IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MARC A. MATOZA	*	
	*	**No. H024056**
Plaintiff and Cross-Appellant	*	
	*	Santa Clara County
vs.	*	Superior Court
	*	No. CV 777643
	*	
NETSCAPE COMMUNICATIONS, et. al.	*	
	*	
Defendants and Appellants	*	

* *

Appeal From The Superior Court of the County of Santa Clara
Kevin E. McKenney, Judge

RESPONDENT'S BRIEF and CROSS-APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal arises from Appellants' motion for summary judgment/adjudication. To determine whether there is a triable issue of fact, the Court must consider the evidence supporting the case for the *non-moving* party: Marc Matoza. But Appellants' Opening Brief instead presents the evidence supporting *Appellants'* case, and then bases Appellants' arguments on this evidence. Appellants call their evidence "undisputed," but in fact it was heavily disputed by almost 2,000 pages of evidence (declarations, depositions, and documents) submitted by Matoza in opposition to Appellants' motion. See CT 2328-4251. Appellants' Opening Brief ignores key parts of this evidence, and therefore the entire Opening Brief is fundamentally flawed.

As we shall show, the record on appeal contains substantial evidence that would permit a reasonable jury to find for Mr. Matoza on several causes of action in his Second Amended Complaint.

STATEMENT OF THE CASE

On Oct. 29, 1998, Marc A. Matoza filed his complaint against Netscape and Conway Rulon-Miller in Santa Clara Superior Court. CT 1. The complaint stated "Jury Trial Demanded." CT 1. Netscape answered on January 15, 1999. CT 7. On January 29, 1999, the parties stipulated to dismissing Rulon-Miller from the case and also stipulated that, with respect to the matters alleged in the complaint, Rulon-Miller was acting within the scope of his employment with Netscape and that his actions are binding on Netscape. CT 12.

On October 10, 2000, Matoza filed a First Amended Complaint, adding America Online, Inc. ("AOL") as a defendant because AOL had recently acquired Netscape. CT 642.

Matoza filed a Second Amended Complaint on December 27, 2000. CT 1124. Defendants demurred to the 2nd through 12th Causes of Action (CT 1416), with points and authorities (CT 3825). Matoza filed an opposition (CT 3845), and Defendants filed a reply (CT 3865). On February 7, 2001, the court entered the following order:

> Defendants' demurrer to the fourth, seventh and tenth causes of action is SUSTAINED with leave to amend. Plaintiff fails to state sufficient facts to constitute these causes of action. (See Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 353, n. 18). Defendants' demurrer to the second, third, fifth, sixth, eighth, ninth, eleventh and twelfth causes of action is OVERRULED. [CT 1482.]

Defendants answered the Second Amended Complaint on March 15, 2001. CT 1486. Their "Second Defense" alleged that their obligation to deliver 20,000 shares of Netscape stock to Matoza (as alleged in the First Cause of Action) was discharged by an "accord and satisfaction." CT 1487.

On July 19, 2001, Defendants file a motion for summary judgment or summary adjudication (CT 2164), with supporting declarations (CT 1528). In opposition to the motion, Matoza filed points & authorities (CT 4252) and a separate statement of disputed facts (CT 4281), supported by declarations, excerpts of depositions, and other exhibits (CT 2328-4251). On September 14, 2001, the court entered an order denying Defendants' request for judicial notice, denying the motion for summary judgment, and granting the motion for summary adjudication as to the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and Twelfth Causes of Action. CT 4799-4801.

As this ruling — together with the ruling on the demurrer — disposed of all of the causes of action in the Second Amended Complaint, the court entered judgment dismissing Matoza's action with prejudice on October 16, 2001. CT 5046.

On October 1, 2001, Matoza filed a motion for new trial, with supporting points & authorities. CT 4803. On October 26, 2001, Defendants filed an

opposition to this motion (CT 5076), and on November 1, 2001, Matoza filed a reply (CT 5084). On November 30, 2001, the court entered its order granting the motion for new trial as to the First Cause of Action and denying the motion as to the Second, Third, Sixth, Eighth, Ninth, Eleventh, and Twelfth Causes of Action. CT 5119.[1]

On January 25, 2002, Defendants filed notice of appeal from the order granting a new trial. CT 5122. On February 19, 2002, Matoza filed notice of cross-appeal from the judgment. CT 5136.

Appellants' Opening Brief was filed on August 19, 2002,

[1] In *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal. 3d 379, 387, the Court summarized the standard of review of an order granting a new trial:

> The determination of a motion for new trial rests so completely within the court's discretion that its actions will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not fully dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting a new trial, the order will not be set aside.

STATEMENT OF FACTS

Matoza's cross-appeal claims that the trial court erred in granting summary adjudication, because — viewing the evidence in a light most favorable to the non-moving party (Matoza) — a reasonable juror could have ruled for Matoza. Defendants' appeal claims that the trial court erred in granting a new trial. Because the court's order granting the new trial was, in effect, a reconsideration of the ruling on the motion for summary adjudication (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859, fn. 29), that order must be affirmed if — viewing the evidence in a light most favorable to Matoza — a reasonable juror could have found that Appellants had failed to sustain their burden of proving their affirmative defense of accord and satisfaction.

For these reasons, the following statement of facts is taken from the documents submitted by both sides on the motion for summary judgment/adjudication. In accordance with established law regarding summary judgment, these documents will be viewed in a light most favorable to the non-moving party: Mr. Matoza.

Because the following statement of facts complies with this rule and the Statement of The Case in Appellants' Opening Brief does not, this statement of facts is quite different from Appellants'.

Matoza's Contract With Netscape

In June of 1994, John Kohler of Netscape called Marc Matoza and asked if he would be interested in joining a new internet company, then called "Mosaic," later to be called "Netscape" (and hereafter, for convenience, referred to as "Netscape"). CT 3974:4-7.

Matoza was a computer scientist who had begun work in Silicon Valley in 1973, with Hewlett Packard. CT 1712. Since then, Matoza had worked (mostly in sales) for several other computer-related companies in this country and in Europe,

including Ashton-Tate, Fisk Communications, and Martech (Switzerland). CT 1713. Matoza was working at the Saratoga Institute when Kohler called. CT 2899:3-13.

Kohler was Netscape's Vice President of Customer Support. CT 236. Netscape had been founded earlier that year by Jim Clark and Mark Andreesen to develop a user-friendly browser that would make it easy for ordinary computer-users to gain access to the Internet. CT 2939:17-23; 2409:1-15. As Clark put it, "This was going to change the way people operated on a daily basis." CT 3255:17-18. Clark and Andreesen had plenty of smart engineers to develop the browser, but they needed people experienced in marketing such products. Andreesen testified that he knew Matoza by reputation. CT 2330:10-11.

Matoza looked into the Internet market (CT 2901:15-2902:3) and decided that it had potential (CT 2904:6-9). Kohler called again and asked him to join Netscape, but Matoza would not yet commit himself. CT 2904:15-2905:5. Kohler arranged for Matoza to meet with Clark and Andreesen in Mountain View (CT 2905:9-2906:8), where Clark and Andreesen spent more than two hours explaining to Matoza their view of the market, the technology, and Netscape (CT 2906:12-2907:8). They hit some golf balls together (CT 2908:9-10), and Clark invited Matoza to accompany him on a trip to the east coast to visit potential customers and discuss marketing. CT 3974:12-14; 2909:15-2911:14. During the trip, they visited CBS, ABC, and other large companies, where Clark tried to sell them his point of view regarding the Internet. CT 2912:3-2914:20.

Clark told Matoza that if he came to work for Netscape, Matoza would receive shares and stock options that would become extremely valuable if Netscape went public or were acquired by another company. CT 3974:14-17. Clark told Matoza:

> It was going to be a home run. This was going to be bigger than Apple. This was going to be bigger than almost anything the Valley's ever seen. This was a whole new world, and the reason for taking me to New York and Chicago where he introduced me to some luminaries in the media

> business as well as some of the – some players in Chicago was to prove to me that this was going to be absolutely a slam dunk home run, of which I was going to make a lot of money doing that. [CT 3254:3-13.]

