No. B323977

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT**

VFLA EVENTCO, LLC,

Plaintiff-Appellant,

vs.

WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC, STARRY US TOURING INC., KALI UCHIS TOURING INC., and BIG GRRRL BIG TOURING, INC.,

Defendants-Respondents.

Appeal From the Superior Court of Los Angeles County,
Case No. 20SMCV0933, Honorable Mark H. Epstein – Dept. R.

BRIEF FOR DEFENDANTS-RESPONDENTS BIG GRRRL BIG TOURING, INC., STARRY US TOURING INC., and KALI UCHIS TOURING INC.

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CERTIFICATE OF INTERESTED ENTITIES

(Cal. Rules of Court, Rule 8.208)

Pursuant to California Rule of Court 8.208, each of Big Grrrl Big Touring, Inc., Starry US Touring, Inc., and Kali Uchis Touring, Inc. certifies on behalf of itself only that the following persons or entities have either an ownership interest of 10 percent or more in Big Grrrl Big Touring, Inc., Starry US Touring, Inc., and Kali Uchis Touring, Inc. or a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

Big Grrrl Big Touring, Inc.: Melissa Jefferson p/k/a Lizzo

Starry US Touring, Inc.: Ellie Goulding

Kali Uchis Touring, Inc.: Karly-Marina Loaiza p/k/a Kali Uchis

Dated: April 6, 2023 By: 

Cynthia S. Arato

Attorney for Defendant-Respondent Big Grrrl Big Touring, Inc.

Dated: April 6, 2023 By: 

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INTRODUCTION

The Superior Court correctly ruled that appellant VFLA Eventco, LLC is not entitled to a refund of the monies it paid to secure commitments from the recording artists Melissa Jefferson p/k/a Lizzo, Ellie Goulding, and Karly-Marina Loaiza p/k/a Kali Uchis to perform at VFLA's new music festival.

Respondents Big Grrrl Big Touring Inc., Starry US Touring, Inc., and Kali Uchis Touring, Inc., are the touring companies for Lizzo, Ellie Goulding, and Kali Uchis, respectively.[1] Between February and March 2020, each of the Artists agreed to perform at Virgin Fest Los Angeles, a brand-new music festival scheduled for that June. Wary of attaching themselves to an untested, first-time festival, each of the Artists agreed to commit to the event only if VFLA, the festival promoter, paid 100% of her fee in advance and promised that the fee would be non-refundable. Consistent with this framework, the parties placed the risk of an unforeseeable cancellation—a so-called "force majeure event"—squarely on VFLA. Specifically, each of the governing contracts provided that the Artist would retain her fee if the performance was canceled "due to Force Majeure" so long as the Artist was "otherwise ready, willing, and able" to perform—that is "ready, willing, and able to perform" *but for* the force majeure event.

VFLA cancelled the festival on May 9, 2020, because of the Covid-19 pandemic. Despite having assumed the risk of such a

[1] The artists and their touring companies are referred to interchangeably as the "Artists."

cancellation, VFLA sued the Artists for breach of contract for retaining the fees that VFLA previously agreed were theirs to keep. Ignoring the word "otherwise," VFLA claimed that the force majeure provision required the Artists to prove that they were "ready, willing, and able to perform" *in the face* of the force majeure event (*i.e.*, the pandemic and resulting government orders).

After a nearly day-long hearing, the Superior Court (Epstein, J.) correctly ruled on summary judgment that the force majeure provision permitted the Artists to retain their fees if they were "ready, willing, and able to perform" *aside from* or *in all respects other than* the force majeure event.

The Superior Court's ruling gives the phrase "otherwise ready, willing, and able" the only meaning to which it is susceptible. *First*, "otherwise" is used in the force majeure provision to modify the adjectives "ready, willing, and able," and when "otherwise" modifies an adjective, it means "in all ways except the one mentioned." Take, for example, the following sentence: "I didn't like the ending, but otherwise it was a very good book." There, "otherwise" 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." Leading dictionaries, and judicial decisions in a variety of settings confirm this singular meaning of the "*otherwise*" clause.

Second, as the Superior Court recognized, VFLA's interpretation turns the final clause of the force majeure provision into surplusage—*something VFLA does not dispute in*

this appeal. This final clause provides that the Artist must return her fee even if she is "otherwise ready, willing, and able to perform" if the force majeure event is the "Artist's death, illness, or injury, or that of [her] immediate family." This exception to the "otherwise ready, willing, and able" clause would be superfluous if the Artist could retain her fee only if she was "ready, willing, and able to perform" *in the face of* the force majeure event. Quite simply, the Artist would never be "ready, willing, and able to perform" if the event that caused the cancellation of her performance was her own "death, illness, or injury," or that of a family member. The canon against surplusage thus confirms the Superior Court's correct interpretation of the provision.

VFLA provides no support for its contrary interpretation. It devotes less than two unintelligible pages (filled with empty words like "connection" and "linkage") to the language at the heart of this case and ignores the surplusage point that dooms its interpretation.

VFLA's failure to proffer any support for its position further establishes that the force majeure provision is unambiguous and that summary judgment was warranted on the contract language alone. And the undisputed extrinsic evidence confirms the Artists' interpretation and demonstrates that VFLA understood it assumed the risk of a force majeure cancellation.

The Superior Court also correctly rejected VFLA's "illegality" and "forfeiture" arguments. The agreements were valid when made and the Artists' interpretation does not require

any party to engage in an illegal act: it merely allocates the risk of an unforeseen event. There is therefore no "illegality" for the Court to avoid. Nor is the force majeure provision a forfeiture clause. VFLA was not deprived of property without consideration—indeed, it received a package of benefits, including exclusivity and the use of the Artists' names and likenesses. The clause, moreover, is triggered by events beyond the control of either party, and, for this reason, VFLA cannot seriously contend that the clause provides for the deprivation of property because of a crime, breach of obligation, or neglect of duty.

For each of these reasons, the Court should affirm the grant of summary judgment to the Artists on VFLA's breach of contract claim. The Court should also affirm the grant of summary judgment on VFLA's claim for breach of the implied covenant of good faith and fair dealing, which fails under the express language of the contract; is improperly duplicative of VFLA's contract claim; and improperly relies on newly conjured theories which VFLA never pled.

STATEMENT OF THE CASE

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.

(1AA-0155 [FAC ¶ 2]; 2AA-2293 [UMF-1].)[2] At that time, VFLA's target date to announce a talent lineup was just seven weeks away and VFLA lacked an opening night headliner to anchor the program. (1AA-0264, 0268-69; 2AA-2294 [UMF-2, 3].) VFLA's CEO had identified Lizzo as an "ideal" headliner and had made her a series of offers escalating from $1.35 to $4 million. (1AA-0273-83; 2AA-2295 [UMF-6, 7].) However, as of the scheduled announce date, VFLA had been unable to secure Lizzo, or anyone else, to headline the event. (1AA-0271.)

The parties finally struck a deal in February 2020 after VFLA agreed (1) to pay Lizzo, through her touring company, a flat fee of $5 million—labeled a "deposit" or "guarantee"—"Immediately upon Confirmation and Issuing of Contract"; and (2) that the guarantee was *not* refundable except as explicitly provided. (3AA-3631, 3634, 3637 [Lizzo Agreement]; 2AA-2296-97 [UMF-10].) VFLA, moreover, was not permitted to announce Lizzo's association with the festival until VFLA paid Lizzo in full. (3AA-3637.) These terms were critical because, as VFLA understood, Virgin Fest was a new and untested event, and it was tainted by its organizer's association with a different event that failed to meet its payment obligations. (1AA-0313-16; 2AA-2297 [UMF-11].)

