SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - WEST DISTRICT

VFLA EVENTCO, LLC, a Delaware limited liability company,

Plaintiff(s),

vs.

WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC, a Delaware limited liability company; STARRY US TOURING, INC., a Delaware corporation; KALI UCHIS TOURING, INC., a California corporation; BIG GRRRL BIG TOURING, INC., a Delaware corporation; and DOES 1-20, inclusive,

Defendant(s).

CASE NO.: 20SMCV00933

ORDER(S):

GRANTING THE ARTIST DEFENDANTS' MOTION FOR SUMMARY JUDGMENT;

DENYING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION; AND

GRANTING WME'S MOTION FOR SUMMARY JUDGMENT

Dept.: R
Hearing Date: 6/17/2022
Hearing Time: 9:00am

Plaintiff VFLA Eventco ("plaintiff" or "VFLA") filed this action against defendants William Morris Endeavor Entertainment, LLC, Starry US Touring, Inc., Kali Uchis Touring, Inc., and Big Grrrl Big Touring, Inc. for failure to return deposits pursuant to a force majeure clause in the contracts after the concert organized by plaintiff was canceled due to COVID. Currently before the Court are three separate motions: William Morris Endeavor's ("WME") motion for summary judgment or, in the alternative, summary adjudication; Starry US Touring, Inc., Kali

Uchis Touring, Inc., and Big Grrrl Big Touring, Inc. (collectively "the Artist defendants") motion for summary judgment or, in the alternative, summary adjudication; and plaintiff's motion for summary adjudication.[1] All are opposed. The Court jointly discusses Artist defendants' and plaintiff's cross-motions first, and then discusses WME's motion.

I. Artists'/Plaintiff's Motions[2]

A. Facts and Relevant Procedural History

In its recitation of the relevant and material facts, the Court mostly relies on VFLA's separate statement in opposition to Big Grrrl's motion. Where necessary, the Court cites Facts from VFLA's separate statement in opposition to Kali Uchi's and Starry US's motion. In December 2019, VFLA announced the presentation of a new music festival in Los Angeles to be held on June 6-7, 2020. (UMF No. 1.) In February 2020, VFLA and Big Grrrl agreed that Lizzo would perform at the festival and in return, VFLA would pay Big Grrrl a certain sum and the sum was non-refundable except under certain instances set forth in the contract. (UMF Nos. 10, 13.) Similarly, Kali Uchis' and Ellie Goulding's respective performances were secured in March 2020. (KS-UMF Nos. 2-3, 6-7.) The various agreements between the parties included an addendum titled the "Virgin Fest Los Angeles – Festival Rider" ("Rider"). (UMF No. 15.) The paragraph regarding force majeure events states as follows:

> A 'Force Majeure Event' means any act beyond the reasonable control of Producer, Artist, or Purchaser which makes any performance by Artist impossible, infeasible, or unsafe (including, but not limited to, acts of God, terrorism, failure or delay of transportation, death, illness, or injury of Artist or Artist's immediate family (e.g. spouses, siblings, children, parents), and civil disorder). In the event of cancelation due to Force Majeure then all parties will be fully excused and there shall be no claim for damages, and subject to the terms set forth herein, Producer shall return any deposit amount(s) (i.e., any amount paid to Producer pursuant to the Performance Contract prior to payment of the

[1] Big Grrrl Big Touring, Inc. ("Big Grrrl") filed its own separate motion. Starry US Touring, Inc. and Kali Uchis Touring, Inc. filed a separate joinder request, along with evidence in support. The Court relies on the Big Grrrl papers to determine the Artists' arguments.

[2] For purposes of these motions, the Court relies on plaintiff's opposing separate statement to defendant Big Grrrl Big Touring, Inc.'s motion.

> Balance) previously received (unless otherwise agreed). However, if the Artist is otherwise ready, willing, and able to perform Purchaser will pay Producer the full Guarantee unless such cancellation is the result of Artist's death, illness, or injury, or that of its immediate family, in which case Producer shall return such applicable pro-rata portion of the Guarantee previously received unless otherwise agreed.

(UMF No. 16.)

Throughout the respective Riders, "Purchaser" refers to VFLA, "Producer" refers to either Big Grrrl, Kali Uchis Touring, or Starry US, and "Artist" refers to either Lizzo, Kali Uchis, or Ellie Goulding. (UMF No. 17; KS-UMF Nos. 11-12.) The Riders were negotiated by Steve Gaches, representative for WME, and Tim Epstein (no known relation), representative for VFLA. (UMF No. 18.) Gaches and Epstein had negotiated riders for past festivals. (UMF No. 19.) For Virgin Fest, Gaches and Epstein used a rider they had previously negotiated a few months earlier for another music festival called Baja Beach ("Baja Rider"). (UMF No. 21.) In May 2019, Gaches sent Epstein a draft for the Baja Rider, which read as follows:

> A 'Force Majeure Event' means any act beyond the reasonable control of Producer, Artist, or Purchaser which makes any performance by Artist impossible, infeasible, or unsafe (including, but not limited to, acts of God, terrorism, failure or delay of transportation, death, illness, or injury of Artist or Artist's immediate family and civil disorder. In the event of cancelation [sic] due to Force Majeure then all parties will be fully excused and there shall be no claim for damages. However, if the Artist has commenced performance prior to such cancellation, Purchaser will pay Producer the full Guarantee.

(UMF Nos. 22-23.)

Gaches invited Epstein to make edits. (UMF No. 24.) Epstein sent back revisions on August 8, 2019 that added new language to the force majeure provision. The language Epstein added is underlined: "In the event of cancelation [sic] due to Force Majeure then all parties will be fully excused and there shall be no claim for damages, and subject to the terms set forth herein, Producer shall return any deposit amount(s) (i.e., any amount paid to Producer pursuant to the Performance Agreement prior to payment of the Balance) previously received (unless otherwise agreed). However, if the Artist has commenced performance (i.e., performance at the venue)

prior to such cancellation, Purchaser will pay Producer the full Guarantee unless such cancellation is the result of Artist's death, illness, or injury, or that of its immediate family, in which case Producer shall return such applicable pro-rata portion of the Guarantee previously received unless otherwise agreed." (UMF Nos. 25-26, 28, 31-32.) Gaches accepted these changes but revised the circumstances under which the Artist would get paid the full guarantee. (UMF No. 33.) Gaches proposed replacing the provision that that the Artist would get paid in full only if the Artist had already "commenced performance" before the cancellation and replace it with a clause allowing the Artist to keep the deposit "if the Artist is otherwise ready, willing and able to perform." (UMF No. 34.) Gaches stated that the change was due to a directive from WME's head of music with regard to higher risk shows and this was "the best we can do for this one." (UMF No. 35.) Epstein agreed to this language in the Baja Rider on behalf of Baja Beach. (UMF No. 37.) Epstein later agreed on behalf of VFLA to use the language from the Baja Rider for the VFLA Rider as a starting point. (UMF No. 38.)

