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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SANTA MONICA COURTHOUSE

VFLA EVENTCO, LLC, a Delaware limited liability company,

Plaintiff,

v.

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,

Defendants.

Case No.: 20SMCV00933

Assigned to the Hon. Mark H. Epstein
Dept. R

DEFENDANT BIG GRRRL BIG TOURING, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION

PUBLIC-REDACTS MATERIAL FROM CONDITIONALLY SEALED RECORD

RESERVATION NO. 769071251884

[Filed concurrently with Separate Statement; Decl. of Cynthia S. Arato]

Date: May 27, 2022
Time: 9:00AM
Place: 1725 Main Street, Dept. R
Santa Monica, CA 90401
Complaint filed: July 16, 2020
Pretrial Conference: July 11, 2022
Trial Date: July 18, 2022

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 27, 2022 at 9:00 a.m., or as soon thereafter as counsel may be heard in Department R of the Los Angeles County Superior Court located at 1725 Main Street, Santa Monica, CA 90402, defendant Big Grrrl Big Touring, Inc. ("Big Grrrl") will, and hereby does, move pursuant to Cal. Civ. Proc. 437c for an order granting summary judgment in its favor on all causes of action brought against it by plaintiff VFLA Eventco, LLC ("VFLA"), or, in the alternative, summary adjudication in its favor. This Motion is made upon the grounds that the action has no merit and there is no triable issue as to any material fact and Big Grrrl is entitled to a judgment as a matter of law. Specifically, Big Grrrl moves for summary judgment, or, in the alternative, summary adjudication on the following issues:

Issue 1: VFLA's claim against Big Grrrl for breach of contract (Fifth Cause of Action) has no merit and there is no triable issue as to any material fact and Big Grrrl is entitled to a judgment as a matter of law; and

Issue 2: VFLA's claim against Big Grrrl for breach of the implied covenant of good faith and fair dealing (Sixth Cause of Action) has no merit and there is no triable issue as to any material fact and Big Grrrl is entitled to a judgment as a matter of law.

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, Separate Statement, the Declaration of Cynthia S. Arato, the oral arguments of counsel, the pleadings and papers on file in this action, the exhibits provided with the concurrently filed Declaration, and upon such other evidence as the Court may properly allow on this matter.

Dated: March 10, 2022

SHAPIRO ARATO BACH, LLP

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION & SUMMARY OF ARGUMENT

Big Grrrl is the touring company for multiple Grammy Award-winning recording artist Melissa Jefferson, professionally known as Lizzo. In February 2020, Lizzo agreed to headline Virgin Fest Los Angeles, a brand-new music festival scheduled for early June. Wary of attaching Lizzo to an untested, first-time event, Big Grrrl agreed to commit only if VFLA, the festival promoter, (1) paid 100% of Lizzo's fee upfront as a "flat GUARANTEE"; and (2) promised that the fee would be non-refundable except in narrow circumstances. Consistent with this framework, the parties placed the risk of an unforeseeable cancellation—a so-called "force majeure" event"—squarely on VFLA. Specifically, the agreement provided that Big Grrrl would retain its guaranteed payment in the event of a force majeure cancellation so long as Lizzo was "otherwise ready, willing, and able" to perform—that is, "ready, willing, and able" but for the force majeure event. VFLA cancelled the festival on May 9 after the City of Los Angeles informed VFLA that the festival would not be permitted due to the Covid-19 pandemic. Despite having assumed that risk of cancellation, VFLA nevertheless sued Big Grrrl for breach of contract for retaining the fee that VFLA previously agreed was Big Grrrl's to keep.

VFLA's contract claim fails under the agreement's force majeure provision. That provision has four components, contained in three sentences: (1) the first sentence defines the term "Force Majeure Event"; (2) the second sentence provides that the Producer (Big Grrrl) is to return its flat GUARANTEE fee in the event of a cancellation due to force majeure; (3) the first half of the third sentence provides an exception to that foregoing rule and requires the Purchaser (VFLA) to pay the fee to Producer (Big Grrrl) so long as the Artist (Lizzo) is "*otherwise* ready, willing, and able to perform"; and (4) the second half of the third sentence provides an exception to that exception and requires Producer (Big Grrrl) to return the fee if the force majeure event resulting in cancellation is Lizzo's death, illness, or injury, or that of her immediate family:

> 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 [Big Grrrl] shall return any deposit amount(s) previously received . . . . However, if the Artist [Lizzo] is otherwise ready, willing, and able to perform Purchaser [VFLA] will pay Producer [Big Grrrl] the full Guarantee unless such cancellation is the result of Artist's death, illness, or injury, or that of its immediate family

As used in the force majeure provision, the phrase "otherwise ready, willing, and able" can mean only one thing—that Lizzo is ready, willing, and able, aside from the force majeure event—and not that Lizzo is "differently" "predisposed" or "inclined" to be ready, willing, and able," as VFLA wrongly contends. The reason for this is simple. "Otherwise" is used in the force majeure provision as an adverb that modifies the adjectives "ready, willing, and able," and when "otherwise" is used as an adverb to modify an adjective, "otherwise" means "in all ways except the one mentioned" or "in other respects." It is only when the adverb "otherwise" modifies a verb (something it does not do here) that it can mean "differently."

Take, for example, the following two sentences:

1. "I didn't like the ending, but otherwise it was a very good book;" and
2. "Don't pretend otherwise."

