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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES, WEST DISTRICT**

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12 TWENTIETH CENTURY FOX FILM  
CORPORATION, a Delaware Corporation,  
13 and FOX 21, INC., a Delaware Corporation,

14 Plaintiff,

15 v.

16 NETFLIX, INC., a Delaware Corporation,

17 Defendant.

18  
19 And Related Cross-Claims.  
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Case No. SC126423

**FOX'S NOTICE OF *EX PARTE*  
APPLICATION AND *EX PARTE*  
APPLICATION FOR ORDER  
CONTINUING THE TRIAL DATE;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

*[Declaration of Molly M. Lens and  
[Proposed] Order Filed Concurrently  
Herewith]*

Hearing Date: February 1, 2019  
Time: 8:30 a.m.  
Dept: K  
Judge: Hon. Lawrence Cho

Complaint filed: September 16, 2016  
Cross-Complaint filed: October 19, 2016

1 **TO ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE THAT on February 01, 2019 at 8:30 a.m., or as soon thereafter  
3 as the matter may be heard, in Department K of the Superior Court of California for the County of  
4 Los Angeles, West District, located at 1725 Main Street, Santa Monica, CA 90401, plaintiffs  
5 Twentieth Century Fox Film Corporation (“TCFFC”) and Fox 21, Inc. (“Fox 21”) (collectively,  
6 “Fox”), will, and hereby do, apply to the Court *ex parte*, pursuant to California Rules of Court  
7 3.1200 *et seq.*, for an order continuing the trial date from May 20, 2019 to a date in the fall of  
8 2019.

9 As set forth in greater detail in the accompanying memorandum of points and authorities,  
10 defendant Netflix, Inc.’s (“Netflix”) pleadings are not set, and will not be set until two months  
11 before trial. Despite Fox’s diligent efforts, substantial discovery remains outstanding, and  
12 Netflix’s recent issuance of numerous subpoenas across the industry is an unanticipated  
13 development that indicates that Netflix (improperly) seeks to greatly expand the scope of  
14 discovery. Accordingly, Fox respectfully requests that the Court issue an order continuing the  
15 trial to a date in the fall of 2019.

16 Fox’s application is brought pursuant to California Rule of Court (“CRC”) 3.1332, and is  
17 based on this Notice and Application, the accompanying Memorandum of Points and Authorities,  
18 the attached Declaration of Molly M. Lens in Support of Fox’s *Ex Parte* Application (“Lens  
19 Decl.”), all other pleadings and papers on file in this matter, and such further evidence and  
20 argument of which the Court may take judicial notice.

21 Fox provided timely notice to counsel for Netflix, in compliance with California Rules of  
22 Court 3.1203(a) and 3.1204(a), on Thursday, January 31, 2019 at 8:24 a.m. (Lens Decl. ¶ [2] and  
23 Exhibit 1.) At the time this application was filed, a response was not yet received from counsel  
24 for Netflix. (Lens Decl. ¶ [3].) Fox provided Netflix with a copy of this application and  
25 supporting documents on January 31, 2019.

26 Pursuant to California Rule of Court 3.1202(a), attorneys for the parties may be reached at  
27 the following addresses and telephone numbers:  
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DATED: January 31, 2019

DANIEL M. PETROCELLI  
MOLLY M. LENS  
DAVID MARROSO  
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By:   
\_\_\_\_\_  
Daniel M. Petrocelli

Attorneys for Plaintiffs  
Plaintiffs Twentieth Century Fox Film  
Corporation and Fox 21, Inc.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Fox respectfully requests that the Court grant its *ex parte* application for an order  
3 continuing the trial date from May 20, 2019 to the fall of 2019.

4 **I. BACKGROUND**

5 Fox commenced this lawsuit on September 16, 2016 after defendant Netflix engaged in an  
6 unlawful campaign to induce Fox employees to breach their fixed-term employment contracts by  
7 soliciting, recruiting, and inducing such employees to terminate their employment with Fox  
8 before the expiration of their fixed-term employment contracts. Specifically, Netflix tortuously  
9 induced both Marcos Waltenberg and Tara Flynn to breach their fixed-term employment  
10 contracts with Fox in order to accept employment with Netflix. Moreover, as confirmed by its  
11 own cross-complaint, Netflix’s campaign continues to this day, with Netflix continuing to openly  
12 tortuously interfere with Fox’s employment contracts. *See* Cross-Complaint, ¶ 27 (“Netflix is  
13 interested in pursuing additional Fox current and former employees for potential employment  
14 opportunities.”). Fox seeks damages and a permanent injunction enjoining Netflix from  
15 tortuously interfering with Fox’s fixed-term employment agreements.

16 Given Netflix’s brazenly unlawful conduct, Netflix filed an unprecedented cross-  
17 complaint on October 19, 2016, which asks the Court to bar Fox from enforcing any and all of its  
18 fixed-term employment contracts with its current employees—literally hundreds of such  
19 contracts—so that it may continue to induce their breach with impunity. Netflix’s cross-  
20 complaint is thus a direct attack on the California Labor Code (and its antecedent provisions),  
21 which for more than one century has explicitly recognized the validity of fixed-term employment  
22 contracts.

