SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

SANTA MONICA COURTHOUSE - DEPARTMENT R

RULING ON SUBMITTED MOTION

TWENTIETH CENTURY FOX FILM CORPORATION, et al. vs. NETFLIX, INC., et al.	Case No.: SC126423 Hearing Date: November 25, 2019 Dept: R Time: 9:30 AM

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 and inducing breach of Flynn Agreement causes of action is denied. Plaintiffs' motion for summary adjudication of the unfair competition in violation of Business & Professions Code §17200 cause of action is granted. Plaintiffs are entitled to injunctive relief as follows: Defendant Netflix, Inc. shall not solicit employees who are subject to *valid* Fixed-Term Employment Agreements with Plaintiffs or induce such employees to breach their *valid* Fixed-Term Employment Agreements with Plaintiffs.

Plaintiffs' motion for summary judgment on Defendant's cross-complaint is granted. In the alternative, for appeal purposes only, Plaintiffs' motion for summary adjudication is granted as to the violation of Business & Professions Code §17200 and declaratory relief causes of action.

Plaintiffs' motion for summary adjudication of Defendant's violation of public policy and unconscionability affirmative defenses is granted.

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 amended 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 amended cross-complaint, and the 3rd (violation of public policy) and 24th (unconscionability) affirmative defenses in Netflix's second amended answer.

The court issued a tentative ruling on Fox's motion for summary judgment/adjudication. The court's tentative ruling included treating Fox's motion for summary judgment/adjudication of Netflix's cross-complaint and affirmative defenses as a motion for judgment on the pleadings, which was granted with leave to amend.

(Court's 6/5/19 Minute Order.) The court continued the hearing on the motion to July 2, 2019, to permit further briefing on the issue of standing relating to Fox's unfair competition in violation of Business & Professions Code §17200 cause of action. (Court's 6/5/19 Minute Order.) Netflix filed an amended cross-complaint and second amended answer on July 9, 2019. The court later continued the hearing on the motion for summary judgment/adjudication, for further briefing. (Court's 8/1/19 Minute Order.)

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. Second Amended Answer

On July 9, 2019, Netflix filed a second amended answer to Plaintiffs' complaint, asserting several affirmative defenses, including affirmative defenses for violation of public policy and unconscionability.

In the violation of public policy affirmative defense, Netflix alleged Plaintiffs' claims are barred by the fact that they allege (or are premised on the allegation) that Netflix has induced breaches of contracts that are void as against public policy. (2nd AA ¶6.) Netflix alleged the Fixed-Term Employment Agreements, along with Plaintiffs' practices for obtaining and enforcing such contracts, run counter to the express provisions and policies of Business & Professions Code §16600, Civil Code §§3390 and 3423, Labor Code §2855, and C.C.P. §526. (2nd AA ¶¶7-13.) Netflix also alleged the Fixed-Term Employment Agreements contain certain one-sided, overbroad, and/or illegal provisions that permeate the contracts, including the following:

1. Unilateral options, exercisable only by Fox regardless of an employee's wishes, to extend the duration of the contract, sometimes by up to four additional years;
2. An injunctive relief provision that deliberately mischaracterizes the nature of the employees' services, purports to grant Fox the right to seek an injunction to compel continued service with Fox against an employee's will (to which Fox is not entitled as a matter of law), and compels the employee to agree that injunction is an appropriate remedy to "prevent a breach;"
3. An overly-broad non-solicitation provision that is unenforceable as a matter of law under Business & Professions Code §16600;
4. An overly-broad confidentiality provision that purports to designate virtually anything the employee knows as Fox's confidential information; and

5. In some contracts not before the court, a "no-shop" provision barring employees from even speaking with other prospective employers until shortly before the end of the contract, a provision that has obvious anti-mobility and First Amendment implications (particularly since Fox cannot legally stop its under-contract "staff employees" from leaving at any time).

(2nd AA ¶¶14-20, 24-33.) Netflix alleged "Fox's contracting practices are designed to create undue pressure on employees to accept the contracts Fox offers them, by leading those employees to believe that their continued employment and/or good standing with Fox depends upon acceptance of a proffered contract, and that have room to negotiate only to a limited extent (and even then, only over salary and title)..." (2nd AA ¶¶20-21.) Netflix also alleged "Fox...uses the leverage and control that its contracting practices afford it to bind employees successively to fixed-term employment contracts – for periods greatly exceeding the seven-year limit prescribed by Labor Code section 2855 – and preclude them from leaving Fox, negotiating for market-based pay, or even testing their value on the market." (2nd AA ¶¶23, 34-38.) Netflix alleged "Fox is engaged in a systematic subversion of California's pro-employee mobility public policy" as a result of "Fox's non-negotiable contract terms" and Fox's "practices concerning those contracts," and, consequently, Plaintiffs' claims, which depend on the enforceability of those contracts, fail. (2nd AA ¶39.)

In the unconscionability affirmative defense, Netflix alleged the "contracts at issue are unconscionable and therefore unenforceable" and, consequently, "Fox cannot enforce either...Waltenberg's or...Flynn's contracts, and Fox cannot obtain an injunction premised on the inducement of breach of those or other similar contracts." (2nd AA ¶61.) Netflix alleged "Fox's fixed-term employment contracts include overbroad, overly harsh, and unfairly one-sided provisions that are substantively unconscionable," including the following provisions: (1) the injunctive relief provisions; (2) unilateral option provisions; (3) non-solicitation provisions; and (4) confidentiality provisions. (2nd AA ¶¶63-77.) Netflix alleged the Fixed-Term Employment Agreements are also procedurally unconscionable "because they are imposed under oppressive circumstances that leave little or no opportunity for Fox's employees to negotiate or decline relevant provisions." (2nd AA ¶¶78-91.) Netflix's unconscionability defense appears to be directed at *all* of Fox's Fixed-Term Employment Agreements.

The violation of public policy and unconscionability affirmative defenses are directed to all of Fox's causes of action, including the unfair competition in violation of Business & Professions Code §17200 cause of action, whereby Fox seeks an injunction restraining Netflix from further interfering with *any* of Fox's Fixed-Term Employment Agreements. (2nd AA ¶¶6, 61.) In the second amended answer, Netflix specifically identifies the Waltenberg and Flynn Agreements, alleging they violate public policy and are unconscionable; however, the allegations in the second amended answer suggest Netflix is also challenging *all* of Fox's Fixed-Term Employment Agreements (at least those with the same challenged provisions). (2nd AA ¶¶5-39, 60-92.)

3. Amended Cross-Complaint

On July 9, 2019, Netflix filed an amended cross-complaint, asserting causes of action for violation of Business & Professions Code §17200 and declaratory relief.

In the violation of Business & Professions Code §17200 cause of action, Netflix alleged "Fox's fixed-term employment contracts, along with its practices for obtaining and enforcing such contracts, run counter to the express provisions and policies" of Business & Professions Code §16600, Civil Code §§3390 and 3423, Labor Code §2855, and C.C.P. §526. (Amended X-C ¶¶24-29, 63.) Netflix alleged Fox's Fixed-Term Employment Agreements also contain one-sided, overbroad, and/or illegal provisions that permeate the contracts, including the unilateral options provision, injunctive relief provisions, non-solicitation clause provisions, confidentiality provisions, and "no-shop" provisions. (Amended X-C ¶¶30-35, 40.) Netflix alleged "Fox's contracting practices are designed to create undue pressure on employees to accept the contracts Fox offers them, by leading those employees to believe that their continued employment and/or good standing with Fox depends upon acceptance of a proffered contract, and that they have room to negotiate only to a limited extent (and even then, only over salary and title). (Amended X-C ¶¶36-38, 45-62.) Netflix alleged "Fox also uses the leverage and control that its contracting practices afford it to bind employees successively to fixed-term employment contracts – for periods greatly exceeding the seven-year limit prescribed by Labor Code §2855 – and preclude them from leaving Fox, negotiating for market-based pay, or even testing their value on the market." (Amended X-C ¶¶39, 41-44, 63.)

In the declaratory relief cause of action, Netflix alleged an "actual controversy has arisen and now exists between Netflix and Fox 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." (Amended X-C ¶66.) 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 California law, including Business & Professions Code §16600. (Amended X-C ¶67.) Netflix seeks judicial determinations that "Fox's contracting practices…[are] unlawful under California law" and Netflix has the right to recruit, hire, and/or retain Fox's current and former employees that are subject to the Fixed-Term Employment Agreements. (Amended X-C ¶¶69-70.)

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),[1] and 30, and overruled as to Nos. 4, 5, 9, 10, 11, 12, 13, 14, 17, 18, 21, 22, 23, 24, 25, 26,[2] 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),[3] 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 applicable. The court will hear argument on No. 149.

Netflix's evidentiary objections (dated 10/25/19) to Fox's supplemental evidence are overruled as to Nos. 1-3, 5-12, 14-18, 20-30, 33, 35-40, 43,[4] 47, 52, 60-71, 73, and 75-76, and sustained as to Nos. 4, 13, 19 (in part),[5] 31-32, 34, 41-42, 44-46, 48-51, 53-59, 72, 74, and 77-80.

Fox's evidentiary objections (dated 11/13/19) to Netflix's supplemental evidence are overruled as to Nos. 4, 5, 8-10, 14, 16, 20-21, 25, 27, 31-35, 39, 41-42, 51, 53, 71-76, 79-81, 87, 89, 92, 99-100, 102-103, 105-106, 115-116, 118-119, 124-127, 137, 144, 168-169, 173-176, 178-182, 183 (only as to the parts in English), 185-186, 189-190, and 192-193, and sustained as to Nos. 1-3, 6-7, 11-13, 15, 17-19, 22-24, 26, 28-30, 36-38, 40, 43-50, 52, 54-70, 77-78, 82-86, 88, 90-91, 93-98, 101, 104, 107-114, 117, 120-123, 128-136, 138-143, 145-167, 170-172, 177, 184, 187-188, and 191. The court will hear argument on No. 194.

The Court declines to rule on Netflix's evidentiary objections (dated 11/20/19). (*See* C.C.P. §437c(q) ("In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.").)

The Court will not consider the parties' arguments and evidence in the *second supplemental briefs* regarding damages with respect to Fox's inducing breach of agreement causes of action. The Court did not give the parties leave to file supplemental briefs and evidence regarding damages.

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[1] No. 29 is only sustained as to the following language: "but he intimated how smart she was, how she was one of the few people he trusted, how they had worked together for a very long time. It was incredibly apparent that she was one of the most respected people in the office."

[2] Nos. 21-22 and 24-26 also do not comply with CRC 3.1354(b).

[3] No. 85 is sustained only as to 441:15-442:2 of Waltenberg's deposition testimony.

[4] Netflix appears to be objecting to the separate statement, not the underlying evidence.

[5] No. 19 is sustained only as to 46:8-18.

C. CRC Violations

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

Fox's *original* 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 *original* 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 *original* 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 *original* separate statement, and Netflix addressed the issue of damages.

Fox filed a *supplemental* separate statement (dated 9/12/19) and Netflix filed a separate statement in opposition to Fox's supplemental separate statement (dated 10/25/19.) The CRC violations identified above pertain to Fox's *original* separate statement, not Fox's *supplemental* separate statement.

D. Undisputed Facts

1. Waltenberg

Waltenberg's 2009 contract with Fox had a fixed-term and a unilateral option. (Netflix's Response to Fox's Supplemental SS, pg. 70, No. 12.) Waltenberg was an at-will Fox employee between May 2012 and December 2014. (Netflix's Response to Fox's Supplemental SS, pgs. 68 and 319, Nos. 9 and 103.) Waltenberg explored employment opportunities between 2012 and 2015, but ultimately decided to stay at Fox. (Netflix's Response to Fox's Supplemental SS, pgs. 69 and 320, Nos. 10 and 104.) 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.) Waltenberg had approximately 15 years of experience working in marketing by the time he negotiated the 2015 agreement. (Netflix's Response to Fox's Supplemental SS, pgs. 69 and 320, Nos. 11 and 105.) Jo Ann Kennedy did not personally coerce Waltenberg into signing his contract. (Netflix's Response to Fox's Supplemental SS, pgs. 71-72, 321, Nos. 14 and 107.) Waltenberg negotiated the salary in his 2015 contract above what Fox initially offered. (Netflix's Response to Fox's Supplemental SS, pgs. 72 and 322, Nos. 15 and 108.) 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 contains the following injunctive relief provision:

> 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.) (Netflix's Response to Fox's Supplemental SS, pgs. 3, 79-80, Nos. 2 and 21.)

The Waltenberg Agreement contains the following confidentiality provision:

> You understand and agree that in the course of employment with the Company, you may acquire confidential information and trade secrets concerning the Company's operations, its future plans and its method of doing business (and the operations, future plans and method of doing business of Company's affiliates), including, by the way of example, but by no means limited to, highly proprietary information about the Company's (and its affiliates) customers, processes, product development, financial, marketing, pricing, cost, and compensation, (hereinafter collectively "Trade Secrets"), all of which information you understand and agree would be extremely damaging to the company if disclosed to a competitor or made available to any other person or corporation. As used herein, the term "competitor" includes, but is not limited to, any corporation, firm or business engaged in a business similar to that of the Company or its subsidiary companies. You understand and agree that such information is divulged to you in confidence and you understand and agree that, at all times, you shall keep in confidence and will not disclose or communicate Trade Secrets or any other secret and confidential information on your own behalf, or on behalf of any competitor, if such information is not otherwise publicly available, unless disclosure is made pursuant to written approval by the Company or is required by law. In view of the nature of your employment and information and Trade Secrets which you may receive during the course of your employment, you likewise agree

> that the company would be irreparably harmed by any violation of this Agreement and that, therefore, the Company shall be entitled to seek an injunction prohibiting you from any violation or threatened violation of this Agreement.

