Cynthia S. Arato (SBN: 156856)
Julian S. Brod (admitted pro hac vice)
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
Tel: (212) 257-4880
carato@shapiroarato.com
jbrod@shapiroarato.com

Attorneys for Defendant
BIG GRRRL BIG TOURING, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, WEST DISTRICT

VFLA EVENTCO, LLC, a Delaware limited liability company,

Plaintiff,

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,

Defendants.

Case No.: 20SMCV00933
Filed: July 16, 2020
Assigned: Hon. Mark H. Epstein, Dept. R

REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT BIG GRRRL BIG TOURING, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

[Filed Concurrently with Response to VFLA's Additional Undisputed Facts; Response to VFLA's Evidentiary Objections]

Date: May 27, 2022
Time: 9:00AM
Place: Dept. R
Res: 769071251884

DATED: May 20, 2022

SHAPIRO ARATO BACH LLP
(Attorneys for Defendant Big Grrrl Big Touring, Inc.)

By: _____
Cynthia S. Arato (SBN 156856)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

OTHER AUTHORITIES

ARGUMENT

I. The Force Majeure Provision Tests Whether The Artists Were "Ready, Willing, And Able To Perform" Aside From The Force Majeure Event

A. VFLA's ever-shifting interpretation is contrary to the unambiguous terms of the Provision

VFLA has nothing to say about Big Grrrl's dispositive showing that because the Force Majeure Provision uses "otherwise" as an adverb that modifies an adjective it must mean "aside from" or "in all ways apart from the one mentioned." MSJ 18:3-20:17. Indeed, faced with Big Grrrl's irrefutable grammatical analysis, VFLA has now *abandoned* its contention—which it relentlessly pursued for two years—that "otherwise" means "differently." MSA 21:7-14; Demurrer Opp. 10:24-11:6. VFLA is free to jettison its half-baked conclusion, but it cannot disregard the *correct* analytical framework that it previously asked the Court to embrace—namely, that the "parts of speech" dictate the meaning of the phrase. Big Grrrl's grammatical analysis proves that the Provision tests whether the Artists were "ready, willing, and able to perform" aside from (not in the face of) the force majeure event.

Having abandoned its contention that "otherwise" means "differently," VFLA now suggests that "otherwise" means "in other respects." But this concession is equally case dispositive because, just like "otherwise," "in other respects" means "aside from that" or "in all ways apart from the one mentioned." For example, "The servings were too small. *Otherwise*, it was an excellent meal" is just another way of saying "The servings were too small. *In other respects*, it was an excellent meal" or "The servings were too small. *Aside from that* it was an excellent meal." If "otherwise" means "in other respects"—and it does—then Big Grrrl's interpretation is correct.

VFLA does not explain how the replacement phrase "in other respects ready, willing and able to perform" can mean "ready, willing and able to perform in the face of the force majeure event." That is because VFLA's interpretation silently equates "in other respects" with "differently"—the very interpretation of "otherwise" that VFLA has been forced to discard. Indeed, VFLA contends in its opposition that because "otherwise" means "in other respects," the word "*modifies the Artist's inclination to be 'ready, willing, and able to perform*'" (Opp. 15:11-5) (emphasis added), but that is exactly what VFLA previously contended when it argued that "otherwise" means "differently." *See*

MSA 20:12-15.[1] If "in other respects" ever could be a synonym for "differently" (and it cannot), Big Grrrl's grammatical analysis proves that it cannot mean "differently" here. Simply put, if "otherwise" as used in the Provision cannot mean "differently" (and it cannot), VFLA cannot give "otherwise" that same meaning via the phrase "in other respects."

Basic grammar and usage also demonstrate that "[h]owever" does not mean that the Artists must be "ready, willing, and able to perform" "in spite of" the force majeure event. Opp. 15:15-20. "[H]owever" is "used when you are saying something that is different from or contrasts with a previous statement." *See* However, *The Britannica Dictionary.*[2] Here, "however" contrasts the rule announced in the second sentence ("Producer shall return any deposit" to the Purchaser) with the exception to that rule set forth in the third sentence ("Purchaser will pay Producer the full Guarantee"). Indeed, "Producer shall return any deposit" and "Purchaser will pay Producer the full Guarantee" are the two independent clauses on either side of "however," and "however" describes the contrast between these two statements. The dependent clause at the start of the second sentence—"In the event of cancelation due to Force Majeure"—is not a *statement* and "however" does not refer to that clause.

