"THE SHOW MUST *NOT* GO ON"
WHAT HAPPENS WHEN THERE IS NO SHOW*:
LITIGATION ISSUES RELATED TO TOURING

***OR WHEN IT'S NOT THE SHOW THE PLAINTIFF EXPECTED!**

By: Alan S. Clarke

I. LITIGATING FORCE MAJEURE CLAUSES

The "force majeure" or "Act of God" clause is an "impossibility of performance" defense to a breach of contract claim that excuses the liability of a nonperforming party. Force majeure clauses typically either suspend performance for a period of time allowing the parties to reschedule (often limited to no more than six months) or allow the parties to terminate the contract, with little or no penalty.

Force majeure defined events can include everything from hurricanes destroying a venue to COVID outbreaks (pandemic or epidemic language which is included now since COVID) to the following events which happen in the area where the performance was to occur: (i) acts of God, (ii) strikes or labor disruptions, (iii) civil riots or disturbances (iv) weather events, (v) acts of terrorism, (vi) medical conditions, which result in quarantine or similar limitations or restrictions on travel, or (vii) damage to the venue rendering it unsafe or unsuitable for giving of live entertainment performances. In the case of an Artist, a Force Majeure Event can include death, serious illness or incapacity of the Artist rendering it impossible or not reasonably practical for Artist to perform.

A recent California Court of Appeal case provides judicial interpretation of language added to a force majeure clause to protect artists. In ***VFLA Eventco, LLC v. William Morris Endeavor Entertainment, LLC, et al.*** 100 Cal.App.5th 287 (2024), the inaugural Virgin Fest Los Angeles was scheduled to take place on 6–7 June 2020. In advance of the event, its promoter, VFLA Eventco, LLC ("VFLA"), entered into agreements with various artists, including Lizzo, which involved the prepayment of millions of dollars in deposits to the artists' respective booking agencies in connection with their performances.

The standard Virgin Fest force majeure clause was as follows:

- "A 'Force Majeure Event' means any act beyond the reasonable control of Producer, Artist, or Purchaser which makes any performance by Artist impossible, infeasible, or unsafe …. In the event of cancelation due to Force Majeure then all parties will be fully excused and

there shall be no claim for damages, and subject to the terms set forth herein, Producer shall return any deposit amount(s) … previously received (unless otherwise agreed)."

William Morris Endeavor's attorney negotiated the contract on behalf of its artists performing in the show, including Lizzo, and added the highlighted language below, the interpretation of which became the focus of the lawsuit:

- "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 …. In the event of cancelation due to Force Majeure then all parties will be fully excused and there shall be no claim for damages, and subject to the terms set forth herein, Producer shall return any deposit amount(s) … 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 March 2020 COVID-19 was declared a national emergency in the United States, and the State of California and both the County and City of Los Angeles enacted emergency shut-down orders. In May 2020, Virgin Fest was prohibited from going ahead as scheduled.

The performance agreements had expressly provided that the COVID-19 pandemic constituted a force majeure event by virtue of it being: "*beyond the reasonable control of [the contracting parties] which ma[de] any performance by Artist impossible, infeasible, or unsafe….*" After the cancellation of the festival, VFLA invoked the force majeure provision and demanded the return in full of all prepaid deposits. While it was undisputed by the parties that COVID-19 triggered the force majeure provision, the Defendants argued that they were entitled to keep the deposits because of the negotiated provision which did not require a return if the artists were "otherwise ready, willing, and able to perform." The artists claimed that this meant that they did not have to return the deposits if they were ready to perform **but for** the force majeure event. Plaintiff VFLA attorneys argued that the artists were required to show that they were ready, willing, and able to perform **in spite of** the force majeure event.

The Court of Appeal affirmed the Defendants' "but for" interpretation, because VFLA's "in spite of" interpretation rendered the force majeure provision indefinite and incapable of being carried into effect, while also rendering its third sentence mere excess. Parol evidence (evidence outside the contract) considered by the Court of Appeal showed the original draft of the force majeure provision (which favored VFLA) had been revised to make the agreement more artist friendly.

II. DAMAGES FROM A SHOW CANCELLED NOT DUE TO A FORCE MAJEURE EVENT: LOST PROFITS FROM BREACH OF CONTRACT

To prove a claim for lost profits, a party must show with reasonable certainty that

1) the defendant's action caused the damage; and

2) there is some standard by which the amount of damages may be adequately determined; and

3) the damages were reasonably foreseeable at the time the contract was made.

As noted, the plaintiff must first show that the defendant's wrongful conduct directly caused the lost profits. This involves proving that the damages flowed as the natural and proximate result of the defendant's actions (*In re Mid-America Corp.*, 159 B.R. 48 (M.D. Florida, 1993)). To avoid summary judgment, Plaintiffs must show a reasonable certainty of the mere existence of lost profits. See *Summit Props. Int'l, LLC v. Ladies Prof'l Golf Ass'n*, No. 07 Civ. 10407, 2010 WL 2382405, at *3 (S.D.N.Y. June 14, 2010).

Second, every United States jurisdiction has adopted the rule that the amount of lost profits must be proven with "reasonable certainty." A sampling of cases includes the following:

- Lost profits must be proven with **reasonable certainty and specificity**. This includes providing figures for **projected revenue and expenses** (*American Infoage, LLC v. Only Solution Software, LLC*, 362 Ga.App.706 (2022);
- Lost or expected profits are recoverable as damages if they are shown to be a consequence of the breach, provided the amount can be proved with reasonable certainty. *See Morristown Lincoln-Mercury, Inc. v. Roy N. Lotspeich Publishing Co.*, 298 S.W.2d 788 (Tenn.Ct.App. 1956) cited in *Baker v. Hooper*, 50 S.W.3d 463 (2001).
- "In an action for breach of contract, a plaintiff is entitled to recover lost profits only if he can establish both the existence and amount of such damages with reasonable certainty." *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir. 2000).

Plaintiff's Side of Lost Profits—Meeting "Reasonable Certainty" Standard At Trial

Reasonable certainty is not mathematical certainty:

- The amount of loss does not need to be proven with mathematical precision but must be **estimated reasonably under the circumstances** (*HGI Associates, Inc. v. Wetmore Printing Co.*, 427 F.3d 867 (11th Cir. 2005)).
- A plaintiff need not provide a calculation of lost profits to a mathematical certainty; instead, it "need only provide the jury the jury with a **sound basis for approximating with reasonable certainty** the profits lost as a result" of a defendant's breach of contract. S*&K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 853 (2d Cir. 1987).

Robert M. Lloyd, in *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 Tenn. J. Bus. L. 11 (2010), identified six factors which courts consider to determine whether a plaintiff has proven lost profits with reasonable certainty:

1. The court's confidence that the estimate is accurate;
2. whether the court is certain that the injured party suffered at least some damage;
3. the degree of blameworthiness or moral fault on the part of the defendant;
4. the extent to which the plaintiff produced the best available evidence of lost profits;
5. the amount at stake [published opinions makes it clear that the more the plaintiff is claiming in damages, the higher the standard of proof to which the court will hold it]; and
6. whether there is an alternative method of compensating the injured party.

According to Lloyd, in most cases, courts consider all or almost all of these factors.

Application to Artist Tours and Shows:

• If an artist or promoter seeks to recover lost profits from a canceled tour, they should provide detailed financial records, if available, showing past tour revenues and expenses to establish a track record of profitability.

• They would also need to present specific data to estimate the projected revenue and expenses for the canceled tour to meet the reasonable certainty standard.

• The key is to provide detailed and specific financial data to support the claim for lost profits

Expert testimony is helpful. In *Williams v. Hardy*, 468 So.2d 429 (Fl.Dist.Ct.App. 1985), Hank Williams, Jr. appealed judgment against him for breach of contract to perform at an outdoor concert, but the court found that testimony of an expert in country music festivals was sufficient to show that gate ticket sales would be double the number of advance ticket sales:

"The evidence as to damages in this case is sufficient as against the argument that damages were purely speculative. The promoter sold 5,928 "advance tickets" at $8.50 each ($50,388) and incurred promotional expenses of $31,356.69. Court found that the testimony of expert in producing and promoting outdoor country music festivals at trial was not speculative and sufficient to show "that under the circumstances of this case it would be a conservative estimate, and reasonable to expect, that gate ticket sales would be double the number of advance ticket sales. This testimony supported the jury's verdict."

However, expert testimony is not required:

In East Hallows Limited Liability Co. v. Live Nation Entertainment, Inc., 3:2019-cv-00465, U.S. District Court for the Middle District of Tennessee, Plaintiff Solomon had an idea for an all-female music festival she called Zenitheve, discussed Zenitheve with senior executives from Live Nation

Entertainment, Inc. ("Live Nation"), then pursued an unsuccessful claim that Live Nation willfully and negligently misrepresented its intention to invest in Zenitheve. Live Nation filed a Motion to Strike Solomon's statement that Plaintiff "lost…the original investment of $82,201.77, artist fees directly related to Zenitheve of $177,000, merchandise profits of $138,600, and additional artist fees over $1,500,000" because Solomon is not a damages expert and has no qualifications that would allow her to provide an opinion on these numbers with any reasonable degree of certainty.

However, in its Order, filed August 10, 2022, the Court stated that Live Nation cited no authority for the proposition that expert testimony is required to establish lost profits. Instead, the Court found that the Advisory Committee notes to the 2000 amendment to Rule 701 of the Federal Rules of Evidence, governing opinion testimony by lay witnesses, provide that "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an ... expert." Fed. R. Evid. 701 advisory committee's note (2000). The Court also found that the Sixth Circuit has approved the admission of lay opinion as to lost profits, citing *United States v. Kerley*, 784 F.3d 327, 339 (6th Cir. 2015) (citing *Lativafter Liquidating Trust v. Clear Channel Comm., Inc*., 345 F. App'x 46, 51 (6th Cir. 2009)).

Defendant's Side of Lost Profits—Challenging "Reasonable Certainty" Standard At Trial

Lost profit damages may not be merely speculative.

- Courts often reject claims for lost profits if they are deemed too speculative. This can occur if the plaintiff fails to provide a reliable methodology for calculating the lost profits or if the evidence is insufficient to support the claim (*In re ICMfg & Associates, Inc.*, 602 B.R.780 (M.D. Florida 2018).

- Lost profits damages "'may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.'" *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir. 2000) (quoting *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132 (1986)).

- *Coastal Aviation. Inc. v. Commander Aircraft Co*., 937 F. Supp. 1051, 1070 (S.D.N.Y.1996) ("To award plaintiff lost profits based on the unproven assumption that it would have [succeeded in its business ventures] would unjustly reward plaintiff rather than make it whole.")"

There is a legal duty to mitigate damages in a breach of contract case, meaning that the non-breaching party must take reasonable steps to minimize their losses resulting from the breach; if they fail to do so, their potential recovery of damages may be reduced.

As noted, the Plaintiff in an economic damages case is expected to mitigate losses by making reasonable efforts to offset losses when possible. But what is reasonable? It means the injured party must do what a reasonable person under the same circumstances would do, taking all

relevant information into consideration. Using that metric for the mitigation of damages, courts will typically reduce a damages award in breach of contract cases if a party had a duty to mitigate and did not do it. Usually, these awards are reduced by the amount that the court believes the party could or should have mitigated. Plaintiff is required to act reasonably to mitigate damage, but failure to do so must be proved by Defendant. A claim for failure to mitigate damages is an affirmative defense.

What if a Plaintiff tries but fail to mitigate damages? Unsuccessful mitigation costs may be recoverable.

In *Smith v. Positive Productions*, 419 F.Supp.2d 437 (SDNY 2005), "Lil Jon," petitioned to vacate, or alternatively to modify, an arbitration award entered in favor of Positive Productions ("Positive"), a Japanese concert promotion company, in the amount of $379,874.00, for costs and damages arising from breach of contracts where Smith agreed to perform three concerts in Japan.

Smith claimed that he should not be held liable for Positive's "botched" efforts to mitigate its losses by booking "Trina" as a replacement. Positive responded that the $54,000 in losses from the "Trina" shows were less than what it would have incurred had no replacement act been booked.

- However, the Court found that an "injured party will be allowed to recover the expenses of a proper effort [to mitigate damages] even though it proves unsuccessful." *Baker v. Dorfman*, 239 F.3d 415, 427 (2d Cir. 2000); cited in *Smith v. Positive Productions*, 419 F. Supp. 2d 437 (SDNY 2005).

The Court found that Plaintiff's expenses of office rent and pay to Positive's staff "were a direct result of production and promotions for Lil Jon's performances," stating that "Smith does not cite a legal rule, let alone a clear and established one, barring the inclusion of fixed costs in an award of expenses."

- Inclusion of office rent and pay to Positive's staff [were allowed] where expenses "were a direct result of production and promotions for Smith's performances." *Smith v. Positive Productions*, 419 F.Supp.2d 437 (SDNY 2005)

III. WHEN THE SHOW IS NOT WHAT – OR WHEN- YOU EXPECTED IT TO BE

Sometimes a show is not what the consumer expected. Are the performer, the promoter and/ or the venue responsible – and are there damages – when a show is late, hot, offensive or lip synched? Here is a California case to watch:

***Justen Lipeles Vs. Madonna Louise Ciccone, Et Al.*, Docket No. 24STCV13523 Cal. Super. Ct. May 29, 2024)**

Plaintiff in this newly filed matter allege that Madonna and her promoter Live Nation, purposely and deceptively withheld informing ticket purchasers in the marketing of the concerts that:

- Madonna would not appear at 8:30 as promised, but would instead make fans wait until after 10:00 p.m. or later to start her show;
- Madonna would maintain a hot and uncomfortable temperature in each of the venues during her performances;
- Madonna would lip synch much of her performance; and
- topless women would perform on stage simulating sexual acts [Plaintiff notes that he "felt like he was watching a pornographic film being made"].

Plaintiffs thus claim that Defendants engaged in unconscionable, unfair, unlawful, deceptive business practices by advertising and offering to the public such concerts without warning.

Causes of action are:

- Breach of written contract
- Negligent misrepresentation
- Intentional infliction of emotional distress
- False advertising
- Negligence/ Negligent Infliction of Emotional Distress
- Unfair Competition (violation of CA Business and Professions Code)
    - (The Business & Professions Code defines unfair competition as any unlawful, unfair, or fraudulent business practice, as well as any "unfair, deceptive, untrue or misleading" advertising. The Unfair Business Practices Act provides for injunctive relief and restitution for violations).

Damages demanded are:

- Compensatory damages suffered by Plaintiff and members of the Class as a result of Defendants' breach of written contract with Plaintiff and members of the Class;
- For injunctive relief ordering the continuing unfair business acts and practices to cease, as the Court deems just and proper;
- Restitution in such amounts Plaintiff and all Class members paid for tickets and/or disgorgement of the profits Defendants obtained from those transactions;
- Reasonable attorneys' fees pursuant to, *inter alia*, CCP 1021.5;
- Costs of this lawsuit;
- Pre- and post-judgment interest;

- For punitive and exemplary damages in a sum to be determined at trial; and
- For such other and further relief as the Court deems just and proper.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JUSTEN LIPELES, an individual, on his own behalf and on behalf of all others similarly situated,

Plaintiffs,

vs.

MADONNA LOUISE CICCONE, an individual; LIVE NATION WORLDWIDE, INC.; a Delaware corporation; LIVE NATION MTOURS (USA), INC., a Delaware corporation; FORUM ENTERTAINMENT, LLC DBA KIA FORUM, a Delaware limited liability company; OAK VIEW GROUP, LLC DBA ACRISURE ARENA, a Delaware limited liability company; GOLDEN STATE WARRIORS, LLC, DBA GOLDEN1 CENTER, a California limited liability company; CHASE CENTER, an entity of unknown form; and DOES 1 through 100, inclusive,

Defendants.

CASE NO.: 24STCV13523

CLASS ACTION COMPLAINT FOR:

1. **BREACH OF WRITTEN CONTRACT;**
2. **NEGLIGENT MISREPRESENTATION;**
3. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;**
4. **FALSE ADVERTISING (Cal. *Bus. & Prof. Code* §§17500 *et seq.*);**
5. **NEGLIGENCE/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; and**
6. **UNFAIR COMPETITION (Cal. *Bus. & Prof. Code* §§17200 *et seq.*)**

DEMAND FOR A JURY TRIAL

All allegations in this Complaint are based upon information and belief except for those allegations which pertain to the Plaintiff named herein and his counsel. Each allegation has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

Justen Lipeles ("Plaintiff") alleges the following:

1. This is a class action brought under California law by a consumer, and a number of consumers who comprise the putative class, who were deceived and lulled into purchasing expensive tickets for a concert to be performed by one of the premier performers of the past 40 years. Defendants had advertised, promoted and covenanted that Madonna Louise Ciccone[1] ("Madonna") would appear for a series of concerts beginning at 8:30 p.m. Madonna's Celebration Tour concerts took place at 4 venues in California; the Kia Forum in Inglewood, Acrisure Arena in Palm Springs, Golden1 Center in Sacramento and the Chase Center in San Francisco.

2. Madonna and her promoter Live Nation, purposely and deceptively withheld informing ticket purchasers in the marketing of the concerts that: (1) Madonna would not appear at 8:30 as promised, but would instead make fans wait until after 10:00 p.m. or later to start her show; (2) Madonna would maintain a hot and uncomfortable temperature in each of the venues during her performances; (3) Madonna would lip synch much of her performance; and (4) topless women would perform on stage simulating sexual acts. Defendants should have disclosed this information to consumers before they purchased their tickets. Forcing consumer to wait hours in hot, uncomfortable arenas and subjecting them to pornography without warning is demonstrative of Madonna's flippant disrespect for her fans.

[1] Madonna, an American singer, songwriter, actress and business woman, commenced her Celebration Tour on October 14, 2023, visiting cities in North America, Europe and South America. Her first North America concert was December 13, 2023 in Brooklyn, New York, followed by 46 concerts in 25 cities. Over her career, Madonna has generated over 1.4 billion dollars in concert ticket sales.

