

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

GRUMPY CAT LIMITED,
Plaintiff.

Plaintiff,

VS.

GRENADE BEVERAGE LLC, et al.,
Defendants.

Case No. SA CV 15-2063-DOC (DFMx)

ORDER DENYING DEFENDANT-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT [88] AND GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF [89]

PAUL SANDFORD, et al.,
Counterclaimants.

GRUMPY CAT LIMITED, et al.,
Counterdefendants

1 Before the Court is Defendant-Intervenor Grumpy Beverage LLC's ("Grumpy
2 Beverage") Motion for Partial Summary Judgment on the Issue of Breach ("Motion") (Dkt. 88).
3 In Opposition, Plaintiff Grumpy Cat Limited ("Cat Ltd." Or "Plaintiff") asks the Court to *sua
4 sponte* grant partial summary judgment on Grumpy Beverage's breach of contract counterclaim
5 ("Opp'n") (Dkt. 89). The Court heard oral argument on the Motion on November 29, 2017.

6 This case concerns a staple of millennial culture: an internet meme. A meme is "an idea,
7 behavior, style, or usage that spreads from person to person within a culture." *See Meme*,
8 Merriam-Webster Online Dictionary (November 22, 2017, 8:57 PM), <https://www.merriam-webster.com/dictionary/meme>. Some memes go viral and spread widely across the internet. *See*
9 Terrica Carrington, Note, *Grumpy Cat or Copy Cat? Memetic Marketing in the Digital Age*, 7
10 Geo. Mason J. Int'l Com. L. 139, 142 (2016). A viral meme can launch an average person—or
11 pet—to fame. *See id.* at 143–45. "Grumpy Cat" is a viral meme that turned a stern-looking
12 house cat named Tardar Sauce into a celebrity. Complaint ("Compl.") (Dkt. 1) ¶ 1. Grumpy Cat
13 features the image of Tardar Sauce with a grumpy motif. *Id.* ¶ 13. For instance:



26 *Grumpy Cat*, Know Your Meme (November 22, 2017, 8:52 PM), <http://knowyourmeme.com/memes/grumpy-cat>.
27

1 **I. FACTS¹**

2 This case concerns Grumpy Cat, a viral Internet meme that transformed a house cat
3 named Tardar Sauce into one of the most famous cats in the world. Compl. ¶ 13. Cat Ltd. is the
4 owner of the intellectual property rights associated with Grumpy Cat, including a registered
5 trademark and four registered copyrights. *Id.* ¶¶ 14, 15, 16; *see also* SUF No. 1. Cat Ltd. alleges
6 that Defendant Grenade Beverage LLC (“Grenade”) and its members, Defendants Nick and
7 Paul Sandford, used the Grumpy Cat name and image beyond what was authorized in a
8 licensing agreement. Compl. ¶ 2. Grenade defaulted, and Grumpy Beverage intervened and
9 joined with the Sandfords in filing a counterclaim. Counterclaim (Dkt. 39).

10 **A. The Parties Enter Into a License Agreement Granting Rights to Grumpy Cat**

11 On or around May 31, 2013, Cat Ltd., the owner of Grumpy Cat’s intellectual property,
12 entered into a license agreement with Defendant Grenade Beverage that granted Grenade
13 certain limited rights to use Grumpy Cat’s copyrighted and trademarked name and image. SUF
14 No. 1; Declaration of Brian Kindler (“Kindler Decl.”) (Dkt. 88-2) Ex. 1 (“License
15 Agreement”). Namely, the Agreement granted Grenade the right to use Grumpy Cat’s name
16 and image to sell a line of Grumpy Cat coffee products as well as—subject to the parties’
17 mutual approval—additional non-alcoholic products. License Agreement §§ 1(b), 2(a).