(Netflix's Response to Fox's Supplemental SS, pgs. 3-4, 81-82, Nos. 3 and 23.)

The Waltenberg Agreement contains the following non-solicitation provision:

> You will not, during the term of your employment and for a period of two (2) years thereafter, either individually or on behalf of any other entity, directly or indirectly, induce or solicit or approach or attempt to induce or solicit or approach any person who is an employee of the Company, or any of its affiliates to render services to any other person, firm or corporation.

(Netflix's Response to Fox's Supplemental SS, pgs. 5 and 83, Nos. 4 and 25.)

The Waltenberg Agreement does not bar Waltenberg from *pursuing* at any time post-contract-expiration employment opportunities. (Netflix's Response to Fox's Supplemental SS, pgs. 5, 84, 322, Nos. 5, 27, and 109.)

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.) The Waltenberg Agreement contains an option, exercisable at Fox's discretion. (Netflix's Response to Fox's Supplemental SS, pgs. 3 and 73, Nos. 1 and 16.) The option is for an additional two-year period (from January 1, 2017 to December 31, 2018). (Netflix's Response to Fox's Supplemental SS, pg. 3, No. 1.) (Supplemental Declaration of Lens ¶66; Exhibit 64.) 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.)[6] 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

[6] Netflix responded to No. 5, as follows: "**Undisputed** that prior to November 6, 2015, Netflix was aware Mr. Waltenberg had an employment agreement with Fox purporting to obligate him to a fixed-term ending at some point in the future, but **disputed** as to whether the contract is valid and enforceable..." (Netflix's Response to Fox's SS, pgs. 5-6, No. 5.) In this response, Netflix does not dispute it was aware of the Waltenberg Agreement prior to November 6, 2015. Netflix only disputes the validity and enforceability of the agreement.

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.)

Waltenberg's 2009 Fox contract contained an injunctive relief provision, confidentiality agreement, and non-solicitation agreement that are substantively identical to the injunctive relief provision, confidentiality agreement, and non-solicitation agreement contained in Waltenberg's 2015 Fox contract. (Netflix's Response to Fox's Supplemental SS, pgs. 86 and 321, Nos. 28 and 106.)

2. Flynn

Flynn's 2012 contract with Fox had a fixed-term and a unilateral option. (Netflix's Response to Fox's Supplemental SS, pg. 205, No. 43.)

The Flynn 2013 Agreement contains the following injunctive-relief provision:

> 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.) (Netflix's Response to Fox's Supplemental SS, pgs. 135-136, 213, Nos. 32 and 49.)

The Flynn 2013 Agreement contains the following confidentiality provision:

> You understand and agree that in the course of employment with the Company, you may acquire confidential information and trade secrets concerning the Company's operations, its future plans and its method of doing business (and the operations, future plans and method of doing business of Company's affiliates), including, by the way of example, but by no means limited to, highly proprietary information about the Company's (and its affiliates) customers, processes, product development, financial, marketing, pricing, cost, and compensation,

> (hereinafter collectively "Trade Secrets"), all of which information you understand and agree would be extremely damaging to the company if disclosed to a competitor or made available to any other person or corporation. As used herein, the term "competitor" includes, but is not limited to, any corporation, firm or business engaged in a business similar to that of the Company or its subsidiary companies. You understand and agree that such information is divulged to you in confidence and you understand and agree that, at all times, you shall keep in confidence and will not disclose or communicate Trade Secrets or any other secret and confidential information on your own behalf, or on behalf of any competitor, if such information is not otherwise publicly available, unless disclosure is made pursuant to written approval by the Company or is required by law. In view of the nature of your employment and information and Trade Secrets which you may receive during the course of your employment, you likewise agree that the company would be irreparably harmed by any violation of this Agreement and that, therefore, the Company shall be entitled to seek an injunction prohibiting you from any violation of threatened violation of this Agreement.

(Netflix's Response to Fox's Supplemental SS, pgs. 136-137, 214-215, Nos. 33 and 51.)

The Flynn 2013 Agreement contains the following non-solicitation provision:

> You will not, during the term of your employment and for a period of two (2) years thereafter, either individually or on behalf of any other entity, directly or indirectly, induce or solicit or approach or attempt to induce or solicit or approach any person who is an employee of the Company, or any of its affiliates to render services to any other person, firm or corporation.

(Netflix's Response to Fox's Supplemental SS, pgs. 137, 216-217, Nos. 34 and 53.)

Fox and Flynn executed a written contract for employment for a specified term, dated November 19, 2015 (the "Flynn Agreement").[7] 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.) Flynn negotiated her salary up to the $190,000.00 to $225,000.00 range in her 2015

[7] In response to No. 13, Netflix does not dispute the existence of the Flynn Agreement. Netflix only disputes the validity and enforceability of the Flynn Agreement. (*See* Netflix's Response to Fox's SS, pgs. 20-25, No. 13 ("**Disputed** as to whether Fox and Flynn executed a ***valid and enforceable*** contract for employment for a specified term, dated November 19, 2015, an essential element of Fox's claim. [¶] Netflix contends the contract is unenforceable...").)

contract amendment. (Netflix's Response to Fox's Supplemental SS, pgs. 206 and 319, Nos. 44 and 101.)

Flynn's 2015 contract does not bar Flynn from *pursuing* at any time post-contract-expiration employment opportunities. (Netflix's Response to Fox's Supplemental SS, pgs. 138, 218, 319, Nos. 35, 55, and 102.)

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.) The 2015 Flynn Agreement contains an option, exercisable at Fox's discretion. (Netflix's Response to Fox's Supplemental SS, pgs. 135 and 207, Nos. 31 and 45.) The option is for an additional two-year period (from November 19, 2017 to November 18, 2019). (Netflix's Response to Fox's Supplemental SS, pg. 135, No. 31.) 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.[8] 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.)

The total term of Flynn's 2013 contract, inclusive of the November 2015 amendment and all available Fox options, was six years. (Netflix's Response to Fox's Supplemental SS, pgs. 139, 276, 338-339, Nos. 36, 65, and 117.) Flynn's 2012 and 2013 Fox contracts provide for different titles and salaries. (Netflix's Response to Fox's Supplemental SS, pgs. 140, 276-277, 339, Nos. 37, 66, and 118.)

E. Analysis

1. Complaint

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

[8] Netflix responded to No. 17, as follows: "**Undisputed** that prior to August 8, 2016, Netflix was aware Ms. Flynn had an employment agreement with Fox purporting to obligate her to a fixed-term ending at some point in the future, but **disputed** as to whether the contract is valid and enforceable..." (Netflix's Response to Fox's SS, pgs. 26-28, No. 17.) In this response, Netflix does not dispute it was aware of the Flynn Agreement prior to August 8, 2016. Netflix only disputes the validity and enforceability of the agreement.

"'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.[9] (Fox's SS, pg. 11, No. 11.)[10]

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[9] Fox, in its Separate Statement, cited to evidence suggesting TCFFC had to hire a consultant, Hugo Domenech ("Domenech"), "to finish the execution of the outstanding work that [Waltenberg] had left behind," Domenech stayed on as a consultant for three months, and Domenech was paid approximately 23,000 pounds (for compensation and accommodations). (Declaration of Lens ¶74, Exhibit 73, Deposition of Roca 175:14-180:11.) In Objection No. 24, Netflix objected to certain portions of Anna Roca's ("Roca") deposition testimony. However, Netflix did *not* object to 175:14-180:11 of Roca's deposition testimony. Moreover, the Court overruled Netflix's objections to the challenged portions of Roca's deposition testimony.

[10] Fox also claims to have suffered millions of dollars in losses due to decreased partner advertising support. (Fox's SS, pg. 10, No. 11 – Exhibit 73.) (Motion, pg. 13, fn. 3.) However, TCFFC did not submit admissible evidence connecting the decreased advertising support (which was not to be paid to TCFFC) to any cognizable damage suffered by Fox (i.e. loss of revenue, increase in expense, etc.).

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, No. 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.) Netflix did not, however, submit admissible evidence showing the same harm would have occurred without that conduct (i.e., 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 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.) Fox was not, however, required to address Netflix's justification defense[11] 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.) 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.

Netflix also argues the Fixed-Term Employment Agreements are tainted with illegality and, therefore, cannot be enforced. Specifically, Netflix argues the Fixed-Term Employment Agreements, including the Waltenberg Agreement, violate public policy and/or are unconscionable. As discussed below in detail, the court finds that Netflix did not meet its burden of showing a triable issue of material fact exists as to these defenses.

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.

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[11] Netflix's second amended answer contains a justification affirmative defense (AD No. 23). Fox did not move for summary adjudication of the justification affirmative defense.

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. Fox 21 did not submit admissible evidence showing resulting damages and appears to assume actual damages are presumed merely by Flynn's failure to complete her contract terms. Fox 21 did not 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.) In light of the undisputed facts set forth above, however, the evidence cited by Netflix does not create a triable issue of material fact as to interference or causation.

Netflix also appears to argue the Fixed-Term Employment Agreements, including the Flynn Agreement violate public policy and/or are unconscionable; however, as discussed below in detail, Netflix did not meet its burden of showing a triable issue of material fact exists as to these defenses.

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 §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....)"

> The UCL does not proscribe specific activities, but in relevant part broadly prohibits 'any unlawful, unfair or fraudulent business act or practice.' '"Because ... section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa.' [Citations]

AMN Healthcare, Inc. v. Aya Healthcare Services, Inc. (2018) 28 Cal.App.5th 923, 949-950.

"By proscribing 'any unlawful' business practice, 'section 17200 'borrows' violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable.'' [Citation] 'Virtually any law—federal, state or local—can serve as a predicate for a [UCL] action.' [Citations] Thus, when the underlying legal claim fails, so too will a derivative UCL claim. [Citation]" *Id.* at 950. *Cf., Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 188: "Accordingly, we agree with the Court of Appeal that the trial court erred in concluding that the unfair competition law cause of action necessarily failed when the other causes of action failed."

Business & Professions Code §17204 provides in relevant part as follows: "Actions for relief pursuant to this chapter shall be prosecuted ... *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.).

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.

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.)

Fox established Netflix engaged in "unlawful, unfair or fraudulent" business acts or practices under Business & Professions Code §17200. As discussed above, the

evidence before the Court shows Netflix induced Waltenberg and Flynn to breach their Fixed-Term Employment Agreements with Fox.

Fox also established it has standing to pursue the unfair competition claim. As argued by Fox, no damages analysis is required to establish UCL standing. (Supplemental Brief, pg. 5.) (*See Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 789 ("While Manufacturers argue that ultimately Pharmacies suffered no compensable loss because they were able to mitigate fully any injury by passing on the overcharges, this argument conflates the issue of standing with the issue of the remedies to which a party may be entitled. That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them. [Citations] The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. [Citation] This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery. [¶] Nothing in the text of section 17204 or Proposition 64 suggests the voters intended to provide otherwise when they remade the UCL's standing requirements. Rather, section 17204 requires only that a party have 'lost money or property,' and Pharmacies indisputably lost money when they paid an allegedly illegal overcharge. We decline Manufacturers' invitation to turn this facially simple threshold condition into a requirement that plaintiffs prove compensable loss at the outset.").) Instead, Fox need only show "some form of economic injury" - some "'...specific, 'identifiable trifle' of injury.'' [Citations]" (*Kwikset Corp.* at 323, 324-325, 330, fn. 15.)[12] (*See also Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1279 ("Nevertheless, injury in fact is 'not a substantial or insurmountable hurdle'; it suffices 'to ''alleged some specific, 'identifiable trifle' of injury.''' [Citation] 'If a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact.' [Citation]").)

> There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. [Citation] Neither the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of 'lost money or property," nor can or need we supply an exhaustive list of the ways in which unfair competition may cause economic harm. It suffices to say that, in sharp contrast to the state of the law before passage of Proposition 64, a private plaintiff filing suit now must establish that he or she has personally suffered such harm.

(*Kwikset Corp.* at 323.) "'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'' [Citation]" (*Id.* at 324, fn. 7.)

Fox submitted evidence showing it suffered economic injury as a result of Netflix's unfair competition in the form of out-of-pocket losses. Economic injury from unfair competition may be shown when a plaintiff is "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (*Kwikset Corp.* at 323.) As set forth above, Fox submitted evidence suggesting TCFFC had to hire Domenech, a consultant, to finish the outstanding work that Waltenberg left behind, Domenech stayed on as a consultant for three months, and Domenech was paid approximately 23,000 pounds (for compensation and accommodations). TCFFC's hiring of Domenech as a consultant is sufficient to establish standing under the UCL.

Fox also submitted evidence showing it suffered economic injury as a result of Netflix's unfair competition in the form of contract disruption. Economic injury from unfair competition may be shown when a plaintiff is "deprived of money or property to which he or she has a cognizable claim." (*Kwikset Corp.* at 323.) As discussed above, the evidence before the Court shows Netflix induced Waltenberg and Flynn to breach their Fixed-Term Employment Agreements with Fox. It is undisputed that Waltenberg and Flynn stopped working for Fox and went to work for Netflix *before* their Fixed-Term Employment Agreements with Fox expired. A "'contractual right' is a textbook 'form of property.'" (Supplemental Brief, pg. 8.) (*See Estate of Schley* (1979) 100 Cal.App.3d 161, 166 ("a contractual right is not an expectancy but a chose in action, a form of property").) (*See also United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 147 ("Contract rights ... [are] property rights") and *Walker v. Northern San Diego County Hospital District* (1982) 135 Cal.App.3d 896, 901 ("A term of employment set by contract has been recognized as a property right which the state cannot extinguish without conforming to the dictates of procedural due process. [Citations]").)