Both meanings that VFLA initially offered for "however"—"on the other hand" and "in spite of that," MSA 22:23-24, support Big Grrrl's interpretation. Like "however," the phrase "on the other hand" contrasts the rule announced in the second sentence with the exception to that rule announced in the third sentence. Unsurprisingly, VFLA no longer claims that "however" means "on the other hand" and instead places its chips on "in spite of that," which it shortens to "in spite of." But "in spite of that" also supports Big Grrrl's interpretation: "In the event of cancelation due to Force Majeure then… Producer shall return any deposit amount… *In spite of that*, if the Artist is otherwise ready, willing, and able to perform Purchaser will pay Producer the full Guarantee…"

The Court ruled on demurrer that VFLA's "reading is not so far out of the realm of grammar that the contract could not be reasonably susceptible to it." Minute Order, March 12, 2021, p. 4. After

---

[1] VFLA previously contended that "the adverb 'otherwise' *modifies the artist's inclination to be 'ready, willing, and able to perform*'. . . . By using the adverb 'otherwise' to modify the Artists' *capacity and willingness to perform* the Force Majeure Provision focuses the analysis on whether the artist is 'in other respects' *or 'differently*' (i.e., the definition of 'otherwise') ready, willing and able to perform notwithstanding the force majeure event." MSA 20:12-15 (emphasis added).

[2] https://www.britannica.com/dictionary/however (last visited May 19, 2022).

two years of litigation, VFLA has finally conceded that "otherwise" must mean "aside from that" or "in all ways apart from the one just mentioned" when used as an adverb modifying an adjective, and it has produced documents showing that it consistently uses "otherwise" just this way. (Touring Defs' Additional Undisputed Facts in Opp. to VFLA's MSA ("AUF") 53). Based on this clear grammatical point, the Court should find that the Provision unambiguously provides that the Artists may retain their fees because they were "ready, willing, and able to perform" *aside from* the force majeure event.

B. VFLA's interpretation turns critical portions of the Force Majeure Provision into surplusage

VFLA has no response to Big Grrrl's showing that VFLA's interpretation renders as surplusage both the word "otherwise" *and* the "death or injury" clause—a clause that *its counsel* added to the Provision to shift risk back to the Artist and agreed was an "exception to the exception." MSJ 21:3-22:4, UF 28-29, 43, 45.[3] VFLA agrees that avoidance of surplusage is a "basic rule" of contract interpretation (Opp. 19:1-2), and this canon further confirms that Big Grrrl's interpretation is correct.

C. There is no surplusage under Big Grrrl's interpretation

Big Grrrl's interpretation of the Provision involves no surplusage—and certainly none that would not also afflict VFLA's own interpretation. Opp. 18:19-19:3. The first sentence of the Provision ("A 'Force Majeure Event' means…") defines what counts as a "Force Majeure Event." The first clause of the second sentence ("In the event of cancelation due to Force Majeure then all parties will be fully excused…") immunizes both parties from claims based on the occurrence of a force majeure event. The second clause of the second sentence ("…Producer shall return any deposit amount…") deals with a Producer's return of an already received "deposit" ("any amount paid…prior to payment of the Balance") while the following sentence deals with VFLA's payment of the remainder of the fee.

In any event, the purported surplusage that VFLA attacks relates to the structure of the Provision and is present in its own interpretation. The sentences defining a force majeure event,

[3] That VFLA's interpretation disregards "otherwise" is demonstrated by VFLA's repeated contention that the Artists must have been "ready, willing, and able to perform" to prevail in this case, even though the test under the Agreement is whether the Artist is "*otherwise* ready, willing, and able to perform." *See* Opp. 8:6-7, 12:1-2, 14:15-17, 16:11-12, 16:18-22, 17:14-16, 19:8-9, 20:9-11, 21:11-13, 27:2-3; *see also* VFLA's Additional Undisputed Facts 65-77 (disputing that Lizzo was ready, willing, and able to perform *aside from* the force majeure event by contending that Lizzo could not have been ready, willing, and able to perform *at* the "illegal" event).

deeming all parties excused, and dictating what happens to deposits are not surplusage under Big Grrrl's interpretation. But if they are, then they are surplusage under VFLA's interpretation, too.

