to the introduction of the bill.

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members and legislators. See *Careau & Co.*, 222 Cal. App. 3d at 1395 (1990). Indeed, had they not done so, it could have impeded their ability to fulfill their duties under the MOU.

Thus, based on the evidence discussed above and in § IV.A.2.a, *supra*, no triable issue of fact has been shown as to the claim that Defendants engaged in any “conscious and deliberate act” that constituted a “failure or refusal to discharge contractual responsibilities,” as required to state a claim for breach of the implied covenant of good faith and fair dealing. *Careau & Co.*, 222 Cal. App. 3d at 1395.

c) Fraud

The FAC alleges that Defendants fraudulently represented to Plaintiffs that they would:

- a. Prepare and publicize a global campaign to support WDA’s anti-dog meat agenda, as well as roll out its Documentary Film;
- b. Utilize HSUS’s substantial resources in the animal rights area as well as vast membership to successfully publicize WDA’s campaign and principally its Documentary Film;
- c. Utilize HSUS’s and HSI’s strong brand and reputation in the animal rights arena to successfully promote the release of the Documentary Film;
- d. Utilize HSUS’s strong political connections to achieve quick passage of Federal legislation banning the consumption of dog meat in the United States.

FAC at ¶ 71. Defendants argue that HSUS intended to perform the contract when the MOU was executed, and that absent a breach of contract, there can be no fraud. Dkt. 95 at 32-33. Plaintiffs counter that Defendants falsely induced them enter the agreement because Defendants did not intend to perform and did not have the ability to do. Instead, Plaintiffs claim that Defendants entered the contract in order to obtain access to Genlin and his wealth, which could be used to support Defendants’ mission. Dkt. 24-25.

A claim for common law fraud under California law requires that the following be established: (i) a false representation; (ii) that is knowingly made; (iii) with the intent to deceive; (iv) on which there can be justifiable reliance; and (v) resulting injury. *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 72-73 (1990). Defendants argue that the FAC is best interpreted to state a claim for promissory fraud. Plaintiffs appear to acknowledge that in their Opposition. Dkt. 102 at 24. “Promissory fraud is a subspecies of fraud. A plaintiff asserting a promissory fraud claim must plead and prove that the defendant made a promise to him that it had no intention of performing.” *UMG Recordings, Inc. v. Glob. Eagle Entm’t, Inc.*, 117 F. Supp. 3d 1092, 1109 (C.D. Cal. 2015) (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) (“A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud”)). As a California Court of Appeal has explained:

The elements of promissory fraud (i.e., of fraud or deceit based on a promise made without any intention of performing it) are: (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by

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the promisee; (5) nonperformance by the party making the promise; and (6) resulting damage to the promise.

Behnke v. State Farm Gen. Ins. Co., 196 Cal. App. 4th 1443, 1453 (2011). “A plaintiff can prove fraudulent intent by circumstantial evidence and a trier of fact may infer such intent given the circumstances surrounding contract formation.” *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615, 620 (N.D. Cal. 2002).

Plaintiffs argue that Defendants never intended to nor could perform on the promises made to WDA and Genlin in the MOU. They argue that the evidence of internal communications among HSUS and HSI employees shows that they were interested in a large potential donation from Genlin, to be used toward the existing campaign to end the dog meat trade in Asia. See, e.g., Ex. H to Baldwin Decl., Dkt. 102-11 (June 4, 2015 e-mail from Rowan to Pacelle that included information about Genlin’s wealth stated that Genlin “could easily give us \$500K to \$1 million”); Ex. K to Baldwin Decl., Dkt. 102-14 (July 24, 2015 e-mail from Bollard stating, “We want Genlin to pony up funds before we commit to do more work for him”).

Further, there was substantial back-and-forth among personnel of Defendants about the ability to work with Genlin and the potential difficulties with promoting *Eating Happiness*. E-mails sent by various employees of HSUS and HSI expressed concern about the quality of *Eating Happiness*, particularly as to earlier versions of the film. See, e.g., Ex. B to Baldwin Decl., Dkt. 102-5 (March 5, 2015 e-mail from Block to Pacelle providing the opinion that the film “is poorly put together and filled with many confusing and unhelpful issues and persons of non interest”). However, later e-mails state that some of these concerns were addressed. See, e.g., Ex. D to Baldwin Decl., Dkt. 102-7 (May 21, 2015 e-mail from Rowan to Pacelle stating, “The version I saw is very different (and much improved) over the one that Kitty saw”). Moreover, doubts about Defendants’ ability to help with the promotion of *Eating Happiness* must be viewed in light of other optimistic statements. For example, a March 2, 2015 e-mail from Rowan stated, “We have typically not been particularly good at promoting films and books,” but then continued: “but we should try to make this film an exception to our typical track record.” Ex. OO to Baldwin Decl., Dkt. 102-45. On May 21, 2015, Rowan stated in an e-mail to Pacelle, “I do not believe it will win an Oscar but it will most certainly generat [sic] buzz.” Ex. D to Baldwin Decl., Dkt. 102-7.