In the first sentence, "otherwise" is an adverb that modifies the adjective "good," and the sentence unquestionably means "I didn't like the ending, but *apart from that* it was a very good book" and not "I didn't like the ending, but *differently* it was a good book." In the second sentence, "otherwise" is an adverb that modifies the verb "pretend," and the sentence unquestionably means "[d]on't pretend *differently*" and not "[d]on't pretend *aside from* an unspecified fact that is not referenced in the sentence." Leading dictionaries, as well as case law, establish this unassailable point and demonstrate that VFLA's contrary interpretation is linguistically nonsensical.

The Court also should reject VFLA's "differently predisposed" interpretation of the "otherwise ready, willing, and able" clause because that interpretation would render substantial portions of the force majeure provision meaningless. Among other things, the fourth and final component of the provision provides that Big Grrrl may retain the GUARANTEE if Lizzo is "otherwise ready, willing, and able to perform" *unless* the force majeure cancellation is caused by Lizzo's own death, injury, or illness, or that of Lizzo's immediate family, in which case Big Grrrl must return the fee. There would be no need for this final exception—which outside counsel *for VFLA* inserted to shift risk to the Artist—if Big Grrrl could retain the GUARANTEE only if Lizzo was "ready, willing, and able to perform" in the face of the force majeure event, something she obviously would not be if the force majeure occurrence was the Artist's death or injury.

The Provision is unambiguous, but even if the Court finds otherwise, the undisputed extrinsic evidence fully supports Big Grrrl's interpretation. For example, as set forth below, the negotiation history and VFLA's pre-dispute communications demonstrate that VFLA understood that it assumed the risk of payment for a force majeure cancellation.

For each of these reasons, this Court should grant summary judgment to Big Grrrl and dismiss VFLA's breach of contract claim.

This Court should also grant summary judgment to Big Grrrl on VFLA's claim for breach of the implied covenant of good faith and fair dealing because VFLA's implied covenant claim seeks an end run around the contract, is improperly duplicative of VFLA's contract claim, and has no evidentiary basis.

STATEMENT OF FACTS

A. The Virgin Fest Event

On December 11, 2019, VFLA publicly announced that it would present a new music festival in Los Angeles—called Virgin Fest Los Angeles—just six months later, on June 6-7, 2020. UF 1. At that time, VFLA's target date to announce a talent lineup was just seven weeks away (UF 2) and VFLA lacked an opening night headliner to anchor the program (UF 3). In particular, VFLA had been unable to secure Lizzo to headline the event (UF 4), even though VFLA had been pursuing Lizzo since the end of October 2019 (UF 5) and had made Lizzo a series of offers escalating from $1.35 to $4 million (UF 6).[1]

The parties finally struck a deal in February 2020—but only after VFLA agreed (1) to pay Big Grrrl a flat GUARANTEE fee of $5 million "Immediately upon Confirmation and Issuing of Contract," and (2) that the fee was *not* refundable except as explicitly provided. UF 10. These terms were critical because, as VFLA understood, Virgin Fest was a new and untested event, and it was tainted by its association with a different event that failed to meet its payment obligations. UF 11.

[1] Notably: (1) VFLA's CEO, Jason Felts, had identified Lizzo from the outset as an "ideal" headliner (UF 7); (2) Richard Branson courted Lizzo with offers to visit his private island and tour Virgin's SpacePort America facility (UF 8); and (3) the wife of VFLA's principal investor instructed Mr. Felts to "please just make Lizzo happen" (UF 9).

In exchange, VFLA obtained Lizzo's commitment to perform, along with other benefits, including the right to utilize Lizzo's name, likeness, and image to advertise her performance, solicit sponsorships, and promote ticket sales and various exclusivity provisions that limited Lizzo's touring and marketing activities. UF 12.

B. The Force Majeure Provision and Its Negotiation History

Big Grrrl and VFLA entered into the disputed agreement (the "Agreement") in February 2020. UF 13. Each of VFLA and Big Grrrl worked through a team of negotiators. VFLA was represented by Tim Epstein, an experienced music lawyer, and Zach Tetreault, VFLA's Talent Buyer. UF 14.

The Agreement includes an addendum titled "Virgin Fest Los Angeles - Festival Rider" (the "Virgin Fest Rider" or "Rider"). UF 15. The Virgin Fest Rider, in turn, contains a provision titled "Excused Performance" which defines and describes the consequences of cancellations due to force majeure and inclement weather.

The paragraph regarding force majeure (the "Virgin Fest Force Majeure Provision" or "Force Majeure Provision") 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 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 [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 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.

(emphasis added). UF 16. (As used throughout the Virgin Fest Rider, Purchaser refers to VFLA, Producer refers to Big Grrrl, and Artist refers to Lizzo. UF 17.)

Steve Gaches, WME's Head of Music and Business Affairs, and Mr. Epstein negotiated the Virgin Fest Rider. UF 18. They did not, however, start from scratch. Rather, Mr. Gaches and Mr. Epstein had a history of negotiating riders for festivals at which WME artists appeared (UF 19), and

their practice was to use a previously agreed upon rider as a starting point "so we're not starting from the jump" (UF 20).

For Virgin Fest, Mr. Gaches and Mr. Epstein used a rider they had negotiated a few months earlier for a different music festival called [redacted] (the "[redacted] Rider"). UF 21.

The original draft of the force majeure provision for the [redacted] Rider provided that all parties were excused in the event of a force majeure cancellation, except that the Purchaser had to pay the Producer the full Guarantee if the Artist had commenced performance before the cancellation occurred. The provision stated, in pertinent part:

[redacted]

UF 22.