In exchange, VFLA obtained Lizzo's commitment to perform, along with other benefits, including the right to use

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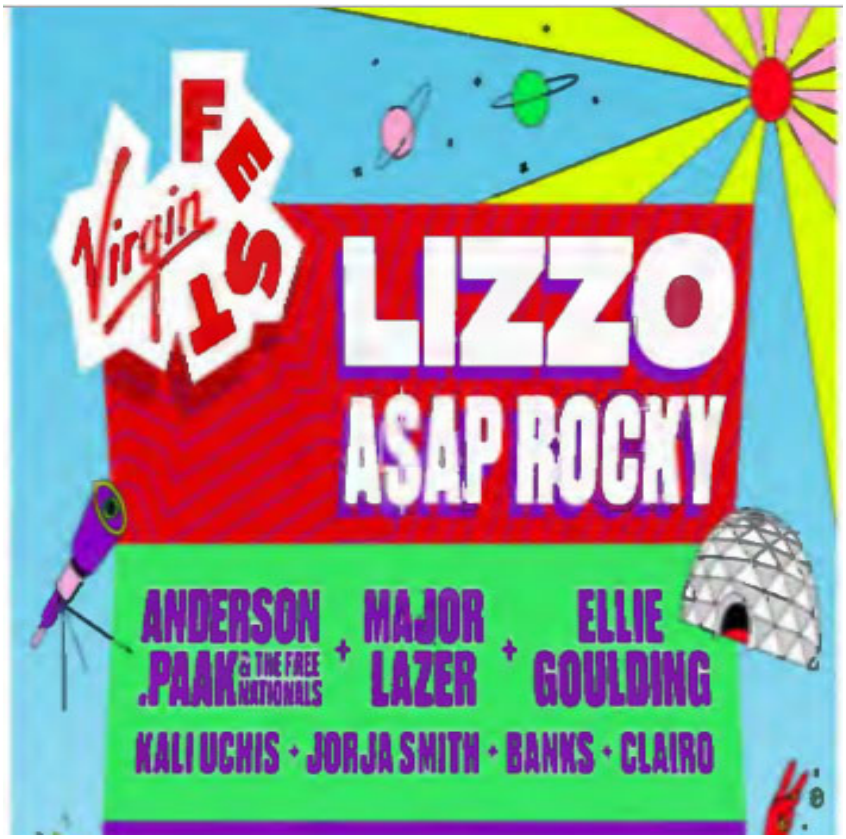
[2] "UMF" refers to an undisputed material fact proffered by Big Grrrl. For the Court's convenience, references are to VFLA's response to Big Grrrl's separate statement in support of Big Grrrl's motion for summary judgment. (*See* 2AA-2292 *et seq.*)

Lizzo's name, likeness, and image to advertise her performance, solicit sponsorships, and promote ticket sales. (3AA-3637, 3640.) VFLA also obtained exclusivity provisions that limited Lizzo's touring and marketing activities. (3AA-3633-34, 3637.) VFLA used these benefits—for example, by widely advertising the festival using Lizzo's name and image—before the festival was cancelled.



(5AA-4215.)

Ellie Goulding and Kali Uchis, through their touring companies, subsequently agreed to join the Virgin Fest lineup. (3AA-3567 [Goulding Agreement], 3594 [Uchis Agreement].) All three Artists were represented by WME, and all three agreements contain the same force majeure provision.

B. The Force Majeure Provision

Each of the Artists' contracts contain identical force majeure language (the "Force Majeure Provision"):

> 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).[3] (3AA-3574, 3600, 3638; 2AA-2300-02 [UMF-16].)

The Force Majeure Provision begins with a broad definition of Force Majeure Event, to include "any act"—including circumstances unique to the Artist—"beyond the reasonable control of [the touring company], [Artist], or [VFLA] which makes

[3] As used throughout the Virgin Fest Rider, "Purchaser" refers to VFLA and "Producer" refers to each Artist's touring company.

any performance by Artist impossible, infeasible, or unsafe[.]" (*Id.*)

The Force Majeure Provision then provides that upon "cancelation due to Force Majeure … all parties will be fully excused and there shall be no claim for damages[.]" (*Id.*)

After that comes a series of rules. First is a default rule providing for the guarantee to be returned to VFLA when the performance is cancelled "due to Force Majeure[.]" (*Id.*) Second is an exception to that default rule—a converse rule, indicated by the word "However"—providing for the Artist to retain her guarantee if she is "otherwise ready, willing, and able to perform." (*Id.*) Finally, there is an exception to that exception—indicated by the word "unless"—which provides that the Artist must return her guarantee if the Force Majeure Event is her own "death, illness, or injury, or that of [her] immediate family[.]" (*Id.*)

C. The Negotiation History

The Force Majeure Provision was contained within a rider—the "Virgin Fest Rider"—negotiated by Steve Gaches, WME's Head of Music and Business Affairs, and Tim Epstein, an experienced music industry lawyer who acted as VFLA's outside counsel. (1AA-0330-31, 0335; 2AA-2302 [UMF-18].)

Gaches and Epstein based the Virgin Fest Rider on a rider they had negotiated a few months earlier for a different music festival called Baja Beach (the "Baja Beach Rider"). (1AA-0333, 0336-38, 0342, 0376; 2AA-2302-03 [UMF 19, 20, 21].) The

negotiations demonstrate that the festival organizer is to bear the risk of a force majeure cancellation.

The original draft of the force majeure provision for the Baja Beach Rider provided that all parties were excused in the event of a force majeure cancellation, except that the Purchaser [festival organizer] had to pay the Producer [touring company/artist] the full guarantee if the artist had commenced performance before the cancellation occurred. The provision stated, in pertinent part:

> 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 cancellation 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.

(5AA-4099-4100; 2AA-2303-04 [UMF-22].)

Gaches invited Epstein to make edits to the force majeure provision. (1AA-0337; 2AA-2304 [UMF-24].) Among other edits, Epstein added a clause providing for the Artist to return the guarantee when the "cancellation is the result of Artist's death, illness, or injury, or that of its immediate family." (1AA-350-51, 0358; 4AA-4113; 2AA-2305-06 [UMF-28].) This clause shifted certain cancellation risk—specifically, the risk of a cancellation resulting from the Artist's own personal circumstances—back to the Artist. (1AA-0350-51, 0359; 2AA-2306-07 [UMF-29].)

Gaches accepted Epstein's additions and made one significant revision: he changed the circumstance under which the Artist would be paid the full guarantee. (1AA-0360-62, 0363-65.) Where the original draft provided that the Artist would be paid the full guarantee only if the Artist had "commenced performance prior to [the force majeure] cancellation" (5AA-4099-4100), Gaches' revision provided for the Artist to retain the full guarantee "if the Artist is otherwise ready, willing and able to perform." (4AA-4013; 2AA-2308 [UMF-34].) 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." (1AA-0361-62, 0366-68; 4AA-4013, 4120; 2AA-2309 [UMF-35].)

Epstein agreed on behalf of Baja Beach to use the new language for the Baja Beach festival. (4AA-4133, 4138; 2AA-2309-2310 [UMF-37].) And several months later, he agreed on behalf of VFLA to use that language for Virgin Fest as well. (1AA-032; 2AA-2310 [UMF-38].)

Epstein conceded that the force majeure provision that he proposed for the Baja Beach 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." (1AA-0339-40, 0354-55; 2AA-2310 [UMF-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. (1AA-0341, 0355,

0357; 2AA-2311 [UMF-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." (1AA-0341, 0355, 0357; 2AA-2311 [UMF-42].) And the second half of the third sentence—the language 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." (1AA-0350-51, 0356, 0357-59; 2AA-2311-12 [UMF-43].)

Epstein further conceded that the only difference between the language he proposed for the force majeure provision in the Baja Beach Rider and the final force majeure provision contained in the Baja Beach and Virgin Fest Riders is the circumstance under which the festival must pay the artist when a Force Majeure Event occurs. As Epstein acknowledged, Gaches "struck language identifying one circumstance"—the Artist having "commenced performance"—and "added language identifying a different circumstance"—the Artist being "otherwise ready, willing, and able to perform." (1AA-0366; 2AA-2312 [UMF-44].) Regardless of the triggering circumstance, Epstein conceded that the final clause which he inserted into the provision creates an "exception to that … exception." (1AA-0357-58; 2AA-2312 [UMF-45].)

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

On May 8, 2020, the City of Los Angeles informed VFLA that it planned to extend 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." (1AA-

0165, 0225; 2AA-2330 [UMF-57].) The next day, VFLA publicly announced that the festival was cancelled. (1AA-0397; 2AA-2330-01 [UMF 58].) On June 2, 2020, VFLA demanded the return of the deposits it had paid to WME on behalf of Lizzo, Goulding, and Uchis. (1AA-0405, 0407-08, 2AA-2332 [UMF-61].) The Artists rejected that demand.

E. This Litigation and the Superior Court's Order Granting Summary Judgment to the Artists

VFLA filed this action on July 16, 2020. Following extensive discovery, VFLA moved for summary adjudication, and the Artists and WME both moved for summary judgment. The Superior Court held nearly a full day of argument on the motions, and on August 31, 2022 entered an order granting summary judgment to the Artists and WME.

In granting summary judgment to the Artists, the Superior Court first rejected VFLA's argument that the Force Majeure Provision was a forfeiture clause that must be construed in VFLA's favor. It explained that the Force Majeure Provision merely allocated the risk of "an event outside of everyone's control" and was not a forfeiture triggered by "a party failing to perform a condition under the contract." (4AA-4641 [SJO-7].) And it rejected VFLA's argument that the Force Majeure Provision provided for the deprivation of property without consideration." (4AA-4642-43 [SJO-8-9].)

