NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-06-1466-DMkK
JASMINE NETWORKS, INC.,	Bk. No. 02-54815
Debtor.	Adv. No. 04-05289
EJAZ MAHMOOD,	
Appellant,	
v.	**M E M O R A N D U M**[1]
OFFICIAL UNSECURED CREDITORS COMMITTEE OF JASMINE NETWORKS, INC.,	
Appellee.	

Argued and Submitted on September 19, 2007
at San Francisco, California

Filed - October 31, 2007

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Marilyn Morgan, Bankruptcy Judge, Presiding

Before: DUNN, MARKELL and KLEIN, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

The Unsecured Creditors' Committee filed an adversary proceeding to collect on a promissory note executed by corporate debtor's former employee in connection with employee's early exercise of stock options. In granting summary judgment in favor of the Unsecured Creditors' Committee, the bankruptcy court held that the employee neither disputed the validity of the promissory note, nor provided sufficient evidence to raise a genuine issue of material fact in support of his affirmative defenses against enforcement of the promissory note. We AFFIRM.

I. FACTS

Jasmine Networks, Inc. ("Jasmine") was a start-up company in the business of developing technology products. In 1999, Jasmine established a stock incentive plan ("Stock Incentive Plan"), the purpose of which was to "attract, retain and motivate" its employees. Appellant, Ejaz Mahmood ("Mahmood"), was a senior hardware engineer manager in Jasmine's employ.

On June 13, 2000, Jasmine's Board of Directors approved a stock option grant to Mahmood under the Stock Incentive Plan ("Stock Option Grant"), authorizing Mahmood to purchase up to 250,000 shares of Jasmine common stock for $.268 per share, for a total exercise price of $71,500. The Stock Option Grant set February 24, 2000 as the vesting commencement date, and established a vesting schedule ("Vesting Schedule"):

> This Option becomes vested in accordance with the following schedule: 25% of the number of Shares on the one-year anniversary of the Vesting Commencement Date, and 1/36 of the remaining Shares subject to the Option shall vest on each monthly anniversary of the Vesting Commencement Date following such one-year anniversary, . . . until termination of your employment . . . relationship . . . with the Company. **This Option may be exercised prior to becoming vested, in accordance**

> **with the [Stock Option] Plan and the Stock Option Agreement.**

(emphasis added).

Paragraph 2(a)(I) of the Stock Option Agreement authorized Mahmood to exercise all or part of the Stock Option Grant at any time after June 13, 2000, provided that if Mahmood chose to exercise the Stock Option Grant with respect to any shares not yet vested under the Vesting Schedule, he was required to execute an early exercise agreement ("Early Exercise Agreement"). The Early Exercise Agreement authorized Mahmood to pay for shares he purchased under the Stock Option Grant by delivery of a promissory note with a pledge and security agreement.[2]

On June 23, 2000, Mahmood received an e-mail from an executive secretary at Jasmine advising him that the paperwork relating to the Stock Option Grant was ready to sign. Mahmood

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[2]Paragraph 2 of the Early Exercise Agreement provided the following options for payment:

> As soon as practicable following the execution and delivery of this Agreement, [Jasmine] will deliver to [Mahmood] a certificate representing the Shares to be purchased by [Mahmood] (which shall be issued in [Mahmood's] name) in exchange for payment of the purchase price therefor and withholding tax, if any, by [Mahmood] by (a) check made payable to [Jasmine], (b) delivery of shares of the Common Stock of [Jasmine] in accordance with Section 3 of the [Stock Option Agreement] and Section 3 of the [Stock Incentive Plan], (c) subject to Section 153 of the Delaware General Corporation Law, delivery of a promissory note in the form attached as Exhibit C to the Option Agreement (or in any form acceptable to [Jasmine]), or (d) a combination of the foregoing.