In March 2020, the State of California and the County and the City of Los Angeles took a series of measures to limit the spread of COVID-19 ("COVID"). (UMF No. 56.) On May 8, 2020, the City of Los Angeles informed VFLA that the festival could not proceed as originally planned because the existing "Safer at Home" order would be extended. (UMF No. 57.) Under that order, music festivals such as VFLA could not go forward. VFLA issued a statement the next day advising it could not proceed as planned due to governmental restrictions and mandates. (UMF No. 58.) After the festival was cancelled, VFLA sent WME a demand for return of all the deposits that WME held in trust. (UMF No. 61; KS-UMF No. 68.) WME, on the Artists' behalf, refused to return the deposits and this litigation followed.[3]

B. Preliminary Matters

1. Evidentiary Objections

VFLA filed evidentiary objections in opposition to the Artists' motions. Preliminarily, any relevance objections are disfavored by the Court on summary judgment. By definition, if the

[3] Other artists did elect to return the deposits and, where such an election was made, WME paid over the money to VFLA. The specific circumstances surrounding those decisions are not fully before this Court.

proffered evidence is irrelevant then it will have no part in the Court's analysis. On the other hand, if the evidence is relevant then the objection is not well taken. This is not to say that the evidence in question is in fact relevant and material to the Court's analysis. It is only to say that if it forms a part of the basis for the Court's decision, then the Court has found the evidence relevant. If not, then the objection is not material to the motions' resolution.

VFLA objected to the Meloni declaration. Objection No. 1 is made on the basis that the declaration does not comply with Code of Civil procedure section 2015.5. This is true; the Meloni declaration does not state it was made under penalty of perjury or under the laws of the State of California. And there is no substantial compliance with that requirement. Objection No. 1 is therefore SUSTAINED, although the Court notes it is an easily curable defect. The remaining Objections to the Meloni declaration are MOOT. Were the motion to stand or fall on that objection, the Court would continue the hearing to allow the defect to be cured.

As for the Arato declaration, Objection No. 3 to Exhibits S and T is OVERRULED. Nothing in those emails is being used to vary or contradict the contracts' terms, but rather to explain the ambiguity in the force majeure clause and the parties' intent. The emails are admissible. Objection No. 7 is SUSTAINED as argumentative. (Although "argumentative" is really an objection to the form of a question rather than an answer or evidence, a declaration can become so argumentative that it has lost all or much of its evidentiary value. That is the situation here. A declaration is a document used to provide evidence. It is not a "briefadavit.")

VFLA's objections regarding the purported improper use of deposition testimony for deponents that reside within 150 miles of the Court is not well taken. VFLA cites Code of Civil Procedure section 2025.620 in support, which states in relevant part that "[a]ny party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following: [¶] The deponent resides more than 150 miles from the place of the trial or other hearing." (*Id.* at subd. (c)(1).) But that is not apt here. deposition testimony is intended to be used in lieu of live testimony in summary judgment proceedings and therefore should be permitted in any situation in which the testimony would be admissible if it were presented live. Indeed, deposition testimony is also explicitly permitted as evidence to be

submitted in support of a motion for summary judgment. (See Code Civ. Proc., § 437c, subd. (b)(1) ["The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken"].)

2. VFLA's Opposing Separate Statement

VFLA's opposing separate statement seemingly includes objections to the Facts. For example, in response to UMF No. 56, VFLA stated that "[t]his fact is incomplete and thus unintelligible. It does not state whether it is referring to Exhibit T or simply making a generalized statement. It also does not identify the 'team' that was 'looped in.' " This sort of approach muddies the waters. It almost reads like an evidentiary objection, but those are not permitted in separate statements. Facts can only be disputed or undisputed. (See Code Civ. Proc., § 437c, subd. (b)(3), (5); Cal. Rules of Court, Rules 3.1350(f)(2) and 3.1354(b) ["Objections to specific evidence must be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement."].) It is also unclear if VFLA means the evidence does not support the Fact. In any event, the Court does not treat these statements as indicative of a dispute.

C. Court's Analysis and Ruling

Prior to addressing the parties' contract dispute, the Court addresses the purported "threshold" issues as identified by VFLA. Those issues are forfeiture and illegality. The Court then proceeds to its interpretation of the force majeure clause.

1. Forfeiture and Illegality

VFLA argues that if the Artists' interpretation is accepted, the force majeure clause operates as a forfeiture. VFLA (rightly) does not contend that a forfeiture is unlawful, for it is not. What VFLA does argue is that if there is any ambiguity in the contractual language, then the Court must resolve that ambiguity *against* a forfeiture. It probably comes as no surprise to the astute reader (especially if the reader has already tried to parse out the force majeure language quoted above) that the Court believes that the clause is ambiguous. If so, VFLA argues that the forfeiture rule is essentially dispositive, for it mandates that the Court engage in no other construction of the contract but rather adopt VFLA's interpretation. The keystone of this part of

VFLA's argument, of course, is that the Artists' interpretation works a forfeiture. But the Court disagrees.

" 'A forfeiture is "[t]he divestiture of property without compensation" or "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." ' (*Sutter Health, supra,* 103 Cal.App.4th at p. 877.)" (*Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1364, parallel citations omitted.) "Where there is a claim made that a forfeiture of rights under a written instrument has occurred, the burden of proof is upon the party making the point 'to show that such was the unmistakable intention of the instrument' (*Quatman v. McCray*, 128 Cal. 285); 'and that the courts tenaciously cling to the rule that forfeiture of estates and restraints upon alienations should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction' (*Stratford Co. v. Continental Mortg. Co.*, 74 Cal.App. 551)." (*Safeway Stores v. Buhlinger* (1927) 85 Cal.App. 717, 720, parallel citations omitted.) "Under California law, the characteristic feature of a penalty is the lack of a proportional relationship between the forfeiture compelled and the damages or harm that might actually flow from the failure to perform a covenant or satisfy a condition. (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977.) In other words, an unenforceable penalty 'bears no reasonable relationship to the range of actual damages the parties could have anticipated would flow' from a breach of a covenant or a failure of a condition. (*Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, 497.)" (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1358, parallel citations omitted.)

There is no forfeiture here because this is not the matter of a party failing to perform a condition under the contract. Instead, this is an event outside of everyone's control (which is, of course, a hallmark of a force majeure). Recognizing that, the parties included a force majeure provision that allocated the risk among them depending on the particular facts of the force majeure situation. Risk allocation is not equivalent to a forfeiture. "The forfeiture doctrine does not apply where there is no forfeiture. (*Hendren v. Yonash* (1966) 243 Cal.App.2d 672, 677.) 'The question in each [forfeiture] case is as to what is the contract between the parties.' (*Ibid.*) [¶] Contracts are,

by their very nature, allocations of risk and responsibility as between the parties. (See *Kanovsky v. At Your Door Self Storage* (2019) 42 Cal.App.5th 594, 598-599.)" (*Southern California School of Theology v. Claremont Graduate University* (2021) 60 Cal.App.5th 1, 9–10, parallel citations omitted, reh'g denied (Feb. 10, 2021), review denied (Apr. 28, 2021).) "*C.M. Staub Shoe Co. v. Byrne* (1915) 169 Cal. 122 is instructive. There our Supreme Court considered a lease provision for the termination of a lease if fire damaged the premises and more than 60 days were required for repair. After a fire occurred, the tenant desired to remain in possession, claiming the property could be repaired within 60 days. The landlord disagreed and seized the property. In holding for the landlord, the court explained, '[T]he . . . clause makes entirely reasonable provision for the various contingencies that might result in case of fire or other injury to the building or premises. There is here no basis for applying the rule of strict interpretation against conditions involving forfeiture. [Citation.] The clause terminating the lease in certain contingencies does not declare a forfeiture. It fixes events, having no relation to any act or default of the parties, upon which it is agreed that the lease shall end.' (*Id.* at p. 129.)" (*11382 Beach Partnership v. Libaw* (1999) 70 Cal.App.4th 212, 217–218.)

