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THE EFFICACY OF THE NEGATIVE INJUNCTION IN BREACH OF ENTERTAINMENT CONTRACTS

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I. INTRODUCTION

Many aspects of the entertainment business are highly speculative and entertainment firms are known to invest heavily in developing and marketing the various products they create. While revenues from successful entertainment projects can be enormous, these successes are frequently offset by other expensive flops. As performers become more individually successful, they become generally more concerned with maximizing their own personal profits than with helping to subsidize development of entertainment projects to benefit their successors.¹ When it comes to remedies for breach of entertainment contracts, it is a constant battle to find a fair balance between the interests of entertainment entities seeking to make a profit—or at a minimum, recoup their investments—and performers seeking artistic autonomy and financial leverage.

Entertainment corporations have consistently relied on equitable remedies to prevent artists from evading their contractual obligations.² A negative injunction to prevent a party from working elsewhere has particular appeal in the entertainment industry. While the typical legal response to contract breach in most situations is damages for loss incurred, it can be very difficult if not impossible to measure the loss of a star

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1. See Patrick Healy, *Broadway Hits Gold in Buffalo*, N.Y. TIMES (Dec. 23, 2011), available at http://theater.nytimes.com/2011/12/24/theater/sheas-performing-arts-center-in-buffalo.html?_r=0 (noting that “only 20 to 30 percent of Broadway shows ever turn a profit.”); Chris Jones, *Rialto Hits Miss a Payback*, VARIETY (May 23, 2011), available at <http://www.variety.com/article/VR1118037392/?categoryid=4076&cs=1&cmpid=RSS%7CNews%7CLegitNews> (stating that “[i]t’s a perennial Broadway truth that only 20%-30% of shows pay back their investors. The percentages really haven’t changed much over the last 60 years.” (quoting Charlotte St. Martin, Executive Director of Broadway League)).

2. David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 785 (1992).

attraction. Additionally, even assuming that the breaching party is not judgment-proof, actual damages or the lost profits from an unfulfilled venture may be far too speculative to prove to a court's satisfaction. While damages are generally an effective remedy in many situations, employers of talent have often turned to the negative injunction remedy.

After presenting a brief history of the application of the negative injunction in personal service contracts, this Article examines the legal and ethical pros and cons of the application of the negative injunction in entertainment contract cases, analyzes negative injunction trends going forward, and then posits for its continued use with limitations.

II. HISTORY

The enforcement of a personal service entertainment contract by means of a negative injunction dates back to the landmark English case of *Lumley v. Wagner* in 1852.³ In that case, an opera singer, by contract, bound herself to sing exclusively for three months at the plaintiff's theatre.⁴ When she attempted to breach the contract and join a rival troupe, the plaintiff sued both her and her new employer. The chancellor granted a negative injunction preventing the defendant from performing for the rival company.⁵ The court reasoned that, while it could not specifically enforce the contract,⁶ an injunction preventing the defendant from performing her services elsewhere might cause her to return and perform her contractual obligations.⁷

Other nineteenth century cases expanded further upon *Lumley*, holding that it is not necessary to include a specific negative injunction clause in a contract as long as it was clear that the services were to be exclusive⁸ and unique.⁹ An even broader holding occurred in 1894 when an English actor who breached his contract with a touring company in the United States was enjoined from performing in England while he was under contract to

3. *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687; 1 De. G. M. & G. 604.

4. *Id.* at 605.

5. *Id.* at 619.

6. *See ABC, Inc. v. Wolf*, 52 N.Y.2d 394, 402 (N.Y. 1981) (noting that it has long been a principle of equity that a court will not order specific performance of a personal service contract because (1) it would be impossible to monitor and enforce the compliance of an unwilling party, and (2) it would violate the Thirteenth Amendment's ban on involuntary servitude).

7. *See Lumley*, 42 Eng. Rep. 687; 1 De. G.M. & G. 618 (showing that while the Chancellor's reasoning was unavailing in the defendant's case, in that she did not return to perform for the plaintiff, the grounds for a negative injunction were established).

8. *Webster v. Dillon*, (1857) 30 L.T.R. (N.S.) 71.

9. *Id.*

perform in the United States.¹⁰ Early entertainment cases in the United States essentially followed the precedents set in these English cases.¹¹

With regard to the uniqueness of the services as a prerequisite to granting a negative injunction, this requirement implies that the subject services are not readily replaceable by the employer, and that monetary damages would be of no help as a remedy.¹² In commenting on the effect of not awarding a negative injunction in cases of truly unique services, in a 1928 case¹³ the New York Supreme Court's Appellate Division said:

If the time shall ever come when a court of equity must stand helplessly by while unique and unusual theatrical performers may be induced to breach contracts with impunity, except for such damages as a jury may see fit to award at some distant date, theatrical corporations will find their business hampered by intolerable conditions.¹⁴

While the time remaining under the original breached contract is important, in a 1937 case,¹⁵ the court issued a negative injunction against the then well-known actress, Bette Davis, preventing her from making films, her chief career, or appearing on stage in England for the remainder of her contract or for the formidable period of three years, whichever would be shorter.¹⁶

10. See *Grimston v. Cunningham*, (1894) 1 Q.B. 125 (explaining that this extensive restriction meant, in essence, that the employer did not have to show any competitive harm).

11. See generally *Daly v. Smith*, 38 N.Y. Sup. Ct. 158 (1874) (citing cases from England where the courts decided whether or not to grant injunctions in engagement/employment contract breach cases); *Mapleson v. Del Puente*, 13 Abb. N. Cas. 144, 147 (N.Y. 1883) (referencing the decision in *Daly v. Smith*, which was based on English Court precedent).

