

OCT 31 2007

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION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
<hr/>			
EJAZ MAHMOOD,	)		
Appellant,	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
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.

<sup>1</sup>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.

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

### 11 I. FACTS

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

18 On June 13, 2000, Jasmine's Board of Directors approved a  
19 stock option grant to Mahmood under the Stock Incentive Plan  
20 ("Stock Option Grant"), authorizing Mahmood to purchase up to  
21 250,000 shares of Jasmine common stock for \$.268 per share, for a  
22 total exercise price of \$71,500. The Stock Option Grant set  
23 February 24, 2000 as the vesting commencement date, and  
24 established a vesting schedule ("Vesting Schedule"):

25 This Option becomes vested in accordance with the  
26 following schedule: 25% of the number of Shares on the  
27 one-year anniversary of the Vesting Commencement Date,  
28 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**

1           **with the [Stock Option] Plan and the Stock Option**  
2           **Agreement.**

3 (emphasis added).

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

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

16 \_\_\_\_\_  
17           <sup>2</sup>Paragraph 2 of the Early Exercise Agreement provided the  
18 following options for payment:

19           As soon as practicable following the execution and  
20 delivery of this Agreement, [Jasmine] will deliver to  
21 [Mahmood] a certificate representing the Shares to be  
22 purchased by [Mahmood] (which shall be issued in  
23 [Mahmood's] name) in exchange for payment of the  
24 purchase price therefor and withholding tax, if any, by  
25 [Mahmood] by (a) check made payable to [Jasmine], (b)  
26 delivery of shares of the Common Stock of [Jasmine] in  
27 accordance with Section 3 of the [Stock Option  
28 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.

1 then met with a representative from the law firm Jasmine had  
2 hired to prepare the Stock Option Plan and was presented with a  
3 package of documents that included the following:<sup>3</sup>

4 Cover Memo from the law firm  
5 Stock Option Grant\*  
6 Stock Option Agreement\*  
7 Summary of Provisions Applicable to Jasmine Networks,  
8 Inc. Common Stock Received Upon Early Exercise of  
9 Options  
10 Early Exercise Agreement\*  
11 Assignment Separate from Certificate  
12 Acknowledgement and Statement of Decision Regarding  
13 Section 83(b) (i.e. early exercise) Election  
14 Receipt and Consent for Stock held in Escrow  
15 Promissory Note in the amount of \$71,500 ("Employee  
16 Note")\*  
17 Pledge and Security Agreement  
18 Assignment Separate from Certificate  
19 Receipt and Consent  
20 Receipt  
21 Stockholders Agreement

22  
23 Mahmood executed the Stock Option Grant, the Stock Option  
24 Agreement, the Early Exercise Agreement, and the Employee Note;  
25 each is dated June 26, 2000.

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

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<sup>3</sup>Only the items marked with an asterisk were included in the record on appeal.

<sup>4</sup>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.

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

10 As relevant to this appeal,<sup>5</sup> the Employee Note provides:

11 For value received, the undersigned promises to  
12 pay [Jasmine] . . . the principal sum of \$71,500 with  
13 interest from the date hereof at a rate of 6.43% per  
14 annum, compounded semiannually, on the unpaid balance  
15 of such principal sum. Such principal and interest  
16 shall be due and payable on June 26, 2007.

17 If the undersigned's employment . . . relationship  
18 with [Jasmine] is terminated prior to payment in full  
19 of this Note, this Note shall be immediately due and  
20 payable.

21 . . .  
22 This Note, which is full recourse, is secured by a  
23 pledge of certain shares of Common Stock of the Company  
24 and is subject to the terms of a Pledge and Security  
25 Agreement between the undersigned and the Company of  
26 even date herewith.

27 The Committee filed a motion for summary judgment ("Summary  
28 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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<sup>5</sup>The Employee Note also contained an attorney fee provision.  
See n.7 infra.

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

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

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

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23  
24 CAL. CORP. CODE § 25400(b) provides:

25 It is unlawful for any person, directly or indirectly, in  
26 this state:

27 . . .  
28 (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.

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

17 Based upon the Mahmood Memorandum Decision, the bankruptcy  
18 court entered judgment ("Judgment") in favor of the Committee in  
19 the amount of \$103,418.84, together with interest at the rate of  
20 6.43% from October 3, 2006, until the Judgment is paid.<sup>7</sup> Mahmood  
21 timely appealed with respect to two of the affirmative defenses  
22 only: waiver and unconscionability.