More tellingly, case law requires that a forfeiture must be clear from the contract's language alone. But VFLA's argument for a forfeiture is dependent on the facts at bar and examples used. VFLA argues that there is a forfeiture here because it is forced to give up the entire guarantee even though performance was impossible and therefore it got nothing of value from the guarantee. (The Artists disagree, claiming that VFLA did get something of value. For purposes of this analysis, the Court will assume, without deciding, that VFLA got nothing.) But that interpretation is dependent on the facts. The forfeiture aspect is not readily apparent based on the plain language of the contract and so this argument lacks merit.

Illustrations are readily imaginable. While the COVID pandemic was nationwide, not all force majeure events would have such scope. For example, were the event to be more localized—say, a fire—the situation could be entirely different. The Artist might well have foregone other opportunities due to its contractual commitment to VFLA and it could well be impossible for the Artist to rebook if the fire was in close proximity (timewise) to the event. Under those

circumstances, it would make perfect sense for the parties to agree that the Artist could retain the money. The point is that the clause either is a forfeiture clause, or it is not. It cannot be a forfeiture clause in some factual scenarios and not in others such that the singular clause's meaning will differ depending on the circumstances surrounding its trigger. The contract's meaning must be the same for all cases. Of course, the outcome may well vary depending on the fact; but the words must mean the same thing irrespective of the facts giving rise to the force majeure.

The illegality argument is also not dispositive. VFLA asserts that construing the agreements as the Artists argue would result in the contract having an unlawful object. The main purpose of the agreements, it contends, was the Artists' performance, which VFLA says was rendered illegal by various COVID-related orders. The argument fails. It is black letter law that "if the contract was valid when made, no subsequent act of the legislature can render it invalid." (*Stephens v. Southern Pac. Co.* (1895) 109 Cal. 86, 95.) "The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed." (Civ. Code, § 1596.) VFLA presents no evidence indicating that the aim of these contracts was illegal when made and of course there is none. It was only after the COVID restrictions were in place, well after the contracts were executed, that the contract's object was in doubt.

Of course, VFLA is correct that if enforcement of the contract required a party to perform an illegal act, the contract could not be performed even if the act's illegality post-dated the contract's origination. Thus, for example, a contract to buy a handgun could not be enforced if new legislation was enacted making such a purchase illegal. The problem with VFLA's argument is that there is nothing in the force majeure clause that requires an illegal act. It does not require the Artists to perform during COVID (the illegal act); it only determines who keeps the money due to the performance's cancellation. The clause merely allocates the risk as among the various parties. Having the Artists return the money is not illegal, but neither is allowing the Artists to retain it.

Thus, the Court does not find VFLA's arguments related to illegality and forfeiture to be compelling. The focus now shifts to the parties' interpretations of the force majeure clause.

2. Contract Interpretation

The parties (unsurprisingly, or we wouldn't be here) have differing interpretations of the force majeure provision in the contracts and whether the clause requires a return of the deposit. As the Court made clear at the hearing, the clause at issue is ambiguous. Both parties have introduced parol evidence. The Court has considered much of the evidence introduced. The Court has not, however, considered any evidence in which a declarant sets forth his understanding of the clause's meaning bereft of any supporting communications. A party's unarticulated unilateral understanding of a contractual term is inadmissible, and the Court has disregarded all such testimony. As to parol evidence more generally, the Court walks a well-trod path.

"When the meaning of the words used in a contract is disputed, the trial court engages in a three-step process. First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. (*Pacific Gas & Electric, supra,* 69 Cal.2d at p. 37; *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.) If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. (*Pacific Gas & Electric,* at pp. 39–40; *Wolf II, supra,* 114 Cal.App.4th at pp. 1350–1351.) When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. (*City of Hope Nat. Medical Center v. Genentech, Inc.* (Apr. 24, 2008, S129463) 43 Cal.4th 375, 395 [interpretation of written instrument solely a judicial function 'when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence']; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865–866.) This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439; *Parsons*, at p. 866, fn. 2) or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. (*Parsons,* at p. 865; *New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1483.) If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury. (*City of Hope Nat. Medical Center,* at p. 395 ['when, as here, ascertaining the intent of the parties at the time

the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury']; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291 [it is a ' "judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence"']; *Pacific Gas & Electric,* at pp. 39–40 [same].)" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126–1127, parallel citations and internal footnote omitted.)[4]

Here, the parties agree on the meaning of the force majeure clause's first and second sentences, neither of which is particularly difficult to understand or interpret. The first sentence defines force majeure events and provides examples. Everyone agrees that the cancellation due to COVID constitutes a force majeure event.

The second sentence describes what will happen if a force majeure event occurs and states that the parties are excused from performance; at that point, there would be no payment for the Artist because the guarantee would be returned. Again, that sentence seems clear enough. The problem lies in the third sentence, which consists of two parts.

The sentence reads (again): "However, if the Artist is otherwise ready, willing, and able to perform [VFLA] will pay [the Artist] the [money] unless such cancellation is the result of Artist's death, illness, or injury, or that of its immediate family, in which case [the Artist] shall return" the money.[5] In the briefing, each party resorted to principles of grammar to bolster its respective position. Thus, VFLA argues that the word "However" signaled an exception to the

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[4] As an initial matter, the Court and the parties had extensive discussion concerning the Court's authority during oral argument. The bottom line is that because contract interpretation is for the Court (and doubly so here where the parties have waived a jury), the Court can choose from conflicting inferences even on summary judgment. However, if the inference to be used depends on the resolution of factual disputes concerning the parol evidence, then resolution must await trial.

Thus, the fact that the Court relies to some degree on parol evidence does not mean that summary judgment is defeated. It does not. Where the parol evidence is not in factual dispute, summary judgment is appropriate. For example, in this case it is not disputed that Gaches and Epstein exchanged various emails, nor is it disputed what those emails said. As such, to the extent that those emails inform or even drive the Court's conclusion, summary judgment is appropriate. If, on the other hand, there were a factual debate as to Gaches' or Epstein's authority, or if the exchange were oral and what was said was unclear, then summary judgment could not be granted for either party, at least if the interpretation turned on the resolution of that dispute.

[5] The Court has used bracketed language for simplicity's sake; no substantive difference is intended.

rule set forth in the prior sentence, but that in contrast, the word "otherwise" was not sentence-spanning and did not refer to the prior sentence. The Artists argued that "otherwise" meant "in all other respects," as in "the ending was terrible but otherwise the play was a masterpiece" or "the appetizer was mediocre but otherwise the meal was outstanding," or (famously) "otherwise, Mrs. Lincoln, how was the play?" Thus, the Artists noted that in this context, "otherwise" meant to signal an exception to the more general proposition. VFLA initially suggested that "otherwise" meant something more akin to the opposite of, or an alternative to, such as "resign now, otherwise you will be fired," or "apologize, otherwise I will never forgive you." However, by the point of its reply brief, VFLA seems to have come around to something more akin to the Artists' interpretation.