12. See *Am. League Baseball Club v. Chase*, 149 N.Y.S. 6, 13-14 (N.Y. App. Div. 1914) (applying the *Lumley* case in an interesting manner by explaining that the athlete in that case was "the foremost first baseman in professional baseball[,] and that while this seemed to satisfy the "unique and individual" rule in *Lumley* for injunctive relief, the court found the player's agreement lacked mutuality of obligation and remedy and that the negative covenant did not have "consideration to support it" and was "unenforceable by injunction."); see also *Phila. Ball Club, Ltd. v. Lajoie*, 202 Pa. 210, 217 (1902) (implementing the *Lumley* rule and discussing adequacy of damages in such cases).

13. *Harry Rogers Theatrical Enters., v. Comstock*, 232 N.Y.S. 1, 4 (N.Y. App. Div. 1928).

14. *Id.* at 3.

15. *Warner Bros. Pictures, Inc. v. Nelson*, [1937] 1 K.B. 209 at 213-16 (Eng.).

16. See *id.* at 217 (explaining, however, that the court refused the plaintiff's request that Davis be barred from all entertainment work). It also appeared that because Davis had said that she would not make further films for the plaintiff, she was suspended from her exclusive studio contract with plaintiff and taken off the plaintiff's payroll when the suit was commenced. *Id.* The court would not order a negative injunction unless the company lifted the

III. SPECIFIC PERFORMANCE AND PRELIMINARY INJUNCTION

It is well settled that the remedy of specific performance will not be granted for personal service contracts.¹⁷ Originally, this rule evolved because of the inherent difficulties courts would encounter in supervising the performance of uniquely personal services.¹⁸ “During the Civil War era . . . a more compelling reason for not directing the performance of personal services”¹⁹ emerged, namely, the Thirteenth Amendment’s prohibition on involuntary servitude.²⁰ Courts have strongly held that judicial compulsion of services would violate the express command of the Thirteenth Amendment, and therefore, “[f]or practical, policy and constitutional reasons, . . . courts continue to decline to affirmatively enforce employment contracts.”²¹

The provisional remedy of a preliminary injunction²² is

suspension because the court believed that one could not both suspend a performer without pay and at the same time restrain the performer from working elsewhere. *Id.*

17. See *Poultry Producers of S. Cal., Inc. v. Barlow*, 208 P. 93, 97 (Cal. 1922) (holding that the court would not order specific performance by the defendant-poultry farmer, but would rather order monetary damages to the co-op); JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA: ADAPTED FOR ALL THE STATES AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE 943-44 (Spencer W. Symons ed., 5th ed. 1941).

18. See *ABC*, 52 N.Y.2d at 402 (quoting from a century-old opinion in *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264, 270 (N.Y. Ch. 1833)):

I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent.

19. *Id.* at 397.

20. *Id.*; Louis Goldman, *Equity—Negative Covenants in Contracts for Personal Services*, 10 S. CAL. L. REV. 340, 347-48 (1936-1937).

21. *ABC*, 52 N.Y.2d at 397; see also *Arthur v. Oakes*, 63 F. 310, 317-18 (7th Cir. 1894) (explaining that “[i]t would be an invasion of one’s natural liberty to compel him to work for or to remain in the personal service of another.”); Goldman, *supra* note 20, at 347-48.

22. Preliminary injunctions have been addressed in various entertainment law cases involving the Lanham Act, copyright infringement, right of privacy, the Cable Communications Act, and breach of personal service contracts. *King v. Innovation Books*, 976 F.2d 824, 825 (2d Cir. 1992); *Lucasarts Entm’t Co. v. Humongous Entm’t Co.*, 815 F. Supp. 332 (N.D. Cal. 1993); *Preliminary Injunction Denied in Case Alleging Infringement of Copyrights to Set Dressings in “Barney & Friends” Episodes*, 15 ENT. L. REP. 9, 14-15 (Mar. 1994) (printing the full text of *Frank Schaffer Publications, Inc. v. The Lyons Partnership, L.P.*, No. CV 93 3614 R (C.D. Cal. 1993)); *Time, Inc. v. Sand Creek Partners*, 825 F. Supp. 210, 212 (S.D. Ind. 1993); *MCA Records, Inc. v. Newton-John*, 90 Cal. App. 3d 18, 24 (Cal. Ct. App. 2d Dist. 1979); *Motown Record Corp. v.*

particularly well suited to the entertainment industry because it preserves the status quo. For example, Artist has signed an exclusive recording contract with Company Records. The recording contract provides that Artist shall record and deliver to Company one album per year for two years and, at Company's option, further recordings for six additional years. Artist delivered and Company has released two albums that have sold very well. Company now wants to exercise its option for Artist's third album. However, Artist believes that Company is not aggressively marketing and promoting Artist's product to Artist's satisfaction. Artist also believes that Company has been withholding royalty payments due to Artist in breach of the contract. Artist wants to pursue a new musical direction and because of his loss of faith in Company's support, Artist wants to sign an exclusive recording contract with XYZ Records, a competitor. As a consequence of the break down in their relationship, Artist has commenced a lawsuit against Company and Company has counterclaimed against Artist. Artist announced that Artist will not record any further recordings for Company and informed the media that Artist intends to enter into an exclusive recording contract with XYZ Records. While the lawsuit is pending, the best, and in reality, the only way for Company to prevent Artist from breaking his exclusive recording contract with Company, is the provisional remedy of a preliminary injunction.

A preliminary injunction is usually applicable in the context of an identifiable subject matter that is in danger of being removed or destroyed and is a means of securing immediate judicial intervention, generally at the outset of a lawsuit and before the commencement of discovery and a full trial on the merits. Although a seemingly more rigid standard would seem to apply where First Amendment concerns are involved, the right to a preliminary injunction is also a personal right as well as a real and intellectual property right.²³ The general purpose of a preliminary injunction is to protect a party from irreparable harm or injury by maintaining the status quo during the pendency of the lawsuit. Most jurisdictions require that a hearing be held upon notice to the adverse party and that the party seeking the preliminary injunction post a bond. Under the Federal Rules of Civil Procedure, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application for a preliminary injunction.²⁴

In order to obtain a preliminary injunction, the applicant must also demonstrate a likelihood of success on the merits,

Brockert, 160 Cal. App. 3d 123, 140 (Cal. Ct. App. 1984).