Mr. Gaches sent Mr. Epstein the above force majeure provision on May 9, 2020 (UF 23), and invited Mr. Epstein to make edits as he felt appropriate (UF 24). Mr. Epstein sent Mr. Gaches a redline response on August 8, 2019. UF 25. In that redline, Mr. Epstein added new language to the proposed force majeure provision (UF 26), including a significant exception that had not been there before. As set forth above, the provision originally provided that all parties were excused in the event of a force majeure cancellation, *except* that the Producer would get paid the full Guarantee for a cancellation in *all* circumstances where the Artist had commenced performance prior to that cancellation. UF 27. Mr. Epstein, however, added an exception to that exception: "unless such cancellation is the result of Artist's death, illness, or injury, or that of its immediate family." UF 28.[2] The exception that Mr. Epstein added shifted certain cancellation risk back to the Artist. UF 29.

[2] Mr. Epstein also added phrases clarifying: (1) the meaning of Artist's immediate family (UF 30); (2) that the [redacted] (UF 31); and (3) that the Artist must commence performance at the specified venue in order to be paid the full Guarantee (UF 32).

Mr. Gaches accepted Mr. Epstein's additions and made one significant revision: he changed the circumstance under which the Artist would get paid the full GUARANTEE. UF 33. Where the original draft provided that the Artist would get paid the full GUARANTEE if the Artist had commenced performance before the force majeure cancellation occurred, Mr. Gaches proposed that the Artist would get paid the full GUARANTEE "if the Artist is otherwise ready, willing and able to perform." UF 34. Mr. Gaches explained that the change was based on a new directive from WME's head of music for international (*i.e.*, higher risk) shows, and that the draft was "the best we can do for this one." UF 35. Mr. Gaches, however, retained Mr. Epstein's exception to the circumstance—unless the cancellation was the result of the death, injury, or illness of the Artist or Artist's family. UF 36.

Mr. Epstein agreed on behalf of [redacted] to use the new language for the [redacted] festival. UF 37. And several months later, he agreed on behalf of VFLA to use that language for Virgin Fest as well. UF 38.[3]

Mr. Epstein has conceded that the force majeure provision that he proposed for the [redacted] Rider and the Force Majeure Provision to which he ultimately agreed follow the same three sentence, four-part convention: the first sentence "defines examples of" or "attempts to define what a force majeure event is." UF 40. The second sentence "describes a consequence of what will happen in the event of a force majeure event"—that the "parties are excused" and there would be no payment to the artist. UF 41. The first half of the third sentence (beginning with "[h]owever") "describes a scenario in which the artist will [nevertheless] be entitled to the full guarantee" and "the purchaser is going to have to pay the producer." UF 42. And the second half of the third sentence (the "unless death or injury" clause)—the language Mr. Epstein added to shift risk back to the Artist—"created an exception to the third sentence of the" clause, or "an exception to the exception." UF 43.

Mr. Epstein has further conceded that the only difference between the language he proposed for the force majeure provision in the [redacted] Rider and the final force majeure provision contained in the [redacted] and Virgin Fest Riders is the circumstance/exception under which the Purchaser must

[3] When negotiating the Virgin Fest Rider, Mr. Gaches and Mr. Epstein modified other parts of the [redacted] Rider, including parts of the Excused Performance provision, but the Force Majeure Provision did not change. (UF 39; *see also* VFLA's Motion for Summary Adjudication ("MSA"), at 17:25-18:2 (Dec. 9, 2021)]).

pay the Producer notwithstanding a Force Majeure Event. As Mr. Epstein acknowledged, Mr. Gaches "struck language identifying one circumstance [the Artist commencing performance] and "added language identifying a different circumstance [the Artist being otherwise ready, willing, and able]." UF 44. Regardless of the operative circumstance/exception, Mr. Epstein conceded that the "unless death or injury" clause which he inserted into the provision creates an "exception to that . . . exception":

> The way that this reads with language added under excused performance, the entirety of that first paragraph, there -- it reads that there is an exception to the parties being fully excused if a force majeure event occurs, and then there is an exception to that particular exception. That is how it reads.

UF 45.

C. VFLA Confirms the Meaning of the Force Majeure Provision

After VFLA and Big Grrrl executed the Agreement, VFLA shared with WME its understanding that the Force Majeure Provision shifts the risk of a force majeure cancellation to VFLA and provides for payment of the full GUARANTEE to Big Grrrl in the event of a force majeure occurrence. VFLA did so starting on February 17, 2020, just one week after the Agreement was signed, while negotiating a performance agreement with co-defendant Starry US Touring, Inc. (for the artist Ellie Goulding).

On February 17, 2020, Ellie Goulding's agent at WME emailed Mr. Tetreault, VFLA's Talent Buyer, with other agents at WME on copy, to confirm Ms. Goulding's willingness to perform at Virgin Fest. UF 46. In that email, the agent included a list of deal points, including that: "*Artist to be paid in full in event of force majeure or inclement weather*." UF 47. (emphasis added). The WME agent asked Mr. Tetreault to "come back" to him if any "deal point is not doable." UF 48. In response, Mr. Tetreault added VFLA's outside counsel, Mr. Epstein, to the email chain, raised two points unrelated to force majeure, and confirmed that "*all of the other deal points below are fine*." UF 49 (emphasis added). The agent and Mr. Tetreault finalized the two open points, and the parties exchanged a list of confirmed points that repeated their agreement that "*Artist to be paid in full in event of force majeure*." UF 50. (emphasis added).