3. A prime example of Madonna's disrespect to her fans was during a December 17, 2019, performance at the Fillmore, Miami Beach, Florida, where she had turned off the venue's air conditioning and her uncomfortable fans chanted:

> "A/C! A/C! AC!... and Madonna, in response, said, "f**k you! I'm cold!... If you're hot, take your f**king clothes off!"[2]

4. If Madonna was not going to perform as advertised, she should have changed the time on the Celebration Tour tickets from 8:30 p.m. to 10:00 p.m. as she and Live Nation did during the 2019 Madame X Tour, giving consumers reasonable notice of a later start time. Further, Madonna and Defendants should have warned consumers of the pornography that they would be forced to watch during her shows.

5. At the December 17th concert, after making her fans listen to pre-recorded music for over two hours in a hot arena, Madonna finally took the stage and made the following admission:

> "I am sorry I am late... no, I am not sorry, it's who I am... I'm always late."

6. Defendants' actions with respect to the California concerts at the various arenas constitute not only a breach of contract with Plaintiff and the Class, but also a wanton exercise in negligent misrepresentation, intentional infliction of emotional distress, false advertising, violation of the Consumers Legal Remedies Act and unfair competition.

7. Plaintiff seeks compensatory, statutory, and injunctive relief for himself and all members of the class, to compensate these consumers for their damages and to protect current and future consumers of Defendants from being subjected to similar unlawful actions.

8. Plaintiff also brings an action seeking relief for Defendants' violations of California *Business & Professions Code* §§ 17200 *et seq*., including full restitution and disgorgement of all compensation retained by Defendants as a result of their unlawful and unfair business practices, as well as injunctive relief.

9. Plaintiff also brings an action seeking relief for Defendants' violations of California *Business & Professions Code* §§ 17500 *et seq*., including full restitution and

[2] December 17, 2019, Filmore East Miami, Florida.

disgorgement of all compensation retained by Defendants as a result of their false advertising, as well as injunctive relief.

JURISIDICTION AND VENUE

10. This Court has jurisdiction over this Complaint under Code of Civil Procedure §410.10. This action is brought under *Code of Civil Procedure* § 382, *Business & Professions Code* §§ 17200 *et seq.* and 17500 *et seq.* Plaintiff Justen Lipeles brings this Complaint on his own behalf and on behalf of all persons in the Class as defined in paragraph 25 below.

11. Venue is proper in this Court pursuant to *Code of Civil Procedure* §§ 395 and 395.5, because the claims made, and the violations as against the persons identified herein, occurred in the County of Los Angeles and because Defendants owned and operated their businesses in the County of Los Angeles and Madonna performed in the County of Los Angeles.

THE PARTIES

PLAINTIFF

12. At all times relevant hereto, Plaintiff was and is an individual over age 18 and a resident of Los Angeles County, California.

DEFENDANTS

13. Plaintiff is informed and believes, and based on that information and belief, alleges, Defendant Madonna is, and at all times mentioned herein was an individual residing in the State of California and doing business in California under the name "Madonna".

14. Plaintiff is informed and believes, and based on that information and belief, alleges, Defendant Live Nation Worldwide, Inc. ("Live Nation") is, and at all times mentioned herein was a Delaware corporation, with a principal place of business at 9348 Civic Center Drive, Beverly Hills, California 90210. Defendant has been authorized to do business and has been doing business in the County of Los Angeles. Live Nation owns and does business as "Ticketmaster."

15. Plaintiff is informed and believes, and based on that information and belief, alleges, Defendant Live Nation MTours (USA), Inc. ("MTours") is, and at all times mentioned

herein was a Delaware corporation, with a principal place of business at 9348 Civic Center Drive, Beverly Hills, California 90210. Defendant has been authorized to do business and has been doing business in the County of Los Angeles.

16. Plaintiff is informed and believes, and based on that information and belief, alleges, Defendant Forum Entertainment, LLC dba Kia Forum ("Kia Forum") is, and at all times mentioned herein was a Delaware limited liability, with a principal place of business at 3900 West Manchester Blvd., Inglewood, California 90305. Defendant has been authorized to do business and has been doing business in the County of Los Angeles.

17. Plaintiff is informed and believes, and based on that information and belief, alleges, Defendant Oak View Group, LLC dba Acrisure Arena ("Acrisure") is, and at all times mentioned herein was a Delaware limited liability company, with a principal place of business at 11755 Wilshire Blvd., Suite 900, Los Angeles, California 90025. Defendant has been authorized to do business and has been doing business in the County of Los Angeles.

18. Plaintiff is informed and believes, and based on that information and belief, alleges, Defendant Golden State Warriors, LLC dba Golden1 Center ("Golden1") is, and at all times mentioned herein was a California limited liability company, with a principal place of business at 1 Warriors Way, San Francisco, California 94158. Defendant has been authorized to do business and has been doing business in the State of California.

19. Plaintiff is informed and believes, and based on that information and belief, alleges, Defendant Chase Center ("Chase") (collectively with Kia Forum, Acrisure and Golden1 the "Venues") (collectively with Madonna, Live Nation, MTours, Kia Forum, Acrisure and Golden1 "Defendants") is, and at all times mentioned herein was an entity of unknown form, with a principal place of business at 500 David J. Stern Walk, Sacramento, California 95814. Defendant has been authorized to do business and has been doing business in the State of California.

20. The true names and capacities, whether individual, corporate, subsidiary, partnership, associate or otherwise of Defendants DOES 1 through 100, inclusive, are unknown to Plaintiff, who therefore sues these Defendants by such fictitious names pursuant to *Code of*

Civil Procedure § 474. Plaintiff will seek leave to amend his Complaint to allege the true names and capacities of DOES 1 through 100, inclusive, when they are ascertained.

21. Plaintiff is informed and believes, and based on that information and belief alleges, that Defendant DOES 1 through 100 are persons, corporations or other entities which reside in or are authorized to do, or are otherwise doing, business in the State of California. Specifically, DOES 1 through 100 maintain offices, operate businesses, employ persons, and conduct business in the County of Los Angeles. Each of the Defendants DOES 1 through 100 was the managerial agent, employee, predecessor, successor, joint-venturers, co-conspirator, alter ego and/or representative of one or more of the other Defendants named herein, and acting with permission, authorization, and/or ratification and consent of the other Defendants.

22. Plaintiff is informed and believes, and based on that information and belief alleges, that the Defendants named in this Complaint, including DOES 1 through 100, inclusive, are responsible in some manner for one or more of the events and happenings that proximately caused the injuries and damages hereinafter alleged.

23. Plaintiff is informed and believes, and based on that information and belief alleges, that Defendants named in this Complaint, including DOES 1 through 100, inclusive, are, and at all times mentioned herein were, the agents, servants, and/or employees of each of the other Defendants and that each Defendant was acting within the course and scope of his, hers or its authority as the agent, servant and/or employee of each of the other Defendants. Consequently, all of the Defendants are jointly and severally liable to the Plaintiff, and the Class, for the damages sustained as a proximate result of their conduct.

24. Plaintiff is informed and believes, and based on that information and belief alleges, that the Defendants named in this Complaint, including DOES 1 through 100, inclusive, knowingly and willfully acted in concert, conspired and agreed together among themselves and entered into a combination and systemized campaign of activity to *inter alia* damage Plaintiff, and the Class, and to otherwise consciously and/or recklessly act in derogation of the rights of Plaintiff and the Class, and the trust reposed by Plaintiff, and the Class, in each of the Defendants, the acts being negligently and/or intentionally inflicted. Their

conspiracy, and Defendants' concerted actions, were such that, to Plaintiff's information and belief, and to all appearances, Defendants, and each of them, represented a unified body so that the actions of one Defendant were accomplished in concert with, and with the knowledge, ratification, authorization and approval of each of the other Defendants.

CLASS ALLEGATIONS

A. The Definition of the Class

25. The Class ("the Class") is defined as follows:

> "All individuals, in California who purchased a ticket or tickets or who became a ticketholder to a 2024 concert that was to have been performed by Madonna, as part of the Celebration Tour, in California.
>
> Plaintiff reserves his right under Rule 3.765 of the California Rules of Court to amend or modify the Class description with greater specificity or further division into subclasses or limitation to particular issues.

B. Maintenance of the Action

26. Plaintiff brings this action individually and on behalf of himself and as representative of all similarly situated persons under *Business & Professions Code* §§ 17203 and 17204 and *Code of Civil Procedure* § 382.

C. The Class Requisites

27. At all material times, Plaintiff was a member of the Class.

28. The Class action meets the statutory prerequisites for maintaining a class action under Code of Civil Procedure § 382 in that:

(a) The persons who comprise the Class are so numerous that the joinder of all those persons is impracticable and the disposition of their claims as a Class will benefit the parties and the Court;

(b) Nearly all factual, legal, statutory, declaratory and injunctive relief issues that are raised in this Complaint are common to the Class and will apply uniformly to every Class member;

(c) The claims of the representative Plaintiff are typical of the claims of each Class member. Plaintiff, like all Class members, has sustained damages arising from Defendants' violations of the laws of the State of California. Plaintiff, and the Class members, were and are similarly or identically harmed by the same unlawful, deceptive, unfair, systematic and pervasive pattern of misconduct engaged in by the Defendants;

(d) The representative Plaintiff has, and will continue to, fairly and adequately represent and protect the interests of the Class and has retained counsel who are competent and experienced in class action litigation. There are no material conflicts between the claims of the representative Plaintiff and the Class members that would make class certification inappropriate. Counsel for the Class will vigorously assert the claims of all Class members.

29. The persons who comprise the Class are so numerous that joining all of them is impracticable, and jointly adjudicating their claims will benefit the parties and the Court. Plaintiff's claims are typical of the claims of the Class that Plaintiff seeks to represent. Plaintiff will fairly and adequately protect the interests of the Class he seeks to represent. Plaintiff does not have any interests that are antagonistic to the Class he seeks to represent. Counsel for Plaintiff are experienced, qualified and generally able to conduct complex class action litigation.

30. The Court should permit the action to be maintained as a class action under *Code of Civil Procedure* § 382 because:

(a) The questions of law and fact common to the Class predominate over any question affecting only individual members:

(b) A class action is superior to any other available method for fairly and efficiently adjudicating the claims of the Class;

(c) The Class members are so numerous that it is impractical to bring all of them before the Court;

(d) Plaintiff and other Class members will not be able to obtain effective and economic legal redress unless the action is maintained as a class action;

(e) There is a community of interest in obtaining appropriate legal and equitable relief for the statutory violations, and in obtaining adequate compensation for the damages and injuries for which Defendants is responsible in an amount sufficient to adequately compensate the Class members;

(f) Without Class certification, the prosecution of separate actions by individual Cass members would create a risk of:

i. Inconsistent or varying adjudications for individual Class members that would establish incompatible standards of conduct for Defendants; and/or,

ii. Adjudication for individual Class members that would, as a practical matter, dispose of other non-party members' interests, or that would substantially impair or impede the non-parties' ability to protect their interests, by, for example, potentially exhausting the funds available from Defendant, and

(g) Defendant has acted or refused to act on grounds generally applicable to the Classes, making final injunctive relief appropriate for the Class, as a whole.

31. Plaintiff contemplates eventually issuing notice to the proposed Class Members that would set forth the subject and nature of the action. The Defendants' own business records may be utilized for assisting to prepare and issue the contemplated notice. To the extent that any further notices may be required, Plaintiff would contemplate using additional media and/or mailing.

GENERAL ALLEGATIONS

AS TO PLAINTIFF

32. On or about March 6th, 2024, Plaintiff purchased for valuable consideration in the amount of $500.00 per ticket, 4 tickets to attend a musical performance by Defendant Madonna, during her Celebration Tour at the Kia Forum on March 7, 2024.

33. Plaintiff was directed to obtain the e-tickets from Defendant Live Nation, which, for purpose the Celebration Tour, acted as a promoter, manager and agent for Defendant Madonna.

34. The terms and conditions printed on the face of the tickets stated that the musical performance by Defendant Madonna was to occur on March 7, 2024, at the Kia Forum, in Inglewood, California, commencing at 8:30 p.m.

35. The concert for the Celebration tour that took place at the Kia Forum on March 7, 2024, started after 10:00 p.m., rather than at 8:30 p.m.

36. Plaintiff arrived before 8:30 p.m. at the venue as was indicated on his e-ticket.

37. Defendants did not provide any notice to Plaintiff that the concert will start at a later time.

38. The temperature inside the Kia Forum was uncomfortably hot as required by Madonna who refused to allow the air conditioning to be turned on. Plaintiff and members of the Class were profusely sweating and became physically ill as a result of the heat. When fans complained about the heat, Madonna unreasonably told them to take their clothes off.

39. Further, during most of the performance it was apparent to Plaintiff that Madonna was lip synching.

40. During the performance Plaintiff was forced to watch topless women on stage simulating sex acts. Plaintiff felt like he was watching a pornographic film being made.

AS TO ALL PLAINTIFFS

41. Plaintiff's and Class members' tickets were purchased from Defendant Madonna, who by contract, employs Live Nation to arrange on her behalf ticket sales through various websites, outlets and ticket agencies. The Plaintiff and members of the Class purchased their tickets in reliance on Defendants' advertisements for concerts starting at 8:30 p.m. and Defendants' websites also confirmed that start time. Accordingly, Plaintiffs and Class members

made the decision to purchase their tickets in part, based on the start time of the concerts. Further, the terms printed on the face of the tickets stated that the musical performance by Madonna was to occur on a certain date and at a certain time. Defendants' representation regarding the start time of the concerts was material to Plaintiff's and Class members' agreements to purchase the tickets.

42. Madonna has a long history of arriving and starting her concerts late, sometimes several hours late. This history occurred throughout her 2016 Rebel Heart Tour, her 2019-2020 Madame X Tour, and prior tours, where Madonna continuously started her concerts over two hours late. In addition, Madonna was more than one- and one-half hours late starting her Celebration Tour concerts in 2024 in California. There have been myriad articles in the media and on the internet over the years about fans complaining about Madonna not taking the stage for several hours after the advertised start time of her concerts. Unfortunately, not all people who rely on advertising for the concerts know this. Further, even if some ticket purchasers know of Madonna's history of starting her concerts late, they do not know *how late* she will show-up on stage at any particular concert, so ticket purchasers arrived at the start time as advertised.

43. All of the subject concerts that took place in California Venues ("Concerts") during Madonna's Celebration Tour started late. Further, the Venues were all hot and uncomfortable, presumably at the direction of Madonna (who has a history of requiring a hot, uncomfortable temperature during her concerts) and on information and belief, Madonna engaged in lip synching during the concerts at the California Venues. Lastly, topless women performed on stage simulating sexual acts at all of the Concerts.

44. Defendants failed to provide any notice to the ticketholders that the Concerts would start much later than the start time printed on the ticket and as advertised, which resulted in ticketholders waiting for hours for the concerts to begin at the various Defendant Venues.

45. Further, ticketholders were uncomfortably hot due to Madonna's requirement that the Venues not turn on air conditioning (which was made worse due to Madonna's failure to take the stage for over one- and one-half hours or more).

46. Ticketholders were also not apprised that Madonna would lip synch some of her songs.

47. Ticketholders were not given any warning that there were be nudity and pornography on stage during Madonna's concerts in the form of topless women who were engaging in simulated sexual acts.

48. Defendants engaged in unconscionable, unfair, unlawful, deceptive business practices by advertising and offering to the public concerts that were promised to begin at 8:30 p.m., when they knew, or should have known, that Madonna would most certainly not take the stage at the advertised start time. These unconscionable unfair, unlawful, deceptive business practices also include failing to warn purchasers of the uncomfortable temperature inside the Venues, that Madonna would not perform all of the music live and that topless women performing lewd, simulated sexual acts would be on stage during the Concerts.

49. On May 29th, 2024, Plaintiff, pursuant to Civil Code §1782, sent Defendants letters notifying them of particular violations of Civil Code §1770. Upon the expiration of the statutory time periods, Plaintiff will amend this complaint accordingly and include additional causes of action as legally permitted.

FIRST CAUSE OF ACTION

BREACH OF WRITTEN CONTRACT

(By Plaintiffs Against Defendants Madonna, Live Nation and MTours and Does 1-100)

50. Plaintiff and the Class reallege and incorporate by reference all of the allegations set forth in this Complaint.

51. Plaintiff and Class members entered into a valid and enforceable written contract with Defendants, Live Nation, Madonna and MTours, in which Defendants offered tickets for concerts that were promised to begin at 8:30 p.m., the terms of which, Plaintiff and Class members accepted by virtue of their purchases of such offered tickets, and which promises were contained in printed representations on tickets sold for valuable consideration.

52. Plaintiff and members of the Class fully performed under the Contract by paying valuable consideration to Defendants Live Nation, MTours and Madonna.

53. Additionally, Defendants failed to provide any notice that the concerts would not begin at 8:30 p.m., but will instead begin after 10:00 p.m. or later.

54. Further, Live Nation, MTours and Madonna breached their contract with Plaintiff and Class members by: (1) failing to provide a comfortable concert environment by refusing to turn on the air conditioning at the Venues at Madonna's request; (2) allowing Madonna to lip synch through some of her performance; and (3) allowing topless women to perform simulated sexual acts on stage without prior warning.

55. As a direct and proximate result of Defendants' breach, Plaintiff and Class members have been damaged in an amount according to proof at trial.

SECOND CAUSE OF ACTION

NEGLIGENT MISREPRESENTATION

(By Plaintiffs Against all Defendants and Does 1 through 100)

56. Plaintiff and the Class reallege and incorporate by reference all of the allegations set forth in this Complaint.

57. Defendants, through various advertising campaigns, made the following representation to Plaintiff and Class members that they were buying tickets to concerts that would start at 8:30 p.m.

58. Additionally, Defendants failed to make representations (or omitted representing) that: 1) the temperature in the Venues would be uncomfortably hot; 2) Madonna would not perform her songs live and would instead lip synch; and 3) topless women would perform simulated sexual acts on stage during the Concerts. Defendants' omissions were made with intent to induce Plaintiff and Class members to rely on those omissions.