23. *Time, Inc.*, 825 F. Supp. at 212.

24. FED. R. CIV. P. 65(a)(2).

irreparable injury, and a balancing of the equities in favor of the applicant.²⁵ The court has broad discretion and may grant the preliminary injunction even in the absence of explicit irreparable harm. Some courts presume irreparable harm if an aggrieved party proves a reasonable probability of success on the merits.²⁶ Even if a party makes this requisite showing, a preliminary injunction will generally be denied if a party has an adequate remedy at law.

IV. ISSUES

Courts have become increasingly reluctant to grant negative injunctions because of the consequence of effectively putting performers completely out of work. In the absence of extreme circumstances, which existed in some of the earlier cases that demonstrated fairly egregious examples of “contract jumping,”²⁷ courts have refused injunctions because of the absence of requisite contractual provisions.

A good example of court application of these principles may be seen in *American Broadcasting Co., Inc. v. Wolf*.²⁸ In this case, the well-known sportscaster, Warner Wolf, had an employment agreement with ABC containing a good-faith negotiation and first-refusal provision that goes to the heart of the case.²⁹ Between the period commencing shortly before the required good faith negotiation period and ending upon termination of Wolf’s contract with ABC, various interactions (including meetings, discussions, and exchange of papers) occurred between Wolf and ABC. There

25. *King*, 976 F.2d at 828.

26. *See* *Manhattan Cable Tel., Inc. v. Cable Doctor, Inc.*, 824 F. Supp. 34, 37 (S.D.N.Y. 1993) (stating that some courts have eliminated the necessity of a showing of irreparable harm if the defense lacks justification for their actions).

27. *Machen v. Johansson*, 174 F. Supp. 522, 525 (S.D.N.Y. 1959).

28. *ABC*, 52 N.Y.2d at 397.

29. *Id.* at 397-98. The pertinent part of the provision read as follows:

You agree, if we so elect, during the last ninety (90) days prior to the expiration of the extended term of this agreement, to enter into good faith negotiations with us for the extension of this agreement on mutually agreeable terms. You further agree that for the first forty-five (45) days of this renegotiation period, you will not negotiate for your services with any other person or company other than WABC-TV or ABC. In the event we are unable to reach an agreement for an extension by the expiration of the extended term hereof, you agree that you will not accept, in any market for a period of three (3) months following expiration of the extended term of this agreement, any offer of employment as a sportscaster, sports news reporter, commentator, program host, or analyst in broadcasting (including television, cable television, pay television and radio) without first giving us, in writing, an opportunity to employ you on substantially similar terms and you agree to enter into an agreement with us on such terms.

Id.

were also interactions, to a large degree unbeknownst to ABC, between Wolf and CBS, which resulted in Wolf leaving ABC and going to work for CBS.³⁰ Among other remedies, ABC sought an injunction against Wolf's employment as a sportscaster for CBS. The court held that Wolf breached the good faith negotiation clause of the contract with ABC but that ABC was not entitled to injunctive relief.³¹

The court pointed out that after a personal service contract terminates, the availability of equitable relief against the former employee diminishes appreciably.³²

Since the period of service has expired, it is impossible to decree affirmative or negative specific performance. Only if the employee has expressly agreed not to compete with the employer following the term of the contract, or is threatening to disclose trade secrets or commit another tortious act, is injunctive relief generally available at the behest of the employer.³³

There is clearly a judicial disfavor of anticompetitive covenants contained in employment contracts based on the notion that once the term of an employment agreement has expired, general public policy favoring robust and uninhibited competition, as well as a person's right to a livelihood, should not give way merely because a particular employer wishes to insulate himself from competition.³⁴ The court said:

Specific enforcement of personal service contracts thus turns

30. *Id.* at 398-99 (stating that:

The first-refusal period expired on June 3, 1980 and on June 4 Wolf was free to accept any job opportunity, without obligation to ABC. Wolf first met with ABC executives in September, 1979 to discuss the terms of renewal contract. Counter proposals were exchanged, and the parties agreed to finalize the matter by October 15. Meanwhile, unbeknownst to ABC, Wolf met with representatives of CBS in early October. Wolf related his employment requirements and also discussed the first refusal-good faith negotiation clause of his ABC contract. Wolf furnished CBS a copy of that portion of the ABC agreement. On October 12, ABC officials and Wolf met, but were unable to reach agreement on a renewal contract. A few days later, on October 16 Wolf again discussed employment possibilities with CBS. Not until January 2, 1980[,] did ABC again contact Wolf. At that time, ABC expressed its willingness to meet substantially all of his demands. Wolf rejected the offer, however, citing ABC's delay in communicating with him and his desire to explore his options in light of the impending expiration of the 45-day exclusive negotiation period. On February 1, 1980, after termination of that exclusive period, Wolf and CBS orally agreed on the terms of Wolf's employment as sportscaster for WCBS-TV a CBS-owned affiliate in New York.)

31. *Id.* at 405.

32. *Id.* at 403.

33. *Id.* at 403.