Fox's deprivation of contractual rights – property rights – is sufficient to establish standing under the UCL. (*See Lozano v. AT&T Wireless Services, Inc.* (9th Cir. 2007) 504 F.3d 718, 733-734 ("The next question we address is whether these injuries are recoverable under the UCL. The only types of relief available under the UCL actions are injunctive and restorative. [Citations] While restoring Lozano's overage payments, if any, fits squarely within the restorative context of the UCL, we question whether restoring Lozano's 'reserved' minutes falls into this category. Restitution in the UCL context, however, includes restoring money or property that was not necessarily in the plaintiff's possession. The California Supreme Court has 'stated that the concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest.' [Citations] Here, Lozano has a vested interest in 400 free anytime minutes. Due to out-of-cycle billing, however, Lozano found it necessary to reserve, and therefore lose, a certain number of those minutes each billing period. *Accordingly, we find that*

Lozano has properly stated an injury that he did not receive the full value of his contract with AWS due to its alleged failure to disclose out-of-cycle billing, and that this injury is redressable under the UCL.") and *Pinel v. Aurora Loan Services, LLC* (N.D. Cal. 2011) 814 F.Supp.2d 930, 942 ("In Plaintiff's case, Aurora foreclosed on her Property without affording her notice of the new date of the trustee sale and did not afford her an opportunity to cure her default, even though she had timely made all of the required payments under the Workout Agreement. Thus, not only has Plaintiff allegedly been deprived of the benefit of their agreement, she also lost her Property to foreclosure. These allegations are sufficient for purposes of prudential standing under the UCL. [Citations]").) (Emphasis Added.)

Additionally, Fox submitted evidence showing it suffered economic injury as a result of Netflix's unfair competition in the form of business disruption. Economic injury from unfair competition may be shown when a plaintiff suffers business disruption, including a diversion of resources and other "expenditures in response to, and to counteract, the effects of the defendants' alleged [misconduct]..." (*See, Animal Legal Defense Fund* at 1278-1284.) (*See also Experian Information Solutions, Inc. v. Lifelock, Inc.* (C.D. Cal. 2009) 633 F.Supp.2d 1104, 1108 ("The Court also finds that no genuine issue of material fact exists as to whether Experian has suffered an injury in fact and lost money or property due to Lifelock's unfair business practice. Experian clearly incurs costs each time it must process a fraud alert made by Lifelock. These costs include the costs of allocating Experian's electronic resources and employee time, plus the maintenance costs of Experian's toll-free telephone number and webpage used to accept fraud alert requests. (Spalding Decl. P 4.) Experian also incurs postage and printing costs in mailing disclosure letters to each consumer on whose behalf a fraud alert is requested. (Spalding Decl. P 5.) [¶] Overall, the Court finds that no genuine issues of material fact exist as to Experian's UCL claim. Experian has established that Lifelock engages in an unfair business practice and that Experian has suffered an injury in fact and lost money or property because of that practice, and Experian is entitled to partial summary judgment of its UCL claim."); *Sarun v. Dignity Health* (2014) 232 Cal.App.4th 1159, 1169 ("Moreover, the *Meyer* Court...also explained that incurring transaction costs to avoid the consequences of a deceptive practice 'falls within the broad meaning of suffering 'any damage as a result of the use or employment' of an unlawful practice, whether or not those transaction costs are cognizable as 'actual damages.'' [Citation] Sarun was faced with just such transaction costs: To avoid the consequences of its allegedly unlawful 'full charges' pricing structure for uninsured emergency care patients, Dignity required Sarun to apply for financial assistance, including providing tax return information and other personal financial data. The tangible burden of such an application process is far more than the 'identifiable trifle' required to confer injury in fact standing."); and *Khan v. 7-Eleven, Inc.* 2015 WL 12781203, *2 ("Thus, alleging a decline in sales due to poor management caused by Defendant's conduct is sufficient to plead economic injury. Moreover, Plaintiff's allegation that he had to hire and pay more workers to cover his duties is also adequate to show economic injury in that Defendant's alleged conduct required him to hire employees, costing him money that would otherwise not have been spent for this purpose.").)

For example, Fox submitted evidence suggesting it had to divert organizational resources after Flynn left and redistribute shows Flynn was overseeing, and Waltenberg's supervisor had to "backfill" and "step in" when he left. (Fox's Separate Statement No. 23, pg. 20 - Declaration of Lens ¶75, Exhibit 74, Deposition of Salke 399:4-400:8, 402:2-6, 441:24-453:14.) (Fox's Separate Statement No. 23, pg. 20 - Declaration of Lens ¶76, Exhibit 75, Deposition of Pearson 136:2-137:8.) (Fox's Separate Statement No. 11, pg. 10 - Declaration of Lens ¶74, Exhibit 73, Deposition of Roca 161:4-162:19.)

Netflix, in supplemental briefing, argues there are disputed facts regarding whether Fox suffered monetary loss. Netflix argues Fox's claimed out-of-pocket costs do not constitute economic injury because Fox "failed to establish as an undisputed fact that it actually incurred any costs over and above what it would have incurred to obtain the services contracted from Waltenberg and Flynn." (Supplemental Opposition, pg. 3.) Netflix contends "Fox would have spent even more on salary for those same services had Waltenberg remained at Fox" and, moreover, "Carlos Castillo, the Fox employee who ultimately took over for Waltenberg, performed the same duties at a lower salary." (Supplemental Opposition, pg. 4.) Netflix argues Fox did not suffer monetary harm and, instead, saved money while receiving the equivalent services. (Supplemental Opposition, pg. 4.) According to Netflix, "Fox incurred no cost that it would not otherwise have incurred to obtain the contracted services," that is "because, regardless of who performed those services, Fox would have had to pay for them." (Supplemental Opposition, pg. 4.)

In making the foregoing arguments, Netflix improperly assumes the quality of the services performed by the replacements, including Domenech and Castillo, are equal to those of Waltenberg and Flynn. There is no evidence to support such an assumption. Moreover, it is disingenuous for Netflix to argue Fox's replacements were on equal footing with Flynn and Waltenberg given the high value Netflix placed on Flynn and Waltenberg as evidenced by the fact that Netflix solicited Flynn and Waltenberg, offered to indemnify them, and doubled their salaries in order to induce them to breach their agreements with Fox and go to work for Netflix. Also, it is unreasonable to assume there would be no business disruption by the loss of such highly valued employees. Further, Netflix does not appear to dispute that Fox hired Domenech as a consultant to finish the outstanding work that Waltenberg left behind and Domenech was paid approximately 23,000 pounds. Additionally, as argued by Fox, the court "cannot consider whether purported savings offset the costs Fox incurred due to Netflix's interference. Netflix's claim that its tortious interference helped Fox 'save money' is thus wholly irrelevant." (Supplemental Reply, pg. 6.) (*See Clayworth* at 789 ("The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. [Citation] This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery.").) (*See also Sarun* at 1169.)

Netflix argues Fox failed to establish an undisputed fact that it suffered any property loss. (Supplemental Opposition, pgs. 5-6.) Netflix argues that employment contracts for "staff" employees are not considered property. (Opposition, pg. 5.) Netflix

contends that "Fox cannot have a property interest in a promise that Waltenberg and Flynn would continue to work for Fox for years in the future because enforcing such a promise would again violate the Thirteenth Amendment and California law, specifically Civil Code §3390. Fox's claim of standing is not based on a property interest in Waltenberg and Flynn. Fox's claim of standing is based on its contractual rights with respect to the *Waltenberg and Flynn Agreements*. The argument is that Waltenberg and Flynn would have continued to work for Fox under the Fixed-Term Employment Agreements *but for* Netflix's interference. Netflix did not cite to on-point case law or authority to suggest that contractual rights under employment agreements are not property. Moreover, as argued by Fox, Netflix did not cite to authority showing that "the loss of contract rights fails to satisfy UCL standing." (Supplemental Reply, pg. 7.) Netflix also appears to argue that there can be no property interest in an employment agreement if an employer cannot seek injunctive relief against the employee. (Supplemental Opposition, pg. 6); however, as argued by Fox, the "availability of injunctive relief is immaterial and does not negate a property interest." (Supplemental Reply, pg. 7.)

Additionally, Netflix argues Fox cannot establish the predicate acts for its UCL claim. Specifically, Netflix argues that because summary adjudication was denied as to the inducing breach of contract claims, it must also be denied as to the derivative UCL claim. (Supplemental Opposition, pgs. 1, 6-7); however, as discussed above, the evidence before the court shows Netflix induced Waltenberg and Flynn to breach their Fixed-Term Agreements with Fox. The only reason the court denied Fox's motion for summary adjudication of the inducing breach of contract causes of action is because there are triable issues of material fact as to resulting *damages*.[13] The cases cited by Netflix do not involve situations where a UCL claim failed solely because *damages* were not established with respect to the predicate claims. (*See AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, *Van Patten v. Vertical Fitness Group, LLC* (S.D. Cal. 2014) 22 F.Supp.3d 1069, and *Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456.) Moreover, as argued by Fox, its "UCL claim does not depend on proof of damages for tortious interference." (Supplemental Reply, pg. 8.) As discussed above, no damages analysis is required to establish UCL standing. Fox only

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[13] (*See De La Torre v. Cash Call* (2018) 5 Cal. 5th 966, 980 ("But plaintiffs are neither bringing a cause of action under the California Financing Law (Fin. Code, § 22000) nor seeking remedies under that division. Instead, plaintiffs advance an unfair competition claim under the UCL. The claim is premised on unlawful business conduct, which section 17200 of the UCL proscribes. [Citations] By prohibiting unlawful business practices, ''section 17200 'borrows' violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable.' [Citation] In this case, section 22302 supplies the requisite 'violations of other laws' by making '[a] loan found to be unconscionable' a violation of the California Financing Law. [Citation] The UCL, in turn, makes that violation 'independently actionable.' [Citation] So the fact that section 22302 does not provide for a private cause of action is immaterial since 'it is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs 'specific power' [citation] to prosecute unfair competition claims.' [Citation] Similarly, it does not matter that plaintiffs cannot recover the remedies made available under section 22302. Plaintiffs are not praying for remedies under section 22302. They are seeking UCL remedies—restitution and injunctive relief—which are recoverable 'cumulative' of any other remedies. [Citations]").)

needed to establish some form of economic injury, which, as discussed above in detail, Fox did.

Netflix also argues that its "to-be-amended affirmative defenses may provide a complete defense to the UCL claim." (Supplemental Opposition, pg. 7); however, Netflix, since making this argument, filed a second amended answer. As discussed below in detail, Netflix did not submit admissible evidence creating a triable issue of material fact as to the violation of public policy and unconscionability defenses.

The court finds Fox is entitled to injunctive relief. 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.) The court finds that based on its past behavior and its stated position in this case, Netflix will likely continue to interfere with Fox's *valid* Fixed-Term Employment Agreements if the misconduct is not enjoined. Netflix has taken the position that Fox's Fixed-Term Employment Agreements violate Business & Professions Code §16600, Civil Code §§3390 and 3423, Labor Code §2855, and/or C.C.P. §526, and/or are unconscionable. The court does not agree that Netflix's has met its burden with regard to this blanket position. As discussed above, Fox already established Netflix induced breach of the Flynn and Waltenberg Agreements. Further, Netflix continues to recruit and hire employees subject to Fixed-Term Employment Agreements with Fox. Netflix does not appear to dispute that from between the date of Fox's complaint and August 31, 2018, Netflix offered employment to 14 individuals who were employed pursuant to specified-term contracts with TCFFC or Fox 21 that had not yet expired at the time Netflix made the offer, and that between the date of Fox's complaint and August 31, 2018, Netflix hired 8 individuals who were employed pursuant to specified-term contracts with TCFFC or Fox 21 that had not yet expired at the time Netflix hired them. (Netflix's Response to Fox's SS No. 25, pgs. 41-42.) (Netflix's Response to Fox's SS No. 26, pg. 44.)[14] Moreover, as indicated in the court's minute order of June 5, 2019, denying Netflix's motion for summary adjudication, the updated numbers as of April 4, 2019 were 17 offers and 15 hires. See Netflix's Response to Fox's Additional Fact Nos. 25, 26, pages 23-25. Netflix will likely continue to solicit employees subject to Fixed-Term Employment Agreements with Fox and/or induce such employees to breach their Fixed-Term Employment Agreements with Fox, without making a proper determination as to whether each separate Fixed-Term Employment Agreement violates Business &

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[14] Fox's Fact No. 25 states: "Between the date of Fox's Complaint and August 31, 2018, Netflix offered employment to 14 individuals who were employed pursuant to specified-term contracts with TCFFC or Fox 21 that had not yet expired at the time Netflix made the offer." Netflix, in response, did not dispute this fact. Instead, Netflix disputed whether the contracts were valid and enforceable. (Netflix's Response to Fox's SS No. 25, pgs. 41-44.)

Fox's Fact No. 26 states: "Between the date of Fox's Complaint and August 31, 2018, Netflix hired 8 individuals who were employed pursuant to specified-term contracts with TCFFC or Fox 21 that had not yet expired at the time Netflix hired them." Netflix, in response, did not dispute this fact. Instead, Netflix disputed whether the contracts were valid and enforceable. (Netflix's Response to Fox's SS No. 26, pgs. 44-45.)