18 Specifically, the License Agreement granted a “license and privilege” for the use of
19 Grumpy Cat’s name and image “in connection with the manufacture, advertisement,
20 merchandising, promotion, distribution, and sale of solely Products.” *Id.* § 2(a). “Products” is
21 defined as “a line of Grumpy Cat-branded coffee products, or other additional products within
22 the Product Category that may, upon the Parties’ mutual approval, be marketed hereunder.” *Id.*
23 § 1(b). “Product Category” is defined as “non-alcoholic beverages.” *Id.* § 1(a). The License
24 Agreement also provides that “all uses [of Grumpy Cat’s name and image] . . . shall be subject

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27 ¹ Unless indicated otherwise, to the extent any of these facts are disputed, the Court concludes they are not material to the
28 disposition of the Motions. Further, to the extent the Court relies on evidence to which the parties have objected, the Court
 has considered and overruled those objections. As to any remaining objections, the Court finds it unnecessary to rule on them
 because the Court does not rely on the disputed evidence.

1 to [Cat Ltd.’s] prior approval.” *Id.* § 4(a).² The License Agreement clarifies that Cat Ltd. is only
2 granting a license and not transferring any rights, title, or interest in its copyrights or
3 trademarks, and that Cat Ltd. owns any adaptations of Grumpy Cat’s image made under the
4 License Agreement. *Id.* § 4(b).

5 Further, the License Agreement required Cat Ltd. and Grenade to form a new entity
6 called Grumpy Beverage LLC to market and sell the Grumpy Cat-branded coffee products.
7 SUF Nos. 3, 4, 34. Grumpy Beverage LLC was formed as a Texas LLC. SUF No. 3. But Cat
8 Ltd. argues that the entity should have been formed as a California LLC under the Agreement,
9 and therefore, the Grumpy Beverage in this case is not the Grumpy Beverage referenced in the
10 Agreement. *Id.* However, this Court previously found—in holding that Grumpy Beverage
11 sufficiently alleged it may bring a breach of contract claim as an intended third-party
12 beneficiary—that Cat Ltd.’s arguments about this distinction between a California LLC and
13 Texas LLC were “unavailing.” *See* Order Dismissing FAC (Dkt. 63) at 5–6.

14 On July 15, 2013, Grenade and Grumpy Beverage entered into a sublicense and
15 assignment of the license agreement (“Sublicense Agreement”) that required Grumpy Beverage
16 to comply with the duties and obligations in the License Agreement in connection with the sale
17 and advertisement of Grumpy Cat products. SUF Nos. 34–35; Declaration of David B. Jonelis
18 (“Jonelis Decl.”) (Dkt. 89-3) Ex. A (“Sublicense Agreement”).

19 Sometime in late 2013 or early 2014, Grumpy Beverage created and began selling a
20 Grumpy Cat iced coffee product called “Grumppiccino.” *See* SUF Nos. 10, 58.

21 **B. The License Agreement Requires a Monthly Accounting**

22 Under the License and Sublicense Agreements, Grumpy Beverage is required to provide
23 Cat Ltd. with monthly accounting statements within ten days of the end of each month. License
24 Agreement § 7(a); Sublicense Agreement. Each accounting statement must “contain a
25 reasonably detailed accounting of Products sold, the selling price thereof, and the deductions
26 and charges made therefrom [sic].” License Agreement § 7(a). Timely accounting statements

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28 ² While the License Agreement does not qualify or limit Cat Ltd.’s right to withhold approval for the use of Grumpy Cat, the
indemnity section of the Agreement provides that each party’s consent to settle claims arising out of the Agreement is “not to
be unreasonably withheld.” *Id.* §§ 4(a), 10(a)(i),(ii).

1 and royalty payments “shall be of the essence” in the License Agreement. *Id.* § 7(d).
2 “[R]epeated failure to render timely accounting and payments shall be deemed due cause for
3 termination.” *Id.* Before terminating the License Agreement, Cat Ltd. must give thirty days’
4 notice by certified or registered letter or courier and a chance to cure any defect. *Id.* §§ 12,
5 14(a).