34. *Id.* at 368.

initially upon whether the term of employment has expired. If the employee refuses to perform during the period of employment, was furnishing unique services, has expressly or by clear implication agreed not to compete for duration of the contract and the employer is exposed to irreparable injury, it may be appropriate to restrain the employee from competing until the agreement expires. Once the employment contract has terminated, by contrast, equitable relief is potentially available only to prevent injury from unfair competition or similar tortious behavior or to enforce an express and valid anticompetitive covenant. In the absence of such circumstances, the general policy of unfettered competition should prevail.³⁵

In applying the above principles, the court concluded that because Wolf's employment contract with ABC had terminated and there was no express anticompetitive covenant made by Wolf, ABC's request for injunctive relief must fail.³⁶

Seventeen years after *Wolf*, plaintiff Sue Nigra sued her former employer, Young Broadcasting of Albany, to invalidate a non-compete agreement.³⁷ Nigra, who had been a broadcaster at WTEN,³⁸ was offered a contract renewal upon expiration of her contract, but she rather accepted employment at a competing station for double her old salary.³⁹ However, her acceptance of the new position, according to the defendant, violated the non-compete covenant in her employment contract with defendant that stated:

[R]egardless of whether WTEN terminates an employee or the employee does not renew its contract with WTEN at the salary that WTEN offers, for a year thereafter the employee may not even work for, much less appear on any commercial television station (including cable, closed circuit or pay television) that broadcasts or transmits to any place within the Albany-Schenectady-Troy area [.]⁴⁰

The court, following the *Wolf* decision, held that because the plaintiff had completed the term of employment, the former employer's attempt to insulate itself from competition was not a legitimate reason to enforce the restrictive covenant.⁴¹

35. *Id.* at 405.

36. *Id.*

37. *Nigra v. Young Broad. of Albany, Inc.*, 676 N.Y.S.2d 848, 849 (N.Y. Sup. Ct. 1998).

38. *Id.*

39. *Id.* at 848-49.

40. *Id.* at 848.

41. *Id.* at 850; see also Marlo D. Brawer, *Switching Stations: The Battle over Non-Compete Agreements in the Broadcasting Industry*, 27 OKLA. CITY U. L. REV. 693, 734 (2002) (stating that "[c]ovenants not to compete are forced on employees as part of the conditions of employment. They are used to unduly burden the employee . . . [B]roadcast employers have an unfair advantage in negotiating contracts with employees who are desperate to make a decent living wage.").

A different result ensued in a New York case where the defendant's breach of a contract with the plaintiff to host a television game show, which was being developed by the plaintiff, and a subsequent contract with a competing production company to host another game show called "To Tell The Truth," resulted in the issuance of a permanent injunction barring defendant from appearing on "To Tell The Truth" or any other game show.⁴² The court distinguished *Wolf* on the basis that it instead involved a contract for employment which had expired, while in this case, the contract for employment had not expired.⁴³ Another issue in this case concerned whether or not the defendant's services were sufficiently unique to meet the requirement as articulated in the *Wolf* case. It should be noted generally that even where the breaching party may have acted in good faith, truthfully believing that he was not violating the subject contract provision, this will not bar the imposition of an otherwise valid negative injunction.⁴⁴

Uniqueness of the performer's talents has always been a vital issue with regard to seeking a negative injunction.⁴⁵ In *King Records v. Brown*,⁴⁶ plaintiff-record company contracted with defendant-vocalist, James Brown, for his exclusive professional services in connection with the production of phonograph records for five years.⁴⁷ The contract recited that the defendant's services were unique and extraordinary, and substantial payments and royalties were thereafter paid to defendant.⁴⁸ During the term of the contract, the defendant breached the contract by entering into another agreement with a different recording company.⁴⁹ The court, stating that "[t]he nature and extent of the recordings made by Brown under plaintiff's contract and the large quantity thereof publicly sold substantiate the contract characterization of Brown's services as unique and extraordinary,"⁵⁰ and granted an injunction.⁵¹

42. *Zink Commc'ns v. Elliott*, No. 90 Civ. 4297 (CSH), 1990 WL 176382, at *30 (S.D.N.Y. Nov. 2, 1990), *aff'd without opinion*, 923 F.2d 846 (2d Cir. 1990).

43. DONALD E. BIEDERMAN, *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 498 (5th ed. 2007).

44. *See Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1239 (11th Cir. 2009) (describing how the court was not persuaded that Florida law would refuse to grant injunctive relief based on an employee's good faith belief that the employee did not violate a covenant not to compete).

45. *See Shubert Theatrical Co. v. Gallagher*, 201 N.Y.S. 577, 583 (N.Y. App. Div. 1923) (granting an injunction where it was shown that defendants' services were unique).

46. *King Records, Inc., v. Brown*, 21 A.D.2d 593, 594 (N.Y. App. Div. 1964).

47. *Id.* at 595.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* at 597 (stating that the injunction was "granted to the extent of restraining [the Defendant] from vocal phonograph recordings and restraining

An opposite result occurred in the case of *Wilhelmina Models, Inc. v. Abdulmajid*⁵² where the court reversed the lower court's granting of an injunction against a fashion model who breached her contract with the plaintiff-model agency.⁵³ The lower court had granted the injunction based primarily upon the above *King* case,⁵⁴ and also because the contract in the subject case recited that the defendant's services were indeed extraordinary, unique, and that there was no adequate remedy at law for the breach of the agreement.⁵⁵ The court, in carefully scrutinizing the "unique" and "extraordinary" recitations, concluded that such language is not of itself conclusive of such facts.⁵⁶ The court said:

The uniqueness of defendant model's services would seem to be somewhat diluted by the fact that plaintiff apparently requires all of the models it manages to sign contracts with such recitations; the contract is obviously a form contract. Insofar as defendant model's services are "unique," in the sense that she looks like herself and not somebody else and is very popular, that uniqueness is not vis-a-vis plaintiff but vis-a-vis the photographers and commercial organizations who hire the model. Vis-a-vis plaintiff, defendant model is simply one of a number of models whom plaintiff manages, some of whom are in the same price category as defendant model[.]⁵⁷

V. PAY OR PLAY/GARDEN LEAVE

A "pay or play" provision in an entertainment service contract means that the artist is guaranteed payment as provided for in the contract regardless of whether or not she actually render services. In other words, the employer is free to utilize or not utilize the artist's services, but in any event, the artist will get paid.⁵⁸ While

the corporate defendants from causing or providing such recordings or manufacturing, distributing or selling any vocal phonograph recordings of [the] defendant.").