After the trip, Kohler called Matoza to get his impression, and Matoza responded that Netscape had business potential, though it was not well defined, but Matoza was interested in joining the company. CT 2916:8-20. Kohler then prepared an offer, met with Matoza, and presented the offer to him. CT 2916:19-24; 3974:18-22. The offer letter was dated July 5, 1994, and stated in part:

> Dear Mark:
>
> I am pleased to offer you a position at Mosaic Communications (the "Company"), as Director of Support Programs. Your starting salary is $9,000 a month. Your first day of employment at Mosaic Communications is July 5th.
>
> * * * *
>
> The Company is in the process of establishing a stock option plan. Upon completion of the plan and upon Board approval, the Company will grant you an option to purchase up to 40,000 shares of common stock at a purchase price equal to the fair market value at the date of your option grant. Your option will be subject to your execution of the Company's standard stock option agreement, which will contain the Company's customary terms and conditions, including vesting of the shares and a Company repurchase right (in the event you exercise your option prior to full vesting) over a four year period.
>
> In addition, we will make available another 20,000 shares triggered by a performance program to be jointly developed when you arrive.
>
> The company also offers you a 401k program for your retirement savings through Smith Barney.
>
> Details and election on all of these benefits will be scheduled during your first week here.
>
> Employment with Mosaic Communications Corporation is not for a specific term and can be terminated by you or by the Company at any time for any reason, with or without cause. * * * *

> If you accept this offer, the terms described in this letter shall be the terms of your employment. Any additions or modifications of these terms would have to be in writing and signed by you and me or another officer of the Company.
>
> * * * *
>
> Sincerely,
>
> MOSAIC COMMUNICATIONS CORPORATION
>
> By: James H. Clark, President and Chief Executive Officer
>
> [CT 2986-87]

Matoza was not happy that part of the offer included 40,000 options rather than 40,000 shares (CT 2921:23-2922:4), but he signed the agreement and accepted the offer that same day. CT 2987. Matoza was one of the first persons in sales hired by Netscape. CT 2340:9-11. His responsibility was "to build a support program for the company and the products." CT 2939:17-23.

Matoza believed that Netscape's agreement with Matoza meant what it said: that Netscape was to provide Matoza with 20,000 shares (triggered by a performance program) in addition to stock options. CT 3975:10-12. Kohler had the same belief. CT 236. Indeed, Kohler had told Matoza that this was what the letter meant. CT 3975:12-16; 2898:4-7. "[H]e made it clear it was shares being offered to me for performance of a performance program" — in addition to the 40,000 options. CT 2918:1-6; 2925:16-2926:19. The 20,000 shares were important to Matoza, because he had been talking to other companies that had offered him much higher salaries. CT 2926:20-2927:3. He told Kohler that "I wanted to make sure that there was some meat in this particular offer." CT 2926:20-2927:7. Clark testified that the provision in Matoza's contract regarding the 20,000 shares for a performance program was unique to Matoza. CT 2375:10-20.

Soon after Matoza signed the offer letter, Clark told Matoza that Netscape would be legally bound only by a "blue ink" document, and that an e-mail would not bind Netscape, because e-mails were often inaccurate. CT 3975:21-3976:4. Netscape's legal department had told Matoza the same thing. *Ibid*. See also CT 3342:16-3344:13.

The 20,000 Shares

Matoza began work the same day he signed the agreement (July 5, 1994), reporting to Kohler. CT 236. Pursuant to his agreement with Netscape, Matoza developed a performance program that required him to (1) complete a Customer Response Center Business Plan, (2) hire people according to that plan, and (3) close at least one "OEM" (original equipment manufacturer) deal prior to December 31, 1994. CT 236; 3106. Both Kohler and Clark approved the program. CT 236; 2508:14-24; 3976:11-15. Clark assigned Kohler to manage the program. CT 2977:14-17.

After spending "a lot of time trying to understand the product, trying to understand the market, trying to understand the direction that the other managers in the company wanted to take the company" (CT 2939:9-16), Matoza fulfilled the terms of his performance program. CT 3977:6-16; 2930:14-22. According to John Kohler:

> Pursuant to the approved performance program, Mr. Matoza prepared a Customer Response Center Business Plan, hiring was accomplished according to the approved plan, and an OEM deal was closed by December, 1994, thus completing the performance program jointly developed by Mr. Matoza. [CT 237; 2515:21-23.]

Kohler stated that at this point, "it was fair for the company to complete its transaction with Marc with an additional 20,000 shares because he had in fact completed his tasks." CT 2516:7-13.

The key OEM contract that Matoza closed (on November 22, 1994) was with Digital Equipment Corporation (DEC), and he was commended for this by

Clark — and made a Regional Vice-President of Netscape. CT 3977:13-20; 2980:11-19. The closing of the DEC deal was important, because it was one of Netscape's first OEM deals (CT 3484:25-3485:5) and because DEC was a major computer company, and this gave Netscape "an air of legitimacy." CT 3789:3-15. Kohler testified that while Matoza was closing the DEC deal, he was also working on 5 or 6 other deals. CT 2514:18-23.

In October or November of 1994, Todd Rulon-Miller joined Netscape and directed Matoza to report to him. CT 2942:7-22. Rulon-Miller sent several e-mails to Matoza congratulating him on his performance. CT 2489, 2491, 2492, 2496, 2499, 2500. In December of 1994, Matoza reminded Rulon-Miller that Netscape now was to deliver the 20,000 shares to him, and Rulon-Miller said he would take care of this at the end of the quarter. CT 3977:21-24.

However, in January of 1995, Matoza told Clark about some misconduct that had occurred in a transaction between Netscape and Silicon Graphics. CT 3978:2-5. Clark felt that certain issues were "walk-away" matters that Netscape could not include in any agreement with Silicon Graphics. CT 3123:19-22. But salesman Tom Dicker had signed the agreement with a walk-away item in it (CT 3123:23-25), and "it created an uncomfortable position for Mr. Rulon-Miller and Mr. Dicker." CT 3124:13-17. When Rulon-Miller heard of this, he called it a "disloyal act," became enraged at Matoza, and told Matoza that he would fire him unless he was "blindly obedient" to Rulon-Miller personally. CT 3978:2-5. Matoza testified:

> Todd was extremely upset with me. He made it very clear to me in that meeting that to work in his organization meant blind obedience, meaning that whatever he said I was to do unquestioned or he would fire me. That was what he expected. I brought up the issue of the 20,000 shares, and he said he would get back to me at that time. [CT 3122:21-3123:2. See also CT 3124:13-17.]

After this meeting, Matoza was concerned that Rulon-Miller would fire him. CT 3128:1-5.

In January of 1995, Clark told Matoza that Rulon-Miller would take care of Matoza's right to the 20,000 shares for satisfying the performance program. CT 3128:6-16. However, when Matoza again asked Rulon-Miller to have Netscape deliver the 20,000 shares, Rulon-Miller said that Matoza already had too many shares and would not receive the 20,000 shares, and if he brought the subject up again Rulon-Miller would fire him. "Mr Rulon-Miller stated that he felt that I had 'too many shares already,' that he was not going to give me those shares, and that if I brought the subject up again he'd fire me." CT 3978:6-13. See also 3129:20-3930:6; 3145:9-19.

Later, Matoza raised this matter with his new supervisor, Mark Biestman (CT 3131:12-23), but Biestman replied that he had had a similar conversation with Rulon-Miller and he too feared that he "was being set up" to be fired. CT 3134:5-3136:8. Rulon-Miller later did in fact fire Biestman for not making his quota (3136:8-17). Biestman then warned Matoza that Rulon-Miller was out to fire him too. CT 3136:23-3137:6.

In May or June of 1995, Matoza spoke to Ms. Kandis Malefyt, Netscape's Vice President of Human Relations, about the 20,000 shares that Netscape owed him for completing his performance program. CT 3980:5-6. She said she would look into it and get back to him, but she never did. *Id.* at 7-9.