6 Throughout 2014 and 2015, Cat. Ltd. sent requests for accountings. In February 2014,
7 Cat Ltd.’s counsel, Kia Kamran, sent an email to Paul Sandford, co-owner of Grenade and
8 Grumpy Beverage, asking for an accounting of royalties. SUF No. 38; Declaration of Kia
9 Kamran (“Kamran Decl.”) (Dkt. 85–5) Ex. C. In March 2014, Kamran sent Paul Sandford two
10 emails asking for the monthly accountings. Kamran Decl. Exs. D, E. On June 2, 2014,
11 Kamran’s assistant sent an email to Paul Sandford requesting the monthly accounting. *Id.* Ex. F.
12 That day, Paul Sandford responded to Kamran’s assistant’s email with an attached letter that
13 provided Grumpy Beverage’s 2014 gross sales and a forecast for the rest of the year. *Id.* Ex. G.
14 Two days later, Kamran emailed Paul Sandford that his letter was “insufficient” because a
15 royalty statement requires greater detail about individual sales. *Id.* Ex. H. This same email
16 expressed concerns about Grumpy Beverage proceeding with selling Grumpy Cat products
17 without obtaining Cat Ltd.’s approval, and stated that “approval is required for any expansion
18 of the current product-line offering.” *Id.* In a separate email sent the same day, Kamran asked
19 Paul Sandford to send accounting statements with the date of sales, the number of units sold,
20 the price at which the units sold, the royalty rate applied, and accrued royalty. *Id.* Ex. I.

21 From October 2014 to July 2015, Cat Ltd. sent multiple emails and letters to Grumpy
22 Beverage asking for detailed accounting. *See id.* Exs. J–O. Significantly, on October 22, 2014,
23 Kamran sent Paul and Nick Sandford, Grumpy Beverage and Grenade’s principals, a letter by
24 email and First Class Mail that noted, “As of this writing no accountings have ever been
25 received as required under the Agreement, and in default of Paragraph 7 thereof requiring
26 monthly accountings.” *Id.* Ex. L. And on December 9, 2014, Kamran sent a letter to Brian
27 Kinder, counsel for Grumpy Beverage and Grenade, reminding him that “in default of Section 7
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1 of the Agreement requiring monthly accountings, no formal accountings have ever been
2 received by our client.” *Id.* Ex. M.

3 **C. Cat Ltd. Refuses to Approve Grumpy Beverage’s Ground Coffee Products**

4 While the accounting dispute was ongoing, Grumpy Beverage was working on new
5 Grumpy Cat ground coffee products. In April 2014, Paul Sandford sent an email to Cat Ltd.’s
6 representative noting that Grumpy Beverage was in the process of creating ground coffee
7 products: “We are working on Grumpy Cups (K-Cup single serve pods) and Triple Grump to
8 compete with Starbucks Double Shot Espresso. It will be simple to follow the successes of
9 Grumppuccino with new products.” SUF No. 10; Kinder Decl. Ex. 2. The following month,
10 Paul Sandford sent an email to a Cat Ltd. representative with a draft image displaying how
11 Grumpy Beverage would market the new ground coffee products. SUF No. 11. Although the
12 Cat Ltd. representative complimented Paul Sandford on the drafts, the representative told Paul
13 Sandford that Cat Ltd. would need to consult with Kamran and another Cat Ltd. representative
14 before approving the design. Kinder Decl. Ex. 5.

15 On October 21, 2015, Paul Sandford sent Kamran the packaging design for a ground
16 coffee product. *Id.* Ex. 7. Ten minutes later, Kamran responded by asking whether Paul
17 Sandford received approval for the ground coffee products and asked him to “[h]old off please
18 until you hear from us again.” *Id.* Ex. 8. A few hours later, Paul Sandford responded, noting
19 that they showed the products to Cat Ltd. over a year prior and that Grumpy Beverage had long
20 been working on these products. *Id.* Ex. 9. Kamran responded that approval is still required and
21 to hold off on producing the products until further communications. *Id.* Ex. 10. On November
22 2, 2015, Kamran emailed Paul Sandford, “Per our conversation of today, our client does not
23 approve this. Do not proceed.” *Id.* Ex. 12. Paul Sandford responded an hour later, telling
24 Kamran that Cat Ltd. “need[ed] specific reasons for the disapproval. We believe we have every
25 right to produce this product under our agreement.” *Id.* Ex. 13.