At oral argument, counsel for the Committee asserted that some employees paid cash for shares purchased pursuant to their Early Exercise Agreements.

then met with a representative from the law firm Jasmine had hired to prepare the Stock Option Plan and was presented with a package of documents that included the following:[3]

- Cover Memo from the law firm
- Stock Option Grant*
- Stock Option Agreement*
- Summary of Provisions Applicable to Jasmine Networks, Inc. Common Stock Received Upon Early Exercise of Options
- Early Exercise Agreement*
- Assignment Separate from Certificate
- Acknowledgement and Statement of Decision Regarding Section 83(b) (i.e. early exercise) Election
- Receipt and Consent for Stock held in Escrow
- Promissory Note in the amount of $71,500 ("Employee Note")*
- Pledge and Security Agreement
- Assignment Separate from Certificate
- Receipt and Consent
- Receipt
- Stockholders Agreement

Mahmood executed the Stock Option Grant, the Stock Option Agreement, the Early Exercise Agreement, and the Employee Note; each is dated June 26, 2000.

Thereafter, Jasmine began a swift decline. Between March and September 2001, Jasmine laid off most of its approximately 60 employees. Mahmood voluntarily resigned in October of 2001. Ultimately, Jasmine filed a chapter 11[4] petition on August 28, 2002.

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[3]Only the items marked with an asterisk were included in the record on appeal.

[4]Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, §§ 101-1330, as enacted and promulgated prior to October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23. All "Rule" or "FRBP" references are to the Federal Rules of Bankruptcy Procedure.

By its order entered June 19, 2003, the bankruptcy court authorized the Official Unsecured Creditors' Committee of Jasmine Networks, Inc. ("Committee") to investigate and collect, on behalf of Jasmine's bankruptcy estate, promissory notes that Jasmine's employees had executed when they exercised the stock options they had been granted. As part of its investigation and collection efforts, on August 26, 2004, the Committee initiated the adversary proceeding against Mahmood that is the subject of this appeal.

As relevant to this appeal,[5] the Employee Note provides:

> For value received, the undersigned promises to pay [Jasmine] . . . the principal sum of $71,500 with interest from the date hereof at a rate of 6.43% per annum, compounded semiannually, on the unpaid balance of such principal sum. Such principal and interest shall be due and payable on June 26, 2007.
>
> If the undersigned's employment . . . relationship with [Jasmine] is terminated prior to payment in full of this Note, this Note shall be immediately due and payable.
>
> . . .
>
> This Note, which is full recourse, is secured by a pledge of certain shares of Common Stock of the Company and is subject to the terms of a Pledge and Security Agreement between the undersigned and the Company of even date herewith.

The Committee filed a motion for summary judgment ("Summary Judgment Motion"), asserting both that no genuine issue of material fact existed on its claim for breach of contract and that it was entitled to judgment as a matter of law. The Committee noted in its Summary Judgment Motion that it did not refute Mahmood's affirmative defenses, for the reason that Mahmood bore the burden of proof on those issues. In his response to the Summary Judgment Motion ("Response"), Mahmood did

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[5]The Employee Note also contained an attorney fee provision. See n.7 infra.

not contest that he had signed the Employee Note, nor that it remained unpaid. The sole issue addressed in the Response was Mahmood's affirmative defense that Jasmine had waived, either expressly or impliedly, collection of the Employee Note.

At oral argument on the Summary Judgment Motion, the bankruptcy court authorized additional briefing. In his supplemental response to the Summary Judgment Motion ("Supplemental Response"), Mahmood addressed other affirmative defenses. Mahmood asserted that rescission of the Employee Note was appropriate because (1) in failing to conduct annual shareholder meetings, Jasmine breached the Shareholder Agreement, (2) ownership of unvested shares had virtually no value, and (3) the Early Exercise Agreement was executed in violation of state law, specifically, CAL. CORP. CODE § 25400(b).[6] Mahmood also asserted that because the Early Exercise Agreement was unconscionable, he should not be obligated on the Employee Note.