In the Spring of 1995, Netscape established a "Performance Grant" program to award stock options to employees who had demonstrated excellent performance. CT 3978:17-18. Matoza received the company's 1995 Sales Excellence award, and he was congratulated by Andreesen and Rulon-Miller for the role he played in closing a deal with Sun Microsystems. CT 3978:22-3979:10; 3143:4-17, 2494. In late May of 1995, Rulon-Miller informed Matoza that, as a result of his performance with Sun, Matoza had earned and would receive an option to purchase 10,000 shares of Netscape. CT 3979:10-13; 3143:4-3142:1. Rulon-Miller did not say that this award was instead of or in any way affected

Netscape's obligation to deliver the 20,000 shares owed to Matoza under his original contract. CT 3979:13-21.

In June, however, Rulon-Miller told Matoza that the 10,000 option performance grant was to be "for" the 20,000 shares that were due to Matoza under his original contract. CT 3980:9-12. Matoza viewed this statement as "pure harassment" and told Rulon-Miller that he did not agree to this. CT 3980:12-13.

Shortly thereafter, Rulon-Miller came to Matoza's desk, pulled him into a conference area, yelled at him, and told him that the 10,000 option Performance Grant would be given to him in return for the 20,000 shares that were due to Matoza under his original contract. CT 3145:25-3146:4. Matoza said this did not make sense and he would not agree to it. CT 3146:5-3147:2.

Later, Rulon-Miller again took Matoza into the conference room. CT 3147:5-17. "He told me that I was going to send him an e-mail that would indicate that I was trading those shares and that I was to do it immediately, and he dictated the details of that e-mail to me." CT 3147:5-17. Although Rulon-Miller again yelled at him, Matoza did not send the e-mail and walked out. CT 3147:18-24.

On June 14, 1995, Rulon-Miller came to Matoza's desk, dictated an e-mail to Matoza, and ordered him to send it to Rulon-Miller immediately. CT 3148:4-16; 3980:14. The e-mail was addressed to Rulon-Miller and stated: "Per our conversation, I accept your offer of 10K shares to satisfy the 20K share option in my employment contract. Let me know when this will be executed." CT 3194. Matoza added this last sentence himself "because I wanted to know what he was proposing." CT 3159:14-16; CT 3980:24-3981:3.

Matoza told him "that I did not agree with the e-mail. I made it very clear to him I did not agree to the transaction, and I did not want to send an e-mail. He told me to send the e-mail." CT 3149:1-4; 3154:10-15; 3980:23-24. Matoza then sent the e-mail. CT 3149:16-17

Q. Why did you send the e-mail?

A. I would have been fired if I hadn't sent that e-mail.

Q. How do you know that?

A. From the blind obedience discussion that he had with me in January; from the fact that he fired Paul Kuntz; he fired John Kohler. There were a number of people that weren't blindly obedient that he fired, and he had a track record in that area, and he and Dicker I knew were trying to fire me. [CT 3149:18-3150:2; 3160:7-8.]

Matoza did not believe that this e-mail surrendered his rights to the 20,000 shares, in part because the e-mail made no mention of any 20,000 *shares*, but only to 20,000 *options*. CT 3980:14-23; 3158:4-23; 3161:18-3162:5. Matoza also knew that the e-mail could not be binding on himself or Netscape, because both his original contract and Netscape's "blue ink" policy required that any modification of his contract be in writing and signed by both himself and an officer of Netscape. CT 3980:24-3981:3. One of Netscape's policies stated: "Email often contains inaccurate or misleading statements, and is often in the nature of a draft. As a result, inappropriate or errant email can cause significant problems." CT 2700-01; 2629:3-11. Also, as a matter of company policy, all stock-option agreements were in writing and signed by the employee and an officer of Netscape, because — according to Ms. Malefyt — "It's good practice for people to be clear about what their deal is." CT 2836:10-2837:23.

Matoza never received any stock-option agreement or other document to be signed pursuant to the e-mail. CT 3981:4-15. Nor did Netscape ever provide him with the 10,000 shares mentioned in the e-mail. CT 3982:24-3983:2. Matoza understood this to mean that Rulon-Miller had abandoned his effort to force him to give up his right to the 20,000 shares. CT 3981:23-3982:2.

On June 19, 1995, Matoza's name was submitted to Netscape's Board of Directors for approval for a Performance Grant of 10,000 options, and the Board expressly approved the Performance Grant. CT 2607-2610; CT 3643. The Board did not say that this grant was in lieu of the 20,000 shares Netscape owed to

Matoza. *Ibid.* Matoza received the Grant under a cover sheet that offered him "Congratulations." CT 3241.

Matoza subsequently signed a Stock Purchase Agreement that provided that his Performance Grant of 10,000 options would vest over a period of 50 months. CT 3983:11-24. The document provided that Netscape could repurchase the shares "should the optionee cease service" with Netscape. CT 3985:9-13. Neither the Stock Purchase Agreement, the cover sheet, nor any other accompanying document said that the options were being provided in lieu of the 20,000 shares Netscape owed to Matoza. *Ibid.* Nor did Rulon-Miller, Ms. Malefyt, or anyone else at Netscape tell him that the Performance Grant was in lieu of the 20,000 shares Netscape owed him under his original contract. CT 3982:3-9.

To this day, Netscape has never delivered to Matoza the 20,000 shares it promised to pay him. CT 3982:24-3983:2; 2931:4-12; 2855:25-2856:4.

The 40,000 Options

Matoza's contract also entitled him to 40,000 options, pursuant to a plan to be established by Netscape. CT 2986-87. In 1994, Netscape's Board of Directors established such a plan, and on July 15, 1994, Matoza executed a Notice of Grant of Stock Option that provided that these 40,000 options could be exercised at $0.075 per share, and 20% of these would vest after 10 months of service and the balance vest at 2% a month over the next 40 months. CT 2988-2989.[2] This Notice provided that "In no event shall any additional shares vest after Optionee's cessation of Service." CT 2988; 3985:11-12. Attached to the Notice was a Stock Option Agreement that provided that Netscape adopted the Plan "for the purpose of attracting and retaining the services of selected Employees" and that the option would terminate "Should optionee cease to remain in Service for any reason. . . ."

[2] The options were exercisable immediately, but subject to repurchase by Netscape. This "reverse vesting" was apparently instituted for tax reasons.

or if he died or became disabled. CT. 2991-92. The Agreement included an Appendix that defined many of the terms in the Agreement, but Netscape failed to provide any definition of the terms "cessation of service" or "optionee cease to remain in service." CT 2999-3001. Nowhere did the Agreement expressly provide that vesting would stop if Netscape fired Matoza without cause. Also attached to the Notice was a Stock Purchase Agreement (CT 3003), in which Netscape stated that, within 60 days after "Optionee ceases for any reason to remain in Service," Netscape may repurchase at the exercise price any shares "in which the Optionee is not, at the time of his or her cessation of Service, vested. . . ." CT 3009. (On June 16, 1995, Matoza and Netscape signed this Stock Purchase Agreement. CT 1207, 1213, 1223.) Attached to the Agreement was Netscape's Stock Option Plan, which stated that it is intended to "encourage [selected employees] to acquire a proprietary interest, or otherwise increase their proprietary interest in the Corporation and continue to render services to the Corporation." CT 3029.

Matoza understood the language of the 1994 documents to provide that "vesting would stop only if I should die, become disabled or choose not to remain in the employ of Netscape." CT 3983:21-24. Netscape never informed him that it claimed any right to unilaterally stop the vesting of his options or to repurchase any shares already purchased by him, or that Netscape believed that vesting would stop if Netscape fired him. CT. 3984:12-22.

The following year, Netscape added *new* language to its *1995* Stock Plan, permitting Netscape to repurchase "upon voluntary or involuntary termination of the purchaser's employment with the Company for any reason (including death or Disability)." CT 2760. But neither these words nor similar words appeared in the *1994* documents.

Netscape issued its Initial Public Offering (IPO) in August of 1995. CT 2351:20-21. Its opening price was $71 per share. CT 1126:18-22.

Matoza paid Netscape all the money necessary to purchase the shares provided by these options. CT 2937:14-17.