26 A few weeks later, Nick Sandford emailed Kamran details about Grumpy Beverage
27 launching ground coffee products. *Id.* Ex. 14. Kamran soon after told Nick Sandford that
28 Grumpy Beverage is “not authorized to proceed with the ground coffee product” and “[d]o

1 NOT proceed with the posting of the ground coffee products.” *Id.* Ex. 15. Kamran warned that
2 Grumpy Beverage’s “failure to comply will be cause for [Cat Ltd.] to formally proceed against
3 [Grumpy Beverage] for breach.” *Id.* Kamran sent an additional email to Paul Sandford, telling
4 him that Cat Ltd. “has the right to approve or disapprove any product offering in its discretion,
5 and it is not approving this product line . . . of ground coffee products.” *Id.* Ex. 16.

6 **II. PROCEDURAL HISTORY**

7 On December 11, 2015, Cat Ltd. filed suit against Grenade and its principals Paul
8 Sandford and Nick Sandford. *See generally* Compl. Cat Ltd. brings seven claims:

- 9 (1) Copyright Infringement, in violation of 17 U.S.C § 101 *et seq.*, against all
10 Defendants;
- 11 (2) Trademark Infringement, in violation of 15 U.S.C. § 1114, against all Defendants;
- 12 (3) Trademark Infringement and False Designation of Origin, in violation of 15
13 U.S.C. § 1125(a), against all Defendants;
- 14 (4) Trademark Dilution, in violation of 15 U.S.C. § 1125(c), against all Defendants;
- 15 (5) Cybersquatting, in violation of 15 U.S.C. § 1125(d), against all Defendants;
- 16 (6) Breach of Contract, against Grenade; and
- 17 (7) Accounting, against all Defendants.

18 Compl. ¶¶ 32–89. Cat Ltd. seeks injunctive relief, damages, treble damages, interest, attorneys’
19 fees, and costs. *Id.* at 21–24.

20 On June 7, 2016, the Clerk entered default against Grenade (Dkt. 33). On August 1,
21 2016, Grumpy Beverage intervened and joined with the Sandfords in filing a counterclaim
22 against Cat Ltd. (Dkt. 39). On October 3, 2016, Grumpy Beverage and the Sanfords filed their
23 First Amended Counterclaim (“FAC”) (Dkt. 52).

24 On December 19, 2016, Grumpy Beverage and the Sanfords (collectively,
25 “Counterclaimants”) filed the operative pleading, the Second Amended Counterclaim (“SAC”)
26 (Dkt. 65). In the SAC, Counterclaimants bring the following twelve counterclaims:

- 27 (1) Declaratory Judgment For Ownership of Trademark, by Grumpy Beverage
28 against Cat Ltd;

- (2) Declaratory Judgment For Ownership of Copyright, by Grumpy Beverage against Cat Ltd.;
- (3) Declaratory Judgment For Ownership of Domain Names, by Grumpy Beverage against Cat Ltd.;
- (4) Declaratory Judgment Of Trademark Non-Infringement, by Counterclaimants against Cat Ltd. and Roes 1-5;
- (5) Declaratory Judgment Of Copyright Non-Infringement, by Counterclaimants against Cat Ltd. and Roes 1-5;
- (6) Intentional Misrepresentation, by Counterclaimants against Cat Ltd.;
- (7) Negligent Misrepresentation, by Counterclaimants against Cat Ltd.;
- (8) Breach of Fiduciary Duty, by Grumpy Beverage against Cat Ltd.;
- (9) Breach of Contract, by Grumpy Beverage against Cat Ltd.;
- (10) Breach of the Covenant of Good Faith and Fair Dealing, by Grumpy Beverage against Cat Ltd.;
- (11) Intentional Interference with Contractual Relations, by Grumpy Beverage against Cat Ltd.;
- (12) Intentional Interference with Prospective Economic Advantage, by Grumpy Beverage against Cat Ltd.;

SAC ¶¶ 43–134. Counterclaimants seek declaratory relief, damages, punitive damages, interest, attorney’s fees, and costs. *Id.* at 34.