VFLA also initially chided the Artists for suggesting that "otherwise" meant something like "but for." In other words, VFLA contended that the Artists required that "otherwise" be meant to suggest that the Court had to posit a hypothetical world (that is, a world without COVID). However, as it really turns out, both sides require "otherwise" to mean some sort of hypothetical world. The Artists suggest that it means as if there were no force majeure event; VFLA suggests that it means if there were no cancellation. Both interpretations require some hypothesizing by the Court, and both imagine an alternate reality. Grammar (sadly) does not really answer the question.

The nub of the dispute is this. VFLA argues that the first part of the third sentence posits a situation where had VFLA not cancelled the event, the Artist would have appeared and performed. The Artists, in contrast, contend that the first part of the third sentence posits a situation where had VFLA not had to cancel the event by dint of the force majeure, the Artist would have performed. In other words, the Artists' interpretation suggests that "otherwise" means "in the absence of," while VFLA suggests that it means something closer to "in spite of." The difference is a bit subtle, but quite significant. In the instant case, VFLA's interpretation is that the Court must ask whether, if VFLA had not cancelled the event, the Artists would have performed (something they might have done had the government not made it illegal but could not do given the governmental mandate); under the Artists' interpretation, the Court must ask

whether, if there had been no COVID pandemic, the Artists would have performed (something that certainly would have happened, at least on this record).

VFLA contends that its reading is the more natural of the two, and more logically allocates the fault. Thus, according to VFLA, where the cancellation decision is that of VFLA alone and where the Artist would have performed but for that cancellation, then the decision was VFLA's to make and it stands to reason that VFLA will have to bear the financial consequences. And that gives some heft to the "ready, willing, and able" clause, since, according to VFLA, that clause makes it clear that the cancellation was VFLA's decision alone and not a mutual one. On the other hand, where the cancellation is not VFLA's choice (as VFLA contends is the case here), then VFLA ought not be compelled to bear the financial burden. Here, VFLA had no choice but to cancel as there was a governmental directive that it do so. And the Artists plainly were not ready, willing, and able to perform, VFLA contends, because doing so would have been illegal given the governmental performance ban and they would have been arrested. Where that is the case, there is really no fault by VFLA and VFLA was powerless to affect the outcome; consequently, VFLA contends that it ought not bear the financial consequences as a matter of fairness and expectation, and its interpretation of the contract comports with that result, making it the stronger of the two.

The Artists take a different view. They note that the cancellation must be "due to Force Majeure" per the second sentence, and that is why "otherwise" must mean *but for* the force majeure event. If there is a cancellation due to force majeure, the Artists contend, then the question is whether but for the force majeure (which, after all, caused the cancellation), the Artists would have performed. If not, then the force majeure would not give the Artist a windfall. For example, if the Artist was going to cancel anyway due to some conflicting better engagement, the happenstance of the force majeure event should not result in a windfall to the Artist. On the other hand, where the force majeure is the only reason for the cancellation and hence the non-performance, then the contract simply allocates the risk to VFLA. However, at least from the Court's perspective, protecting against a long-shot windfall, while perhaps proper, is not the

provision's easiest reading. It seems that there are far better ways to protect against that very strange circumstance than to write the clause this way.

At bottom, neither side's interpretation is inherently flawed, nor is it inherently compelling. The Court must therefore look beyond the first part of the third sentence.

One principal principle of contract interpretation is that one reads the contract as a whole, and that certainly applies to the whole of the third sentence. (See Civ. Code, § 1641.) Another is that contracts should be interpreted to avoid surplusage. (*City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71.) To that end, the Court asked each party to posit a situation where its interpretation would not render the second part of the third sentence superfluous. To recap, the second part of that sentence is an "exception to the exception." (The "rule" is in the second sentence—in the event of a force majeure, VFLA gets the money back. The exception is in the first part of the third sentence—except where the Artist is otherwise ready, willing, and able to perform, in which case the Artist gets to keep the money. The exception to the exception is the final part of the third sentence—except where the cancellation is due to the Artist's or member of Artist's family's death, illness, or injury, in which case VFLA gets the money.) Neither party had a truly great answer to this question, but at least the Artists had an answer that fit; VFLA really did not.

The Artists gave, as an example, a situation where the force majeure was an illness in the family. Where an Artist's family member was ill, that would constitute a force majeure as the first sentence defines a force majeure as including the "death, illness, or injury of Artist or Artist's immediate family." Because that is a force majeure event and assuming that the Artist cancelled due to that illness the "rule" would be that VFLA would get the money back. On the other hand, but for that illness, the Artist would have performed, so the "exception" would apply and the Artist would get to keep the money. But because the cancellation was due to the illness of an immediate family member, the exception to the exception would apply, and VFLA would get the money in the end. Note that the second clause of the third sentence goes outside the "but for" or even the "in spite of" hypothetical world. It goes back to the reality of the situation. If the force majeure is related to the Artist's (or the Artist's immediate family's) death, illness, or injury, then

VFLA gets the money. This is because the test for that clause is whether the "cancellation is the result of" such a death, illness, or injury and in this hypothetical, it was.

VFLA had a harder time of it. In the above example, VFLA would read the first part of the second sentence as being one where the Artist cancelled, but under that circumstance, the Artist was (by definition) not ready, willing, or able to perform. In other words, the odd part of this language is that the force majeure provision does not speak of cancellation of the event—it just speaks of a force majeure event that makes performance "impossible, infeasible, or unsafe," and thus the cancellation can be either by VFLA (cancelling the entire festival or the Artist's performance) or by the Artist. VFLA did claim that it had some examples where the exception to the exception had effect, but the Court ultimately did not find that any of those examples really called that clause into play or where the result could turn on that clause. In that way, VFLA's interpretation seems to the Court to render the final clause of the third sentence surplusage.

VFLA did suggest a hypothetical where there was an earthquake in California. In one iteration, there was significant damage to the City, but the specific VFLA venue was still in operation; in the contrasting iteration, the VFLA venue was destroyed. In the first example, if VFLA cancelled on the theory that while its specific venue was operational, the situation simply made a music festival a bad idea, then the test would be whether the Artist was ready, willing, and able to come and perform anyway. That would depend, perhaps, on the Artist's predilections, the ability to find transportation to Los Angeles and to the VFLA venue (in the hypothetical world where the event had not been cancelled), and the like. If the Artist was able to overcome those obstacles and was ready, willing, and able to perform, then the Artist could (according to VFLA) keep the money notwithstanding VFLA's cancellation. In the latter example, where the festival's venue was destroyed, then the Artist would not be ready, willing, and able to perform because there would be nowhere to perform (thus making the Artist "unable" to perform). That is an interesting hypothetical, and the Court appreciates that VFLA had found examples where the specific facts of the force majeure would lead to different results depending on circumstances and where it is not almost always a foregone conclusion that the Artist gets to keep the money if the

Artist is not the party cancelling the performance. However, VFLA's example would not implicate the second clause of the third sentence.