Netscape Fires Matoza

In October of 1997, Matoza was promoted to responsibility for all value-added retailers in the West. CT 3392:1-14.

In January of 1998, while Netscape was negotiating with AOL to have AOL acquire Netscape's stock for AOL stock, Netscape CEO James Barksdale announced that Netscape executives had agreed to work without salary. CT 3985:14-15. Soon thereafter, on January 8, Matoza offered to work for Netscape for only $1 per month. CT 3985:16-21. Nevertheless, that same month, Netscape fired Matoza. CT 3986:3-4.

In January of 1998, Netscape informed Matoza that the vesting of the options under the 1994 and 1995 agreements would stop, even though Netscape — not Matoza — had terminated his employment. CT 3985:22-24. Netscape thereafter refused to deliver Matoza 25,600 shares of common stock he purchased on June 16, 1995 through exercising his options. CT 3985:24-3986:2. Instead, Netscape claimed that those shares were "unvested" and Netscape attempted to "repurchase" those shares from Matoza by sending him a check for $481.28 (representing $0.075 per share). CT 3407; 3986:13-15. Matoza never cashed that check. CT 3387:18-3388:6. Instead, Matoza sent a check for $7,680 to Netscape to pay for the shares (CT 3410-13), but Netscape never delivered those 25,600 shares to Matoza. CT 3987:6-10.

On January 8, 1998, Netscape asked Matoza to sign a general release of all claims against Netscape, but Matoza refused to do so. CT 3982:22-23.

THE SECOND AMENDED COMPLAINT

Because the issues raised by the appeal and cross-appeal arise from the Second Amended Complaint, a short summary of that complaint might be helpful.

The First Cause of Action alleges that Netscape breached its July 5, 1994, contract by failing to deliver the 20,000 shares to Matoza. CT 1127-28.

The Second Cause of Action alleges that at the time it entered into that contract, Netscape fraudulently concealed its intent to act arbitrarily and in bad faith to stop the full vesting of Matoza's 40,000 options. CT 1128-29.

The Third Cause of Action alleges that Matoza exercised those options and that Netscape breached its July 5, 1994, contract by refusing to deliver all of the 40,000 shares to Matoza and by erroneously claiming that the 1994 Notice of Stock Option permitted Netscape to stop the vesting after Netscape terminated Matoza's employment. CT 1130-31. This cause of action refers to Exhibit B, the July 15, 1994, Grant of 40,000 stock options to Matoza. CT 1152.

The Fourth Cause of Action alleges that Netscape breached the covenant of good faith and fair dealing implied in the 1994 Stock Option Agreement by terminating Matoza's employment in January of 1998 as a mere pretext to cheat Matoza out of the 40,000 options provided by that Agreement. CT 1131-32.

The Fifth Cause of Action alleges that when Netscape presented the 1994 Stock Option Agreement to Matoza, Netscape fraudulently concealed its intent to act in bad faith to stop the vesting of the 40,000 stock options. CT 1132-33.

The Sixth Cause of Action alleges that Netscape breached a 1995 Stock Purchase Agreement by failing to deliver 40,000 shares to Matoza. CT 1133-34. This cause of action refers to Exhibit C, the June 16, 1995 "Stock Purchase Agreement" by which Matoza purchased the 40,000 shares pursuant to the options granted on July 15, 1994. CT 1206.

The Seventh Cause of Action alleges that Netscape breached the covenant of good faith and fair dealing implied in the 1995 Stock Purchase Agreement by

terminating Matoza's employment in January of 1998 as a mere pretext to cheat Matoza out of the 40,000 options provided by that Agreement. CT 1134-35.

The Eighth Cause of Action alleges that when Netscape presented the 1995 Stock Purchase Agreement to Matoza, Netscape fraudulently concealed an intent to act in bad faith to stop the vesting of the 40,000 stock options. CT 1135-36.

The Ninth Cause of Action alleges that Netscape breached the 1995 Stock Option Agreement (the "Performance Grant") by refusing to deliver all of the 20,000 shares to Matoza and by erroneously claiming that the 1995 Stock Option Agreement permitted Netscape to stop the vesting after Netscape terminated Matoza's employment. CT 1137-38. This cause of action refers to Exhibit D, which is the June 19, 1995, Notice of Grant of Stock Option — representing the "Performance Grant" awarded to Matoza. CT 1229. (While Matoza was initially awarded 10,000 options, the Notice shows 20,000 options to reflect a 2-1 stock split. CT 1230-31.)

The Tenth Cause of Action alleges that Netscape breached the covenant of good faith and fair dealing implied in the 1995 Stock Option Agreement by terminating Matoza's employment in January of 1998 as a mere pretext to cheat Matoza out of the 40,000 options provided by that Agreement. CT 1138-39.

The Eleventh Cause of Action alleges that when Netscape presented the 1995 Stock Option Agreement to Matoza, Netscape fraudulently concealed its intent to act in bad faith to stop the vesting of the stock options. CT 1139-40.

The Twelfth Cause of Action alleges that Netscape breached its fiduciary duty as an escrow holder to deliver to Matoza the stock previously alleged.

As indicated in the Statement of the Case (above), the trial court sustained Defendants' demurrer to the 4th, 7th, and 10th Causes of Action, then granted summary adjudication as to the remaining causes of action, and then changed its mind and granted a new trial as to the 1st Cause of Action.

ARGUMENT

RESPONSE TO APPELLANTS' OPENING BRIEF

I. APPELLANTS' "STATEMENT OF THE CASE" IS IRRELEVANT TO THIS APPEAL.

Appellants' "Statement Of The Case" differs quite substantially from the Statement of Facts presented above. This is because Appellant has presented not "The" case, but *Appellants'* case. This would be perfectly proper if Appellant were presenting an opening statement or summation to the jury, whose job is to resolve conflicting stories. But that is not the job of a court ruling on a motion for summary judgment. The court's sole task is to examine the evidence in a light most favorable to the non-moving party (here Matoza), resolve all reasonable inferences in favor of that party, and then determine whether that evidence would permit a reasonable juror could find in favor of the non-moving party. An examination of the record citations relied on in Appellants' statement of "The" case shows that Appellants rely mostly on the testimony of Rulon-Miller, Malefyt, and Shell — Netscape witnesses who cooperated with Appellants by furnishing them with declarations to support their motion for summary judgment. But Appellants fail to provide this Court with the evidence in the record *supporting* the trial court's ruling.

The basic rules for considering motions for summary judgment and summary adjudication were summarized by our Supreme Court in *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35-36:

> The summary judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should be used with caution. (*Eagle Oil & Ref. Co. v. Prentice* (1942) 19 Cal.2d 553, 556) Summary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. (Code Civ. Proc., § 437c; *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 374) "The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory." (*Lipson v. Superior Court, supra*, 31 Cal.3d at p. 374.)

> "The affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion." (*Slobojan v. Western Travelers Life Ins. Co.* (1969) 70 Cal.2d 432, 436-439) "... [I]ssue finding rather than issue determination is the pivot upon which the summary judgment law turns." (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441).

And in *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395, the court stated:

> "Though often said, it appears necessary to again reiterate that a summary judgment is a drastic measure which deprives the losing party of trial on the merits." (*Bunzel v. American Academy of Orthopaedic Surgeons* (1980) 107 Cal.App.3d 165, 169; see also *Rincon v. Burbank Unified School Dist.* (1986) 178 Cal.App.3d 949, 952.) The right to a jury trial, embodied in article I, section 16 of the California Constitution, is at stake. * * * * [T]echnical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers.

The task of the reviewing court was discussed in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334:

> On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.

In their Opening Brief, Appellants contend that the trial court erred by granting a new trial on Matoza's First Cause of Action for Netscape's breach of its promise to deliver 20,000 shares to Matoza. Appellants rely solely on their affirmative defense that the June 14, 1995, e-mail was an "accord and satisfaction" that discharged its duty to deliver those shares.

As we shall show, however, the record contains substantial evidence rebutting this defense. Therefore, there is a triable issue of fact on this question. After the trial court erroneously granted summary adjudication on the First Cause of Action, it properly corrected this error by granting a new trial on the First Cause of Action.

II. THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER THE JUNE 14, 1995, E-MAIL CREATED AN ACCORD AND SATISFACTION.

Accord and satisfaction is an affirmative defense that must be specially pleaded. 5 Witkin, Calif. Procedure 4th, *Pleading*, §1021. Appellants did plead this defense (CT 1487), and because "the burden of proof follows the burden of pleading" (1 Witkin, Calif. Evidence 4th, *Burden*, §6), they have the burden of proving it at trial. Appellants concede at AOB 19 that they have the burden of proving both an accord and a satisfaction.

The record contains evidence showing several independent reasons why a reasonable juror might find that Appellants have failed to sustain this burden.

A. There Is Substantial Evidence That There Was No *Accord*.

1. The E-mail Was Not An Effective Modification of Matoza's Initial Contract Because It Was Not A "Blue Ink" Document.

Netscape's 1994 contract with Matoza required Netscape to deliver 20,000 shares to Matoza, but Appellants now claim that the 1995 e-mail modified that obligation. The record contains substantial evidence from which a reasonable juror could determine that Appellants have failed to prove that the e-mail was an effective modification:

* The July 5, 1994, contract explicitly provided that "Any additions or modifications of these terms would have to be in writing and signed by you and me or another officer of the Company." CT 2986-87. The e-mail was not "in writing," as that term was used in the contract, because *Netscape intended "in writing" to mean a "blue ink" document*. The contract itself was a "blue ink" document, and Netscape had a policy that the Company would be bound only by "blue ink" documents. An effort to modify that does not comply with the contract's requirements for modification is ineffective. See, e.g., *Mariani v.*

Jackson (1986) 183 Cal.App.3d 695, 705-706; *Beggerly v. Gbur* (1980) 112 Cal.App.3d 180, 189.

* Clark had told Matoza that Netscape would be legally bound only by a "blue ink" document, and that an e-mail would not bind Netscape, because e-mails were often inaccurate. CT 3975:21-3976:4.

* Netscape's legal department had told Matoza the same thing. CT 3975:21-3976:4. See also CT 3342:16-3344:13.

* One of Netscape's policies stated: "Email often contains inaccurate or misleading statements, and is often in the nature of a draft. As a result, inappropriate or errant email can cause significant problems." CT 2700-01; 2629:3-11.

* As a matter of company policy, all stock-option agreements were in writing and actually signed by the employee and an officer of Netscape, because — according to Ms. Malefyt — "It's good practice for people to be clear about what their deal is." CT 2836:10-2837:23.

* Matoza believed that the e-mail could not bind himself or Netscape, because of the last sentence he had added and because both his original contract and Netscape's "blue ink" policy required that any modification of his contract must be in writing and signed by both himself and an officer of Netscape. CT 3980:24-3981:3.

Appellants argue at AOB 35 that an e-mail is a "writing." Perhaps it is, but it is not a *"blue ink"* writing, and no case holds that it is. Netscape and Matoza

intended to be legally bound not by any "writing," but only by a "blue ink" writing.

While Appellants might (or might not) have evidence in rebuttal, it would seem clear that a triable issue of fact exists on whether Appellants can sustain their burden of proving that the e-mail was an effective modification.

2. The E-Mail Was Not A Binding Contract Because The Parties Did Not Intend It To Be A Binding Contract.

Witkin states:

> Where any of the terms are left for future determination and it is understood that the agreement is not to be deemed complete until they are settled, or *where it is understood that the agreement is incomplete until reduced to writing and signed by the parties, no contract results until this is done*. [1 Witkin, Summary of Calif. Law 9th, *Contracts*, § 142; emphasis added. See also *Beck v. American Health Group Int.* (1989) 211 Cal.App.3d 1555.]

Here, substantial evidence shows that the parties did not intend the e-mail itself to be a binding contract surrendering Matoza's right to the 20,000 shares. More remained to be done, and that more never occurred.

* The e-mail failed to state *the price* at which the options could be exercised, which could have been nominal, substantial, or somewhere in-between. This was one of the essential terms left for future determination. If the option price was substantial, Matoza might well have rejected the deal. At AOB 33, Appellants claim that a written contract "would add nothing to what the parties already agreed upon," but that is not the case.

* When Rulon-Miller came to Matoza's desk on June 14, dictated an e-mail to Matoza, and ordered him to send it to Rulon-Miller immediately, Matoza typed the dictated e-mail — but added a final qualifying sentence: "Let me know when this will be executed." Matoza added this "because I wanted to know what he was proposing." CT 3149:1-3159:16; CT 3980:24-3981:3. A reasonable juror could infer that these lay parties used the word "executed" not in its formal legal sense, but to mean a written contract containing all essential terms — including the option price — that would be presented to Matoza for him to consider.

* Matoza believed that the e-mail was not a binding contract, because of the last sentence he added and because both his original contract and Netscape's "blue ink" policy required that any modification of his contract must be in writing and signed by both himself and an officer of Netscape. CT 3980:24-3981:3. A reasonable juror could find that Matoza's belief that the e-mail was not binding was reasonable, and that he therefore *did not intend* the e-mail alone to be a binding contract.

* The intent of the only other party to the e-mail — Rulon-Miller — is unknown, because Rulon-Miller admitted in his declaration that "I have no recollection of the specific June 1995 conversations that Exhibit A [the e-mail] refers to." CT 1500:8-9.

* Matoza explicitly told Rulon-Miller "that I did not agree with the e-mail. *I made it very clear to him I did not agree to the transaction*, and I did not want to send an e-mail. He told me to send the e-mail." CT 3149:1-4; 3154:10-15; 3980:23-24; emphasis added. Matoza then sent the e-mail solely because he feared being fired if he disobeyed Rulon-Miller (as others had been). CT 3149:18-3150:2; 3160:7-8.

Upon hearing this evidence, a reasonable juror might well determine that Appellants had failed to sustain their burden of proving that the parties intended the e-mail to be a binding contract by which Matoza surrendered his right to the 20,000 shares promised to him.

3. The E-Mail Was Not An "Accord" Because It Made No Mention of Netscape's Obligation To Deliver 20,000 Shares to Matoza.

"An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." Civil Code §1521.

On its face, the e-mail could not have been an accord, because it made no effort to extinguish Netscape's obligation to deliver 20,000 shares to Matoza — as it *did not even mention* those 20,000 shares. While the e-mail mentioned a "20K share *option* in my employment contract" (CT 3194; emphasis added), it said *nothing* about the 20,000 *shares* that Matoza seeks in his First Cause of Action. Thus, the plain language of the e-mail itself shows that it was not an accord.

Matoza testified that he did not understand Rulon-Miller's dictation of "20K share option" to mean the 20,000 shares Netscape owed him for completing the performance program:

> I did not understand Mr. Rulon-Miller's reference to '20K share option' to be a reference to 20,000 shares, especially since the only reference to options in my July 5, 1994 offer letter was to an option to purchase 40,000 shares. I did not then understand or believe that I had in fact 'agreed' to give up my 20,000 shares, and did not at the time understand the June 14, 1995 e-mail dictated to me by Mr. Rulon-Miller as representing my 'acceptance' of an option to purchase 10,000 shares in exchange for my right to receive the 20,000 shares owed as a result of my completion of the July 5, 1994 performance program. [CT 3980:14-23. See also 3158:4-23; 3161:18-3162:5.]

This evidence — nowhere discussed in Appellants' Opening Brief — is alone sufficient to raise a triable issue of fact regarding whether there was a binding accord discharging Netscape's obligation to deliver 20,000 shares to Matoza. As the trial court stated, "There is sufficient difference between 'shares' and 'share options' that a triable issue of fact remains. CT 5119.[3]

[3] At AOB 20, Appellants quote this language and read it to mean that the trial court "apparently" concluded that there is a triable issue of fact as to the meaning

4. Because There Was No "Bona Fide Dispute," There Was No Consideration For the E-Mail.

Because an accord is a contract, it must be supported by consideration. *Moving Picture Machine Operators Union v. Glasgow Theatres* (1970) 6 Cal.App.3d 395, 402-403; *Zuckerman v. Pacific National Bank* (1986) 187 Cal.App.3d 1394, 1405; 1 Witkin, Summary of Calif. Law 9th, *Contracts*, §898. A defendant who invokes the defense of accord and satisfaction must prove this consideration by showing that the parties were agreeing to settle a "bona fide dispute." *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 571.