Mr. Tetreault then proceeded to "loop[] in the [VFLA] team to provide any additional color to the confirmation points below." UF 51. Mr. Epstein then weighed in and explained to everyone (including WME) that some of the confirmed points "*overlap[ed]* with what has already been agreed

to in the Virgin Fest festival rider"—which Mr. Epstein referred to as the "pre-negotiated T&Cs"—"usually with a lot more detail in the T&Cs." UF 51, 52. Mr. Epstein did not state that the force majeure deal point which WME and VFLA had confirmed for the Starry US Touring agreement conflicted with his understanding of the Virgin Fest Rider's Force Majeure Provision. UF 53. Nor did he change the Virgin Fest Rider when papering the agreement between Starry US Touring and VFLA. UF 54. Accordingly, the final Starry US Touring agreement—which WME and VFLA agreed would require VFLA to pay in full for a force majeure cancellation—used the identical "pre-negotiated" Virgin Fest Rider, containing the identical Force Majeure Provision, that Big Grrrl and VFLA had used in the Agreement. UF 55.

D. VFLA Cancels Virgin Fest and Demands the Return of the GUARANTEE

In mid-March 2020, the State of California and County and City of Los Angeles took a series of measures to combat Covid-19, including the issuance by the City of Los Angeles of various "Safer at Home" orders. UF 56. Ultimately, on May 8, 2020, the City of Los Angeles informed VFLA that it would be extending an existing "Safer at Home" order "to a future date to be determined" and that Virgin Fest Los Angeles "will not be allowed as originally planned on June 6 to 7." UF 57. The next day, VFLA publicly announced that "[t]he safety of our community, well-being of all and the healing of our planet are our underlying focus. As a result of the governmental restrictions and mandates resulting from the Covid-19 pandemic, VIRGIN FEST in Los Angeles is prevented from proceeding as scheduled next month." UF 58.

VFLA solicited this letter. Specifically, starting on or about April 15, 2020, VFLA's CEO, Jason Felts, had been asking Billy Chun, a Deputy Mayor for the City of Los Angeles, for the City to tell VFLA whether or not the festival could proceed. UF 59. As part of that dialogue, Mr. Felts represented to Mr. Chun in writing that "*the artists are ready, willing and able to perform*" at Virgin Fest. UF 60 (emphasis added).

On June 2, 2020 Mr. Ciongoli sent WME a demand for the return of all deposits held in trust by WME regarding Virgin Fest—including the $5 million payment under the Agreement. UF 61. The demand letter conveyed VFLA's position that the governmental orders and underlying COVID-19

pandemic conditions were unforeseeable and qualified as a force majeure event that made the artists' performances impossible, and that, accordingly, the deposits should be returned. UF 62.

ARGUMENT

I. BIG GRRRL IS ENTITLED TO RETAIN THE GUARANTEE UNDER THE FORCE MAJEURE PROVISION, WHICH TESTS WHETHER LIZZO WAS READY, WILLING, AND ABLE ASIDE FROM THE FORCE MAJEURE EVENT

The Force Majeure Provision allows Big Grrrl to retain the Guarantee in the event of a cancellation resulting from force majeure, so long as Lizzo is "otherwise ready, willing, and able" to perform. The Provision is unambiguous because there is only one plausible, coherent interpretation of the "otherwise ready, willing, and able to perform" clause: (1) in the event of a cancellation due to force majeure, the parties are excused and VFLA is entitled to the return of any deposit; (2) "however" (*i.e.*, *in contrast to the prior sentence*), if Lizzo is "*otherwise* ready, willing, and able to perform," (*i.e.*, *except due to the Force Majeure circumstances*), VFLA will pay Big Grrrl the full Guarantee. Any other interpretation is contrary to normal English usage and would render superfluous various terms of the Provision, including a critical exception to the above exception which *VFLA's lawyer* inserted into the Provision to shift risk back to the Artist. To the extent the Court finds the Provision ambiguous, the undisputed extrinsic evidence fully supports Big Grrrl's correct interpretation of the Provision.

Only Big Grrrl's interpretation gives effect to the mutual objective intent of the parties (*Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1264), "as evidenced by the words of the instrument" (*Shaw v. Regents of Univ. of Cal.* (1997) 58 Cal. App. 4th 44, 55), and "in light of the usual and ordinary meaning of the contractual language and the circumstances under which the contract was made" (*Rice v. Downs* (2016) 248 Cal. App. 4th 175, 185-186). Because the Agreement is not susceptible to the meaning given to it by VFLA, summary judgment should be awarded to Big Grrrl.

A. The Force Majeure Provision Tests Whether Lizzo Was Ready, Willing, and Able to Perform Apart From or Setting Aside the Force Majeure Event

1. As used in the Force Majeure Provision, "otherwise" means "apart from" and cannot mean anything else

Because the word "otherwise" as used in the Force Majeure Provision is an adverb that modifies the adjectives "ready, willing, and able," the word means "in all ways except the one mentioned" and not, as VFLA wrongly contends "differently predisposed" "or inclined" to be "ready, willing, and able." VFLA's MSA, at 21:1-2, 7-9; VFLA's Omnibus Opp. to Touring Co. Defs.' Demurrer ("Demurrer Opp.") (Feb. 24, 2021), at 19:19-23. Accordingly, as a matter of grammar and sentence construction, as well as the common use of the English language, the word "otherwise" asks whether Lizzo was "ready, willing, and able to perform" *in the absence of* the pandemic and attendant government restrictions and not *in spite of* those circumstances.

The critical sentences of the Force Majeure Provision read, in pertinent part:

> In the event of cancelation [sic] due to Force Majeure . . . Producer shall return any deposit amount(s) . . . previously received . . . . 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 . . . the Guarantee . . . .