The bankruptcy court issued its written decision ("Mahmood Memorandum Decision"), expressly incorporating the legal analysis from its contemporaneous decision in a related adversary proceeding ("Gokhale Memorandum Decision"). The bankruptcy court held that there was "no genuine issue of material fact with respect to the validity of Mahmood's promissory note, Mahmood's

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[6] CAL. CORP. CODE § 25400(b) provides:

> It is unlawful for any person, directly or indirectly, in this state:
> . . .
> (b) To effect, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

liability on the note, and the amount due thereunder." Mahmood Memorandum Decision, p. 4:19-21. Further, the bankruptcy court held that as a matter of law, Jasmine neither waived nor extinguished its right to enforce the Employee Note according to its terms [Gokhale Memorandum Decision pp. 5:24 - 6:25]; that Mahmood provided no evidence that Jasmine breached any agreement with Mahmood that would provide a basis to rescind the stock purchase transaction [Gokhale Memorandum Decision pp. 7:1 - 8:9]; that Mahmood was not entitled to rescind the Employee Note based on alleged lack of consideration [Gokhale Memorandum Decision pp. 8:11 - 9:20]; that Mahmood had not raised a genuine issue of material fact to establish that the Early Exercise Agreement was unconscionable [Gokhale Memorandum Decision pp. 9:22 - 12:16]; and that Mahmood presented no evidence to indicate that the Early Exercise Agreement was executed in violation of CAL. CORP. CODE § 25400(b) [Gokhale Memorandum Decision pp. 12:18 - 13:12].

Based upon the Mahmood Memorandum Decision, the bankruptcy court entered judgment ("Judgment") in favor of the Committee in the amount of $103,418.84, together with interest at the rate of 6.43% from October 3, 2006, until the Judgment is paid.[7] Mahmood timely appealed with respect to two of the affirmative defenses only: waiver and unconscionability.

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[7]After this appeal was filed, the Committee filed a motion in the bankruptcy court seeking an award of attorneys fees and costs as the prevailing party pursuant to Fed. R. Civ. P. 54(d), applicable in adversary proceedings under FRBP 7054(d). We entered our "Order of Limited Remand" to allow the bankruptcy court to rule on that motion. By its order ("Fee Order") entered May 10, 2007, the bankruptcy court awarded the Committee attorneys fees in the amount of $13,282.00 and costs of $696.28, for a total of $13,978.28. Neither party has appealed the Fee Order.

On appeal, Mahmood asserts that a genuine issue of fact exists regarding whether Jasmine either expressly or impliedly waived its right to collect on the Employee Note from him personally. In support of this affirmative defense, Mahmood relies on the following items of "evidence" he asserts are in the record:

1. A written statement, dated July 24, 2003 ("July 24, 2003 Statement"). The July 24, 2003 Statement was prepared on behalf of a former Jasmine employee. At the time the July 24, 2003 Statement was prepared, that employee was faced with litigation on his own promissory note owed to Jasmine. The July 24, 2003 Statement apparently was sent to all five of the former, i.e. prepetition, members of Jasmine's Board of Directors. Three of those board members signed the July 24, 2003 Statement. In relevant part, the July 24, 2003 Statement provides:

> It has come to our attention that . . . many ex-employees have been served with a demand letter . . . for payment on promissory notes that were signed in connection with Jasmine's employee stock options. It was our intent when these notes were issued in early 2000 that they were to be fully secured by the Jasmine stock as complete collateral. The intent was never to collect on these notes other than by the employee's surrender of the Jasmine stock.

Exhibit 1 to Declaration of James Cai Re: Opposition to Motion for Summary Judgment, Exhibit 1.