23 On October 26, 2018, following a stay of its cross-complaint due to Fox’s unsuccessful  
24 anti-SLAPP motion to dismiss and appeal (denied solely on the basis of prong 1), Netflix  
25 amended its cross-complaint to substitute Fox Entertainment Group LLC (“FEG”) and Fox  
26 Networks Group, Inc. (“FNG”) for Doe defendants. FEG and FNG promptly moved to quash  
27 based on Netflix’s unreasonable delay in amending. The matter is set for hearing on February 21,  
28 2019. If FEG’s and FNG’s motion is denied, two new Fox parties will be added to the case,

1 which will entitle Fox to pursue additional discovery, summary judgment, and other measures to  
2 fully defend their interests. Netflix also may seek additional discovery.

3 If FEG and FNG’s motion to quash is granted, there still remains substantial outstanding  
4 discovery to be litigated. For example, just this month, Netflix sought to radically expand  
5 discovery across the entertainment industry, serving subpoenas on eight major studios and media  
6 companies seeking information relating to Netflix’s other competitor’s use of specified-term  
7 contracts. These subpoenas will be met with strenuous objections and motions to quash. In all  
8 events, discovery and pretrial proceedings, including Fox’s anticipated motion for summary  
9 judgement, cannot be adequately litigated to conclusion, nor can the case be properly and  
10 efficiently prepared for trial, absent a continuance of the May trial date. Fox has sought no prior  
11 continuance of trial.

## 12 **II. GOOD CAUSE EXISTS TO CONTINUE THE TRIAL DATE**

13 Good cause exists to grant Fox’s *ex parte* motion because: (1) Netflix’s pleadings are not  
14 set, and will not be set until two months before trial, (2) despite Fox’s diligent efforts, substantial  
15 discovery remains outstanding, and (3) Netflix’s recent issuance of numerous subpoenas across  
16 the industry is an unanticipated development that indicates that Netflix (albeit improperly) seeks  
17 to substantially expand the scope of discovery, and in any event is likely to elicit motion practice  
18 that is unlikely to be resolved before trial. Additionally, there has been no prior continuance in  
19 this matter, the modest requested extension is reasonable, and there will be no prejudice to any  
20 parties or witnesses because of the continuance (in fact, it would put trial approximately when  
21 Netflix initially requested).

22 **Netflix’s pleadings are not set.** Netflix did not amend its cross-complaint to substitute  
23 Fox Entertainment Group LLC (“FEG”) and Fox Networks Group, Inc. (“FNG”) for Doe  
24 defendants until October 26, 2018. (Lens Decl. ¶ [8].) FEG and FNG promptly moved to quash  
25 service of the amended cross-complaint and summons on December 14, 2018. (*Id.*). As detailed  
26 in that motion, Netflix was aware of facts giving rise to its claims against FEG and FNG at the  
27 time it filed its initial cross-complaint, and in any event delayed unreasonably in amending its  
28 cross-complaint. FNG and FEG’s motion is not set for hearing until February 21, 2019. (*Id.*)

1 Thus, at this point it is unclear who the parties at trial will be. Moreover, should the Court deny  
2 FNG and FEG’s motion, FNG and FNG, and Fox, will have only a few months to conduct  
3 discovery before trial. Based on the pace of discovery to date, that will be insufficient both to  
4 provide FNG and FEG “a reasonable opportunity to conduct discovery and prepare for trial,” and  
5 to provide Fox “a reasonable opportunity to conduct discovery and prepare for trial in regard to  
6 the new party’s involvement in the case.” CRC 3.1332(c)(5)(A)-(B).

7 **Substantial discovery remains outstanding, despite diligent efforts.** Despite diligent  
8 efforts by Fox, the pace of discovery has been slower than anticipated. For example, Fox is still  
9 working to schedule Netflix depositions that it noticed in October 2017. (Lens Decl. ¶ [12].) As  
10 another example, just earlier this week, Netflix was ordered—again—to answer interrogatories  
11 that Fox propounded in March 2017, which the Court ordered Netflix to answer in August 2017.  
12 These are but two examples of a much greater problem.

13 To help facilitate the significant discovery disputes between the parties, the Court  
14 appointed a discovery referee on March 19, 2018. (Lens Decl. ¶ [10].) The Discovery Referee  
15 has since held hearings on June 5, 2018, June 28, 2018, October 11, 2018, December 19, 2018,  
16 and January 29, 2019, and issued over fifteen recommendations, addressing twenty separate  
17 discovery motions filed by the parties. (*Id.*) Netflix has (unsuccessfully) challenged several of  
18 the Discovery Referee’s recommendations, which has further slowed discovery. Moreover, three  
19 of Discovery Referee’s recommendations are currently with the Court, and three more  
20 recommendations are anticipated this week. In addition, the parties have already scheduled  
21 discovery hearings with the Referee for March 8, 2019, and April 2, 2019, with six motions  
22 scheduled to be heard on March 8 alone. (*Id.*)

23 Given that substantial outstanding discovery still remains, it is unlikely that Fox will be  
24 able to complete its necessary discovery in time to meet the current trial date. (Lens Decl. ¶ [9].)  
25 This, too, provides independent grounds for continuance of trial. CRC 3.1332(c)(6).

