No. 03-1696

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MURRAY L. SWANSON,

Plaintiff-Appellant,

v.

SONERA CORPORATION, a foreign
Corporation a/k/a SONERA OYJ, and
SONERA CORPORATION U.S.,

Defendants-Appellees.

Appealed from the Circuit Court of Cook County, Illinois
County Department, Law Division, No. 01 L 001949
The Honorable Judge **Lee Preston**, Judge Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

INTRODUCTION

Fundamentally, this appeal is about basic Illinois pleading practice and procedure, and Defendants' efforts to require Plaintiff to "establish his case at the pleading stage. " (see Defendants' Response Brief at pp. 13, 19, 23, 24, 25)(hereinafter "Resp. Brief"). It is beyond cavil that a plaintiff in Illinois need not "establish" his case in order to survive a Section 2-615 motion to dismiss and that the pleadings should be liberally construed in resolving such a motion. Even though Illinois is a fact-pleading state, no complaint is defective if it contains information that reasonably informs the defendant of the nature of the claim. Defendants here indisputably are informed of the nature of Plaintiff's claims against them. Moreover, Plaintiff adequately has stated legally cognizable claims against the Defendants, which is all that is required of him at this stage, despite Defendants' misguided assertions that Plaintiff "must show by clear and convincing evidence" the elements of his causes of action simply "[t]o state a claim." (Resp. Brief at p. 19). The trial court's orders erroneously held Plaintiff to a standard of establishing his claims at the pleading stage, which plainly is contrary to Illinois law. Accordingly, the orders entered below dismissing Plaintiff's claims should be reversed.

Moreover, the Defendants' and trial court's myopic focus on the contract phrase "as may be established" misapprehends Plaintiff's claims and taints all purported bases for dismissal. "As may be established" is not a talismanic phrase that, viewed in isolation, bars all claims under any theory of recovery, particularly where the Defendants *did* establish a compensation plan that breached the parties' agreement. Significantly, Plaintiff did not allege that Defendants failed to establish any type of plan at all; Plaintiff alleged that the supposed plan actually established by Defendants was not the "tax advantaged and/or stock-based long-term incentive plan[] (including any stock purchase or stock option plan[])" upon which the parties had agreed. Thus, the trial court's ruling that the phrase "as may be established" did not obligate the Defendants to establish

a plan missed the mark. The trial court compounded that error by barring Plaintiff from pleading any further claims based upon Defendants' failure to provide the agreed upon LTIP.

Furthermore, the trial court's determination that Defendants' promise to provide Plaintiff with a LTIP "competitive with those offered to United States executives at comparable telecommunications companies" was not "sufficiently definite and certain" to be "enforceable" (R. C00148) was erroneous as a matter of Illinois law. Defendants' subsequent arguments in favor of dismissal and the resulting orders dismissing Plaintiff's amended complaints resolutely adhered to this erroneous determination, and accordingly these orders suffered from the same legal error. The Defendants unquestionably understood the promises they made to Plaintiff, and they reaffirmed those promises to Plaintiff for as long as they needed in order to quintuple the value of their investment portfolio and achieve their other desired business objectives via Plaintiff's considerable expertise and efforts. Such allegations plainly entitle Plaintiff to relief under Illinois law, and the trial court's dismissal of all of Plaintiff's causes of action was erroneous.

Plaintiff's failure to "establish" his claims at the pleading stage and the purported unenforceability of a promise to provide a "competitive" LTIP are the two main themes of Defendants' appellate Response Brief, which repeatedly appear in nearly every portion of Defendants' argument. Neither of these themes, however, reflects Illinois law, and neither can justify dismissal of Plaintiff's claims. If this Court rejects even one of those themes, the trial court's dismissal order must be reversed and remanded. Defendants' remaining arguments in support of dismissal of Plaintiff's claims likewise are bereft of any sound legal basis. Accordingly, the lower court's orders dismissing Plaintiff's well-pleaded claims should be reversed.

ARGUMENT

I. PLAINTIFF ADEQUATELY STATED HIS CAUSES OF ACTION, AND IT IS NOT NECESSARY FOR HIM TO "ESTABLISH" HIS CLAIMS TO SURVIVE A SECTION 2-615 MOTION TO DISMISS.