59. The omissions were material given Plaintiff and Class members reasonable expectation of a comfortable temperature inside the Venues and a live performance without nudity. Defendants' affirmative concealments alleged herein were material in that there was a substantial likelihood that reasonable prospective ticket purchasers would have considered them important in deciding whether or not to attend Madonna's Celebration Tour Concerts.

60. Defendants owed a duty of reasonable care to provide Plaintiff and members of the Class with Concerts that began at 8:30 p.m., Venues that had comfortable temperatures, Madonna's live performances and the absence of nudity and pornography.

61. Defendants' representations and/or omissions were made for the purpose of inducing Plaintiff and members of the Class to purchase concert tickets to Madonna's Celebration tour.

62. As a result of the negligent representations and omissions, Plaintiff and Class members were induced into purchasing tickets to the Concerts.

63. Plaintiff and Class members reasonably relied on Defendants' representations and omissions relating to the Concerts.

64. Defendants' representations were false and Defendants knew or should have known that the representations were false.

65. As a result of Defendants' negligent misrepresentations and omissions, Plaintiff and members of the Class have suffered actual and consequential damages, according to proof at trial.

THIRD CAUSE OF ACTION

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

(Plaintiffs Against all Defendants and Does 1 through 100)

66. Plaintiff and the Class reallege and incorporate by reference all of the allegations set forth in this Complaint.

67. Plaintiff is informed and believes, and thereon alleges, that Defendants' actions were intentional, extreme, and outrageous.

68. Plaintiff is further informed and believes, and thereon alleges, that such actions were done with the intent to cause serious emotional distress or with reckless disregard of the probability of causing Plaintiff and Class members serious emotional distress.

69. As a direct, legal and proximate result of Defendants' actions, Plaintiff and Class members suffered severe emotional distress which might have caused them to sustain

severe, serious and permanent injuries to their person, all to their damage in a sum to be shown according to proof.

70. As a direct, legal and proximate result of Defendants' aforesaid actions, Plaintiff and members of the Class may be compelled to employ the services of hospitals, physicians and surgeons, nurses, and the like, to care for and treat them, and may incur future hospital, medical, professional and incidental expenses, all to Plaintiff and Class members' damage in a sum to be shown according to proof.

71. As a direct, legal and proximate result of the aforesaid tortious conduct of Defendants, Plaintiff and Class members may be prevented from engaging in their usual occupations, thereby sustaining a loss of income, in an amount according to proof.

72. Defendants, and each of them, committed the acts herein alleged maliciously fraudulently, and oppressively, and with reckless disregard for Plaintiff and Class members' rights. Conduct by the Defendants, and each of them, amounted to malice and was carried out in a despicable, deliberate, cold, callous and intentional manner, entitling Plaintiff and Class members to recover punitive damages from the Defendants in an amount sufficient to deter such conduct in the future and according to proof.

FOURTH CAUSE OF ACTION

FALSE ADVERTISING

(Business & Professions Code §§ 17500 *et seq*. Plaintiffs Against all Defendants and Does 1 through 100)

73. Plaintiff and the Class reallege and incorporate by reference all of the allegations set forth in this Complaint.

74. Defendants advertise and promote Madonna's concerts. Defendants are advertising concerts in a manner that by its very nature is deceptive, untrue or misleading within the meaning of Business & Professions Code §§ 17500 *et seq*. because the statements contained on the tickets concerning start times are misleading and likely to deceive, and continue to deceive, members of the putative Class and the general public.

75. Defendants' representations and omissions were materially false and misleading and likely to deceive the consuming public because Defendants knew and failed to disclose that: 1) Madonna would, or would most likely, start the Concerts late and that she has a consistent history over many years of starting her concerts over one and one half or more hours late; 2) the temperature inside the Venues would be uncomfortably hot as required by Madonna, 3) that Madonna would be lip synching through some of her performance; and 4) that topless women would be simulating sexual acts on stage during Madonna's performance.

76. In making and disseminating the statements and/or omissions alleged herein, Defendants knew or should have known that the statements were untrue or misleading, and Defendants acted in violation of Business & Professions Code §§ 17500 *et seq*.

77. The misrepresentations and non-disclosures by Defendants of the material facts detailed above constitute false and misleading advertising and therefore constitute a violation of Business & Professions Code §§ 17500 *et seq*.

78. The representations and omissions were committed for various Madonna concerts throughout the United States over many years sufficiently to be considered a regular business practice.

79. Through their deceptive acts and practices, Defendants have improperly and illegally obtained money from Plaintiff and members of the Class. As such. Plaintiff requests that this Court cause Defendants to restore this money to Plaintiffs and members of the Class, and to enjoin Defendants from continuing to violate Business & Professions Code §§ 17500 *et seq*., as discussed above. Otherwise, Plaintiff and those similarly situated will continue to be harmed by Defendants' false and/or misleading advertising.

80. Pursuant to Business & Professions Code §§ 17535, Plaintiff and members of the Class seek an order requiring Defendants to disclose the true nature of their misrepresentations and non-disclosures. Plaintiff and Class members request an order requiring Defendants to disgorge their ill-gotten gains and/or award restitution of all monies wrongfully acquired by Defendants by means of such acts of false advertising plus interest and attorneys' fees to restore any and all monies which were acquired and obtained by means of such untrue

and misleading advertising, misrepresentations and omissions, and which ill-gotten gains are still retained by Defendants.

FIFTH CAUSE OF ACTION

NEGLIGENCE/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

(By Plaintiffs Against all Defendants and Does 1 through 100)

81. Plaintiff and the Class reallege and incorporate by reference all of the allegations set forth in this Complaint.

82. Defendants owed Plaintiff and the Class a duty of care not to permit the above described actions, including but not limited excessive heat, pornographic imagery, and being forced to wait for extended periods of time for no valid reason.

83. Plaintiff and Class expended consider sums of money to experience what was expected to be high quality entertainment, and instead they were subjected to offensive treatment as described above.

84. Defendants knew, or should have known, that their failure to exercise due care in their actions would cause Plaintiff and the Class severe emotional distress.

85. As a direct, legal and proximate result of Defendants' actions, Plaintiff and the Class suffered severe emotional distress which caused or might have caused them to sustain severe, serious and permanent injuries to their person, all to their damage in a sum to be shown according to proof.

86. As a direct, legal and proximate result of Defendants' actions, Plaintiff and Class were or might be compelled to employ the services of hospitals, physicians and surgeons, nurses, and the like, to care for and treat them, and may incur future hospital, medical, professional and incidental expenses, all to their damage in a sum to be shown according to proof.

SIXTH CAUSE OF ACTION

UNFAIR COMPETITION

(Business & Professions Code §§ 17200 *et seq*. By Plaintiffs Against all Defendants and Does 1 through 100)

87. Plaintiff and the Class reallege and incorporate by reference all of the allegations set forth in this Complaint.

88. Defendants are "person(s)" as that term is defined in Business & Professions Code §17021.

89. The Business & Professions Code defines unfair competition as any unlawful, unfair, or fraudulent business practice, as well as any "unfair, deceptive, untrue or misleading" advertising. The Unfair Business Practices Act provides for injunctive relief and restitution for violations.

90. A business act or practice is "unlawful" if it violates any established state or federal law.

91. A business act or practice is "unfair" if the reasons, justifications and motives of the alleged wrongdoer are outweighed by the gravity of the harm to the alleged victims.

92. Defendants' breach of contract, intentional infliction of emotional distress, false advertising and negligent misrepresentations and violation of the Consumer Legal Remedies Act as described above are unlawful and unfair pursuant to Business & Professions Code §17200 et seq.

93. The gravity of the harm to Plaintiff and members of the Class resulting from such unfair acts and practices outweighs any conceivable reasons, justification and/or motives of Defendants for engaging in such deceptive acts and practices. By committing the acts and practices alleged above, Defendants have engaged, and continue to engage, in unfair business practices within the meaning of Business & Professions Code §17200.

94. At all times relevant herein, by and through the conduct described herein, Defendants have engaged in unfair and unlawful practices by failing to (1) start concerts at the stated ticket times; (2) provide Venues with comfortable temperatures; (3) provide live performances, (4) warn that the concerts would nudity and simulated sexual acts, all in violation of Business & Professions Code §§ 17200 *et seq*.

95. By and through the unfair and unlawful business practices described herein, Defendants have obtained valuable property and money from the Plaintiff and the Class and

have deprived them of valuable rights and benefits guaranteed by law all to the detriment of Plaintiff and the Class.

96. All the acts described herein are unlawful and in violation of public policy; and in addition are immoral, unethical, oppressive, and unscrupulous, and thereby constitute unfair and unlawful business practices in violation of Business & Professions Code §§ 17200 et seq.

97. Defendants' acts and practices as described herein have deceived members of the consuming public.

98. Plaintiff and the Class are entitled to, and do, seek such relief as may be necessary to restore to them the money and property which Defendants have acquired, or of which Plaintiff and the Class have been deprived by means of the above-described unfair and unlawful business practices.

99. Plaintiff and the Class are further entitled to, and do, seek a declaration that the above-described business practices are unfair and unlawful and that injunctive relief should be issued restraining Defendants from engaging in any of the above described unfair and unlawful business practices in the future.

100. Plaintiff and the Class have no plain, speedy, and/or adequate remedy at law to redress the injuries which they have suffered as a consequence of the unfair and unlawful business practices of Defendants. As a result of the unfair and unlawful business practices described above, Plaintiff and the Class have suffered and will continue to suffer irreparable harm unless Defendants are restrained from continuing to engage in these unfair and unlawful business practices. In addition, Defendants should be required to disgorge the moneys paid by Plaintiff and the Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court enter judgment in his favor and against Defendants, and each of them, as follows:

1. Compensatory damages suffered by Plaintiff and members of the Class as a result of Defendants' breach of written contract with Plaintiff and members of the Class;

2. For injunctive relief ordering the continuing unfair business acts and practices to cease, as the Court deems just and proper;

3. Restitution in such amounts Plaintiff and all Class members paid for tickets and/or disgorgement of the profits Defendants obtained from those transactions;

4. Reasonable attorneys' fees pursuant to, *inter alia*, CCP 1021.5;

5. Costs of this lawsuit;

6. Pre- and post-judgment interest;

7. For punitive and exemplary damages in a sum to be determined at trial; and

8. For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff Justen Lipeles hereby respectfully requests a trial by jury for all claims and issues raised in his Complaint that may be entitled to a jury trial.

LIPELES LAW GROUP, APC

Date: May 29th, 2024

By: _____
Thomas H. Schelly
Attorneys for Plaintiff Justen Lipeles, an individual, on his own behalf and on behalf of all others similarly situated

419 F.Supp.2d 437
United States District Court,
S.D. New York.

Jonathan SMITH, Petitioner-Cross-Respondent,
v.
POSITIVE PRODUCTIONS,
Respondent-Cross-Petitioner.

No. 05 Civ. 3748(MBM).
|
Sept. 28, 2005.

Synopsis

Background: Musical artist petitioned to vacate, or, alternatively, to modify arbitration award in favor of concert promotion company, which found that artist breached contracts to perform concerts in Japan and awarded company $379,874.00 in damages and costs. Company cross-petitioned for confirmation of award.

Holdings: The District Court, Mukasey, J., held that:

[1] artist received proper notice of arbitration;

[2] terms of parties' first agreement, including its arbitration clause, were preserved when artist failed to perform under second agreement;

[3] award of lost profits in connection with first set of cancelled shows was not in manifest disregard of New York law;

[4] award of $184,000 in lost profits had at least barely colorable justification in the record and had to be confirmed;

[5] award of reputational damages could not be disturbed; and

[6] award of attorney fees was not in manifest disregard of New York law.

Award confirmed.

West Headnotes (37)

[1] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Alternative Dispute Resolution Limitation to Statutory Grounds

An arbitration award may be vacated only on the grounds enumerated in the Federal Arbitration Act (FAA) or if it was arrived at in manifest disregard of the law. 9 U.S.C.A. § 1 et seq.

[2] **Alternative Dispute Resolution** Notice

Musical artist received proper notice of arbitration proceeding brought by concert promotion company in connection with parties' contracts when artist did not deny that at least one of his agents received correspondence and notices related to arbitration, and did not deny that, throughout proceedings, company's counsel spoke with and corresponded by e-mail with artist's representatives, who assured him that artist was aware of arbitration, that related documents and correspondence were being forwarded to artist, and that artist would be represented by counsel at hearing; that agent was unable to communicate effectively with artist was irrelevant to whether artist had sufficient notice of arbitration. 9 U.S.C.A. § 10(a)(3, 4).

[3] **Alternative Dispute Resolution** Hearing

Although an arbitrator does not have to follow the strictures of formal court proceedings in conducting the arbitration hearing, he must nevertheless grant the parties a fundamentally fair hearing.

1 Case that cites this headnote

[4] **Alternative Dispute Resolution** Notice

A fundamentally fair hearing, in the arbitration context, requires that all parties receive notice of the arbitration.

4 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Notice

New York law governing notice did not apply to arbitration proceeding, given parties' agreement in arbitration clause that arbitration association's rules would govern arbitration, and those rules provided for different means of notice. N.Y.McKinney's CPLR 7503(c).

7 Cases that cite this headnote

[6] **Alternative Dispute Resolution** Defects and Irregularities in Procedure

Given strong policy favoring arbitration and undisputed proof that musical artist had notice of arbitration commenced by concert promotion company, arbitration award would not be disturbed on ground that suite number was missing from mailing address on notice of arbitration proceeding, or that notice was not sent by certified or registered mail.

1 Case that cites this headnote

[7] **Alternative Dispute Resolution** Operation and Effect

Contracts Operation and Effect

Pursuant to second agreement between musical artist and concert promotion company, which indicated that parties' first agreement would be deemed void and superseded in all respects upon artist's performance of all of his obligations under second agreement, terms of first agreement, including its arbitration clause, were preserved when artist failed to perform his obligations under second agreement.

[8] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Manifest disregard of the law by arbitrators is a judicially-created ground for vacating arbitration award, and, to advance the goals of arbitration, courts may vacate awards under that doctrine only for an overt disregard of the law, and not merely for an erroneous interpretation.

[9] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Court must not disturb arbitration award simply because of an arguable difference of opinion regarding the meaning or applicability of the laws.

[10] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

For court to vacate arbitration award based on arbitrator's manifest disregard of the law, arbitrator must have known affirmatively of the governing legal principle, yet refused to apply it or ignored it altogether.

1 Case that cites this headnote

[11] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

For court to vacate arbitration award based on arbitrator's manifest disregard of the law, governing legal principle must be well-defined, explicit, and clearly applicable.

1 Case that cites this headnote

[12] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Legal principle clearly governs the resolution of an issue before arbitrator, for purposes of court's ability to vacate arbitration award based on arbitrator's manifest disregard of the law, if its applicability is obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.

[13] **Alternative Dispute Resolution** Findings, Conclusions, and Reasons for Decision

Arbitrators are not required to document their reasoning.

[14] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Particularly when the arbitrator provides little reasoning or none at all for his decision, arbitration award must be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case.

[15] **Alternative Dispute Resolution** Confirmation or Acceptance by Court

Arbitration award must be confirmed if there is a barely colorable justification for the outcome reached, even if that justification is based on an error of fact or law.

1 Case that cites this headnote

[16] **Damages** Loss of Profits

New York law requires that plaintiff prove with a reasonable degree of certainty that any claimed loss of profits was caused by defendant's breach of contract.

[17] **Damages** Breach of Contract

Under New York law, damages from lost profits may not be merely speculative, possible, or imaginary, but must be reasonably certain and directly traceable to breach of contract, and not remote or the result of other intervening causes.

1 Case that cites this headnote

[18] **Damages** Loss of Profits

Under New York law, amount of lost profits, as with all damages, need not be demonstrated with scientific rigor.

1 Case that cites this headnote

[19] **Damages** Extent of Damage Not Shown

When the existence of damages is certain but the amount itself is uncertain, plaintiff will not be denied a recovery of substantial damages under New York law.

[20] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Musical artist's awareness that he could be liable for concert promotion company's lost profits from first of two sets of concerts that artist failed to perform could be inferred from circumstances surrounding cancellation of first set of shows, and therefore arbitrator's award of lost profits in connection with those shows was not in manifest disregard of New York law, even though parties' contracts did not expressly provide for recovery of lost profits.

[21] **Damages** Breach of Contract

Under New York law, liability for damages for lost profits must have been contemplated by the parties at the time of contract.

2 Cases that cite this headnote

[22] **Damages** Under Circumstances Within Contemplation of Parties

Under New York law, party breaching the contract is liable for those risks foreseen, or which should have been foreseen, at the time the contract was made.

[23] **Damages** Breach of Contract

Under New York law, when contract is silent on the subject of damages for lost profits, court must take a common-sense approach and determine what the parties intended by considering the nature, purpose, and particular circumstances of the contract known by the parties, as well as what liability defendant fairly may be supposed to have assumed consciously.

2 Cases that cite this headnote

[24] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Musical artist did not show how concert promotion company's efforts to mitigate its losses by booking replacement performer for concerts cancelled by artist were unreasonable, even if such efforts were "botched," as artist contended, and therefore arbitrator did not act in manifest disregard of New York law in awarding mitigation damages to company based on artist's breaches of contract.

[25] **Damages** Expenses

Damages Breach of Contract

Under New York law, an injured party will be allowed to recover the expenses of a proper effort to mitigate damages even though it proves unsuccessful, and such expenses include those reasonably incurred by the injured party that would not have been incurred had there been no breach of contract.

1 Case that cites this headnote

[26] **Damages** Breach of Contract

Under New York law, rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter.

3 Cases that cite this headnote

[27] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Even if second contract between musical artist and concert promotion company was executory accord under New York law, arbitrator's failure to identify it as such was mere failure to understand the law, and, absent proof that arbitrator was aware of New York law governing executory accords but flouted it, such error did not rise to level of manifest disregard of the law that warranted vacating arbitration award in company's favor on its breach of contract claims against artist. N.Y.McKinney's General Obligations Law § 15-501(3).