Appellants claim that the e-mail was intended to settle a bona fide dispute regarding whether Matoza had fulfilled his performance program and was therefore entitled to the 20,000 shares. But there is substantial evidence that no such bona fide dispute existed:

* When Matoza asked Rulon-Miller for the 20,000 shares, Rulon-Miller gave a *different reason* for refusing: he said that Matoza already had too many shares. "Mr Rulon-Miller stated that he felt that I had 'too many shares already,' that he was not going to give me those shares, and that if I brought the subject up again he'd fire me." CT 3978:6-13. See also 3129:20-3930:6; 3145:9-19.

* The e-mail made no mention of any dispute between Netscape and Matoza. CT 3194.

* John Kohler testified that Matoza had in fact completed the performance program. CT 237; 2515:21-23.

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of "your offer of 10K shares" in the e-mail. It is possible, however, that the trial court was instead referring to the meaning of "20K share option."

* So did Matoza. CT 3977:6-16; 2930:14-22.

* Shortly before the e-mail was sent, Matoza had been told that he would receive a "Performance Grant" that would award stock options to employees who had demonstrated excellent performance. CT 3978:17-3979:1013; 3143:4-3142:1. Matoza received Netscape's 1995 Sales Excellence award, and he was congratulated by Andreesen and Rulon-Miller for the role he played in closing the deal with Sun Microsystems. CT 3978:22-3979:10; 3143:4-17, 2494. It seems unlikely that Netscape officials would express such appreciation for Matoza's work if they had serious doubts about Matoza's completion of his performance program.

From this evidence, a reasonable juror could decide that Appellants had failed to sustain their burden of proving that the e-mail was intended to settle a bona fide dispute between Netscape and Matoza.

B. There Is Substantial Evidence That There Was No *Satisfaction*.

An obligation may be discharged by an accord and satisfaction, but not by an accord alone. As Witkin states:

> The old obligation remains in force until the new contract is performed by satisfaction, i.e., when the creditor accepts the new consideration. (C.C. 1522; Moving Picture Machine Operators Union v. Glasgow Theatres (1970) 6 C.A.3d 395, 403, 86 C.R. 33; see Rest.2d, Contracts § 281(2); 6 Corbin § 1274; 15 Williston 3d § 1841.) Hence, in an action brought by the creditor on the old obligation the debtor cannot plead an executory accord as a bar, but he can so plead an accord and satisfaction. (Silvers v. Grossman (1920) 183 C. 696, 699, 192 P. 534; Blumer v. Madden (1932) 128 C.A. 22, 26, 16 P.2d 319) . . . . [1 Witkin, Summary of Calif. Law 9th, *Contracts*, §899. See also Civil Code §1523: "Acceptance, by the creditor, of the consideration of the accord extinguishes the obligation, and is called satisfaction."]

1. The E-Mail Required Netscape To Deliver Shares, Not Options.

Appellants contend that the e-mail was "satisfied" by the delivery of the 10,000 option Performance Grant[4] the Board awarded to Matoza in 1995. But the e-mail promised Matoza 10,000 *shares*, not 10,000 *options*, so a delivery of *options* would not satisfy the accord. There is no evidence that Netscape ever delivered 10,000 *shares* to Matoza.

At AOB 20-32, Appellants present a lengthy argument asking this Court to ignore the plain meaning of the e-mail and to instead construe 10,000 "*shares*" to mean 10,000 "*options.*" Appellants claim that "10K shares" is merely "an informal, shorthand description of the 10,000 share options that Mr. Rulon-Miller had repeatedly offered." AOB 29. However, the fact that these offers were repeatedly *rejected* by Matoza would permit a reasonable juror to infer that Rulon-Miller felt he needed to up the ante from options to shares to induce Matoza to accept.

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[4] At AOB 13 and 36, Appellants call it the "1995 Grant" — rather than what the Netscape Board called it: a "Performance" Grant.

In any event, Appellants' attempt to blur the distinction between "options" and "shares" overlooks the fact that the distinction is extremely important in economic terms, because shares establish ownership in the company while options represent only the possibility of ownership — and might become profitable only if market price for shares rises above the price at which the option could be exercised at some future time. Matoza knew this, as he insisted that his contract promise him shares as well as options, and Jim Clark agreed to this. See Statement of Facts, *supra*, at page 7. So did Clark himself, whose book "made it real clear that he [Clark] took shares and not options because he was very clear that he was worried about stock options not being realized. . . ." CT 3274:15-21. Some employees might blur the distinction between "options" and "shares" in common conversation, but no competent executive would use these terms interchangeably when dictating a contract he intended to be binding.

Appellants assert at AOB 10 that "Netscape understood" that the word "shares" in the e-mail meant "options." But the person who dictated the e-mail — Rulon-Miller — admitted in his declaration that "I have no recollection of the specific June 1995 conversations that Exhibit A [the e-mail] refers to." CT 1500:8-9. He then stated that he had offered Matoza 10,000 options *earlier* (CT 1500:13-18), but nowhere in his declaration does he state that at the time he dictated the e-mail, he intended "shares" to mean "options."

Appellants admit (at AOB 10) that Matoza's declaration (CT 3980) clearly states that Matoza understood "shares" to mean "shares" — not "options" — but Appellants assert that "He [Matoza] kept silent on the one occasion when Mr. Rulon-Miller said the word 'shares' while realizing that Mr. Rulon-Miller misspoke. CT 3157:19-3159:5." AOB 27. But Appellants end their citation to the record just before Mr. Matoza explained that he did *not* "realize" that Rulon-Miller did not mean what he dictated:

> I don't understand anything. This was dictated. This was not – I did not have any opportunity to talk, to change any words, and/or even to

> respond, other than I took the bodacious position of saying I don't agree, which I was told to send it. I added the "Let me know when this will be executed" *because I wanted to know what he was proposing*. [CT 3159:9-16; emphasis added.][5]

This testimony is sufficient to permit a reasonable juror to find that Matoza did *not* know that Rulon-Miller meant "options" when he dictated "shares."

2. Netscape's Board Intended The Performance Grant to Reward Matoza for His Excellent Performance — Not To "Satisfy" The E-Mail.

Even assuming that the e-mail promised options rather than shares, there is substantial evidence that Netscape itself did *not intend* the 10,000 option Performance Grant to "satisfy" the e-mail, but *to reward Matoza for his superior performance*:

* Rulon-Miller told Matoza that "as a result of my performance in securing the relationship with Sun," he would receive 10,000 share options.[6]

* Rulon-Miller admitted that performance grants were "based on a manager's appraisal within their department of those people they thought that deserved a recommendation based on what they had done at Netscape." CT 3593:1-5.

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[5] See also CT 3158:12-17: : "I added a line, 'Let me know when this will be executed,' because I expected something to come out of this that I wanted to see in writing. I wanted to see what was being proposed by Mr. Rulon-Miller by having me send this particular document."

[6] "In late May 1995 Mr. Rulon-Miller met with me, repeated his congratulations to me, and told me that, as a result of my performance in securing the relationship with Sun, I had earned and was entitled to receive and would be granted an option to purchase 10,000 shares of Netscape stock. In so informing me, Mr. Rulon-Miller made no mention of the 20,000 shares owed to me as a result of my completion of the July 5, 1994 performance program." [CT 3979:10-14. See also 3143:4-3142:1.]

Matoza too said that performance grants "were based on individual employee excellence." CT 3978:17-20.

* The Board approved the 10,000 options to Matoza by expressly adopting a list of designated employees that was entitled "Performance Grants." CT 3642-3643. Matoza's name was on this list. CT 3643. Nowhere did the Board did say that this grant was in lieu of the 20,000 shares Netscape owed to Matoza. CT 2607-2610; CT 3643. At AOB 39-40, Appellants note that 10,000 was the same as the number used in the e-mail. True, but it was also the same as the number of options Rulon-Miller had told Matoza he would receive for his excellent performance.