Block expressed consistent reservations about working with Genlin. On May 21, 2015, she sent an e-mail to Pacelle stating that the “film was awful,” and that “I’m no Siskel and Ebert but the film will not make any money.” Ex. C to Baldwin Decl., Dkt. 102-6. On June 6, 2015, Block sent an e-mail to Bollard, stating that the film “is greatly improved over the version I saw in March.” Ex. E to Baldwin Decl., Dkt. 102-8. She continued: “That said i [sic] still don’t think it will have any commercial success -- but that is irrelevant i [sic] guess if it gets some notice and becomes part of a bigger dialog [sic].” *Id.* She e-mailed Liley the same day, stating, “last thing I’ll say on this .. even though the cove won an oscar [sic] .. it still had no impact on the dolphin slaughter.” Ex. PP to Baldwin Decl., Dkt. 102-46. On July 1, 2015, Block sent an e-mail to another HSI employee expressing further reservations about the relationship between Genlin and Defendants. Ex. CC to Baldwin Decl., Dkt. 102-32. That e-mail stated:

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we support the overall mission of the movie -- banning dog meat.. but our messaging different -- as our strategy. Peter has worked very hard to get the HSUS/HSI to support Genlin. He feels he will have a tremendous effect in China[.] I have my doubts that Genlin is focused on anything other than his ego.. but that's my two cents.

Id. Block's concerns were not accepted by the leadership of Defendants.

There is also some evidence that Defendants realized after they entered into the MOU that certain of their assumptions had been incorrect. An e-mail sent by Rowan to Li on October 9, 2015, stated that the legislative process was taking "much longer than expected, in part because of the chaos in Congress at the moment." Ex. U Baldwin Decl., Dkt. 102-24. It also stated that there had been a "serious misreading" of the impact of *Eating Happiness*, in part because the subject matter was difficult to observe. *Id.*

None of this evidence shows a triable issue as to a claim of promissory fraud. As non-profit organizations, HSUS and HSI are dependent on donations. Thus, evidence that they were eager to secure a donation from Genlin is not, by itself, evidence of dishonesty or fraudulent intent. Although there were some reservations expressed within HSUS and HSI about entering a relationship with Plaintiffs, those reservations were of less concern over time as *Eating Happiness* was edited. Further, there is no evidence that those, including Block, who were the most pessimistic about the prospects of the film, had any decision-making authority with respect to whether Defendants would enter a relationship with Plaintiffs. Rowan, who played a significant role in securing the relationship between Plaintiffs and Defendants, was consistently optimistic about the prospects for the film. The October 9, 2015 e-mail from Rowan indicates that he had not anticipated the difficulties associated with promoting a movie based on such a difficult subject at the time the MOU was entered into.

As discussed in greater detail in §§ IV.A.2.a and b, *supra*, Defendants did not fail to fulfill any of the promises identified in the FAC. Nonperformance is an element of a claim for promissory fraud. See *Behnke*, 196 Cal. App. 4th at 1453. Defendants prepared and publicized a global campaign in support of an anti-dog meat agenda, including events linked to World Dog Lovers' Day and independent screenings of *Eating Happiness*. They publicly announced their support of the documentary and used or attempted to use their resources, including their blog, Twitter account, e-mail lists and celebrity and non-celebrity contacts, to do so. They also used their contacts in Congress to push legislation banning the consumption of dog meat. To the extent that Plaintiffs argue that these actions were not successful, that would not matter. Thus, "mere failure to perform on a contract does not constitute fraud." *Richardson v. Reliance Nat. Indem. Co.*, No. C 99-2952 CRB, 2000 WL 284211, at *4 (N.D. Cal. Mar. 9, 2000) (quoting *Rhenigans v. Smith*, 161 Cal. 362, 366 (1911)); see also *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001) ("[F]raudulent intent cannot be proven . . . by simply pointing to the defendant's subsequent failure to perform as promised.").