[28] **Alternative Dispute Resolution** Amount of Award, or Overvaluation and Undervaluation

Alternative Dispute Resolution Error of Judgment or Mistake of Law

Arbitrator's award of lost profits to concert promotion company on its claims for breach of contract against musical artist was not double recovery or in manifest disregard of New York law, given arbitrator's view, which was at least barely colorable, that parties' second of two contracts was part of company's attempt to mitigate damages arising from artist's breach of first contract.

[29] **Alternative Dispute Resolution** Amount of Award, or Overvaluation and Undervaluation

In determining, under New York law, damages for lost profits sustained by concert promotion company as a result of musical artist's cancellation of set of concerts, arbitrator reasonably could focus on number of performances, instead of dates on which performances did or were to occur, and conclude that booking of replacement performer for two shows was proper attempt by company to mitigate its damages arising from artist's failure to perform three shows, even though dates for performances did not completely coincide.

[30] **Alternative Dispute Resolution** Consistency and Reasonableness; Lack of Evidence

Arbitrator's award of $184,000 in lost profits to concert promotion company for musical artist's breaches of contract had at least a barely colorable justification in the record, and therefore award had to be confirmed, notwithstanding artist's contention that figure grossly overstated company's lost profits and was otherwise speculative.

[31] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Arbitrator's inclusion of fixed costs in expenses awarded to concert promotion company on its breach of contract claims against musical artist did not warrant vacating arbitration award on grounds that it was in manifest disregard of the law, given absence of clear and established legal rule barring inclusion of fixed costs in award of expenses under New York law, and given artist's failure to show that challenged overhead expenses were not incurred as part of company's preparation and investment in concerts cancelled by artist.

[32] **Alternative Dispute Resolution** Modification

That concert promotion company might have misidentified date for which it incurred penalties for canceling services for concert that musical artist failed to perform was not type of error warranting modification of company's arbitration award arising from artist's breaches of contract.

1 Case that cites this headnote

[33] **Damages** Elements of Compensation in General

Damages for harm to reputation generally are not recoverable in a breach of contract action under New York law.

13 Cases that cite this headnote

[34] **Damages** Elements of Compensation in General

Under New York law, damages for harm to reputation are available only in exceptional cases in which plaintiff proves specific business opportunities lost as a result of its diminished reputation, and vague assertions will not suffice.

12 Cases that cite this headnote

[35] **Damages** Elements of Compensation in General

Absent specific proof, damages for loss of reputation are too speculative to be recovered under New York contract law.

9 Cases that cite this headnote

[36] **Alternative Dispute Resolution** Consistency and Reasonableness; Lack of Evidence

Notices received from concert promotion company of losses suffered by other businesses involved in preparing for and promoting concerts arranged by company that musical artist failed to perform served as proof of specific harm to company's reputation, and thus provided at least barely colorable justification for arbitrator's award of reputational damages under New York law, such that award could not be disturbed on judicial review.

[37] **Alternative Dispute Resolution** Error of Judgment or Mistake of Law

Arbitrator did not act in manifest disregard of New York law by carrying forward arbitration clause from first agreement between musical artist and concert promotion company while awarding attorney fees to company under parties' second agreement, pursuant to which artist's failure to perform his obligations left first agreement intact, in that arbitrator could have concluded either that first agreement's silence on fee issue did not preclude award of fees, or that second agreement added fee provision, in lieu of first agreement's silence, and carried over first agreement's arbitration clause because it had not been superseded by second agreement's forum selection clause. N.Y.McKinney's CPLR 7513.

Attorneys and Law Firms

***441** Peter Haviland, Los Angeles, CA, for Petitioner-Cross-Respondent Jonathan Smith.

Alan P. Fraade, Mintz & Fraade, P.C., New York, NY, for Respondent-Cross-Petitioner Positive Productions.

OPINION AND ORDER

MUKASEY, District Judge.

Jonathan Smith, better known as the musical artist "Lil Jon," petitions to vacate, or alternatively to modify an arbitration award entered by arbitrator Mark Diamond of the International Centre for Dispute Resolution ("ICDR") in favor of Positive Productions ("Positive"), a Japanese concert promotion company, in the amount of $379,874.00, for costs and damages arising from breach of contracts wherein Smith agreed to perform three concerts in Japan. (*See In the Matter of the Arbitration between Positive Productions and Jonathan Smith PKA Lil John and the East Side Boys,*) Award of Arbitrator dated December 28, 2004 ("Arbitration Award") (Ex. A to Declaration of Bruce Jacobs ("Jacobs Decl.")) Positive opposes the petition and cross-petitions to confirm the award. Both petitions have been brought pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, 10, & 11. Jurisdiction is based on diversity of citizenship. *See* 28 U.S.C. § 1332. For the reasons set forth below, the award is confirmed.

I.

The following facts are undisputed unless otherwise noted.

On January 9, 2004, Smith and Positive entered into a written agreement whereby Smith agreed to perform three concerts to be promoted by Positive on March 12 and 13, 2004 in Yokohama, Japan and March 14, 2004 in Okinawa, Japan. (Ex. H to Jacobs Decl. ("January Agreement")) It was signed by Broderick Morris of Positive and Robert Mitchell, Smith's manager. (*Id.* at 8) A $35,000 advance was forwarded to Smith's agent, Ujaama Entertainment, Inc. ("Ujaama"). (*Id.* at 2) The agreement contained an arbitration provision, whereby

> [a]ny claim or dispute arising out of or relating to [the agreement] or the breach thereof shall be settled by arbitration with the rules and regulations of the American Arbitration Association. The parties hereto agree to be bound by the award and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

(*Id.* at 8) Pursuant to the agreement, Positive rented venues, purchased airline tickets, arranged for Smith's transportation to and within Japan, reserved lodging, promoted Smith through a variety of Japanese ***442** media sources, and sold tickets to the performances. (Positive Opp'n at 6-7; January Agreement ¶¶ 5, 8, 10)

On March 4, 2004, Smith informed Positive that he would not be able to travel to Japan and perform the shows "because he, or some of his band members, were unable to obtain passports." (Positive Answer to Petition to Vacate or, in the Alternative, Modify Arbitration Award, and Cross Petition to Confirm Arbitration Award ("Positive Answer") ¶ 6) The shows were cancelled and refunds paid on tickets. (Positive Opp'n at 7) Ujaama returned the $35,000 deposit to Positive. (*Id.*)

After the March performances were cancelled, the parties negotiated and entered into another agreement, dated May 7, 2004, pursuant to which Smith agreed to perform concerts on June 27, 2004 in Okinawa, on June 29, 2004 in Osaka, and on July 2, 2004, in Yokohama. (Ex. I to Jacobs Decl. ("May Agreement")) The May Agreement refers to the January Agreement, providing that "[u]pon [Smith] performing all of [his] obligations hereunder the [January] Agreement shall be deemed void and superceded [sic] in all respects by this [May] agreement." (*Id.* at 1) Again, Positive forwarded a $35,000 deposit to Ujaama and prepared for the shows. (Positive Opp'n at 8)

On June 8, 2004, Positive was informed by telephone that Smith wanted to attend the Black Entertainment Television ("BET") Awards show on June 29 in Los Angeles and preferred not to come to Japan during the last week of June. (*Id.*) By letter dated June 11, 2004, William Leibowitz, who introduced himself as "the attorney[ ] for TVT Records," confirmed the development. (Ex. C to Jacobs Decl.) In defense of Smith, Leibowitz contended that it "is unrealistic and unfair for [Positive] to suggest that [Smith]-who will literally dominate the BET Awards this year-should refrain from attending and performing and thereby forfeit one of the great moments in his life and career, all so that [he] can perform in front of a few thousand people in Japan." (*Id.*)

On June 13, 2004, Gerald Weiner-Positive's lawyer-stated in an e-mail to Leibowitz that "[t]o the best of [his] knowledge [Leibowitz did] not represent Jonathan Smith," that "[t]here is no contractual relationship between [Positive] and TVT Records," and that Leibowitz was "inserting [himself] into a dispute which has been ongoing since March in which [Leibowitz did] not represent any of the parties...." (Ex. D to Declaration of Abid Qureshi ("Qureshi Decl.")) Five days later, Morris of Positive, in an e-mail to Weiner and Leibowitz, stated that a second "no show" in three months "would be very damaging to all." (*Id.*) He had learned from Erskine Isaac of Ujaama that TVT had booked a radio show for Smith in Los Angeles on July 3. He proposed that the shows be rescheduled so that Smith could perform in Yokohama on July 2 and in Okinawa on July 3, and fly thereafter to Los Angeles for the radio show. (*Id.*) On June 18, 2004, Leibowitz, again introducing himself as "the attorney for TVT Records," informed Positive that Smith would not appear for the scheduled June and July shows but would attempt to make himself available on later dates. (*Id.*) Again, refunds were given for tickets and Ujaama returned the $35,000 deposit. (Positive Opp'n at 9) To replace the cancelled shows, Positive booked on about one week's notice another American singer, Trina, for concerts on July 2 and 3 in Yokohama and Okinawa, respectively. (*Id.*)

On July 8, 2004, Weiner filed a Notice of Intent to Arbitrate and a Demand for Arbitration ***443** with the American Arbitration Association and mailed copies of both to (i) Smith at his address "c/o BME Recording, 2144 Hills Ave. NW, Atlanta, Georgia 30318," and (ii) Erskine Isaac at Ujaama at "501 7th Ave. # 312, New York, New York 10001." (Affidavit of Gerald B. Weiner ("Weiner Aff.") ¶ 5) Neither these letters nor any subsequent correspondence mailed or faxed to Smith or Isaac was returned as undeliverable. (*Id.*) Positive claimed that

> [Smith] failed and refused to travel to Japan or to appear and perform at the dates originally set forth in the [January] Agreement. Following extensive negotiations [the parties] agreed to reschedule these performance dates to June 27, 29 and July 2, 2004 and a new written agreement was entered into in that regard. [Smith] also failed to travel to Japan or perform on these reschedule dates.

(Ex. B to Jacobs Decl. (Notice of Intent to Arbitrate) at 2) Positive sought $700,000 in damages arising from "these failures." (*Id.*)

On July 14, 2004, ICDR sent via express mail an acknowledgment of receipt of the Demand for Arbitration, notice of a deadline to file a statement of defense by Smith, and notice of the date of an administrative conference call to Isaac at Ujaama's New York office. (Positive Opp'n at 3) Smith neither responded to the Demand nor participated in the administrative conference call. (*Id.*)

An arbitration hearing was held on December 6, 2004, in New York. (Positive Opp'n at 12) Smith did not appear. (Smith Petition to Vacate or Modify Arbitration Award ¶ 8) Positive presented documentary and testimonial evidence on "the creation and performance under the two agreements, out-of-pocket expenses, lost profits, and attorneys' fees." (Smith Petition to Vacate or Modify Arbitration Award ¶ 9) On December 28, the arbitrator awarded Positive a total of $379,874, which consisted of (i) $184,000 in lost profits, (ii) $138,000 in expenses incurred by Positive, (iii) $7,874 in legal fees, and (iv) $50,000 for loss of reputation and business. (Arbitration Award at 2) These figures appear to track the amounts requested by Positive in its "Statement of Facts" submission. (Ex. B to Qureshi Decl. at 4-5) The arbitrator made the following factual findings:

> [Positive] made powerful efforts to fulfill its duties under its agreement with [Smith]. It made accommodations to [Smith] that were above and beyond the terms of the original agreement. Modifications to the original agreement were made by [Positive] at the behest of [Smith] in an effort to ameliorate the breach of the original agreement by [Smith]. Further efforts to ameliorate damages were taken by [Positive] after [Smith] failed to perform [his] duties under the terms of the modified agreement. [Smith] failed to cooperate with these efforts to ameliorate [Smith's]

> failure to perform under the terms of the modified agreement. Loss to [Positive's] income and reputation has resulted from [Smith's] actions and failure to perform.

(Arbitration Award at 1)

On February 11, 2005, by his current counsel, Smith submitted a Notice of Request to Correct and/or Vacate Award to the ICDR. (Ex. C to Jacobs Decl.) He argued that he had not received proper notice of the arbitration, that the arbitrator did not have jurisdiction over the matter, and that the award contained "computational errors and is unconscionable." (*Id.*) On February 23, 2005, the arbitrator denied Smith's request. (Ex. A to Qureshi ***444** Decl.) Smith filed the instant petition on May 16, 2005.

II.

The burden on a party seeking to vacate an arbitration award is "a formidable one" in light of the "limited review of arbitration decisions ... necessary both to effectuate the parties' agreement to submit their disputes to arbitration and to avoid costly and protracted litigation about issues the arbitrators have already decided." *Capgemini U.S. LLC v. Sorensen,* No. 04-7584, 2005 WL 1560482, at *3 (S.D.N.Y. July 1, 2005) (citing cases).

[1] An arbitration award may be vacated only on the grounds enumerated in the FAA or if it was arrived at in "manifest disregard of the law." *Wallace v. Buttar,* 378 F.3d 182, 189 (2d Cir.2004); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 808 F.2d 930, 933 (2d Cir.1986).

III.

Smith argues first that neither he nor Leibowitz-who he claims was his lawyer for disputes arising from the January and May agreements-was given proper notice of the arbitration. He contends that any communications between Positive and Ujaama were insufficient notice because under the May Agreement, Positive was required to give any notices to Smith at "c/o BME Recording, 2144 Hills Ave. NW, No. D-2, Atlanta, Georgia 30318." (May Agreement at Preamble and ¶ 15) However, Ujaama was designated in the January Agreement to receive notices to Smith. (January Agreement at Preamble and ¶ 23) ("Agreement made ... by and between LIL JON ... whose address is c/o UJAAMA ENTERTAINMENT....")

Smith argues further that Positive "could have given [him] proper notice through his legal representative, William R. Leibowitz." (Smith Reply at 6) Positive claims that it "had no knowledge of the identity of Smith's attorneys until February 11, 2005," when Smith's current counsel submitted to the ICDR a Notice of Request to Correct and/or Vacate the Award. (Positive Opp'n at 18) In response, Smith points to the June 18, 2004 letter from Leibowitz to Positive, which he contends indicated that Leibowitz represented Smith. (Ex. C to Jacobs Decl.) ("... as I hereby reiterate on behalf of the Artist (Smith)"; "On behalf of TVT and the Artist....")

Smith claims also that Positive sent the arbitration notice to a defective address by omitting "BME Recording" and BME Recording's Suite number. (Ex. B to Jacobs Decl.) According to Weiner, only the Suite number was omitted from the mailing address. (Weiner Aff. ¶ 5) Finally, Smith claims that he did not receive proper notice of the hearing in the form of personal service, registered mail, or certified mail. *See* N.Y. CPLR § 7503(c).

[2] **[3]** **[4]** Section 10(a)(3) of the FAA provides in relevant part that an arbitration award may be vacated "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced," 9 U.S.C. § 10(a)(3), or "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.* § 10(a)(4). Although an arbitrator does not have to follow "the strictures of formal court proceedings in conducting the arbitration hearing," he "must nevertheless 'grant the parties a fundamentally fair hearing.' " ***445** *Kaplan v. Dunhill, Inc.,* No. 96-0258, 1996 WL 640901, at *5 (S.D.N.Y. Nov.4, 1996) (quoting *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW,* 500 F.2d 921, 923 (2d Cir.1974)). A "fundamentally fair hearing" requires that all parties receive notice of the arbitration. *Id.*

Moreover, AAA rules provide:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-29.

Smith likens this case to *Kaplan* and argues that he was not given proper notice of the arbitration. In *Kaplan,* a labor union commenced an arbitration against Dunhill on behalf of a fired employee. First, the Court found that neither Dunhill nor its counsel was copied on the request for arbitration that the union sent to the AAA, and that the AAA addressed correspondence to a title that did not exist at Dunhill. *Id.* at *1. The AAA also sent a notice of hearing by certified mail to Dunhill's New York office. *Id.* Dunhill's receptionist signed for the certified letter and testified at deposition that although she could not recall exactly how she disposed of the notice after signing the receipt, she would have put it in Dunhill's internal mail box to be forwarded eventually to Dunhill's President or Payroll Manager. *Id.* at *2. The letter was found eventually behind Dunhill's internal mailbox next to the receptionist's desk, but only after the arbitration hearing had closed. *Id.* at *3. Dunhill employees claimed that no one from the union had contacted Dunhill or its counsel about the hearing until after it was over. *Id.* at *2. The Court vacated the arbitration award in light of this "substantial, undisputed evidence that [Dunhill] did not receive notice of the hearing." *Id.* at *7.

In this case, however, Smith does not deny that at least one of his agents-Ujaama-received correspondence and notices relating to the arbitration. Moreover, Positive claims, and Smith does not deny, that throughout the arbitration proceedings, Gerald Weiner, Positive's counsel, spoke to Isaac on at least six occasions by telephone and exchanged numerous e-mails with him. (Positive Opp'n at 3-4) Isaac assured Weiner that Smith was aware of the arbitration, that related documents and correspondence were being forwarded to Smith, and that Smith would be represented by counsel at the hearing and that attorney would contact Weiner. In an e-mail from Weiner to Isaac and Morris dated August 17, 2004, Weiner asked, "Has an attorney for Jonathan Smith appeared in this matter? Do we know who will be representing him?" (Ex. B to Affirmation of Alan Fraade ("Fraade Aff.")) According to an e-mail from Weiner to Morris dated September 16, 2004, Weiner "talked to both the AAA and Erskine [Isaac] today. The AAA had asked me to find out from Erskine if Lil Jon is going [to] hire a lawyer and appear in this action. Erskine says he has told Mitchell over and over they must hire a lawyer and they say they are going to, but so far he doesn't know anything more." (Ex. A to Fraade Aff.) It is clear from this correspondence that at least Isaac and Mitchell, both representatives of Smith, were aware of the pending arbitration and knew that Smith needed a lawyer. That "Ujaama was completely unable to communicate effectively with Smith" (Smith Reply at 5) is irrelevant to ***446** whether Smith was given sufficient notice of the arbitration.