Professions Code §16600, Civil Code §§3390 and 3423, Labor Code §2855, and/or C.C.P. §526, and/or is unconscionable. Further, as discussed below in detail, the Flynn and Waltenberg Agreements, as well as, the Fixed-Term Employment Agreements *with the same challenged provisions*, do not violate public policy, are not unconscionable, and any offending provision(s) can be severed.

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 granted.[15] The court finds Fox is entitled to injunctive relief, as follows: Netflix shall not solicit employees who are subject to *valid* Fixed-Term Employment Agreements with Fox or induce such employees to breach their *valid* Fixed-Term Employment Agreements with Fox.

2. Second Amended Answer

a. Violation of Public Policy (3rd AD)

As discussed above, Netflix's second amended answer contains a violation of public policy affirmative defense. Netflix's violation of public policy affirmative defense is based on alleged violations of and/or violations of the policies supporting Business & Professions Code §16600, Civil Code §§3390 and 3423, Labor Code §2855, and C.C.P. §526. Netflix alleged Fox's Fixed-Term Employment Agreements also contain one-sided, overbroad, and/or illegal provisions that permeate the agreements, including the unilateral options, injunctive relief provisions, non-solicitation provisions, confidentiality provisions, and "no-shop" provisions.

1. Injunctive Relief Provisions

Business & Professions Code §16600 provides, as follows: "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."

"In its typical application, section 16600 invalidates certain far-reaching postemployment covenants not to compete. [Citation]" (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.)[16] (*See USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197, 208 ("We agree with the reasoning of *Hassey* and, likewise, conclude Case has no claim under Business and Professions Code section 16600. He voluntarily agreed to participate in the training program and understood UPI would front all the costs of the Learner Program and expected reimbursement of training costs if he chose to leave within 30 months of completing the program. This was an agreement concerning advanced educational costs. *It did not restrain Case from working for a*

[15] This court's ruling does not impact Netflix's ability to argue Fox's *other* Fixed-Term Employment Agreements violate public policy and/or are unconscionable.

[16] The court notes that "agreements designed to protect an employer's proprietary information do not violation section 16600. [Citation]" (*Fowler* at 44.)

competitor or any other entity. Indeed, Case quit UPI and went to work elsewhere, and he was entirely free to do so. He had also agreed to reimburse UPI for the costs it fronted for his advanced training, a benefit Case retained despite his departure.").) (Emphasis Added.)

"Business and Professions Code section 16600 has consistently been interpreted as invalidating any employment agreement that unreasonably interferes with an employee's ability to compete with an employer *after* his or her employment ends. [Citation] However, the statute 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.)[17]

Civil Code §3390 provides, in pertinent part, that an obligation to employ another in personal service cannot be specifically enforced.

Civil Code §3423 provides, in pertinent part, as follows:

> An injunction may not be granted:
> ***
> (e) To prevent the breach of a contract the performance of which would not be specifically enforced, other than a contract in writing for the rendition of personal services from one to another where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and where the compensation for the personal services is as follows...

C.C.P. §526(b) provides, in pertinent part, that an injunction cannot be granted to "prevent the breach of a contract the performance of which would not be specifically enforced, other than a contract in writing for the rendition of personal services from one to another where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and where the compensation for the personal services is as follows..."[18]

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[17] The court notes that "[w]hatever 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."
(*Imperial Ice Company v. Rossier* (1941) 18 Cal.2d 33, 36.)

[18] Case law suggests the special and unique language in Labor Code §2855, Civil Code §3423, and C.C.P. §526 pertains to artists, musicians, or performers that have achieved distinction or star quality. (*See Motown Record Corp. v. Brockert* (1984) 160 Cal.App.3d 123, 137-138, *Paramount Pictures Corp. v. Holden* (S.D. Cal. 1958) 166 F.Supp 684, 688, and *Lemat Corp. v. Barry* (1969) 275 Cal.App.2d 671, 678.)

Netflix did not sustain its burden of showing the injunctive relief provisions violate any of these statutes or public policy. It is undisputed the Waltenberg Agreement, the 2013 Flynn Agreement, and other Fixed-Term Employment Agreements contain the following injunctive relief provision:

> 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. 63-65, Nos. 29-30.) (Netflix's Response to Fox's Supplemental SS, pg. 3, 135-136, 269, Nos. 2, 36, and 59.) (Emphasis Added.)

Netflix did not establish that the injunctive relief provisions in the Waltenberg Agreement, 2013 Flynn Agreement, and other Fixed-Term Employment Agreements violate Business & Professions Code §16600. As set forth above, the statute does not "affect limitations on an employee's conduct or duties *while* employed." (*Angelica Textile Services, Inc.* at 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 suggests 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.) Further, the injunctive relief provisions 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.)[19]

The court disagrees with Netflix's contention that the injunctive-relief provisions violate Civil Code §§3390 and 3423 or C.C.P. §526.

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[19] In the ruling on Netflix's motion for summary adjudication, the court stated: "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 a 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." (Court's 6/5/19 Ruling.)

Netflix, relying on *Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937 and *Golden v. California Emergency Physicians Medical Group* (9th Cir. 2015) 782 F.3d 1083, appears to argue 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.) (Second Supplemental Opposition, pgs. 3-10.) As discussed below in detail, the court believes that Netflix's reliance on *Golden* and *Edwards* is misplaced.

Golden is not binding on this court and, in any event, is distinguishable. *Golden* involved a "no-employment provision" in a settlement agreement. (*Golden* at 1084-1085.) "The no-employment provision expresse[d] the parties' agreement 'that...Golden shall not be entitled to work or be reinstated at any CEP-contracted facility or at any facility owned or managed by CEP.'" (*Id.* at 1085.) The provision "waive[d] any right Dr. Golden otherwise may have to continue or to regain previous or current employment with CEP" and "provide[d] that 'if CEP contracts to provide services to, or acquires rights in, a facility that is an emergency room...at which Golden is employed or rendering services, CEP has the right to and will terminate Golden from any work in the emergency room without any liability whatsoever.'" (*Id.*) In contrast, the injunctive relief provisions at issue in this action do not require Waltenberg, Flynn, or other employees to waive their rights to continue or regain previous or current employment with Fox and do not give Fox the right to terminate the employment of Waltenberg, Flynn, or other employees without any liability whatsoever. Moreover, in *Golden*, the United States Court of Appeals for the Ninth Circuit, did not even determine whether the "no-employment provision" violated Business & Professions Code §16600. The court remanded the case to the district court to "determine in the first instance whether the no-employment provision constitutes a restraint of a substantial character to Dr. Golden's medical practice." (*Id.* at 1093.)[20]

Edwards involved "a more traditional variety of non-compete covenants – an employment agreement forbidding a certified public accountant from poaching Arthur Anderson's clients and personnel after leaving the firm." (*Id.* at 1091.) (*See Edwards* at 942.) The California Supreme Court concluded the non-competition agreement was invalid, stating:

> As the Court of Appeal observed, "The first challenged clause prohibited Edwards, for an 18-month period, from performing professional services of the type he had provided while at Andersen, for any client on whose account he had worked during 18 months prior to his termination. The

[20] The court stated: "In determining a contract's validity under section 16600, therefore, the court should direct its inquiry according to the actual statutory language: whether the challenged provision 'restrain[s anyone] from engaging in a lawful profession, trade, or business of any kind.' Cal. Bus. & Prof. Code § 16600. This prohibition extends to any 'restraint of a substantial character,' no matter its form or scope. [Citation] The statutory context of section 16600 furthermore suggests that the prohibition on professional restraints extends to a larger category of contracts than simply those where the parties 'agree . . . to refrain from carrying on a similar business within a specified geographic area.' [Citations]" (*Id.* at 1092.)

> second challenged clause prohibited Edwards, for a year after termination, from 'soliciting,' defined by the agreement as providing professional services to any client of Andersen's Los Angeles office." The agreement restricted Edwards from performing work for Andersen's Los Angeles clients and therefore restricted his ability to practice his accounting profession. [Citation] The noncompetition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession. [Citation]

(*Id.* at 948.)

The court in *Edwards* also refused to adopt a "narrow-restraint exception to section 16600" and left it to the "Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600." (*Id.* at 949-950.) In contrast to *Edwards*, the Fixed-Term Employment Agreements at issue in the instant action do not contain non-compete covenants.[21] In fact, it is undisputed that the Waltenberg Agreement and Flynn's 2015 Agreement do not bar Waltenberg and Flynn from *pursuing* at any time post-contract expiration employment opportunities. (Netflix's Response to Fox's Supplemental SS, pgs. 5, 84, 138, 218, 319, 322.)

Netflix also argues Business & Professions Code §16600 does not bar only post-term covenants not to compete. (Second Supplemental Opposition, pgs. 5-7.) First, Netflix argues "*Angelica Textile* cannot be read to give a blessing under Section 16600 to fixed-term employment contracts that purport to (a) limit an employee's ability to quit, and/or (b) stop her from working anywhere else during the contract term" because the case did not involve a fixed-term contract. (Second Supplemental Opposition, pgs. 3-5.) Second, Netflix argues "there is no hard-and-fast rule that [Business & Professions Code §16600] cannot invalidate in-term employment restrictions when they are sufficiently oppressive," it would be odd if every conceivable in-term restriction was fair game in light of the "all-encompassing language" of Business & Professions Code §16600, and courts have specifically held that Business & Professions Code §16600 can prohibit in-term restrictions, including in the employment context. (Second Supplemental Opposition, pgs. 5-7.) The California Court of Appeal, Fourth Appellate District, Division One, in *Angelica Textile Services, Inc.*, clearly stated that Business & Professions Code §16600 "does not affect limitations on an employee's conduct or duties *while* employed." (*Angelica Textile Services, Inc.* at 509.) The court did not distinguish between at-will and fixed-term employment. As discussed above, the

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[21] Netflix's reliance on *AMN.* is also misplaced. (Opposition, pgs. 10 and 19.) *AMN* involved a non-solicitation of employee provision. (*AMN* at 936.) The California Court of Appeal, Fourth Appellate District Division One, concluded the provision was void under Business & Professions Code §16600. The court reasoned: "the broadly worded provision prevents individual defendants, for a period of at least one year after termination of employment with AMN, from either 'directly or indirectly' soliciting or recruiting, or causing others to solicit or induce, any employee of AMN. *This provision clearly restrained individual defendants from practicing with Aya their chosen profession—recruiting travel nurses on 13-week assignments with AMN.* [Citations]" (*Id.*) (Emphasis Added.) Waltenberg and Flynn are not recruiters and the Fixed-Term Employment Agreements do not restrain them from practicing their chosen professions.

injunctive relief provisions in the Fixed-Term Employment Agreements are essentially limitations on the employees' conduct or duties *while* employed.

Moreover, the federal cases cited by Netflix are not binding on this court and, in any event, are distinguishable because they involve non-compete or no-employment clauses limiting the right to pursue lawful employment or restraining lawful employment. (*See ITN Flix, LLC v. Hinojosa* (9th Cir. 2017) 686 Fed. Appx. 441, 443-444 (agreement not to play other vigilante characters), *Steinberg Moorad & Dunn, Inc. v. Dunn* (9th Cir. 2005) 136 Fed. Appx. 6, *10 (non-competition clause), and *Golden* at 1084-1085 (no-employment provision).) In the instant action, the injunctive relief provisions do not and did not prevent Waltenberg, Flynn, or any other employees from leaving Fox and/or pursing lawful employment. In fact, Waltenberg, Flynn and at least 13 other Fox employees actually left Fox for positions at Netflix.

Additionally, in the second supplemental opposition, Netflix, relying on *D'Sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, appears to argue that inclusion of the injunctive-relief provision "sends a powerful 'or else' message to all Fox employees." (Second Supplemental Opposition, pg. 8.) This court finds that Netflix's reliance on *D'Sa* is misplaced. That case does not apply here. In *D'Sa*, the California Court of Appeal, Second Appellate District, Division Three, held that "an employer cannot lawfully make the signing of an employment agreement, which contains an unenforceable covenant not to compete, a condition of continued employment ...." (*Id.* at 496.) The Court of Appeal further held "that an employer's termination of an employee who refuses to sign such an agreement constitutes a wrongful termination in violation of public policy." (*Id.*) The Court of Appeal recognized "there exists a clear legislative declaration of public policy against covenants not to compete." (*Id.* at 499.)

In contrast to *D'Sa*, the instant action does not involve a covenant not to compete or termination of employment for refusal to sign an agreement that contained a covenant not to compete.[22] As discussed above, the injunctive relief provisions in the *executed* Fixed-Term Employment Agreements do not violate Business & Professions Code §16600. Moreover, it is undisputed that the Waltenberg Agreement and Flynn's 2015 Agreement do not bar Waltenberg and Flynn from pursuing at any time post-contract-expiration employment opportunities. (Netflix's Response to Fox's Supplemental Separate Statement, pgs. 5 and 138, Nos. 5 and 35.)