VFLA concedes that the word "otherwise," as used in the Force Majeure Provision, is an adverb which modifies "ready, willing, and able." VFLA's MSA, at 20:24-27. But recognizing the part of speech of "otherwise" is just the first step of the analysis. One must also determine the part of speech of "ready, willing, and able." Here, each of the terms "ready," willing," and "able" are adjectives, and when "otherwise" is used as an adverb to modify an adjective, "otherwise" means "in all ways except the one mentioned" or "in other respects." Leading dictionaries and case law establish this unassailable fact.

Dictionary examples of sentences using "otherwise" uniformly establish this point:

- Otherwise, *The Britannica Dictionary*: "in all ways except the one mentioned" // "One of the boys had a freckle on his cheek. *Otherwise*, the twins are nearly identical."; "It rained in the morning; *otherwise* it was a beautiful day.";[4]
- Otherwise, *Merriam-Webster*: "in other respects" // "I didn't like the ending, but *otherwise* it was a very good book"; "The patient had a foot problem, but she was *otherwise* healthy.";[5]
- Otherwise, *The Am. Heritage Dictionary*, "In other respects: *an otherwise logical mind*."[6]

Case law is the same. Regardless of the fact pattern, courts recognize that the phrase "otherwise ready, willing, and able" means ready, willing, and able in all ways *except* the one previously mentioned—the precise meaning that Big Grrrl advances here. *See, e.g., In re Blue Dog at 399 Inc.* (S.D.N.Y. Bnkr. 2015) 540 B.R. 67, 75; *Exportaciones Del Futuro S.A. de C.V. v. Iconix Brand Grp. Inc.* (S.D.N.Y. 2009) 636 F. Supp. 2d 223, 229-30.[7]

For "otherwise" to mean "differently," as VFLA contends (*see* Demurrer Opp., at 19:19-23; VFLA's MSA, at 20:27-21:2), "otherwise" needs to modify a verb, something it does not do in the Force Majeure Provision.[8] For example, in the phrase "if you feel otherwise," "otherwise" modifies the verb "feel" and is synonymous with "differently." The same is true of "[d]on't pretend otherwise," in which "otherwise" modifies the verb "pretend" and of "[t]hey think otherwise," in which otherwise modifies the verb "think." *See, e.g.*, Otherwise, *Am. Heritage Dictionary* ("In another way; differently: *She thought otherwise*.").

"Otherwise" does not mean "differently" when it modifies an adjective, as it does here. Indeed, using some of the bulleted dictionary sentences set forth above, it would be nonsensical to say:

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[4] https://www.britannica.com/dictionary/otherwise (last visited March 9, 2022).

[5] https://www.merriam-webster.com/dictionary/otherwise (last visited March 9, 2022).

[6] https://www.ahdictionary.com/word/search.html?q=otherwise (last visited March 9, 2022).

[7] *See also, e.g.*, *Meisler v. Smith* (5th Cir. 1987) 814 F.2d 1075, 1082; *Capital 1 Commercial Grp. v. Tortora* (Ct. App. Mich. 2007) 2007 WL 1485865, at *2; *United States v. Glassel* (9th Cir. 1973) 488 F.2d 143; *Morris v. State* (Ark. 1989) 300 Ark. 340, 341; *United States v. Hughey* (D. Ark. 1953) 116 F. Supp. 649, 653; *Mt. Healthy Bd. of Ed. v. Curry* (Ct. App. Ohio 1985) 1985 WL 8944, at *3.

[8] VFLA also states that "otherwise" means "in other respects" (Demurrer Opp., at 10:25-27; VFLA's MSA, at 20:27-21:2), but that definition *supports* Big Grrrl's position, as set forth above and below.

- "It rained in the morning; *differently*, it was a nice day;"
- "I didn't like the ending, but *differently* it was a very good book;
- "The patient had a foot problem, but she was *differently* healthy;" or
- "a *differently* logical mind."

In contrast, it makes sense to say:

- "It rained in the morning; *apart from that*, it was a nice day;"
- "I didn't like the ending, but *setting that aside* it was a very good book;
- "The patient had a foot problem, but she was *in other respects* healthy;" or
- "*but for that*, a logical mind."

For this same reason, the Court should construe "otherwise ready, willing, and able" to mean the only thing it can mean—ready, willing, and able, *aside from* the force majeure event—and not "differently" "predisposed/inclined to be" "ready, willing, and able," as VFLA nonsensically contends. *See George v. Auto. Club of S. Cal.* (2011) 201 Cal. App. 4th at 1129 (in construing contracts, courts should not "render the operative provisions [of the contract] nonsensical"); *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal. 3d 800, 807 ("Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists."); *Hertzka Knowles v. Salter* (1970) 6 Cal. App. 3rd 325, 335 ("A contract ought not to be construed to an absurd conclusion, if a reasonable one is possible.").

2. Big Grrrl's interpretation is the only interpretation that gives meaning to the word "otherwise" and the "unless death or injury" exception to the exception

The Court also should reject VFLA's "differently predisposed" interpretation of the "otherwise ready, willing, and able" clause because that interpretation strips all meaning from (1) the word "otherwise" *and* from (2) the "unless death or injury" exception to the exception.[9]

Under VFLA's construction, the Force Majeure Provision would mean the same thing with or without the word "otherwise"—in either case the Artist would need to prove she was "ready, willing,

[9] *See, e.g.*, *Rice*, 248 Cal. App. 4th at 186 ("An interpretation that leaves part of a contract as surplusage is to be avoided."); *Rebolledo v. Tilly's, Inc.* (2014) 228 Cal. App. 4th 900, 923 ("Moreover, it is well settled contracts 'are construed to avoid rendering terms surplusage.'"); Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.").

and able to perform" in the face of a force majeure occurrence to receive the full Guarantee. VFLA's construction of the Provision thus improperly renders textual language meaningless or superfluous.

