SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

West District, Santa Monica Courthouse, Department R

SC126423 June 5, 2019
TWENTIETH CENTURY FOX FILM CORP., ET AL. VS. 9:30 AM
NETFLIX, INC.

Judge: Honorable Marc D. Gross
Judicial Assistant: P. Anyankor
Courtroom Assistant: A. Wiggins

CSR: Alise Harrington, #11392
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Daniel M. Petrocelli , Molly M. Lens, and Leah Godesky

For Defendant(s): Karen G. Johnson-McKewan , Ellen Caro, Jesse Cheng, Michael C. Chow, and Russell Cohen

NATURE OF PROCEEDINGS: Hearing on Motion for Summary Judgment; Hearing on Motion for Summary Judgment

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Alise Harrington, CSR # 11392, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The matters are called for hearing.

The Court issues the following Tentative Rulings:

Plaintiffs Twentieth Century Fox Film Corporation and Fox 21, Inc.'s motion for summary judgment on the complaint is denied. Plaintiffs' motion for summary adjudication of the inducing breach Waltenberg Agreement, inducing breach of Flynn Agreement, and unfair competition in violation of Business & Professions Code §17200 causes of action is also denied.

The court treats Plaintiffs' motion for summary judgment/adjudication on Defendant Netflix, Inc.'s cross-complaint as a motion for judgment on the pleadings, which is granted with 20 days leave to amend.

The court treats Plaintiffs' motion for summary adjudication of Defendant's violation of public policy and unconscionability affirmative defenses as a motion for judgment on the pleadings, which is granted with 20 days leave to amend.

Plaintiffs Twentieth Century Fox Film Corporation ("TCFFC") and Fox 21, Inc. ("Fox 21")

(collectively "Plaintiffs" or "Fox") move for summary judgment against Defendant Netflix, Inc. ("Defendant" or "Netflix") on the complaint and cross-complaint. In the alternative, Plaintiffs move for summary adjudication of the 1st (inducing breach of the Waltenberg Agreement), 2nd (inducing breach of the Flynn Agreement), and 3rd (unfair competition in violation of Business & Professions Code §17200) causes of action in their complaint, the 1st (violation of Business & Professions Code §17200) and 2nd (declaratory relief) causes of action in Netflix's cross-complaint, and the 3rd (violation of public policy) and 24th (unconscionability) affirmative defenses in Netflix's operative answer.

A. Background

1. Complaint

On September 16, 2016, Plaintiffs filed a complaint against Netflix, alleging causes of action for inducing breach of the Waltenberg Agreement, inducing breach of the Flynn Agreement, and unfair competition in violation of Business & Professions Code §17200.

Plaintiffs alleged TCFFC entered into a Fixed-Term Employment Agreement with Marcos Waltenberg ("Waltenberg"), effective as of December 9, 2014 ("Waltenberg Agreement"), Waltenberg, as a material condition of his employment with TCFFC, agreed to perform his duties as Vice President, Promotions, at least through December 31, 2016, Netflix knew about the Waltenberg Agreement, including that Waltenberg agreed to work with TCFFC for a specified term that had not yet expired, during its recruitment and solicitation of Waltenberg, Netflix committed intentional acts designed to induce Waltenberg to breach the Waltenberg Agreement by offering Waltenberg employment, recruiting and soliciting Waltenberg, hiring Waltenberg, and indemnifying Waltenberg for claims arising from his breach of the Waltenberg Agreement, Waltenberg materially breached the Waltenberg Agreement in January 2016, as a result of Netflix's tortious interference, by ending his employment with TCFFC and failing to perform his duties through the agreed-upon term, and TCFFC suffered damages as a result of Netflix's conduct. (Complaint ¶¶8-10, 23-31.)

Plaintiff also alleged Fox 21 entered into a Fixed-Term Employment Agreement with Tara Flynn, effective as of November 19, 2013 ("Flynn Agreement"), Flynn, as a material condition of her employment with Fox 21, agreed to perform her duties as Executive Director, Creative, and then Vice President, Creative, through an initial term ending November 19, 2015, at Fox 21's election, an additional two-year period ending November 18, 2017, and an additional two-year period, pursuant to amendment, ending November 18, 2019, Netflix knew about the Flynn

Agreement, including that Flynn had agreed to work for Fox 21 for a specified term that had not yet expired, during its recruitment and solicitation of Flynn, Netflix committed intentional acts designed to induce Flynn to breach the Flynn Agreement by offering Flynn employment, recruiting and soliciting Flynn, hiring Flynn, and indemnifying Flynn for claims arising from breach of the Flynn Agreement, Flynn materially breached the Flynn Agreement in August 2016, as a result of Netflix's tortious interference, by ending her employment with Fox 21 and failing to perform her duties through the agreed-upon term, and Fox 21 suffered damages as a result of Netflix's conduct. (Complaint ¶¶12-22, 32-40.)

Plaintiffs alleged Netflix's intentional interference with their Fixed-Term Employment Agreements is an unlawful business act or practice under the Unfair Competition Law ("UCL") and Netflix has unlawfully competed with Plaintiffs by soliciting, recruiting, and inducing Plaintiffs' employees to breach their Fixed-Term Employment Agreements with Plaintiffs. (Complaint ¶¶41-45.) Plaintiffs alleged Netflix is engaged in a brazen campaign to unlawfully target, recruit, and poach valuable Fox executives by illegally inducing them to break their employment contracts with Plaintiffs and to work at Netflix, an injunction is necessary to abate Netflix's continuing threat of unlawfully interfering with Plaintiffs' Fixed-Term Employment Agreements, and Plaintiffs are entitled to injunctive relief against Netflix restraining it from further interfering with any of Plaintiffs' Fixed-Term Employment Agreements. (Complaint ¶¶1, 45.) Plaintiffs prayed for a "permanent injunction enjoining Netflix, and its agents, servants, employees, attorneys, successors and assigns, and all persons, firms and corporations acting in concert with it, from interfering with any of Fox's Fixed-Term Employment Agreements." (Complaint, Prayer 1.)

2. Cross-Complaint

On October 19, 2016, Netflix filed a cross-complaint against Plaintiffs, alleging causes of action for violation of Business & Professions Code §17200 and declaratory relief. Netflix alleged Plaintiffs' use of Fixed-Term Employment Agreements unlawfully restrains Fox employees from accepting employment elsewhere, including Netflix. (X-C ¶30.) Netflix alleged Plaintiffs engage in the widespread use of unlawfully restrictive Fixed-Term Employment Agreements and require otherwise typically at-will employees to enter into such agreements as a condition of employment or promotion. (X-C ¶15.) Netflix alleged that, pursuant to the Fixed-Term Employment Agreements, Plaintiffs require these employees to work exclusively for Fox for a specified term of years, secure the exclusive and unilateral right to extend the length of employment for an additional number of years, and include provisions that unlawfully purport to allow Fox to seek injunctive or equitable relief to prevent a breach of the agreement. Netflix

alleged Plaintiffs, through these restrictive covenants, effectively seek to prevent their employees from leaving to work for competitors before the end of the agreements' term(s). (X-C ¶15.) Netflix alleged the Waltenberg Agreement and Flynn Agreement illustrate Plaintiffs' unlawful behavior – both were subject to Fixed-Term Employment Agreements with additional option years that Plaintiffs exercised unilaterally, neither was permitted to negotiate the terms of his or her continued employment upon Plaintiffs' exercise of its option, neither contract falls into the narrow requirements of personal services agreements (such as those that are used for actors, musicians, and celebrities tied to a particular creative project), and Plaintiffs refused to allow termination of the contracts because Flynn and Waltenberg announced they intended to accept jobs with Netflix. (X-C ¶20.) Netflix alleged Plaintiffs' attempt to prevent Waltenberg, Flynn, and any other employee who is subject to a Fixed-Term Employment Agreement with Fox, from seeking or accepting employment from competitors, such as Netflix, is unlawful and constitutes an unfair, unlawful, or fraudulent business practice under the UCL. (X-C ¶¶26-27, 31.)

Netflix seeks a judicial declaration "that Fox's enforcement of fixed-term employment agreements, arising from employment of Mr. Waltenberg and Ms. Flynn, and other Fox employees that Netflix may seek to employ, be found unlawful under California law." (X-C ¶37.) Netflix also seeks a judicial "determination of [its] rights to recruit, hire and/or retain Fox's current and former employees who are subject to fixed-term employment agreements." (X-C ¶38.) Netflix prayed for the following: (1) an order enjoining Fox from continuing to use or enforce Fixed-Term Employment Agreements or other restraints of trade against its employees in California; (2) a declaration that Fixed-Term Employment Agreements with Fox employees are unenforceable under Business & Professions Code §16600, and may not be used to prevent these individuals from seeking employment with other companies, including Netflix; and (3) a declaration that Fox is estopped from enforcing Fixed-Term Employment Agreements to prohibit Fox's employees from employment with other companies, including Netflix. (X-C, Prayer, pgs. 10-11.)

3. First Amended Answer

On July 26, 2018, Netflix filed a first amended answer to Plaintiffs' complaint, asserting several affirmative defenses, including affirmative defenses for violation of public policy and unconscionability. Netflix alleged Plaintiffs' claims are barred by the fact that they allege Netflix has induced breach of contracts that are void as against public policy and unconscionable and, therefore, unenforceable. (FAA, pgs. 2, 6.)

B. Evidentiary Objections

Netflix's evidentiary objections are sustained as to Nos. 1, 2, 3, 6, 7, 8, 15, 16, 19, 20, 29 (in part), and 30, and overruled as to Nos. 4, 5, 9, 10, 11, 12, 13, 14, 17, 18, 21, 22, 23, 24, 25, 26, 27, and 28.

Fox's evidentiary objections are sustained as to Nos. 1, 3-4, 6, 8, 10-13, 16, 23, 25, 27-28, 30-31, 35-38, 43-45, 55, 59-61, 63-71, 73-82, 84, 85 (in part), 87-90, 92-106, 109-110, 112, 114, 117, 121-126, 131, 133-134, 136, 138-141, 144-145, 151, and 153-156, 164-165, and overruled as to Nos. 2, 5, 7, 9, 14-15, 17-22, 24, 26, 29, 32-34, 39-42, 46-54, 56-58, 62, 72, 83, 86, 91, 107-108, 111, 113, 115-116, 118-120, 127-130, 132, 135, 137, 142-143, 146-148, 150, 152, and 157-163. Fox's objections Nos. 166-167 are not directed to evidence and are thus not applicable. The Court will hear argument on No. 149.

C. CRC Violations

Fox did not include Netflix's cross-claims for violation of Business and Professions Code §17200 and declaratory relief in the separate statement in violation of CRC 3.1350(b) and (d).

Fox's separate statement does not identify "material fact[s] claimed to be without dispute" with respect to resulting damages in support of Issues 1 and 2. (See CRC 3.1350(d)(1)(B).) In the separate statement, Fox stated it did not receive the benefit of Waltenberg's services after January 22, 2016 through the end of the Term, December 31, 2016, and it did not receive the benefit of Flynn's services after September 2, 2016 through the end of the Term, November 18, 2017. (Fox – SS Nos. 11 and 23.) However, these are not material facts showing resulting damages. Fox's separate statement also does not identify "material fact[s] claimed to be without dispute" with respect to resulting economic harm in support of Issue 3. Nevertheless, the court will proceed on the merits because Netflix did not challenge the sufficiency of Fox's separate statement, Fox cited to evidence of damages in the separate statement, and Netflix addressed the issue of damages.

D. Undisputed Facts

Fox and Waltenberg executed a written contract for employment for a specified term, dated December 9, 2014 ("Waltenberg Agreement"). (Netflix's Response to Fox's SS, pgs. 2-4, No. 1.) At the time Waltenberg signed his employment contract with Fox in the spring of 2015 Waltenberg understood that he was agreeing to work for Fox for a specified term and Fox was agreeing to employ him for a specified term. (Netflix's Response to Fox's SS, pgs. 76-79, Nos.