Netflix also argues the Limited-Term Employment Agreements do not have a "resignation provision," absent such a provision, "an employee wishing to leave Fox must breach his or her contract," and any "such breach (or attempt to breach)...triggers the contract's injunctive-relief provision, which purports to allow Fox to dragoon the

[22] The Court of Appeal in *D'Sa* did not address the issue of "whether defendants could enforce any part of this noncompetition clause if plaintiff had signed and returned the agreement in a timely manner, continued in his employment, and later left that employment..." (*Id.* at 498.) The only issue before the Court of Appeal was "whether defendants [could] make plaintiff's acceptance of the agreement a condition of his continued employment by firing him when he refused to sign it," and the Court of Appeal held "they cannot." (*Id.*)

employee back into its ranks and enjoin any other breach of contract." (Second Supplemental Opposition, pg. 7.) Netflix did not cite any on-point case law or authority to support the need for a resignation provision. Moreover, as argued by Fox, "*requiring* 'resignation provisions' would [essentially] turn fixed-term contracts *into* at-will agreements." (Second Supplemental Reply, pg. 9.) (Emphasis Added.) (*Compare* Labor Code §§2922 ("An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.") and 2925 ("An employment for a specified term may be terminated by the employee at any time in case of any wilful or permanent breach of the obligations of his employer to him as an employee.").) (*See also Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 335 ("An at-will employment may be ended by either party 'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice. [Citations]").) Further, employers and employees can agree to lawful limitations on termination rights. (*See Guz* at 336 (Labor Code §2922 "does not prevent the parties from *agreeing* to any limitation, otherwise lawful, on the employer's termination rights. [Citation]...[¶]...[T]he parties are free to define their relationship, including the terms on which it can be ended, as they wish. The parties may reach *any* contrary understanding, otherwise lawful, 'concerning either the term of employment or the *grounds or manner* of termination.' [Citation]").) As argued by Fox, the parties "are...free to bargain for a 'resignation provision'..., but they are also free not to, and the absence of such a provision does nothing to render employment contracts invalid." (Supplemental Reply Brief, pg. 9.)

Netflix further argues the injunctive relief provisions do, in fact, restrain employees, as evidenced by the Civil Code §3423 language included in the provisions. (Supplemental Opposition, pgs. 7-8.) Netflix did not cite on-point authority holding that the inclusion of the Civil Code §3423 language renders the injunctive-relief provision a de facto non-compete provision. Moreover, Netflix did not cite any evidence which supports its assertion. From the filing of the complaint until April 14, 2019, of the 17 Fox employees under contract to whom Netflix offered employment, 15 of them, including Flynn and Waltenberg, actually left Fox – mid-contract - to work for Netflix.

Finally, Netflix argues a "breach does not nullify the injunctive-relief provision" because "contracts imposing duties for 'a specified term' can be subject to 'continuous' or successive breach." (Supplemental Opposition, pgs. 8.) The cases cited by Netflix do not support a finding that the injunctive relief provisions are somehow void.

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 offending provision(s) can be severed. 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, 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.)

Netflix's reliance on *Latona* is misplaced. That case is distinguishable and is not binding on this court. *Latona* involved a "Non-Compete and Confidentiality Agreement" ("Agreement"). (*Id.* at 1090.) The Agreement contained a non-compete clause and a 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.)

Unlike *Latona,* the instant action does not involve the wrongful termination of an employee or a refusal to sign an agreement containing non-compete provisions that violate public policy. Rather, the instant action involves signed Fixed-Term Employment Agreements. Moreover, this action does not involve non-compete 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.

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 also argues that severance cannot cure the illegality of Fox's contracts. (Second Supplemental Opposition, pgs. 10-11); however, Netflix did not establish the "central purpose of the contract[s] is tainted with illegality." (Second Supplemental Opposition, pg. 10.) (*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.").)

Finally, Netflix argues the interlocking restrictions in the Fixed-Term Employment Agreements render the agreements invalid under Business & Professions Code §16600, specifically the injunctive-relief provision, unilateral option, "no-shop" provision, non-solicitation provision, and confidentiality provision. (Supplemental Opposition, pgs. 7-10.) As discussed in the court's ruling, the provisions are lawful and/or can be severed.

2. Unilateral Options

Netflix failed to sustain its burden of showing the unilateral options violate public policy. The Waltenberg Agreement, the Flynn Agreement, and other Limited-Term Employment Agreements contain options, exercisable at Fox's discretion. (Netflix's Response to Fox's Supplemental SS, pgs. 3, 135, and 268, Nos. 1, 31, and 58.) There is nothing before the court to show that unilateral options automatically violate public policy. Instead, California case law suggests the use of unilateral options in employment contracts is permitted under certain circumstances. (*See Lemat Corp. v. Barry* (1969) 275 Cal.App.2d 671, 676-677 ("Lemat first argues that the court erred in granting injunctive relief for only the one year remaining of the two-year term of the contract. We think the court's construction of paragraph 24 of the option provision, as providing for a second year in addition to the initial year, is an eminently reasonable one that follows the well-thought out decision in *Central New York Basketball, Inc.* v. *Barnett* (1961) 88 Ohio L.Abs. 40, 19 Ohio Ops.2d 130 [181 N.E.2d 506]), a case almost on all fours with the instant one. In *Barnett*, the owner of an NBA franchised professional basketball team sought to enforce a substantially similar renewal option against a player who, like Barry, after the first year, entered into an agreement to play with a team franchised by the ABA. The court held that the reasonable practical construction of the renewal option was that the club could renew the player's contract for an additional year, and that so interpreted, the renewal provision did not lack mutuality and was supported by sufficient consideration. We think the identical reasoning applies here.").)[23]

In opposition, Netflix argues that, piling onto the exclusion of a resignation provision and inclusion of the injunctive relief provision, virtually all of Fox's contracts allow it to unilaterally extend the contractual term. (Second Supplemental Opposition, pgs. 8-9.) Netflix argues that, not only do Fox's contracts purport to prevent employees from working elsewhere for a specified period of time, they purport to allow Fox to extend the period of its dominion in its sole discretion. (Second Supplemental

[23] The Court of Appeal noted that the court in *Central New York Basketball, Inc.* stated: "'"...The authorities are to the effect that so long as there is consideration for the obligation of the defendant, it is not essential that there be a mutuality of obligation between plaintiff and defendant in order to sustain a right of action in the plaintiff against the defendant for a breach of such obligation..."'" (*Id.* at 677, fn. 7.)

Opposition, pg. 9.) Netflix argues Fox admits it never negotiates the unilateral nature of the provision and the only possible reason for refusing to make the provision mutual is to enable Fox to force employees to remain at Fox against their will and to hold even more leverage in its threat to prevent employees from working elsewhere. (Supplemental Opposition, pg. 9.)

Netflix did not cite any on-point case law or authority to suggest the unilateral options in the Flynn, Waltenberg, and other Fixed-Term Employment Agreements are somehow unlawful or void. The fact that the unilateral options may provide Fox a better bargaining position in the future is insufficient to establish the provisions are void. Moreover, at least with respect to Flynn and Waltenberg, the agreements provide for increased compensation for the option years. (Supplemental Declaration of Lens ¶¶62-66; Exhibits 60-64.)

3. No-Shop Provisions

Netflix argues that some of Fox's contracts include a "no-shop" provision barring employees from seeking or investigating new employment opportunities for 90 to 120 days before the end of their contracts. (Supplemental Opposition, pg. 9.) Netflix argues this provision plainly runs afoul of California law permitting an employee to seek other employment and even make some preparations to compete before resigning. (Supplemental Opposition, pg. 9.)

It is undisputed that some of Fox's fixed-term contracts contain a provision precluding the employee from "seek[ing] or negotiat[ing]" for new employment more than 90 days before the contract expires. (Netflix's Response to Fox's Supplemental SS, pg. 272, No. 62.) Fox argues that "Netflix cites no authority and alleges no facts suggesting that the...No-Shop clauses restrain employees *after* they leave Fox." (Second Supplemental Reply, pg. 9.)

Netflix did not cite controlling authority holding these clauses are invalid. The Fixed-Term Employment Agreements directly at issue in this action – the Flynn and Waltenberg Agreements – *do not* contain the "no-shop" provision. Moreover, even assuming, arguendo, such "no-shop" provisions are invalid, there is nothing before the court to suggest the provisions could not be severed.

4. Non-Solicitation Provisions

Netflix failed to sustain its burden of showing the non-solicitation clauses violate public policy. The 2013 Flynn Agreement, the Waltenberg Agreement, and other Fixed-Term Employment Agreements contain the following non-solicitation provision:

> You will not, during the term of your employment and for a period of two (2) years thereafter, either individually or on behalf of any other entity, directly or indirectly, induce or solicit or approach or attempt to induce or solicit or approach any person

> who is an employee of the Company, or any of its affiliates to render services to any other person, firm or corporation.

(Netflix's Response to Fox's Supplemental SS, pgs. 5, 137, and 271, Nos. 4, 34, and 61.) In the second amended answer, Netflix alleged the non-solicitation provisions are "wildly overbroad" and violative of Business & Professions Code §16600. (2nd AA ¶18.) As discussed above, Business & Professions Code §16600 does not affect limitations on an employee's conduct or duties *while* employed. Moreover, the post-employment restriction is not void on its face under Business & Professions Code §16600. The non-solicitation provisions are essentially non-interference provisions that prevent a former Fox employee from raiding the employees of Fox or Fox's affiliates for a period of two years. Netflix din not establish that such non-interference provisions violate Business & Professions Code §16600.

The case of *Loral Corp. v. Moyes* (1985) 174 Cal.3d 268 is instructive. In *Loral Corp.*, the California Court of Appeal, Sixth Appellate District, determined that a termination agreement between an employer and former employee, which contains a provision "restrain[ing] the former employee from disrupting, damaging, impairing or interfering with his former employer's business by 'raiding' its employees," is not void on its face under Business & Professions Code §16600. (*Id.* at 271, 275-278.) The court characterized the agreement as a "noninterference agreement." (*Id.* at 275.) The court stated the "potential impact on trade must be considered before invalidating a noninterference agreement." (*Id.* at 278.) The court recognized that a "contract must be construed to be lawful if possible." (*Id.* at 278-279.) The court also recognized that "Defendant is restrained from disrupting, damaging, impairing or interfering with his former employer by raiding Conic employees under his termination agreement." (*Id.* at 279.) The court stated this "does not appear to be any more of a significant restraint on his engaging in his profession, trade or business than a restraint on solicitation of customers or on disclosure of confidential information." (*Id.*) The court noted the agreement "'expressly permits Moyes to be employed by or engage in a competing business.' [Citation]" (*Id.*) The court also noted the "restriction only slightly affects Conic employees" – "[t]hey are not hampered from seeking employment with Aydin nor from contacting Moyes," and all "they lose is the option of being contacted by him first." The court recognized the provision "does not restrain [the employees] from being employed by Aydin." (*Id.* at 279.) The court recognized the "restriction presumably was sought by plaintiffs in order to maintain a stable work force and enable the employer to remain in business" and this "restriction has the apparent impact of limiting Moyes' business practices in a small way in order to promote Conic's business." (*Id.* at 280.) According to the court, this "noninterference agreement has no overall negative impact on trade or business." (*Id.*)

In opposition, Netflix argues the non-solicitation provisions are overbroad – they are unlimited as to geography and restrict Fox employees during their employment and for two years after employment from "directly or indirectly" approaching or enticing "any person who is an employee of Fox or any of its affiliates to render services to any other person, firm or corporation." (Netflix's Supplemental Opposition, pgs. 9-10.) Netflix contends "Fox's affiliates include hundreds or more companies around the world

– companies that are never disclosed to Fox employees when they signed their fixed-term contracts." (Netflix's Supplemental Opposition, pg. 10.) Netflix also argues that "Courts have invalidated non-solicitation provisions under section 16600." (Netflix's Supplemental Opposition, pg. 10.)

Netflix did not cite any on-point case law or authority to suggest the non-solicitation provisions violate Business & Professions Code §16600. Netflix's reliance on *AMN* and *WeRide Corp. v. Kun Huang* (N.D. Cal. 2019) 379 F.Supp.3d 834 is misplaced. *WeRide* is not binding on this court. Moreover, *AMN* is distinguishable because it involved a non-solicitation of employee provision that restrained the individual defendants from practicing their chosen profession. (*AMN* at 936.) According to the California Court of Appeal, Fourth Appellate District, Division Two, "the broadly worded provision prevents individual defendants, for a period of at least one year after termination of employment with AMN, from either 'directly or indirectly' soliciting or recruiting, or causing others to solicit or induce, any employee of AMN." (*Id.*) The court stated this "provision clearly restrained individual defendants from practicing with Aya their chosen profession – recruiting travel nurses on 13-week assignments with AMN." (*Id.*)[24] In contrast to *AMN*, the instant action does not involve recruiters and/or restraints on Waltenberg and Flynn from practicing their chosen profession with Netflix.

Even assuming, arguendo, the non-solicitation provisions violate Business & Professions Code §16600, the provisions can properly be severed.

5. Confidentiality Provisions

Netflix failed to sustain its burden of showing the confidentiality provisions violate public policy. The 2013 Flynn Agreement, the Waltenberg Agreement, and other Fixed-Term Employment Agreements contain the following confidentiality provision:

> You understand and agree that in the course of employment with the Company, you may acquire confidential information and trade secrets concerning the Company's operations, its future plans and its method of doing business (and the operations, future plans and method of doing business of Company's affiliates), including, by the way of example, but by no means limited to,

[24] The *AMN* court doubted the validity of *Loral Corp.* "post-*Edwards*." (*Id.* at 939.) However, the *AMN* court's decision did not rest on that analysis alone. The *AMN* court stated:

> Even if *Moyes*'s use of a reasonableness standard survived *Edwards*, we find *Moyes* factually distinguishable to our case. Unlike the former employee in *Moyes*, who was an executive officer of the plaintiff employer, in the instant case individual defendants were in the *business* of recruiting and placing on a temporary basis medical professionals, primarily nurses, in medical facilities throughout the country. If enforced, section 3.2 of the CNDA thus restrained individual defendants from engaging in their chosen profession, even in a 'narrow' manner or a 'limited' way. [Citation] We thus independently conclude section 3.2 of the CNDA is void under section 16600.

(*Id.* at 939.)