Given the ambiguity in the contract's language, the Court looks to the parol evidence illuminating how the clause came to be. The original force majeure clause was relatively straightforward and favored the promoter. It stated that in the event of a force majeure, the promoter would be entitled to the money unless the artist had already begun to perform. Epstein then modified the clause to create a substantive exception where the force majeure cancellation was due to the artist's (or the artist's immediate family's) death, illness, or injury. However, Gaches then modified the clause to become more Artist-friendly. Rather than limit the Artist's recovery to situations where she had already started performing, she could retain the money so long as she was "otherwise ready, willing, and able to perform." And that change was accompanied by an explanation from Gaches that it was more Artist-friendly for higher risk shows. (While the term "higher risk shows" has not been defined, it is not hard to interpret the phrase as differentiating between shows or festivals that are less well established.) That change, in context, lends support to the Artists' position here. Rather than require the Artist to have started the actual performance, so long as she would otherwise have done so she could keep the money. Gaches' change was more temporal than substantive in nature: rather than require that the Artist actually have started the performance, so long as the Artist would otherwise have done so it would be enough. This temporal change lends support to the Artists' claim that "otherwise" means, essentially, but for the force majeure event itself, rather than in spite of that event. This is because if the artist had already started to perform, then by definition the artist was ready, willing, and able to do so *but for the force majeure event*.

The other thing that strikes the Court as somewhat meaningful is that the clause speaks of cancellation, but not cancellation of the event. It is the cancellation of the performance, meaning that either side could cancel. Like virtually all of the other evidence in this case, that could be argued both ways. But in the Court's view, the stronger argument favors the Artists' position. The force majeure definition encompasses things that cancel the entire event and also things that cancel a single artist's performance. Because both constitute a force majeure, the exception to

the exception has some parallel structure to it. Thus, where the force majeure is more broad-based such that it would cause a cancellation of the entire music festival, the Artist is able to retain the money. But where it is Artist-centric, such as an illness, VFLA gets the money. In that way, the exception to the exception harkens back to the different kinds of force majeure defined in the first sentence and a pleasing parallelism emerges. No question but that this argument is not perfect. A delay in transportation is (or could be) Artist-centric yet it would appear that a transportation-related force majeure might still work in the Artists' favor under the Artists' interpretation. But even so, there is some draw to the symmetry.

Of course, none of this is certain. The words are susceptible to either VFLA's or the Artists' interpretation. However, the clause's history and its exception to the exception to the rule structure favor the Artists' interpretation over that of VFLA. On balance, the Court believes that the Artists have the better and stronger interpretation, although the matter is not certain.

There is other parol evidence, but the Court does not find it terribly helpful or persuasive. There was an email exchange in which it was suggested outright that the Artist would retain the money in the event of a force majeure or cancellation for inclement weather. A VFLA representative (but not Epstein) purported to agree, but the person doing so was not the negotiator and the purported agreement lacked anything that resembled formality. Epstein, who eventually responded to the email, stated that he would comment on the particulars of the note (which had a number of points), although he never did (at least to this aspect). The part about inclement weather did find its way into the agreement, and clearly, but the force majeure plain language never did. That history is ambiguous at best. One could draw inferences either way and ultimately this history adds nothing meaningful to the picture. There is also evidence that other WME contracts did use "but for" language. Again, however, that is of little value. There is no evidence in the record suggesting that anyone compared the alternative language and made some form of conscious decision as to which to use. Rather, it appears that the Baja Beach Rider was near at hand and recently negotiated by the same individuals, so the parties used it as the template. There is also evidence that some artists with similar or identical contracts returned the money. However, without knowing far more of the circumstances, that means little. There are a host of reasons why

a particular artist might so choose: a desire to avoid litigation, an effort to be in a good position if the festival is rescheduled, a personal view that it might be unfair to keep the money. These are all possibilities. But none is in the record definitively and without some far more concrete showing, the fact that some performers elected to fight rather than concede does not affect the outcome here.

In short, the other avenues of parol evidence essentially petered out. The Court is left with the clause's history, the "natural" reading, and the desire to avoid surplusage and give the entire provision a unified and consistent meaning. (There is some argument that the ambiguity should be resolved against the drafter. But that is a rule of last resort and followed more in the breach than in actuality. Further, this particular clause seems to have both parties' fingerprints on it.) On overall balance, the Court believes that the Artists have the better of it.

Because the Court does not rely on any dispute in the evidence, the Court suspects that its ruling will be reviewed de novo. (See *Wolf, supra,* 162 Cal.App.4th at p. 1134.) Thus, this would appear to be only the first stop on the parties' journey to resolution. Even so, the Court believes that the inference it draws is most consistent with the clause's overall structure and the bargaining history.

Because the clause, as the Court interprets it, means that each Artist is entitled to the money so long as she is ready, willing, and able to perform had there been no "cancellation due to Force Majeure," the Artists' motion for summary judgment is GRANTED and VFLA's motion is DENIED.

II. WME's Motion

At oral argument, the Court asked whether there is anything left of VFLA's case against WME if the Court grants summary judgment in the Artists' favor. VFLA candidly agreed that in that event its case against WME must fail as well. Accordingly, the Court need not address WME's motion for summary judgment. The Court does so anyway in the event that an appellate tribunal reaches a different conclusion as to the Artists' and VFLA's cross-motions.

A. Facts and Relevant Procedural History

According to the undisputed material facts, VFLA entered into separate contracts with the Artist defendants in connection with the contemplated respective performances of Lizzo, Kali Uchis, and Ellie Goulding at the upcoming Virgin Fest in Los Angeles. (UMF Nos. 1-3.)[6] Each of these agreements contained a "Role of Agent" provision, which stated as follows: "William Morris Endeavor Entertainment, LLC acts only as agent for Producer and assumes no liability hereunder and in furtherance thereof and for the benefit of William Morris Endeavor Entertainment, LLC, it is agreed that neither Purchaser nor Producer/Artist will name or join William Morris Endeavor Entertainment, LLC . . . as a party in any civil action or suit anywhere in the world, arising out of, in connection with, or related to any acts of commission or omission pursuant to or in connection with this Agreement by either Purchaser or Producer/Artist." (DMF No. 5.)[7] Each agreement further specified that VFLA shall pay certain specified amounts to the Artists' agent, WME; VFLA wired those sums, which were then held by WME. (DMF Nos. 14, 17-18, 21-22, 24-25.)[8]

The agreements incorporate the VFLA Riders, and in footnote 1, the VFLA Rider provides that the deposits are "non-refundable, except in instances specifically set out herein." (UMF No. 36.) As discussed above, each agreement contains the "Excused Performance" provision, which (again, for ease of reference) states:

> A 'Force Majeure Event' means any act beyond the reasonable control of Producer, Artist, or Purchaser which makes any performance by Artist impossible, infeasible, or unsafe (including, but not limited to, acts of God, terrorism, failure or delay of

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[6] References to "UMF" refer to the undisputed material facts as contained in VFLA's opposing separate statement. The Court notes that VFLA also inserts "Objections" to these Facts. This is improper for the same reasons previously discussed in connection with the Artists' and VFLA's cross-motions.

[7] References to "DMF" are to disputed material facts. Though the Court cites to DMFs here in its recitation of the undisputed evidence, it does so only to the extent the DMF at issue sometimes contain undisputed facts. For example, in DMF No. 5, VFLA does not dispute that each agreement contained the Role of Agent provision. It only disputes any implication that WME cannot be sued for its own conduct or that WME is not a party who claims an interest in the deposits/funds. The Court appreciates VFLA's separation between the undisputed and disputed portions of certain Facts.

[8] The Court interchangeably refers to the amounts paid to the Artists to secure their performance at the Virgin Fest as "deposits," "funds," and "guarantees." The Court does not intend for any legal significance to be attached to any of these terms.