Plaintiffs also argue that "Defendants intentionally eliminated memorializing references to the specific promises they had already made to Plaintiffs before the MOU when proposing the written version of the proposal for the MOU." Dkt. 102 at 25. In support of this position they cite to redlines of e-mails sent to Pacelle to Genlin on June 21, 2015 and July 30, 2015. See Ex. HH to Baldwin Decl., Dkt. 102-37; Ex. ZZ

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to Baldwin Decl., Dkt. 102-60. Rather than showing a triable issue of fraud, these redlined documents reflect that Defendants made an effort not to promise performance beyond what they could deliver. Moreover, because these e-mails were sent prior to August 21, 2015, the date on which the MOU was signed, they do not constitute evidence that Defendants retreated from their promises after they secured Genlin's donation.

Finally, Plaintiffs argue that the "Defendants' misuse of and failure to account for the use of Plaintiffs' funds demonstrates their fraudulent intent." Dkt. 102 at 25. This argument implies that the alleged misuse of funds was not, in itself, fraudulent, but shows that Defendants did not intend to fulfill the promises made through the MOU when they were communicated to Plaintiffs. Given the absence of any evidence that Defendants did not fulfill their commitments, this argument is unpersuasive as an effort to show a triable issue of fact.

Even if the FAC could be read to plead a claim of fraud arising from Defendants' alleged misuse of some of the \$500,000 donated pursuant to the MOU, the evidence does not show a triable issue of fact as to such a claim. There is some evidence that not all of the money from the restricted accounts set up with Plaintiffs' donation was spent on the promotion of *Eating Happiness* or lobbying for the passage of the anti-dog meat bill. For example, \$8000 was provided to a World Rabies Day event that focused on the administering rabies vaccinations to dogs in Southeast Asia. Ex. QQ to Baldwin Decl., Dkt. 102-48. Rowan suggested that he was considering "snaffling" funds from HSUS -- the account set up for lobbying expenses -- and using them "to cover some of the costs of the latest Korean dog operation." Ex. II to Baldwin Decl., Dkt. 102-38. Bollard suggested to Bass that some of the funds contributed by Genlin could be used to fund an investigation into international supermarket brands that sold canned dog meat in China. Ex. R to Baldwin Decl., Dkt. 102-21.

These expenditures were reasonable pursuant to the terms of the MOU and the July 30, 2015 e-mail between Pacelle and Genlin. In the July 30, 2015 e-mail, Pacelle recommended the following donation:

1. An investment in a global publicity campaign against the dog meat trade (\$250,000/year to HSI).

To create the atmospherics for the movie's success, we need to build the social and cultural climate that makes the movie relevant. We will engage in a global publicity campaign focused on the cruelty of the dog meat trade. We will help organize events in major cities in the United States (Washington D.C., New York, Los Angeles) for the movie. We will also increase global publicity on the cruelty of the trade throughout the year. We will do this by mobilizing our resources to shine a spotlight on the cruelty of the trade.

Ex. 5 to Pacelle Decl., Dkt. 95-17 at 13.

The MOU, which was entered into on August 21, 2015, stated:

Both parties desire to become partners in the collaborative project called "End Eating Dog Meat." This project includes the launch of a global publicity campaign relating to the Asian dog meat

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trade, specifically through the use of the movie “*Eating Happiness*” as well as concurrent legislation banning dog meat consumption in the United States.

Ex. A to FAC at 2. The specific duties delegated to HSUS were: “organize global publicity campaigns and events for the promotion of ‘*Eating Happiness*,’” and “lobby, write and promote legislation banning dog meat consumption in the United States.” *Id.*

Neither the MOU nor the other documents setting out the respective duties for WDA and HSUS/HSI clearly establishes that the parties intended the funds from Plaintiffs were to be used exclusively for lobbying and the promotion of *Eating Happiness*. Rather, they represent that those activities are two specific means to promote the more general goal of “a global publicity campaign relating to the Asian dog meat trade.” Ex. A to FAC at 2. Plaintiffs have not argued, and no evidence has been presented, that the funds were not used to advance this goal. Thus, because there is no evidence that the funds were misused with an “intent to deceive,” a fraud claim based on this theory necessarily fails.

d) Accounting

“A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting.” *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009). “The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant’s relationship with the plaintiff, the defendant is obliged to surrender.” *Id.* at 179-80. “An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation.” *Id.* at 179. An accounting claim, as an equitable remedy, is “dependent upon a substantive basis for liability,” and has no “separate viability.” *Glue-Fold, Inc. v. Slutterback Corp.*, 82 Cal. App. 4th 1018, 1023 n.3 (2000).