31-32.) The Waltenberg Agreement provides, in pertinent part, as follows:

The services to be furnished by you hereunder and the rights and privileges granted to the Company by you are of a special, unique, unusual, extraordinary, and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law, and a breach by you of any of the provisions contained herein will cause the Company irreparable injury and damage. You expressly agree that the Company shall be entitled to seek injunctive and other equitable relief to prevent a breach of this Agreement by you. Resort to such equitable relief, however, shall not be construed as a waiver of any proceeding or succeeding breach of the same or any other term or provision. The various rights and remedies of the Company hereunder shall be construed to be cumulative and no one of them shall be exclusive of any other or of any right or remedy allowed by law.

(Netflix's Response to Fox's SS, pgs. 63-64, No. 29.) Fox, pursuant to Paragraph 1(a) of the Waltenberg Agreement, agreed to employ Waltenberg for a period of two years, from January 1, 2015 to December 31, 2016 ("Term"). (Netflix's Response to Fox's SS, pgs. 4-5, No. 2.) On November 6, 2015, Netflix sent a written offer of employment to Waltenberg ("Offer Letter"). (Netflix's Response to Fox's SS, pg. 5, No. 3.) Waltenberg executed Netflix's Offer Letter on November 7, 2015. (Netflix's Response to Fox's SS, pg. 5, No. 4.) Prior to November 6, 2015, Netflix was aware that Waltenberg had an employment agreement with Fox that contained a specified term that had not expired. (Netflix's Response to Fox's SS, pgs. 5-6, No. 5.) On December 16, 2015, Netflix agreed in writing to defend and indemnify Waltenberg from and against any action by Fox taken in connection with his acceptance of Netflix's offer of employment ("Waltenberg Indemnification Agreement"). (Netflix's Response to Fox's SS, pgs. 6-9, No. 6.) Netflix paid for Pennington Lawson LLP to represent Waltenberg. (Netflix's Response to Fox's SS, pg. 7, No. 7.) Netflix more than doubled Waltenberg's salary. (Netflix's Response to Fox's SS, pgs. 9-11, No. 8.) Waltenberg stopped working at Fox on January 22, 2016. (Netflix's Response to Fox's SS, pg. 11, No. 9.) Prior to January 22, 2016, Netflix was aware the Waltenberg Agreement recited a term that ended on December 31, 2016. (Netflix's Response to Fox's SS, pgs. 11-12, No. 10.) Waltenberg started working at Netflix on January 25, 2016. (Netflix's Response to Fox's SS, pg. 15, No. 12.)

Fox and Flynn executed a written contract for employment for a specified term, dated November 19, 2015 (the "Flynn Agreement"). At the time Flynn signed her employment contract with Fox in the fall of 2015, Flynn understood that she was agreeing to work for Fox for a specified term. (Netflix's Response to Fox's SS, pgs. 81-85, No. 36.) In the fall of 2015, Fox offered Flynn $180,000 per annum, Flynn asked for $250,000 per annum, and Fox and Flynn executed the

Flynn Agreement, which provided for a salary of $190,000 per annum. (Netflix's Response to Fox's SS, pgs. 85-86, No. 37.) The Flynn Agreement provides, in pertinent part, as follows:

The services to be furnished by you hereunder and the rights and privileges granted to the Company by you are of a special, unique, unusual, extraordinary, and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law, and a breach by you of any of the provisions contained herein will cause the Company irreparable injury and damage. You expressly agree that the Company shall be entitled to seek injunctive and other equitable relief to prevent a breach of this Agreement by you. Resort to such equitable relief, however, shall not be construed as a waiver of any proceeding or succeeding breach of the same or any other term or provision. The various rights and remedies of the Company hereunder shall be construed to be cumulative and no one of them shall be exclusive of any other or of any right or remedy allowed by law.

(Netflix's Response to Fox's SS, pgs. 64-65, No. 30.) Fox, pursuant to Paragraph 1 of the Flynn Agreement, agreed to employ Flynn for a period of two years from November 19, 2015 to November 18, 2017 (the "Term"). (Netflix's Response to Fox's SS, pg. 25, No. 14.) On August 8, 2016, Netflix sent a written offer of employment to Flynn ("Offer Letter"). (Netflix's Response to Fox's SS, pgs. 25-26, No. 15.) Flynn executed Netflix's Offer Letter on August 9, 2016. (Netflix's Response to Fox's SS, pg. 26, No. 16.) Prior to August 8, 2016, Netflix was aware that Flynn had an employment agreement with Fox that contained a specified term that had not expired. On August 9, 2016, Netflix agreed in writing to defend and indemnify Flynn from and against any action by Fox taken in connection with her acceptance of Netflix's offer of employment ("Flynn Indemnification Agreement"). (Netflix's Response to Fox's SS, pg. 28, No. 18.) Netflix paid for Pennington Lawson LLP to represent Flynn. (Netflix's Response to Fox's SS, pgs. 28-29, No. 19.) Netflix doubled Flynn's salary. (Netflix's Response to Fox's SS, pgs. 29-30, No. 20.) Flynn stopped working at Fox on September 2, 2016. (Netflix's Response to Fox's SS, pg. 30, No. 21.) Prior to September 2, 2016, Netflix was aware the Flynn Agreement recited a term that ended on November 18, 2017. (Netflix's Response to Fox's SS, pgs. 30-31, DRSS No. 22.) On September 6, 2016, Flynn started working at Netflix. (Netflix's Response to Fox's SS, pg. 34, No. 24.)

E. Analysis

1. Complaint

a. Inducing Breach of the Waltenberg Agreement (1st COA) by TCFFC

"'The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' [Citation]" (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 55.) "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage [Citation], it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. [Citation]" (Id.)

TCFFC submitted evidence proving each element of the inducing breach of the Waltenberg Agreement cause of action against Netflix. (See C.C.P. §437c(p)(1).) TCFFC submitted evidence showing the existence of an agreement with Waltenberg. It is undisputed that Fox and Waltenberg executed the Waltenberg Agreement and, pursuant to Paragraph 1(a) of the agreement, TCFFC agreed to employ Waltenberg for a period of two years, from January 1, 2015 to December 31, 2016 ("Term"). TCFFC also submitted evidence suggesting Netflix was aware of the Waltenberg Agreement, Netflix engaged in intentional acts designed to induce breach or disruption of the Waltenberg Agreement, and there was an actual breach or disruption of the Waltenberg Agreement. It is undisputed that Netflix was aware, prior to November 6, 2015, that Waltenberg had an employment agreement with Fox that contained a specified term that had not expired, Netflix sent an Offer Letter to Waltenberg on November 6, 2015, Waltenberg executed the Offer Letter on November 7, 2015, Netflix agreed in writing, on December 16, 2015, to defend and indemnify Waltenberg from and against any action by Fox taken in connection with his acceptance of Netflix's offer of employment, Netflix paid for Pennington Lawson LLP to represent Waltenberg, Netflix more than doubled Waltenberg's salary, Waltenberg stopped working at Fox on January 22, 2016, Netflix was aware, prior to January 22, 2016, the Waltenberg Agreement recited a term that ended on December 31, 2016, and Waltenberg started working at Netflix on January 25, 2016.
Additionally, TCFFC submitted evidence suggesting it suffered resulting damages. Specifically, TCFFC submitted evidence suggesting it had to pay a consultant (Hugo Domenech) to assume some of Waltenberg's duties while it searched for a replacement and to otherwise assist with the transition. (Fox's SS, pg. 11, No. 11.)

Based on the foregoing, TCFFC met its burden on summary judgment/adjudication. Therefore, the burden shifts to Netflix to create a triable issue of material fact. As discussed below in detail, Netflix met its burden.

Netflix submitted evidence showing a triable issue of material fact exists as to resulting damages. Netflix submitted evidence suggesting TCFFC saved time and money by promoting Castillo to Waltenberg's position because TCFFC did not have to train someone from the outside and paid Castillo significantly less than Waltenberg. (Netflix's Response Fox's SS, pgs. 12-15, 11.) (Opposition, pg. 14, fn. 18.) Netflix also submitted evidence challenging TCFFC's claim of a loss/decrease in millions of dollars in promotional support. (Netflix's Response to Fox's SS, pgs. 12-15, No. 11.) The Executive Summary Marketing Partnerships Promotions sheet (Exhibit 92) shows $7,525,819 in partner advertising support ("ATL Value") secured for "Home," $5 million of which was from a "Global" (not Latin America specific) McDonald's deal, rather than the $17 million Roca testified Waltenberg secured. (Fox's SS No. 11.) (Netflix's Response to Fox's SS, pgs. 12-15, No. 11.) (Caro Exhibit 92.) Breen testified that the amount of money that brands spend on promotions does not impact how much money Fox spends on its own marketing of its movies. (Netflix's Response to Fox's SS, pgs. 12-15, No. 11.) (Caro Exhibit 1.)

TCFFC's request for $1 in damages does not save the motion for summary judgment/adjudication because, as discussed above, there is a triable issue of material fact as to whether Plaintiffs suffered any resulting damages, which cannot be determined via the instant motion.

Netflix argues it was not a substantial factor in causing an alleged breach of the Waltenberg Agreement. (Opposition, pg. 14.) Netflix cites to Yanez v. Plummer (2013) 221 Cal.App.4th 180, 187, for the proposition that "conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (Opposition, pg. 14.) Netflix argues the evidence shows Waltenberg would have left TCFFC before his contract ended even without a job offer from Netflix. (Opposition, pg. 14.) However, Netflix did not submit admissible evidence showing the same harm would have occurred without that conduct – that Waltenberg would have left TCFFC before the Term on his agreement expired and/or on the same date he left TCFFC.

Netflix also argues its conduct was not designed to induce a breach of the Waltenberg Agreement because Netflix expected Waltenberg to be let out of his contract. (Opposition, pgs. 13-14.) However, in light of the undisputed facts set forth above, the evidence cited by Netflix does not create a triable issue of material fact as to interference or causation.

Netflix contends there are many factual disputes as to whether Fox's contracts, including the Waltenberg and Flynn Agreements, are valid and enforceable. (Opposition, pgs. 10-13.) Netflix argues Fox's Fixed-Term Employment Agreements violate Business & Professions Code §16600

and "California's 'settled legislative policy in favor of open competition and employee [mobility].'" (Opposition, pgs. 10-13, 17-20.) (See Business & Professions Code §16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").) However, Netflix's reliance on Business & Professions Code §16600 is misplaced. The injunctive relief provisions in the Fixed-Term Employment Agreements, which are set forth in the Court's ruling on Netflix's motion for summary adjudication, are irrelevant to the injunctive relief Fox seeks in this action. Fox represents it "does not seek, and has never sought, injunctive relief against Flynn or Waltenberg" and "has never sought injunctive relief against any breaching employee." (Reply, pgs. 6-7.) Moreover, the injunctive relief provisions in the Fixed-Term Employment Agreements do not violate the statute. Business & Professions Code §16600 does not "affect limitations on an employee's conduct or duties while employed." (Angelica Textile Services, Inc. v. Park (2013) 220 Cal.App.4th 495, 509.) The injunctive relief provisions are essentially limitations on the employees' conduct or duties while employed. The provisions refer to injunctive relief to prevent a breach of the agreements, which suggest the provisions apply while the employees are still employed (i.e. before any breach occurs). Moreover, as argued by Fox, the injunctive relief provisions do not, in fact, restrain anyone. Fox, by way of the injunctive relief provisions, merely reserved the right to seek injunctive relief. (Motion, pg. 21.)