Similarly, VFLA's interpretation renders inoperative the "unless death or injury" exception to the exception that *its counsel* added to the Provision to shift risk back to the Artist. UF 26-29, 36, 43, 45. The third sentence of the Force Majeure Provision states:

> 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.

This sentence provides that Big Grrrl may retain the Guarantee if Lizzo is "otherwise ready, willing, and able to perform," *unless* the force majeure cancellation is caused by Lizzo's own death, injury, or illness, or that of Lizzo's immediate family. There would be no need for this final exception to the exception, if, upon a force majeure cancellation, Big Grrrl could retain the Guarantee only if Lizzo was "ready, willing, and able to perform" *in the face of* the force majeure event.

Lizzo could never be "ready, willing, and able to perform" in the face of a force majeure event that caused her performance to be cancelled because of her own "death, illness, or injury." In this setting, Lizzo could never show that she feels "differently" than VFLA about the cancellation.

The same is true for the "death, illness, or injury" of Lizzo's immediate family. If a member of Lizzo's immediate family was injured badly enough to cause a force majeure cancellation of Lizzo's performance, the performance would be cancelled because Lizzo had decided that she was not willing to perform under that unfortunate circumstance. Her performance would not be cancelled because VFLA cancelled it against her wishes. Here too, Lizzo could never show that she is "differently" "predisposed" or "inclined" than VFLA about the cancellation. By definition, an Artist who cancels her own performance because of her own family member's injury could never demonstrate that she was "ready, willing, and able to perform" in the face of the very event that caused her to cancel that performance in the first place.

If the drafters had intended the "otherwise ready, willing, and able" provision to require the Artist to show a willingness to perform *in the face of* the force majeure event, rather than *in its absence*, they would not have needed the "unless death or injury" exception to the exception. But that

final exception is present in the Provision. Mr. Epstein, moreover, has conceded that the "unless death or injury" clause operates as an "exception to the exception"—it is not simply superfluous verbiage. UF 45. For this reason as well, the Court should adopt Big Grrrl's interpretation of the Provision, which gives content and effect to all the Provision's terms.

3. Extrinsic evidence confirms Big Grrrl's interpretation of the Provision

To the extent the Court finds the Provision ambiguous, extrinsic evidence demonstrates that VFLA understood that the Force Majeure Provision shifts essentially all risk of a force majeure cancellation away from the Artist and to VFLA.[10] Four pieces of undisputed extrinsic evidence dictate this conclusion: the admissions that VFLA made about meaning of the Force Majeure Provision when negotiating its agreement with Starry US Touring; the inclement weather provision in the Excused Performance Provision; the negotiation history; and agreements that VFLA voluntarily entered into with other artists that contain a "but for" clause.

The Starry US Touring Admissions. As set forth above, after the Agreement was fully executed in February 2020 (UF 10), VFLA was negotiating a similar deal with WME for Starry US Touring and the artist Ellie Goulding, and VFLA readily agreed in that negotiation that Ms. Goulding, as the Artist, would be "*paid in full*" for Virgin Fest "*in event of force majeure.*" UF 49, 51, 52. VFLA's talent buyer confirmed this deal points in writing with WME (*id.*), and that talent buyer forwarded the confirmed deal point to VFLA executives and to VFLA's outside transactional lawyer (UF 51). That lawyer told the group (which included representatives of WME) that some of the deal points "*overlap[ed]* with what has already been agreed to in the [pre-existing] Virgin Fest festival rider" (UF 52), and VFLA thereafter entered into an agreement with Starry US Touring that used the Virgin Fest Rider and its "pre-existing" Force Majeure Provision, unchanged (UF 55).

Mr. Epstein never stated that the confirmed force majeure deal point for Starry US Touring conflicted with what he understood the Virgin Fest Rider already provided for regarding a force

[10] Parol evidence is admissible to explain or interpret ambiguous language in an integrated agreement. *Rosenfeld v. Abraham Joshua Heschel Day Sch, Inc.* (2014) 226 Cal. App. 2d 886, 897; Code Civ. Proc. § 1856(g) ("[Parol evidence rule] does not exclude other evidence of the circumstances under which the agreement was made or to which it relates . . . or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement . . . .").

majeure cancellation (UF 53), and he did not modify the Virgin Fest Rider in any way for the Starry US Touring deal (UF 54). Accordingly, VFLA's final agreement with Starry US Touring—which WME and VFLA had agreed would require VFLA to pay in full for a force majeure cancellation—used the identical "pre-negotiated" Virgin Fest Rider, containing the identical Force Majeure Provision, that Big Grrrl and VFLA had used in the Agreement. (UF 55).

These pre-litigation communications are entirely consistent with Big Grrrl's interpretation of the Agreement, under which, in the event of a force majeure cancellation, Big Grrrl would be entitled to the full GUARANTEE in all but a narrow range of circumstances, and entirely inconsistent with VFLA's position that, in the event of a force majeure cancellation, Big Grrrl would be entitled to retain its GUARANTEE only in the highly unlikely event that Lizzo was "ready, willing, and able" to perform in the face of circumstances that VFLA had concluded makes performance "impossible, infeasible, or unsafe." VFLA and Mr. Epstein's pre-litigation communications and conduct thus (1) confirm that VFLA agreed to accept the risk of a cancellation due to a force majeure event and understood that the Virgin Fest Rider placed that risk on VFLA; and (2) cannot be reconciled with VFLA's current litigation posture. *See Kennecott Corp. v. Union Oil Co. of Cal.* (1987) 196 Cal. App. 3d 1179, 1189 ("The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions.").