Defendants' appellate Response Brief, like their motion papers below, resonates with the theme that plaintiff must "establish" his claims simply to survive a motion to dismiss filed pursuant to 735 ILCS 5/2-615. (Resp. Brief at pp. 13, 19, 23, 24, 25). It is a matter of elementary Illinois practice and procedure, however, that pleadings should be plain and concise, and that no pleading is bad in substance if it contains such information as would reasonably inform the opposite party of the nature of the claim. 735 ILCS 5/2- 603(a); 735 ILCS 5 /2-612(b); *Wolinsky v. Kadison*, 114 Ill. App. 3d 527, 536, 449 N.E.2d 151 (1st Dist. 1983). Pleadings also should be liberally construed so as to do substantial justice between the parties. 735 ILCS 5/2- 603(c).

It is axiomatic that in ruling on a §2-615 motion to dismiss, the court must accept as true all well-pleaded facts in the complaint and all reasonable inferences that can be drawn therefrom. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8-9, 607 N.E.2d 201 (1992). The trial court erroneously dismissed Plaintiff's claims for failure to "establish" his causes of action. This court, however, must only determine whether the allegations of the complaint, construed in a light most favorable to Plaintiff, are sufficient to state claims upon which relief may be granted. *Stroger v. Reg'l Transp. Auth.*, 201 Ill. 2d 508, 516, 778 N.E.2d 683 (2002). Although Plaintiff must allege ultimate facts necessary to support the claims, he need not set forth evidence which may well be derived from discovery subsequent to the filing of the complaint. *Wait v. First Midwest Bank/Danville*, 142 Ill. App. 3d 703, 712, 491 N.E.2d 795 (4th Dist. 1986)(reversing dismissal of a breach of contract claim); *Bank of Lincolnwood v. Comdisco*, 111 Ill. App. 3d 822, 444 N.E.2d 657 (1st Dist. 1982)(upholding plaintiff's breach of contract claim where the allegations reasonably informed the defendant of the nature of the claim). Unless it clearly

appears from the face of the complaint that no set of facts can be proved that will entitle Plaintiff to recover, a cause of action should not be dismissed on the pleadings. *Gouge v. Central Illinois Public Service Co.*, 144 Ill. 2d 535, 542, 582 N.E.2d 108 (1991); *see also Chicago Motor Club v. Robinson*, 316 Ill. App. 3d 1163, 1171, 739 N.E.2d 889, 897 (1st Dist. 2000).

Here, Plaintiff alleged facts which, if proved, would entitle him to recover, and it is such proof of the parties' agreement that the Defendants so desperately seek to suppress. Plaintiff is entitled to an opportunity to adduce through discovery the evidence that he knows will substantiate his claims. Plaintiff suffered legally compensable wrongs at the hands of the Defendants, and the Defendants should not be allowed to escape their obligations, after having reaped the considerable fruits of Plaintiff's labors, by holding Plaintiff to an unprecedented pleading standard professing to require a plaintiff to "establish" his claims in his complaint. The orders dismissing Plaintiff's complaints should be reversed, and Plaintiff should be allowed to proceed with his claims. If, ultimately, he cannot "establish" his claims as Defendants argue, Defendants certainly will have an opportunity at the appropriate time—on summary judgment—to argue the facts.

II. DEFENDANTS' PROMISES TO IMPLEMENT A "COMPETITIVE" LTIP ARE ENFORCEABLE.

Defendants argue throughout their appellate response brief that Plaintiff's causes of action properly were dismissed because a promise to provide a LTIP "competitive with executive compensation practices in the United States telecommunications market" or "with terms commensurate with discussions between the parties" is unenforceable as a matter of law. Defendants have not cited any Illinois caselaw that actually supports this sweeping assertion, however. Defendants likewise have failed to rebut or distinguish the apt cases cited by Plaintiff, which establish that Illinois law does recognize as enforceable such contract terms.