> transportation, death, illness, or injury of Artist or Artist's immediate family (e.g. spouses, siblings, children, parents), and civil disorder). In the event of cancelation due to Force Majeure then all parties will be fully excused and there shall be no claim for damages, and subject to the terms set forth herein, Producer shall return any deposit amount(s) (i.e., any amount paid to Producer pursuant to the Performance Contract prior to payment of the Balance) previously received (unless otherwise agreed). However, if the Artist is otherwise ready, willing, and able to perform Purchaser will pay Producer the full Guarantee unless such cancellation is the result of Artist's death, illness, or injury, or that of its immediate family, in which case Producer shall return such applicable pro-rata portion of the Guarantee previously received unless otherwise agreed.

(DMF No. 38.)

The Virgin Fest was cancelled due to COVID, and VFLA demanded a return of the funds it paid into the WME trust account for the Artists' performance. (UMF Nos. 42, 45.) The deposits used to secure the Artists' performance were not returned. (DMF No. 54.)

B. Preliminary Matters

1. Request for Judicial Notice

In opposition, VFLA requests judicial notice of COVID-related government orders, proclamations, and more issued in the months after COVID. The request is GRANTED in its entirety. (See Evid. Code, § 452, subds. (b)-(c), (h).)

2. Evidentiary Objections

VFLA filed 32 pages of evidentiary objections in opposition. The Court has reviewed the Objections and does not believe it needs to rule on them individually. The Court reminds VFLA of our Supreme Court's statement in *Reid v. Google* (2010) 50 Cal.4th 512, 532-533 that only meritorious objections should be raised and that objections should only be to evidence that makes a difference. Here, a number of the objections do not meet that standard and constitute the "'blunderbuss objections to virtually every item of evidence'" that the *Reid* Court explicitly warned against. To the extent that some objections have merit, they are lost within the pages of other objections. For example, VFLA objects to the depositions of Marc Geiger, Josh Kurfirst, and Kevin Shivers, claiming that WME cannot use their depositions because they each live within

150 miles of the Court. As discussed previously, these objections lack merit and are the types of objections that clutter VFLA's presentation.

Thus, the Court DECLINES to rule on VFLA's evidentiary objections individually. With that said, that does not mean that all of WME's evidence is properly before the Court. Where certain evidence is inadmissible, the Court has not considered it.

WME filed its own evidentiary objections in reply. The relevance objections are DISREGARDED for the reasons previously discussed. WME's objections to the Felts declaration are OVERRULED. Felts is attesting to events he experienced as plaintiff's CEO. Exhibit D to his declaration is not being used to establish the truth of the matters asserted, but to establish that a demand letter was sent. The objections to the Epstein declaration are similarly OVERRULED. In paragraph 8, Epstein provides his view of negotiations and what his understanding was of the communications. (That said, as set forth above, a party's unarticulated unilateral understanding of a contractual term is inadmissible to prove the term's meaning and is disregarded by the Court.) Except for one sentence, paragraph 13 does not include a legal conclusion but rather an explanation of what *did not* occur during contract negotiations. The statement "I never agreed to any such interpretation or construction of the 'Excused Performance' provision[]" is a little more difficult. Ultimately, the Court does not believe this is a legal conclusion or opinion, but a statement of Epstein's acts. The same analysis applies to paragraph 15 and paragraph 16. Epstein's explanation of the industry usage of the words "flat guarantee" and "guarantee" in paragraph 16 is not improper. To the extent that these are terms of art, it is proper to have one "in the know" describe their meaning. At the end of the day, though, this evidence is not dispositive.

The objections to portions of the Geller declaration are OVERRULED, except to paragraph 17, Exhibit R, page 168:5-21. There is no page 168 attached to the deposition transcript in Exhibit R. To the extent plaintiff meant page 269:5-21, the objection is OVERRULED.

The first objection to the Chau declaration is OVERRULED. Kurfist's statement is not an improper legal conclusion nor is it speculative, but rather is explanatory of the meaning of a "pay-or-play" contract. The objection to paragraph 6 and page 182:7-11 of Exhibit D is

OVERRULED. Geiger is testifying to his personal knowledge. The other objection to page 103:3-9 of Exhibit D is DISREGARDED. There is no page 103 attached to Exhibit D. To the extent the objection is to Exhibit E, the objection fails for the same reasons. The objection to paragraph 8 and page 182:21-24 of Exhibit F is OVERRULED as Shivers was testifying to matters within his personal knowledge. WME's final objection is aimed at paragraph 10 and page 61:1-16 of Exhibit H. There is no hearsay involved. Felts is not reiterating the conversation for the truth of the matter asserted (i.e., a concert in Los Angeles is a bad idea) but to recount that the conversation actually happened and certain concerns were relayed to him. Any remaining objections that have not been discussed are OVERRULED.

The Court notes, however, that while it has set forth a number of evidentiary rulings, the beating heart of the Court's analysis does not depend on the resolution of those objections. For future reference, the parties would be well served by limiting their objections to those that are truly important, meaning that the motion's outcome at least could turn on whether the evidence is admitted or excluded.

3. Reply Separate Statement

WME filed a separate statement in reply. Code of Civil Procedure section 437c does not authorize a "reply separate statement" to be filed by any party. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) The filing is unauthorized and DISREGARDED.

C. The Court's Analysis and Ruling

WME moves for summary judgment or, in the alternative, summary adjudication of the four claims stated against it and VFLA's request for punitive damages. The causes of action as stated against WME are the first cause of action for conversion, second cause of action for money had and received, third cause of action for violation of the UCL, and fourth cause of action for declaratory relief. Though WME raises multiple arguments, one is determinative: WME argues that as an agent, it cannot under these circumstances be liable for the acts of its principals, the Artists.

WME points to the "Role of Agent" clause in the agreements as defining its role in this dispute. According to WME, that clause makes clear that any decision as to refunding the

guarantees lies with the Artists. (DMF Nos. 48-54.) As quoted above, the Role of Agent provision states as follows: "William Morris Endeavor Entertainment, LLC acts only as agent for Producer and assumes no liability hereunder and in furtherance thereof and for the benefit of William Morris Endeavor Entertainment, LLC, it is agreed that neither Purchaser nor Producer/Artist will name or join William Morris Endeavor Entertainment, LLC . . . a party in any civil action or suit anywhere in the world, arising out of, in connection with, or related to any acts of commission or omission pursuant to or in connection with this Agreement by either Purchaser or Producer/Artist." (DMF No. 5.) As WME notes, the FAC makes clear that the acts at issue in the conversion, money had and received, violation of the UCL, and declaratory relief claims are all acts arising out of or in connection with the various agreements. Thus, the Role of Agent clause applies on its face.