For breach of contract, the counterclaim at issue in this Motion, Grumpy Beverage alleges that Cat Ltd. breached the License Agreement by “failing and refusing to actively cooperate in the advertising and marketing of the products being manufactured” and not approving the ground coffee products. *Id.* ¶¶ 104–115.

On November 1, 2017, Grumpy Beverage filed the instant Motion. On November 8, 2017, Cat Ltd. opposed, and on November 15, 2017, Grumpy Beverage replied (“Reply”) (Dkt. 90).

III. LEGAL STANDARD

Summary judgment is proper if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is to be granted cautiously, with due respect for a party’s right to have its factually grounded claims and defenses tried to a jury. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial, but it need not disprove the other party’s case. *Celotex*, 477 U.S. at 323. When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out that the non-moving party has failed to present any genuine issue of material fact as to an essential element of its case. *See Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990).

Once the moving party meets its burden, the burden shifts to the opposing party to set out specific material facts showing a genuine issue for trial. *See Liberty Lobby*, 477 U.S. at 248–49. A “material fact” is one which “might affect the outcome of the suit under the governing law” *Id.* at 248. A party cannot create a genuine issue of material fact simply by making assertions in its legal papers. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Rather, there must be specific and admissible evidence identifying the basis for the dispute. *See id.* The Court need not “comb the record” looking for other evidence; it is only required to consider evidence set forth in the moving and opposing papers and the portions of the record cited therein. Fed. R. Civ. P. 56(c)(3); *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). The Supreme Court has held that “[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party].” *Liberty Lobby*, 477 U.S. at 252.

IV. DISCUSSION

Grumpy Beverage moves for partial summary judgment as to its breach of contract counterclaim on its allegations that it had a right to sell ground coffee under the License Agreement and that Cat Ltd.’s refusal to approve the sale of ground coffee products was a breach of the License Agreement. Mot. at 1. In its Opposition, Cat Ltd. suggests that, based on the evidence, the Court can *sua sponte* enter partial summary judgment in favor of Cat Ltd. on Grumpy Beverage’s breach of contract counterclaim. Opp’n at 10.

To prevail on a breach of contract claim, a party must prove: (1) the existence of a contract, (2) the performance of the contract or excuse for nonperformance, (3) breach by the other party, and (4) resulting damages. *Richman v. Hartley*, 224 Cal. App. 4th 1182, 1186 (2014).

Determining whether Cat Ltd. breached the License Agreement, as Grumpy Beverage claims, requires determining whether the License Agreement granted Grumpy Beverage a pre-approved right to sell ground coffee products; and if not, whether Cat Ltd. breached the Agreement by refusing to approve the ground coffee products without providing a justification. Cat Ltd. suggests that because neither of these conditions are met, the Court may *sua sponte* enter partial summary judgment in Cat Ltd.'s favor on Grumpy Beverage's breach of contract counterclaim.

A. Whether the License Agreement Granted Grumpy Beverage a Pre-Approved Right to Sell Grumpy Cat Ground Coffee Products

Grumpy Beverage argues that the License Agreement granted it the pre-approved right to sell ground coffee products, because the License Agreement included pre-approval for “a line of Grumpy Cat-branded coffee products.” Mot. at 4–7. Cat Ltd. responds that the License Agreement only authorized Grumpy Beverage to produce one line of coffee products—specifically, iced coffee—and that additional products needed Cat Ltd.’s approval. Opp’n at 11–16. Determining this issue will require the Court to construe the contract term “a line of Grumpy Cat-branded coffee products,” which entails a determination of whether the contract is

1 integrated; if so, whether the term is ambiguous; and if so, whether extrinsic evidence resolves
2 the ambiguity.

3 The License Agreement expressly grants Grumpy Beverage the pre-approved right to
4 sell “a line of Grumpy Cat-branded coffee products.” License Agreement §§ 1(b); 2(a). Cat Ltd.
5 argues that this term only includes a “singular line” of coffee products, and that extrinsic
6 evidence shows that this “line” is the iced coffee Grumppicccino product that Grumpy Beverage
7 marketed. Opp’n at 13. Grumpy Beverage argues that the plain language of a “line” of coffee
8 products includes coffee products in general and was not limited to a single iced coffee product.
9 Reply at 6–7. Further, Grumpy Beverage argues that the agreement was integrated and
10 therefore Cat Ltd.’s extrinsic evidence should be excluded. Reply at 5.