Big Grrrl's interpretation, moreover, is not that the "artist is entitled to the deposit unless the artist cancels because of the artist's death, illness or injury, or that of their family," Opp. 16:22-26; 18:19-19:3; 25:4-8. Like the "but for" test that VFLA agreed to in other agreements (MSJ 25:6-26), "otherwise ready, willing, and able" means that the Artist does not receive a windfall if she would not have performed for reasons independent of the force majeure event—for example, because she developed political objections to the festival, or retired from music, or accepted a better offer.

D. VFLA's "illegality" arguments misconstrue the law

The Court previously and correctly ruled that "illegality" did not apply because Virgin Fest was legal at the time of contracting and the Provision is a risk allocation clause. Minute Order, at 2.

VFLA's contention that subsequent government orders changed the original meaning of the Force Majeure Provision contravenes the fundamental rule that "[t]he mutual intention of the parties *at the time of contracting* governs interpretation." *George v. Auto Club of S. Cal.* (2011) 201 Cal. App. 4th 1112, 1120. Nor do the government mandates prohibit the Court from adopting Big Grrrl's interpretation of the Force Majeure Provision or require it to void the contract. Opp. 20:7-21:21. California law is clear: "If a contract is valid when made, no subsequent legislative act can render it invalid." *Stephens v. S. Pac. Co.* (1895) 109 Cal. 86, 95; *Moran v. Harris* (1982) 131 Cal. App. 3d 913, 918 ("In determining whether the subject of a given contract violates public policy, courts must rely on the state of the law as it existed at the time the contract was made."); 14 Cal. Jur. 3d Contracts § 169.

Industrial Development & Land Co. v. Goldschmidt (1922) 56 Cal. App. 507 (Opp. 19:12-16, 21:3-9) is not to the contrary. While the intermediate appellate court held that Prohibition rendered "inoperative" a lease that restricted a tenant to operating a liquor business, the California Supreme Court later *disavowed* that reasoning. *Id.* at 509.[4] Even if *Goldschmidt* were good law, it would not apply here because the parties contemplated the possibility of a force majeure event and allocated the

[4] VFLA's other precedents concern contracts or contractual provisions that were illegal at the time of contracting (Opp. at 20:17-21:10), except for *Orlando v. Carolina Cas. Ins. Co.* (E.D. Cal. July 26, 2007) 07-cv-92, 2007 WL 2155708, at *6, which is not about illegality at all.

risk of such an occurrence. As the Court has recognized, there is nothing "illegal" about such a risk allocation. Minute Order, at 2; *see* Witkin Summary of Cal. Law, § 862, Contract Provision to Shift Risk ("[P]arties may make special provision for adjustment of rights in the event of impossibility arising from any cause.").

E. This case does not involve a forfeiture for VFLA

Neither of VFLA's two claimed bases for forfeiture apply. A ruling that Big Grrrl may retain its fee could not "divest" VFLA "of property *without compensation*" (Opp. 13:23-24) because VFLA *was* compensated. VFLA acknowledged that its payment was *not* solely for the Artist's personal performance but was, instead, consideration for a *package of benefits*, including the Artist's agreement to not play other events within a defined timeframe and geographic radius and VFLA's right to "advertise" the festival and to "solicit[] sponsorships and ticket sales" using the "Artist's name, likeness, and image[.]" UF 12; AUF 55. VFLA used these benefits prior to its cancellation. *Id.* The Force Majeure Provision is a risk allocation provision, not a forfeiture provision. *Cf. NetOne, Inc. v. Panache Destination Management, Inc*., 20-cv-150, 2020 WL 6325704, at *4 n.8 (D. Haw. Oct. 28, 2020) (clause permitting event organizer to retain deposits on force majeure cancellation was not a forfeiture clause).[5]

This case also cannot involve "the loss of . . . property *because of* a . . . breach of obligation, or neglect of duty." Opp. 13:14-25 (emphasis added). No defendant has contended that VFLA breached or neglected anything (Opp. 14:2)—to the contrary, it is VFLA who claims that the defendants breached by refusing to return the prepaid fees.