The Superior Court next rejected VFLA's illegality argument. It noted that "[i]t is black letter law that 'if the contract was valid when made, no subsequent act of the

legislature can render it invalid.'" (4AA-4643 [SJO-9].) And it held that the Force Majeure Provision did not require the Artists to perform an illegal act (*e.g.*, performing in contravention of government orders prohibited live events), but merely determined which of the parties was entitled to the Artists' guarantees. (*Id.*) This involved no illegality.

The Superior Court then turned to the interpretation of the Force Majeure Provision. The Superior Court explained its well-established authority to interpret the contract as a matter of law given that there were no factual disputes concerning the extrinsic evidence, *e.g.*, disputes as to the credibility of the witness, and further explained that it possessed this authority even though the parties disputed the inferences to be drawn from that evidence. (4AA-4644-45 [SJO-10-11].)

The Superior Court then addressed the language of the Force Majeure Provision. Finding that the "otherwise ready, willing, and able" clause, read in isolation, was not determinative, the Superior Court turned to the third sentence's final clause—the "exception to the exception"—to determine the Force Majeure Provision's meaning. (4AA-4648-49 [SJO-11-14].) The Superior Court found that the Artists' interpretation gave meaning to the final clause whereas "VFLA's interpretation … render[s] the final clause of the third sentence surplusage." (4AA-4649 [SJO-14-15].) Because contracts should be read "as a whole" and "interpreted to avoid surplusage" (4AA-4648 [SJO-14]), this favored the Artists' interpretation.

Finally, the Superior Court turned to the extrinsic, or "parol," evidence. While it found most of the extrinsic evidence "not … helpful or persuasive," it noted that the "otherwise ready, willing, and able" language had been inserted by WME to make the Force Majeure Provision more "Artist-friendly" for "higher risk shows." (4AA-4650-51 [SJO-16-17].) The Superior Court found that "[t]hat change, in context, lends support to the Artists' position." (4AA-4650 [SJO-16].)

In sum, the Superior Court found that the Force Majeure Provision's "structure" and "history" "favor the Artists' interpretation" and that "the Artists have the better and stronger interpretation." (4AA-4651 [SJO-17]; *see also* 4AA-4652 [SJO-18] ["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."].) Because the record showed that the Artists "certainly" would have performed had there been no Covid-19 pandemic (4AA-4647 [SJO-13]), the Superior Court granted summary judgment to both the Artists and WME.

LEGAL STANDARDS

"The purpose of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to resolve whether, despite their allegations, trial is necessary to resolve their dispute." (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1331 [cleaned up].)

Courts determining summary judgment motions interpret contracts as a matter of law when there is no conflict in the

extrinsic evidence—that is, when "the evidentiary facts themselves are not in dispute." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1134 & n. 18; *see also Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) This remains the case even when the contract is ambiguous (*Wolf*, *supra*, at p. 1134) and "even when conflicting inferences may be drawn from the undisputed extrinsic evidence" (*id.*, at p. 1126; *see also Gilkyson v. Disney Enters., Inc.* (2021) 66 Cal.App.5th 900, 915, 922 & n. 13 [ruling that "interpretation of the contracts remained a question for the court despite the parties' disagreement as to the inferences to be drawn from" the undisputed extrinsic evidence].) Thus, when there are no credibility disputes regarding the evidence, the interpretation of a contract is "solely a judicial function" properly decided on a motion for summary judgment. (*Parsons*, *supra*, at p. 865; *see also City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 70-71 [observing that "[i]t is a judicial function to interpret a contract … unless the interpretation turns upon the credibility of extrinsic evidence"]; *Habitat Trust*, *supra*, 175 Cal.App.4th at p. 1342 [same].)

This Court reviews the Superior Court's grant of summary judgment *de novo*. (*Habitat Trust*, *supra*, 175 Cal.App.4th at p. 1331.) The Superior Court's evidentiary rulings are reviewed for abuse of discretion. (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 875.)

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT ON VFLA'S BREACH OF CONTRACT CLAIM

The Force Majeure Provision permits an Artist to retain her guarantee when her performance is cancelled "due to Force Majeure" so long as the Artist is "otherwise ready, willing, and able to perform." This language unambiguously permits the Artist to retain her guarantee provided she is "ready, willing, and able to perform" *aside from*, or *in all respects other than*, the Force Majeure Event.

VFLA's contrary interpretation, which requires the Artist to show that she was ready, willing, and able to perform in the face of the Force Majeure Event, gives no meaning to the word "otherwise" and renders the final clause of the Force Majeure Provision surplusage. To the extent there remains any doubt, the relevant and undisputed extrinsic evidence confirms that the Artists' interpretation is correct.

A. The Artists' Interpretation of the Force Majeure Provision Is the Only Correct Interpretation as a Matter of Grammar and Ordinary Usage

The Superior Court's interpretation properly gave 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, 54-55), 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, 185-86).

Here, the "words of the instrument"—"otherwise ready, willing, and able to perform"—unambiguously demonstrate the parties' "objective intent" that the Artist retain her guarantee if her performance is cancelled "due to Force Majeure" provided she is "ready, willing, and able to perform" *aside from*, or *in other respects than* the Force Majeure Event. This is the only possible meaning of "otherwise" as it is used in this clause.

Dictionary definitions, legal usage, and ordinary usage all demonstrate that the Artists' interpretation of the word "otherwise" is correct.

Leading dictionaries, for example, establish that when otherwise is used, as here, to modify an adjective, it means "in all ways except the one mentioned" or "in other respects":

- 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 Dictionary*: "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]

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[4] https://www.britannica.com/dictionary/otherwise (last visited March 31, 2023).

[5] https://www.merriam-webster.com/dictionary/otherwise (last visited March 31, 2023).

- Otherwise, *The Am. Heritage Dictionary*, "In other respects: *an otherwise logical mind*."[6]

In each of these examples, the word "otherwise" tells you that the speaker is *setting aside* a previously mentioned fact or event to state a conclusion. Thus, in the first example, "otherwise" conveys that the twins are identical *aside from* the previously mentioned freckle on one boy's cheek. If the "freckle" was included in the analysis, the speaker could not describe the twins as identical. In the second example, "otherwise" conveys that it was a beautiful day *aside from* the previously mentioned rain in the morning. If the rain was included in the analysis, the speaker could not conclude it was a beautiful day. As the Superior Court noted, we find the same meaning in the well-known joke "Otherwise, Mrs. Lincoln, how was the play" (4AA-4646 [SJO-12]), where the humor derives from the absurdity of asking Mrs. Lincoln to assess the play *aside from* the President's assassination.

These examples are not inapposite because they "recognize the existence of the original event," as VFLA claims. (VFLA Br. 34). That is precisely what the Force Majeure Provision does: it recognizes the occurrence of the Force Majeure Event (here, the pandemic and resulting government orders barring live events) and then tests whether the Artist was ready, willing, and able to perform once that event is excluded from the analysis, *i.e.*, "but for" the Force Majeure Event.

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[6] https://www.ahdictionary.com/word/search.html?q=otherwise (last visited March 31, 2023).

VFLA fails to cite a single case that interprets the phrase "otherwise ready, willing, and able" to mean anything other than this common "but for" usage. And, in fact, courts around the country commonly use "otherwise ready, willing, and able" in just this way—to mean "in all ways except the one mentioned" or "in other respects." Thus, courts readily explain that:

1. A plaintiff's failure to perform under a contract "is not necessarily fatal [to a claim for breach] where a defendant's conduct was an impediment to performance and where Plaintiff was *otherwise ready, willing, and able to perform*." (*Exportaciones Del Futuro S.A. de C.V. v. Iconix Brand Group Inc.* (S.D.N.Y. 2009) 636 F.Supp.2d 223, 229-30 [emphasis added]; *see also In re Blue Dog at 399 Inc.* (S.D.N.Y. Bankr. 2015) 540 B.R. 67, 75.) In other words, a plaintiff may be entitled to recover despite its failure to perform if it was ready, willing, and able to perform *but for* the defendant's breach.

2. A real estate "broker is entitled to … his commission where a sale is not completed due to a title problem and the purchaser is *otherwise ready, willing and able*." (*Meisler v. Smith* (5th Cir. 1987) 814 F.2d 1075, 1082 [emphasis added].) That is, the broker must show that *but for* the title problem the purchaser would have gone through with the deal.