11 The parol evidence rule prohibits use of extrinsic evidence to contradict or supplement a
12 fully integrated contract where the contract “is intended to be a final expression of that
13 agreement and a complete and exclusive statement of the terms.” *Lonely Maiden Prods., LLC v.*
14 *GoldenTree Asset Mgmt., LP*, 201 Cal. App. 4th 368, 371–72 (2011). If the contract purports to
15 be integrated, then extrinsic evidence is excluded, except to “explain or interpret ambiguous
16 language.” *Id.* (citing Cal. Code Civ. Proc. § 1856(b), (g)).

17 “In considering whether a writing is integrated, the court must consider the writing itself,
18 including whether the written agreement appears to be complete on its face; whether the
19 agreement contains an integration clause; whether the alleged parol understanding on the
20 subject matter at issue might naturally be made as a separate agreement; and the circumstances
21 at the time of the writing. Whether a contract is integrated is a question of law when the
22 evidence of integration is not in dispute.” *Founding Members of the Newport Beach Country*
23 *Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 953–54 (2003) (citation
24 omitted). This License Agreement contains an unequivocal integration clause:

25 Integration: This Agreement, along with its recitals, any exhibits,
26 appendices, addendums, and schedules, all of which are incorporated herein
27 by this reference, encompasses the entire agreement of the parties, and
supersedes all previous understandings and agreements between the Parties,

1 whether oral or written. The parties hereby acknowledge and represent, by
2 affixing their hands and seals hereto, that said parties have not relied on any
3 representation, assertion, guarantee, warranty, collateral contract or other
4 assurance, except those set out in this Agreement, made by or on behalf of
5 any other party or any other person or entity whatsoever, prior to the
6 execution of this Agreement.

7 See License Agreement § 14(j). Based on the integration clause, the Court finds the License
8 Agreement to be integrated. *See Newport Beach Country Club*, 109 Cal. App. 4th at 953–54.

9 Nonetheless, when a dispute arises as to the meaning of the language of an integrated
10 contract, the Court receives provisionally extrinsic evidence to determine whether it in fact
11 reveals an ambiguity. *Lonely Maiden*, 201 Cal. App. 4th at 371–72. An ambiguity exists if “the
12 language is reasonably susceptible to more than one possible meaning.” *Id.* If an ambiguity is
13 present, extrinsic evidence should be admitted to aid in interpretation of the contract. *Id.*; *see also* *Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (1992). “The test of admissibility of extrinsic
14 evidence to explain the meaning of a written instrument is not whether it appears to the court to
15 be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a
16 meaning to which the language of the instrument is reasonably susceptible.” *Pacific Gas &*
17 *Elec. Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal. 2d 33, 37 (1968). If there is no “material
18 conflict” in the extrinsic evidence, the contract should be interpreted by the Court as a matter of
19 law. *Lonely Maiden*, 201 Cal. App. 4th at 371–72. In contrast, when “ascertaining the intent of
20 the parties at the time the contract was executed depends on the credibility of extrinsic
21 evidence, that credibility determination and the interpretation of the contract are questions of
22 fact that may properly be resolved by the jury.” *City of Hope Nat. Medical Center v.*
23 *Genentech, Inc.*, 43 Cal. 4th 375, 395 (2008).

25 On the one hand, “a line of products” (as in “a line of Grumpy Cat-branded coffee
26 products”) is a singular term, suggesting that Grumpy Beverage had a right to only produce one
27 type of coffee. *See Opp’n at 13*. On the other hand, the dictionary definition of a “product line”
28 is “a group of related products marketed by the same company,” suggesting Grumpy Beverage

1 may have had a right to produce a group of related coffee products, including iced and ground
2 coffee. *See Product Line*, Collins English Dictionary (November 23, 2017, 3:38 PM),
3 <https://www.collinsdictionary.com/us/dictionary/english/product-line>. Because this term is
4 “reasonably susceptible to more than one possible meaning,” it is ambiguous. *See Lonely
5 Maiden*, 201 Cal. App. 4th at 371–72.