Defendants have cited many cases in support of their position that "the alleged statements upon which Swanson relies are too indefinite to be enforceable." (Resp. Brief at pp. 9-10). Although the cited cases observe that contract terms should be clear and definite, these cases do not interpret or offer any guidance as to what "clear and definite" means. In the *McInerney* case (176 Ill. 2d 482, 680 N.E.2d 1347 (1997)), concerning a claim for lifetime employment, the issue presented to the court involved the adequacy of the consideration, not the definiteness of the contract terms. Similarly, in the *Wilson* case (112 Ill. App. 3d 932, 445 N.E.2d 901 (2d Dis. 1983))(involving the plaintiff's failure to graduate from college), the court did not even discuss whether any particular contract terms were "definite and certain." The *McErlean* case (90 Ill. App. 3d 1141, 414 N.E.2d 128 (1st Dist. 1980)), cited by Defendants for the proposition that a plaintiff must allege the "essential terms" of an agreement (but included in the string cite supporting Defendants' assertion that the promise was not enforceable), involved a claim for alleged breach of a commitment to loan money in the absence of any type of note, and it in no way discussed whether the alleged promise was clear or sufficiently definite. The court in the *Phillips* case (162 Ill. App. 3d 774, 516 N.E.2d 692 (5th Dist. 1987)) later cited by Defendants likewise did not weigh the clarity or definiteness of the alleged terms, and it merely concluded that the trial court's ruling, *after hearing the evidence at a bench trial*, should be upheld. (Resp. Brief at p. 20). Thus, the cases cited by Defendants do not support dismissal of Plaintiff's claims as a matter of law on the grounds of unenforceability of the Defendants' promise.

In fact, Illinois law supports enforcement of Defendants' promise of a LTIP "competitive with executive compensation practices in the United States telecommunications market" or "with terms commensurate with discussions between the parties." *Price v. Highland Community Bank*, 722 F. Supp. 454, 460-462 (N.D. Ill. 1989), *aff'd*, 932 F. 2d 601 (7th Cir. Ill. 1991) establishes

that an oral promise to provide an incentive compensation plan is sufficiently definite to be enforceable, even if the specific terms of the promised plan were not stated. The enforceability of the contract term "competitive" just recently was recognized in *Smith v. Burkitt*, 795 N.E.2d 385, 391, 2003 Ill. App. LEXIS 1014, 277 Ill. Dec. 18 (5th Dist. 2003), where the court rejected the defendants' contention that the phrase "any business *competitive* with" the plaintiffs was "too vague and indefinite" to be enforceable. (Emphasis added). Thus, Defendants' promise here certainly was not so vague or indefinite as to be deemed unenforceable as a matter of law, and this assertion affords no legal basis for dismissal of any of Plaintiff's causes of action. *See Brody v. Finch University of Health Sciences/Chicago Medical School*, 298 Ill. App. 3d 146, 154, 698 N.E.2d 257 (2d Dist. 1998) ("a valid contractual agreement existed between plaintiffs and defendant to admit *qualified* Program graduates into defendant's medical school") (emphasis added); *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 314, 515 N.E.2d 61, 65 (1987) (the term "appropriate listings" is not unenforceable).

III. PLAINTIFF ADEQUATELY STATED A CLAIM FOR BREACH OF CONTRACT.

It is indisputable that Plaintiff's complaint asserted the legally requisite elements of a breach of contract action under Illinois law, as Plaintiff alleged the existence of a contract, performance by Plaintiff of his obligations thereunder, Defendants' breach, and resulting damages to Plaintiff. (R. C00246); *Brown and Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1030, 715 N.E.2d 804 (1st Dist. 1999). Defendants acknowledge the existence of the employment agreement as a binding contract, but dispute that the agreement contained any binding promise regarding a LTIP. In this regard, Defendants continue to focus solely upon the "as may be established" phrase contained in the contract, contorting the allegations of Plaintiff's complaint, ignoring Plaintiff's assertions that the purported plan actually

established by the Defendants was not the LTIP upon which the parties had agreed, and casting Plaintiff's allegations in a light most favorable to Defendants. On a motion to dismiss, however, the allegations of the complaint must be construed in a light most favorable to Plaintiff. Plaintiff's construction of his own allegations is that Defendants, having exercised their "discretion" (Defendants' term) to establish a compensation plan, committed a breach of contract by establishing a plan that was not the "tax advantaged and/or stock-based long-term incentive plan" upon which the parties had agreed.[1] Accepting Plaintiff's allegations as true, which the court must do in a §2-615 motion to dismiss setting, it is clear that Plaintiff adequately stated a cause of action for breach of contract.