Perhaps the best example of the Role of Agent clause's applicability is in connection with the conversion claim. That is the cause of action that comes closest to escaping the Role of Agent clause and, as discussed below, Civil Code section 2343. In that claim, VFLA alleges that WME is liable for conversion because WME refused to comply with "VFLA's rightful demand" for the return of the deposits. (FAC, ¶49.) VFLA contends this constitutes wrongful dominion over VFLA's property. (*Id.* at ¶49(A).) VFLA further asserts that WME chose not to return the deposits itself, and that act in and of its was wrongful. (*Ibid.*)

One of the requirements for a conversion claim is that the defendant acted wrongfully or dispossessed the plaintiff of its property rights. "The elements of a claim for conversion are (1) '"the plaintiff's ownership or right to possession of the property at the time of the conversion,"' (2) '"the defendant's conversion by a wrongful act or disposition of property rights,"' and (3) damages." (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1135, citing *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451.) WME starts with an argument based on Civil Code section 2343 and that is a good place to start. As WME notes, it cannot be liable for its acts at the direction of its principal per Civil Code section 2343.[9]

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[9] The Court focuses its discussion on Civil Code section 2343 because the Role of Agent clause takes direction from that statute. Per the Role of Agent clause, WME is acting only as an agent for the Artists and is not responsible for

It is broadly accepted that an agent is not liable to third parties except where he or she consents that credit be personally given to him or her in a transaction; where he or she enters into a written contract in the name of the principal without good faith belief in their authority to do so; or his or her acts are independently "wrongful in their nature." (Civ. Code, § 2343.) VFLA only pleads the latter option here. (See FAC, ¶49(A).) For purposes of section 2343, "wrongful" acts are those that constitute independent torts. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 693-694.) "Based on *Kurtin*, *Shafer*, and the way 'wrong' and 'wrongful' are used in other contexts, we conclude 'acts are wrongful in their nature' for purposes of Civil Code section 2343 when they constitute an independent tort, such as the tort of negligent undertaking. Under this interpretation of Civil Code section 2343, agents are protected from vicarious liability for the torts of their principals, but are held responsible for their own actions that constitute a tort, such as the negligent undertaking tort recognized in California." (*Id.* at p. 693.)

WME contends there is no such independently wrongful act here because the Artists made the decision not to return the money and it only acted per their direction. (DMF Nos. 48-51.) WME notes that this is in contrast to other WME artists who directed WME to return the deposits, which it then did. (DMF No. 54.) This, WME insists, demonstrates that there is no independently wrongful act but rather compliance with the direction of its principals (and the contractual language). This argument is sufficient to shift the burden for all the causes of action (though the Court is only focusing on the conversion claim).

In opposition, VFLA stresses that conversion is a strict liability tort. It claims that all that matters is what WME did, not what the Artists directed WME to do. It then cites *Peredia* for the proposition that an agent acting under the authority of a principal is still liable for its own tortious conduct. VFLA is correct as far as statements of black-letter law go. An agent is responsible for its own tortious conduct. If an agent's principal directed the agent to make a knowingly defamatory statement about a third party, for example, the agent could not escape liability with

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any acts or omissions taken by VFLA or the Artists in connection with the agreements. (DMF No. 6.) Stated differently, WME, as an agent, is not vicariously liable for the acts of its principals, the Artists (or VFLA) in connection with the agreements. That is similar to the essence of Civil Code section 2343, which generally establishes only discrete situations where the agent may be liable.

"the principal told me to do it" defense. The logic there, though, is that the agent's actions are independently wrongful; one need not look at the principal's conduct to figure that out. But VFLA does not establish that WME committed its own tort. The predicate basis of VFLA's conversion claim against WME concerns the failure to abide by the terms of the force majeure provision in the agreements and to return the guarantees. (FAC, ¶49.) These are acts that concern the agreements and their interpretation. At the end of the day, this is nonfeasance, i.e., the failure to act, predicated on direction from the principals (the Artists). There is no independent tort pled or proved. The situation might be different if WME refused to return the money even though the Artists directed that the money be returned, for then WME would be usurping the principal's role, not following the principal's directives. But there is no such evidence here.[10]

VFLA equates the lack of intent requirement in conversion as *precluding* application of Civil Code section 2343 in conversion claims. That is not the law and VFLA cites no law stating as much. It is worth emphasizing that there is no dispute that the parties agreed that WME was acting as the Artists' agent in connection with the agreements and the parties agreed WME would not be liable for any acts or omissions in connection with the agreements. (DMF No. 6 [partially undisputed as to "Role of Agent" clause].) VFLA's claims fall into the ambit of the clause. As a result, VFLA must overcome section 2343 in order to hold WME, *as the agent*, liable for the Artists' acts. Whether per section 2343 or the Role of Agent clause, VFLA's argument fails. It presents no case holding that an agent acting in the scope of its agency can be vicariously liable for the principal's conversion *without* a qualifying act under section 2343.

VFLA then argues in the alternative that it has established independently wrongful acts: "Although not required to prove conversion, the evidence establishes WME engaged in wrongful conduct when it interfered with VFLA's possessory interests in its Deposits — separate and

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[10] VFLA notes that the evidence establishes that the Artists were hardly exercising independent judgment in deciding whether the force majeure clause required them to pay the deposits back to VFLA. The evidence largely establishes that the Artists themselves were not familiar with the force majeure clause, let alone its intricacies or history. And the same is true of the Artists' advisors (outside of WME). It is probably fair to say that the Artists took their cue from WME and were following WME's advice—perhaps without exercising much independent thought or judgment—in deciding not to return the money. That might well establish that WME had significant influence and was hardly a mere bystander following the directives given independently by the Artists. But even so it does not detract from the main point that the Artists were free to disregard WME's advice (and at least some performers did so); they were the principals, not WME.

independent of its substantial interference by failing to return the Deposits after it demanded their return." (Opp., p. 22:18-21.) This is circular. WME's allegedly independently wrongful act in the conversion claim is conversion.[11] But that is insufficient under *Peredia*. The agent must have committed an independent tort; the tort has to be independent of the principals' tort. Here, they are allegedly one and the same.

As if to emphasize the "wrongfulness" of WME's acts, VFLA goes on to emphasize that WME influenced the Artists' decision based on its own financial interest in the deposits. WME was also allegedly not happy with VFLA for proceeding with the festival after being counseled not to do so by WME. (AMF No. 132.)[12] But all of these go to intent, which VFLA itself previously emphasized is irrelevant to conversion. " 'The foundation of the [conversion] action rests neither in the knowledge nor the intent of the defendant.'" (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208, citing *Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387.) Further, it is unclear how "influencing" is an independent tort. In other words, even assuming as true that WME advised the Artists that they need not return the money, that is no more than providing advice, and advising a party as to a contract's meaning (at least where the contract is—as discussed above—reasonably susceptible to the meaning advanced) is simply not a tort.

Thus, VFLA does not identify any independently wrongful act, as described by *Peredia*, for which WME can be liable, that implicates the violation of a *duty owed to VFLA*, like fraud or negligent undertaking. (See *Peredia, supra,* 25 Cal.App.5th at p. 694; see also, *Mears, supra,* 97 Cal.App.2d at pp. 491-492 [agent not liable to third parties for conversion due to nonfeasance, i.e., failure to perform duty owed by agent to the principal].) When VFLA's claim is stripped to

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[11] VFLA further claims that "[w]hen WME chose not to comply with VFLA's demand for the return of the Deposits, that necessarily was a decision WME made for itself because, as the holder of the property, the law required WME to make that decision for itself." (Opp., p. 21:25-27.) The law is more nuanced than that when it comes to an agent's failure to act (i.e., nonfeasance). An agent is not liable for the delay or refusal to transfer something (even when that refusal is wrongful) because that is the tort of the principal and the agent's refusal sounds in nonfeasance. (*Mears v. Crocker First Nat. Bank of San Francisco* (1950) 97 Cal.App.2d 482, 491-492.) However, where the agent commits a separate tort (i.e., misfeasance) per section 2343, then the agent is liable for its own tort. Here, VFLA's circular argument indicates the problem with its position: there is no separate tort.