Even assuming, arguendo, the injunctive relief provisions in the Fixed-Term Employment Agreements violate Business & Professions Code §16600 and/or are void for any other reasons, the Fixed-Term Employment Agreements are still valid as to the remaining lawful terms. The injunctive relief provisions are collateral to the main purpose of the Fixed-Term Employment Agreements, which is to employ the employees for specified terms and at set levels of compensation. (See Civil Code §1599 ("Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.").) (See also Winston Research Corp. v. 3 M (9th Cir. 1965) 350 F.2d 134, 140, fn. 4 ("The employment agreements contained a provision restricting the right of the employee to work for a competitor of Mincom after termination of employment, contrary to Cal.Bus. & Prof.Code § 16600. But as the district court held, under California law the void provision was severable and the remainder of the contract fully enforceable. [Citation] As we note later, we also agree with the district court that in the circumstances of this case use in California of contracts containing this unenforceable provision did not require the court to deny Mincom equitable relief for unclean hands.").)

Netflix also appears to argue the Fixed-Term Agreements are tainted with illegality and, therefore, cannot be enforced. (Opposition, pgs. 12-13.) (See Armendariz v. Foundation Health

Psychcare Services, Inc. (2000) 24 Cal.4th 83, 124 ("The basic principles of severability that emerge from Civil Code section 1599 and the case law of illegal contracts appear fully applicable to the doctrine of unconscionability. Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.").) Netflix contends the Flynn and Waltenberg Agreements "contain an explicit restraint: the injunctive relief provision that purports to entitle Fox to enjoin Flynn and Waltenberg from working anywhere but Fox" and argues "Fox can only support this restriction by falsely characterizing Flynn's and Waltenberg's services are 'of a special, unique, unusual, extraordinary, and intellectual character' – a representation with a specific and narrow meaning under California law that does not apply here." (Opposition, pg. 12.) (See Civil Code §3423(e) and C.C.P. §526(b)(5).)

Netflix, relying on Latona v. Aetna United States Healthcare (C.D. Cal. 1999) 82 F.Supp.2d 1089, argues severance is unavailable because Fox "uses contracts to 'control' its employees by preventing them from exploring other opportunities or testing their market value to improve their negotiating position" and the "unlawful and misleading contract terms, including the injunctive relief provision, further that overall purpose by creating an in terrorem effect on Fox employees who, fearing litigation and 'tend[ing] to assume that the contractual terms proposed by their employer…are legal, if draconian,' will not test the provision by attempting to leave Fox." (Opposition, pgs. 12-13.)

Latona involved a "Non-Compete and Confidentiality Agreement" ("Agreement"). (Id. at 1090.) The Agreement contained a non-compete clause, anti-solicitation clause, and confidentiality clause. (Id. at 1091.) Aetna asked its employees to sign the agreement, the plaintiff refused, and Aetna terminated plaintiff's employment. (Id. at 1090-1091.) The plaintiff sued Aetna for violating Business & Professions Code §16600. The United States District Court determined the exceptions to Business and Professions Code §16600 did not apply. (Id. at 1094-1096.) The court also noted:

…defendant's argument, that the Agreement cannot violate public policy because even if unenforceable, it is simply a nullity, ignores the realities of the marketplace. As between Aetna and an individual employee, the company is in an infinitely better position to acquaint itself with the applicable laws, and to know whether the non-compete clause violates section 16600. Employees, having no reason to familiarize themselves with the specifics of California's employment law, will tend to assume that the contractual terms proposed by their employer

(especially one of Aetna's magnitude) are legal, if draconian. Furthermore, even if they strongly suspect that a non-compete clause is unenforceable, such employees will be reluctant to challenge the legality of the contractual terms and risk the deployment of Aetna's considerable legal resources against them. Thus, the in terrorem effect of the Agreement will tend to secure employee compliance with its illegal terms in the vast majority of cases. Prospective future employers, too, may be reluctant to hire Aetna's workers; even if secure in the knowledge of the unenforceability of Aetna's non-compete clause, these employers may well wish to avoid the expense and energy of defending a lawsuit in which they are likely to be joined. [Citations] In this way Aetna will be able to stifle marketplace competition for its human capital. This outcome is clearly in derogation of the fundamental public policy interests that section 16600 was intended to advance.

(Id. at 1096-1097.) The court determined the severability clause did not save the Agreement. The court noted "Aetna has emphasized throughout the litigation, the contract was never signed, Ms. Latona enjoyed no benefit from it, and Aetna never sought to enforce it against her." (Id. at 1097.) The court recognized the case presented "a wholly different issue: whether an employer may fire an employee for refusing to sign an agreement containing provisions in direct violation of public policy, then escape liability for wrongful termination on the grounds that the other provisions of the agreement were inoffensive." The court answered "no." (Id.) The court stated "Aetna never gave plaintiff the option of signing only a portion of the Agreement," she "was required to sign it in its entirety, complete with the illegal provisions," Aetna could have revised the Agreement but did not, Aetna presented the Agreement to the plaintiff as a "take it or leave it" proposition," and, when she declined, Aetna fired her. The court ruled Aetna could not be relieved "of liability for a wrongful termination on the ground that if it had excised the offensive portions of the Agreement, plaintiff would have had no grounds to object to signing it." (Id.) The court found "that the unenforceability of the Agreement [could not] be saved by the severability clause." (Id. 1097-1098.)

However, Netflix's reliance on Latona is misplaced. The case is distinguishable and is not binding on this court. As set forth above, the issue before the court in Latona was "whether an employer may fire an employee for refusing to sign an agreement containing provisions in direct violation of public policy, then escape liability for wrongful termination on the grounds that other provisions of the agreement were inoffensive." (Id. at 1097.) The instant action does not involve the wrongful termination of an employee for refusing to sign an agreement containing provisions that violate public policy. Rather, the instant action involves signed Fixed-Term Employment Agreements. There is no dispute that Flynn and Waltenberg executed the agreements with Fox. Moreover, the dispute in this action does not involve non-compete and/or

anti-solicitation clauses. The Fixed-Term Employment Agreements contain injunctive relief provisions, which Netflix claims are invalid. Further, as discussed above, the injunctive relief provisions in the Fixed-Term Employment Agreements, unlike the Agreement in Latona, apply while the employees are still employed and do not, in fact, restrain anyone. Also, as discussed above, the injunctive relief provisions in the Flynn and Waltenberg Agreements are collateral to the main purpose of the Fixed-Term Employment Agreements, which is to employ the employees for specified terms and at set levels of compensation.

Additionally, Netflix did not submit admissible evidence suggesting Fox included the injunctive relief provisions in contracts for employees that were not providing services of a special, unique, unusual, extraordinary, and intellectual character in order to mislead the employees as to their legal rights and/or enjoin them from working anywhere other than Fox. The fact that Fox included the injunctive relief provisions in their Fixed-Term Employment Agreements is insufficient to render the entire agreements unenforceable, especially considering Fox represents it "does not seek, and has never sought, injunctive relief against Flynn or Waltenberg" and "Fox has never sought injunctive relief against any breaching employee." (Reply, pgs. 6-7.) (See Winston Research Corp. at 141.)

Netflix argues its conduct was justified. (Opposition, pgs. 19-20.) Netflix argues Fox ignored its justification defense, which provides another basis to deny the motion for summary judgment/adjudication. (Opposition, pg. 19.) According to Netflix, its "recruitment and hiring of Flynn and Waltenberg – and its pursuit of qualified candidates for any given position – vindicates California's well-established public policy in favor of 'open competition and employee mobility'" and there are disputed issues of material fact as to "whether the nature of Netflix's conduct, weighted against Fox's contracts and their effect on mobility and labor market competition, justify any alleged interference with contract." (Opposition, pg. 19.) However, Fox was not required to address Netflix's justification defense to meet its moving burden on summary judgment/adjudication (on the complaint). (See C.C.P. §437c(p)(1) ("A plaintiff….has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action.").) Moreover, the undisputed facts show Netflix intentionally interfered with the Waltenberg and Flynn Agreements and Netflix's "stake in advancing [its] economic interest will not justify the intentional inducement of a contract breach…" (See Environmental Planning & Information Council v. Superior Court (1984) 36 Cal.3d 188, 193-194 ("The contours of justification, or privilege, are not precisely defined. In relation to the tort of interference with contract, we have said: 'Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the

interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties.' [Citation] When the defendant's action does not interfere with the performance of existing contracts, the range of acceptable justification is broader; for example, a competitor's stake in advancing his own economic interest will not justify the intentional inducement of a contract breach [Citation], whereas such interests will suffice where contractual relations are merely contemplated or potential. [Citation]").) (See also Imperial Ice Co. v. Rossier (1941) 18 Cal.2d 33, 36 ("It is well established…that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. [Citation] Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom.").) There can be no dispute that Netflix, by virtue of its "entry into original content production," was in effect competing with Fox. (Opposition, pg. 1.) (See also Netflix's X-C ¶¶11-14.) The undisputed facts show Netflix intentionally interfered with Fox's contracts with Waltenberg and Flynn. In doing so, Netflix arguably sought to further its own economic interest at Fox's expense and such conduct is not justified.

In light of the court's ruling, Fox's motion for summary judgment is denied. Based on the foregoing, TCFFC's motion for summary adjudication of the inducing breach of the Waltenberg Agreement cause of action is denied.

b. Inducing Breach of the Flynn Agreement (2nd COA) by Fox 21

Fox 21 did not submit evidence proving each element of the inducing breach of the Flynn Agreement cause of action against Netflix. (See C.C.P. §437c(p)(1).) Fox 21 submitted evidence showing the existence of an agreement with Flynn. It is undisputed that Fox 21 and Flynn executed the Flynn Agreement and, pursuant to Paragraph 1 of the Flynn Agreement, Fox 21 agreed to employ Flynn for a period of two years from November 19, 2015 to November 18, 2017. Fox 21 also submitted evidence suggesting Netflix was aware of the Flynn Agreement, engaged in intentional acts designed to induce breach or disruption of the Flynn Agreement, and there was an actual breach or disruption of the Flynn Agreement. It is undisputed that Netflix sent a written offer of employment to Flynn on August 8, 2016, Netflix was aware, prior to August 8, 2016, Flynn had an employment agreement with Fox that contained a specified term that had not expired, Netflix agreed in writing, on August 9, 2016, to defend and indemnify Flynn from and against any action by Fox taken in connection with her acceptance of Netflix's offer of employment, Netflix paid for Pennington Lawson LLP to represent Flynn, Netflix

doubled Flynn's salary, Flynn stopped working at Fox on September 2, 2016, Netflix was aware, prior to September 2, 2016, the Flynn Agreement recited a term that ended on November 18, 2017, and Flynn started working at Netflix on September 6, 2016.
However, Fox 21 did not submit admissible evidence showing resulting damages. Fox 21 appears to assume actual damages are presumed merely by Flynn's failure to complete her contract terms. However, Fox 21 did no cite to on-point case law or authority to support such a presumption. As to specific damages, Fox's separate statement lists an item of damage under No. 23, suggesting Fox 21 hired Andrew Richley ("Richley"), intending to replace an executive level opening created by Flynn's departure, and paid Richley a higher salary than Flynn. However, this is too tenuous to support summary adjudication because the evidence also shows Richley did not replace Flynn directly in that it was a different position and Flynn's department was terminated. (Fox's Separate Statement, pg. 21, No. 23 – Declaration of Lens ¶¶53 and 75; Exhibits 52 and 74.)