> highly proprietary information about the Company's (and its affiliates) customers, processes, product development, financial, marketing, pricing, cost, and compensation, (hereinafter collectively "Trade Secrets"), all of which information you understand and agree would be extremely damaging to the company if disclosed to a competitor or made available to any other person or corporation. As used herein, the term "competitor" includes, but is not limited to, any corporation, firm or business engaged in a business similar to that of the Company or its subsidiary companies. You understand and agree that such information is divulged to you in confidence and you understand and agree that, at all times, you shall keep in confidence and will not disclose or communicate Trade Secrets or any other secret and confidential information on your own behalf, or on behalf of any competitor, if such information is not otherwise publicly available, unless disclosure is made pursuant to written approval by the Company or is required by law. In view of the nature of your employment and information and Trade Secrets which you may receive during the course of your employment, you likewise agree that the company would be irreparably harmed by any violation of this Agreement and that, therefore, the Company shall be entitled to seek an injunction prohibiting you from any violation of threatened violation of this Agreement.

(Netflix's Response to Fox's Supplemental SS, pgs. 3-4, 136-137, and 270-271, Nos. 3, 33, and 60.) In the second amended answer, Netflix alleged Fox's confidentiality provisions treat "virtually every bit of information an employee learns while employed by Fox as confidential, and forbids its disclosure post-employment," and the "prohibition goes well beyond legitimate trade secrets, and is phrased broadly enough to include the basic knowledge of the industry and the skills acquired that make employees valuable and marketable." (2nd AA ¶19.) Netflix also alleged the confidentiality provisions limit the employees' ability to find employment after leaving Fox. (2nd AA ¶19.); however, as argued by Fox, the confidentiality provisions only limit disclosure of Fox's confidential and trade secret information, not Fox employees' general knowledge. (Fox's Second Supplemental Brief, pg. 14.) "[A]greements designed to protect an employer's proprietary information do not violate section 16600. [Citation]" (*Fowler* at 44.)

In opposition, Netflix argues the Fixed-Term Employment Agreements contain overbroad confidentiality provisions that go "beyond the dissemination of trade secrets, encompassing vast amounts of information including information in an employee's head." (Second Supplemental Opposition, pg. 10.) Netflix argues the provisions impede "employees from deploying general knowledge and skills post employment." (Second Supplemental Opposition, pg. 10.) Netflix, relying on *Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 577-578, also argues that "even restraints protecting trade secrets are of questionable validity under section 16600." (Netflix's Supplemental Opposition, pg. 10.)

As discussed above, the confidentiality provisions are limited to disclosure of Fox's confidential and trade secret information. The provisions do not apply to an employee's general knowledge. (Second Supplemental Reply, pg. 9, fn. 10.) (*See Wanke, Industrial, Commercial, Residential, Inc. v. Keck* (2012) 209 Cal.App.4th 1151, 1177 ("Thus, under *Edwards*, Business and Professions Code section 16600 generally prohibits the enforcement of a nonsolicitation agreement in all cases in which the trade secret exception does *not* apply.").) Moreover, Netflix did not provide the court with admissible evidence showing the confidentiality provisions prevented Flynn, Waltenberg, or any other employee from deploying their general knowledge and skill post-employment with Fox. Additionally, Netflix did not cite to on-point case law or authority to establish that restraints protecting trade secrets are invalid under Business & Professions Code §16600. Netflix's reliance on *Dowell* is misplaced. The California Court of Appeal, Second Appellate District, Division Two, in *Dowell*, did *not* resolve the issue of "the continued viability of the common law trade secret exception to covenants not to compete." (*Id.* at 577.) The court determined that, even assuming the exception exists, it had no application because "the noncompete and nonsolicitation clauses in the agreements are not narrowly tailored or carefully limited to the protection of trade secrets, but are so broadly worded as to restrain competition. [Citation]" (*Id.* at 577-578.)

6. Labor Code §2855 – Seven-Year Rule

Labor Code §2855(a) provides, as follows:

> Except as otherwise provided in subdivision (b), a contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4 (commencing with Section 3070), may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

The *Manchester v. Arista Records, Inc.* (C.D. Cal. 1981) 1981 U.S. Dist. Lexis 18642 case 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,* 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.

(*Id.* at *18-20) (emphasis added.) The court finds *Manchester* is well-reasoned and persuasive.

Netflix failed to sustain its burden of showing the Waltenberg Agreement violates the seven-year rule. Waltenberg's 2009 contract with Fox had a fixed-term and a unilateral option. (Netflix's Response to Fox's Supplemental SS, pg. 70, No. 12.) Waltenberg was an at-will Fox employee between May 2012 and December 2014. (Netflix's Response to Fox's Supplemental SS, pg. 68, No. 9.) Fox and Waltenberg executed the Waltenberg Agreement for a specified term, dated December 9, 2014. (Netflix's Response to Fox's SS, pgs. 2-4, No. 1.) 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.) The Waltenberg Agreement contains an option, exercisable at Fox's discretion. (Netflix's Response to Fox's Supplemental SS, pg. 3, No. 1.) The Waltenberg Agreement states, in pertinent part, as follows: "In addition, the Company shall have one irrevocable option, exercisable within the sole discretion of the Company, to employ you for one additional two-year period ('the Option Period') pursuant to this Agreement, commencing January 1, 2017 and ending December 31, 2018." (Netflix's Response to Fox's Supplemental SS, pg. 3, No. 1.) (Supplemental Declaration of Lens ¶66; Exhibit 64.) The Waltenberg Agreement provides for, at most, *a four-year term.* Waltenberg stopped working at Fox on January 22, 2016, before the initial two-year term expired. (Netflix's Response to Fox's SS, pg. 11, No. 9.)

Netflix also failed to sustain its burden of showing the Flynn Agreement violates the seven-year rule.[25] Flynn's September 2012 contract with Fox had a fixed-term and a unilateral option. (Netflix's Response to Fox's Supplemental SS, pg. 205.) 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.) (Supplemental Declaration of Lens ¶63; Exhibit 61.) Flynn signed the November 2013 Agreement on November 20, 2013. 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 Vice President, Creative (effective November 19, 2014), 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. (Fox's SS – No. 13.) (Netflix's Response to Fox's SS, pgs. 20-25, No. 13.) (Supplemental Declaration of Lens ¶64; Exhibit 62.) Fox 21 exercised its option in the November 2013 Agreement. (Fox's SS – No. 13.) (Netflix's Response to Fox's SS, pgs. 20-25, No. 13.) 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. (Fox's SS – No. 13.) (Netflix's Response to Fox's SS, pgs. 20-25, No. 13.) (Supplemental Declaration of Lens ¶65; Exhibit 63.) Flynn stopped working at Fox on September 2, 2016. (Netflix's Response to Fox's SS, pg. 30, No. 21.)

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[25] In the original reply, Fox 21 conceded 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, but argued Fox 21 "never executed the Flynn Option." (Reply, pg. 6, fn. 5.) However, Fox now represents the "statement in its May 23, 2019 reply brief that Flynn's contract could have run more than seven years...was a mistake." (Second Supplemental Brief, pg. 16, fn. 19.)

Flynn's agreements do not violate the seven-year rule. Flynn's 2012 Agreement has a maximum *three-year term* (two years, plus an option for an additional year). Flynn's 2013 Agreement, including the November 2015 Amendment and all available Fox options, is *six years*. (Netflix's Response to Fox's Supplemental SS, pg. 139, No. 36.) The evidence before the court and undisputed facts show the 2013 Agreement is a separate agreement and "it was not entered into with the purpose of evading the seven year employment limitation of §2855." (*Manchester* at *20.) Flynn signed the 2013 Agreement on November 20, 2013, more than a year after she executed the 2012 Agreement. (Supplemental Declaration of Lens ¶¶63-64; Exhibits 61-62.) Moreover, Flynn's 2012 and 2013 Agreements provide for different titles and salaries. (Netflix's Response to Fox's Supplemental SS, pg. 140, No. 37.) Flynn even negotiated her salary up to the $190,000.00 to $225,000.00 range in her 2015 contract amendment. (Netflix's Response to Fox's Supplemental SS, pg. 206, No. 44.)

Even assuming, arguendo, the agreements were considered together and violate the seven-year rule, *Kirkland v. Golden Boy Promotions, Inc.* 2013 WL 12132028, suggests the additional option in the 2015 Amendment 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. (Netflix's Response to Fox's SS, pg. 30, No. 21.)

Netflix, in opposition, argues there are genuine issues of material fact as to whether certain Fox Fixed-Term Employment Agreements violate the seven-year rule and are unenforceable. (Second Supplemental Opposition, pg. 11.) Netflix contends "it is hotly disputed whether the subsequent and overlapping contracts contain material key provisions as Fox claims." Netflix represents that a review of Fox's contracts reveals at least 97 employees who remained under contract with Fox for more than seven years and received no promotion, and 87 of those employees never changed divisions. (Second Supplemental Opposition, pg. 12.) Netflix argues this "strongly indicates that these are not actually 'new' or 'superseding' agreements, but extensions that flout

section 2855." (Second Supplemental Opposition, pg. 12.) Netflix also argues that even "were it relevant that Fox puts its employees under 'new' and 'superseding' agreements, there exists a triable issue of fact as to whether they are fairly negotiated at arm's length, as Fox claims." (Second Supplemental Opposition, pg. 13.)

As discussed above, and in the court's ruling denying Netflix' motion for summary adjudication, the Waltenberg and Flynn Agreements do not violate the seven-year rule. Moreover, in light of the standing and indispensable party issues discussed below in detail, the other Fixed-Term Employment Agreements are not properly before this Court.

Based on the foregoing, Fox's motion for summary adjudication of Netflix's violation of public policy affirmative defense is granted.

b. Unconscionability (24th AD)

"'"'Unconscionability is ultimately a question of law for the court.' [Citation.] 'However, numerous factual issues may bear on that question. [Citation.]...'"" (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 236.)

"'Unconscionability has procedural and substantive aspects. [Citation.] 'Both procedural and substantive unconscionability must be present before a court can refuse to enforce an arbitration provision based on unconscionability. However, the two elements need not be present in the same degree.' [Citation.] Courts use a ''sliding scale'' approach in assessing the two elements. [Citation.] 'In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'' [Citations]" (*Id.* at 242.)

"This sliding scale approach 'requires a court to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided.' [Citation] 'The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.' [Citation]" (*Id.*)

"Procedural unconscionability 'addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.' [Citation] '''''Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. ... Surprise involves the extent to which the terms of the bargain are hidden in a 'prolix printed form' drafted by a party in a superior bargaining position.''''' [Citation] '[P]rocedural unconscionability requires either oppression or surprise.' [Citations] Both are not required." (*Id.* at 243.)

"'The substantive element of unconscionability 'pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided.' [Citation.] This includes consideration of the extent to which the disputed term is

outside the reasonable expectation of the nondrafting party or is unduly oppressive.' [Citations]" (*Id.* at 247.) "'It has long been recognized that substantive unconscionability is not susceptible to 'precise definition'' [Citation], and therefore our courts have used a wide variety of expressions to describe contractual provisions that are substantively unconscionable, including '''overly harsh'''[citation], '''unduly oppressive''' [citation], ''so one-sided as to 'shock the conscience''' [citation], or ''unfairly one-sided' [citation]'' [Citation]. Our Supreme Court recently clarified that 'these formulations...all mean the same thing.' [Citation] The essential notion they each capture is ''that unconscionability requires a substantial degree of unfairness beyond 'a simple old-fashioned bad bargain.''' [Citation]" (*Id.* at 247-248.)

Netflix argues Fox's Fixed-Term Employment Agreements[26] are substantively unconscionable for "all the reasons [the] contracts are void as against California public policy." (Netflix's Second Supplemental Opposition, pgs. 15-16.) As discussed above in detail, the court finds that Netflix did not sustain its burden to show that the Fixed-Term Employment Agreements of Waltenberg and Flynn violate public policy.

The court notes it is undisputed that entertainment-industry employment contracts often contain unilateral options (granting the employer the right to extend the duration of an employee's tenure), injunctive-relief provisions, confidentiality agreements, and non-solicitation provisions similar to those included in most Fox Fixed-Term Employment Agreements. (Netflix's Response to Fox's Supplemental SS, pgs. 73, 80, 82, 83, Nos. 16, 22, 24, 26.) While the existence of industry custom may not be dispositive in itself, it is relevant to the court's independent determination of unconscionability.

In *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1392-1393, the California Court of Appeal, First Appellate District, Division Five, determined the challenged contractual provision was commonplace in employment contracts with sales representatives at the time. The court stated:

> When viewed in light of the circumstances as they existed on August 23, 1991, when the instant contract was executed, we cannot say the contract provision with respect to compensation after termination was so unfair or oppressive in its mutual obligations as to 'shock the conscience.' [Citation] If the official notes accompanying Uniform Commercial Code section 2-302, upon which Civil Code section 1670.5 is based, is to be relied upon as a guide, the contract terms are to be evaluated "in the light of the general commercial background and the commercial needs of the particular trade or case..." [Citation] Corbin suggests that the test is whether the terms are "so extreme as to appear unconscionable according to the mores and business

[26] To the extent both sides argue about whether the contracts of past or current Fox employees other than Waltenberg or Flynn are unconscionable, the court declines to make rulings on this issue as these contracts are not properly before the court, as discussed below.