[5] New York law, which requires notice by registered mail or personal service, is inapplicable. The parties expressly agreed in the January Agreement arbitration clause that the AAA's Rules would govern the arbitration. (January Agreement at 8); *see Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (the parties may specify by contract the rules under which arbitration will be conducted). Rule 39 of the Commercial Arbitration Rules of the AAA provides that "any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration ... may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service." There is no requirement that notices be sent to a party's counsel. Moreover, "the AAA, the arbitrator, and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules."

[6] Regardless, in light of the strong policy favoring arbitration and undisputed proof that Smith had notice of the arbitration, the award will not be disturbed on the ground that a suite number was missing from a mailing address or that a notice was not sent by certified or registered mail. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos,* 553 F.2d 842, 845 (2d Cir.1977) ("no unfairness results from giving effect to the notice they actually received"); *Marsillo v. Geniton,* No. 03-2117, 2004 WL 1207925, at *5-6 (S.D.N.Y.

June 1, 2004) (although it was unclear whether petitioner received all arbitration-related correspondence, award was confirmed where he had actual notice of NASD arbitration proceedings and "his failure to make any inquiries" about other correspondence "suggest that [he] simply chose to ignore the arbitration proceedings"); *Gingiss Int'l, Inc. v. Bormet,* 58 F.3d 328, 332 (7th Cir.1995) ("inadequate notice is not one of [the statutory] grounds" for vacating an arbitration award); *Bernstein Seawell & Kove v. Bosarge,* 813 F.2d 726, 729-30 (5th Cir.1987) (award confirmed where party had actual notice of arbitration proceedings; "due process is not violated if the [arbitration] hearing proceeds in the absence of one of the parties when that party's absence is the result of his decision not to attend"); *Borop v. Toluca Pacific Sec. Corp.,* No. 97-4591, 1997 WL 790588, at *2 n. 7 (N.D.Ill.Dec.17, 1997) ("Absent fraudulent or improper conduct, defective notice cannot justify an order vacating an arbitration award under Section 10 of the FAA").

IV.

[7] Next, Smith contends that the arbitrator had no jurisdiction because the May Agreement "specifically eliminated the arbitration provision" in the January Agreement (Smith Brief at 7) and provided that "any dispute arising under [the May Agreement] shall be litigated only before courts within the State of New York." (May Agreement at 6)

The plain language of the May Agreement provides otherwise. Only "[u]pon [Smith] performing all of [his] obligations" under the May Agreement would the January Agreement "be deemed void and superceded [sic] in all respects" by the May Agreement. (May Agreement at 1) Because Smith failed to perform his obligations under the May Agreement, the terms of the January Agreement, including the arbitration provision, were preserved. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("The [FAA] establishes that, as a matter of ***447** federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); *Collins & Aikman Prods. Co., v. Building Systems, Inc.,* 58 F.3d 16, 19 (2d Cir.1995) (matters are arbitrable " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute' ") (quoting *Threlkeld & Co., Inc. v. Metallgesellschaft Ltd.,* 923 F.2d 245, 250 (2d Cir.1991)).

V.

[8] **[9]** **[10]** **[11]** **[12]** Smith contends also that the arbitrator awarded various categories of damages in "manifest disregard" of New York law. Alternatively, Smith argues that the award contains miscalculations and should be modified accordingly. *See* 9 U.S.C. § 11. [1] " 'Manifest disregard of the law' by arbitrators is a judicially-created ground for vacating their arbitration award." *Bobker,* 808 F.2d at 933. "In order to advance the goals of arbitration, courts may vacate awards [under the doctrine] only for an overt disregard of the law and not merely for an erroneous interpretation." *Folkways Music Publishers, Inc. v. Weiss,* 989 F.2d 108, 111 (2d Cir.1993). "A court must not disturb an award simply because of an arguable difference of opinion regarding the meaning or applicability of the laws." *W.K. Webster & Co. v. Am. President Lines, Ltd.,* 32 F.3d 665, 669 (2d Cir.1994). Rather, the arbitrator must have known affirmatively of the governing legal principle yet refused to apply it or ignored it altogether. *See Bobker,* 808 F.2d at 933 ("the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it"); *see also Siegel v. Titan Indus. Corp.,* 779 F.2d 891, 892 (2d Cir.1985). The governing legal principle "must be well defined, explicit, and clearly applicable." *Bobker,* 808 F.2d at 934. A legal principle "clearly" governs the resolution of an issue before the arbitrator if its applicability is "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Id.* at 933.

[13] **[14]** **[15]** Arbitrators are not required to document their reasoning. *See Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.,* 143 F.3d 704, 716 (2d Cir.1998). Particularly where the arbitrator provides little reasoning or none at all, the award must be confirmed if "a ground for the arbitrator's decision can be inferred from the facts of the case." *Siegel,* 779 F.2d at 894 (citation omitted); *see also GMS Group, LLC v. Benderson,* 326 F.3d 75, 78 (2d Cir.2003). Put another way, an arbitration award must be confirmed if there is a " 'barely colorable justification for the outcome reached,' " even if that justification is based on an error of fact or law. *Banco de Seguros del Estado v. Mut. Marine Office, Inc.,* 344 F.3d 255, 260 (2d Cir.2003) (quoting *Landy Michaels Realty Corp. v. Local 32B-32J, Serv.*

Employees ***448** *Int'l Union, AFL-CIO,* 954 F.2d 794, 797 (2d Cir.1992)).

A. Lost profits

The lost profits component of the award-$184,000-appears to be based on Positive's claim that it would have made approximately $130,000 in profits "had [the March shows] gone forward without incident" plus $54,000 in losses from the replacement shows. (Ex. B to Qureshi Decl. at 4) Smith contends that the award was in manifest disregard of New York law because (i) lost profits damages were not contemplated by the parties at the time of contract; (ii) the arbitrator held Smith responsible for Positive's "aggravation of its own injuries in its botched mitigation attempt" by booking replacement performances; (iii) the arbitrator awarded Positive lost profits based on a July 3, 2004 show that was "outside the scope of the agreement between the parties"; and (iv) the amount is overly speculative. (Smith Reply at 12)

[16] **[17]** **[18]** New York law requires that "a plaintiff prove with a reasonable degree of certainty that any claimed loss of profits was caused by the defendant's breach." *Bausch & Lomb, Inc. v. Bressler,* 977 F.2d 720, 728 (2d Cir.1992). In other words, damages from lost profits " 'may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.' " *Care Travel Co. v. Pan American World Airways, Inc.,* 944 F.2d 983, 994 (2d Cir.1991) (quoting *Kenford Co. v. County of Erie,* 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132, 493 N.E.2d 234 (1986) (per curiam)). However, the amount of lost profits, as with all damages, need not be demonstrated with "scientific rigor." *Lexington Prods. Ltd. v. B.D. Communications, Inc.,* 677 F.2d 251, 253 (2d Cir.1982); *see also S & K Sales Co. v. Nike, Inc.,* 816 F.2d 843, 852 (2d Cir.1987).

[19] In *Lexington Products,* the Second Circuit noted:

> When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be any good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damage which he had caused is uncertain.

677 F.2d at 253 (quoting *Randall-Smith, Inc. v. 43rd St. Estates Corp.,* 17 N.Y.2d 99, 106, 268 N.Y.S.2d 306, 312, 215 N.E.2d 494 (1966)). Thus, when the existence of damages is certain but the amount itself is uncertain, "plaintiff will not be denied a recovery of substantial damages." *Contemporary Mission, Inc. v. Famous Music Corp.,* 557 F.2d 918, 926 (2d Cir.1977); *see also Lexington Prods.,* 677 F.2d at 253 ("where a wrong has been done, the courts will endeavor to make a reasonable estimate of damages") (citing *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264-66, 66 S.Ct. 574, 90 L.Ed. 652 (1946)). Smith does not so much dispute that Positive suffered damages from his breach as challenge the damage amounts set by the arbitrator.

[20] **[21]** **[22]** **[23]** In addition, liability for lost profits damages must have been contemplated by the parties at the time of contract. *See Ashland Mgmt. v. Janien,* 82 N.Y.2d 395, 403, 604 N.Y.S.2d 912, 915, 624 N.E.2d 1007 (1993). "The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made." *Id.* Where the contract is silent on the subject, the court must take a "common sense" ***449** approach, and determine what the parties intended by considering "the nature, purpose and particular circumstances of the contract known by the parties ... as well as what liability the defendant fairly may be supposed to have assumed consciously." *Kenford Co. v. County of Erie,* 73 N.Y.2d 312, 319, 540 N.Y.S.2d 1, 4, 537 N.E.2d 176 (1989) (internal quotation marks and citation omitted).

Neither the January Agreement nor the May Agreement mentions liability for lost profits. However, Positive claims that by the time the parties entered the May Agreement, Smith was aware of Positive's investment in the performances, as well as the volume of advance ticket sales for the cancelled March shows. On March 5, 2004, shortly before Smith cancelled the March shows, Weiner warned Isaac that if Smith did not appear "as scheduled, there will be immediate litigation" and that Positive would "hold [Smith] personally responsible" for Positive's losses. (Ex. D to Fraade Aff.) Weiner detailed Positive's investment in the shows, that Positive would "lose the potential profit" from the shows, and that Positive would suffer "significant and real damage to [its] reputation within the music industry" if the shows

did not take place. (*Id.*) The arbitrator recognized that Smith "failed to cooperate with [Positive's] efforts to ameliorate [Smith's] failure to perform under the terms of the modified agreement." (Arbitration Award at 1) Smith appears to argue that although the above communications might prove that the parties contemplated lost profits damages by the time they entered into the May Agreement, they do not bear on the parties' intent as to liability for the March shows. The text of the e-mail need not be repeated; Weiner clearly referred to the March performances, which were the subject of the January Agreement. Smith's awareness that he might be liable for lost profits from the March shows "can be inferred from the facts of [this] case." *Siegel,* 779 F.2d at 894; *see also Kenford,* 73 N.Y.2d at 320, 540 N.Y.S.2d 1, 537 N.E.2d 176.

[24] Second, Smith claims that it should not be held liable for Positive's "botched" efforts to mitigate its losses by booking "Trina" as a replacement. Positive responds that the $54,000 in losses from the "Trina" shows were less than what it would have incurred had no replacement act been booked. Expenses for the replacement shows totaled 6,489,216 yen, or $62,886. (Ex. M to Jacobs Decl.) Those shows generated ticket sales of 832,000 yen, or $8,062. (*Id.*) Approximately 574,000 yen, or $5,562 of those sales appear to have come from exchanges by holders of tickets to the cancelled Lil Jon performances. (*Id.*)

[25] **[26]** Under New York law, an "injured party will be allowed to recover the expenses of a proper effort [to mitigate damages] even though it proves unsuccessful." *Baker v. Dorfman,* 239 F.3d 415, 427 (2d Cir.2000) (quoting *Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publ'g Ass'n,* 226 N.Y. 1, 122 N.E. 463, 465 (N.Y.1919)); *see also Gordon & Co. v. Ross,* 84 F.3d 542, 546-47 (2d Cir.1996). Such expenses include those reasonably incurred by the injured party that would not have been incurred had there been no breach of contract. Smith does not explain how Positive's mitigation efforts, although perhaps "botched," were unreasonable. Regardless, "where a choice has been required between two reasonable courses, the person whose wrong forced the choice can not complain that one rather than the other was chosen. The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party or merely for the purpose of ***450** showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter." *Sunpride Ltd. v. Mediterranean Shipping Co.,* No. 01-3493, 2003 WL 22682268, at *9 (S.D.N.Y. Nov.12, 2003) (quoting *In re Kellett Aircraft Corp.,* 186 F.2d 197, 198-199 (3d Cir.1950)).

[27] In a related argument, Smith contends that the award of $184,000 is "double recovery" in manifest disregard of the law because the May Agreement constituted an executory accord under New York law. A party claiming breach of an executory accord can claim damages either for breach of the original agreement or for breach of the accord, but not for both. *See* N.Y. Gen. Oblig. L. § 15-501(3) ("if an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract, [or] obligation ... which is the subject of the accord, or to assert his right under the accord"); *see also Abou-Khadra v. Mahshie,* 4 F.3d 1071, 1078-79 (2d Cir.1993).

[28] The arbitrator provided a twofold interpretation of the May Agreement. First, it was "a modification" of the January Agreement. Second, it was part of Positive's attempt to mitigate damages arising from Smith's breach of the January Agreement. In the arbitrator's words, "[m]odifications to the original agreement were made by [Positive] at the behest of [Smith] in an effort to ameliorate the breach of the original agreement by [Smith]." (Award at 1) Once it was clear that Smith would not "cooperate" with that first attempt to mitigate damages, Positive engaged in "[f]urther efforts to ameliorate damages" by booking Trina on short notice. (*Id.*) Even assuming that the May Agreement is an executory accord, the arbitrator's failure to identify it as such is a mere "failure ... to understand the law." Absent proof that the arbitrator was aware of New York law governing executory accords but flouted it, such an error does not satisfy the manifest disregard standard. *Willemijn Houdstermaatschappij, BV v. Standard Microsys. Corp.,* 103 F.3d 9, 13 (2d Cir.1997). Regardless, the award of lost profits damages was not "double recovery" or in manifest disregard of New York law in light of the arbitrator's at least "barely colorable" view of the May Agreement was part of Positive's attempt to mitigate damages arising from Smith's breach of the January Agreement. *Banco de Seguros del Estado,* 344 F.3d at 260.

[29] Third, Smith argues that the claimed $54,000 in losses from the "Trina" shows-assuming that it is part of the $184,000 in lost profits awarded-should be vacated because it included losses from a July 3, 2004 show that "was outside the scope of the parties' agreement." Under both the January and May Agreements, Smith agreed to perform three shows. Upon

Smith's cancellation, Trina was booked to perform two shows. Hence, it was reasonable for the arbitrator to focus on the number of performances instead of their dates, and conclude that booking Trina for two performances was a proper attempt by Positive to mitigate damages arising from Smith's failure to perform three shows.

[30] Finally, Smith assumes that the award includes the $130,000 claimed by Positive as lost profits from the March shows, and argues that that figure grossly overstates lost profits and is otherwise speculative. He calculates the amount as follows: for three shows in venues with maximum capacities of 1,300, advance tickets were sold at 4,000 to 5,500 yen per ticket (*see* Ex. U to Qureshi Decl. (show ***451** advertisement listing ticket prices)).[2] Accordingly, Positive's maximum gross receipts total 19,500,000 yen or approximately $188,974.50. (*See* Ex. L to Jacobs Decl. (according to the yen-U.S. dollar exchange rate as of December 2004)) After subtracting Smith's fee of $75,000 (January Agreement at 1)[3] and half of Positive's claimed expenses of $138,000, Smith concludes that Positive's maximum possible profit was $44,974.50.

Positive does not respond to Smith's calculation with any precision, but instead relies on proof of ticket sales from the cancelled performances and "for comparison," proof of ticket sales from the Trina shows. Indeed, neither party has offered a disciplined or even a useful analysis of the record. Instead, the court has been compelled to navigate the clutter of underlying documents on its own.

Smith's computation fails to account for other possible elements of a lost profits claim. The court's calculation is as follows: Positive's advance ticket sales records for the March shows list 476 tickets sold at 5,500 yen each for the March 12 performance, 819 tickets at 5,500 yen each for March 13, and 371 tickets at 4,000 yen each for March 14. (Ex. S to Qureshi Decl.) The remaining tickets were to be sold at the door: 824 tickets at 6,500 yen each on March 12, 481 tickets at 6,500 yen each on March 13, and 929 tickets at 5,000 yen each on March 15. Assuming sell-outs on all three dates, ticket sales would have totaled 21,734,000 yen, or approximately $210,624. In addition to ticket sales, Positive would have earned profits from its 20 percent cut of "all merchandising sales at each venue." (January Agreement ¶ 15)

It is possible also that the arbitrator incorporated other loss figures that Positive attributed to Smith's breach-*i.e.,* its "loss in the 2004 fiscal year of approximately $300,000 after having a profit of approximately $115,000 in 2003 and $200,000 in 2002" and the "dramatic" drop in ticket sales for other shows produced by Positive after Smith's June/July shows were cancelled. (Ex. B to Qureshi Decl. at 5); *see, e.g., Aniero Concrete Co., Inc. v. New York City Const. Auth.,* 308 F.Supp.2d 164, 207 (S.D.N.Y.2003) ("An established business often is in a good position to offer evidence of past experience as a reasonable basis from which a jury may determine lost profits with the requisite degree of certainty.").

Moreover, it can be inferred from Positive's balance sheet and the arbitration award that the arbitrator subtracted considerably less than 50 percent of the $138,000 in expenses listed on Positive's balance sheet. Most of the expenses enumerated on the balance sheet (Ex. K to Jacobs Decl.) are "cancel charges," promotion and overhead costs, and other expenses incurred as a result of cancelling the March and June/July performances, which, at least in the arbitrator's view, are mitigation damages.

A cynic would view the arbitrator's award of lost profits as a simple rubber-stamping of Positive's claim of $130,000 in lost profits from the March shows and $54,000 in losses from the replacement shows. However, the court's standard of review is far more forgiving, and where, as here, it happens that the arbitrator's decision has as at least a "barely colorable ***452** justification" in the record, the award must be confirmed. *Banco de Seguros del Estado,* 344 F.3d at 260; *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S,* 333 F.3d 383, 390 (2d Cir.2003) ("Even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case.").

B. Expenses

In awarding Positive $138,000 in expenses, there is little question that the arbitrator relied on Positive's balance sheet, which provides a total of 14,222,088 yen, or approximately $137,824 in expenses for both the March and June/July Lil Jon shows. (Ex. K to Jacobs Decl.) Smith has three objections to this portion of the award.