Moreover, even if VFLA *had* breached the agreement by refusing to pay Big Grrrl, VFLA would not have suffered any "loss of property" *because of* that breach. If VFLA had failed to pay Big

[5] *Kuish v. Smith* (2010) 181 Cal. App. 4th 1419, (Opp. 14:3-6), is an inapplicable case concerning "cover" rules that govern real property transactions, as dictated by Civ. Code § 3307. The plaintiff contracted to buy a house, paid a deposit, but did not go through with the purchase. The seller resold the house in a rising market and refused to return the plaintiff's deposit. *Kuish* held that the seller could not keep the plaintiff's deposit under Section 3307, because the seller sold the home for more than the original contract price and had not suffered any "benefit of the bargain" damages. *Id.* at 1428-29. This is not real property case, and *Kuish*'s reasoning would not apply in any event where Big Grrrl had no ability to "cover" once VFLA cancelled the event (*i.e*., to obtain a new contract to perform at a different event on June 6, and for the same fee) and would lose the benefit of its bargain if it could not retain its bargained-for fee.

Grrrl its fee, VFLA would not have lost anything at all, much less suffered a loss *because of* any breach or neglect—it would have kept its money and experienced a gain. VFLA also will suffer no loss *because of* a breach or neglect if the Court rules that Big Grrrl may retain its fee. Rather, such a ruling would confirm that no one has breached the agreement. There is thus no scenario under which VFLA can suffer a forfeiture resulting from its breach or neglect.

Finally, if any party benefits from the strict construction rule of Section 1442 it is *Big Grrrl and not VFLA* because it is Big Grrrl/Artists who must satisfy the condition which VFLA contends triggers the alleged forfeiture. The statute provides that "[a] *condition* involving a forfeiture must be strictly interpreted *against the party for whose benefit it is created*." Civ. Code § 1442 (emphasis added). Thus, "Section 1442, by its terms, is premised on a condition which the promisor must perform or not perform on pain of forfeiture in favor of the promisee" and "requires a clear statement of the required performance or nonperformance so that the promisor can conform his or her behavior and avoid a forfeiture." *Aviel v. Ng* (2008) 161 Cal. App. 4th 809, 819 (Section 1442's strict construction did not apply to forfeiture "triggered by events entirely independent of any performance by" the party suffering the forfeiture).[6]

Here, as VFLA recognizes, it is Big Grrrl that must fulfill the "ready, willing, and able" condition. MSA 20:27-28 n.6 ("Here, the Producers' reliance on the third sentence of the Force Majeure Provision turns on the Artists' ability to establish a condition…"). This condition exists for VFLA's benefit to ensure that Big Grrrl does not receive a windfall if Lizzo would not have performed even absent the force majeure event. Thus, assuming the condition involves a forfeiture—and it does not—the statute requires strict construction in Big Grrrl's favor and *against VFLA*.

---

[6] VFLA's cited cases are in accord. In *Lowe v. Ruhlman* (1945) 67 Cal. App. 2d 828, for example, the defendant was the beneficiary of a life estate in certain property "as long as, and on condition that" the defendant lived on the property *alone*. *Id.* at 830-31. To avoid a forfeiture, the court construed the condition narrowly against the party for whose benefit the condition was created—the legatees to whom the property would revert if the condition were violated—and in favor of the party who had to fulfill the condition—the defendant required to live alone on the property. *Id.* at 832-33. *Nelson v. Schoettgen* (1934) 1 Cal. App. 2d 418, *Conolley v. Power* (1924) 70 Cal. App. 70, *Smith v. Baker* (1950) 95 Cal. App. 2d 877, and *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal. 2d 751, are in accord. The courts construed conditions/alleged conditions in favor of the party who had to satisfy the condition and against the party for whose benefit the condition existed. *Hawley v. Orange County Flood Control District* (1963) 211 Cal. App. 2d 708, merely notes in dicta that a forfeiture clause is to be strictly construed against the party the provision benefits. *Id.* at 717.

F. VFLA's extrinsic evidence is insufficient to defeat summary judgment

The extrinsic evidence offered by VFLA fails to create a material dispute as to the meaning of the Provision and does not disturb Big Grrrl's entitlement to judgment. Opp. 22:8-25:10. VFLA relies on three purported pieces of extrinsic evidence which it contends show that Big Grrrl and WME agreed with VFLA's contract interpretation, but the evidence does not support the inferences VFLA draws and thus cannot defeat summary judgment. *See Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal. App. 4th 1107, 1134 & n.18 (extrinsic evidence only creates a material dispute of fact where the evidentiary facts themselves, rather than the inferences to be drawn from them, are disputed); *Habitat Tr. for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal. App. 4th 1306, 1341-42 (same).