> practices of the time and place." (1 Corbin, Contracts (1963) § 128, p. 551.)
>
> Our survey of case law indicates that the contract provision challenged here is commonplace in employment contracts with sales representatives, such as Ali, who have ongoing responsibilities to "service" the account once the sale is made. [Citations] In briefing below, the rationale for deferring commissions until payment is actually received by the customer was explained by American Software: "[I]f the entire commission were to be deemed earned by merely obtaining buyers, the burden of servicing those buyers pending receipt of revenues would fall on American Software's other salespersons unfamiliar with the earlier transaction who would receive nothing for their efforts."...
>
> Nor do we find that the terms of this contract represent "an overly harsh allocation of risks...which is not justified by the circumstances under which the contract was made." [Citation] The contract terms with regard to Ali's compensation involved certain risks to both parties to the bargain. The contract in the instant case placed a risk on Ali that she would lose commissions from her customers if payment was not received by American Software within 30 days after her resignation. American Software took the risk that at the time of Ali's termination, she would not have earned sufficient commissions to cover the substantial draws "credited" to her. This is part of the bargaining process--it does not necessarily make a contract unconscionable. The contract simply does not appear to be "overly harsh or one-sided, with no justification for it at the time of the agreement." [Citation]

(*See also, Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1339-40.)

While this court does not find that each provision in Fox's Fixed-Term Employment Agreements is necessarily enforceable, neither does it find the agreements to be so unfair or oppressive so as to shock the conscience and render them invalid for substantive unconscionability.

Moreover, even if some or all of the allegedly offending provisions were found to be unconscionable, such provisions could properly be severed from the rest of the agreement(s). (Civil Code section 1670.5(a).) As discussed earlier, the court rejects Netflix's argument that the challenged provisions taint the central purpose of the employment agreements with illegality and therefore cannot be severed. The court finds the clauses at issue are collateral to the central purpose of the agreements.

Netflix also claims the Waltenberg and Flynn Agreements are procedurally unconscionable. Considering the determination above that the Flynn and Waltenberg Agreements are *not* substantively unconscionable and/or that any offending provisions can be severed, the court does not believe it is required to address the issue of whether the Flynn and Waltenberg Agreements are procedurally unconscionable. (*See Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 957 ("In sum, the arbitration clause the Browns signed was not substantively unconscionable. As such, the finding of procedural unconscionability is irrelevant. Without substantive unconscionability, procedural unconscionability is an insufficient basis on which to deny a motion to compel arbitration.") and *Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1167 ("For these reasons, we hold that the record in this case discloses no procedural unconscionability. In light of our conclusion, we need not address whether there was a showing of substantive unconscionability or whether the court should have severed the challenged provisions.").)

Even if the court considered the issue of procedural unconscionability, as discussed below, Netflix did not establish the *level* of procedural unconscionability, if any, for the Flynn and Waltenberg Agreements, and Netflix did not submit admissible evidence showing the Flynn and Waltenberg Agreements are, in fact, procedurally unconscionable.

As Fox notes, this aspect of unconscionability "is about 'prevention of oppression and unfair surprise,' *not* the 'disturbance of allocation of risks because of superior bargaining power.'" (Quoting *Am. Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1390.) Second Supplemental Motion, pg. 17.

Netflix does not claim unfair surprise. It only argues oppression based on alleged lack of meaningful negotiation and choice, and cites three cases, none of which are similar to this case. (Netflix's Second Supplemental Opposition, pgs. 14-15.)

"A procedural unconscionability analysis 'begins with an inquiry into whether the contract is one of adhesion.'" (*Armendariz, supra*, 24 Cal.4th at p. 113) An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.' *OTO, L.L.C. v. Kho* (2019) 8 Cal. 5th 111, 126 quoting *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348.

Here, the Waltenberg and Flynn Agreements do not appear to meet the test for contracts of adhesion in view of both employees' ability to negotiate higher salaries than offered by Fox – see Facts 33 and 37, at pages 79 and 85, in Netflix's Separate Statement in Opposition to Motion for Summary Judgment; and Exhibit 20 to Declaration of Daniel Justice in Opposition to Plaintiffs' Second Supplemental Motion for Summary Judgment (the "Flynn Declaration")). Moreover, Netflix did not argue that they were standardized contracts.

"In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract." *Grand Prospect* at 1348.

The California Supreme Court enumerated the factors which should be considered in the determination of oppression:

> The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney.

OTO, supra, 8 Cal.5th at 126-27, quoting *Grand Prospect, supra*, 232 Cal.App.4th at 1348.[27]

In the case at bar, Netflix did not carry its burden of submitting admissible evidence to support its defense of unconscionability. *OTO* at 126. It failed both to cite the proper test and to discuss most of the factors of procedural unconscionability outlined above in *OTO* and how they apply to this case. Netflix did not argue or present evidence of the following factors: (1) the amount of time Waltenberg and Flynn had to consider the subject agreements; (2) Waltenberg and Flynn's education and experience (the court notes, however, that both Waltenberg and Flynn are highly experienced and highly paid entertainment executives who had worked for Fox for years before the contracts at issue, both with and without fixed term employment agreements, and were familiar with the contract terms – see Facts 9-12, pgs. 68-70 and Facts 41-43, pgs. 204-205, in Netflix's Separate Statement in Opposition to Plaintiffs' Supplemental Separate Statement and Flynn Declaration); and (3) whether Waltenberg and/or Flynn were assisted in contract review by an attorney. Netflix also failed to argue the significance of the third above factor – the length of the contracts and challenged provisions.

Netflix did attempt to establish coercion in connection with the Waltenberg and Flynn Agreements, which is relevant to the second *OTO* factor –the amount and type of pressure exerted on the signing party. Regarding Waltenberg, Netflix admits that the person with whom he negotiated his contract did not coerce him.[28] Fact 14, pg.71, of Netflix's Sperate Statement in Opposition to Plaintiffs' Supplemental Statement.

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[27] The court did not clarify whether one, a majority, or all the factors must be present, and did not weigh the factors.

[28] Netflix attempts to argue coercion, citing a Fox internal email commenting that "Waltenberg was 'making himself unemployable at Fox' by hiring an attorney to discuss his proposed departure." Netflix's Supplemental Opposition pg. 15, citing Justice Declaration Exhibit 28; however, Netflix cites no evidence indicating that Waltenberg was privy to this information and, in any event, it occurred *after* the Waltenberg Agreement was signed.

Regarding Flynn, Netflix asserts that "Fox coerced Ms. Flynn into signing multiple contracts and signed her last contract amendment under duress." Netflix's Second Supplemental Opposition, pg. 14 fn. 8.

Flynn signed fixed term employment agreements with Fox in September 2012[29], November 2013, and an amendment thereto in November 2015 – the Flynn Agreement. Flynn Declaration. Instead of letting her existing contract and option expire in September of 2015, Flynn states she felt she had "little choice" but to sign the proposed new contract and she "reluctantly agreed" to sign it in November of 2013 for a two year term and a two year option. Flynn Declaration, par 8. This contract elevated her title, increased her salary and extended her term. *Id.* at paragraphs 6-8. It is unclear from her declaration why she felt she had little choice but to sign the extension in view of her claim that she did not want to extend her term with Fox, had received an offer from another employer for more than double her salary and believed the salary offered was "far below" what she could earn with a different employer. *Id.* at paragraphs 6-7. She does not say she believed and/or relied on the supervisor's alleged comments that she "could not accept other offers while I was under contract" with Fox or that "I couldn't work anywhere else" or whether she considered them to be hyperbole. *Id.* at par. 7.

Flynn then asserts that about one year later her supervisor demanded she accept a proposed modification agreement which would extend the option period and give her another salary increase. She was able to negotiate the salary up but still believed it was lower than market and that she could earn more salary elsewhere. Flynn Declaration, paragraphs 6-13. She admittedly "was approached about other jobs in the entertainment industry at a fairly regular cadence, including at least three times in 2015." Fact 39, pg. 86, in Netflix's Separate Statement in Opposition to Fox's Motion for Summary Judgment. She says her supervisor told her she was creating significant problems by demanding more, that people high up in the company were very angry with her due to her counteroffer and that, without her agreement, the supervisor instructed the CFO to close her deal at Fox's last offer. *Id.* at par. 13. She claims she "understood I would be terminated if I did not sign the agreement," but does not state why she had such understanding even though she was then under contract, and that she "unwillingly" signed the Flynn Agreement. *Id.* at par. 14.

Flynn does not claim that she did not understand the contract terms of the November 2013 agreement or the Flynn Agreement. She does not state whether she sought any advice before signing either agreement.

While the court does not condone the supervisor's alleged behavior, the court cannot characterize it as anything more than moderately coercive in nature and

[29] Netflix asserts that in connection with the September 2012 contract, Flynn's supervisor "screamed at her for engaging counsel and proposing to negotiate different terms than what Fox had offered." Netflix's Second Supplemental Opposition, pg. 15, citing Flynn Declaration, par. 4. On the other hand, Flynn also states that after she told her supervisor that she objected to the proposed salary as being less than what Fox paid to "two men before me," Fox increased her salary to match the figure she provided to her supervisor. Flynn Declaration, paragraphs 4-5.

insufficient to support a finding of procedural unconscionability in view of the weakness or absence of Netflix's showing on this and the other relevant factors.

The bottom line is "'*[o]ppression* occurs where a contract involves lack of negotiation and meaningful choice....'" *(OTO* at 126) (italics in original) (citations omitted). Netflix failed to show that Waltenberg or Flynn lacked a meaningful choice but to sign their agreements. Both negotiated higher salaries than offered by Fox. See Facts 33 and 37, at pages 79 and 85 in Netflix's Separate Statement in Opposition to Motion for Summary Judgment. Waltenberg explored other employment opportunities before signing his 2015 contract. See Fact 10, pg. 69, of Netflix's Separate Statement in Opposition to Plaintiffs' Supplemental Separate Statement. Flynn "was approached about other jobs in the entertainment industry at a fairly regular cadence," received at least one prior employment offer for more than twice her salary before signing her 2013 contract and believed she could obtain a far higher salary elsewhere than that which Fox was offering when she signed. See Fact 39 at pg. 86 in Netflix's Separate Statement in Opposition to Motion for Summary Judgment and Exhibit 20 to Justice Declaration, *supra*, paragraphs 6-7).

Netflix also appears to argue the fact that the injunctive relief clause and unilateral options were non-negotiable renders the agreements procedurally unconscionable. (Netflix Second Supplemental Opposition, pg. 14.) However, the *Grand Prospect* court addressed a similar issue and answered no. (*See Grand Prospect* at 1351 ("A question presented by the facts of this case is whether the Lease should be classified as a contract of adhesion because the cotenancy requirements were presented by Ross on a take-it-or-leave-it basis. We conclude this aspect of Ross's negotiating posture did not make the Lease a contract of adhesion.").)

In sum the court finds that Netflix failed to carry its burden of showing the Waltenberg and Flynn Agreements were procedurally unconscionable. Even assuming, arguendo, the Flynn and/or Waltenberg Agreements were somehow found to contain some degree of procedural unconscionability, any such procedural unfairness should be considered limited. (*See, Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1470-71," whatever procedural unfairness is inherent in an adhesion agreement in the employment context, it was limited in this case;" and *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 248 ("Defendant acknowledges the arbitration clause 'was presented as a 'take-it-or-leave-it' contract of adhesion in the employment context.' [Citation] *** But that alone 'establish[es] only a modest degree of procedural unconscionability.' [Citation]").)

Thus, Fox's motion for summary adjudication of Netflix's unconscionability affirmative defense is granted.

3. Amended Cross-Complaint

In the amended cross-complaint for violation of Business & Professions Code §17200 *and* declaratory relief, Netflix seeks a declaration that Fox's Fixed-Term

Employment Agreements are unenforceable and an order preventing Fox from enforcing such agreements to prohibit employment with other companies, including Netflix. (Amended X-C, pg. 25.) Netflix's causes of action *both* seek this relief as to an unspecified number of unidentified current and/or former Fox employees who allegedly had or have such contracts. (Amended X-C ¶57.) These Fox employees are not parties to this case. Moreover, Netflix is not a party to any of the Fixed-Term Employment Agreements at issue in the amended cross-complaint. For these reasons and, as further discussed below, Netflix's amended cross-complaint fails.

a. Indispensable Parties

C.C.P. §389 provides, as follows:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.
> (b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross–complainant will have an adequate remedy if the action is dismissed for nonjoinder.

"'A person is an indispensable party to litigation ''if his or her rights must necessarily be affected by the judgment.'' [Citation.] Stated differently, 'Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party.' [Citation.] These principles have been codified in Code of Civil Procedure section 389. An ''indispensable party is not bound by a judgment in an action in which he was not joined.''' [Citation] (*In re Marriage of Ramirez* (2011) 198 Cal.App.4th 336, 344.)

The California Court of Appeal, First Appellate District, Division One, in *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 214,

raised the issue of indispensable parties on its own motion on appeal. The "plaintiff corporation...sought a declaration that all currently outstanding insurance contracts where defendant county is the insured party entered into or procured by the corporation and its predecessor partnership...are valid and in full force and effect." (*Id.* at 205.) The insurance companies were not parties to the action, which purported to "adjudicate the validity of insurance policies in which they are contracting parties." (*Id.* at 213.) The Court of Appeal stated:

> We apprehend that there are serious due process implications in presuming to adjudicate the validity of the insurance policies without affording the insurance companies their day in court. The insurance companies are not parties to the instant litigation which purports to adjudicate the validity of insurance policies in which they are contracting parties. "(P)ersons whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action" are indispensable parties. [Citations] If such persons are not before the court, the court is without jurisdiction to adjudicate their rights because the failure to join an indispensable party constitutes a jurisdictional defect. [Citations] [¶] Because the requirement that indispensable parties be before the court is mandatory, *it may be raised at any time* and it may be raised by the appellate court on its own motion if the parties fail to make the objection. [Citations]

(*Id.* at 214.) The Court of Appeal noted that "no objection to the nonjoinder of the insurance companies was made in the court below nor [had] it been urged by the parties on [the] appeal." (*Id.*) Nevertheless, it was proper for the Court of Appeal to raise the indispensable party defect on its own motion. (*Id.*)

The Fox employees who are parties to the alleged unenforceable Fixed-Term Employment Agreements are indispensable parties. Clearly, the rights, interests, and/or duties of Fox's fixed-term employees would be affected by the decree sought by Netflix in this action. These Fox fixed-term employees are not parties to the instant action. The court, therefore, "is without jurisdiction to adjudicate their rights because the failure to join an indispensable party constitutes a jurisdictional defect [Citation]" (*Id.*)

b. Standing[30]

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[30] Fox indirectly raised the issues of standing and indispensable parties. Fox asserted the following arguments in the motion, second supplemental motion, and second supplemental reply:

> ...Netflix, a rival competitor, wants the Court to exercise its equitable powers to invalidate hundreds of contracts to which Netflix is not a party and where the contracting parties themselves – Fox and its employees – have no interest in seeking their contracts declared invalid. This proposition is all the more perverse when considering Netflix seeks to break contracts of employees who are not before the Court and have no opportunity to be heard... (Motion, pg. 8.)