3. The entrapment defense has been described as (1) inducement by government agents, and (2) a defendant who was not "otherwise ready and willing to commit the offense." (*United States v. Glassel* (9th Cir. 1973) 488 F.2d 143, 146; *Morris v. State* (Ark. 1989) 779 S.W.2d 526, 526 ["merely affording one the

means and opportunity to do that which he is *otherwise ready, willing, and able* to do does not constitute entrapment"] [emphasis added].) In other words, the defense cannot be sustained if the defendant was ready, willing, and able to commit the crime *even absent* government inducement.

VFLA chides the Artists for citing these "non-California cases." (VFLA Br. 35.) But the Artists do not cite these cases as *precedent* for a point of law, but to show how courts commonly use the "otherwise ready, willing, and able" phrase.

And it is not just judges and dictionary-writers who use "otherwise" to mean "in all ways except the one mentioned" or "aside from that"—VFLA uses the word that way too. For example, in the lead-up to the planned festival, VFLA's CEO, Jason Felts emailed a colleague, "I would fully capitalize LIZZO … Otherwise the subject line is approved." (4AA-4178.) In other words, the subject line was approved *except for* the previously mentioned change. Similarly, a VFLA employee emailed Felts: "When I know what acts are on the bill, I can target the stations that have our artists in rotation, *otherwise* they cannot commit to promotions." (4AA-4174.) In other words, she explained that in a world where VFLA did not identify the acts on the bill, the stations could not commit to promotions. (*See also, e.g.*, 4AA-4184, 4187, 4190, 4197, 4203.)

The Artists' Interpretation gives "otherwise" Its commonly understood meaning, dictated by basic rules of grammar when "otherwise" is used to modify an adjective. In contrast, VFLA's interpretation of the Force Majeure Provision, renders

"otherwise" meaningless. VFLA agrees that "otherwise" means "in other respects" (VFLA Br. 33), but it does not explain how this meaning—which the Artists embrace—supports its interpretation of the clause. And it cannot, because if the Artist is entitled to her guarantee following a Force Majeure Event if she is "*in other respects* ready, willing, and able to perform," the Artist is entitled to her guarantee when, *aside from the previously mentioned Force Majeure Event*, she is ready, willing, and able to perform.

VFLA's interpretation of "however" is also divorced from ordinary grammar and usage. VFLA argues that "'however'… has a connection and linkage to the 'force majeure' event in the prior two sentences"; that "'however' means 'in spite of that'"; and that the Force Majeure Provision thus asks whether the Artist is ready, willing, and able to perform "'in spite of' the force majeure event." (*Id.*) This is gobbledygook.

"However" is "used when you are saying something that is different from or contrasts with a previous statement." *However*, The Britannica Dictionary.[7] A common synonym, as VFLA previously acknowledged, is "on the other hand." (5AA-0562.) Consistent with that accepted meaning, "however" here informs you that the rule at the start of the third sentence (Artist keeps the guarantee) is the converse of the rule at the end of the preceding sentence (Artist returns the guarantee). The Artists are not "ignor[ing] the grammatical significance of the word

[7] https://www.britannica.com/dictionary/however (last visited, March 31, 2023).

'however," (VFLA Br. 34), they are giving it its natural and only plausible meaning.

Indeed, even VFLA's definition of "however"— "in spite of that"—supports the Artists' interpretation of the Force Majeure Provision. If "in spite of that" is substituted for "however," the meaning of the Force Majeure Provision does not change: "In the event of cancelation due to Force Majeure … [the Artist] shall return any deposit amount[s] … previously received (unless otherwise agreed). *In spite of that* [*i.e.*, in spite of that rule], if the Artist is otherwise ready, willing, and able to perform [the festival] will pay [the Artist] the full guarantee[.]"

As a matter of grammar and ordinary usage, "otherwise" has only one meaning in the Force Majeure Provision: "aside from the foregoing" or "in all ways except the one mentioned." "However" similarly has only one meaning here—introducing a converse rule, an exception to the rule that comes before. VFLA's inability to offer a plausible interpretation of either word should end this case.

B. The Artists' Interpretation Is the Only Interpretation That Gives Meaning to All Clauses and Words in the Force Majeure Provision

1. VFLA's Interpretation Results in Surplusage

VFLA does not challenge the Superior Court's finding that its interpretation renders inoperative the "Artist's death, illness, or injury" "exception to the exception" that *its counsel* added to the Force Majeure Provision to shift risk back to the Artist. (4AA-4649 [SJO-14-15]; *see also* 1AA-350-51, 0358; 4AA-

41132AA-2305-06 [UMF-28].) This is fatal to VFLA's claim because "[c]ourts must interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless" (*City of Atascadero v. Merrill Lync, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473; *see also* Civ. Code, § 1641) and "[a]n interpretation that leaves part of a contract as surplusage is to be avoided" (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 186).

The third sentence of the Force Majeure Provision provides that the Artist retains her guarantee if she is "otherwise ready, willing, and able to perform … *unless such cancellation is the result of the Artist's death, illness, or injury, or that of [her] immediate family*[.]" (3AA-3638.) The parties agree that this final clause is intended to prevent the Artist from retaining her guarantee when the Force Majeure Event is the Artist's own personal circumstances. (VFLA Br. 32 & n. 8.)

Yet the final "Artist's death, illness, or injury" clause serves no purpose under VFLA's proffered interpretation, because under that interpretation, the protection provided by this final exception to the exception is already baked into the Force Majeure Provision and is thus unnecessary. Quite simply, the Artist would never be "ready, willing, and able to perform" *in the face of a Force Majeure Event* when the Force Majeure Event that caused the cancellation was her own inability or unwillingness to perform because of her own "death, illness, or injury" or that of

an immediate family member. VFLA's interpretation therefore renders the "Artist's death, illness or injury" clause surplusage.

An example illustrates the point. If the Artist was seriously injured and could not perform, she would be entitled to invoke the Force Majeure Provision and cancel her performance. Under the Artists' interpretation of the "otherwise ready, willing and able" clause, and absent the final exception, the Artist would still retain her guarantee in this setting because she would be "ready, willing, and able to perform" *but for* or *aside from* her injury. The drafters added the final "exception to the exception" to the Force Majeure Provision to provide that the Artist returns the guarantee when the Force Majeure Event is the Artist's personal circumstances.

This was intentional. Indeed, VFLA's outside counsel added the "Artist's death, illness, or injury" clause to the Force Majeure Provision to shift risk back to the Artist. (1AA-0350-51, 0359; 2AA-2306-07 [UMF-29].) And he conceded that it operates as an "exception to the exception"—and is thus not superfluous verbiage. (1AA-0357-58; 2AA-2312 [UMF-45].)

At oral argument, the Superior Court invited VFLA to identify a hypothetical circumstance in which, accepting VFLA's interpretation of the "otherwise ready, willing, and able" clause, the "Artist's death, illness, or injury" exception to the exception would alter the result. (*See* RT-33.) VFLA was unable to identify any scenario that "called that clause into play or where the result could turn on that clause." (4AA-4649 [SJO-15].) The Superior

Court correctly concluded that VFLA's interpretation "render[s] the final clause … surplusage." (*Id.*)

VFLA does not even try to dispute the Superior Court's finding that its interpretation renders the final "exception to the exception" surplusage. Instead, it invents a straw man argument, claiming that "[t]he Artists … incorrectly contended that under VFLA's interpretation, the phrase 'otherwise ready, willing, and able' would be rendered meaningless and surplusage." (VFLA Br. 36.) This misconstrues the Artists' argument. The Artists have never contended that VFLA's interpretation renders the "otherwise ready, willing, and able" clause surplusage. The Artists contend—and have demonstrated—that VFLA's interpretation renders the "Artist's death, illness, or injury" clause surplusage. VFLA has nothing to say about that dispositive point.

2. The Artists' Interpretation Does Not Render Any Language Surplusage

The Artists' interpretation does not, as VFLA claims, permit the Force Majeure Provision to be reduced to a single sentence, providing that "VFLA bears all risk of a force majeure cancellation except one based on the Artist's death, illness, or injury, or that of its immediate family." (VFLA Br. 27, 37.)

The Artists' interpretation does *not* limit the Artist's obligation to return her guarantee to just the "single circumstance" of a "death, illness, or injury." (VFLA Br. 37.) Under the Artists' interpretation, the Artist must return her guarantee both in the "death, illness, or injury"

setting *and* where *any other* circumstance independent of the Force Majeure Event would have prevented the Artist from being "ready, willing, and able to perform." Such circumstances are readily discernable. For example, the Artist might have received a better offer to perform a different show, or the Artist might have developed political objections to one of the festival's sponsors, or decided to take a break from performing. In these circumstances too, the "otherwise ready, willing, and able" condition dictates that the guarantee is returned to VFLA.