[31] First, he argues that fixed costs "are clearly not recoverable as damages" (Smith Mem. of Law at 13) and that the inclusion of office rent and pay to Positive's staff for January, February, March, and June 2004 "was an evident miscalculation." (Smith Reply at 15) Positive responds that these expenses "were a direct result of production and promotions for Smith's [March] performances" from

January through March, 2004, and that it incurred even more such expenses through June after Smith cancelled those performances.

Smith does not cite a legal rule, let alone a clear and established one, barring the inclusion of fixed costs in an award of expenses. Nor can one be gleaned from a review of the caselaw. *See, e.g., Hamil Am., Inc. v. GFI,* 193 F.3d 92, 104-05 (2d Cir.1999) (in copyright infringement action, whether overhead expenses are deductible from gross revenues depended on "nexus" between those expenses and production of infringing product); *Adams v. Lindblad Travel, Inc.,* 730 F.2d 89, 92-93 (2d Cir.1984) (noting that fixed costs should not be included in plaintiff's damages when plaintiff is an ongoing business whose fixed costs are not affected by defendant's breach of contract); *see also Deiulemar Compagnia Di Navigazione, S.p.A. v. Transocean Coal Co., Inc.,* No. 03-2038, 2004 WL 2721072, at *2 (S.D.N.Y. Nov.30, 2004) (summarizing disagreement over whether caselaw barred deduction of fixed expenses from calculation of claimant's damages). Moreover, Positive fails to demonstrate that these overhead expenses were not incurred as part of Positive's preparation and investment in the Lil Jon Shows.

Second, Smith contends that "PA and Lighting" expenses for the July 2 and 3 shows were double counted. Smith misreads Positive's balance sheets. The balance sheet for the cancelled Lil Jon shows lists a "PA and Lighting Cancel Charge" for the March 12 and 13 shows in the amount of 1,054,000 yen. (Ex. K to Jacobs Decl.) These amounts were penalties Positive incurred for cancelling "PA and Lighting" services for those scheduled shows. The balance sheet for the "Trina" shows lists "PA Lighting" expenses of 194,250 yen for the July 2 show and 164,850 yen for the July 3 show. (Ex. M to Jacobs Decl.) These charges were for services actually rendered by the "PA and Lighting" vendors hired for the "Trina" shows. The "PA and Lighting" figures from the two balance sheets denote different types of charges for different shows; the arbitrator did not "double count."

[32] Third, Smith argues that a 527,000 yen "PA & Lighting Cancel Charge" for a July 3 show is outside the scope of the parties' agreement. (Ex. K to Jacobs Decl.) To reiterate, the arbitrator could have deemed more relevant the number of shows that Smith agreed to perform rather than the dates of those shows. If so, it ***453** can be inferred from the balance sheet that Positive was penalized for cancelling "PA and Lighting" services for one of the three Lil Jon shows scheduled for late June and early July. It is undisputed that Positive had to cancel the June-July Lil Jon shows; the balance sheet reflects penalties Positive incurred for at least two of those shows, specifically "7/2 and 7/3." That Positive may have mistakenly misdated one of those charges is not the kind of error that warrants modification of the award. *See B.V.D. Licensing Corp. v. Maro Hosiery Corp.,* No. 88-2459, 1990 WL 200648, at *3 (S.D.N.Y. Dec.4, 1990).

C. Reputation Damages

[33] **[34]** **[35]** **[36]** Damages to reputation generally are not recoverable in a breach of contract action under New York law. *See, e.g., Karetsos v. Cheung,* 670 F.Supp. 111, 115 (S.D.N.Y.1987) (precluding recovery for damage to plaintiff's reputation as a result of the breach); *MacArthur Const. Corp. v. Coleman,* 91 A.D.2d 906, 457 N.Y.S.2d 530, 531 (1st Dept. 1983) (damage claim in breach of contract action for injury to plaintiff's reputation in the industry is not actionable); *Dember Const. Corp. v. Staten Island Mall,* 56 A.D.2d 768, 392 N.Y.S.2d 299 (1st Dep't 1977) (claim seeking damages to plaintiff's reputation arising out of breach of contract is not actionable). They are available only in exceptional cases when the plaintiff proves "specific business opportunities lost as a result of its diminished reputation"; vague assertions will not suffice. *I.R.V. Merch. Corp. v. Jay Ward Prods., Inc.,* 856 F.Supp. 168, 175 (S.D.N.Y.1994); *Karetsos,* 670 F.Supp. at 115. "Absent specific proof, damages for loss of reputation are too speculative to be recovered under contract law." *Saxton Communication Group, Ltd. v. Valassis Inserts, Inc.,* No. 93-388, 1995 WL 679256, at *2 (S.D.N.Y. Nov. 15, 1995).

The arbitrator found that "[l]oss to [Positive's] income and reputation has resulted from [Smith's] actions and failure to perform." (Arbitration Award at 1) Positive submitted a notice from a director of Yokohama Bay Hall (the venue scheduled for the March 12, March 13, and July 2 performances) discontinuing their business relationship because of "the amount of losses caused" by the cancellation of the performances. (Ex. G to Qureshi Decl.) MTV Japan, which helped publicize the performances, notified Positive that it "would like to negotiate ... the payment of the fees of the performance announcement and advertisement and cancellation announcement that [MTV Japan] conducted through [its] broadcasting media." (Ex. H to Qureshi Decl.) It stated that the cancelled performances resulted in a "substantial amount of losses" to MTV Japan as well as "a great loss of [MTV Japan's] reputation among [its] broadcasting customer and audiences." (*Id.*) Another

broadcast advertiser, TV Kanagawa, sent Positive a similar notice. (Ex. I to Qureshi Decl.)

Fellows Company, a vendor hired to prepare sound, lighting, and the stage, demanded compensation for the preparations it had already made for the July performances. (Ex. J to Qureshi Decl.) It noted that the cancelled March and July performances "affect [its] trustworthiness," that its losses from the cancelled performances were "so great" that they "considered ... suing" Positive. (*Id.*) M.O.P. Company, a promoter hired by Positive, also cited considerable losses resulting from the cancelled July performances and demanded payment of "losses and damages." (Ex. K to Qureshi Decl.) Finally, FM Later Wane, a broadcast advertiser, complained of the cancelled performances and told Positive that it "would have to reconsider [its] way of doing business" with Positive. (Ex. L to Qureshi Decl.)

***454** These notices are proof of specific harm arising from the loss of reputation. Because they constitute at least "a barely colorable justification for the outcome reached" by the arbitrator, the award of damages to reputation will not be disturbed. *Banco de Seguros del Estado,* 344 F.3d at 260.

D. Legal fees

[37] Last, Smith contends that the arbitrator's award of attorneys' fees to Positive was in manifest disregard of the law because the January Agreement provides that it "shall be construed in accordance with the laws of the State of New York" (January Agreement at 8), under which attorneys' fees may not be awarded unless specifically provided for in the contract. *See* N.Y. CPLR § 7513. He asserts that the award of attorneys' fees cannot be based on the January Agreement because there was no provision authorizing such an award. On the other hand, according to Smith, the award cannot be based on the May Agreement because along with the clause providing for attorneys' fees to the prevailing party, that agreement designated forum in the New York courts, stripping the arbitrator of any power to award attorneys' fees.

Even in the face of New York's prohibition, the Second Circuit has held that even if there is a choice of law clause selecting New York law, the parties may arbitrate the issue of attorneys' fees. *See PaineWebber Inc. v. Bybyk,* 81 F.3d 1193, 1202 (2d Cir.1996) ("a choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including the right to arbitrate claims for attorneys' fees"); *cf. Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 59-60, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (even with a New York choice of law clause, an arbitrator may award punitive damages, although New York law does not allow arbitrators to award such damages).

Moreover, the arbitrator did not act in manifest disregard of New York law by carrying forward the arbitration agreement from the January Agreement while awarding attorneys' fees to Positive under the May Agreement. To reiterate, the May Agreement provides that "[u]pon [Smith] performing all of [his] obligations hereunder the [January] Agreement shall be deemed void and superceded [sic] in all respects by this agreement." (May Agreement at 1) Because Smith's failure to perform left the January Agreement intact, it appears that the arbitrator concluded either that the January Agreement's silence on attorneys' fees did not preclude the award of attorneys' fees, or that the May Agreement added an attorneys' fee provision-in lieu of the January Agreement's silence-and carried over the January Agreement's arbitration clause because it had not been superseded by the May Agreement's forum clause. *See Marine Transport Lines v. Int'l Org. of Masters, Mates & Pilots,* 878 F.2d 41, 46 (2d Cir.1989) (modification of contract may add new terms, but the terms of the old contract "are still to be followed so far as not changed or as inconsistent with the new terms").

In any event, Smith's argument is no more than a dispute about the reasonable interpretation of the two agreements. The Second Circuit has stated that "[i]nterpretation of [ ] contract terms is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation." *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.,* 126 F.3d 15, 25 (2d Cir.1997) (citing *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)); *In re I/S* ***455** *Stavborg v. Nat'l Metal Converters, Inc.,* 500 F.2d 424, 432 (2d Cir.1974) ("whatever arbitrators' mistakes of law may be corrected, simple misinterpretations of contracts do not appear one of them").

* * * * * *

For the above reasons, Smith's petition is denied and Positive's cross-petition granted.

SO ORDERED:

All Citations

419 F.Supp.2d 437

Footnotes

1 The court “may make an order modifying or correcting the award upon the application of any party to the arbitration”:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

2 The advertisement for the March 12 and 13 performances lists ticket prices at 5,500 yen in advance and 6,500 yen at the door. For the March 14 performance, tickets were 4,000 yen in advance and 5,000 yen at the door.

3 Smith's calculation of his fee for the shows appears to include a guaranteed $70,000 as well as a $5,000 “bonus” if the shows sold out.

Filed 3/6/24

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

VFLA EVENTCO, LLC, Plaintiff and Appellant, v. WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC, et al., Defendants and Respondents.	B323977 (Los Angeles County Super. Ct. No. 20SMCV00933)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark H. Epstein, Judge. Affirmed.

Carlton Fields, Harvey W. Geller, and Steven B. Weisburd for Plaintiff and Appellant.

Wilson Sonsini Goodrich & Rosati, Susan K. Leader, Conor D. Tucker, and Stephanie V. Balitzer for Defendant and Respondent William Morris Endeavor Entertainment, LLC.

Shapiro Arato Bach, Cynthia S. Arato, Julian S. Brod, and Avery D. Medjuck for Defendant and Respondent Big Grrrl Big Touring, Inc.

Law Offices of Max J. Sprecher, Max J. Sprecher; Meloni & McCaffrey, and Robert S. Meloni for Defendants and Respondents Starry US Touring Inc. and Kali Uchis Touring, Inc.

Plaintiff and appellant VFLA Eventco, LLC (VFLA) sued defendants and respondents Starry US Touring, Inc. (Starry US), Kali Uchis Touring, Inc. (Kali Uchis Touring), Big Grrrl Big Touring, Inc. (Big Grrrl), and William Morris Endeavor Entertainment, LLC (WME) for various causes of action related to $6 million in deposits paid to secure the performances of Ellie Goulding, Kali Uchis, and Lizzo at VFLA's music festival scheduled for June 2020.[1]

As a result of the COVID-19 pandemic and in compliance with the government restrictions meant to mitigate the pandemic, VFLA cancelled the festival and demanded the return of the deposits from WME, who negotiated the performance contracts and held the deposits as the artists' agent. VFLA claimed its right to the deposits under the force majeure provision in the parties' performance contracts, which determined the parties' rights to the deposits in the event of a force majeure cancellation. The artists refused VFLA's demand, claiming VFLA bore the risk of a cancellation due to the pandemic.

VFLA sued the artists for breach of contract and breach of the implied covenant of good faith and fair dealing. VFLA also sued WME for conversion, money had and received, unfair business

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[1] We refer to the producers Starry US, Kali Uchis Touring, Big Grrrl, and their respective performers collectively as "the artists" unless otherwise necessary.

practices, and declaratory relief. The trial court granted summary judgment in favor of the artists and WME, finding VFLA bore the risk of the festival's cancellation, and that WME could not be held liable as an agent for the actions of its principals.

For the reasons stated below, we hold the trial court properly granted summary judgment in favor of the artists and WME. The force majeure provision is not reasonably susceptible to VFLA's interpretation, and, in any event, the parol evidence favors the artists. Further, we also hold the artists' interpretation does not work an invalid forfeiture or make the performance contracts unlawful. Since VFLA conceded that, if the artists prevailed, WME should prevail as well, we affirm the judgment in its entirety.

BACKGROUND

I. Virgin Fest and the performance contracts

In December 2019, VFLA publicly announced Virgin Fest Los Angeles (Virgin Fest), a two-day music festival, scheduled for June 2020 in Los Angeles.[2] In February and March 2020, VFLA entered into performance contracts with Starry US, Kali Uchis Touring, and Big Grrrl to secure the performances of Ellie Goulding, Kali Uchis, and Lizzo respectively.

As the artists' agent, WME negotiated the performance contracts with VFLA. The performance contracts contained a "Role of Agent" provision, providing: "[WME] acts only as agent for Producer and assumes no liability hereunder and in furtherance thereof and for the benefit of [WME], it is agreed that neither Purchaser nor Producer/Artist will name or join [WME] . . . as a

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[2] The facts are taken from VFLA's opposing separate statements to Big Grrrl's, Kali Uchis Touring's, Starry US's, and WME's motions for summary judgment.

party in any civil action or suit anywhere in the world, arising out of, in connection with, or related to any acts of commission or omission pursuant to or in connection with this Agreement by either Purchaser or Producer/Artist."[3]

Each performance contract also included an identical addendum titled the "Virgin Fest Los Angeles—Festival Rider" (the Virgin Fest riders). The Virgin Fest riders contained a force majeure provision, providing: "A 'Force Majeure Event' means any act beyond the reasonable control of Producer, Artist, or Purchaser which makes any performance by Artist impossible, infeasible, or unsafe (including, but not limited to, acts of God, terrorism, failure or delay of transportation, death, illness, or injury of Artist or Artist's immediate family (e.g., spouses, siblings, children, parents), and civil disorder). In the event of cancelation due to Force Majeure then all parties will be fully excused and there shall be no claim for damages, and subject to the terms set forth herein, Producer shall return any deposit amount(s) (i.e., any amount paid to Producer pursuant to the Performance Contract prior to payment of the 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

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[3] "Purchaser" refers to VFLA. "Producer" refers to either Starry US, Kali Uchis Touring, or Big Grrrl, and "Artist" refers to either Ellie Goulding, Kali Uchis, or Lizzo. "Guarantee" does not mean "non-refundable," rather, it is a term of art meaning the deposits are a flat amount and not tied to a percentage of the ticket sales.

applicable pro-rata portion of the Guarantee previously received unless otherwise agreed."

WME's representative, Steve Gaches, and VFLA's representative, Tim Epstein, negotiated the Virgin Fest riders. Gaches and Epstein had negotiated festival riders in the past, including a recent festival rider for the Baja Beach festival in Mexico (the Baja Beach rider). Gaches and Epstein used the Baja Beach rider as a starting point for the Virgin Fest rider.

The original draft of the Baja Beach rider's force majeure provision read: "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 claims for damages. However, if the Artist has commenced performance prior to such cancellation, Purchaser will pay Producer the full Guarantee."

Gaches invited Epstein to make edits to the draft Baja Beach rider. Epstein sent back a redline version of the draft, which contained the following italicized changes to the force majeure provision. "In the event of cancel[l]ation due to Force Majeure then all parties will be fully excused and there shall be no claim for damages, *and subject to the terms set forth herein, Producer shall return any deposit amount(s)* (*i.e., any amount paid to Producer pursuant to the Performance Agreement prior to payment of the Balance*) *previously received* (*unless otherwise agreed*). However if the Artist has commenced performance (*i.e., performance at the venue*) prior to such cancellation, Purchaser will pay Producer the

full Guarantee *unless such cancellation is the result of Artist's death, illness, or injury, or that of its immediate family, in which case Producer shall return such applicable pro-rata portion of the Guarantee previously received unless otherwise agreed.*" Gaches accepted these changes, but proposed replacing the provision that the artists would get paid in full only if they had "commenced performance" before the force majeure cancellation with a clause allowing the artists to keep the deposit if they were "*otherwise ready, willing and able to perform*." Gaches told Epstein the revision was "the best we can do for this one," indicating WME had a "new directive" with respect to international travel shows. Epstein agreed to Gaches's revision. Gaches and Epstein then used the Baja Beach rider's force majeure provision for the Virgin Fest riders.

Under the terms of the performance contracts, VFLA transferred to WME's trust account the sums of $400,000 for Kali Uchis, $600,000 for Goulding, and $5 million for Lizzo. The performance contracts provided the deposits were nonrefundable unless otherwise agreed. The deposits were consideration for the artists' performance at Virgin Fest, as well as for exclusivity and advertising rights. The exclusivity rights prohibited the artists from publicly performing or announcing any public performance within a certain geographic area and within a certain period with respect to Virgin Fest. Each artist also granted VFLA the right to use her image, name, and likeness for Virgin Fest's marketing and advertising materials.

II. Virgin Fest's cancellation and VFLA's demand for the deposits

In March 2020, the State of California and the County and the City of Los Angeles issued a series of orders to limit the spread

of COVID-19, including the City of Los Angeles's various "Safer at Home" orders. The orders prohibited "all indoor and outdoor public and private gatherings and events." On May 8, 2020, the City of Los Angeles informed VFLA that it would be extending an existing Safer at Home order "to a future date to be determined" and that Virgin Fest would "not be allowed as originally planned" for June 2020. The next day, VFLA publicly announced that "[a]s a result of the governmental restrictions and mandates resulting from the [COVID-19] pandemic, [Virgin Fest] in Los Angeles is prevented from proceeding as scheduled next month."