2. Testimony from the deposition of Jasmine's Chief Executive Officer, Ravi Dattatreya ("Dattatreya"), which Mahmood asserts demonstrates:

- that he told employees that employee promissory notes would not be collectible unless Jasmine went public;
- that Jasmine never intended to hold its employees personally liable on the promissory notes;
- that the Chairman of Jasmine's Board of Directors, Dr. Das, confirmed that Jasmine never intended to hold its employees personally liable on the notes and would restrict its remedy to recovery of stock in the event of breach;

- that he communicated to Jasmine employees in "every single meeting" he had with the employees, the concept that Jasmine had no intention of personally collecting the notes; and

- that it was Jasmine's practice to forgive the notes for employees who were terminated.

3. Testimony from the deposition of Jasmine's Chief Operations Officer, David M. Robert, that he did not believe he would be obligated to repay the note he signed as a result of statements made to him by Dattatreya.

Mahmood also asserts that a genuine issue of fact exists regarding whether the Early Exercise Agreement is unconscionable. In support of his unconscionability defense, Mahmood contends that there is evidence in the record that (1) the stock purchase transaction was presented on a "take it or leave it" basis, (2) Jasmine employees were not given sufficient time to review the multiple documents that comprised the stock purchase transaction and to have their attorneys review those documents, (3) no disclosure document was presented to Jasmine's employees in conjunction with the stock purchase transaction, and (4) the "reasonable expectation" of Jasmine's employees was that Jasmine would not hold them personally liable on the employee notes.

II. JURISDICTION

The bankruptcy court had jurisdiction over this non-core proceeding pursuant to 28 U.S.C. §§ 1334 and 157(c)(2).[8]

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[8]Collection of a promissory note owed to a bankruptcy estate by a third party is a non-core matter within the "related to" jurisdiction of the bankruptcy court. See Piombo v. Castlerock Props. (In re Castlerock Props.), 781 F.2d 159, 162 (9th Cir. 1986) ("[S]tate law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C.

(continued...)

Typically, absent consent of the parties, in non-core matters, the bankruptcy court is limited to making findings and recommendations to the district court, which has jurisdiction to enter the final order or judgment. The parties to this appeal, as well as the bankruptcy court, appear to have been operating under the assumption that the subject matter of the dispute was within the core jurisdiction of the bankruptcy court. This misapprehension is not fatal to the finality or validity of the Judgment.

The failure to object to entry of the Judgment by the bankruptcy court in this non-core matter is deemed consent. See Mann v. Alexander Dawson, Inc. (In re Mann), 907 F.2d 923 (9th Cir. 1990); Daniels-Head & Assoc. v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.), 819 F.2d 914 (9th Cir. 1987); Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 410-11 (9th Cir. BAP 2005)(issue of consent held waived on appeal where appellant failed to raise limitation on bankruptcy court's jurisdiction in non-core matters either in the bankruptcy court or before the BAP); In re Windmill Farms Mgmt. Co., 116 B.R. 755, 761-63 (Bankr. S.D. Cal. 1990).

We have jurisdiction pursuant to 28 U.S.C. § 158.

III. ISSUES

Whether Mahmood presented sufficient evidence in his response to the Summary Judgment Motion to raise a genuine issue

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[8](...continued)
§ 157(b)(2)(B)-(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, sections § 157(b)(2)(A) and (O).").

of material fact on his affirmative defense of waiver.

Whether Mahmood presented sufficient evidence in his response to the Summary Judgment Motion to raise a genuine issue of material fact on his affirmative defense of unconscionability.

IV. STANDARDS OF REVIEW

We review summary judgment orders de novo. Tobin v. San Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001). Viewing the evidence in the light most favorable to the non-moving party, we must determine "whether there are any genuine issues of material fact and whether the trial court correctly applied relevant substantive law." Id. We review a bankruptcy court's conclusions of law de novo. Fireman's Fund Ins. Co. v. Grover (In re Woodson Co.), 813 F.2d 266, 270 (9th Cir. 1987).