Nor does the Artists' interpretation render the "otherwise ready, willing, and able" condition "toothless and illusory." (VFLA Br. 39.) If, for example, the Artist had accepted a better offer to perform a different show or decided to stop performing, VFLA would marshal the evidence to prove those other circumstances, the same way it needs to marshal the evidence to prevail under its interpretation.

In the end, VFLA is not making a "surplusage" argument; it just contends that the Force Majeure Provision could have been drafted more concisely. This misses the mark, for the reasons set forth above. Regardless, there is no "canon of concision," and VFLA does not identify any language that is rendered *surplusage—i.e.*, non-operative—under the Artists' interpretation.

C. Extrinsic Evidence Confirms the Artists' Interpretation

To the extent the Court finds the Force Majeure Provision ambiguous, extrinsic evidence demonstrates that VFLA

understood that the Force Majeure Provision shifts almost all the risk of a force majeure cancellation away from the Artist and to VFLA.

1. The Negotiation History

The negotiation history supports the Artists' interpretation. The Virgin Fest Rider was based on a rider—the "Baja Beach Rider"—previously negotiated between VFLA's outside counsel, Timothy Epstein, and WME. When drafting the Baja Beach Rider, Epstein recognized that the original language providing for the Artist to retain the full guarantee if she had commenced performance allowed the Artist to retain the guarantee even if the cancellation was caused by the Artist's own incapacity. (1AA-0353-55.) He therefore added the "Artist's death, illness, or injury" "exception to the exception" to shift risk back to the Artist. (1AA-0346, 0350-51, 0359; 2AA-2306-07 [UMF-29].) And neither he nor WME's Steve Gaches struck the "Artist's death, illness, or injury" "exception to the exception" after Gaches made "otherwise ready, willing, and able to perform" the operative circumstance under which the Artist retained her guarantee. (1AA-0368; 2AA-2309 [UMF-36].) This shows that the "otherwise ready, willing, and able" clause operates as the Artists contend.

Moreover, as the Superior Court correctly recognized, when Gaches replaced the circumstance under which the Artist is paid notwithstanding a force majeure event, he shifted risk *away from WME's clients*. (4AA-4650-51 [SJO-16-17].) Gaches explained to Epstein, in writing, 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 WME made clear to Epstein it viewed as a high-risk event for its Artists. (1AA-0361-62, 0366-68; 4AA-4013, 4120; 2AA-2309 [UMF-35].)

No reasonable trier of fact could conclude that Gaches' change of the operative circumstance for this high-risk event *narrowed* the circumstances in which WME's clients would be paid and made it less likely that the festival would bear the cost of a cancellation due to force majeure. But that is the conclusion that VFLA urges this Court to reach.

Under the prior language, the artist would be entitled to retain the guarantee if the force majeure event occurred after the artist had commenced performance; Gaches replaced that concept with the "otherwise ready, willing, and able to perform" condition. (1AA-0353-55.) Under VFLA's interpretation of that, an artist 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 of VFLA, a factfinder would have to conclude—illogically—that Gaches modified the Force Majeure Provision to shift risk *towards* WME's clients, all while telling Epstein that the new term was "the best [WME] could do" for an event that WME viewed as high risk. (4AA-4120.)

The only logical conclusion to draw from the negotiation history is that Gaches replaced the prior language in the Force Majeure Provision with language that shifted risk *away from*

WME's artists and *towards the festival*, which is precisely what the Artists' interpretation does.

VFLA's passing suggestion that this history should be disregarded because Baja Beach was an international festival and Virgin Fest was not (VFLA Br. 38) lacks merit. It is undisputed that the actual language incorporated in the Baja Beach Rider—which was intended to address the higher risk associated with international shows—was also used for Virgin Fest, another risky endeavor, and was accepted by VFLA's outside counsel, Epstein, who had previously negotiated the Baja Beach Rider. In any event, even if the motive behind the language had changed (and it did not), the language remained the same, and it is the language that counts.

2. VFLA Admissions Regarding the Starry US Touring Agreement

After the agreement with Big Grrrl was fully executed in February 2020, VFLA negotiated a similar deal with WME for Starry US Touring and the artist Ellie Goulding. As part of that negotiation, VFLA readily agreed that Goulding would be "*paid in full*" for Virgin Fest "*in event of force majeure.*" (4AA-4075.) VFLA's talent buyer, Zach Tetreault, confirmed this and other deal points in writing with WME (*id.*), and Tetreault forwarded the confirmed deal points to VFLA executives and to Epstein, VFLA's outside transactional lawyer (1AA-0382; 4AA-4078-79). Epstein then told the group (which included representatives of WME) that some of the deal points "*overlap*" with the "pre-negotiated T&Cs," *i.e.*, the festival rider. (*Id.*) VFLA thereafter

entered into an agreement with Starry US Touring that used the Virgin Fest Rider, and its "pre-negotiated" Force Majeure Provision, unchanged. (3AA-3574.)

Epstein never stated, either in that email chain or later, that the "pre-negotiated" Virgin Fest Rider was inconsistent with the confirmed force majeure deal point for Starry US Touring and would require the Artist to bear significant risk for a force majeure event. (1AA-0381.) Nor did he modify the Virgin Fest Rider for the Starry US Touring deal in response to Tetreault's email expressing WME's understanding that force majeure risk was allocated to VFLA. (1AA-0385.) 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 Kali Uchis had used in their agreements with VFLA.

VFLA does not dispute the material facts regarding these communications. Instead, it argues over the inferences to be drawn from those facts. But the implication of these undisputed facts is clear. Epstein viewed the deal point that "artist to be paid in full in event of force majeure" as essentially the same as the Force Majeure Provision in the Virgin Fest Rider. While VFLA contends that the "artist to be paid in full" language did not appear on the face pages of the final Starry agreement (VFLA Br. 47), that *supports* the inference that Epstein understood that the "paid in full" point already was embodied "with a lot more

detail" in the previously negotiated Virgin Fest Rider such that it was unnecessary to address it elsewhere.[8]

It is irrelevant that Tetreault supposedly was not responsible for negotiating the full terms of the deal. (VFLA Br. 49.) Regardless of how VFLA understood or wished to cabin Tetreault's responsibilities, he expressly confirmed *all the* deal points set forth in WME's email, and Epstein thereafter made additional critical admissions, with VFLA's top executive on copy, and did not revise the Virgin Fest Rider. This conduct *confirmed* 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" Epstein referred to) and did not need to be changed to conform to the agreed-upon points.

These pre-litigation communications belie VFLA's assertion that WME "never disclosed any subjective intent, purpose, or construction of the Force Majeure Provision that allocated the entire risk of cancellation due to force majeure on VFLA." (VFLA Br. 24.) VFLA and 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

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[8] Neither of the interim emails to which VFLA cites (VFLA Br. 47) 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 (7AA-7444-45) and the other outlines only other deal terms that had been recently revised (7AA-7410).

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 [observing that 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"].)

D. VFLA's Extrinsic Evidence Does Not Support its Interpretation

The extrinsic evidence offered by VFLA fails to create a material dispute as to the meaning of the Force Majeure Provision and does not disturb the Artists' entitlement to judgment. (VFLA Br. 45-47.) VFLA relies on three purported inferences from the undisputed extrinsic evidence, but the evidence does not support VFLA's inferences, and thus cannot defeat summary judgment. (*See Wolf*, *supra*, 162 Cal.App.4th at p. 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 Trust*, 175 Cal.App.4th at pp. 1341-42 [same].)

1. Kali Uchis Touring's Return of the Sol Blume Deposit

The return by Kali Uchis Touring of its $100,000 deposit for the Sol Blume festival does not "show[] that … the Artists interpreted the Force Majeure Provision the same way as VFLA." (VFLA Br. 45.) Uchis returned the deposit for business reasons unrelated to the language of the agreement and VFLA has no evidence to the contrary.

Uchis's $100,000 guarantee was returned to the organizers of that festival ("ENT") "because ENT was willing to work to reschedule the festival," a material circumstance that distinguished it from how VFLA chose to handle its cancellation. (1AA-1660-61, 1670.) That reason was documented in a letter agreement with ENT, dated April 8, 2020, stating that the return of Uchis's guarantee was "an accommodation to [ENT]" based on ENT's "agree[ment] to work in good faith with [Uchis] toward a possible performance at Sol Blume in 2021." (1AA-1664.)