Thereafter, VFLA demanded the return of deposits from WME, taking the position that the government's orders and underlying COVID-19 pandemic conditions qualified as a force majeure event, making the artists' performances impossible, and that, accordingly, the deposits should be returned. VFLA also informed all performers, who were represented by WME and who were contracted to perform at Virgin Fest, that it would take legal action if the deposits were not returned. Each WME client returned the deposits to VFLA except for Ellie Goulding, Kali Uchis, and Lizzo, who disputed VFLA's interpretation of the force majeure provision.

III. Procedural history

In response, VFLA sued the artists for breach of contract and breach of the implied covenant of good faith and fair dealing. VFLA also sued WME for conversion, money had and received, violating Business and Professions Code section 17200, and declaratory relief.

After extensive discovery, the artists and WME moved for summary judgment. VFLA also moved for summary adjudication on its breach of contract cause of action against the artists. The

artists argued the proper inquiry under the force majeure provision in determining whether they were entitled to keep the deposits was whether they were ready, willing, and able to perform but for the force majeure event. They claimed, among other things, the term "otherwise" meant "apart from" and was not susceptible to any other interpretation in light of the force majeure provision's "death, illness, or injury" exception.

VFLA claimed the force majeure provision's "otherwise ready, willing, and able" condition meant the artists were ready, willing, and able to perform "in spite of" the force majeure event. Therefore, because the government orders and underlying COVID-19 pandemic prevented the artists' performances, the artists could not satisfy the condition they were "ready, willing, and able to perform." VFLA also claimed the artists' "but for" interpretation resulted in an unlawful forfeiture and made the performance contracts unlawful.

WME filed its own motion for summary judgment, arguing, among other things, it was not liable as the artists' agent for what was essentially a contract dispute between VFLA and the artists. WME further argued it could not be held liable for its principals' decisions to not return the deposits because WME's conduct was not independently wrongful or tortious.

The trial court granted the artists' and WME's motions for summary judgment and denied VFLA's motion for summary adjudication. It held the artists' interpretation did not result in an invalid forfeiture, nor did it make the agreements unlawful. In interpreting the force majeure provision, the trial court found the language was susceptible to either VFLA's or the artists' interpretation, and turned to parol evidence. The trial court explained and the parties agreed, since the parol evidence was

undisputed and the parties had waived their right to a jury, the trial court could choose from conflicting inferences and interpret the performance contracts as a matter of law.

The trial court found the original draft of the force majeure provision favored the festival organizer, but was revised to become more artist-friendly, noting the artists could only keep the deposit under the original force majeure provision if they "commenced performance" while under the revised version, they could keep the deposit if they established they were "otherwise ready, willing, and able to perform." The trial court considered other parol evidence, but found it unpersuasive as it could support inferences in favor of either side's interpretation.

The trial court also decided WME's motion on the merits even though VFLA conceded WME should prevail if the artists prevailed on their motion. Although WME raised numerous arguments, the trial court found one determinative—WME could not be held liable as an agent for the actions of its principals under the performance contracts' role of agent provision. Further, WME had not engaged in any independently wrongful or tortious conduct.

VFLA appealed.

DISCUSSION

I. Standard of review

Summary judgment is proper "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A party seeking summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th

826, 850.) A defendant meets this burden by showing that plaintiff "has not established, and cannot reasonably expect to establish" an essential element of his claim. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

We review a grant of summary judgment de novo, which means we "decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) In deciding whether a material issue of fact exists for trial, we "consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence." (Code Civ. Proc., § 437c, subd. (c).)

II. The artists' "but for" interpretation of the force majeure provision is the only reading that avoids surplusage and gives meaning to every clause

When interpreting a contract, we try "to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) If the contract language "is clear and explicit, and does not involve an absurdity," the language governs the interpretation. (Civ. Code, § 1638.) And, if possible, "[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone." (Civ. Code, § 1639.) We interpret the contract as a whole "so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) We will avoid an interpretation "that leaves part of a contract as surplusage." (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 186.) We also interpret a contract to "make it lawful, operative, definite, reasonable, and capable of being carried

into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.) We will also avoid interpretations that render the contract "unusual, extraordinary, harsh, unjust or inequitable [citations], or which would result in an absurdity." (*Harris v. Klure* (1962) 205 Cal.App.2d 574, 578.)

Here, the force majeure provision is three sentences. The first sentence defines a force majeure event as "any act beyond the reasonable control of Producer, Artist, or Purchaser which makes any performance by Artist impossible, infeasible, or unsafe." The first sentence then provides examples of a force majeure, including, "acts of God, terrorism, failure or delay of transportation, death, illness, or injury of Artist or Artist's immediate family, . . . and civil disorder." Here, the parties do not dispute that the COVID-19 pandemic and government orders meet the definition of a force majeure.

The second sentence states the artists shall return the deposits to VFLA in the event of a force majeure cancellation, providing: "In the event of cancel[l]ation 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 . . .) previously received . . . unless otherwise agreed." Like the first sentence, the parties do not dispute the meaning of the second sentence, that is, VFLA is entitled to the deposits in the event of a force majeure cancellation unless another term of the performance contract applies.

The third sentence, which is at the heart of the parties' dispute, reads: "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." The first part of the third sentence thus creates an exception to when the artist must return the deposit to VFLA in the event of a force majeure, that is, when the artist can show he or she was "otherwise ready, willing, and able to perform." The second part of the third sentence creates an exception to that exception, providing that the artist must return the deposit to VFLA when the force majeure cancellation is a result of the artist's "death, illness, or injury, or that of its immediate family."

The parties' disagreement over the force majeure provision and the determination of which party keeps the deposit in the event of a force majeure cancellation can be summarized as follows.

The artists claim their right to the deposits is conditioned on them demonstrating they were "ready, willing, and able to perform" *but for* the occurrence of the force majeure event. According to the artists, the word "otherwise" modifies the adjectives "ready, willing, and able," and when "otherwise" modifies an adjective it means "in all ways except the one mentioned." In other words, the controlling question is, had the force majeure event not occurred, would the artists have been ready, willing, and able to perform.

On the other hand, VFLA claims the artists' right to retain the deposits is conditioned on a showing that the artists were "otherwise ready, willing, and able to perform" *in spite of* the occurrence of the force majeure. In other words, VFLA asserts the use of the word "however" at the beginning of the third sentence connects the "ready, willing, and able" condition to the force majeure event in the prior two sentences, meaning the artists must

show they are "otherwise ready, willing, and able to perform" notwithstanding or regardless of the force majeure.

We hold the artists have the better interpretation. The artists' interpretation is the only reading of the force majeure provision that gives effect to all three sentences, including the exception to the exception, i.e., a cancellation that is the result of a force majeure that is the artist's death, illness, or injury, or that of the artist's immediate family. Further we hold the artists' interpretation is the only interpretation that makes the force majeure provision capable of being carried into effect while remaining true to the parties' intent to allow the artists to retain the deposits at least in some circumstances in the event of a force majeure cancellation.

While VFLA's reading appears reasonable at first glance, it suffers from two fundamental problems. It makes the force majeure provision indefinite and incapable of being carried into effect (Civ. Code, § 1643) and deprives the third sentence of any meaning thus rendering it surplusage (*Rice v. Downs*, *supra*, 248 Cal.App.4th at p. 186). Under VFLA's interpretation, we are unsure, and VFLA has not explained, how the artists could ever establish their right to the deposits by showing they were "ready, willing, and able to perform" in spite of a force majeure event when a force majeure event is defined as any act making the artists' performance "impossible, infeasible, or unsafe." This begs the question, in the event of a force majeure that results in cancellation of the festival or the individual artists' performances, how could the artists ever show they were able to perform notwithstanding the occurrence of an event that made their performances impossible, infeasible, or unsafe?

None of VFLA's arguments or hypotheticals answer this question. Nor has VFLA identified any scenarios where the artists would definitively have the right to retain the deposits in the event of a force majeure cancellation. For example, VFLA claims the artists "*might* still be able to establish they were 'ready, willing, and able' to perform" in the face of force majeure events such as "terrorism," a "failure or delay of transportation," or "civil disorder" which "*might* result in the cancellation of Virgin Fest." Each of these examples hypothesizes a force majeure event smaller in scope than the COVID-19 pandemic, impacting Virgin Fest only indirectly. The problem with these examples, however, is either VFLA decides not to cancel Virgin Fest because the venue or area where Virgin Fest was set to take place is not impacted, in which case the force majeure provision does not apply, or, if Virgin Fest or the artists' performances are cancelled, VFLA never explains how the artists could show they were otherwise able to perform notwithstanding a force majeure event that rendered the artists' performances or the festival itself infeasible or unsafe.

VFLA asserts what distinguishes its hypotheticals from what occurred here is that the COVID-19 related orders had the unique effect of rendering the artists' performances " 'illegal' " and " 'unlawful' " at the times and places set forth in the performance contracts. According to VFLA, when the force majeure event makes the underlying performance illegal, the artists can never be "ready, willing, and able to perform." However, the definition of a force majeure event does not distinguish between something that makes the performances illegal versus something that makes the performances impossible, unsafe, or infeasible. We find VFLA's distinction is without a difference and leads us back to the same fundamental problem with VFLA's reading—if a force majeure

event makes the artists' performances "impossible, infeasible, or unsafe," the artist can never show how they are otherwise able to perform in the face of a force majeure.

As such, VFLA's interpretation of the force majeure provision is neither definite nor capable of being carried into effect without violating the intention of the parties, which was to allow the artists to keep the deposits in at least some circumstances. (See Civ. Code, § 1643.)

The problem with VFLA's "in spite of" interpretation becomes clearer when we consider a force majeure event that is the artists' death, illness, or injury. VFLA's reading is untenable considering the artists could never be "otherwise ready, willing, and able to perform" in spite of a force majeure event that was their own death, illness, or injury, which are expressly defined as force majeures in the provision's first sentence. But, putting that logical fallacy aside, VFLA's right to the return of deposit in the event of a cancellation due to the artists' or artists' immediate family members' death, illness, or injury is already provided for in the first two sentences of the provision. Thus, under VFLA's reading, the second part of the third sentence, i.e., the exception to the exception, adds nothing to the meaning of the force majeure provision despite Epstein and Gaches specifically negotiating that term. Accordingly, VFLA's interpretation makes the third sentence of the force majeure provision surplusage. (*Rice v. Downs*, *supra*, 248 Cal.App.4th at p. 186.)

VFLA also raises its own surplusage argument, contending if the parties intended to create a "but for" test, they would have done so in one sentence reading: "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." This is not a surplusage

argument, but a claim the parties could have drafted the force majeure provision more clearly and concisely. While that is undoubtedly true, the issue is not which party could have drafted a shorter more comprehensible force majeure provision. Indeed, VFLA's interpretation could also have been one sentence that read: "[I]n the event of cancellation due to force majeure, producer shall not be paid and shall return any deposit amounts unless the artist is ready, willing, and able to perform in the face of the force majeure event." The issue is which party's interpretation gives effect to each part of the force majeure provision and the contract as a whole, which VFLA's interpretation cannot do. (Civ. Code, § 1641; *Rice v. Downs*, *supra*, 248 Cal.App.4th at p. 186.)

Accordingly, we hold the artists' "but for" interpretation of the force majeure provision is the only correct reading that gives meaning to each part of the provision and makes it definite and capable of being carried into effect while reflecting the intention of the parties.

III. The parol evidence favors the artists' "but for" interpretation

Even assuming the force majeure provision is reasonably susceptible to VFLA's interpretation, that is, the word "otherwise" only modifies the condition that the artists are "ready, willing, and able to perform," and the word "however" relates back to the force majeure, providing the artists must show they are "ready, willing, and able" notwithstanding the force majeure, we would still affirm the trial court's grant of summary judgment as the parol evidence, to the extent it favors either side, tends to favor the artists' interpretation.

When the language in a contract is reasonably susceptible to either parties' interpretation, the court may look to parol evidence,

including the surrounding circumstances of the negotiations; the contract's object, nature, and subject matter; and the parties' subsequent conduct. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 979–980.)

A. VFLA has not identified material conflicts in the parol evidence

In looking at the parol evidence, we must address a threshold issue identified by VFLA, which is whether the trial court resolved conflicts in the parol evidence that should have been reserved for trial.[4]

In evaluating the extrinsic evidence, the court engages in a three-step process. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126–1127 (*Wolf*).) "First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.] If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. [Citations.] When there is no material conflict in the extrinsic evidence, the trial court

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[4] In its summary judgment order, the trial court noted it had extensive discussion with the parties during oral argument concerning its authority to decide between conflicting inferences, stating "[t]he bottom line is that because contract interpretation is for the [c]ourt (and doubly so here where the parties have waived a jury), the [c]ourt can choose from conflicting inferences even on summary judgment. However, if the inference to be used depends on the resolution of factual disputes concerning the parol evidence, then resolution must await trial."

interprets the contract as a matter of law. [Citations.] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation." (*Ibid.*)

VFLA cites several examples in the record where it claims the trial court erroneously resolved conflicts in the parol evidence. VFLA's citations do not support its claim of error.

VFLA first cites to the declarations of Epstein and Jason Felts, VFLA's chief executive officer, which according to VFLA, the trial court ignored even though they gave accounts of "what was said and not said" between VFLA and WME during negotiations. Specifically, Epstein stated he never discussed the meaning of the phrase "otherwise ready, willing, and able" with Gaches or anyone else at WME, and he never agreed to and was unaware of the artists' interpretation that "otherwise ready, willing, and able" meant ready, willing, and able but for the occurrence of the force majeure. Similarly, Felts stated he never agreed VFLA would bear the risk of cancellation due to a force majeure.

The record shows the trial court reviewed the Epstein and Felts declarations, but excluded them to the extent they were the declarants' undisclosed understanding of the parties' agreements, stripped of any supporting evidence that those understandings were disclosed during negotiations. The trial court's exclusion of this evidence was not error. "California recognizes the objective theory of contracts [citation], under which '[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation' [citation]. The parties' undisclosed intent or understanding is irrelevant to contract interpretation." (*Founding Members of the Newport Beach*

Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal.App.4th 944, 956 (*Newport Beach Country Club*).) As the trial court properly excluded Epstein's and Felts's undisclosed understandings of the force majeure provision, they are insufficient to raise a conflict in the parol evidence or a triable issue of fact. (See *id.* at p. 960.)

VFLA responds by directing us to the artists' argument that, if we agree with VFLA on appeal and reverse the trial court's grant of summary judgment, we must remand the matter for a bench trial because the artists successfully defeated VFLA's motion for summary adjudication with a material disputed fact. VFLA reasons, because the artists' motion is "the mirror image of VFLA's motion and both motions are based on the same evidence, the same triable issue of fact that the [a]rtists claim prevents summary judgment for VFLA must also preclude summary judgment for the [a]rtists." Specifically, the artists rely on Gaches's testimony that he told Epstein, and Epstein agreed, the artists must be paid in the event of a force majeure cancellation with only narrow exceptions. Meanwhile, as described above, Epstein denies Gaches ever disclosed this understanding.

While we agree with VFLA that this testimony is conflicting and related to the parties' negotiations, it is not grounds for reversal.

As an initial matter, we note VFLA never raised this issue in the trial court. In its opposition to the artists' motion for summary judgment, VFLA did not point to any disputes in material fact. " 'Though this court is bound to determine whether defendants met their threshold summary judgment burden independently from the moving and opposing papers, we are not obliged to consider arguments or theories, including assertions as to deficiencies in

defendants' evidence, that were not advanced by plaintiffs in the trial court.' [Citation.] 'Ordinarily the failure to preserve a point below constitutes a [forfeiture] of the point.' " (*Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 698.) Because VFLA never directed the trial court to this apparent disparity in Epstein's and Gaches's accounts, its contention on appeal that this conflict created a triable issue of material fact is forfeited. (See *ibid.*)

However, even if VFLA had preserved this argument, we would not remand for a bench trial. This is because, even if we drew an inference in favor of VFLA and assumed the truth of Epstein's version of events, i.e., that Gaches never disclosed his understanding of the force majeure provision and Epstein never agreed to the artists' interpretation, the purported conflict is immaterial to VFLA's argument. (See *Villalobos v. City of Santa Maria* (2022) 85 Cal.App.5th 383, 390.) Even if Gaches never disclosed his understanding of the agreement, this fact is immaterial to the court's interpretation. (*Newport Beach Country Club*, *supra*, 109 Cal.App.4th at p. 960.) Conversely, when considering the artists' opposition to VFLA's motion for summary adjudication, we would have to draw an inference in the artists' favor as the nonmoving party. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470.) And by drawing an inference that Gaches informed Epstein of his understanding the artists had to be paid in the event of a force majeure, we would have to find the artists carried their burden in opposing VFLA's motion. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 846.) Thus, contrary to VFLA's suggestion, this apparent conflict in Gaches's and Epstein's testimony is not a two-way street resulting in a triable issue of fact in VFLA's favor.

VFLA's remaining examples of purported conflicts in the parol evidence are not persuasive. Our review of the evidence shows the evidence was undisputed and therefore the trial court could choose between conflicting inferences and interpret the contract as a matter of law. (*Wolf*, *supra*, 162 Cal.App.4th at pp. 1126–1127.)

For example, VFLA cites to evidence that Kali Uchis chose to return a deposit to another festival organizer even though the agreement for that festival contained the same force majeure language as the Virgin Fest rider. This evidence, however, was undisputed and considered by the trial court, who found it did not necessarily require an inference in favor of either side given the additional reasons Kali Uchis returned that deposit, making those circumstances materially different than the facts here.

VFLA also claims there was conflicting parol evidence regarding an e-mail from Ellie Goulding's agent, stating: "With [the City of Los Angeles] extending [the] stay at home order through July, Virgin Fest has been forced to cancel due to [force majeure]. With no current plans to reschedule, we need to proceed with the process of returning the deposit currently held by WME." Like VFLA's Kali Uchis example, this parol evidence was undisputed.