The March 20, 2020 email from Lizzo's talent agent, Matthew Morgan, to VFLA CEO Jason Felts stating that Lizzo is "ready, willing, and able to play this as soon as the gov't says we can" does not support an inference that Big Grrrl and WME agreed with VFLA's interpretation of the Force Majeure Provision. Opp. 22:25-26:2. VFLA argues that "[t]here would have been no point in saying 'as soon as the gov't says we can' if all that mattered under the Force Majeure Provision was the subjective say-so of the Artists in a make-believe world where the illegality of concerts did not exist[.]" *Id*. 22:25-26:2. But Mr. Morgan was answering a practical question with a practical statement: Lizzo would play the show if the government permitted it to go forward. Indeed, this is how VFLA interpreted the email—Mr. Felts' response was "Sounds good!"—and VFLA used similar phrasing when it told the City of LA that "artist representatives have…told us that the artists are ready, willing and able to perform if the government permits." AUF 48; UF 60. This wasn't a coded message about the meaning of the Provision—it was a simple statement using common phrasing that Lizzo would play the festival if the government permitted and is consistent with Big Grrrl's position in this case.

Nor can the Court draw any inference that the mere return by Kali Uchis Touring of its $100,000 deposit for the Sol Blume festival "undermines the interpretation that defendants are offering here." Opp. 22:10-12. Kali Uchis Touring could have returned the money for countless reasons having nothing to do with allegedly agreeing that the underlying contract obligated Kali Uchis Touring to do so, and VFLA has adduced *no* evidence that the money was returned for that reason. Indeed, as demonstrated in the Touring Defendants' opposition to VFLA's motion for summary adjudication, and

as evidenced by contemporaneous documentation, Kali Uchis returned the deposit for business reasons unrelated to the agreement's terms. Touring Def's Opp. to VFLA's MSA ("Defs.' Opp") 22:9-18.

The same holds true for the email that one of Ms. Goulding's agents at WME sent to Ms. Goulding's management team, stating that Starry US Touring needs to return the VFLA fee. Nothing in that email, and no evidence that VFLA has adduced, shows that the agent was addressing any legal reason to return the fee, and that was not the agent's intent, as the Touring Defendants demonstrated in their opposition to VFLA's competing motion. Defs.' Opp 22:19-23:9. Indeed, the agent does not discuss or even mention the Agreement or the governing Festival Rider.

Finally, that Big Grrrl and Uchis are parties to "but for" agreements does not demonstrate that Big Grrrl is asking the Court to "write into the Force Majeure Provision language that WME purposely chose not to include." Opp. 17:17-18:2; *see* Defs.' Opp. 24:3-25-10. Nor does "otherwise" "silently incorporate a 'but for' analysis." Opp. 8:22-25. The WME attorney who drafted the Provision considered the language a "plain language synonym" for "but for." AUF 52. He was correct. What VFLA calls a "silent incorporation" is just the plain meaning of the Provision.

G. Big Grrrl's extrinsic evidence confirms its interpretation

VFLA does not address Big Grrrl's evidence regarding the inclement weather provision and the negotiation history of the Festival Rider and Force Majeure Provision.

VFLA also does not dispute that it readily entered into performance agreements that explicitly adopt the "but for" standard that VFLA previously contended is absurd and illegal and it never would have entertained. (MSJ 25:6-26:9). VFLA contends that this evidence is "irrelevant" because VFLA only ever claimed that it would not have entered into a "but for" agreement with *WME* (as opposed to other agencies) (*id.*18 n.4), but that is too clever by half.

VFLA, finally, does not dispute the material facts that Big Grrrl presented regarding VFLA's admissions about the Starry US Touring Agreement. Instead, it argues over the inferences to be drawn from those facts. But the clear implication of these undisputed facts is that Mr. Epstein viewed the deal point that Mr. Tetreault confirmed—"artist to be paid in full in event of force majeure"—as an "overlap" with the Force Majeure Provision in the Rider, which *he never revised* after VFLA confirmed the point. While VFLA contends that the "artist to be paid in full" language did not appear

on the face pages of the final Starry agreement (Opp. 23:20-24:2), that fact *supports* the inference that Mr. Epstein understood that the "paid in full" deal point already was embodied "with a lot more detail" in the previously negotiated Rider such that it was unnecessary to address it elsewhere.[7]

It is irrelevant that Mr. Tetreault supposedly was not "responsible for" negotiating force majeure terms (Opp. 25:10-22); he expressly confirmed *all the* deal points set forth in WME's email and Mr. Epstein thereafter made additional critical admissions, with VFLA's top executive on copy, and did not thereafter revise the Rider. UF 51. This evidence *clarifies* that the Force Majeure Provision *already* said, in effect, that the Artists were to be paid in full in the event of a force majeure cancellation, subject to enumerated exceptions (the "details" Mr. Epstein referred to), and did not need to be changed to conform to the agreed-upon points.