6 To address this ambiguity, Cat Ltd. introduced extrinsic evidence, which it argues shows
7 that the term “a line of Grumpy Cat-branded coffee products” referred to a singular line of
8 coffee—iced coffee. On February 12, 2013, prior to the License Agreement, Nick Sanford
9 emailed a Licensing Proposal to Ben Lashes, Grumpy Cat’s brand manager, writing “we see an
10 opportunity in the market for a product bearing the Grumpy Cat trademark. Specifically, we
11 would like to create *a line* of Grumpy Cat Premium Iced Coffees. Coffee, especially iced coffee
12 is what we feel to be the best category in the beverage market to make a play on Grumpy Cat.”
13 Declaration of Ben Clark (Dkt. 89-29) Ex. Z (Dkt. 89-30) (emphasis added); Opp’n at 14.

14 Grumpy Beverage did not put forth any extrinsic evidence in its Reply to contradict the
15 seeming equivalence between “a line of Grumpy Cat Premium Iced Coffees” in Nick Sanford’s
16 email and “a line of Grumpy Cat-branded coffee products” in the License Agreement.
17 However, Grumpy Beverage argued at the hearing that the Agreement “coffee products”
18 language is broader than “iced coffee,” suggesting that the parties intended the Agreement’s
19 terms to be broader than those in the original proposal, and that the Agreement’s pre-approval
20 covered multiple types of coffee products. Further, Grumpy Beverage suggested it could bring
21 additional extrinsic evidence at trial to support this interpretation. Also, Grumpy Beverage
22 argues that the post-agreement course of dealing shows that ground coffee was intended to be
23 included in “line of products,” pointing to Paul Sanford’s April 2014 email to Cat Ltd.’s
24 representative: “We are working on Grumpy Cups (K-Cup single serve pods) and Triple Grump
25 to compete with Starbucks Double Shot Espresso. It will be simple to follow the successes of
26 Grumppuccino with new products.” Reply at 6; SUF No. 10; Kinder Decl. Ex. 2. Grumpy
27 Beverage argues that this email suggests that the parties intended to pre-approve not just the
28 iced coffee Grumppuccino product, but also other coffee products.

Because of the conflicting extrinsic evidence to which the parties cite, there is a genuine dispute of material fact as to the intent of the parties in pre-approving a “line of coffee products” in the License Agreement. The dispute is whether a “line of coffee products” includes or excludes ground coffee. Therefore, “ascertaining the intent of the parties at the time the contract was executed” regarding the pre-approval of “coffee products” is a question of fact to be “resolved by the jury.” *See City of Hope Nat. Medical Center v. Genentech, Inc.*, 43 Cal. 4th 375, 395 (2008); Fed. R. Civ. P. 56(a).

Accordingly, the Court DENIES Grumpy Beverage's Motion for Partial Summary Judgment on the issue of breach.

B. Whether Cat Ltd. Breached The License Agreement By Refusing to Approve Grumpy Beverage's Ground Coffee Products

In the event that the jury finds that the License Agreement did not pre-approve ground coffee, Grumpy Beverage would have been required to acquire Cat Ltd.’s approval to sell ground coffee products. Grumpy Beverage argues and asks the Court to rule as a matter of law, that Cat Ltd. breached the contract by refusing to grant, without providing justification, the approval Grumpy Beverage sought for ground coffee products. Mot. at 7. But Cat Ltd. correctly points out that the License Agreement grants Cat Ltd. an unrestricted right to approve or disapprove all uses of Grumpy Cat’s image:

All uses of the Licensed Properties, as well as any visual depictions, interpretations, and adaptations thereof created by or for Licensee for use on Products or otherwise in the Product Category or in the advertisement or promotion of any of the foregoing (the “Works”), as well as all Products on which such Works are to be depicted on, shall be subject to Lessor’s prior approval.