VFLA also points to an e-mail exchange between Lizzo's agent and Felts, regarding Lizzo's intent to publicly perform in light of the COVID-19 pandemic. In the exchange, Felts asked the agent about Lizzo's public statement that "it's time to stop performing due to [COVID-19]." The agent responded that Lizzo intended to move forward with her confirmed engagements, and she was "ready, willing, and able to play . . . as soon as the [government] says we can." Again, this evidence was undisputed.

We are also not persuaded by VFLA's argument that summary judgment should be reversed because the trial court "ignored" evidence submitted by VFLA. While the trial court's order does not refer to every piece of evidence submitted by VFLA, any purported error is harmless where, as here, our independent review establishes the validity of the judgment. (*Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 782.)

In sum, VFLA has not identified any material conflicts in the parol evidence. Therefore, the trial court was authorized to choose between conflicting inferences and interpret the contract as a matter of law. (See *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1341–1342.)

B. The parol evidence supports the artists' interpretation

Having found the parol evidence was undisputed, we also conclude, to the extent the evidence supported either side's interpretation, it tended to favor the artists' reading.

Most notably, we find Gaches's revision of the force majeure provision during the parties' negotiations particularly persuasive to the artists' position. Gaches revised the condition that the artists had to be paid in the event of a force majeure cancellation only if they "commenced performance" to the condition that they needed to be "otherwise ready, willing, and able to perform." Gaches explained the revision was "the best we can do for this one," based on a "new directive" from the head of WME's music department in light of the fact that Baja Fest was an international, i.e., higher risk

festival.[5] Although the extent of this change is contested, it certainly shifted some risk from the artists to the festival organizer. To accept VFLA's interpretation, we would have to conclude Gaches's revision made it less likely, indeed, potentially impossible, for the artists to demonstrate they were "otherwise ready, willing, and able to perform" in the face of a force majeure, which was clearly not the intention of the parties. Thus, the issues with VFLA's interpretation of the force majeure provision notwithstanding, there is simply no inferences to be drawn in VFLA's favor on this evidence.

With respect to the remaining parol evidence identified by VFLA, we agree with the trial court's assessment that it is not particularly persuasive to either side's position.

For example, VFLA argues the parol evidence shows that "prior to the instant litigation, WME and the [a]rtists interpreted the [f]orce [m]ajeure [p]rovision the same way as VFLA; namely, without a 'but for' exception." VFLA directs us to the parol evidence that other WME clients chose to return the deposits to VFLA. VFLA also again cites to Kali Uchis's decision to return the deposit to the other festival organizer even though that performance contract contained the same force majeure provision at issue here.

The record shows VFLA has taken this evidence out of its broader context. For example, it was undisputed that the deposits paid to the other performers were far less than what was paid to Ellie Goulding, Kali Uchis, and Lizzo. Thus, while it is possible to interpret the performers' decisions to return the deposits as

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[5] Although the term "higher risk" was not contained in the draft comments, Epstein testified that it was communicated to him that international also implied higher risk in this context.

supporting an inference that WME and its performers initially agreed with VFLA's interpretation of the force majeure provision, it is also equally reasonable to assume these other performers returned the deposits to avoid a costly litigation after VFLA threatened legal action. Moreover, it was undisputed WME advised its clients that they had the option of returning the deposits to avoid a public dispute that would result in litigation. As for Kali Uchis's decision to return the deposit to the other festival organizer, the record shows Kali Uchis's return of the deposit was contingent on the other festival organizer working with her in good faith to reschedule the performance. Given this additional context, these performers' decisions to return the deposits under materially different circumstances are not particularly helpful to VFLA's position.

VFLA also relies on an e-mail exchange between Ellie Goulding's representative and her agent in which they discuss returning the deposit in light of the COVD-19 pandemic. VFLA argues this is strong evidence in support of its interpretation. However, in doing so, VFLA ignores other evidence from the artists that the agent had limited knowledge of the force majeure provision, and then in subsequent e-mails he advised the representative that Ellie Goulding could retain the deposit, and that other WME clients would be doing so under the disputed terms of the force majeure provision.

VFLA also cites to Lizzo's statement that she would be "ready, willing, and able" to perform as soon as the government said she could. Again, we do not find this evidence particularly persuasive to either side's reading. Indeed, the statement is consistent with the artists' "but for" interpretation—that COVID-19 and the government shutdowns were the only thing impeding

Lizzo's performance but that she was otherwise ready, willing, and able to perform.

VFLA also cites evidence that WME negotiated other contracts containing force majeure provisions, which contained the "but for" language that the artists urge us to adopt here. However, there was no evidence that either Gaches or Epstein had access to or compared these other contracts with the Baja Fest or Virgin Fest riders. Further, Gaches explained he used the term "otherwise" as a plain language synonym for "but for." Thus, without some connection between the other contracts using the "but for" language and the agreements here, such evidence is of little value.

Accordingly, the parol evidence VFLA asserts supports its interpretation of the force majeure provision is more or less equally supportive of the artists' reading. However, the only parol evidence that unambiguously supports either side's position is Gaches's revision making the force majeure provision more artist-friendly and, to at least some extent, shifting the risk of a force majeure cancellation from the artist to the festival organizer. When combined with the actual language of the force majeure provision, Gaches's revision tips the parol evidence in favor of the artists.

IV. The artists' factual showing was sufficient

VFLA argues that, even if we accept the artists' interpretation of the force majeure provision, we should still vacate the trial court's grant of summary judgment because the artists failed to make a sufficient factual showing that they were ready, willing, and able to perform but for the force majeure event. This argument is without merit.

First, VFLA never argued this below. Throughout its briefing, VFLA consistently argued the artists could not show they were "ready, willing, and able" because the COVID-19 pandemic

and resulting government orders prevented them from doing so as a matter of law. In other words, VFLA argued its interpretation of the force majeure was the correct one and, under that interpretation, the artists could never show they were otherwise ready, willing and able to perform under the circumstances. Accordingly, we find VFLA's argument forfeited. (*Meridian Financial Services, Inc. v. Phan*, *supra*, 67 Cal.App.5th at p. 698.)

However, even if VFLA preserved this argument, it is not grounds to remand the matter for a bench trial because VFLA never alleged this alternative theory in its pleadings.

"The pleadings play a key role in a summary judgment motion. ' "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues . . . " ' and to frame 'the outer measure of materiality in a summary judgment proceeding.' [Citation.] As our Supreme Court has explained it: 'The materiality of a disputed fact is measured by the pleadings [citations], which "set the boundaries of the issues to be resolved at summary judgment." [Citations.]' [Citation.] Accordingly, the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as *alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.)

Like its briefing in the underlying cross-motions, VFLA's operative complaint only claims the artists could not satisfy the condition that they were ready, willing, and able to perform in the face of the COVID-19 pandemic. Indeed, VFLA demanded the deposits based on its unilateral interpretation of the force majeure provision and never inquired whether the artists were otherwise ready, willing, and able to perform. Then, neither VFLA's operative

pleading nor its subsequent briefing asserted that the artists were not ready, willing, and able to perform due to some other impediment unrelated to the COVID-19 pandemic. Thus, whether the artists made such a factual showing under their own interpretation of the force majeure provision is irrelevant.[6] (*Hutton v. Fidelity National Title Co.*, *supra*, 213 Cal.App.4th at p. 493.)

V. The artists' interpretation does not result in a forfeiture or penalty

VFLA also argues we must adopt its interpretation of the force majeure provision because the artists' interpretation would work an invalid forfeiture or penalty. We disagree.

" 'A forfeiture is "[t]he divestiture of property without compensation" or "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." ' " (*Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1364.) " 'Forfeitures are not favored by the courts, and, if an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it. The burden is upon the party claiming a forfeiture to show that such was the unmistakable intention of the instrument. [Citations.] "A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible." ' " (*Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 771.)

The artists' interpretation does not work a forfeiture here. In at least one respect, VFLA's argument is missing a hallmark of

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[6] Because we find that VFLA forfeited this argument and the issue is otherwise irrelevant based on the pleadings, we do not address VFLA's evidentiary objections to Lizzo's testimony under Code of Civil Procedure section 2025.260, subdivision (c).

forfeiture, which is a breach by the forfeiting party, i.e., VFLA. (See *Nelson v. Schoettgen* (1934) 1 Cal.App.2d 418, 423; *Smith v. Baker* (1950) 95 Cal.App.2d 877, 884.) Here, VFLA merely disagrees with the artists' interpretation of the force majeure provision and how it allocated risk between the parties. And, while VFLA and the artists disagree as to when they were to bear the risk of a force majeure cancellation, it was the "unmistakable intent" of the parties that the risk of a force majeure cancellation should be reflected in the determination of who was ultimately entitled to the deposits. (See *Universal Sales Corp. v. California Press Mfg. Co.*, *supra*, 20 Cal.2d at p. 771.) Because there has been no breach and the parties clearly intended to allocate risk with respect to a force majeure cancellation, VFLA's forfeiture argument is unconvincing.

Moreover, while we acknowledge a breach is not a necessary element of a forfeiture, we note the circumstances here also lack a second indicator of a forfeiture or penalty, which is an unfair divestiture of property that bears no relationship to the actual damages anticipated by the parties when they negotiated the contracts. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1337–1338.) For example, although not constituting a breach, a failure to satisfy a condition may constitute a forfeiture when the value of the property forfeited bears no reasonable relationship to the range of anticipated harm when that condition is not satisfied. (*Ibid.*) We must prioritize the substance of the parties' agreement over its form, and compare the value of the forfeited property with the range of harm anticipated by the parties at the time of contracting. (*Ibid.*)

Here, when we compare the value of the property forfeited, i.e., the deposits, with the range of harm anticipated by the parties at the time of contracting, for example, the artists' lost opportunity

to publicly perform in the Los Angeles area around the time of Virgin Fest, the two amounts bear a reasonable relationship to each other. The amount of the deposits, which represented the artists' fee for their Virgin Fest performances, is what these artists could command from VFLA because they also gave up their right to put on competing public performances in and around Los Angeles in the summer of 2020. Thus, the amount of the deposits bore a reasonable relationship to the anticipated range of harm caused by Virgin Fest's cancellation. (See *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, *supra*, 232 Cal.App.4th at pp. 1337–1338.)

VFLA claims that it received nothing for the deposits. However, this claim is belied by the record, which demonstrates VFLA bargained for more than the artists' performances at Virgin Fest. Rather, the performance contracts also granted VFLA valuable exclusivity rights that prohibited the artists from publicly performing or even publicly announcing any other competing performances within a certain time and within a certain geographical area of Virgin Fest.

We are also not persuaded by VFLA's argument that the condition that the artists be "otherwise ready, willing, and able" must be strictly interpreted against the artists under Civil Code section 1442, which provides: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."

As we have concluded above, the artists' interpretation of the force majeure provision does not work a forfeiture, therefore, Civil Code section 1442 does not apply.

However, even assuming Civil Code section 1442 applies, it does not support VFLA's argument. This is because the condition was created for VFLA's benefit, not the artists. It is the artists who

must satisfy the condition they are "otherwise ready, willing, and able to perform" so as not to receive a windfall if they cancelled their performance for reasons independent of the force majeure. Thus, Civil Code section 1442 requires us to construe the condition that the artists be "otherwise ready, willing, and able to perform" against VFLA because it is the artists who must satisfy that condition. (See *Conolley v. Power* (1924) 70 Cal.App. 70, 75–76.) To hold otherwise would allow a party to use Civil Code section 1442 to obscure a contractual condition, making it more difficult for the other party, who must satisfy the contractual condition, from having a clear understanding of how that condition can be satisfied.

VI. The artists' interpretation does not make the performance contracts unlawful

VFLA argues the artists' interpretation of the force majeure provision is also untenable because it requires this court to endorse an illegal act or enforce a contract with an unlawful object, specifically, allowing the artists to say they were "ready, willing, and able" to perform despite the COVID-19-related restrictions prohibiting their performances. Again, we are not persuaded.

Every contract must have a lawful object. (Civ. Code, § 1550.) "The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do." (Civ. Code, § 1595.) "Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." (Civ. Code, § 1598.) "Where an agreement is capable of being interpreted in two ways," we should construe it in order to make the agreement lawful and capable of being carried into effect. (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633.) In determining whether the subject of a

given contract is lawful, we rely on the state of the law as it existed at the time of contracting. (*Moran v. Harris* (1982) 131 Cal.App.3d 913, 918.)

VFLA argues the performance contracts had a single object—the artists' performances at Virgin Fest—which became unlawful as a result of the government's COVID-19 orders. Therefore, according to the VFLA, the contracts are void, or, alternatively, we must reject the artists' interpretation because it would allow the artists to assert they were "ready" and "able" to perform an illegal act. Neither argument has merit.

First, as discussed above, we disagree with VFLA's characterization that the artists' performance at Virgin Fest was the performance contracts' only object, as VFLA also bargained for valuable exclusivity rights, which the artists granted.

Second, nothing in the force majeure provision requires the artists to actually perform and violate COVID-19 restrictions, thus, the artists are not asking us to help them carry out an illegal object. By adopting the artists' interpretation, we are not endorsing or requiring the artists to perform an illegal act. Rather, our interpretation of the force majeure provision merely requires us to decide who is entitled to the deposits in the event of a force majeure cancellation.

Third, the record is clear that the performance contracts did not have an unlawful object at the time of contracting. It was only after the government issued its COVID-19 restrictions that the artists' performances at Virgin Fest became unlawful. "[I]f the contract was valid when made, no subsequent act of the legislature can render it invalid." (*Stephens v. Southern Pac. Co.* (1895) 109 Cal. 86, 95.)

VFLA asserts that *Indus. Devl. & Land Co. v. Goldschmidt* (1922) 56 Cal.App. 507 (*Goldschmidt*) forecloses the artists' position that they were "ready, willing, and able to perform" at Virgin Fest after the government orders prohibited their performances. We find *Goldschmidt* distinguishable.

In *Goldschmidt*, a landlord sued his commercial tenants who stopped paying rent after prohibition made illegal their winery and liquor business operation on the property. (*Id*. at pp. 134–135.) The *Goldschmidt* court held that the tenants were excused from performance, i.e., paying rent for the remainder of the lease term, when prohibition came into effect and made operating their business unlawful. (*Id*. at pp. 508–509.) A critical factor in *Goldschmidt* was the lease's restrictive terms, which provided the property could not be used for any other purpose other than a winery and liquor business. (*Id*. at p. 135.) "The restrictive clauses make it appear definitely enough that the lessees were bound to use the premises for the purpose of conducting a winery or wholesale or retail liquor business, or for all of such purposes, and that such uses could not be varied at their option." (*Id*. at p. 511.) Because the lease's terms were restrictive, the *Goldschmidt* court concluded the lease became inoperative upon the enactment of prohibition. (*Id*. at pp. 510–511.)

Unlike the restrictive lease in *Goldschmidt*, the performance contracts here anticipated the possibility of a force majeure cancellation, and allocated the financial risk between the parties accordingly. It is not illegal for parties to negotiate what happens when a condition under a contract becomes impossible. (*Mathes v. Long Beach* (1953) 121 Cal.App.2d 473, 477.)

VFLA also argues the "ready, willing, and able" condition is void under Civil Code section 1441, which provides that "[a]

condition in a contract, the fulfillment of which is . . . unlawful," is "void." We disagree. As discussed above, the relevant inquiry is whether the artists were "otherwise ready, willing, and able" absent the force majeure, not whether they could perform in violation of the COVID-19 restrictions. As such, nothing in the performance contract requires the artists to satisfy an unlawful condition.

VII. Because VFLA's contract claim fails, its breach of the implied covenant of good faith and fair dealing claim fails as well

Given our finding that the artists' interpretation of the force majeure provision is the correct one, we conclude the artists also prevail on VFLA's cause of action for breach of the implied covenant of good faith and fair dealing.

" ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' " (*Carma Developers* (*Cal.*)*, Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371.) A party need not show a specific breach of the contract to prove a claim for breach of the implied covenant of good faith and fair dealing. (*Ibid.*) "Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." (*Id.* at p. 373.) Nonetheless, "the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (*Ibid.*) "[T]he implied covenant of good faith is read into contracts 'in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' " (*Ibid.*) The implied covenant will not "be read to prohibit a party from doing that which is expressly permitted by an agreement." (*Id.* at p. 374.) Thus, " 'the parties may, by express

provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing.' " (*Ibid*.) In other words, no covenant of good faith and fair dealing can be implied which forbids acts and conduct expressly authorized by the contract. (*Ibid*.)

The plaintiff "must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

Here, VFLA points to various instances of bad faith conduct by the artists. These include a statement from a WME representative that it was treating Virgin Fest as a "money grab," Lizzo's endorsement of an open letter calling for the music industry to pause in order to curb the spread of COVID-19, WME's statement to Felts that the performance contracts were "pay or play" agreements negotiated "under the strictest terms" because Virgin Fest's potential success was doubtful, Kali Uchis's decision to return the deposit to the other festival organizer, and a statement from Ellie Goulding's management expressing doubt she "would be able to pull [her] show together in time for [Virgin Fest]."

None of these examples, if proven, are sufficient to show the artists breached the implied covenant of good faith and fair dealing. They do not demonstrate the artists' failure or refusal to discharge

contractual responsibilities which frustrated the reasonable expectations of VFLA under the performance contracts. (*Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at p. 1395.) Instead, what occurred here is both sides took a hardline but good faith position with respect to the force majeure provision, which they were entitled to do. Moreover, it was the COVID-19 pandemic, not any actions by the artists, that interfered with VFLA's expectations under the performance contracts. As far as Lizzo's call for the music industry to shut down during the pandemic and Ellie Goulding's management's statement that she may not be able to pull together her performance in time, those statements had no bearing on Virgin Fest's cancellation, which is what ultimately caused the harm to VFLA. (See *Floystrup v. City of Berkeley Rent Stabilization Bd.* (1990) 219 Cal.App.3d 1309, 1318.)

VIII. WME's motion for summary judgment

Because VFLA conceded if the artists prevailed, WME should prevail as well, we also affirm the trial court's grant of summary judgment in favor of WME.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

VIRAMONTES, J.

WE CONCUR:

STRATTON, P. J.

WILEY, J.