26 **Netflix’s subpoenas across the industry.** Although Netflix indicated in July 2018 that it  
27 intended to notice depositions for several third party witnesses, it was not until January 11, 2019  
28 that Fox received notice that Netflix began serving subpoenas, beginning with Warner Bros.

1 Entertainment, Inc. (Lens Decl. ¶ [13].) On January 23, 2019, Fox received notice that Netflix  
2 served subpoenas on seven additional entities: (1) The Walt Disney Co., (2) NBCUniversal Media  
3 LLC, (3) Viacom International, Inc, (4) Viacom Inc., (5) Paramount Pictures Corp., (6) Lions  
4 Gate Entertainment Inc., and (7) Dreamworks Animation LLC. (*Id.*) The subpoenas are aimed at  
5 the employment practices of these third-parties. (*Id.*) In doing so, Netflix has unexpectedly (and  
6 improperly) sought to expand the scope of discovery beyond Fox. Given the nature of the  
7 information sought, and the impropriety of the requests, it is anticipated that these third parties  
8 will refuse to produce the requested information and the issue will need to be resolved by motion  
9 practice. However unlikely, to the extent that Netflix succeeds in its attempt to expand the case to  
10 the entire industry, with a May 20, 2019 trial date, Fox will not have adequate time to prepare a  
11 response for trial, or obtain additional discovery to rebut any inferences Netflix seeks to draw.

12 This, too, is independent grounds for a continuance. *See* CRC 3.1332(c)(6)-(7).

13 **Other factors to be considered.** A continuance is warranted based on other factors, as  
14 well. First, the Court should consider “[w]hether there was any previous continuance, extension  
15 of time, or delay of trial due to any party.” CRC 3.1332(d)(2). In this case, there has been no  
16 previous continuance, though the trial date was previously changed at Netflix’s request. (Lens  
17 Decl. ¶ [4].).

18 Second, the Court should consider “[t]he length of the continuance requested.” CRC  
19 3.1332(d)(3). Here, the requested continuance of approximately six months is reasonable, and  
20 would allow for the pleadings to be settled, and for all parties to adequately complete discovery.

21 Third, the Court should consider “prejudice that parties and witnesses will suffer as a  
22 result of the continuance” as well as “[w]hether all parties have stipulated to a continuance.”  
23 CRC 3.1332(d)(5) and (10). Here, there will be no prejudice to Netflix. Indeed, the continuance  
24 would put the trial on approximately the same time frame that Netflix requested for trial during  
25 the July 2018 trial setting conference.<sup>1</sup> (Lens Decl. ¶ [7].) And while Netflix has not agreed to  
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27 <sup>1</sup> While Fox advocated for an earlier trial date at the time, as explained above, discovery has  
28 progressed much slower than anticipated. Netflix’s recent subpoenas seeking to expand discovery  
to third parties only exacerbate the problem.

1 stipulate to a continuance, when Fox initially reached out to Netflix last week, Netflix initially  
2 indicated that it was receptive to the idea before it changed its mind on Tuesday. (*Id.* ¶ [6].)

3 **III.   GROUNDS FOR EX PARTE RELIEF**

4 *Ex parte* relief is appropriate where there is a danger of “irreparable injury” absent such  
5 relief. CRC 3.1202(c). Fox could not have proceeded by noticed motion since, as noted above,  
6 Fox only became aware of some of the facts on which this *ex parte* application is based on  
7 January 23, 2019. (Lens Decl. ¶ [13].) Currently, the parties are only four months out from trial  
8 but the pleadings are not set, with it unclear even which parties are even properly in the case.  
9 Because of the amount of discovery which remains to be done before the case can be prepared for  
10 trial, Fox will be prejudiced should the trial move forward on May 20, 2019. In addition, because  
11 the trial date triggers certain deadlines, including motions of summary judgment, and an  
12 extension of the trial date appears inevitable, it would prejudice Fox to have the trial date  
13 continued at a later date. Indeed, unless the trial date is extended, the date for summary judgment  
14 will have passed before any resolution on FNG and FEG’s motion to quash.

15 **IV.   CONCLUSION**

16 For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order  
17 continuing the trial date and Final Status Conference, currently scheduled for May 20, 2019 at  
18 9:30 a.m. and May 13, 2019 at 8:30 a.m., respectively. Plaintiff also respectfully requests that the  
19 Court confirm that the continued trial date be deemed to be the initial trial date for purposes of all  
20 motion and both ordinary and expert discovery deadlines specified in the California Code of Civil  
21 Procedure and/or the California Rules of Court, and that all dates that are contingent upon the  
22 date of trial be based upon the new trial date.

23 DATED: January 31, 2019

O’MELVENY & MYERS LLP

24  
25 By: 

26 Daniel M. Petrocelli