* Neither the Stock Purchase Agreement, the cover sheet, nor any other accompanying document said that the options were being provided in lieu of the 20,000 shares Netscape owed to Matoza. CT 3983-3985.

* Matoza received the Grant under a cover sheet that offered him "Congratulations." CT 3241. An employer would not "congratulate" an employee for receiving only *10,000 options* as settlement of a dispute over whether he had performed well enough to justify his contractual right to *20,000 shares*. If that was what the Board had intended, "Condolences" would have been a more fitting greeting.

Based on this evidence, a reasonable juror could decide that Appellants had failed to sustain their burden of showing that the Performance Grant options were given in satisfaction of the e-mail.

Appellants' rely on some allegedly conflicting evidence.

Matoza understood the Performance Grant to be for his sales excellence in completing the Sun deal and other transactions, and not in lieu of the 20,000 shares owed to him under his contract. CT 3979:14-21. At AOB 36-37,

Appellants contend at AOB 36-37 that the portion of Matoza's declaration stating his "understanding" varied from his deposition testimony. But it didn't. Matoza testified at his deposition that the Performance Grant was "related to the 10,000 share options that were offered to me by Todd Rulon-Miller." "Related to" referred to the conversation in which Rulon-Miller told him that as a result of his performance in securing the relationship with Sun, he would receive 10,000 share options. CT 3143:4-3144:18.

Appellants argue at AOB 37 that Matoza never communicated his "subjective understanding" of the purpose of the Performance Grant to Netscape. He didn't have to, however, because both Rulon-Miller and the Board already knew the purpose of the Grant: to reward Matoza for his excellent work.

Appellants argue at AOB 38-39 that Matoza testified that Rulon-Miller once told him that the 10,000 options would be for the 20,000 shares Netscape owed Matoza. But Matoza told Rulon-Miller that "I didn't agree with that" (CT 3146:21-24), and this conversation occurred *before* the later meeting at which the e-mail calling for 10,000 *shares* was dictated. CT 3147:5-17.

Even if these arguments had merit, they would do no more than rebut or impeach Matoza's substantial evidence (summarized above) that the Performance Grant was intended to reward him for his sales excellence, and not to fulfill Netscape's obligation to deliver 20,000 shares to him. A triable issue of fact would remain.

C. There Is Substantial Evidence Contradicting Appellant's Claim of Equitable Estoppel.

"Whether there is an estoppel is chiefly a question of fact." 11 Witkin, Summary of Calif. Law, 9th ed., *Equity*, §177. This is certainly the case here.

Appellants' claim of equitable estoppel (at AOB 40-47) is based on several of the same factual assumptions that underlie their argument for accord and satisfaction. Because those factual assumptions are contradicted by substantial evidence to the contrary (as shown above), summary judgment could not properly be granted on the issue of equitable estoppel.

To show the first element of equitable estoppel, Appellants assume (at AOB 42) that Matoza "knew" what Rulon-Miller was proposing and also that Matoza accepted the Performance Grant of 10,000 options because of the "Acceptance Email." As explained above, however, there is substantial evidence in the record that (1) Matoza did *not* understand what Rulon-Miller's final proposal would be, and that (2) the Performance Grant was intended to reward Matoza for his excellent service, and not to satisfy the e-mail.

Appellants also argue that Matoza "misled" Netscape by his "silence" regarding his understanding of the meaning of the e-mail "acceptance," while knowing that Rulon-Miller had a different understanding. Once again, there is evidence that Matoza did not know Rulon-Miller's understanding. And there was substantial evidence that would permit a reasonable juror to find that the e-mail was not an "acceptance" because it was *not a contract* — because it did not comply with Netscape's "blue ink" policy.

To show the second and third elements of equitable estoppel, Appellants claim at AOB 43-44 that Matoza intended to relinquish his claim to the 20,000 shares when he accepted the Performance Grant, but there is substantial evidence that he intended only to accept the reward Netscape chose to give to its best-performing employees.

To satisfy the fourth element of equitable estoppel, Appellants once again assume (at AOB 44-45) that the Performance Grant of 10,000 options was given to satisfy the e-mail's reference to 10,000 shares. As explained above, however, there is substantial evidence in the record that the Performance Grant was intended to reward Matoza for his excellent service, and not to satisfy the e-mail. If so, Appellants would have failed to prove an essential element of equitable estoppel: detrimental reliance.

As Appellants concede (at AOB 41-42), in order to succeed on the defense of equitable estoppel, they must sustain their burden of proving *all four* of its elements. As Witkin states, "There can be no estoppel where one of these elements is missing." 11 Witkin, Summary of Calif. Law, 9th ed., *Equity*, §177. But there is substantial evidence permitting the finder of fact to conclude that *none* of the four elements were proved.

In sum, there are several triable issues of fact on Appellants' claim of equitable estoppel, so this issue should proceed to trial.

CONCLUSION

Appellants' Opening Brief asserts that, "Defendants supported their motion for summary adjudication with evidence that established every element of the defense of accord and satisfaction, and also every element of separate defense of estoppel." AOB 18. Perhaps they did, but this shows no more than sufficient evidence *to establish their prima facie case* for these affirmative defenses. It simply ignores Matoza's contrary evidence, which establishes a triable issue of fact.

Appellants' Opening Brief pays scant attention to the extensive evidence and reasonable inferences appearing in Matoza's submissions. Such evidence and inferences support the trial court's conclusion that there was substantial evidence showing that there was no valid accord and satisfaction and no equitable estoppel.

For this reason, the trial court's ruling granting a new trial on this issue should be affirmed. This is not one of those rare cases where the "drastic remedy" of summary judgment should cut off a party's "hallowed right to have a dispute settled by a jury of his or her peers." *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.

CROSS-APPELLANT'S OPENING ARGUMENT

I. STATEMENT OF APPEALABILITY (RULE 14(A))

Matoza cross-appeals from the judgment dismissing Matoza's action with prejudice. CT 5046. This judgment was based, in part, on the trial court's granting Appellants' motion for summary adjudication on the First, Third, Sixth, Ninth, and Twelfth Causes of Action. CT 4799. We contend that the trial court erred as to each of these Causes of Action

The cross-appeal is from a judgment disposing of all the issues in this case and is allowed by CCP §904.1(a)(1). See also *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 52, 73.

II. THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER NETSCAPE BREACHED ITS PROMISE TO DELIVER 20,000 SHARES TO MATOZA (1ST CAUSE OF ACTION).

This issue is addressed in our Response to Appellants' Opening Brief, above.

III. THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER MATOZA'S OPTIONS CONTINUED TO VEST AFTER NETSCAPE TERMINATED HIS EMPLOYMENT (3RD, 6TH, AND 9TH CAUSES OF ACTION).

The Third, Sixth, and Ninth Causes of Action are all based on Matoza's claims that Netscape refused to recognize that his options (both the 40,000 options promised in his initial contract and the 20,000 options provided by the Performance Grant) continued to vest after Netscape terminated him. Netscape contends that these options stopped vesting when Netscape terminated Matoza.

This issue turns on the meaning of certain words in the 1994 Notice of Grant of Stock Option: "In no event shall any additional shares vest after Optionee's cessation of Service." CT 2988; 3985:11-12. Similar language appears in the attached Stock Option Agreement: the option would terminate "Should optionee cease to remain in Service for any reason. . . ." or if he died or became disabled. CT. 2991-92.

Matoza believed that "Optionee's cessation" and "optionee ceases" would apply only if optionee quits (CT 3322:19-24; 3327:4-18), while Appellants argue that these words mean that vesting stops whenever optionee loses his employment for any reason — including Netscape's unilateral decision to fire the optionee with or without cause. But nowhere did the Agreement expressly provide that vesting would stop if Netscape fired the optionee without cause.