[12] References to "AMF" are to VFLA's additional material facts in its opposing separate statement.

its essentials, the only tort identified is the Artists' failure to authorize a release the funds back to VFLA. In seeking to hold WME vicariously liable for the torts of its principals, VFLA runs afoul of section 2343 (and the Role of Agent clause) and fails to overcome it. Thus, the motion for summary adjudication is GRANTED as to the first cause of action for conversion. (See *Peredia, supra,* 25 Cal.App.5th at p. 693 ["Under this interpretation of Civil Code section 2343, agents are protected from vicarious liability for the torts of their principals, but are held responsible for their own actions that constitute a tort"].)

And even if section 2343 provided no absolute shield, the contract would. Parties can contract to absolve themselves of many future torts. Indeed, negligence waivers in contracts have become ubiquitous. The Role of Agent clause is just such an example. WME and VFLA agreed that WME could not be sued for certain things, which included what is really a dispute between the Artist and VFLA. It takes no great elasticity of imagination to see that the center of this dispute is between VFLA and the Artists; WME is holding the money and is essentially caught in the middle. Thus, even as to conversion, the Role of Agent clause would protect WME under these circumstances. Make no mistake; there are limits to exculpation clauses. Parties generally cannot contract around future intentional torts, for example. But one of VFLA's major points here is that conversion need not be an intentional tort. It can be strict liability, and that is really the fairest description of the situation here. WME was holding the money; if it released the money to VFLA, it would face suit by its clients; if it released the money to the Artists (and took its fee), it would face suit by VFLA. What it did was to hold the money. (At one point, VFLA suggested that WME took some of the money for its own use, but there is no evidence of that.) True, it might have been wiser for WME to have interpleaded the money into Court or placed the money into an independent escrow account. But at least it is unclear that interpleader is available where the interpleader has an interest in the funds (and it seems here as though WME's fee is part of the deposits). (See *Pacific Loan Management Corp. v. Superior Court* (1987) 196 Cal.App.3d 1485, 1489–1490 ["The true test of suitability for interpleader is the stakeholder's disavowal of interest in the property sought to be interpleaded, coupled with the perceived ability of the court to resolve the entire controversy as to entitlement to that property without need for the stakeholder to be a

party to the suit"].) In any event, while interpleader or escrow might have been helpful, the Court is not aware of any legal obligation to so act under these circumstances.

The same conclusion follows for most of the remaining causes of action. They all boil down to a failure to return the deposits, which is a contract dispute between VFLA and the Artists. (FAC, ¶¶55 ["Despite VFLA's demand for the return of the Deposits, WME refused to return them."]; 59 ["By refusing to return the VFLA Deposits paid under the Performance Agreements, by exercising wrongful dominion over the VFLA Deposits and thereby committing acts of conversion under California law, and by wrongly asserting that the Performance Agreements were 'pay or play' agreements, WME engaged in, and continues to engage in, unlawful and unfair business practices."]; 64 ["As a result of WME's conduct, an actual controversy has arisen and now exists between VFLA and WME concerning the return of the VFLA Deposits to VFLA."].) Without an independently wrongful act, VFLA cannot hold WME liable for these disputes.

However, one portion of the UCL claim remains. There, VFLA alleges that WME's assertion that the agreements are "pay or play" agreements is unfair or unlawful conduct.[13] (FAC, ¶59.) But WME persuasively argues that its position that these are "pay or play" agreements does not amount to unlawful conduct. "Violations of federal as well as state and local law may serve as the predicate for an unlawful practice claim under Business and Professions Code section 17200. (See *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1450, fn. 5; *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838–839.)" (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 676, parallel citations omitted.) WME correctly emphasizes, though, that its position is not in violation of any law.

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[13] The portion of the claim predicated on the failure to return deposits immediately fails as it is derivative of the conversion claim. " ' "By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable."' (*Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 644.) 'Virtually any law—federal, state or local—can serve as a predicate for a [UCL] action.' (*State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1102–1103, disapproved of on another ground as stated in *Cel–Tech, supra*, 20 Cal.4th at pp. 184–185.) Thus, when the underlying legal claim fails, so too will a derivative UCL claim. (*Cel-Tech*, at p. 182.) Because all of AMN's other claims fail as a matter of law, as discussed *ante*, so too must its derivative UCL claim. (See *ibid.*)" (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 950.)

WME further claims that its position that the agreements are "pay or play" is not unfair conduct. "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.)[14] The determination of whether a practice is "unfair" under the UCL is a question of law. (*People v. Duz-Mor Diagnostic Laboratory, Inc.* (1998) 68 Cal.App.4th 654, 660.) WME asserts that its position on the nature of the agreements is neither anticompetitive, nor a violation of any law. It insists this is simply shifting the financial risk onto VFLA. WME has made a *prima facie* showing and the burden shifts.

VFLA contends that WME's conduct is unlawful because it is based on the "court-made" common law tort of conversion. As previously discussed, though, the conversion claim fails and so does the derivative portion of the UCL claim. On the question of "unfair" conduct, VFLA argues that "[i]n holding the Deposits hostage, WME negatively affected competition by attempting to effect a forfeiture of the money VFLA used to operate its business. Companies like WME who hold the money of their competition are in the unique position of being able to inflict harm." (Opp., p. 25:16-18.) The Court is not sure how this rises to the level of "unfair" conduct, at least under these facts (even read in the light most favorable to VFLA). This argument improperly focuses on the wrong to VFLA as a competitor, not competition in general. "The United States Supreme Court has stressed that the ' "antitrust laws ... were enacted for 'the protection of *competition,* not *competitors.*' " ' (*Cargill, Inc. v. Monfort of Colorado, Inc.* (1986) 479 U.S. 104, 115, original italics.) They 'do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws.' (*Id.* at p. 116.) Injury to a competitor is not equivalent

[14] This is the test for "unfair" conduct in actions filed by competitors. There is currently a split of authority on what test applies in consumer actions regarding unfair conduct. (See *Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 256-257 [describing the three tests].) VFLA's claim here is predicated solely on WME's unfair business practices as a competitor. (FAC, ¶57.) There is no need to discuss the three tests in the consumer context.

to injury to competition; only the latter is the proper focus of antitrust laws. [Citations.]" (*Cel-Tech, supra,* 20 Cal.4th at p. 186, parallel citations omitted, emphasis by *Cargill* Court.)

Beyond that, there is no evidence that WME purposely held the deposit to harm VFLA's business operations as a competitor, let alone any evidence that VFLA's business operations were in fact harmed by WME's failure to return the deposits. The motion for summary adjudication is GRANTED as to the UCL claim. Because no substantive claim against WME survives, the request for punitive damages fails as well. WME's motion for summary judgment is GRANTED.

III. Conclusion

For the reasons set forth above, and good cause appearing therefor, the Artists' motion for summary judgment is GRANTED. VFLA's motion for summary adjudication is DENIED. WME's motion for summary judgment is GRANTED. Clerk to provide notice.

DATED: Aug 31, 2022

Hon. Mark H. Epstein
Judge of the Superior Court

09/02/22