These statements and conduct are admissible. As an initial matter, VFLA's statements and conduct about the Starry US Agreement could not amend or alter the Big Grrrl Agreement and are not, therefore, parol evidence with respect to the Big Grrrl Agreement, especially where they post-date the execution of the Big Grrrl Agreement. In any event, the evidence is admissible even with respect to the Starry US Touring Agreement (Opp. 24:3) because Section 1856—the parol evidence rule—explicitly "does not exclude other evidence of the circumstances under which the agreement was made or to which it relates . . . to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement." Cal. Civ. Proc. Code § 1856; *see also Cont. Baking Co. v. Katz* (1968) 68 Cal. 2d 512, 521 ("[E]xtrinsic evidence is admissible in order to explain what those [contract] terms are.").

II. VFLA's Good Faith and Fair Dealing Claim Fails as a Matter of Law

Careau & Co. v. Sec. Pac. Bus. Credit, Inc. (1990) 222 Cal. App. 3d 1371 and its general summary of the contours of an implied covenant claim does not overcome Big Grrrl's showing that VFLA's claim is improperly duplicative of its breach of contract claim. As *Careau* held, an implied

[7] Neither of the interim emails to which VFLA cites (Opp. 23:24-24:2) bear on the meaning of the Force Majeure Provision. Neither discusses force majeure issues or purports to confirm every contractual provision or the terms of the Festival Rider. Indeed, one of the emails is an *automatically generated* confirmation email that includes only select deal points (Big Grrrl's Response to VFLA's Additional Undisputed Facts ("RAUF") 106) and the other outlines for Ms. Goulding's team only those deal terms that had recently been *revised*, and those terms did not include the previously confirmed force majeure point. (RAUF 107).

covenant claim should be dismissed where the plaintiff "allege[s] nothing more than a duplicative claim for contract damages[.]" *Id.* at 1401. Here, the damages VFLA seeks on its covenant and contract claims are *the same*, demonstrating that the implied covenant claim is improperly duplicative. *Careau* 222 Cal. App. 3d at 1401.

In any event, Big Grrrl did not breach the covenant post-cancellation by disagreeing with VFLA regarding the interpretation of the Agreements. Opp. 27:5-25. Unsurprisingly, VFLA fails to cite a single case where such a disagreement was found to support an implied covenant claim. That is because there is none.

VFLA's two new *pre-cancellation* breach theories also fail. VFLA now says that Big Grrrl breached the implied covenant when Lizzo signed on to a March 15, 2020 "open letter" that acknowledged that the "the live music side has already been forced to shut down" and called for the rest of the industry to "pause" "for a few weeks." Opp. 26:12-22; Geller Decl. ¶ 18, Ex. S. It also contends that Starry breached by not disclosing a manager's belief that the pandemic and resulting government restrictions would make it difficult to "pull" Ms. Goulding's "show together." Opp. 27:13-15. VFLA did not plead these new pre-cancellation theories in its Amended Complaint, and they cannot be used to deny summary judgment. *Laabs v. City of Victorville* (2008) 163 Cal. App. 4th 1242, 1253, 1258 (declining to consider new theories raised for the first time in opposition and holding that "the complaint limits the issues to be addressed at the motion for summary judgment"). In any event, VFLA has consistently claimed that Virgin Fest was cancelled by government mandate (*see, e.g.*, Opp. 9:28), and neither the letter nor the manager's belief had anything to do with Virgin Fest's cancellation. Without a causal link between the alleged breach and some asserted harm, VFLA's implied covenant claim fails. *See Troyk v. Farmers Grp., Inc.* (2009) 171 Cal. App. 4th 1305, 1352 ("Implicit in the element of damage is that the defendant's breach caused the plaintiff's damage.").

Dated: May 20, 2022

SHAPIRO ARATO BACH LLP

By: _____
Cynthia S. Arato (SBN 156856)