V. DISCUSSION

On motion made pursuant to Fed. R. Civ. Proc. 56(c), summary judgment

> . . . shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056.

The bankruptcy court held that because no genuine issue of material fact existed with respect to the validity of, Mahmood's liability on, and the amount due under, the Employee Note, the Committee met its prima facie burden of establishing that it was

entitled to judgment as a matter of law. Mahmood does not contest those holdings.

Once the Summary Judgment Motion had been "made and supported" as provided by Fed. R. Civ. P. 56, Mahmood could not rest upon the mere allegations or denials in his pleadings. He was required "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In other words, after the moving party has demonstrated that no genuine issue of material fact exists with respect to the motion for summary judgment, "we must then assess whether the non-moving party has come forward with its own significant and probative evidence showing a genuine issue of material fact as to the relevant claims or defenses." Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com), No. 04-17565 (9th Cir. Sept. 21, 2007)(citing Richards v. Neilson Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)).

In order to survive the Summary Judgment Motion, Mahmood needed to establish that there was a genuine issue of material fact as to one or more of his affirmative defenses. To accomplish this, Mahmood was required to set forth, by affidavits or otherwise, specific facts showing that a genuine issue existed for trial. See Fed. R. Civ. P. 56(e).

The bankruptcy court's determination that the Committee had established entitlement to judgment on the Employee Note is not before us for review. However, Mahmood asks that we review de novo the record below, and that we determine that Mahmood

demonstrated the existence of a genuine issue of material fact with respect to each affirmative defense considered in this appeal.

A. The Affirmative Defense of Waiver

Mahmood asserts on appeal two alternate theories which he contends establish an affirmative defense of waiver. First, Mahmood contends that enforcement of the Employee Note against him is waived because Jasmine failed to go public. Second, he contends that Jasmine did not waive complete collection of the Employee Note, but rather that Jasmine waived its right to hold Mahmood personally as a source from which his Employee Note could be collected. Both theories fail as a matter of law.

1. The obligation represented by the Employee Note is not conditional

"An obligation is a legal duty by which a person is bound to do or not to do a certain thing." CAL. CIV. CODE § 1427. Further, "[a]n obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event." CAL. CIV. CODE § 1434. As noted by the bankruptcy court, under California law, "[a] condition may be waived." 1 BERNARD E. WITKIN, SUMMARY OF CAL. LAW CONTRACTS § 823 (10th ed. 2006).

Mahmood asserts a condition to enforcing the Employee Note against him personally was that Jasmine's stock have "gone public."[9] There are several problems with Mahmood's assertion

[9]Mahmood does not contend thereby that there was an oral condition precedent to delivery of the Employee Note. He

(continued...)

that his promise to pay the Employee Note according to its terms was conditional on that basis.

First, Mahmood's payment obligation was unconditional, both by definition and by its terms. "[A] promissory note is a form of negotiable instrument-an unconditional promise to pay money signed by the person undertaking to pay, payable on demand or at a definite time." Saks v. Charity Mission Baptist Church, 110 Cal. Rptr. 2d 45, 58 (Cal. Ct. App. 2001)(emphasis added)(citations omitted). Furthermore, the explicit terms of the Employee Note provided no condition to Mahmood's payment obligation:

> For value received, the undersigned promises to pay [Jasmine] . . . the principal sum of $71,500 with interest from the date hereof at a rate of 6.43% per annum, compounded semiannually, on the unpaid balance of such principal sum. Such principal and interest shall be due and payable on June 26, 2007.
>
> If the undersigned's employment . . . relationship with [Jasmine] is terminated prior to payment in full of this Note, this Note shall be immediately due and payable.
>
> . . .
>
> This Note, which is full recourse, is secured by a pledge of certain shares of Common Stock of the Company and is subject to the terms of a Pledge and Security Agreement between the undersigned and the Company of even date herewith.