Appellants raised this issue in their demurrer to the Second Amended Complaint, but Judge Rushing disagreed with Appellants and overruled the demurrer. CT 1482. Appellants again raised this issue in their motion for summary judgment/adjudication, and this time Judge McKenney agreed with them. CT 4799.

To interpret "Optionee's cessation" and "optionee ceases", Civil Code §1639 directs us to begin with the words of the agreement, and Civil Code §1644 then directs us to interpret those words "in their ordinary and popular sense." Our

interpretation of "Optionee ceases" is consistent with these rules. "Optionee" is the subject, and "ceases" is the verb. In "their ordinary and popular sense," these words apply when the "optionee" — but not the optionor — commits an act that "ceases" the employment relationship.

This construction is supported by both American and English dictionary definitions of "cease."

American Heritage Dictionary (2nd College Ed. 1985) defines "cease" first as a transitive verb: "To put to an end; discontinue." Thus, "Optionee ceases" means "Optionee puts to an end" or "Optionee discontinues", i.e., Optionee puts to an end (or discontinues) his services for Netscape. "Optionee ceases" would *not* happen when "Optionor [Netscape] puts to an end" or "Optionor [Netscape] discontinues" the employment relationship.

The Oxford English Dictionary agrees. As a transitive verb, the OED defines "cease" as "To put a stop to." Thus, "Optionee ceases" means "Optionee puts a stop to" his services for Netscape — and would not apply when Optionor (Netscape) puts a stop to it.

Nevertheless, Appellants read this language differently, arguing that "Optionee ceases" whenever Optionee's work stops for *any* reason — including being terminated by Netscape (even without cause). We submit that this interpretation is not consistent with the words as used "in their ordinary and popular sense."

Netscape's Vice-President for Human Resources Kandis Malefyt testified that the words could be read "either way." CT 2681:2-2683:4. Assuming she is correct, we would then have two reasonable readings, which would require us to look beyond the words alone. When we do, we find that well-established supplemental rules of interpretation support Matoza's reading.

First, we apply the rule that any uncertainty should be resolved "most strongly" against the party who caused the uncertainty. Civil Code §1654. In this case, that party was Netscape, a large corporation who presented this form

agreement to its employees on a "take-it-or-leave-it" basis. As stated in *Neal v. State Farm Ins. Co.* (1961) 188 Cal.App.2d 690, 695:

> The rule that any ambiguities caused by the draftsman of the contract must be resolved against that party . . . applies with peculiar force in the case of the contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language. Hence, any ambiguity in the contract should be resolved against the draftsman, and questions of doubtful interpretation should be construed in favor of the subscribing party. [See also *Laux v. Freed* (1960) 53 Cal.2d 512, 524; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 803.]

In addition, Netscape had ample resources to clarify this ambiguity if it truly intended to stop vesting simply by firing an employee:

* Netscape was represented by two of California's most prominent law firms: Brobeck, Phleger, and Harrison, and Wilson, Sonsini (CT 2360:15-17; 2674:20-22; 3343:24-3344:2), as well as several in-house counsel (CT 2625:10-23). These lawyers were quite capable of writing language that permitted Netscape to stop vesting by firing an employee — if that was what Netscape had intended.

* The Agreement included an Appendix that defined many of the terms in the Agreement, but Netscape failed to provide any definition of the terms "cessation of service" or "optionee cease to remain in service." CT 2999-3001.

* Netscape had a "Human Resources" department (CT 1512:26-27), but none of these people ever bothered to tell Matoza (orally or in writing) the interpretation it now tries to place on these words (CT 3324:11-22; CT 3984:12-22) — even though Mr. Clark testified that he "had a practice" of explaining stock options to many of his new employees (CT 2400:3-17). So did Netscape's Controller's office (CT 2677:4-15), but these people did not tell Matoza Netscape's view of when vesting would stop. CT 3324:11-22; CT 3984:12-22.

* The following year, Netscape showed that if it wanted to stop vesting by firing an employee, it knew quite well how to write language that said exactly that: Netscape's *1995* Stock Plan expressly permitted Netscape to repurchase options "upon voluntary *or involuntary* termination of the purchaser's employment with the Company for any reason (including death or Disability)." CT 2760; emphasis added. But Netscape chose not to include these words in its *1994* documents.

Second, we should consider the *purpose* of the Stock Option Plan, as expressly stated by Netscape in the Plan itself: to "encourage [selected employees] to acquire a proprietary interest, or otherwise increase their proprietary interest in the Corporation *and continue to render services to the Corporation*." CT 3029; emphasis added. This supports Matoza's reading of "Optionee ceases. . . ." The Plan's gradual vesting would "encourage" employees to "continue to render services to the Corporation." by discouraging them from quitting, because quitting ("Optionee ceases") would cause them to lose options that had not yet vested.

This purpose should be seen in light of Netscape's weak situation in 1994. Netscape was a Silicon Valley start-up, and, as Mark Andreesen testified, "all start-ups are high risk", and Netscape needed to "attract at that point the kinds of people in Silicon Valley who were willing to go to start-ups and take on sales and marketing and engineering jobs." CT 2337:21-2338:3. If Netscape had then told prospective key employees such as Matoza the interpretation it now claims to place on "Optionee ceases", many of these people (perhaps all) would have refused to work for Netscape. If the Company failed (as was likely), the employee's options would be worthless, and if the Company succeeded, the Company could simply stop vesting at its whim. Few top-level engineers or sales persons (the very people Netscape so badly needed) would accept such an offer. As Andreesen testified, "the kind of people that you're generally looking for" at this stage would not come to work for Netscape without stock options. CT

2338:4-10. At that early stage, Netscape could *not* reserve the unilateral right to stop vesting and still attract these essential employees. Later on, in 1995, when the Company's success seemed assured, it could then adopt a new option plan that *explicitly* allowed Netscape to stop vesting upon "involuntary" termination. But Netscape could not afford to do this in 1994.

Third, we may consider the effect of either interpretation.

Netscape worries that Matoza's interpretation would continue vesting even after an employee is fired for misbehavior or poor work.

But under Netscape's broad interpretation, top Netscape executives could hire an employee to do important creative work for the company during its crucial "start-up" phase, but once the start-up phase ended and the "managerial" phase began (when creative people are not so essential), simply fire the employee in order to stop vesting — and, of course, to minimize dilution of top executives' own stock holdings. Jim Clark was concerned about such dilution (CT 2410:2-24; 2393:12-2398:6) and he admitted that "my intent was to try to minimize my own dilution" (CT 2395:10-11).

Also under Netscape's broad interpretation, Netscape could fire many employees who were performing well — solely to prevent vesting in order to decrease dilution of Netscape stock right before a stock-for-stock trade when Netscape might be acquired by a larger company (such as AOL). In this case, it appears that this is exactly what happened, as Netscape fired Matoza and other valuable employees in early 1998 — right before AOL acquired Netscape.

Perhaps the best way to accommodate these possibilities is to interpret the disputed language to mean that vesting stops when the employee either quits or is terminated for good cause. This would leave Netscape free to win its case by proving at trial (if it can) that Matoza was fired for good cause.

If this Court finds that our arguments are convincing on the face of the documents, then there is no need for a trial on the meaning of "Optionee ceases." If this Court instead finds that our arguments are convincing only if the extrinsic

evidence discussed above is true, then there is a triable issue of fact as to whether that extrinsic evidence is true. Either way, the trial court erred in entering summary adjudication on the Third, Sixth, and Ninth Causes of Action, and to this extent the judgment should be reversed.

IV. THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER NETSCAPE WRONGFULLY WITHHOLDS SHARES IT HOLDS IN ESCROW FOR MATOZA (12TH CAUSE OF ACTION).

Appellants have conceded that their escrow agreement with Matoza requires them to release to him vested shares and unvested shares that Netscape did not properly repurchase. CT 1435:22-25; 2181:26-2182:2. If the Court agrees with either of our Points I or II above, then the 12th Cause of Action should be allowed to proceed to trial.

CONCLUSION

For the above-stated reasons, the judgment should be reversed, and this case should be allowed to proceed to trial.

Date: _____

Respectfully submitted,

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