Defendants never have addressed squarely Plaintiff's contention that the plan established by the Defendants was not the "tax advantaged and/or stock-based long-term incentive plan" "competitive with executive compensation practices in the United States telecommunications market" (R. C00241; C00013-21) upon which Mr. Swanson and Mr. Relander had agreed. Instead, Defendants hid behind the parol evidence rule, not surprisingly seeking to avoid introduction of any evidence of the parties' negotiations and communications to construe the agreement, which would establish Plaintiff's right to recovery. Defendants repeatedly assert that the phrase "as may be established" is unambiguous, but they still, to this date, have ignored Plaintiff's assertions that the antecedent "tax advantaged and/or stock-based long-term incentive plan" phrase, taken in the context of a plan that Defendants actually did establish, was

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[1] None of Defendants' cited cases are to the contrary. Those cases, which incidentally involve such inapt topics as bank overdrafts (*Saunders v. Michigan Ave. Nat'l Bank*, 278 Ill. App. 3d 307, 662 N.E.2d 602 (1st Dist. 1996)) and discharge from employment (*Crenshaw v. DeVry, Inc.*, 172 Ill. App. 3d 228, 526 N.E.2d 474 (1st Dist. 1988); *Mosow v. Nat'l Lock Co.*, 119 Ill. App. 2d 232, 255 N.E.2d 500 (2d Dist. 1970); *Lashbrook v. Oerkfitz*, 65 F. 3d 1339 (7th Cir. 1995)), shed no light on the issue of whether a plaintiff alleging that a defendant who, in exercising its discretion to implement a compensation plan, establishes a plan not comporting with the parties' agreement, states a claim for breach of contract. Similarly, the case cited by Defendants for the proposition that payment of a discretionary bonus cannot be compelled (*Collins v. Assoc. Pathologists, Ltd.*, 676 F. Supp. 1388 (C.D. Ill. 1987))does not grant a defendant immunity from a claim for breach of contract if the defendant exercises its discretion to implement a compensation plan that does not comport with the parties' agreement.

competitive LTIP" (R. C00249). These allegations in no way contradicted the Employment Agreement. Furthermore, contrary to Defendants' assertions, the seemingly talismanic "as may established" phrase does not override Plaintiff's allegations of reliance as a matter of law because, as previously discussed, that phrase is not relevant to Plaintiff's allegations that the plan actually implemented by the Defendants was not the LTIP upon which the parties had agreed.

As for Defendants' assertion that Plaintiff was not damaged and "did not suffer actual injury," (Resp. Brief at p. 28), Defendant has not cited a single case in which a pleading has been dismissed for failure to plead general damages. Moreover, this issue simply is not appropriately decided on a Section 2-615 motion to dismiss when the Plaintiff has in fact alleged that he suffered substantial damages as a result of his reliance on the Defendants' false statements. (R. C00249); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 530, 546 N.E.2d 33 (2d Dist. 1989)(recognizing the established rule that general damages need not be specifically pleaded). Furthermore, Plaintiff relied upon the repeated false statements of the Defendants, after the execution of the Employment Agreement, in continuing his employment, divesting himself of 54,891 common shares of TDS stock and resigning his position with the TDS board. Although Defendants may use this argument to dispute the monetary value of this alleged injury, the argument does not support the dismissal of Plaintiff's claims at the pleadings stage. Accordingly, Plaintiff sufficiently alleged a claim for fraudulent inducement, and the trial court's dismissal of that claim should be reversed.

V. COUNT II ADEQUATELY ALLEGED A CLAIM FOR BREACH OF AN ORAL MODIFICATION OF THE CONTRACT THAT WAS SUPPORTED BY CONSIDERATION.

Defendants argue that Count II properly was dismissed for two reasons: 1) the alleged promise is unenforceable and 2) the alleged modification lacks consideration. (Resp. Brief at pp. 13-19). In Section II above, Plaintiff discredited Defendants' argument that the promise is

ambiguous, and that parol evidence should be admissible to determine whether the plan as implemented was the type of "tax advantaged and/or stock-based long-term incentive plan" promised. In light of Plaintiff's uncontested claim of ambiguity, the trial court erred in dismissing Plaintiff's breach of contract claim without considering any of the extrinsic evidence that Plaintiff contended would support his cause of action.