Second, no condition was articulated to Mahmood prior to, or contemporaneous with, his execution of the Employee Note. Mahmood does not argue that he was aware of any condition to the Employee Note at the time he signed it. In fact, in his Declaration, Mahmood states he was told after he had signed the Employee Note that he should not worry, because Jasmine would not

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[9](...continued)
contends only that Jasmine's subsequent actions waived the right to collect the Employee Note from him.

collect upon the Employee Note. Declaration of Ejaz Mahmood in Opposition to Motion for Summary Judgment, p. 3:6-8.

Third, to the extent that Mahmood alleges a modification to the Employee Note, such modification was not in writing. This is fatal in this case, as the terms of the Employee Note require modifications to be in writing, and Mahmood made no allegations that Jasmine: intended to waive the provision; was in any way estopped to raise this provision; was bound to the modification by any new consideration provided by Mahmood; or was bound by any new oral agreement that supplanted the terms of the original Employee Note. See CAL. CIVIL CODE § 1698. In fact, the only evidence offered by Mahmood that enforcement of the Employee Note against him personally was conditioned upon Jasmine going public was the following testimony of Jasmine's former CEO:

> Q: Is it also your testimony that you don't know whether you told any employee that the notes would not be collectible unless the company went public?
>
> A: That one, I am not sure.
>
> Q: So it's possible that you did?
>
> A: It's possible that I might have given a feeling of that kind to somebody. It's possible.
>
> Q: In what way would you have given a feeling?
>
> A: By, for example, saying don't worry.
>
> . . .
>
> Q: Was it ever - was it ever your intention at any time to convey the impression that any promissory note signed in exchange for the stock options would not be collected unless the company went public?
>
> A: I think the intent was there.

July 19, 2004, Deposition of Eswarahalli "Ravi" Dattatreya

("Dattatreya Deposition"), pp. 68:3-11 - 69:2-10.

This ambiguous deposition testimony simply is inadequate to create a genuine issue of material fact regarding whether Jasmine's going public was intended to be a condition to collection of the Employee Note.

2. Jasmine did not limit its recourse for satisfaction of the payment obligation under the Employee Note to any stock it held as security

As noted above, Mahmood asserts that Jasmine waived its right to look to Mahmood as a source from which the Employee Note could be collected. In doing so, Mahmood contends, Jasmine limited its right to collection to enforcement against the collateral, i.e., the shares of stock granted under the Stock Option Grant. This assertion fails as a matter of law.

A material part of an agreed exchange that creates a contract cannot be waived. WITKIN, supra § 823. The bankruptcy court correctly concluded that payment of the Employee Note was a material part of the agreement between Mahmood and Jasmine. "A covenant is a promise to render some performance." Id. § 778. While a condition to a contract may be waived, "[t]o relinquish the entire obligation of performance, some recognized form of discharge is necessary, e.g., release, accord and satisfaction, or novation." Id.

> An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration.

CAL. CIV. CODE § 1541.

No evidence of a writing or any consideration to support a

waiver of Mahmood's payment covenant is in the record. The bankruptcy court held that, as a matter of California law, Jasmine neither waived nor extinguished its right to enforce the Employee Note according to its terms.

> The only evidence of waiver consists of several instances where Jasmine personnel made statements to the effect that [Mahmood] did not need to worry because Jasmine did not intend to collect on the notes that Jasmine employees signed. For example, [Mahmood] relies on deposition testimony of Ravi Dattatreya, Jasmine's CEO and founder, that Jasmine was a company with a caring attitude and a family feeling. Dattatreya analogized the notes to a loan he might make to a son - one where the note might be legally binding but he would never enforce it. Dattatreya indicated that he may have told some employees, "Don't worry," in or around the time that they were signing the notes. Even accepting all of this evidence as true, there can be no dispute that collection of the [Employee Note] is a material part of the agreement between [Mahmood] and Jasmine.

Gokhale Memorandum Decision, p. 6:4-12.