Based on the foregoing, the court finds Fox 21 did not meet its burden on summary judgment/adjudication to show damages on the second cause of action

In any event, Netflix submitted evidence showing a triable issue of material fact exists as to resulting damages. Netflix submitted evidence suggesting Fox 21 never actually replaced Flynn and there is no evidence of monetary harm. (Netflix's Response to Fox's SS, pgs. 31-32, No. 23.) (Opposition, pg. 14, fn. 18.) Barron testified she has not performed an analysis to determine whether there has been a decline in revenues attributed to Fox 21 since the fall of 2016 and such an analysis would not be useful because Flynn "had nothing to do with revenues. She had more to do with the cost side of it." (Netflix's Response to Fox's SS, pgs. 31-32, No. 23.) Barron also testified she does not believe Fox 21 has replaced Flynn, she is not aware of any disruption to Fox 21's financial planning, long-range plans, as a result of Flynn's departure, and she is not generally aware of any effect on Fox 21 as a result of Flynn's departure (unless someone wanted to bring it up to her). (Netflix's Response to Fox's SS, pgs. 31-32, No. 23.) (Deposition of Barron 202:25-203:25.) Fan testified Flynn was never replaced, no one ever confirmed for Fan the person to whom she would be reporting, and "[they] just made sure the job was done and persevered." (Netflix's Response to Fox's SS, pgs. 31-32, No. 23.) (Deposition of Fan 106:16-108:5.)

Fox 21's request for $1 in damages does not save the motion for summary judgment/adjudication because there is a triable issue of material fact as to whether Fox 21 suffered any damage, which cannot be determined via the instant motion.

Netflix argues it was not a substantial factor in causing an alleged breach of the Flynn Agreement. (Opposition, pg. 14.) Netflix argues the evidence shows Flynn would have left Fox 21 before her contract ended even without a job offer from Netflix. (Opposition, pg. 14.) However, Netflix did not submit admissible evidence to show the same harm would have occurred without that conduct – that Flynn would have left Fox 21 before the Term on her agreement expired and/or on the same date she left Fox 21.

Netflix also argues its conduct was not designed to induce a breach of the Flynn Agreement because Netflix "was content to speak with her about a future hire and deferred to her as to how she wanted to proceed." (Opposition, pgs. 13-14.) However, in light of the undisputed facts set forth above, the evidence cited by Netflix does not create a triable issue of material fact as to interference or causation.

The court notes Netflix appears to argue the Fixed-Term Employment Agreements, including the Flynn Agreement, violate the 7-year rule under Labor Code §2855. (Opposition, pgs. 5, 8.) The evidence before the Court shows Flynn signed the first agreement on October 25, 2012. ("September 2012 Agreement"). The September 2012 Agreement identifies the term of employment as two years – from September 10, 2012 to September 9, 2014, with one option for an additional year – from September 10, 2014 to September 9, 2015. The September 2012 Agreement identifies Flynn's position as Director, Creative, and sets forth the following compensation schedule: (1) 80,000 per annum for the first twelve months; (2) $85,000 per annum for the second twelve months; and (3) $92,500 per annum for the one-year option period. (Fox's SS – No. 13.) (Netflix's Response to Fox's SS, pgs. 20-25, No. 13, citing Exs. 59 - 62.) Flynn signed the second agreement on November 20, 2013 ("November 2013 Agreement"). The November 2013 Agreement states it supersedes any and all prior agreements and identifies the term of two years – from November 19, 2013 to November 18, 2015, with one option for an additional two years – from November 19, 2015 to November 18, 2017. The November 2013 Agreement identifies Flynn's position as Executive Director, Creative, and sets forth the following compensation schedule: (1) $95,000 per annum for the first twelve months; (2) $127,500 per annum for the second twelve months; and (3) $135,000 per annum for the first twelve months of the option period and $145,000 per annum for the second twelve months of the option period; and (4) a car allowance in the amount of $7,200. Id. Fox 21 exercised its option in the November 2013 Agreement. Id. As of November 19, 2015, Flynn and Fox 21 amended the November 2013 Agreement, as follows: (1) $190,000 per annum for the first twelve months of the option period and $200,000 per annum for the second twelve months of the option period and (2) one additional two-year option. Id.

However, the Labor Code contemplates that an employee and employer can, under certain circumstances, enter into an employment contract for a "specified term." Also, Netflix did not establish that all of Fox 21's agreements with Flynn are void. Netflix did not identify or analyze Fox 21's contracts and amendment with Flynn and/or the terms of the contracts and amendment. Netflix merely argued, in a footnote, that "Flynn's contract is also invalid because it extends beyond the seven-year limit for personal services contracts." (Opposition, pg. 13, fn. 17.) While Fox 21 concedes the agreements and amendment entered into with Flynn (set forth above) "could have led" to a more than seven-year term in violation of Labor Code §2855, Fox 21 represents it "never executed the Flynn Option." (Reply, pg. 6, fn. 5.) The question before the court is whether the unexercised options in the Amendment to the November 2013 Agreement render the November 2013 Agreement void or merely render the Amendment or options (to the extent they result in a term exceeding seven years) void. Netflix did not adequately address this issue. Netflix, relying on Kirkland v. Golden Boy Promotions, Inc. 2013 WL 12132028, argues the fact that "Flynn had not reached seven years when she left does not matter" because, where, "as here, the central purpose of a contract extension is to bind the employee beyond the maximum period under law, the contract is void." (Opposition, pg. 13, fn. 17.) As discussed below, Kirkland does not support Netflix's argument. Instead, Kirkland suggests the option may be void, not the November 2013 Agreement.

In Kirkland, the United States District Court concluded the Promoter Agreement itself was not unenforceable under 4 C.C.R. §222 (with the exception of the extension provisions, which are severable) even though the Contract Extension, "which was meant to extend the term of the original Promoter Agreement," was illegal under §222 because the "sole and central purpose of the Contract Extension was to form a contract for a period exceeding five years." (Id. at 4-6.) (Emphasis Added.)

An argument can be made that the November 2013 Agreement is not void. If the central purpose of the November 2013 Agreement was to employ Flynn for a term of two years, with one option for an additional two-year term, at set compensation, the purpose would be lawful. That purpose would not be dependent on extension of the Flynn-Fox 21 relationship beyond the seven-year period permitted by Labor Code §2855. Assuming, for purposes of the instant motion only, that the Amendment is a contract extension that was meant to extend the term of the November 2013 Agreement and the sole and central purpose of the Amendment was illegal under Labor Code §2855, under the reasoning in Kirkland, the Amendment would be void, not the November 2013 Agreement. The undisputed facts show Flynn stopped working at Fox 21 on September 2, 2016, which was during the option term set forth in the November 2013 Agreement and before the (unexercised) option term in the amendment to the November 2013 Agreement.

Additionally, the statute itself suggests the November 2013 Agreement would not be void. Labor Code §2855(a), by its plain terms, states a contract to render personal service "may not be enforced against the employee beyond seven years from the commencement of service under it."

Netflix did not explain how the Flynn Agreement is void and/or cite to on-point case law or authority to support a finding that the November 2013 Agreement is void because an Amendment to the agreement contains unexercised options that would arguably extend the total term beyond seven years. Netflix also did not establish Fox's other Fixed-Term Employment Agreements violate the seven-year rule. Even assuming, arguendo, some of Fox's Limited-Term Employment Agreements violate the seven-year rule, it would not preclude Fox from seeking an injunction with respect to the Limited-Term Employment Agreements that do not violate the seven-year rule.
Based on the foregoing, Fox 21's motion for summary adjudication of the inducing breach of the Flynn Agreement cause of action is denied.

c. Unfair Competition in Violation of Business & Professions Code §17200 (3rd COA) by Plaintiffs

Business & Professions Code §17204 provides, as follows: "Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Emphasis Added.)

To satisfy the standing requirements under the UCL, a party must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." (Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 322.) (See also Law Offices of Mathew Higbee v. Expungement Assistance Services (2013) 214 Cal.App.4th 544, 555-556 ("Proposition 64 amended section 17204 to provide that no private party has standing to prosecute a UCL action unless he or she 'has

suffered injury in fact and has lost money or property as a result of the unfair competition.' [Citations] 'To satisfy the narrower standing requirements imposed by Proposition 64, a party must now … establish a loss or deprivation of money or property sufficient to qualify as an injury in fact, i.e., economic injury…' [Citation]").)

Business & Professions Code §17203 provides, as follows: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state."

Injunctive relief under the UCL "requires a threat that the misconduct to be enjoined is likely to be repeated in the future." (Madrid v. Perot Systems Corp. (2005) 130 Cal.App.4th 440, 465.)

Fox argues "Netflix tortiously interfered with Fox's specified term employment contracts with Waltenberg and Flynn," the "first two causes of action establish that Netflix has engaged in an unlawful business practice under Section 17200," and "Fox is entitled to an injunction for 'threatened future harm or [a] continuing violation.'" (Motion, pgs. 17-19.)

However, there is a triable issue of material fact as to whether Fox suffered resulting economic injury and thus has standing to seek injunctive relief. As discussed above in detail, there is a triable issue of material fact as to resulting damages with respect to the inducing breach of Waltenberg Agreement. Also, as discussed above, Fox 21 did not submit admissible evidence showing it sustained resulting damages, and, in the alternative, there is a triable issue of material fact as to resulting damages with respect to the inducing breach of Flynn Agreement cause of action.

Based on the foregoing, Fox's motion for summary adjudication of the unfair competition in violation of Business & Professions Code §17200 cause of action is denied.

2. Cross-Complaint

a. Violation of Business & Professions Code §17200 (1st COA)

As discussed above and in the court's ruling on Netflix's motion for summary adjudication, the injunctive relief provisions in the Fixed-Term Employment Agreements do not violate Business & Professions Code §16600 because the provisions appear to apply while the employees are still employed and do not, in fact restrain anyone, and, even assuming, arguendo, the injunctive relief provisions in the Fixed-Term Employment Agreements violate Business & Professions Code §16600 and/or are void for any other reasons, the Fixed-Term Employment Agreements are still valid as to the remaining lawful terms

It is not clear from the allegations in the cross-complaint or Netflix's opposition (see pg. 20) that Netflix's cause of action for violation of Business & Professions Code §17200 is based on Fox's alleged violations of Labor Code §2855. Netflix alleges Fox's Fixed-Term Employment Agreements are "unlawfully restrictive" because they require the employees to work exclusively for Fox for a specified term of years, they secure the exclusive and unilateral right to extend the length of employment for an additional number of years, and they include provisions that unlawfully purport to allow Fox to seek injunctive relief or equitable relief to prevent a breach of the agreements. (X-C ¶15.) Netflix alleged "Fox effectively seeks to prevent its employees from leaving Fox to work for competitors before the end of the agreement's term." (X-C ¶15.) Netflix alleged the "unreasonable terms and conditions of Fox's fixed-term employment contracts, coupled with Fox's selective and abusive enforcement tactics, create a deterrent effect that restrains employee mobility, artificially suppresses compensation, and stifles competition in violation of California law." (X-C ¶19.) Netflix alleged the Waltenberg Agreement and the Flynn Agreement are examples of "Fox's unlawful behavior." (X-C ¶20.) Netflix also alleged the Fixed-Term Employment Agreements violate Business & Professions Code §16600, are anti-competitive, and create a form of involuntary servitude. (X-C ¶¶24-25, 28-32.) Netflix's mere reference to Labor Code §2855 in the cross-complaint is insufficient to allege one or more contracts violate the seven year rule. (X-C ¶26.) Moreover, it is unclear whether Netflix's violation of Business & Professions Code §17200 cause of action can properly be based on alleged violations of Labor Code §2855.

Based on the foregoing, the court treats Fox's motion for summary adjudication of the violation of Business & Professions Code §17200 cause of action as a motion for judgment on the pleadings, which is granted with leave to amend. (See Prue v. Brady Co./San Diego, Inc. (2015) 242 Cal.App.4th 1367, 1375-1376, and American Airlines, Inc. v. County of San Mateo (1996)

12 Cal.4th 1110, 1117-1118.)

b. Declaratory Relief (2nd COA)

A cause of action for declaratory relief requires the following elements: (1) person interested under a written instrument or a contract; or (2) a declaration of his or her rights or duties (a) with respect to another or (b) in respect to, in, over or upon property; and (3) an actual controversy. (C.C.P. §1060.)