2. The May 27, 2020 Email to Ellie Goulding's Management

Nor did WME rely on a contrary interpretation of the Agreements (or even any interpretation of the Agreements) in connection with an email sent to Goulding's management on May 27, 2020, telling them they would need to return Goulding's guarantee. (VFLA Br. 46.) One of Goulding's agents, Kirk Sommer, reviewed that email for no more than a couple of minutes during a "chaotic period" when "a great number of shows [were] being postponed or rescheduled"; has no recollection of reviewing the performance agreement, Virgin Fest Rider, or Force Majeure Provision; and had no intention of advising Goulding in that email about her rights or obligations under the Agreement. (1AA-1677-78, 1689-92.) In any event, Sommer's lack of knowledge regarding the relevant terms means that the May 27, 2020 email is of minimal probative value when weighed against the clear language of the agreement and extrinsic evidence that confirms the Artists' interpretation. (*See Wolf*,

supra, 162 Cal.App.4th at p. 1134 [evidence that defendant made years of royalty payments based on what defendant described as a "misunderstanding of its obligations" did not prevent judgment for defendant based on language of agreement].)

Moreover, even if Sommer's email could be read out of context to contain an inference supporting VFLA's contract interpretation, the email must be read along with subsequent emails Sommer sent just days later explaining that Goulding could retain the guarantee under "specific language in the contract." (1AA-1700-02.) As such, Sommer's initial email cannot create a disputed issue of fact.

3. The March 20, 2020 Email From Matthew Morgan to Jason Felts

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 VFLA's interpretation of the Force Majeure Provision. (VFLA Br. 46.) Morgan sent that email after Lizzo (and others) attached their name to an "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" (3AA-3796-97) and VFLA asked if Virgin Fest was "an exception to this?" (4AA-4159).

VFLA argues that "[t]here was no point in saying 'as soon as the gov't says we can' if all that mattered was a make-believe world where the illegality of concerts did not exist[.]" (VFLA Br. 46.) But 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—Felts' response was "Sounds good!" (4AA-4158.) 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." (4AA-4163.) This wasn't a coded message about the meaning of the Force Majeure Provision—it was a simple statement that the artists would play the festival if the government permitted it.

In any event, Morgan's email is *fully consistent* with the Artists' interpretation of the Force Majeure Provision. Morgan was telling Felts that the government mandates were the only impediment to Lizzo's performance—in other words, that Lizzo was ready, willing, and able to perform *aside from* the government mandates. And this was true: The government mandates prohibited live performances, but Lizzo was otherwise ready, willing, and able to play the show, and would have played the show had she been permitted to do so. (1AA-0418-21.)

4. Other Agreements Containing "But For" Language

The fact that Big Grrrl and Uchis are parties to "but for" agreements does not demonstrate that the Artists are asking the court to "write language into the Force Majeure Provision that WME chose not to include." (VFLA Br. 39.)

Gaches, the WME attorney who negotiated the VFLA rider, used the phrase "otherwise ready, willing, and able" instead of the phrase "ready, willing, and able to perform (but for the

occurrence of such Force Majeure Event)" in the festival rider because it is a "plain language synonym." (1AA-4066-67.) He explained that there was a directive "from the business" to draft using "plain language" and that nobody uses the phrase "but for" in "plain conversation." (*Id.*)

And Gaches was not wrong. "But for" is almost pure legalese—a phrase rarely used by anyone who has not sat through 1L Torts. "Otherwise," on the other hand, is found in every major English dictionary and is regularly used by non-lawyers in everyday communication. Indeed, as explained above, VFLA's own documents demonstrate that VFLA commonly used "otherwise" in informal business correspondence to mean "apart from the thing previously mentioned" and "in other respects." (*See supra* at 29.)

Nor was there any reason for Gaches to explain to Epstein that "otherwise" was synonymous with "but for." (VFLA Br. 23-24.) When Gaches added the word to the Baja Beach Rider he was not replacing "but for" with "otherwise." Rather, he was replacing one triggering circumstance (focused on whether the artist had commenced performance at the time of the force majeure cancellation) with another (whether the artist was "otherwise ready, willing, and able"). (*See supra*, pp. 17-20.)

There was nothing "surreptitious[]" about WME's use of the word "otherwise" in accordance with its plain meaning (VFLA Br. 13); that this meaning can be expressed in different ways does not support VFLA's interpretation.

E. Because There Is No Conflict in the Extrinsic Evidence, the Court May Properly Interpret the Contract on Summary Judgment

VFLA's cursory argument that the meaning of the Force Majeure Provision can only be properly determined following trial, and that the Superior Court "used the summary judgment motions as 'a substitute for the open trial method of determining facts'" (VFLA Br. 26; *see also id.* at 14) fails for several reasons.

First, as explained *supra*, pp. 25-35, the Artists were entitled to summary judgment because their interpretation of the Force Majeure Provision is the only interpretation that both (1) accords with ordinary rules of grammar and usage and (2) does not render an operative provision surplusage. VFLA fails to posit a coherent or plausible contrary interpretation. Consequently, this Court can and should affirm "based on the words of the instrument alone." (*Gilkyson*, *supra*, 66 Cal.App.5th at p. 915 & n. 11 [contract interpretation is "solely a judicial function when based on the words of the instrument alone"]; *see also Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 [whether the language of a contract is "reasonably susceptible" to a party's interpretation, "is a question of law subject to de novo review"].)

Second, as set forth above, the Superior Court correctly rejected the strained inferences that VFLA sought to draw from the undisputed extrinsic evidence. (*See*, *supra* pp. 41-45; 4AA-4645 [SJO-10-11 & n. 4].)

VFLA, finally, suggests that this Court should reverse because the Superior Court "cherry-pick[ed]" and "selectively

relied on parol evidence," while ignoring "the evidence submitted by VFLA." (VFLA Br. 14, 26, 45.) But, as discussed, the Superior Court did not "selectively" rely on anything—rather, it correctly concluded that the extrinsic evidence does not support the *legal inferences* VFLA urges (4AA-4650-51 [SJO-16-17]), something VFLA agreed the Superior Court had the authority to do (RT-19). In short, VFLA does not "cite to any competent evidence in the record that supports [its] implied assertion that interpretation of the agreement rests upon a credibility dispute" (*Habitat Trust*, *supra*, 175 Cal. App. 4th at p. 1342) and consequently "summary judgment was not improper" (*id.*).[9]

F. VFLA's "Illegality" Arguments Fail

VFLA's scattershot "illegality" arguments cannot save its defective interpretation of the Force Majeure Provision. (VFLA Br. 40-45.)

First, while the Artists may be "foreclose[d]" and "precluded" from contending that they were "willing" and "able" to perform at Virgin Fest in the face of the government orders in effect in June 2020 (*id.* at 40), that has never been the Artists'

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[9] VFLA's motion for summary adjudication, on the other hand, *is* defeated by a material disputed fact. In opposition to VFLA's motion, the Artists submitted evidence that Gaches told Epstein while negotiating the force majeure language that WME's clients had to get paid in the event of a force majeure cancellation, with only narrow exceptions, and Epstein understood and agreed to that language. (4AA-4068-70.) Thus, even if this Court were to vacate the Superior Court's grant of summary judgment to the Artists, it must remand for a bench trial rather than grant judgment in VFLA's favor.

contention. Rather, the Artists are entitled to summary judgment because they were "ready, willing, and able to perform" *aside from* the Force Majeure Event.

Second, the Artists are not asking this Court help them achieve an "illegal object[]." (*Id.* at 41.) As the Superior Court correctly ruled, "there is nothing in the force majeure clause that requires an illegal act. It does not require the Artists to perform during COVID … it only determines who keeps the money due to the performance's cancellation." (4AA-4643 [SJO-9].) The Artists ask this Court to affirm their right to retain certain fixed sums of money under a contract that "allocates the risk as among various parties." (*Id.*) There is nothing "illegal" about doing that.

Finally, VFLA insinuates that the agreements are "void" because the government subsequently entered orders making it unlawful to hold the festival. (VFLA Br. 42-43.) But it is black letter law that "[i]f the contract was valid when made, no subsequent act of the legislature can render it invalid." (*Stephens v. S. Pac. Co.* (1895) 109 Cal. 86, 95; *accord* 14 Cal.Jur.3d Contracts, § 169 ["If a contract is valid when made, no subsequent legislative act can render it invalid."]; *see also 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."].)[10] And even if VFLA could have sought

[10] VFLA incorrectly claims that *Stephens* and *Moran* are inapplicable because they concern public policy, not laws, and that *Stephens*'s holding is *dictum*. (VFLA Br. 42.) *Stephens*

to "void" the agreements, it has instead affirmed the agreements by suing for their breach and is thus precluded from asking the Court to find that the Agreements are "void." (*See Tyler v. J.I. Metrovich Bldg. Co.* (1920) 47 Cal.App. 59, 62) ["[I]t is elementary that a party cannot denounce a contract as void and at the same time demand enforcement of its provisions favorable to him."].)