License Agreement § 4(a) (emphasis added). While other parts of the License Agreement require that consent not be unreasonably withheld, there is no such limiting language in Section 4(a)'s requirement that Cat Ltd. approve uses of Grumpy Cat's image and name. *Compare* License Agreement § 10(d)(i),(ii) (requiring that each party's consent to settle claims arising

1 out of the Agreement is “not to be unreasonably withheld”), *with id.* § 4(a) (lacking any such
2 limiting language for Cat Ltd.’s required approval for uses of Grumpy Cat). Therefore, Cat Ltd.
3 had a right under the License Agreement to withhold approval for uses of Grumpy Cat’s image
4 and name. Accordingly, as a matter of law, if the jury finds that ground coffee products were
5 not pre-approved, Cat Ltd. did not breach the License Agreement by denying Grumpy
6 Beverage’s request to use Grumpy Cat for ground coffee products.

7 Nevertheless, in its Reply, Grumpy Beverage argues that even if the License Agreement
8 invested Cat Ltd. with discretionary power to refuse additional products, Cat Ltd. violated the
9 covenant of good faith and fair dealing by withholding approval of Grumpy Beverage’s ground
10 coffee products without good faith. Reply at 3. However, because Grumpy Beverage did not
11 move for summary judgment on its counterclaim for Breach of the Covenant of Good Faith and
12 Fair Dealing, and because courts generally do not consider arguments raised for the first time in
13 a reply brief, because the opposing party does not have an opportunity to respond, the Court
14 declines to address the good faith and fair dealing issue at this time. *See SAC ¶¶ 116–20. Cent.*
15 *Delta Water Agency v. United States*, 306 F.3d 938, 952 n.10 (9th Cir. 2002); *Crandal v.*
16 *Starbucks Corp.*, 249 F. Supp. 3d 1087, 1104 (N.D. Cal. 2017).

17 **C. Whether the Court Should Grant Cat Ltd. Partial Summary Judgment**

18 Cat Ltd. suggests that the Court can enter partial summary judgment in Cat Ltd.’s favor
19 on the issue of breach. Opp’n at 12. It is well recognized that “where the party moving for
20 summary judgment has had a full and fair opportunity to prove its case, but has not succeeded
21 in doing so, a court may enter summary judgment *sua sponte* for the nonmoving party.” *Albino*
22 *v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014); *see also Cool Fuel, Inc. v. Connett*, 685 F.2d
23 309, 311 (9th Cir. 1982).

24 Grumpy Beverage has had a full and fair opportunity to prove its breach of contract
25 counterclaim in the instant partial summary judgment motion. *See Albino*, 747 F.3d at 1176.
26 However, as discussed above, the evidence shows that if the License Agreement did not grant
27 Grumpy Beverage the pre-approved right to sell ground coffee products, Cat Ltd. had discretion
28

1 under the License Agreement to reject Grumpy Beverage's proposals to sell ground coffee
2 products.

3 Accordingly, the Court *sua sponte* GRANTS partial summary judgment in favor of Cat
4 Ltd. as to the specific issue of whether Cat Ltd. breached the License Agreement by denying
5 Grumpy Beverage's request to use Grumpy Cat's name and image for ground coffee products
6 (assuming they were not pre-approved).

7 **V. DISPOSITION**

8 For the foregoing reasons, the Court DENIES Defendant-Intervenor Grumpy Beverage
9 LLC's motion for partial summary judgment on the issue of whether Plaintiff Grumpy Cat
10 Limited breached the License Agreement by refusing to approve the ground coffee products.

11 Further, the Court GRANTS partial summary judgment in favor of Plaintiff Grumpy Cat
12 Limited. The Court GRANTS partial summary judgment to Plaintiff as to the specific issue of
13 whether (assuming the License Agreement did not pre-approve ground coffee products)
14 Plaintiff breached the License Agreement by denying Grumpy Beverage's request to use
15 Grumpy Cat's name and image for ground coffee products. The Court DENIES partial
16 summary judgment to Plaintiff as to the specific issue of whether the License Agreement
17 granted Grumpy Beverage a pre-approved right to sell ground coffee products.

18
19 DATED: December 1, 2017

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22 DAVID O. CARTER
23 UNITED STATES DISTRICT JUDGE
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