23 \_\_\_\_\_  
24 <sup>7</sup>After this appeal was filed, the Committee filed a motion  
25 in the bankruptcy court seeking an award of attorneys fees and  
26 costs as the prevailing party pursuant to Fed. R. Civ. P. 54(d),  
27 applicable in adversary proceedings under FRBP 7054(d). We  
28 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.

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

- 7 1. A written statement, dated July 24, 2003 ("July 24,  
8 2003 Statement"). The July 24, 2003 Statement was  
9 prepared on behalf of a former Jasmine employee. At  
10 the time the July 24, 2003 Statement was prepared, that  
11 employee was faced with litigation on his own  
12 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:

13 It has come to our attention that . . . many  
14 ex-employees have been served with a demand  
15 letter . . . for payment on promissory notes  
16 that were signed in connection with Jasmine's  
17 employee stock options. It was our intent  
18 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.

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

- 21 2. Testimony from the deposition of Jasmine's Chief  
22 Executive Officer, Ravi Dattatreya ("Dattatreya"),  
which Mahmood asserts demonstrates:
- 23 - that he told employees that employee promissory  
24 notes would not be collectible unless Jasmine went  
public;
  - 25 - that Jasmine never intended to hold its employees  
26 personally liable on the promissory notes;
  - 27 - that the Chairman of Jasmine's Board of Directors,  
28 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;



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

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

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

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

## 24 **II. JURISDICTION**

25 The bankruptcy court had jurisdiction over this non-core  
26 proceeding pursuant to 28 U.S.C. §§ 1334 and 157(c)(2).<sup>8</sup>

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27 <sup>8</sup>Collection of a promissory note owed to a bankruptcy estate  
28 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...)

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

10 The failure to object to entry of the Judgment by the  
11 bankruptcy court in this non-core matter is deemed consent. See  
12 Mann v. Alexander Dawson, Inc. (In re Mann), 907 F.2d 923 (9th  
13 Cir. 1990); Daniels-Head & Assoc. v. William M. Mercer, Inc. (In  
14 re Daniels-Head & Assoc.), 819 F.2d 914 (9th Cir. 1987); Price v.  
15 Lehtinen (In re Lehtinen), 332 B.R. 404, 410-11 (9th Cir. BAP  
16 2005) (issue of consent held waived on appeal where appellant  
17 failed to raise limitation on bankruptcy court's jurisdiction in  
18 non-core matters either in the bankruptcy court or before the  
19 BAP); In re Windmill Farms Mgmt. Co., 116 B.R. 755, 761-63  
20 (Bankr. S.D. Cal. 1990).

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

### 22 23 **III. ISSUES**

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

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26  
27 <sup>8</sup>(...continued)  
28 § 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).”).

1 of material fact on his affirmative defense of waiver.

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

#### 6 IV. STANDARDS OF REVIEW

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

#### 17 V. DISCUSSION

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

20 . . . shall be rendered forthwith, if the pleadings,  
21 depositions, answers to interrogatories, and admissions  
22 on file, together with the affidavits, if any, show  
23 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.

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

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

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

3       Once the Summary Judgment Motion had been "made and  
4 supported" as provided by Fed. R. Civ. P. 56, Mahmood could not  
5 rest upon the mere allegations or denials in his pleadings. He  
6 was required "to make a showing sufficient to establish the  
7 existence of an element essential to that party's case, and on  
8 which that party will bear the burden of proof at trial."  
9 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In other  
10 words, after the moving party has demonstrated that no genuine  
11 issue of material fact exists with respect to the motion for  
12 summary judgment, "we must then assess whether the non-moving  
13 party has come forward with its own significant and probative  
14 evidence showing a genuine issue of material fact as to the  
15 relevant claims or defenses." Sigma Micro Corp. v.  
16 Healthcentral.com (In re Healthcentral.com), No. 04-17565 (9th  
17 Cir. Sept. 21, 2007) (citing Richards v. Neilson Freight Lines,  
18 810 F.2d 898, 902 (9th Cir. 1987)).

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

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

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

4  
5 A. The Affirmative Defense of Waiver

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

14  
15 1. The obligation represented by the Employee Note is not  
16 conditional

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

24 Mahmood asserts a condition to enforcing the Employee Note  
25 against him personally was that Jasmine's stock have "gone  
26 public."<sup>9</sup> There are several problems with Mahmood's assertion

27  
28 <sup>9</sup>Mahmood does not contend thereby that there was an oral  
condition precedent to delivery of the Employee Note. He

(continued...)