"For declaratory relief, the party must show it either has suffered or is about to suffer an injury of 'sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.' [Citation]" (Stonehouse Homes LLC v. City of Sierra Madre (2008) 167 Cal.App.4th 531, 542.)

"[D]eclaratory relief operates prospectively only, rather than to redress past wrongs…" (Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388, 1404.)

Netflix alleged there is an actual controversy between the parties "concerning their respective rights and duties with respect to Fox's fixed-term employment agreements and efforts to unlawfully restrict or prevent Netflix from recruiting, hiring, and/or employing Fox's current and former California employees." (X-C ¶34.) Netflix alleged "Fox's fixed-term employment agreements with Waltenberg and Flynn, and upon information and belief, with other Fox employees, unlawfully restrain them from their right to pursue lawful employment with Netflix," in direct violation of Business & Professions Code §16600. (X-C ¶35.) Netflix alleged a judicial declaration is necessary at this time as it has established employment relationships with former employees of Fox (Waltenberg and Flynn) and wishes to continue those relationships and it "wishes to compete fairly to employ other Fox employees and is denied the opportunity due to Fox's continued use of the unlawful fixed-term employment agreement." (X-C ¶36.) Netflix requests a "judicial declaration that Fox's enforcement of fixed-term employment agreements, arising from employment of Mr. Waltenberg and Ms. Flynn, and other Fox employees that Netflix may seek to employ, be found unlawful under California law." (X-C ¶37.) Netflix also requests a "judicial determination of Netflix's rights to recruit, hire and/or retain Fox's current and former employees who are subject to fixed-term employment agreements." (X-C ¶38.) As discussed above and in the court's ruling on Netflix's motion for summary adjudication, the injunctive relief provisions in the Fixed-Term Employment Agreements do not violate Business & Professions Code §16600 because the provisions appear to apply while the employees are still employed and do not, in fact restrain anyone, and, even assuming, arguendo, the injunctive relief

provisions in the Fixed-Term Employment Agreements violate Business & Professions Code§16600 and/or are void for any other reasons, the Fixed-Term Employment Agreements are still valid as to the remaining lawful terms.

It is unclear both from the cross-complaint and Netflix's opposition (see pg. 20) whether this cause of action is based in any way on an alleged violation of the seven year rule. Netflix's mere reference to Labor Code §2855 in the cross-complaint is insufficient to allege one or more contracts violate the seven year rule.

Based on the foregoing, the court treats Fox's motion for summary adjudication of the declaratory relief cause of action as a motion for judgment on the pleadings, which is granted with leave to amend.

3. First Amended Answer

a. Violation of Public Policy (3rd AD)

Netflix asserts violation of public policy as the third affirmative defense in its first amended answer. Netflix alleged "Plaintiffs' claims are barred by the fact that they allege Netflix has induced breach of contracts that are void as against public policy." (FAA, pg. 2.) However, it is unclear from the first amended answer and Netflix's opposition (see pgs. 16-17, §D.1) whether this defense is based on anything other than Business & Professions Code §16600. In the first amended answer, Netflix did not identify the "public policy" at issue and/or allege facts to show the Fixed-Term Employment Agreements violate public policy. Answers must plead a factual basis for defenses, just as complaints must for causes of action. (See C.C.P. §431.30(b) ("The answer to a complaint shall contain…(2) A statement of any new matter constituting a defense.").) (See also FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 384 ("That brings us to the allegations of new matter. Numerous defenses were purportedly raised by defendants' allegations of affirmative defense. Most of these allegations fail to state a defense even when liberally construed in defendants' favor. [Citation] Some are simply immaterial. For example, defendants allege as a conclusion that plaintiff's claim is barred by laches, an equitable defense that has no application to the plaintiff's legal claim. [Citation] All of the allegations are proffered in the form of terse legal conclusions, rather than as facts 'averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint.' [Citation] The only affirmative defenses that are mentioned in the summary judgment proceedings, fraud in the inducement and failure of consideration, are not well pled, consisting of legal conclusions, and would not have survived a demurrer.

[Citations]").)

Consequently, the court treats Fox's motion for summary adjudication of the violation of public policy affirmative defense as a motion for judgment on the pleadings, which is granted with leave to amend.

b. Unconscionability (24th AD)

Netflix asserts unconscionability as the twenty-fourth affirmative defense in its first amended answer. Netflix alleged "that each of the contracts for which Plaintiffs allege Netflix has induced a breach or may induce a breach in the future are unconscionable and therefore unenforceable." (FAA, pg. 6.) However, Netflix did not allege "ultimate facts demonstrating" the Fixed-Term Employment Agreements are unconscionable. (IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal.App.3d 451, 460.)
Based on the foregoing, the court treats Fox's motion for summary adjudication of Netflix's unconscionability affirmative defense as a motion for judgment on the pleadings, which is granted with leave to amend.

F. Conclusion

Fox's motion for summary judgment on the complaint is denied. Fox's motion for summary adjudication of the inducing breach of the Waltenberg Agreement, inducing breach of the Flynn Agreement, and unfair competition in violation of Business & Professions Code §17200 causes of action is denied.

The court treats Fox's motion for summary judgment/adjudication on Netflix's cross-complaint as a motion for judgment on the pleadings, which is granted with leave to amend.

The court treats Fox's motion for summary adjudication of Netflix's violation of public policy and unconscionability affirmative defenses as a motion for judgment on the pleadings, which is granted with leave to amend.

SC126423 June 5, 2019
TWENTIETH CENTURY FOX FILM CORP., ET AL. VS. 9:30 AM
NETFLIX, INC.

Judge: Honorable Marc D. Gross
Judicial Assistant: P. Anyankor
Courtroom Assistant: A. Wiggins
CSR: Alise Harrington, #11392
ERM: None
Deputy Sheriff: None

Dated: June 5, 2019

Hon. Judge Marc D. Gross
Judge of the Superior Court

**********END OF TENTATIVE RULING**********

Defendant Netflix, Inc.'s motion for summary adjudication is denied.

Defendant Netflix, Inc. ("Defendant" or "Netflix") moves for summary adjudication of the 3rd cause of action (for unfair competition in violation of Business & Professions Code §17200) in the complaint filed by Plaintiffs Twentieth Century Fox Film Corporation ("TCFFC") and Fox 21, Inc. ("Fox 21") (collectively "Plaintiffs" or "Fox") on the ground that Fox "is not entitled to a blanket injunction preventing Netflix from recruiting and hiring Fox's employees whom Fox legally could not enjoin directly."

A. Background

1. Complaint

On September 16, 2016, Plaintiffs filed a complaint against Netflix, alleging causes of action for inducing breach of the Waltenberg Agreement, inducing breach of the Flynn Agreement, and unfair competition in violation of Business & Professions Code §17200.

Plaintiffs alleged TCFFC entered into a Fixed-Term Employment Agreement with Marcos Waltenberg ("Waltenberg"), effective as of December 9, 2014 ("Waltenberg Agreement"), Waltenberg, as a material condition of his employment with TCFFC, agreed to perform his duties as Vice President, Promotions, at least through December 31, 2016, Netflix knew about the Waltenberg Agreement, including that Waltenberg agreed to work with TCFFC for a specified term that had not yet expired, during its recruitment and solicitation of Waltenberg, Netflix committed intentional acts designed to induce Waltenberg to breach the Waltenberg Agreement by offering Waltenberg employment, recruiting and soliciting Waltenberg, hiring Waltenberg, and indemnifying Waltenberg for claims arising from his breach of the Waltenberg Agreement, Waltenberg materially breached the Waltenberg Agreement in January 2016, as a result of Netflix's tortious interference, by ending his employment with TCFFC and failing to perform his duties through the agreed-upon term, and TCFFC suffered damages as a result of

Netflix's conduct. (Complaint ¶¶8-10, 23-31.)

Plaintiff also alleged Fox 21 entered into a Fixed-Term Employment Agreement with Tara Flynn, effective as of November 19, 2013 ("Flynn Agreement"), Flynn, as a material condition of her employment with Fox 21, agreed to perform her duties as Executive Director, Creative, and then Vice President, Creative, through an initial term ending November 19, 2015, at Fox 21's election, an additional two-year period ending November 18, 2017, and an additional two-year period, pursuant to amendment, ending November 18, 2019, Netflix knew about the Flynn Agreement, including that Flynn had agreed to work for Fox 21 for a specified term that had not yet expired, during its recruitment and solicitation of Flynn, Netflix committed intentional acts designed to induce Flynn to breach the Flynn Agreement by offering Flynn employment, recruiting and soliciting Flynn, hiring Flynn, and indemnifying Flynn for claims arising from breach of the Flynn Agreement, Flynn materially breached the Flynn Agreement in August 2016, as a result of Netflix's tortious interference, by ending her employment with Fox 21 and failing to perform her duties through the agreed-upon term, and Fox 21 suffered damages as a result of Netflix's conduct. (Complaint ¶¶12-22, 32-40.)

Plaintiffs alleged Netflix's intentional interference with their Fixed-Term Employment Agreements is an unlawful business act or practice under the Unfair Competition Law ("UCL") and Netflix has unlawfully competed with Plaintiffs by soliciting, recruiting, and inducing Plaintiffs' employees to breach their Fixed-Term Employment Agreements with Plaintiffs. (Complaint ¶¶41-45.) Plaintiffs alleged Netflix is engaged in a brazen campaign to unlawfully target, recruit, and poach valuable Fox executives by illegally inducing them to break their employment contracts with Plaintiffs and to work at Netflix, an injunction is necessary to abate Netflix's continuing threat of unlawfully interfering with Plaintiffs' Fixed-Term Employment Agreements, and Plaintiffs are entitled to injunctive relief against Netflix restraining it from further interfering with any of Plaintiffs' Fixed-Term Employment Agreements. (Complaint ¶¶1, 45.) Plaintiffs prayed for a "permanent injunction enjoining Netflix, and its agents, servants, employees, attorneys, successors and assigns, and all persons, firms and corporations acting in concert with it, from interfering with any of Fox's Fixed-Term Employment Agreements." (Complaint, Prayer 1.)

2. Cross-Complaint

On October 19, 2016, Netflix filed a cross-complaint against Plaintiffs, alleging causes of action for violation of Business & Professions Code §17200 and declaratory relief. Netflix alleged Plaintiffs' use of Fixed-Term Employment Agreements unlawfully restrains Fox

employees from accepting employment elsewhere, including Netflix. (X-C ¶30.) Netflix alleged Plaintiffs engage in the widespread use of unlawfully restrictive Fixed-Term Employment Agreements and require otherwise typically at-will employees to enter into such agreements as a condition of employment or promotion. (X-C ¶15.) Netflix alleged that, pursuant to the Fixed-Term Employment Agreements, Plaintiffs require these employees to work exclusively for Fox for a specified term of years, secure the exclusive and unilateral right to extend the length of employment for an additional number of years, and include provisions that unlawfully purport to allow Fox to seek injunctive or equitable relief to prevent a breach of the agreement. Netflix alleged Plaintiffs, through these restrictive covenants, effectively seek to prevent their employees from leaving to work for competitors before the end of the agreements' term(s). (X-C ¶15.) Netflix alleged the Waltenberg Agreement and Flynn Agreement illustrate Plaintiffs' unlawful behavior – both were subject to Fixed-Term Employment Agreements with additional optionyears that Plaintiffs exercised unilaterally, neither was permitted to negotiate the terms of his or her continued employment upon Plaintiffs' exercise of its option, neither contract falls into the narrow requirements of personal services agreements (such as those that are used for actors, musicians, and celebrities tied to a particular creative project), and Plaintiffs refused to allow termination of the contracts because Flynn and Waltenberg announced they intended to accept jobs with Netflix. (X-C ¶20.) Netflix alleged Plaintiffs' attempt to prevent Waltenberg, Flynn, and any other employee who is subject to a Fixed-Term Employment Agreement with Fox, from seeking or accepting employment from competitors, such as Netflix, is unlawful and constitutes an unfair, unlawful, or fraudulent business practice under the UCL. (X-C ¶¶26-27, 31.)