For all of these reasons, and for the reasons stated in Plaintiff's opening brief, the lower court's order dismissing Count I of Plaintiff's Complaint for Breach of Contract should be reversed.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING PLAINTIFF'S CLAIM FOR FRAUDULENT INDUCEMENT.

The trial court dismissed Plaintiff's fraudulent inducement claim as a matter of law for two reasons: 1) because "any promises before the agreement that Sonera would set up a Long Term Incentive Program would contradict the Agreement...[and] would be barred by the Parol Evidence Rule" (R. C00237) and 2) because "Plaintiff fails to explain how post-contract misrepresentations would support a claim for fraudulent inducement." (R. C00236-237). As Plaintiff explained in considerable detail in Sections IIA and IIB of his opening brief, these two bases for the court's dismissal of the fraudulent inducement claim are incorrect as a matter of Illinois law. Under settled Illinois law, "parol evidence on the allegation of fraud in the inducement . . . is admissible to prove the fraud. . ." *General Elec. Credit Auto Lease v. Jankuski*, 177 Ill. App. 3d 380, 386, 532 N.E.2d 361 (1st Dist. 1988); *see also Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F. 2d 1540, 1546 (7th Cir. 1990) ("Claims of fraud in the inducement are not blocked by the parol evidence rule."). Moreover, Plaintiff not only "explained," but he alleged in his complaint, that Defendants' post-contract

misrepresentations fraudulently induced him to continue his employment with Sonera, and therefore, the lower court's second basis for dismissal of this claim should be reversed.

Notably, Defendants have not even attempted to defend the trial court's dismissal of the fraudulent inducement claim and instead have treated Plaintiff's fraud and fraudulent inducement claims as one, apparently hoping to divert this court's attention from the fact that the trial court's dismissal of the fraudulent inducement claim was fatally flawed. Defendants have argued that Plaintiff "has failed to *establish* a claim for fraudulent inducement" (Resp. Brief at p. 24, emphasis added), but these arguments, based upon an incorrect legal standard, afford no basis for dismissing the claim.

Defendants also cursorily have concluded that their alleged false statements are "unenforceable." As discussed in detail above, however, Defendants' promises regarding the LTIP are enforceable as a matter of Illinois law, and the unenforceability theory provides no basis for dismissal of Plaintiff's cause of action.

Defendants further argue that Plaintiff "cannot establish reliance." (Resp. Brief at p. 25). Obviously, Plaintiff is not required at this stage of the proceedings to "establish" anything, and Plaintiff's specific allegation of reliance suffices to survive a Section 2-615 motion to dismiss as a matter of Illinois law. (R. C00249). The *Collins* case cited by plaintiff (676 F. Supp. 1388, *aff'd*, 844 F. 2d 473) lends no support to Defendants' arguments, as it was decided on summary judgment, and Collins' claim for an unpaid bonus *directly contradicted* that contract's *express* language, which stated that the plaintiff would be paid a salary "with or without supplementation" by way of bonus. Here, by contrast, Plaintiff alleged that the Defendants "made false statements of material fact to Plaintiff that if he agreed to become the Managing Director and CEO of Sonera U.S. and continue in that position he would be provided with a

unenforceable and demonstrated that Illinois law regards such promises as being fully enforceable. For purposes of succinctness, Plaintiff does not repeat those arguments here, but adopts and incorporates them as if fully set forth in this Section. In this section of the brief, Plaintiff demonstrates that he did allege the existence of consideration for the oral contract modification sufficiently to withstand a motion to dismiss.

Plaintiff alleged that his "resignation from the Board of TDS, exercise of his TDS options and liquidation of the resulting shares at the request of Sonera" ..."commercially benefited Sonera " and were to his own "financial detriment in reliance on the promise of the forthcoming LTIP." (¶46; R. C00248). Plaintiff also alleged that, at Defendants' request, he resigned from the TDS board and exercised his TDS stock options to avoid any appearance of a conflict of interest for purposes of the TDS/Sonera merger. (¶¶ 20-26; R. C00243). The parties believed that Plaintiff's relinquishment of such interests in TDS would facilitate government approval of the merger, which obviously conferred a benefit upon Defendants. In return for Defendants' relinquishment of these interests and resulting detriment, Defendants agreed to modify orally the Employment Agreement to ensure implementation of the promised LTIP. (*Id.*, R. C00248). The allegations are entirely consistent with the Illinois Supreme Court's contractual consideration framework set forth in *Doyle v. Holy Cross Hosp.*, 186 Ill. 2d 104, 708 N.E.2d 1140 (1999), and they adequately support a claim for breach of contract. Dismissal of Count II thus was inappropriate.