For the reasons stated in this Order, summary judgment is granted on all of Plaintiffs’ substantive claims. Therefore, there is no basis for an accounting.

e) Violation of Cal. Bus. & Prof. Code § 17500

Cal. Bus. & Prof. Code § 17500 prohibits the dissemination of a statement that is “untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading” *Arizona Cartridge Remanufacturers Ass’n, Inc. v. Lexmark Int’l, Inc.*, 421 F.3d 981, 985 (9th Cir. 2005). “[A] statement is false or misleading if members of the public are likely to be deceived.” *Chern v. Bank of Am.*, 15 Cal. 3d 866, 876 (1976).

The FAC alleges that the following statements were misleading:

- a. Representing to Plaintiffs that they had the intention and ability to effectively promote the Documentary Film, and to promote Plaintiffs’ anti-dog meat cause as promised, and that they had the intention and ability to screen the Documentary Film for members of the U.S.

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Congress and to lobby for, sponsor and obtain passage of legislation advancing Plaintiffs' aims. In fact, Defendants either had no such intention at any time, or had no such ability, or had neither such intention or such ability.

- b. Representing to plaintiffs and the public that 100 percent of "net" proceeds from their donations would be used for the charitable purposes of their choice.
- c. Leading Plaintiffs to believe that HSUS had staff experienced in and committed to the promised promotional and lobbying activities.

FAC at ¶ 117.

It is not clear that § 17500 applies. There is no evidence that any statements were made to "members of the public." See *Chern*, 15 Cal. 3d at 876. Rather, this dispute involves statements during the negotiation of a private contract. See *Otashe Golden, M.D. v. Sound Inpatient Physicians Med. Grp., Inc.*, No. 14-CV-00497-TLN-EFB, 2015 WL 8539034, at *5 (E.D. Cal. Dec. 11, 2015) ("Plaintiff has not provided any proof that the public was induced or that a false advertisement was disseminated to the public.").

Further, the actions that Plaintiffs allege to constitute a violation of § 17500 are the same ones advanced in support of the claims for breach of contract, breach of the covenant of good faith and fair dealing and fraud. Those claims fail for the reasons stated earlier. Plaintiffs cannot succeed on the § 17500 claim for the same reasons.

f) Violation of Cal. Bus. & Prof. Code § 17200

California law protects consumers and competitors by "promoting fair competition in commercial markets for goods and services." *Duste v. Chevron Products Co.*, 738 F. Supp. 2d 1027, 1047 (N.D. Cal. 2010). Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. It "defines unfair competition very broadly, to include anything that can properly be called a business practice and that at the same time is forbidden by law." *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000) (internal quotation marks omitted). "Each prong of the UCL is a separate and distinct theory of liability," with the "unlawful," "unfair," and "fraudulent" prongs each offering "an independent basis for relief." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). Under the "unlawful" prong of the UCL, "section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008) (internal citation omitted).

Plaintiffs have not established a triable issue as to the applicability of § 17200 because there is no evidence that a "commercial market" was affected or involved in connection with the contested conduct. See *Duste*, 738 F. Supp. 2d at 1047. Further, even assuming that § 17200 does apply, it would be derivative of the substantive claims that have been discussed above. Because all of those claims fail, there is no basis for the alleged violation of § 17200. Therefore, summary judgment is appropriate.

B. Conclusion

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For the reasons stated in this Order, the Motion for Summary Judgment is **GRANTED**.

V. Motion to Exclude Tompkins

Because summary judgment is granted on all of Plaintiffs' claims, the Motion to Exclude Tompkins is **MOOT**.

VI. Motion to Modify Scheduling Order

Because summary judgment is granted on all of Plaintiffs' claims, the Motion to Modify the Scheduling Order is **MOOT**.

VII. Conclusion

For the reasons stated in this Order, the Motion to Exclude Lowy is **DENIED** as to the evidence presented that is relevant to the motions addressed in this Order, the Motion for Summary Judgment is **GRANTED**, and the Motion to Exclude Tompkins and Motion to Modify the Scheduling Order are **MOOT**. On or before May 19, 2017, Defendants shall prepare a proposed judgment consistent with this Order and seek to reach an agreement with Plaintiffs as to its form. Any agreed-upon form of judgment shall be lodged on or before that date. The notice shall indicate whether the form of judgment is agreed upon or whether Plaintiffs will file any objections by May 26, 2017 in accordance with the Local Rules.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
ak _____