52. *Wilhelmina Models, Inc. v. Abdulmajid*, 413 N.Y.S.2d 21, 22 (N.Y. App. Div. 1979).

53. *Id.*

54. *King*, 21 A.D.2d at 593.

55. *Wilhelmina Models*, 413 N.Y.S.2d at 22-23.

56. *Id.*

57. *Id.* at 23 (distinguishing this case from *King* by pointing out that "[t]he defendant model does not render any services to plaintiff nor does plaintiff pay the defendant model. It is quite the other way around. Plaintiff renders services to defendant model as manager and defendant model pays plaintiff. Thus damages would appear to be an adequate remedy."); see also *Machen*, 174 F. Supp. at 522.

58. See BIEDERMAN, *supra* note 43, at 110 (explaining that:

In the event [a] Company or Producer desires to terminate the services of Director as the director of the Property, then notwithstanding that this pay or play clause is exercised prior to completion of Director's services, Director shall be entitled to retain all fixed compensation paid hereunder and Director shall be entitled to receive any unpaid balance of fixed compensation provided herein.).

pay or play provisions in entertainment contracts typically become germane relative to damages issues,⁵⁹ they also have application relative to enforcement of a negative injunction, particularly as to the issue of deprivation of the performer's ability to earn a living.⁶⁰ As noted earlier in *Wolf*, many courts are hostile to negative injunctions that limit employee conduct after the term of employment has ended.⁶¹ Additionally, there has been a lack of consistency with respect to the "special and unique" issue. Some cases on these grounds never support a negative injunction⁶² while other cases, on the same grounds have shown support.⁶³

English courts, having the same concerns as American courts, have developed a way to enforce restrictive covenants by either vitiating the need for a negative injunction, or in the alternative, overcoming the free labor ideal argument. This has been accomplished by an arrangement called "garden leave," pursuant to which an employer will continue to pay the employee her full salary and benefits—without utilizing her services—to prevent her from moving to a competitor, usually during an extended contractual period of employment.⁶⁴ The phrase garden leave refers to the assumption that the employee will stay home and work in her garden during that period while remaining financially secure.⁶⁵ While the subject period will likely be during the extended term of employment, it is possible to provide for similar garden leave after the term of employment, by option exercisable by the employer. It is not a long jump to the concept of including garden leave provisions as part of enforcement of non-compete provisions in entertainment contracts.

Of particular importance concerning the concept of garden leave relative to enforcement of a negative injunction after

59. With respect to computation of damages, liquidated damages, mitigation of damages, consequential damages, etc., see *Lynch v. CIBY 2000*, 1998 CV 97-9022 (C.D. Cal.) (granting summary judgment for plaintiff in a "pay or play" case where the court relied on *Payne v. Pathe Studios, Inc.*, 6 Cal. App. 2d 136 (Cal. Dist. Ct. App. 1935) and *De La Palaise v. Gaumont-British Picture Corp., Ltd.*, 39 Cal. App. 2d 461 (1940) for the proposition that "the duty to mitigate does not apply when an employee seeks minimum [guaranteed] compensation.").

60. See generally *Simons v. Fried*, 98 N.E.2d 456 (N.Y. 1951); see generally *Reed, Roberts Assocs., Inc., v. Strauman*, 386 N.Y.S.2d 677 (N.Y. 1976).

61. *ABC*, 52 N.Y.2d at 398.

62. *Id.*; see also *Nigra*, 676 N.Y.S.2d at 849; *Wilhelmina Models*, 413 N.Y.S.2d at 22-23.

63. *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 64 (2d Cir. 1998); *Natsource LLC v. Paribello*, 151 F. Supp. 2d 465, 473-74 (S.D.N.Y. 2001).

64. See generally Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2002).

65. *Id.* at 2305 (explaining that "[d]uring this time the employee will not have access to the employer's confidential information.").

employment has ended is that it negates the argument that the restriction deprives the individual from her ability to earn a living.⁶⁶ It has been persuasively argued that the garden leave concept may be an important way for American courts to improve upon the consistency in interpretation and enforcement of negative injunction provisions:

Garden leave may be the solution for which American companies, looking to protect themselves from the threat of opportunistic employees joining competitors, have been searching. The restrictive covenants traditionally used for this purpose, including non-competition and non-solicitation agreements, have proven to be largely ineffective because courts view them with considerable skepticism and enforce them inconsistently. Garden leave, however, has the potential to succeed where they have failed. Largely overcoming the traditional objections to restrictive covenants, garden leave is a much more equitable arrangement that compensates the employee by forcing an employer to internalize the cost of keeping the employee out of work.⁶⁷

VI. INJUNCTION STATUTES

A number of states have statutes governing the enforceability of restrictive covenants.⁶⁸ In reviewing the various statutory provisions of those states heavily involved in the entertainment industries, particularly California, one finds that the statutes basically recite that in order to provide the basis for injunctive relief, the subject contract must: be in writing, provide for services that are unique and extraordinary, and, most importantly, provide for a minimum compensation.⁶⁹

66. *Id.* at 2315.

67. *Id.* at 2323.

68. Cal. Civ. Code § 3423 (West 2012); N.Y. C.P.L.R. § 6301 (McKinney 2013).

69. *See* CAL. CIV. CODE § 3423 (West 2012), which provides for minimum compensation:

(1) As to contracts entered into on or before December 31, 1993, the minimum compensation provided in the contract for personal services shall be at the rate of six thousand dollars (\$6,000) per annum.