Plaintiff's invocation of 735 ILCS 5/2-606 likewise is inappropriate here. Clearly, this claim for breach of an *oral* modification to a contract does not implicate the provisions of §2-606, which governs claims founded upon "a written instrument." Moreover, Defendants' suggestion that Plaintiff should be required to attach to his pleading, and thus open to the public,

sensitive financial documents that are ancillary to his claim for breach of an oral contract is unsupported by Illinois law.

Plaintiff unmistakably alleged a legally cognizable and factually supported claim for breach of an oral contract modification. Defendants' invocation of irrelevant procedural rules or semantic distinctions fails to impact the validity of Plaintiff's cause of action. Moreover, notwithstanding Defendants' ostensible disappointment in their failure to include a "no oral modification clause" in the Employment Agreement or frustration with their employees' participation in an oral contract modification, Count II adequately stated a claim for breach of an orally modified contract.

VI. PLAINTIFF IS NOT REQUIRED TO "ESTABLISH" HIS CLAIMS NOW, AND HE ADEQUATELY ALLEGED A CLAIM FOR PROMISSORY ESTOPPEL.

Nowhere is Defendants' seeming misapprehension of Illinois pleading practice and procedure more palpable than in their promissory estoppel arguments, in which they argue that Plaintiff "has failed to *establish* a claim for promissory estoppel" (Resp. Brief at p. 19)(emphasis added), and most egregiously, that

> To *state a claim* for promissory estoppel, Swanson *must show by clear and convincing evidence* that 1) Sonera U.S. made an unambiguous promise to Swanson; (2) Swanson relied on the promise; (3) Swanson's reliance was expected and foreseeable by Sonera; and (4) Swanson relied on the promise to hid detriment.

(Resp. Brief at p. 19) (emphasis added).

Defendants' motion to dismiss the Second Amended Complaint contained the same misstatements of Plaintiff's pleading burden, and since the lower court ordered that Defendants' fundamentally flawed "motion to dismiss is hereby granted," that order effectively adopted Defendants' erroneous statements of the applicable pleading standard and must be reversed on that basis alone. (R. C00275; R. C00315).

Substantively, Defendants' arguments in support of the lower court's dismissal of Count III, like their arguments supporting dismissal of Plaintiff's other claims, insist that Defendants' promises were too indefinite. Illinois law, however, recognizes such promises as enforceable (for the reasons previously stated in Section II, above). Thus, Plaintiff's allegations that Defendants promised that 1) they would "implement a LTIP competitive with executive compensation practices in the United States telecommunications market" (¶ 8); 2) "competitive schemes will be put in place in March '99"; (¶9) and 3) that "a satisfactory LTIP would be implemented" (¶ 14) suffice to allege an enforceable promise. (R. C00240-242).

Defendants' additional argument that Plaintiff should be barred from proceeding with his promissory estoppel claim because it is the same as his breach of contract claim is incorrect, both legally and factually. Legally, Defendants' contention that Plaintiff cannot plead claims for both promissory estoppel and breach of contract simply is wrong. Plaintiff indisputably is entitled to plead breach of contract and promissory estoppel in the alternative, which he has done. *Wagner Excello Foods, Inc. v. Fearn Int'l, Inc.*, 235 Ill. App. 3d 224, 601 N.E.2d 956, (1st Dist. 1992). Defendants steadfastly have denied the existence of any enforceable agreement to provide any type of LTIP, and the trial court never ruled that any enforceable agreement to provide any particular type of LTIP existed, leaving Plaintiff free to pursue relief under the theory of promissory estoppel.