Netflix seeks a judicial declaration "that Fox's enforcement of fixed-term employment agreements, arising from employment of Mr. Waltenberg and Ms. Flynn, and other Fox employees that Netflix may seek to employ, be found unlawful under California law." (X-C ¶37.) Netflix also seeks a judicial "determination of [its] rights to recruit, hire and/or retain Fox's current and former employees who are subject to fixed-term employment agreements." (X-C ¶38.) Netflix prayed for the following: (1) an order enjoining Fox from continuing to use or enforce Fixed-Term Employment Agreements or other restraints of trade against its employees in California; (2) a declaration that Fixed-Term Employment Agreements with Fox employees are unenforceable under Business & Professions Code §16600, and may not be used to prevent these individuals from seeking employment with other companies, including Netflix; and (3) a declaration that Fox is estopped from enforcing Fixed-Term Employment Agreements to prohibit Fox's employees from employment with other companies, including Netflix. (X-C, Prayer, pgs. 10-11.)

3. First Amended Answer

On July 26, 2018, Netflix filed a first amended answer to Plaintiffs' complaint, asserting several affirmative defenses, including affirmative defenses for violation of public policy and unconscionability. Netflix alleged Plaintiffs' claims are barred by the fact that they allege Netflix has induced breach of contracts that are void as against public policy and unconscionable and, therefore, unenforceable. (FAA, pgs. 2, 6.)

B. Evidentiary Objections

Plaintiffs' corrected evidentiary objections are overruled as to Nos. 1-2 (for failure to comply with CRC 3.1354(b)), sustained as to Nos. 3-6, overruled as to Nos. 7-12 (on the merits), and sustained as to Nos. 13-15.

Netflix's evidentiary objections are sustained as to Nos. 1 and 5 (in part), and overruled as to Nos. 2, 3, 4, 6, 7, 8, 9, 10, and 11.

C. Analysis

Netflix argues the unfair competition in violation of Business & Professions Code §17200 cause of action fails because Plaintiffs are not entitled to a blanket injunction preventing Netflix from recruiting and hiring Fox's employees whom Fox legally could not enjoin directly.

Business & Professions Code §17200 provides, as follows: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Tortious interference with an employment contract can satisfy the "unlawful" prong of UCL claim. (See CRST Van Expedited, Inc. v. Werner Enterprises (9th Cir. 2007) 479 F.3d 1099, 1107 ("CRST's third cause of action alleges that Werner has violated the UCL and seeks an order requiring Werner to cease and desist from 'stealing' CRST employees and requiring Werner to terminate employees wrongfully solicited. The UCL provides a cause of action for parties injured by any 'unlawful, unfair or fraudulent business act or practice' to seek injunctive relief. Cal. Bus. & Prof. Code §§ 17200, 17203, 17204. The California Supreme Court has given the term 'unlawful' a straightforward and broad interpretation: [¶] The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the

same time is forbidden by law…Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. [¶] [Citations] [¶] We conclude that CRST adequately alleged that Werner violated the UCL because CRST adequately alleged that Werner engaged in an 'unlawful' business act or practice that allegedly harmed CRST, namely, intentional interference with CRST's employment contracts. [Citation] First, CRST's allegation of intentional interference by a corporate competitor with the employment contracts CRST had with two of its drivers clearly alleges a business act or practice. [Citation] Second, intentional interference with contract is a tortious violation of duties imposed by law. [Citations] We need go no further to conclude that the district court must be reversed on its dismissal of Count III. We conclude CRST adequately alleged a violation by Werner of the UCL by alleging Werner engaged in an 'unlawful' business practice, to wit, intentional interference with existing contracts of employment.").) (See also Blizzard Entertainment Inc. v. Ceiling Fan Software LLC (C.D. Cal. 2013) 28 F.Supp.3d 1006, 1017 ("The UCL prohibits 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.' [Citation] An act can be alleged to violate any or all of the three prongs of the UCL—unlawful, unfair, or fraudulent. Plaintiff contends Defendants actions are unlawful and unfair. [¶] The UCL prohibits 'unlawful' practices that are forbidden by any law. [Citation] The statute 'borrows' violations of other laws and treats them as actionable. [Citation] A claim under the UCL unlawful prong may be premised upon the unlawful actions that constitute tortious interference with contractual relations. [Citation] [¶] Because the uncontroverted facts establish tortious interference with contractual relations, and because Defendants' actions in designing, licensing, and supporting its botting software can fairly be said to constitute a 'business act or practice,' the uncontroverted facts likewise establish a UCL violation. [¶] Summary judgment in favor of Blizzard is therefore granted as to its UCL claim under the 'unlawful' prong.").)

"Injunctive relief under [Business and Professions Code sections 17203 and 17535 cannot be used…to enjoin an event which has already transpired; a showing of threatened future harm or continuing violation is required. [Citation] Injunctive relief has no application to wrongs which have been completed [Citation], absent a showing that past violations will probably recur. [Citation]" (People v. Toomey (1984) 157 Cal.App.3d 1, 20.)

Netflix argues the third cause of action for unfair competition fails because Plaintiffs are not entitled to an injunction against Netflix. (Motion, pg. 8.) According to Netflix, the third cause of action is based on Plaintiffs' claim that "Netflix's recruitment practices have violated and will continue to violate California's UCL thereby entitling Fox to a permanent injunction enjoining Netflix from recruiting or hiring any of Fox's fixed-term employees." (Motion, pgs. 8, 16-18.)

Specifically, Netflix contends injunctive relief is reserved for famous artists and performers, not ordinary business employees. According to Netflix, a "contract to render personal services cannot be specifically enforced, except in extraordinary cases, without running afoul of the Thirteenth Amendment's prohibition against involuntary servitude." (Motion, pgs. 9-11.) Netflix argues there is no dispute that Fox's fixed-term employees are not artists or performers. (Motion, pg. 13.)

Netflix, relying on Beverly Glen Music, Inc. v. Warner Communications, Inc. (1986) 178 Cal.App.3d 1142, 1145, argues "Fox cannot enjoin Netflix from recruiting its employees unless Fox also is entitled to legally enjoin those employees directly." (Motion 9:1-2.) Netflix argues "Fox cannot, as a matter of law, enjoin its employees directly" because such "an injunction would amount to coercion – effectively forcing those employees to remain at Fox even when they wish to leave and work elsewhere – and thus the remedy is limited under California law to very specific circumstances not found in this case." (Motion 9:3-6.)

However, Plaintiffs are not seeking an injunction enjoining Netflix from recruiting and hiring any of Fox's fixed-term employees. Plaintiffs seek an injunction restraining Netflix from intentionally interfering with any of Fox's Fixed-Term Employment Agreements. (Complaint ¶¶41-45.) Plaintiffs, in the complaint, pray for a "permanent injunction enjoining Netflix, and its agents, servants, employees, attorneys, successors, and all persons, firms and corporations acting in concert with it, from interfering with any of Fox's Fixed-Term Employment Agreements." (Complaint, Prayer 1.) (Emphasis Added.) In their opposition to the motion for summary adjudication, Plaintiffs represent they seek "to enjoin Netflix from systematically and tortiously interfering with the existing contracts of current, non-breaching Fox employees." (Opposition, pg. 22.)

Moreover, Netflix's reliance on Beverly Glen is misplaced. In Beverly Glen, the plaintiff "signed to a contract a then-unknown singer, Anita Baker" in 1982, Ms. Baker recorded an album for the plaintiff, Warner Communications offered Ms. Baker a better deal in 1984, Ms. Baker accepted the offer and notified the plaintiff that she was no longer willing to perform under the contract, the plaintiff sued Ms. Baker and sought to have her enjoined from performing for any other recording studio, the injunction was denied because "under Civil Code §3423…California courts will not enjoin the breach of a personal service contract unless the service is unique in nature and the performer is guaranteed annual compensation of at least $6,000.00, which Ms. Baker was not," the plaintiff voluntarily dismissed the action against Ms. Baker following the ruling on injunction, and then the plaintiff sued Warner Communications "for inducing Ms. Baker to breach her contract and moved the court for an injunction against Warner to prevent it from

employing her." (Id. at 1143.) The trial court denied plaintiff's requested injunction, "reasoning that what one was forbidden by statute to do directly, one could not accomplish through the back door." (Id.) The plaintiff appealed.

The Court of Appeal affirmed. The court recognized the rule that "a contract to render personal services cannot be specifically enforced." (Id. at 1144.) According to the court, an "unwilling employee cannot be compelled to continue to provide services to his employer either by ordering specific performance of his contract, or by injunction" and, to do so, "runs afoul of the Thirteenth Amendment's prohibition against involuntary servitude." (Id.) The court noted that Civil Code §3423(5) and C.C.P. §526(5), enacted in 1872, "both provided that an injunction could not be granted: 'To prevent the breach of a contract the performance of which would not be specifically enforced.'" (Id. at 1145.) The court also noted these sections were amended in 1919, "creating an exception for: 'a contract in writing for the rendition or furnishing of personal services from one to another where the minimum compensation for such service is at the rate of not less than six thousand dollars per annum and where the promised service is of a special, unique, unusual, extraordinary or intellectual character…'" (Id.) The court recognized the plaintiff unsuccessfully argued Ms. Baker fell within this exception and elected not to appeal that judgment. (Id.) The sole issue before the court was "whether plaintiff – although prohibited from enjoining Ms. Baker from performing herself – can seek to enjoin those who might employer her and prevent them from doing so, thus achieving the same effect." (Id.) The court ruled the plaintiff could not do so. The court reasoned that whether "plaintiff proceeds against Ms. Baker directly or against those who might employ her, the intent is the same: to deprive Ms. Baker of her livelihood and thereby pressure her to return to plaintiff's employ." (Id.) The court also reasoned that if "Warner's behavior has actually been predatory, plaintiff has an adequate remedy by way of damages" and an "injunction adds nothing to plaintiff's recovery from Warner except to coerce Ms. Baker to honor her contract." (Id.)

The Beverly Glen case is distinguishable from the instant action. First, Beverly Glen involved a single act – Warner Communications' purported act of stealing Ms. Baker away from the plaintiff, while the instant action involves an alleged "brazen campaign to unlawfully target, recruit, and poach valuable Fox executives by illegally inducing them to break their employment contracts with Fox to work at Netflix," and alleged threatened continued interference with Fox's Fixed-Term Employment Agreements. (Complaint ¶¶1, 31, 40, 41-45.) In fact, Plaintiffs, in opposition to the motion for summary adjudication, submitted evidence suggesting Netflix not only intentionally interfered with the Waltenberg and Flynn Agreements but continued to interfere with Fox's Fixed-Term Employment Agreements after the instant action was filed. Netflix does not appear to dispute that from between the date of Fox's complaint and April 14,

2019, Netflix offered employment to 17 individuals who were employed pursuant to fixed-term contracts with TCFFC or Fox 21 that had not yet expired at the time Netflix made the offers. (Netflix's Response to Fox's Additional Facts, pgs. 23-24, No. 25.) Netflix also does not appear to dispute that between the date of Fox's complaint and April 14, 2019, Netflix hired 15 individuals who were employed pursuant to fixed-term contracts with TCFFC or Fox 21 that had not yet expired at the time Netflix hired them. (Netflix's Response Fox's Additional Facts, pgs. 24-25, No. 26.)