(2) As to contracts entered into on or after January 1, 1994, the criteria of subparagraph (A) or (B), as follows, are satisfied:

(A) The compensation is as follows:

(i) The minimum compensation provided in the contract shall be at the rate of nine thousand dollars (\$9,000) per annum for the first year of the contract, twelve thousand dollars (\$12,000) per annum for the second year of the contract, and fifteen thousand dollars (\$15,000) per annum for the third to seventh years, inclusive, of the contract.

(ii) In addition, after the third year of the contract, there shall actually have been paid for the services through and including the contract year during which the injunctive relieve is sought, over and above the minimum contractual compensation specified in

There have been several cases of particular interest interpreting the minimum compensation aspect of the California statute.⁷⁰ In *Fox v. Williams*,⁷¹ the plaintiff, Redd Foxx, a well-known entertainer in nightclubs and on phonograph records, sued for an accounting, declaratory, and other relief against the defendant-recording company that was distributing his recordings.⁷² The defendant filed a cross-complaint for injunctive relief to prevent the plaintiff from breaching the exclusivity clause of his contract. The trial court granted the injunction restraining the plaintiff “from making sound recordings for any other person, firm or corporation . . . so long as royalties earned . . . equal or exceed the sum of \$3,000 [the then statutory minimum] for any royalty period.”⁷³

On appeal, the appellate court found that the royalty payments were not guaranteed but rather contingent on album sales, and therefore did not meet the requirements of the statute even though the royalties actually earned over any given period might exceed the required annual statutory rate.⁷⁴

About a decade later, the court found grounds to enforce a negative injunction in the case of *MCA Records, Inc. v. Newton-John*,⁷⁵ which involved a recording contract between MCA, the plaintiff-recording company, and the then internationally famous Olivia Newton-John, the defendant-recording artist. The agreement provided that the defendant was to record and deliver two albums per year for an initial period of two years, and at

clause (i), the amount of fifteen thousand dollars (\$15,000) per annum during the fourth and fifth years of the contract, and thirty thousand dollars (\$30,000) per annum during the sixth and seventh years of the contract. As a condition to petitioning for an injunction, amounts payable under this clause may be paid at any time prior to seeking injunctive relief.

(B) The aggregate compensation actually received for the services provided under a contract that does not meet the criteria of subparagraph (A), is at least 10 times the applicable aggregate minimum amount specified in clauses (i) and (ii) of subparagraph (A) through and including the contract year during which the injunctive relief is sought. As a condition to petitioning for an injunction, amounts payable under this subparagraph may be paid at any time prior to seeking injunctive relief.

70. See generally Allen R. Grogan, *Statutory Minimum Compensation and the Granting of Injunctive Relief to Enforce Personal Service Contracts in the Entertainment Industries: The Need for Legislative Reform*, 52 S. CAL. L. REV. 489 (1979) (explaining that while the original minimum amounts have been legislatively increased, the case law interpreting the statute under lower amounts remains fundamental).

71. *Fox v. Williams*, 244 Cal. App. 2d 223, 227 (Cal. Dist. Ct. App. 1966).

72. *Id.* at 227.

73. *Id.* at 230.

74. *Id.* at 244.

75. *MCA Records*, 90 Cal. App. 3d at 21.

plaintiff's option, further recordings in three one-year option periods.⁷⁶ Plaintiff was to pay defendant royalties as well as a non-returnable advance of \$250,000 for each album during the initial two years and \$100,000 for each album during the option years, with the costs of recording to be borne by defendant.⁷⁷

Following three recordings, both parties filed breach of contract actions against the other and the trial court granted to plaintiff a preliminary injunction barring defendant from recording with anyone but plaintiff during the pendency of the action.⁷⁸ The defendant's objection to the injunctive relief to enforce the exclusivity provisions of the contract was based on the contention that inasmuch as the defendant was required to bear production costs of her recordings, her proceeds or net profits from the guaranteed advances would be reduced below the statutory guaranteed minimum payment.⁷⁹ The court held that the minimum compensation referred to in the statute did not mean net profits, and further said: "even if it did, suitable recordings could be made at costs that would net the defendant minimum compensation of \$6,000 [the then-minimum] a year. It is decisive here that . . . exclusive control of production costs remained in the defendant's hands at all times."⁸⁰

As a result of the *Foxx* and *MCA* cases, many California record companies started to include in their contracts, almost as a matter of boilerplate, a clause providing for the company to have an option exercisable at any time, to pay the recording artist the statutory minimum compensation, thereby providing the basis for enforcement of a negative injunction to enforce exclusively provisions.⁸¹ In *Motown Record Corp. v. Brockert*, such an option

76. *Id.*

77. *Id.*

78. *Id.* The preliminary injunction granted by the trial court was for the pendency of the action or until April 1, 1982, two years after the termination of the five-year contract. *Id.* While the preliminary injunction was affirmed, it was modified by deleting the "or until April 1, 1982" language, as the court held that the injunction could not extend the term of the contract beyond its specified maximum. *Id.*

79. *Id.* at 22.

80. *Id.*

81. See CAL. CIV. CODE § 3423(e) (West 2012) (codifying the so-called "Superstar Insurance" provision, where the company could make a single payment equal to ten times the aggregate minimum amount required to secure and maintain the right to injunctive relief in each of the years of the contract); CAL. CIV. PROC. CODE § 526 (West 2012); see also PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES AND PROBLEMS 725 (2d ed. 2002) (stating that:

For example, a label that did not pay the guaranteed minimums to an artist in years one through three (i.e. \$9,000 then \$12,000 then \$15,000), but that released an extraordinarily successful album by the artist in year four, could qualify to seek an injunction against the artist by making a lump sum payment on the courthouse steps which, in this

clause was at issue.⁸² The defendant-performer, professionally known as Teena Marie, appealed a preliminary injunction restraining her from performing her singing and songwriting for anyone other than the plaintiff-recording and publishing companies (Motown and Jobete, respectively) until their exclusive contracts expired. The contracts provided each company with an option exercisable at any time to pay Teena Marie the then minimum statutory amount of \$6,000 per year. After six years under the contracts, Teena Marie notified Motown and Jobete that she would no longer perform under the contracts.⁸³ The following month, Motown and Jobete exercised the \$6,000 per year option.⁸⁴ The court held that the option clause did not satisfy the statutory requirement of minimum compensation based on the fact that the legislative language refers to contracts that guarantee the performers the minimum amount from the outset.⁸⁵ The court said:

The most reasonable, common sense reading of this language is that “minimum compensation for such service” refers back to the “contract in writing for . . . personal services.” To be subject to specific enforcement, the contract must have as one of its terms a compensation provision providing for payment at the minimum rate of \$6,000 per year. In other words, agreeing to payment of the minimum compensation is not a condition precedent to the granting of injunctive relief; it is a threshold requirement for admission of the contract into the class of contracts subject to injunctive relief under the statute.⁸⁶

The court also noted that:

If we were to hold the option clause satisfies section 3423, we would nullify the \$6,000 compensation requirement as a counterweight on the employer. Whereas the \$6,000 compensation requirement was intended to balance the equities, the \$6,000 option clause is intended to allow record companies to avoid payment of minimum compensation while retaining the power of economic coercion over the artist.⁸⁷

case, would total \$510,000 (ten times the \$15,000 required for year 4, plus \$360,000 as ten times the total that was supposed to have been paid during the first three years of the contract). By year seven, this payment for an injunction would have to total \$960,000 (less any amounts that had actually been paid in prior years under the contract.).

82. *Motown Record*, 160 Cal. App. 3d at 126.

83. *Id.*

84. *Id.* at 127.

85. *Id.* at 135.

86. *Id.*

87. See *id.* at 140 (noting that this is accomplished by giving “the company the coercive power of a credible threat of injunctive relief without it having to guarantee or pay the artist anything” and that this threat could be as effective as the injunction itself).

In a 1986 case,⁸⁸ in an attempt to circumvent the California minimum compensation statute, a record company sought an injunction not against the contract-breaching artist, but rather against the rival record company that was seeking to employ her. The case involved Anita Baker, a then unknown singer who had recorded a modestly successful album for plaintiff and then accepted a better deal with the defendant-record company.⁸⁹ After it was established that the plaintiff was not entitled to an injunction against Ms. Baker because the minimum compensation required by the statute had not been met,⁹⁰ the plaintiff tried a back door attempt by seeking the injunction against the rival record company defendant. The court, in denying the injunction, stated that “[w]hether plaintiff proceeds against Ms. Baker directly or against those who might employ her, the intent is the same: to deprive Ms. Baker of her livelihood and thereby pressure her to return to plaintiff’s employ.”⁹¹

VII. OTHER ASPECTS

At times in the entertainment business, the negative injunction being sought may not relate to an individual’s performance, but rather to a specific creative property such as a Broadway show, motion picture, or television show.⁹² In 2008, the New York Supreme Court issued a preliminary injunction preventing the airing of the hit cable television show “Project Runway” on the Lifetime network.⁹³ The dispute involved a contract between NBC Universal and The Weinstein Company.⁹⁴ The injunction prevented The Weinstein Company from moving the hit show from NBC to another television network based on the allegation that Weinstein breached NBC’s contractual right of first

88. *Beverly Glen Music, Inc. v. Warner Commc’ns, Inc.*, 178 Cal. App. 3d 1142, 1144 (Cal. Ct. App. 1986).

89. *Id.* at 1143-44.

90. *Id.* at 1145.

91. *Id.* But how could damages be accurately calculated, given the unknown future market for Baker’s performances?

92. See Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355-56 (1978) (explaining that negative injunctions do not apply only to individual performance but also to certain licenses, patent right, and other “unique” items); see also *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (holding that suits for injunctions involving patents were subject to the same standards of equity as in other suits seeking a permanent negative injunction).

93. See Bill Carter & Brian Stelter, “*Project Runway*” Move to Lifetime Is Blocked, N.Y. TIMES (Sept. 30, 2008), http://www.nytimes.com/2008/09/27/arts/television/27_runw.html?_r=0 (explaining that even though such injunctions are rarely granted in the entertainment industry, the judge issued an order saying “Project Runway” cannot be shown on Lifetime).

94. *Id.*

refusal to the show.⁹⁵ The parties ultimately settled the lawsuit with The Weinstein Company agreeing to pay NBC an undisclosed amount for the right to move the show.⁹⁶

Performers are not the only parties who may violate their personal service performing contracts. If a producer decides to replace an actor or other creative person, such as a director or choreographer, in breach of that individual's contract, the issue arises as to whether the individual may seek to enjoin the enterprise from going forward. In the case of *Gennaro v. Rosenfield*,⁹⁷ the plaintiff, a well-known and successful choreographer and dancer,⁹⁸ was engaged to choreograph the London stage production of "Singin' In The Rain."⁹⁹ The contract provided that Gennaro would have an option to choreograph any future first-class production of the show in the United States, including any Broadway production.¹⁰⁰ During the successful run of the London production, a Broadway production was planned that did not include Gennaro.¹⁰¹ Gennaro sought a preliminary injunction to enjoin the Broadway production from going forward,¹⁰² arguing that he would suffer irreparable harm to his

95. *Id.*

96. See Meg James & Maria Elena Fernandez, "Project Runway" Lawsuit Over; the Series Moves to Lifetime (updated), L.A. TIMES (Apr. 1, 2009), <http://latimesblogs.latimes.com/showtracker/2009/04/project-runway-lawsuit-over-the-runway-series-moves-to-lifetime.html> (explaining that since the lawsuit has been settled, Project Runway can finally move to Lifetime); see also Molly S. Machacek, "Make It Work": Project Runway and Injunctive Relief in the Television Industry, 14 CHAP. L. REV. 165, 175 (2010) (arguing against negative injunctions in television and stating that:

Unlike real estate cases, in which each piece of disputed property is unique, in the television industry it can be difficult to determine if a property is unique enough to warrant the application of a preliminary injunction. A television program, similar to music, films, and books, is unique in the non-legal definition because it is a creative property that conceivably comes from an original idea and ostensibly is the only one of its kind: but these characteristics do not mean that the issuance of a preliminary injunction is always an appropriate remedy when a television show is involved.)