The Inclement Weather Provision. In addition to force majeure, the Excused Performance Provision also addresses cancellations caused by inclement weather, and this inclement weather provision further establishes that VFLA agreed to accept the risk associated with cancellations for unforeseeable events. The Virgin Fest Rider provides that VFLA bears all the risk of cancellation due to inclement weather at the location of the event. UF 63. This is a far more significant provision than the one dealing with force majeure, because, as VFLA's transactional lawyer has explained, prior to the pandemic, inclement weather was the cause of festival cancellations "99% of the time." UF 64. It is utterly implausible, and no rationale trier of fact could conclude, that VFLA readily agreed to bear all the risk of cancellation for inclement weather—covering 99% of the cancellation scenarios—yet declined to bear that risk for force majeure events—covering the remaining 1%.

The Negotiation History. The negotiation history also supports Big Grrrl's interpretation. As set forth above, when drafting the [redacted], Mr. Epstein recognized that the original circumstance under which the Producer would retain the full GUARANTEE (if the Artist commences performance) allowed the Producer to retain the fee even if the cancellation was caused by the Artist's own incapacity. He, accordingly, added the "death or injury" exception to the exception to shift risk back to the Producer/Artist. And neither he nor Mr. Gaches struck the "unless death or injury" "exception to the exception" after Mr. Gaches made "otherwise ready, willing, and able to perform" the operative circumstance that defined the Provision's first exception. UF 26-28, 36-39, 43, 45. Mr. Epstein has acknowledged that his added exception to the exception operates in the same manner in the Force Majeure Provision as it did in his original revision to the [redacted], a concession which proves that the "otherwise ready, willing, and able" clause operates as Big Grrrl contends. (*See infra* p. 21-23).

Moreover, when Mr. Gaches replaced the circumstance under which the Artist gets paid notwithstanding a force majeure event. Mr. Gaches explained that the change was based on a new directive from WME's head of music for international shows and was "the best we can do for this one," namely, an international festival which Mr. Epstein understood WME viewed as a high-risk event. UF 33-35.

No reasonable trier of fact could conclude that Mr. Gaches' change of the operative circumstance for this high-risk event (1) narrowed the circumstances in which WME's clients would be paid; (2) made it less likely that VFLA would bear the cost of a cancellation due to force majeure; and (3) lessened the risk for VFLA, but that is exactly what VFLA asks this Court to conclude.

Under the prior language, Producer would be entitled to retain the Guarantee [redacted] and Mr. Gaches changed that to so long as the Artist was "otherwise ready, willing, and able to perform." UF 33-35. Under VFLA's current interpretation of that new language, Producer would be entitled to retain the Guarantee only in the highly improbable event that performance was "impossible, infeasible, or unsafe," but the Artist was *nonetheless* willing to perform. Thus, to find in favor VFLA, a factfinder would have to conclude—illogically—that Mr. Gaches modified the Force Majeure Provision to shift risk *towards*

WME's clients, all while telling Mr. Epstein that the new term was "the best [WME] could do" for an event that WME viewed as high risk. UF 35. The only logical conclusion to draw from the negotiation history is that Mr. Gaches replaced the prior language in the Force Majeure Provision with language that shifted risk *away from* WME's artists and *to* VFLA, which is precisely what Big Grrrl's interpretation does.

The But For Agreements. The extrinsic evidence also contradicts VFLA's attacks that the applicable 'but for' analysis . . . requires the Court to hypothesize about a make believe world where the governmental laws and orders . . . do not exist" and that, accordingly, VFLA would never have agreed to it. VFLA's MSA, at 11:14-16; 18:21-23; 20:17-19; First Am. Compl. ¶ 15. But VFLA entered into two agreements for Virgin Fest that explicitly utilized this "make believe" standard—for the artists [redacted] and [redacted]. The force majeure provision in these two agreements provides, in pertinent part:

[redacted]

UF 65.

The "but for" test incorporated in the above provision shifts virtually all the risk of a force majeure occurrence to VFLA, except where the artists were about to cancel but for the coincidental force majeure event, *i.e.*, a "hypothetical," "make believe" world where the force majeure event never occurred. *See* VFLA's MSA, at 23:12-18. VFLA thus agreed to be bound by the very "but for" test in now contends it never would have accepted.[11]

[11] Despite the language in these agreements, VFLA demanded that these two artists return their deposits. UF 66. In making that demand, VFLA never asked whether the artists were ready, willing, and able to perform but for the force majeure event (UF 67) and made clear that it had no interest in

It is of no moment that WME chose to express this same "but for" concept in the [redacted] and Virgin Fest Riders with the words "otherwise ready, willing, and able," rather than "but for." There is no magic to the particular words used to express this concept and there are many ways to do so including "separate from," "apart from," "aside from," "but for," "in the absence of," and "otherwise." These words all mean the same thing: "in all ways except the one mentioned." What they don't mean is "differently."

The above undisputed extrinsic evidence confirms that Big Grrrl is to retain the full Guarantee under the Force Majeure Provision so long as Lizzo was ready, willing, and able to perform *in the absence* of the Covid-19 pandemic and attendant government restrictions and not in spite of them.