Inexplicably, Defendants argue that Plaintiff's mere allegation of the existence of an oral modification to the Employment Agreement somehow constitutes an "admission of the existence of an agreement" that bars Plaintiff from seeking to recover under a promissory estoppel theory. (Resp. Brief at p. 21). Similarly, Defendants oddly contend that Plaintiff's additional allegation (that facts constituting contractual consideration alternatively satisfied the detrimental reliance

element of a promissory estoppel claim) somehow is tantamount to a judicial finding that contractual consideration exists. By this curious logic, all of Plaintiff's allegations should be deemed "admissions," and carried to its end, entry of judgment as a matter of law in favor of the Plaintiff would be required, because every allegation of the complaints would be deemed admitted. Obviously, Defendants' arguments in this regard are misguided, and in accordance with longstanding Illinois law, Plaintiff is free to allege a cause of action for promissory estoppel in the alternative to a claim for breach of contract unless and until it is established by a binding judicial admission or judicial finding that an enforceable contract exists between the parties. *Doyle*, 186 Ill. 2d 104.

Factually, Defendants' contention that Plaintiff's promissory estoppel claim is premised upon the existence of an enforceable contract likewise is mistaken. Plaintiff's allegations that "Defendants misrepresented their intention to act in accordance with their agreement (1) to eliminate any discretionary aspects of the Employment Agreement relating to the establishment of the LTIP; [] (2) to implement an LTIP satisfactory to Mr. Swanson"; or (3) "to provide Mr. Swanson with an LTIP, pursuant to the modified Employment Agreement," (¶¶ 50-51, R. C00248) assume for purposes of pleading in the alternative that Defendants' agreements were not legally binding. Such allegations are entirely consistent with the concepts of promissory estoppel and alternative pleading, which provide plaintiffs with a right of recovery when defendants renege on promises that may not be held to satisfy traditional contract law requirements.

Continuing their shotgun approach to motions to dismiss, Defendants also say that Count III was defective for Plaintiff's failure to "establish" that his reliance on Defendants' promises was "expected and foreseeable" by Defendants. (Resp. Brief at p.23). Plaintiff obviously was

not required to "establish" his reliance at this point, but his pleading of reliance was sufficient in substance, even though it did not use the precise words cited by the Defendants. As previously noted, a pleading is not bad in substance if it contains such information as would reasonably inform the opposing party of the nature of the claim. *Wolinsky*, 114 Ill. App. 3d at 536. Here, Plaintiff alleged that "Sonera intended for Mr. Swanson to rely on its misrepresentations." (¶ 53; R. C00249). Had Defendants intended Plaintiff to rely on their misrepresentations, it goes without saying that any resulting reliance was expected and foreseeable by Defendants. Defendants' semantic gamesmanship thus does not constitute a valid basis for dismissing Count III. Likewise, Defendants' factual dispute as to whether Defendants expected and foresaw that Plaintiff would resign from the Board of TDS, exercise his TDS options, and liquidate the resulting shares, is not properly addressed on a motion to dismiss, where Plaintiff's allegations are taken as true. Plaintiff alleged that he "relied on Defendants' misrepresentations when he agreed to modify the Employment Agreement and when he resigned from the Board of TDS and when he exercised his TDS option and liquidated the resulting shares, all to his detriment." (¶ 54; R. C00249). These allegations must be accepted as true for present purposes, notwithstanding Defendants' other interpretations, and they suffice to state a claim for promissory estoppel.

Plaintiff's allegations of promissory estoppel, read in the context of the complaint as a whole, adequately stated a cause of action for promissory estoppel under Illinois law. Plaintiff alleged that Defendants continually promised to ensure implementation of a LTIP commensurate with the parties' discussions and agreements in order to induce Plaintiff to accept their offer of employment and later, to remain in their employ and relinquish benefits obtained through previous employment, all while Defendants reaped the substantial fruits of Plaintiff's labors.

Plaintiff believes that the parties' agreements regarding the LTIP should be deemed to be enforceable contracts; however, if the court does not share the view that the agreements constitute binding contracts, Plaintiff seeks to hold Defendants to their promises through the theory of promissory estoppel. Such allegations plainly state a claim under Illinois law, and the lower court's order dismissing Count III should be reversed.