Industrial Development & Land Co. v. Goldschmidt (1922) 56 Cal.App. 507 (VFLA Br. 41-43) does not support VFLA's position here. In that case, an intermediate appellate court held that Prohibition rendered "inoperative" a commercial lease that restricted a tenant to operating a liquor business. (56 Cal.App. at p. 509.) However, as noted at the end of the published decision, the California Supreme Court later *disavowed* that reasoning while affirming the result on grounds not discussed by the lower court. (*Id.* at pp. 511-12.) *Lloyd v. Murphy* (1944) 25 Cal.2d 48, moreover, did not "cite[] *Goldschmidt* with approval" for the proposition that a subsequent change in the law requires a court to void a contract that was lawful when made. (VFLA Br. 42.)

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concerned both public policy *and* a specific "act of the legislature," and *held* that the "act of the legislature found in the statutes of 1891" could not invalidate the agreement there at issue because the act was "passed subsequent to the making of the contract." (109 Cal. at p. 95.) *California Jurisprudence* quotes this holding as black-letter law. (14 Cal.Jur.3d Contracts § 169.) Similarly, *Moran* concerned whether "a contractual interest, valid and legal at the time of its creation" survived "a change in the law," and turned on whether the enactment of a Rule of Professional Conduct prohibiting fee splitting rendered invalid an agreement made before the rule was enacted. (*Moran*, 131 Cal.App.3d at 918-23.)

Rather, *Lloyd* characterized *Goldschmidt* as "excus[ing] the tenant from *further* performance on the theory of illegality or impossibility by a change in domestic law." (25 Cal.2d at 57 [emphasis added].)

Goldschmidt also does apply here because the parties contemplated the possibility of a Force Majeure Event and allocated the risk of such an occurrence in their contracts. As the Superior Court correctly ruled, there is nothing "illegal" about such a risk allocation. (4AA-4643 [SJO-9]; *see* Witkin Summary of California Law, § 862, Contract Provision to Shift Risk ["The parties may make special provision for adjustment of rights in the event of impossibility arising from any cause."] [citing *Mathes v. Long Beach* (1953) 121 Cal.App.2d 473, 477].)[11]

G. The Force Majeure Provision Is Not a Forfeiture Clause

The Superior Court also correctly rejected VFLA's argument that the Force Majeure Provision is a forfeiture clause and should be interpreted strictly against the Artists.

First, the Artists' retention of their guarantees does not cause the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." (VFLA Br. 28.)

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[11] VFLA's other "illegality" precedents are unavailing. (VFLA Br. 42-43.) *Timney v. Lin* (2003) 106 Cal.App.4th 1121 and *Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, and *Commercial Building Co. v. Levy* (1930) 108 Cal.App. 54 are textbook examples of contracts or contractual provisions found void because they were illegal *at the time of contracting*. *Segal v. Silberstein* (2007) 156 Cal.App.4th 627 enforced an arbitration provision and its facts have nothing to do with illegality.

As VFLA's cases illustrate, a contractual forfeiture typically involves the loss of a party's rights upon a *breach of contract*. Both *Nelson v. Schoettgen* (1934) 1 Cal.App.2d 418, and *Smith v. Baker* (1950) 95 Cal.App.2d 877 (VFLA Br. 28) involved breaching parties who allegedly forfeited rights upon their breaches: in *Nelson*, the right to exploit certain mineral claims; in *Smith*, the right to the profits of a lettuce crop. In both cases, the courts applied the presumption against forfeitures and held that the agreements in question did not contemplate the forfeiture of these rights upon breach. (*Nelson*, *supra*, at p. 423; *Smith*, *supra*, at pp. 883-84.)

Here, in contrast, the Force Majeure Provision is not triggered by either party's breach; rather, it is triggered by events that, by definition, are beyond either party's control. As the Superior Court correctly held, the Force Majeure Provision allocated the risk of "an event outside of everyone's control" and was not a forfeiture triggered by "a party failing to perform a condition under the contract." (4AA-4641 [SJO-7].)

Second, the Artists' retention of their guarantees is not an "unenforceable penalty." (VFLA Br. 29.) California law prohibits contractual penalties, *i.e.*, "sum[s] payable upon the breach of a private contract" (34 Cal.Jur.3d Forfeitures and Penalties, § 2) that "operate[] to compel performance of an act … without regard to … actual damages" (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 739; *see also* Civ. Code §§ 1671, subd. (b), 3294, subd. (a)). But if there is no breach, there is no penalty. Again, VFLA's cases illustrate the point. In both

Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish (1951) 37 Cal.2d 16, and *Kuish v. Smith* (2010) 181 Cal.App.4th 1419 (VFLA Br. 29-30) the courts held that the retention of a deposit upon a counterparty's breach (and without any claim of actual damages) was an invalid penalty. (*Freedman*, *supra*, at pp. 21-23; *Kuish*, *supra*, at pp. 1426-29.) In contrast, a contract providing for payment upon the exercise of an option or occurrence of an event anticipated in the contract, does not create a penalty. (*See Blank v. Borden* (1974) 11 Cal.3d 963, 969-71; *Western Camps, Inc. v. Riverway Ranch Enterprises* (1977) 70 Cal.App.3d 714, 725-27; *Kuhlemeier v. Lack* (1942) 50 Cal.App.2d 802, 806-08; *Payne v. Pathe Studios* (1935) 6 Cal.App.2d 136, 140-42.)

Third, the Artists' retention of their guarantees does not cause "the divestiture of property without compensation." (VFLA Br. 28-29.) VFLA acknowledged in the agreements that its guarantees were consideration for a package of benefits, including (i) the Artists' agreement not to play other events within a defined period and geographic radius, and (ii) the right to use the Artists' "name, likeness, and image" to advertise the festival and solicit sponsorships. (3AA-3633-34, 3637, 3640.) The contractual grant of this bundle of rights alone means there was no "divestiture of property without compensation." VFLA, moreover, used the rights granted by the Artists. (5AA-4215 [email blast with festival poster containing Artists' names, with Lizzo in headline position, and statement that "Tickets are on sale now!"].)

Regardless, VFLA's argument is not that the Artists didn't grant VFLA name and likeness rights or didn't honor their exclusivity obligations. VFLA argues instead that the Artists' performance of these promises gave VFLA nothing of meaningful value, given the worldwide cancellation of events. For example, VFLA contends that the Artists' promises of exclusivity—*which the Artists honored*—didn't mean much where the Artists could not have performed anywhere else. (VFLA Br. 29.) But the Superior Court correctly held that the meaning of the contract does not change over time and whether the clause is or is not a forfeiture clause must be judged as of the time of contracting, not at the time of cancellation. (4AA-4642-43 [SJO-8-9]; *cf. Krechuniak v. Noorzoy* (2017) 11 Cal.App.5th 713, 722-23 [in determining whether liquidated damages clause constitutes unenforceable penalty or forfeiture "court should place itself in the position of the parties at the time the contract was made"].)

Here, at the time of contracting, the Artists gave VFLA valuable consideration beyond their promise to perform at Virgin Fest Los Angeles. VFLA expressly acknowledged in the Agreement that the Artists' guarantees were in consideration for that entire package of benefits. (3AA-3637, 3640.) The subsequent cancellation of the festival because of the pandemic and associated government orders does not transform the Force Majeure Provision into a forfeiture clause.

Finally, VFLA reads the strict construction rule of Section 1442 backwards. The statute provides that "[a] *condition* involving a forfeiture must be strictly interpreted *against the*

party for whose benefit [the condition] is created." (Civ. Code, § 1442 [emphasis added].) The statute does not apply because the Force Majeure Provision does not "involv[e] a forfeiture." But if there *is* a forfeiture in this case, it is a forfeiture *against the Artists*, who granted VFLA valuable rights, and, if VFLA prevails, will receive nothing in return. Accordingly, if the strict construction rule of Section 1442 applies, it compels strict construction in the Artists' favor and *against VFLA*.