B. Lizzo Was Ready, Willing, and Able to Perform in The Absence of Covid-19 and Related Government Restrictions

VFLA's sole contention in its Complaint regarding the "ready, willing, and able" standard is that Lizzo could not have been "ready, willing, and able" to perform because such a performance was prohibited by the City of Los Angeles and would have been unlawful. First Am. Compl., ¶¶ 28 *et seq*. VFLA does not contend that if Covid-19 and the government orders prohibiting public events had not occurred, Lizzo would not have been "ready, willing, and able" to perform at Virgin Fest. Indeed, VFLA's CEO admitted that Lizzo would have been "ready, willing, and able" to perform in this setting when he represented to the Deputy Mayor of the City of Angeles in early May 2020 that "the artists are ready, willing and able to perform" at Virgin Fest. UF 60. This is unsurprising. Lizzo wanted to perform at the Virgin Fest event because she loves performing (UF 69); she would have done anything possible to perform other than breaking the law (UF 70); and she was in Los Angeles on the weekend of June 6 and had no commitments that would have prevented her from performing (UF 71).

II. BIG GRRRL IS ENTITLED TO JUDGMENT ON VFLA'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

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engaging on this dispositive point (UF 68) ("I'm going to reserve my thoughts on your interpretation of force majeure at this stage")).

This Court should dismiss VFLA's contrived claim for breach of the covenant of good faith and fair dealing because the claim (1) seeks an end run around VFLA's underlying claim for breach; and/or (2) is improperly duplicative of that claim.

It is unclear whether VFLA seeks to prevail on its implied covenant claim regardless of the outcome of its underlying claim for breach. On the one hand, VFLA alleges that the Court should order Big Grrrl to return the GUARANTEE to VFLA, irrespective of the outcome of VFLA's breach claim, to prevent Big Grrrl from depriving VFLA of the "benefits" of the Agreement, because Big Grrrl allegedly "concealed" or "changed" its understanding of the Agreement's terms (in alleged bad faith). First Am. Compl., at ¶¶ 72-73. On the other hand, VFLA also alleges that Big Grrrl acted wrongfully simply by refusing to return the GUARANTEE. *Id*. ¶ 73.

Both allegations fail. To prove a breach of the implied covenant of good faith and fair dealing, a plaintiff must show "that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities . . . which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Careau & Co. v. Security Pac. Bus. Credit, Inc.* (1990) 222 Cal. App. 3d 1371, 1395. Further, "[t]he covenant of good faith and fair dealing 'cannot be used to imply an obligation which would completely obliterate a right expressly provided by a written contract.'" *Halvorsen v. Aramark Unif. Servs.* (1998) 65 Cal. App. 4th 1383, 1390. It also cannot duplicate a breach of contract claim. *See Careau & Co.*, 222 Cal. App. 3d at 1401.

If, on the one hand, this Court rules against VFLA on its breach of contract claim and finds that Big Grrrl is entitled to retain the full GUARANTEE, it would be impossible for Big Grrrl to deprive VFLA of the benefits of the Agreement by retaining, and not returning, the funds. In that setting, the opposite is true: any obligation that VFLA seeks to "imply" to compel Big Grrrl to return the full Guarantee would "obliterate" Big Grrrls' right to retain those funds as "expressly provided by [the] written [Agreement]." *Halvorsen*, 65 Cal. App. 4th at 1390. If, on the other hand, this Court rules in favor of VFLA, and finds that Big Grrrl must return the Guarantee to VFLA, VFLA will obtain complete relief through its breach of contract claim and its claim for breach of the implied covenant

will be superfluous. *Careau & Co.*, 222 Cal. App. 3d at 1401 (dismissing improperly duplicative claim). Either way, VFLA's implied covenant claim fails as a matter of law.

In any event, VFLA cannot demonstrate that Big Grrrl improperly "concealed" it's understanding of the Agreement from VFLA prior to execution (even if such conduct could give rise to a claim for breach of the implied covenant).[12] The opposite is true. When Mr. Gaches and Mr. Epstein negotiated the force majeure provision (as part of the [redacted] Rider), Mr. Gaches let Mr. Epstein know that he was changing the Force Majeure Provision to be less advantageous to Mr. Epstein's Purchaser client. UF 35 ("This is the best we can do for this one"). Mr. Epstein also conceded (when working on the Starry US Touring deal for Ellie Goulding) that the Virgin Fest Rider provided that "Artist would be paid in full in event of force majeure." UF 51-55. The meaning of the Provision is, moreover, evident based on an understanding of the English language. Regardless, if VFLA failed to fully appreciate the meaning of the Force Majeure Provision, that is not something it can remedy through an implied covenant claim.

VFLA, finally, was not "deprived" of the benefits of the Agreement. VFLA used Lizzo's name and likeness to advertise the festival, sell tickets, and secure sponsorships. UF 12. Nor has Big Grrrl ever believed that it was clear from the outset that the Festival would not occur, and VFLA has adduced no evidence of the same, despite agreeing to produce all non-privileged documents related to the transaction and deposing Lizzo and numerous current and former employees of WME.

CONCLUSION

For the aforementioned reasons, Big Grrrl respectfully requests that this Court grant its motion for summary judgment, or, in the alternative, summary adjudication.

Dated: March 10, 2022

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[12] *See*, *e.g.*, *Am. Express Bank, FSB v. Kayatta* (2010) 190 Cal. App. 4th 563, 570 ("[T]he implied covenant of good faith and fair dealing does not impose a duty to disclose.").