> ....it would be a grossly "unconscionable result," Cal. Civ. Code §1670.5(a), if the Court were to invalidate the employment contracts of current Fox employees who are not parties to this

C.C.P. §1060 provides, in pertinent part, as follows:

> Any person interested *under a written instrument*, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property...may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross–complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under *the* instrument or contract.

(Emphasis Added.)

C.C.P. §367 provides, as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."

A plaintiff or cross-complainant generally does not have standing to seek declaratory relief on a contract to which he or she is not a party. (*See Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 55 ("'Plaintiffs have standing to sue if they or someone they represent have either suffered or are threatened with an injury of sufficient magnitude to reasonably assure the relevant facts and issues will be adequately presented.' [Citation] [¶] We can readily conclude Fladeboe had no standing to seek declaratory relief or to assert any of the claims alleged in the complaint. He was never an Isuzu dealer. He was not a party to the Dealer Agreement with Isuzu or the Asset Purchase Agreement with Fladeboe VW. Fladeboe was the sole shareholder of RFLM and is the sole shareholder of Fladeboe AG. As a shareholder, Fladeboe did not have standing to assert corporate claims, except in a derivative action. [Citations]").)

"The real party in interest is one 'having an actual and substantial interest in the subject matter of the action and who would be benefitted or injured by the judgment in the action.' [Citation]" (*County of Alameda v. State Board of Control* (1993) 14 Cal.App.4th 1096, 1103.) "'An action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law...will not be entertained; *and the same is true of a suit the sole object of which is to settle rights of third persons who are not parties.*' [Citation]" (*Id.*) "'A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.' [Citation]" (*Id.*) "Plaintiffs who attempt to assert or enforce the substantive rights of others are denied standing..." (*Id.* at 1105.)

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litigation. It would raise obvious due-process issues, because employees would suddenly lose the security and benefits for which they bargained without any opportunity to be heard, plainly in violation of their rights. (Second Supplemental Motion, pgs. 23-24.)

Nor does Netflix explain how the Court would possibly declare all such contracts invalid in the absence of the employees who are parties to these contracts – none of whom is before the Court or had an opportunity to be heard... (Second Supplemental Reply, pg. 7.)

The *Oppenheimer* case is instructive. (*Oppenheimer v. General Cable Corp.* (1956) 143 Cal.App.2d 293.) The California Court of Appeal, Second Appellate District, Division Two, determined a plaintiff did not have standing to assert a declaratory relief claim against individual defendants that were not parties to the employment contract at issue. (*Id.* at 294-298.) The plaintiff prayed for, among other things, "a declaration of rights, duties and obligations of plaintiff and defendants under the terms of the written contract of employment [with defendant corporation]." (*Id.* at 295, 296.) "The individual defendants [were] declared to have been at all times the 'agents, servants, employees and officials of the corporation' and to have 'acted and purported to act for and on behalf of said corporation defendant at all such times in their respective official capacities.'" (*Id.*) The Court of Appeal determined that "[a]ny breach of contract that is alleged in the complaint is that of the corporation and not of its agents, and they are not personally liable by reason thereof [Citations]." (*Id.* at 297.) The Court of Appeal stated:

> Defendants Canfield, Volle and Gunderson, as agents of the corporation, have neither rights nor obligations in relation to plaintiff under the contract of their principal and are asserting no interest in or under the contract antagonistic to any right of plaintiff. While plaintiff may be entitled to declaratory relief to settle disputes as between himself and the corporation under the contract, he is not entitled to declaratory relief as against the individual defendants. Section 1060, Code of Civil Procedure, provides for declaratory relief "in cases of actual controversy relating to the legal rights and duties of the respective parties." *It does not provide for the settlement of disputes between plaintiff and persons having no interest under the contract such as Canfield, Volle and Gunderson in the instant matter...*'The Declaratory Judgment Act plainly contemplates that there shall be an actual controversy between persons having an interest in the subject matter of the action.' [Citation]

(*Id.* at 297) (citations omitted) (emphasis added.) The Court of Appeal also stated that "[c]learly, section 1060...does not entitle plaintiff to maintain an action against the individual defendants for a declaration of his rights under a contract to which these defendants are not parties and are alleged to have no legal rights or duties. As between plaintiff and these defendants, no dispute as to their legal rights and duties is shown." (*Id.*) The Court of Appeal recognized that the court may also "refuse to exercise its declaratory relief powers in any case where its declaration or determination is not necessary or proper at the time under all the circumstances. [Citations]" (*Id.*) (*Id.* at 297-298.)

Additionally, the *D. Cummins Corp. v. United States Fidelity & Guaranty Co.* (2016) 246 Cal.App.4th 1484 ("*Cummins*") case supports this court's ruling. Cummins Corp. purchased 19 insurance policies issued by U.S. Fidelity between July 1, 1969, and January 1, 1987, and purchased 4 insurance policies issued by the predecessor to U.S. Fire between February 1, 1988, and January 1, 1992. (*Id.* at 1486-1487.) Holding Co., formed on January 17, 2014, is the parent and controlling shareholder of Cummins Corp.

(*Id.* at 1487.) Cummins Corp. and Holding Co. filed a complaint for declaratory relief against the insurers, seeking a declaration that the insurers "are obligated to defend and/or indemnify Cummins..., in full, including, without limitation, payment of the cost of investigation, defense, settlement and judgment..., for past, present and future Asbestos Suits under each of the Policies triggered by the Asbestos Suits." (*Id.*) "Plaintiffs also sought additional, detailed declarations regarding the duties of the insurers with respect to asbestos actions against Cummins Corp." (*Id.*) U.S. Fidelity demurred to Holding Co.'s declaratory relief cause of action, arguing, among other things, lack of standing. The trial court agreed, granted U.S. Fire's joinder, and dismissed Holding Co.'s claims. (*Id.* at 1488.) Holding Co. appealed. (*Id.* at 1489.) The California Court of Appeal, First Appellate District, Division Two, affirmed the judgment dismissing Holding Co.'s complaint for declaratory relief. (*Id.* at 1486.)

The Court of Appeal noted "Holding Co...asserts that it is an interested person under section 1060, despite the fact that it is not a party to or directly affected by the insurance policies that are the subject of the declaratory relief action, and despite the fact that it does not otherwise fit into any of the categories of exceptions to the requirement of contractual privity. [Citation]" (*Id.* at 1490.) Holding Co. argued it has a "practical interest in the proper interpretation of Cummins Corp.'s insurance policies given its relationship to, and its central role in the pursuit of those insurance assets'" and claimed it "'is, most importantly the sole entity responsible for managing the affairs of Cummins Corp., including making decisions as to litigation strategy, resolution and settlement.' [Citations] (*Id.* at 1490-1491.) "Therefore, according to Holding Co., it is '[a]ny person interested under a written instrument...or under a contract, or who desires a declaration of his or her rights or duties with respect to another' for purposes of participating in a declaratory relief action against the insurers. [Citation]" (*Id.* at 1491.)

The Court of Appeal disagreed with Holding Co., stating as follows:

> This argument is not persuasive. While Holding Co. may, as it says, have a "practical interest" in the success of Cummins Corp.'s litigation with the insurers by virtue of its relationship with the corporation, it has not shown how that indirect interest—no matter how enthusiastic it may be [Citation]—translates into "a legally cognizable theory of declaratory relief." [Citation] Rather, as the trial court found, it is the corporation itself that has a direct interest in the interpretation of the policies in question.

(*Id.*) The Court of Appeal concluded that "Holding Co. has not alleged any facts or legal theory giving it more than an indirect interest in the policies at issue. [Citations]" (*Id.* at 1493.) The Court of Appeal stated "Holding Co. has not demonstrated the existence of an actual controversy between it and the insurers" and, hence, "the only proper parties to this declaratory relief action are Cummins Corp. and the insurers." (*Id.*) The Court of Appeal stated:

> In conclusion, given that Holding Co., the controlling shareholder of Cummins Corp., does not have a contractual relationship with the

> insurers and is not otherwise interested in the contract between the corporation and the insurers (see § 1060), the trial court acted within its discretion when it concluded that a declaration of Holding Co.'s rights was "not necessary or proper at the time under all the circumstances." (§ 1061.) In addition, because Holding Co. has not shown that there is a reasonable possibility it could amend the complaint to plead facts showing that it is a "person interested under a written instrument" or demonstrated the existence of an "actual controversy relating to the legal rights and duties" of it and the insurers (§ 1060), the court did not abuse its discretion when it sustained the demurrer without leave to amend.

(*Id.* at 1493-1494.)

Application of the foregoing precedent demonstrates that Netflix lacks standing to challenge the validity of other present or former unidentified Fox employees' Fixed-Term Employment Agreements. First, Netflix is *not* a party to Fox's Fixed-Term Employment Agreements, nor does Netflix have a direct interest in such agreements. Yet Netflix is attempting to settle the rights of all Fox employees who are subject to Fixed-Term Employment Agreements, whether or not the employees want to challenge the agreements. Second, Fox's fixed-term employees, who are the real parties in interest, are *not* parties to the instant action whereas Netflix is not the real party in interest. Third, Netflix is not the proper advocate for Fox's fixed-term employees. Netflix has its own agenda – to invalidate Fox's Fixed-Term Employment Agreements so that it may recruit and hire Fox's fixed-term employees with impunity. While Netflix thus has a potential indirect interest in invalidating contracts for those Fox employees it wishes to hire, if any, the court finds that Netflix does not have a legally cognizable interest in Fox's Fixed-Term Employment Agreements sufficient to justify its declaratory relief cause of action.

c. Actual Controversy & Unlawful, Unfair, or Fraudulent Business Act or Practice

"'The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.'' [Citation]" (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1012.)

A cause of action for declaratory relief requires 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.)[31]

[31] Netflix cannot obtain declaratory relief as to *former* Fox employees. "[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 cannot establish the existence of an actual controversy with Fox and cannot establish Fox engaged in any unlawful, unfair, or fraudulent business act or practice. As discussed above, Netflix lacks standing to challenge the validity of Fox's Fixed-Term Employment Agreements and Fox's fixed-term employees are indispensable parties. Also, for the reasons discussed above, the court does *not* find that the challenged provisions in the Fixed-Term Employment Agreements of Waltenberg and Flynn violate public policy or are unconscionable. Further, any offending provision(s) can be severed. Accordingly, the declaratory relief claim fails. *See, Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1277: "As discussed *ante*, plaintiffs failed to state claims for unfair competition and violation of the CLRA. There are no other facts that reveal an actual controversy exists between the parties. Therefore, the second amended complaint did not state a claim for declaratory relief. [Citation]") For the same reasons, Netflix's violation of Business & Professions Code §17200 cause of action fails. *See, Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 357: "Plaintiff acknowledged in the trial court he could not amend this cause of action, and we agree with that conclusion. Because the cause of action for violation of Business and Professions Code section 17200 was predicated on the violation of the predatory lending law, it, too, must fail."

Even assuming, arguendo, Netflix has standing, the violation of Business & Professions Code §17200 and declaratory relief causes of action fail. As discussed above, Netflix failed to demonstrate that the challenged provisions in Fox's Fixed-Term Employment Agreements violate public policy or are unconscionable. Moreover, were the court to determine – in an action in which all of the proper parties were joined and the facts and circumstances demonstrated the unconscionability and/or violation of public policy of any allegedly offending provisions – such provisions may be properly severed from any agreement(s) at issue, rather than declaring the entire agreement(s) void.

Fox's motion for summary judgment on Netflix's amended cross-complaint is granted. In the alternative, for appeal purposes only, Fox's motion for summary adjudication of Netflix's declaratory relief and violation of Business & Professions Code §17200 causes of action is granted.

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 and inducing breach of the Flynn Agreement causes of action is denied. Fox's motion for summary adjudication of the unfair competition in violation of Business & Professions Code §17200 cause of action is granted. The court finds Fox is entitled to injunctive relief, as follows: Netflix shall not solicit employees who are subject to *valid* Fixed-Term Employment Agreements with Fox or induce such employees to breach their *valid* Fixed-Term Employment Agreements with Fox.

Fox's motion for summary judgment on Netflix's amended cross-complaint is granted. In the alternative, for appeal purposes only, Fox's motion for summary

adjudication is granted as to the violation of Business & Professions Code §17200 and declaratory relief causes of action.

Fox's motion for summary adjudication of the violation of public policy and unconscionability affirmative defenses in Netflix's second amended answer is granted.

Dated: Dec. 10, 2019

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

12/10/19