Second, the plaintiff in Beverly Glen sued Warner Communications "for inducing Ms. Baker to breach her contract," while the instant action involves claims for inducing breach of the Waltenberg and Flynn Agreements and unfair competition in violation of Business & Professions Code §17200. (Id. at 1144.) Third, the plaintiff in Beverly Glen sued Warner Communications for inducing Ms. Baker to breach her contract and moved the court for an injunction against Warner Communications to prevent it from employing Ms. Baker after the plaintiff sued Ms. Baker and was denied an injunction enjoining Ms. Baker from performing for any other recording studio. (Id. at 1143-1144.) As argued by Plaintiffs, "[n]o court here has ruled Fox is legally barred from enforcing its contractual rights and enjoining breaching employees from accepting employment elsewhere." (Opposition, pgs. 23-24.)

The court sees a critical distinction between an injunction directed at Fox employees, which would implicate the unique or intellectual character requirement of Civil Code §3423, and an injunction directed at third party, Netflix, to prevent tortious inducement of breach of contract. In the latter situation, Fox employees are free to leave to work elsewhere (absent tortious interference), which is the policy behind Civil Code §3423.

Netflix also argues Plaintiffs impermissibly seek to protect Fox's entire fixed-term workforce from competitors. (Motion, pg. 9.) It is undisputed that each of Fox's Fixed-Term Employment Agreements contain an injunctive relief provision that states:

The services to be furnished by you hereunder and the rights and privileges granted to the Company by you are of a special, unique, unusual, extraordinary, and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law, and a breach by you of any of the provisions contained herein will cause the Company irreparable injury and damage. You expressly agree that the Company shall be entitled to seek injunctive and other equitable relief to prevent a breach of this Agreement by you. Resort to such equitable relief, however, shall not be construed as a waiver of any proceeding or succeeding breach of the same or any other term or provision.

The various rights and remedies of the Company hereunder shall be construed to be cumulative and no one of them shall be exclusive of any other or of any right or remedy allowed by law.

(Fox's Response to Netflix's Separate Statement, pg. 2, No. 2)

However, as argued by Plaintiffs, the injunctive relief provisions in the Fixed-Term Employment Agreements are "irrelevant to the injunctive relief Fox seeks" in this action. (Opposition, pg. 21.) The injunctive relief provisions state Fox "shall be entitled to seek injunctive relief and other equitable relief to prevent a breach of this Agreement" by the employees. (Fox's Response to Netflix's Separate Statement, pg. 2, No. 2.) (Emphasis Added.) Plaintiffs, in the instant action, do not seek injunctive relief against any breaching employees, including Waltenberg and Flynn. (Opposition, pgs. 21-22.) Instead, Plaintiffs seek injunctive relief against Netflix. Plaintiffs, by way of the complaint, seek a "permanent injunction enjoining Netflix, and its agents, servants, employees, attorneys, successors and assigns, and all persons, firms and corporations acting in concert with it, from interfering with any of Fox's Fixed-Term Employment Agreements…" (Complaint, Prayer 1.) (Emphasis Added.) As argued by Plaintiffs, the "requested relief has nothing to do with whether a Fox employee can choose to breach her contract and work for another employer absent tortious inducement to breach by some third party." (Opposition, pg. 22.) "In other words, Fox is not seeking to restrict the mobility of any employee via injunction: Fox simply seeks to enjoin a third party's [alleged] active, ongoing, and tortious interference with…employment agreements." (Opposition, pg. 22.) As argued by Plaintiffs, "if the employment agreements did not contain the Paragraph 10 provisions, Fox's unfair-competition claim would be precisely the same. The claim thus does not depend in any way on the validity of [the injunctive relief] provisions." (Opposition, pg. 22.)

Netflix appears to rely on Business & Professions Code §16600 to support its motion for summary adjudication. (Motion, pg. 14.) Business & Professions Code §16600 states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Netflix argues "Fox's fixed-term employees are precisely the type of ordinary business employees who are entitled to exercise their statutorily-recognized right under Business and Professions Code section 16000 to engage in business and occupations of their choosing, and they can be replaced by others with similar business experience even if the departing employees have special relationships or high-ranking positions." (Motion, pg. 14:12-16.) However, Netflix's reliance on Business & Professions Code §16600 is misplaced. The injunctive relief provisions do not violate the statute. Business & Professions Code §16600 does not "affect limitations on an employee's conduct or duties while employed." (Angelica Textile Services, Inc. v. Park (2013) 220 Cal.App.4th 495, 509.) The

injunctive relief provisions are essentially limitations on the employees' conduct or duties while employed. The provisions refer to injunctive relief to prevent a breach of the agreements, which suggest the provisions apply while the employees are still employed (i.e. before any breach occurs). Moreover, as argued by Plaintiffs, the injunctive relief provisions do not, in fact, restrain anyone. Fox, by way of the injunctive relief provisions, merely reserved the right to seek injunctive relief. (Fox's Response to Netflix's Separate Statement, pg. 2, No. 2.)

Even assuming, arguendo, the injunctive relief provisions in the Fixed-Term Employment Agreements violate Business & Professions Code §16600 and/or are void for any other reasons, the offending provisions may be severed, and the Fixed-Term Employment Agreements would remain valid as to the remaining lawful terms. (See Civil Code §1599 ("Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.").)

Netflix argues Fox is not entitled to injunctive relief against its entire fixed-term workforce because some employees are impermissibly bound for more than seven years. (Motion, pgs. 15-16.) According to Netflix, the "California Legislature has unambiguously declared that 'a contract to render personal service[s]…may not be enforced against [an] employee beyond seven years." (Motion, pg. 15.) (See Labor Code §2855(a).) (See also De La Hoya v. Top Rank, Inc. (C.D. Cal. 2001) 2011 WL 34624886, *12, 14 ("The parties to a personal services contract may not evade the seven-year limitation imposed by [Labor Code] section 2855(a) simply by signing a mid-term amendment to 'modify their relationship' without providing for a period of freedom or otherwise relieving the talent of its existing obligations" and the "right conferred by [Labor Code] second 2855(a) is created in the public interest and is not waivable, directly or indirectly.").) Netflix argues it is undisputed that Fox utilizes consecutive and overlapping contracts to bind employees beyond the statutorily-permitted seven years and, consequently, Fox cannot enforce these agreements by injunction or otherwise. (Motion, pgs. 15-16.) Netflix, relying on De La Hoya and Kirkland v. Golden Boy Promotions, Inc. (C.D. Cal. 2013) 2013 WL 12132028, argues that "[c]ontracts, successive contracts, and contract extensions that impinge on this right by imposing continuous obligations longer than seven years are void and unenforceable as a matter of law." (Opposition, pg. 15.) Netflix contends that "more than 35 percent of the employees [122 employees] who would fall under Fox's requested injunction have been under contract for more than seven years, and in some cases up to 30 years." (Motion, pg. 16.)

However, the De La Hoya case is distinguishable from the case at bar and, in any event, is not binding on this court as it is a federal case and much of the language relied upon by Netflix is dicta.

De La Hoya involved a rather convoluted series of contractual relationships among a number of parties, but the essential and relevant facts are as follows: an initial agreement was entered into between the boxer, Oscar De La Hoya, and his management company, Top Rank, Inc., which was subsequently amended on two occasions, including an amendment which sought to make that initial agreement end co-terminously with a separate third-party agreement entered into by Top Rank and two other parties. It was this amendment which caused the initial agreement to exceed the seven-year rule.

The De La Hoya court noted the defendant did not characterize the initial agreement as being superseded, but rather as having been amended and extended. Thus, the De La Hoya court did not believe that the amendments in that case constituted one or more superseding agreements. Accordingly, the court's discussion regarding new or superseding contracts would appear to be dicta as it was superfluous to the basis of its finding that the agreement and all amendments thereto were void and unenforceable under California labor code Section 2855(a).

The court determined "the September 1992 Agreement and the November 1996 Amendment thereto were part of a continuous, uninterrupted eight-year contractual relationship pursuant to which De La Hoya would provide Top Rank with boxing services" and the "term of the November 1996 Amendment, like that of the September 1992 Amendment, was tied to the duration of the contracts with HBO and TVKO." (Id. at 12.) The Court recognized "De La Hoya and Top Rank have treated their agreements as a single package." (Id.) The Court also noted "Top Rank has represented to both state and federal courts that the September 1992 Agreement is the foundation of its right to De La Hoya's personal services." (Id.) The Court stated:

In his sworn declaration in this case, Arum described the November 1996 Amendment as an "amended agreement" that "altered" the existing relationship. Decl. of Robert Arum ¶¶ 10–11. He did not state that it created an entirely new relationship. Similarly, in its state court complaint against Univision, Top Rank did not even mention the November 1996 Amendment, referring exclusively to the September 1992 Agreement and various extensions thereto to justify its exclusive right to De La Hoya's services as a professional boxer. In that complaint Top Rank described the September 1992 Agreement as having been "amended" and "extended" through 2002, rather than superseded in November of 1996. These characterizations constitute non-binding evidentiary admissions. [Citations]

(Id.) (Emphasis Added.)

Thus, De La Hoya did not involve a claim of separate agreements. De La Hoya simply "restates the principle that merely amending a contract – without superseding the prior contract and thereby allowing the employee an opportunity to negotiate for materially different terms – will not restart the seven-year 'clock' under Section 2855." (Opposition, pg. 20.)

Fox argues that, in contrast to De La Hoya, "neither Fox nor its employees treat multiple consecutive contracts as a 'single package'" and, instead, "any new agreements are separately negotiated after the formation of the initial agreements and expressly supersede any prior agreements." (Opposition, pg. 20.) Further, as discussed below, Netflix did not provide the Court with a meaningful analysis of the Fixed-Term Employment Agreements and/or whether they constitute separate agreements.

Kirkland also does not help Netflix. Kirkland is not binding on this court and, in any event, suggests an underlying contract may be valid even where a contract extension is illegal.

In Kirkland, the plaintiff entered into a contract with Golden Boy Promotions, Inc. ("GBP") on October 14, 2008, giving GBP the right to promote the plaintiff's professional boxing matches on an exclusive basis ("Promoter Agreement"). (Id. at *1.) The Promoter Agreement had a five-year term. (Id.) On October 15, 2008, the plaintiff entered into a Management Agreement with Miller, Wolf, Cameron Dunkin (doing business as D&D Boxing, Inc.), and Billingsley (collectively the "Managers"), pursuant to which the plaintiff engaged the Managers "to provide advice, guidance, direction, and services to further his professional boxing career for a period of five years from the date of his next professional bout." (Id. at *2.) GBP alleged the plaintiff was arrested in March 2009 and incarcerated for two years. (Id.) "On March 5, 2011, GBP, Dunkin, Miller and [the plaintiff] executed an agreement to extend the terms of the Promotor Agreement and the Management Agreement for an additional two years (the 'Contract Extensions')." (Id.) The plaintiff sought, among other things, "a judicial declaration that the Promoter Agreement, Management Agreement, and Contract Extensions are void and unenforceable for illegality, failure of consideration, and unilateral mistake…" (Id.) The plaintiff argued the "Promoter Agreement violates [4 CCR] §222 because the parties extended the contract beyond the five-year period permitted by the second sentence of the statute." (Id. at *4.) The Promoter Agreement, on its face, provides for a term of five years, but the plaintiff argued the agreement was invalid "because it contemplates extensions for various reasons." (Id.) The Promoter Agreement contains a provision commonly referred to as a severability clause (Paragraph 13), which states:

Nothing contained in this Agreement shall be construed so as to require the violation of a law or regulation, and wherever there is any conflict between any provision of this Agreement and any

law or regulation, the applicable law or regulation shall prevail, provided, however, that in such event the provision so affected shall be curtailed only to the extent necessary to permit compliance with the minimum legal requirement, and no other provision of this Agreement shall be effected thereby.