97. *Gennaro v. Rosenfield*, 600 F. Supp. 485, 486 (S.D.N.Y. 1984).

98. See *id.* at 487 (stating that Peter Gennaro "is a choreographer and dancer. He has choreographed a number of well-known Broadway musicals, including "Fiorello," "The Unsinkable Molly Brown," and "Annie" (for which he won a Tony Award).").

99. *Id.*

100. *Id.*

101. *Id.* at 488.

102. *Id.* (explaining that the requested injunction sought to prevent the Broadway producer from:

(a) producing any American first-class stage production of the musical "Singin' In The Rain" (the "American production") with choreography by any choreographer other than Peter Gennaro; (b) entering into any contract for choreography of the American production with any

reputation and erosion of his professional skills.¹⁰³

The court denied the injunction indicating that it could be granted only if Gennaro could “show that the harm which he would suffer from the denial of his motion is ‘decidedly’ greater than the harm which [the defendants] would suffer if the motion was granted.”¹⁰⁴ While the court said that atrophy of professional skills may constitute irreparable harm, it also said that this principle was very limited and noted that Gennaro’s skills are not likely to diminish or atrophy, citing the fact that “[s]ince he has already choreographed the London production, the Broadway production represents less than a unique opportunity to develop his skills.”¹⁰⁵

A negative injunction against a performer may not necessarily seek to totally bar the performer from performing for a specific entity or third party. Such would be the case regarding a negative injunction to enforce a breach by a recording artist of a “re-recording restriction” contained in most recording contracts. Such a negative covenant typically provides that the artist will not re-record material recorded for the record label for anyone else, not only for the term of the agreement, but also for a certain amount of time after the term of the agreement.¹⁰⁶ The negative covenant might run for five years from the date of release of the artist’s recording for the label, or until two years after the date of termination of the recording agreement.¹⁰⁷

VIII. CONCLUSION

While the negative injunction as a contract remedy in breach of entertainment contracts dates back to at least the 1800s,¹⁰⁸ its application remains inconsistent. While many cases indicate that courts have become increasingly reluctant to grant them,¹⁰⁹ other cases demonstrate a willingness to grant them particularly under

choreographer other than Peter Gennaro; (c) advertising, promoting or otherwise publicizing the American production, in print or any other media, whereby the actual or prospective choreography is represented as by any choreographer other than Peter Gennaro).

103. *Id.* at 488-89.

104. *Id.* at 492 (citing *Buffalo Forge Co. v. Ampco-Pittsburg Corp.*, 638 F.2d 568, 569 (2d Cir. 1981)).

105. *Gennaro*, 600 F. Supp. at 488.

106. See KASHIF, *EVERYTHING YOU’D BETTER KNOW ABOUT THE RECORD INDUSTRY* 350 (Elsa Boyd et al. eds., 1st ed. 1996) (providing an example of such a provision).

107. The purpose of such a provision is to prevent the artist from recording the same material for a new label that would then be in direct competition with sales of the original recording.

108. *Lumley*, 42 Eng. Rep. 687; 1 De. G. M. & G. 604.

109. *ABC*, 52 N.Y.2d at 402.

distinct circumstances.¹¹⁰ The primary reasons for their denial relate to the absence of clear and requisite contract provisions, the availability of monetary damages, and the strong public policy favoring robust and uninhibited competition as well as a person's right to a livelihood.

It is this author's opinion that performers' contracts are personal promises that create moral and ethical responsibilities upon which others reasonably rely, and which reliance should be protected to the greatest extent provided for by the law. Notwithstanding public policy as above noted, most entertainment contracts have features that are distinctive from ordinary employment contracts particularly in the areas of up-front investments and risks in the creation of entertainment projects. While it is clear that specific performance may not be granted to force a performer to render her services,¹¹¹ in many cases, the existence of the negative injunction remedy is the only realistic and effective way to prevent the sort of egregious breaches¹¹² that are regularly committed by performers in the pursuit of maximizing their own personal profits and advancing their careers.¹¹³ The negative injunction is the principal deterrent to contract-jumping in the entertainment business. Additionally, the application of the negative injunction should not only apply to "stars," but "up-and coming" artists as well, who make the same contractual commitments and whose employers have a huge economic stake in helping their career development.¹¹⁴

110. See, e.g., *Grimston*, 1 Q.B. 125; *Harry Rogers Theatrical Enters., Inc.*, 232 N.Y.S. at 2; *Zink Commc'n*, 1990 WL 176382, at *30; BIEDERMAN, *supra* note 43; *King Records*, 21 A.D.2d at 597.

111. POMEROY, *supra* note 17, at 943.

112. See Joe Baltake, *So Long, Sue Ya Later: When Stars Walk, Lawyers Talk, and Some of Hollywood's Biggest Courtroom Scenes Are Not on Film*, SACRAMENTO BEE, July 28, 1996, at EN18 (giving an extensive list of examples of actors walking off movie sets, seemingly in breach of their contracts).

113. Even if the final result—perhaps based on financial weight—may be the performer's decision to perform her original contractual services.

114. See *Motown Record*, 160 Cal. App. 3d at 137 (noting a trend toward enforcing negative covenants against "prima donnas" but not against the "spear carriers.").