Under Section 1442, "a condition which the promisor must perform … on pain of forfeiture" must provide "a clear statement of the required performance … so that the promisor can conform his or her behavior and avoid a forfeiture." (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 819.) *Lowe v. Ruhlman* (1945) 67 Cal.App.2d 828, on which VFLA relied below, illustrates this rule. The defendant in *Lowe* held a life estate in certain property "as long as, and on condition that" the defendant *lived on the property alone*. (*Id.* at pp. 830-31.) The defendant married and the legatees sued to terminate the life estate, notwithstanding the fact that the defendant and his wife did not cohabit. (*Id.* at pp. 831-32.) The court found that the prohibition was on cohabitation, not marriage. (*Id.* at pp. 832-33.) In doing so, it construed the condition narrowly in favor of the defendant (*i.e.*, the party who had to fulfill the condition of living alone or suffer a forfeiture) and against legatees (*i.e.*, the party that would benefit if the defendant violated the condition). (*Ibid.*) Similarly, in *Nelson v. Schoettgen*, *supra*, *Conolley v. Power* (1924) 70 Cal.App. 70, and *Smith v. Baker*, *supra*, (VFLA Br. 28, 31), the

courts construed conditions (or alleged conditions) in favor of the party who had to satisfy the condition and against the party for whose benefit the condition existed.

Here, the Artist is the party that must satisfy the "otherwise ready, willing, and able" condition, as VFLA recognized below. (1AA-0506 [VFLA Am.MSA 20 & n. 6].) That condition was created for VFLA's benefit: the condition prevents an Artist from receiving a windfall if she has reasons for not performing independent of the Force Majeure Event, and it is VFLA that receives the money—money paid upfront and generally nonrefundable—if the Artist does not satisfy the condition. Accordingly, if the Force Majeure Provision provides for a forfeiture, then Section 1442 requires that the condition be strictly construed in favor of the Artists and against VFLA.

H. The Artists Were Ready Willing and Able to Perform Aside From the Covid-19 Pandemic

The Superior Court correctly found that the Artists "certainly" would have performed "if there had been no COVID pandemic." (4AA-4647 [SJO-13].)

Lizzo testified at her deposition that she would have performed had live performances not been prohibited (1AA-0418-20), and VFLA proffered no contrary evidence. Rather, VFLA challenges Lizzo's testimony on the spurious grounds that Big Grrrl was "precluded … from using [Lizzo's] deposition as evidence" because she resides within 150 miles of the Superior Court. (VFLA Br. 43.)

The 150-mile restriction on which VFLA relies applies to "trial or other hearing[s]" (Code Civ. Proc., § 2025.620, subd.

(c))—not to summary judgment submissions. (*See id*. § 437c, subd. (b) [a motion for summary judgment may be supported by deposition testimony].) And caselaw makes clear that "it is proper to use a deposition in support of, or in opposition to, a motion for summary judgment in conjunction with or in lieu of affidavits." (*In re Kerner's Estate* (1969) 275 Cal.App.2d 785, 789; *see also Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 82 [moving party submitted sufficient evidence to shift the burden of proof by submitting "affirmative evidence" including "his own deposition denying the allegations"].) Unsurprisingly, the Superior Court rejected VFLA's 150-mile argument as frivolous. (4AA-4639 [SJO-5].) There was no error, much less an abuse of discretion, in that evidentiary ruling.

The issue is, in any case, irrelevant. "[T]he complaint limits the issues to be addressed at the motion for summary judgment" (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258) and "[i]t is axiomatic that arguments not raised in the trial court are forfeited on appeal" (*Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1038). VFLA never argued below, much less alleged in its complaint, that the Artists would not have been "ready, willing, and able" to perform had the Covid-19 pandemic and attendant government restrictions not occurred, and VFLA cannot defeat summary judgment by raising that argument now. (*See Laabs*, *supra*, at p. 1258 [declining to permit plaintiff to expand the issues through opposition papers on summary judgment]; *Habitat*

Trust, *supra*, 175 Cal.App.4th, at p. 1331 ["[t]he pleadings govern the issues to be addressed" on summary judgment].)

II. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE ARTISTS ON VFLA'S IMPLIED COVENANT CLAIM

The Superior Court properly granted summary judgment dismissing VFLA's implied covenant claim because that claim (1) does not encompass "a failure or refusal" by the Artists "to discharge contractual responsibilities" which "deprives [VFLA] of the benefits of the [agreements]"; (2) improperly seeks to "imply an obligation which would completely obliterate a right expressly provided by a written contract"; and (3) improperly duplicates VFLA's contract claim. (*Careau & Co. v. Security Pacific Bus. Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395, 1401; *Halvorsen v. Aramark Unif. Servs.* (1998) 65 Cal.App.4th 1383, 1390.)

To the extent the Court affirms the Superior Court's dismissal of VFLA's breach of contract claim and finds that the Artists are entitled to retain their payments, it would be impossible for the Artists to have deprived VFLA of the benefits of the agreements by retaining, and not returning, the funds. In that case, the opposite would be true: any obligation that VFLA seeks to "imply" to compel Artists to return the full guarantee would "obliterate" the Artists' right to retain those funds as "expressly provided by [the] written [Agreement]." (*Halvorsen*, *supra*, 65 Cal.App.4th at p. 1390.) Regardless, VFLA seeks the same relief and same monetary damages through each of its breach of contract and implied covenant claims—the return of its payments—and its implied covenant claim is therefore

improperly duplicative. (*Careau & Co.*, *supra*, 222 Cal.App.3d at p. 1401 [dismissing implied covenant claim that "allege[s] nothing more than a duplicative claim for contract damages[.]"].)

In any event, the Artists did not breach the covenant by (1) entering into Agreements that paid them handsomely, (2) disagreeing with VFLA regarding the interpretation of the Force Majeure Provision, or (3) choosing not to enforce their contractual rights against *other* music festivals. (VFLA Br. 50.) Unsurprisingly, VFLA fails to cite a single case where such assertions were found to support an implied covenant claim. That is because no such case exists.

Nor can VFLA defeat summary judgment by relying on (1) the Lizzo "open letter," (2) the email regarding anticipated difficulties bringing Ms. Goulding's performance together, or (3) any other supposed misdeeds by the Artists (*see* VFLA Br. 50), because these putative bad acts caused VFLA no harm. (*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."].) VFLA has consistently claimed that Virgin Fest was cancelled by government mandate (*see, e.g.*, VFLA Br. 12, 18-19); it cannot simultaneously claim that it was harmed by alleged Artist conduct that did not cause that cancellation. VFLA insinuates that the "open letter" depressed its ticket sales for the music festival (*id.* at 50), but the festival was cancelled irrespective of those sales, and VFLA has never claimed it is entitled to damages for any supposed lost revenue.

In any event, VFLA never raised these post-hoc claims of breach in its pleadings—its allegations in connection with its fair dealing claim all related to the Artists' conduct "*after* VFLA demanded the return of the VFLA Deposits" (1AA-0176-77 [FAC 23:14-24:23] [emphasis added])—in particular, the Artists' allegedly unreasonable interpretation of the agreements and refusal to accede to VFLA's demands. None of VFLA's allegations related to the Artists' conduct prior to Virgin Fest's cancellation. VFLA's implied covenant claim fails for this reason as well. (*See Laabs*, *supra*, 163 Cal.App.4th at p. 1258; *Habitat Trust*, *supra*, 175 Cal.App.4th, at p. 1331.)

CONCLUSION

The Artists respectfully request that this Court affirm the Superior Court's grant of summary judgment dismissing VFLA's claims.

Dated: April 6, 2023 By: _____
Cynthia S. Arato
Attorney for Respondent Big Grrrl Big Touring Inc.

Dated: April 6, 2023 By: _____
Robert S. Meloni
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CERTIFICATION OF WORD COUNT

Pursuant to Rules 8.204(c)(1) and 8.204(c)(4) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Brief, counsel certifies that the text of this Brief (including footnotes) was produced using 13-point type and contains 12,136 words.

Dated: April 6, 2023

By: 

Cynthia S. Arato
Attorney for Defendant-Respondent
Big Grrrl Big Touring, Inc.

PROOF OF SERVICE

I, Cynthia S. Arato, declare:

I am employed in New York County, State of New York. I am over the age of 18 years and not a party to the within action. My business address is 1140 Avenue of the Americas, 17th Floor New York, NY 10036. My electronic mail (email) address is: carato@shapiroarato.com.

On this date, I served:

BRIEF FOR DEFENDANTS-RESPONDENTS BIG GRRRL BIG TOURING, INC., STARRY US TOURING INC., and KALI UCHIS TOURING INC.

☒ By forwarding the document(s) by electronic transmission via the TrueFiling interface on this date to parties listed on the attached service list; and

☒ By causing the document(s) to be placed in a sealed envelope for collection and mailing with the United States Postal Service on this date to the following person(s):

Clerk for the Hon. Mark H. Epstein
Superior Court of California
Santa Monica Courthouse
1725 Main Street, Dept. R
Santa Monica, California 90401

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at New York, New York on April 6, 2023.

Cynthia S. Arato

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