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

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

12 For value received, the undersigned promises to  
13 pay [Jasmine] . . . the principal sum of \$71,500 with  
14 interest from the date hereof at a rate of 6.43% per  
15 annum, compounded semiannually, on the unpaid balance  
16 of such principal sum. Such principal and interest  
17 shall be due and payable on June 26, 2007.

18 If the undersigned's employment . . . relationship  
19 with [Jasmine] is terminated prior to payment in full  
20 of this Note, this Note shall be immediately due and  
21 payable.

22 . . . .  
23 This Note, which is full recourse, is secured by a  
24 pledge of certain shares of Common Stock of the Company  
25 and is subject to the terms of a Pledge and Security  
26 Agreement between the undersigned and the Company of  
27 even date herewith.

28 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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<sup>9</sup> (...continued)  
contends only that Jasmine's subsequent actions waived the right  
to collect the Employee Note from him.

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

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

15 Q: Is it also your testimony that you don't know  
16 whether you told any employee that the notes would  
not be collectible unless the company went public?

17 A: That one, I am not sure.

18 Q: So it's possible that you did?

19 A: It's possible that I might have given a feeling of  
20 that kind to somebody. It's possible.

21 Q: In what way would you have given a feeling?

22 A: By, for example, saying don't worry.

23 . . .

24 Q: Was it ever - was it ever your intention at any  
25 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?

26 A: I think the intent was there.  
27

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

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

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

6  
7 2. Jasmine did not limit its recourse for satisfaction of  
8 the payment obligation under the Employee Note to any  
stock it held as security

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

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

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

27 CAL. CIV. CODE § 1541.

28 No evidence of a writing or any consideration to support a



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

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

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

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

27 B. The Affirmative Defense of Unconscionability

28 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

1 would not hold him personally liable on the Employee Note.

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

13  
14 1. The "adhesion contract" approach

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

23 While a contract of adhesion can be unconscionable, it is  
24 not always so. "A finding of adhesion merely begins another  
25 inquiry--whether a particular provision within the contract  
26

27  
28 

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<sup>10</sup>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).

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

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

11 Q: Did you ever convey either of those two concepts  
12 to any Jasmine employee during the time that the  
13 promissory notes were being signed as you have  
earlier testified?

14 A: Well, I have already testified that by action and  
15 by saying something loosely like "don't worry,"  
that I might have conveyed that impression.

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

17 A: Well, we had this Jasmine family idea, which we  
18 used in every single meeting that we had with the  
19 employees, and my personal feeling was that if I  
20 make a loan to my son, it may be a legally binding  
21 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.

22 Dattatreya Deposition, p. 86:15-22.

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

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

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

6 Los Angeles County v. Law Bldg. Corp., 62 Cal. Rptr. 542, 547

7 (Cal. Ct. App. 1967); see also Morris v. Redwood Empire Bancorp,  
8 27 Cal. Rptr. 3d 797, 810 (Cal. Ct. App. 2005)

9 (“[U]nconscionability is determined as of the time the contract  
10 was entered into, not in light of subsequent events.”). As we  
11 previously have noted, Mahmood does not contend that Jasmine made  
12 any representations that it would not seek to collect the  
13 Employee Note from him until some unspecified time after he  
14 signed the Employee Note.

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

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25 <sup>11</sup>Other factors that courts have considered in evaluating  
26 the reasonable expectations of the weaker party to an adhesion  
27 contract include whether the language of such provision is “too  
28 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).

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

3  
4 2. Procedural versus substantive unconscionability

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

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

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

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

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

6 Gokhale Memorandum Decision, p. 12:7-9, citing Chow v. Levi  
7 Strauss & Co., 122 Cal. Rptr. 816, 822-23 (Cal. Ct. App. 1975).

8 That Mahmood ultimately did not profit from the transaction does  
9 not render the bargain unfair, and thus unconscionable. Stock  
10 purchases in any circumstances entail risk, but such risk does  
11 not make stock purchase transactions inherently unconscionable.

12 Mahmood also had the potential to enjoy other benefits as a  
13 result of the stock purchase transaction. By early exercise of  
14 the Stock Option Grant, Mahmood could take advantage of favorable  
15 tax treatment that would minimize any tax he might owe on the  
16 future increased value of the Jasmine stock he purchased.

17 Further, the stock, including any unvested shares, was subject to  
18 a repurchase agreement, which, if exercised by Jasmine, would  
19 correspondingly have reduced Mahmood's liability under the  
20 Employee Note. Finally, the repurchase agreement would have  
21 protected Mahmood from tax liability if repurchased shares had  
22 increased in value.

## 23 24 **VI. CONCLUSION**

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

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

9 We AFFIRM.

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