The bankruptcy court concluded that, even if Jasmine personnel had assured Mahmood that they would not pursue collection from him, as a matter of law, the right to collect was not waived. We agree.

B. The Affirmative Defense of Unconscionability

Mahmood asserts that a genuine issue of fact exists regarding whether the stock transaction documents, including the Employee Note, are unconscionable. Specifically, he asserts that he was presented with a stack of documents on a "take it or leave it" basis, that he was not given sufficient time either to review the stock transaction documents or to have an attorney review them on his behalf, that he received no disclosure document, and that his "reasonable expectation" was that Jasmine

would not hold him personally liable on the Employee Note.

The unconscionability analysis by California courts has been evolving over many years.[10] As noted by the bankruptcy court, that evolution has distilled into two alternative "analytical frameworks," each of which requires the court ultimately to consider whether the contract is unduly burdensome to one of the parties. See Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993). One approach comports closely to California common law precedent; the other, to cases decided under the Uniform Commercial Code. Both approaches should lead to the same result. See Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 511 n.9 (Cal. 1985).

1. The "adhesion contract" approach

Under one analytical framework, the threshold inquiry in an unconscionability determination under California law is whether the contract is an adhesion contract. See Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1281 (9th Cir. 2006). The bankruptcy court assumed, as do we, that for purposes of the Summary Judgment Motion, Mahmood's evidence would establish that the documents which implemented the stock purchase, including the Employee Note, were adhesion contracts.

While a contract of adhesion can be unconscionable, it is not always so. "A finding of adhesion merely begins another inquiry--whether a particular provision within the contract

[10]For a history of the unconscionability doctrine in California, see Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 HASTINGS L.J. 459 (1995).

should be denied enforcement on grounds that it defeats the expectations of the weaker party or it is unduly oppressive or unconscionable." Intershop Commc'n A.G. v. Superior Court, 127 Cal. Rptr. 2d 847, 855 (Cal. Ct. App. 2002). These are the issues on which Mahmood was required to provide sufficient evidence to establish the existence of a material fact in dispute.

The only evidence offered by Mahmood to establish his reasonable expectation that he would not personally be liable on the Employee Note was the following testimony of Dattatreya:

> Q: Did you ever convey either of those two concepts to any Jasmine employee during the time that the promissory notes were being signed as you have earlier testified?
>
> A: Well, I have already testified that by action and by saying something loosely like "don't worry," that I might have conveyed that impression.

Dattatreya Deposition, p. 85:1-7, and

> A: Well, we had this Jasmine family idea, which we used in every single meeting that we had with the employees, and my personal feeling was that if I make a loan to my son, it may be a legally binding document, he might think that it's payable, but I would have the intention not to force it on him. So I had that kind of a feeling in me. But how it conveyed and became part of my action, I don't know.

Dattatreya Deposition, p. 86:15-22.

Even if this evidence is sufficient to establish a genuine issue of fact by its content, which it is not, it is irrelevant because of the point in time to which the evidence is directed.

In evaluating the reasonable expectations of the parties to a transaction, the focus is on the time the agreement is entered into.

> The fairness of a bargain is to be viewed in light of the circumstances as they existed at the time the bargain was struck and not at the time the parties seek to enforce the rights based upon their earlier contract.

Los Angeles County v. Law Bldg. Corp., 62 Cal. Rptr. 542, 547 (Cal. Ct. App. 1967); see also Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 810 (Cal. Ct. App. 2005) ("[U]nconscionability is determined as of the time the contract was entered into, not in light of subsequent events."). As we previously have noted, Mahmood does not contend that Jasmine made any representations that it would not seek to collect the Employee Note from him until some unspecified time after he signed the Employee Note.