VII. PLAINTIFF SUFFICIENTLY ALLEGED A CLAIM FOR FRAUD TO WITHSTAND A MOTION TO DISMISS.

Plaintiff alleged that Defendants made false statements of material fact, that they would provide Plaintiff with a LTIP commensurate with their discussions, and that this statement was made by the Defendants with the intent to deceive Plaintiff and to secure Plaintiff's continued employment despite Plaintiff's contractual option to terminate his employment upon 30 days' notice. (¶¶ 63-68; C00252-254). Plaintiff alleged that his reliance on Defendants' promises were justified and that the precise terms of the promised LTIP were not included in the written documents due to Sonera's recent public offering. (¶¶ 11, 63-68; R. C00241; C00252-254). Plaintiff further alleged that, in reliance on Defendants' misrepresentations, he resigned his position on the Board of Directors of TDS and exercised his TDS options, failing to benefit from over $1 million in appreciation on these shares. (¶¶ 63-68; C00252-254). Plaintiff thus succinctly but adequately alleged each of the elements of a fraud claim under Illinois law, including the elements of reasonable reliance and "actual injury". On this basis, the court below erred in dismissing Count V as a matter of law, and its order should be reversed.

Moreover, Defendants' unsupported contention that Plaintiff could not have justifiably relied on Defendants' promises because he was a businessman ring hollow. By this rationale, no sophisticated businessman (or corporation) ever could sue under Illinois law for fraud in the absence of an ironclad contract (which would seem to render a fraud claim obsolete). Were this

the state of Illinois law, a sophisticated business exception to common law fraud claims would exist, and the absence of any such exception seemingly proves the baselessness of Defendants' assertions. Furthermore, Defendants' contentions that Plaintiff's "purported reliance is unjustified as a matter of law" (Resp. Brief at p. 25) is directly contrary to this court's explicit holding that "justifiable reliance...is a question of fact" that is "to be determined by the finder of fact and not the by the trial court as a matter of law." *Sims v. Tezak*, 296 Ill. App. 3d 503, 511, 694 N.E.2d 1015 (1st Dist. 1998).

It is not disputed that Plaintiff adequately alleged the elements of a cause of action for fraud. Defendants instead challenge the merits of Plaintiff's factual allegations, which simply is improper on a motion to dismiss filed pursuant to 735 ILCS 5/2-615. Therefore, the order dismissing Plaintiff's well-pleaded claim for fraud should be dismissed.

VIII. SONERA IS A PARTY TO THE EMPLOYMENT AGREEMENT

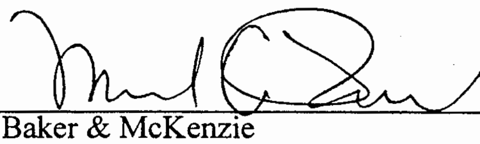
Although Defendants assert that the claims against Sonera Corporation should be dismissed, as it is not a party to the Employment Agreement, the trial court never addressed this point. Contrary to the Defendants' unsupported assertion, the uncontroverted facts available show that Sonera Corporation is a party to the Employment Agreement and is properly a party to these proceedings. The Employment Agreement is drafted on Sonera Corporation letterhead. The very first sentence of the contract states "[t]he purpose of this letter is to confirm the terms of Sonera's offer to you. . . ." (Emphasis added). Additionally, when Plaintiff attempted to resolve this dispute, Mr. Relander, and other Sonera Corporation executives, repeatedly informed him that the matter was being taken up with the Board of *Sonera Corporation*, not that of Sonera U.S. The Bond Loan with Warrants Schemes that the Defendants claim as a gratuitous substitute for the LTIP that was promised to Plaintiff were for Sonera Corporation shares, indicating the Defendants' penchant for treating the two companies interchangeably in respect to this matter.

The Defendants should not be allowed to hide behind the "multiple hats" of Mr. Relander and the companies, claiming that Mr. Relander was acting as the CEO of Sonera Corporation when it is convenient for their arguments, and that he was acting as President of Sonera U.S. when that would be more expedient. Thus, any claim that Sonera Corporation was not a party to the Employment Agreement runs contrary to the facts presently available, and Sonera Corporation should remain a party defendant in this litigation.

CONCLUSION

Wherefore, for the foregoing reasons, Plaintiff-Appellant Murray L. Swanson respectfully requests that this Court reverse the trial court's order granting Defendants' Motions to Dismiss, and remand the case to the trial court for further proceedings.

Respectfully submitted,



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