(Id. at *5.) "California courts have found that such 'severability clauses' are valid and 'evidence of the parties' intent that, to the extent possible, the valid provisions of the contracts be given effect, even if some provision is found to be invalid or unlawful.' [Citation]" (Id. at 5.) The plaintiff argued Paragraph 13 could not save the Promoter Agreement "because 'an illegal contract is void; it cannot be ratified by subsequent act, and no person can be estopped to deny its validity." (Id.)

The United States District Court noted that "California courts distinguish…between contracts whose central purposes are illegal, and contracts that include illegal provisions." (Id.) The court recognized "the California Supreme Court has stated: 'If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.' [Citations]" (Id.) The court determined that it "is clear from the face of the Promoter Agreement that the central purpose of the contract is to provide for GBP's promotion of [the plaintiff's] professional boxing matches on an exclusive basis," which is a lawful purpose (Id.) The court recognized "[t]hat purpose is not dependent on extension of the promoter-boxer relationship beyond the five year period permitted by §222." The court noted the default term of the Promoter Agreement is five years and the "provisions of the Promoter Agreement allowing for extension of the agreement beyond five years in the event certain contingencies occur are not inextricably intertwined with the balance of the agreement; the remaining terms can be enforced if these provisions are removed." (Id.) The court determined the extension provisions "are severable from the Promoter Agreement, such that they do not render the contract void and unenforceable as a whole." The court concluded the "Promoter Agreement is not unenforceable under §222 with the exception of those portions of paragraphs 5 and 7 that permit extension beyond the default five-year period." (Id.) The court stated: "To the extent Kirkland's complaint seeks a declaration that the Promoter Agreement is void for illegality, his motion for judgment is granted with respect to those portions of paragraphs 5 and 7 that permit extension of the agreement beyond five years." (Id. at 6.)

The plaintiff also argued the Contract Extension is illegal because it violates §222. The court rejected GBP's argument that the Contract Extension is a separate contract that has a two-year

term. The court recognized the Contract Extension is titled "Contract Extension" and "states on its face that it extends the terms of the Promotor Agreement's Term Sheet 'for an additional two (2) years [.]'" (Id.) The court noted the "title of the document and its use of the word 'additional' indicate that the Contract Extension was meant to extend the term of the original Promoter Agreement, rather than create a freestanding two-year contract. The fact that the Contract Extension contains no additional terms leads to the same conclusion." (Id.) The court determined that the "language of the Contract Extension makes plain its purpose: to extend GBP's contract with Kirkland for an additional two years as a result of Kirkland's unavailability for a like period." (Id.) The court concluded the "the sole and central purpose of the Contract Extension was to form a contract for a period exceeding five years" and, because the central purpose is illegal under §222, the Contract Extension is void. (Id.) The court granted the plaintiff's motion for judgment on the first cause of action to the extent he seeks a declaration that the Contract Extension is void for illegality. (Id.) The court cited to the holding in De La Hoya, "that a boxing contract was void for illegality because it exceeded the seven-year maximum term for personal service contracts set forth in California Labor Code §2855(a), and rejecting defendant's argument that an 'amendment' extending term of contract from five years to more than ten years created a new, superseding contractual relationship." (Id.)

In Kirkland, the court concluded the Promoter Agreement itself was not unenforceable under 4 C.C.R. §222 (with the exception of the extension provisions, which are severable) even though the Contract Extension, "which was meant to extend the term of the original Promoter Agreement," was illegal under §222 because the "sole and central purpose of the Contract Extension was to form a contract for a period exceeding five years." (Id. at 4-6.) (Emphasis Added.) An argument can be made that, assuming certain contract extensions violate the seven-year rule, the underlying agreements may still be valid and enforceable.

This court does not believe the overall legislative intent behind Labor Code §2855(a) would be served by the blanket ruling Netflix seeks, one that would prohibit all employees under contract in any business or context from engaging in continuous employment with the same employer for more than seven years. Netflix is, in effect, asking this court to look solely to the length of each employee's tenure with Fox as determinative. However, Netflix, in making this argument, does not address the difference between the length of time someone has worked for a company and the term of any specific employment contract.

Netflix's position ignores the benefits to the employee of having continuous employment if the employee so chooses. This may provide financial security and provide an employee assurance that he or she will be able to continue to meet their obligations (mortgage, car payment, school

tuition, etc.). "An employment, having no specified term, may be terminated at the will of either party or notice to the other." (Labor Code §2924.) Labor Code §2855 merely ensures a choice must be available to employees at least every seven years to ensure they have the freedom and opportunity to choose to enter into employment agreements.

Additionally, Netflix did not properly identify a single Fox employee that has served under a Fixed-Term Employment Agreement for more than seven years. Netflix referred to the Fixed-Term Employment Agreements (attached as Exhibit 5 to Catherine Lui's declaration), Lui's declaration, and Plaintiffs' responses to Requests for Admissions. The court sustained Plaintiffs' evidentiary objections to ¶7 of Lui's declaration, as well as, Appendix A and Appendix B (attached to Netflix's separate statement), and Plaintiffs' responses to Requests for Admission do not establish a violation of Labor Code §2855(a). Plaintiffs merely admitted that at least one of their employees executed more than one Fixed-Term Employment Agreement with the term of such multiple Fixed-Term Employment Agreements adding up to more than seven consecutive years. The problem is that Netflix did not provide the court with a meaningful analysis of the Fixed-Term Employment Agreements attached as Exhibit 5.

Some or all of the multiple Fixed-Term Employment Agreements may qualify as separate agreements. (See Mitchell v. American Fair Credit Association, Inc. (2002) 99 Cal.App.4th 1345, 1353-1354 ("when a material term in a contract is altered or added, a new agreement between the parties has been reached"). This is especially true considering Plaintiffs, in a footnote, point out several instances where employees entered into subsequent agreements with new terms (i.e. promotions/new titles, salary increases, car allowance increases, and/or increased bonus eligibility). (Opposition, pg. 15, fn. 51.) (Fox's Response to Netflix's Separate Statement, pgs. 8 and 9, Nos. 8 and 10.) (Declaration of Lui ¶6; Exhibit 5 – Vanessa Morrison, Michael Walsh, Len Iannelli, and David Johnson.)

Another case which this court considers better reasoned than De La Hoya, suggests a determination as to whether there has been a violation of Labor Code §2855(a) requires consideration of the circumstances surrounding the formation of the contracts in each situation. In Manchester v. Arista Records, Inc. (C.D. Cal. 1981) 1981 U.S. Dist. Lexis 18642, *18-20, the United States District Court stated:

Manchester takes the position that the 1976 agreement is not an independent contract. However, her analysis is too broad. She argues that, since the 1976 contract was entered into before the 1973 contract expired, it must necessarily be an extension of the 1973 contract and thus also invalid pursuant to § 2855. She argues that it cannot be anything but an invalid extension

because of the prohibition of waiver of employees' rights under § 2855. This argument is unpersuasive. It would effectively prevent an employee from entering into a new contract with his or her current employer until after the completion of all obligations between them. The better course is to consider the circumstances surrounding the formation of the new contract in each situation. If the new contract was entered into at or near the time of formation of the earlier contract, and if the two contracts appear to have been entered into to avoid the application of §2855 to a single agreement, then they should be considered a single contract for purposes of §2855. However, if the latter contract was entered into toward the end of the first contract, it should be treated as a separate agreement for purposes of §2855. Each employment situation will necessarily be interpreted according to its unique facts. The interpretation of the two contracts should be made in light of the policy consideration underlying § 2855 to protect employees, rather than by principles of formal contract law…[¶] The 1976 contract was entered into after the 1973 agreement was partially completed. It was an integrated agreement that differed in several material respects from the 1973 agreement. It did not have a forum selection clause; it materially altered the royalty provisions; and it was entered into to pay the debt that Manchester owed to Philips and thus was supported by different consideration. The only significant factor that supports treating the two contracts as one is that the 1976 agreement is an option contract that Arista could exercise only if it had exercised all of its options under the 1973 contract. [¶] Upon consideration of all of these undisputed facts, it is the determination of the Court that the 1976 contract was separately entered into and that it was not entered into with the purpose of evading the seven year employment limitation of § 2855.

(Emphasis Added.) Netflix contends that it "has identified approximately 122 employee subject to uninterrupted fixed-term employment obligations for longer than seven years, sometimes even approaching 30 years." (Motion, pg. 7.) However, Netflix did not address the circumstances surrounding the formation of each Fixed-Term Employment Agreement and did not establish that the agreements violation Labor Code §2855.

Netflix does not contend that all of Fox's Fixed Term Employment Agreements violate the seven-year rule. Even assuming some of them do, it would not preclude Fox from seeking an injunction with respect to those that do not violate the seven-year rule.

Based on the foregoing, Netflix's motion for summary adjudication is denied.

D. Conclusion

Netflix's motion for summary adjudication of Plaintiff's 3rd (unfair competition in violation of

Business & Professions Code §17200) cause of action is denied.

Dated: June 5, 2019

Hon. Judge Marc D. Gross
Judge of the Superior Court

**********END OF TENTATIVE RULING**********

The Court has read and considered all documents filed hereto regarding the above-captioned Hearings on Motion for Summary Judgment and provides counsel with its written Tentative Ruling.

Counsel are given the opportunity to argue.

After argument, the Court adopts its Tentative Ruling as to Defendant Netflix, Inc.'s Motion for Summary Adjudication, as the Final Ruling of the Court.

Order Denying Defendant Netflix, Inc.'s Motion for Summary Adjudication is signed, filed, and incorporated herein by reference this date.

On the Court's own motion, the Hearing on Motion for Summary Judgment scheduled for 06/05/2019 is continued to 07/02/2019 at 09:30 AM in Department R at Santa Monica Courthouse.

Counsel for the Plaintiff is to file/serve further briefing as to the standing of the Third Cause of Action by the close of business day on 06/12/2019. (SEVEN-PAGE MAXIMUM)

Counsel for the Defendant is to file/serve a response by the close of business day on 06/21/2019. (SEVEN-PAGE MAXIMUM)

Counsel for the Plaintiff is to file/serve a response by the close of business day on 06/26/2019. (FIVE-PAGE MAXIMUM)

Counsel orally stipulate that service in the form of an email is satisfactory.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

West District, Santa Monica Courthouse, Department R

SC126423 June 5, 2019
TWENTIETH CENTURY FOX FILM CORP., ET AL. VS. 9:30 AM
NETFLIX, INC.

Judge: Honorable Marc D. Gross
Judicial Assistant: P. Anyankor
Courtroom Assistant: A. Wiggins

CSR: Alise Harrington, #11392
ERM: None
Deputy Sheriff: None

Court and Counsel confer Re: party's compliance with completing a Mandatory Settlement Conference. Both parties represent to the Court that their Mandatory Settlement Conference completion date is in November.

Court and Counsel confer Re: Jury Trial and Trial-Related Documents.

Counsel for the Plaintiff represents to the Court that Jury Fees have been posted.

Counsel are directed to file a Joint Trial-Binder before the Final Status Conference date, and comply with Los Angeles County Court Rules 3.25 (f) and (g).

Counsel are ordered to file a Joint Statement of the Case, Joint Exhibit Lists, Joint Witness Lists with time estimates, Operative Pleadings, Motion in Limines, Oppositions and Replies, and submit a Deposition Grid if there is Deposition Testimony.

Counsel are further ordered to meet and confer Re: Jury Instructions and Verdict Forms.

Notice is waived.