Further, we agree with the bankruptcy court that the plain and unambiguous terms of the Employee Note were sufficient to dispel any "pre-existing" expectation Mahmood might have had regarding its enforcement. See Graham v. Scissor-Tail, Inc., 623 P.2d 165, 173 n.18 (Cal. 1991) ("Notice" is an extremely significant factor for the court to weigh in assessing the reasonable expectations of the weaker party to an adhesion contract.).[11] The Employee Note was less than one page long and contained a provision, immediately above the place where Mahmood signed, indicating that it was a full recourse note. Based on

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[11]Other factors that courts have considered in evaluating the reasonable expectations of the weaker party to an adhesion contract include whether the language of such provision is "too complicated or subtle for an ordinary layman to understand" (Wheeler v. St. Joseph Hospital, 133 Cal. Rptr. 775 (Cal. Ct. App. 1976) (citations omitted)), and the extent to which a contract may affect the public interest (Graham, 623 P.2d at 173 n. 19).

the documents Mahmood signed, any expectation that he would not be personally liable on the Employee Note was not reasonable.

2. Procedural versus substantive unconscionability

Under the second analytical framework for determining unconscionability under California law, a contract will not be enforceable if it is both procedurally and substantively unconscionable. See Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); Patterson, 18 Cal. Rptr. 2d at 565 (citing A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114 (Cal. Ct. App. 1982)). Courts apply a sliding scale under this approach. Morris, 27 Cal. Rptr. 3d at 805 (quoting Armendariz, 6 P.3d at 690 ("[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required . . . and vice versa.")).

To be procedurally unconscionable, either oppression, e.g., an inequality of bargaining power which leads to lack of negotiation or meaningful choice, or surprise, e.g., terms hidden in a standard form of agreement, must be present. See Allan v. Snow Summit, 59 Cal. Rptr. 2d 813, 825 (Cal. Ct. App. 1996). In its analysis, the bankruptcy court assumed that the stock purchase transaction "had at least some elements of procedural unfairness due to the absence of negotiation over its terms."

To be substantively unconscionable, however, the bargain must be unfair. At its core, this dispute centers on Mahmood's promise to pay $71,500 to purchase 250,000 shares of Jasmine stock, which ultimately became worthless. The bankruptcy court noted that at the time the documents were executed the parties'

expectations for Jasmine were high, such that everyone believed the value of the stock would only increase over time.

> [S]tock options, by their very nature, constitute a significant fringe benefit for employees who are allowed to purchase corporate assets on favorable terms and are thereby given a financial incentive and economic interest in the success of the company.

Gokhale Memorandum Decision, p. 12:7-9, citing Chow v. Levi Strauss & Co., 122 Cal. Rptr. 816, 822-23 (Cal. Ct. App. 1975). That Mahmood ultimately did not profit from the transaction does not render the bargain unfair, and thus unconscionable. Stock purchases in any circumstances entail risk, but such risk does not make stock purchase transactions inherently unconscionable.

Mahmood also had the potential to enjoy other benefits as a result of the stock purchase transaction. By early exercise of the Stock Option Grant, Mahmood could take advantage of favorable tax treatment that would minimize any tax he might owe on the future increased value of the Jasmine stock he purchased. Further, the stock, including any unvested shares, was subject to a repurchase agreement, which, if exercised by Jasmine, would correspondingly have reduced Mahmood's liability under the Employee Note. Finally, the repurchase agreement would have protected Mahmood from tax liability if repurchased shares had increased in value.

VI. CONCLUSION

The bankruptcy court correctly determined that the Committee had established Mahmood's liability on and the amount due under the Employee Note. Mahmood failed to establish that a genuine issue of material fact existed with respect to his affirmative

defenses of waiver and unconscionability. Nothing in the record establishes the existence of a genuine issue of fact in support of the affirmative defense of unconscionability where Mahmood failed to provide any evidence that his realistic, i.e., reasonable, expectation was that he would have no obligation to pay the Employee Note or that the stock purchase transaction was oppressively one-sided. Accordingly, the Committee was entitled to judgment as a matter of law.

We AFFIRM.