EXHIBIT J

Not Reported in F.Supp., 1989 WL 135246 (N.D.Ill.)
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Hayes & Griffith, Inc. v. GE Capital Corp.
N.D.Ill.,1989.
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
HAYES & GRIFFITH, INC., an Illinois corporation, Plaintiff,
v.
GE CAPITAL CORPORATION, a New York corporation, formerly known as General Electric Credit Corporation, a New York corporation, Defendant.
No. 88 C 10179.

Oct. 24, 1989.

MEMORANDUM OPINION AND ORDER

ROVNER, District Judge.

***1** Plaintiff Hayes & Griffith, Inc. ("H & G") seeks damages from GE Capital Corporation (" GECC") to compensate H & G for the loss of income H & G expected to gain in connection with a corporate buyout transaction in which H & G had planned to participate as an investment banker but from which H & G was ultimately excluded. Count I of H & G's complaint is based on promissory estoppel, and Count II is based on tortious interference with advantageous business relation. GECC brought a motion to dismiss the complaint, and the Court referred the motion to the Magistrate for a report and recommendation. The Magistrate has recommended that Count I be dismissed with prejudice and Count II be dismissed without prejudice.[FN1] GECC has not objected to the Magistrate's findings with respect to Count II. The Court has reviewed those findings and agrees with them. Count II is therefore dismissed without prejudice. GECC has submitted objections to the Magistrate's findings with respect to Count I. For the reasons described below, the Court accepts the Magistrate's recommendations with respect to Count I but dismisses Count I without prejudice.

Neither party has taken issue with the Magistrate's description of the allegations of the complaint, and the Court will not re-state those allegations. At issue is the significance of five representations allegedly made by GECC to H & G.[FN2] The Magistrate concluded that none of these representations suffice to support a claim of promissory estoppel, which requires the following elements:

(1) a promise, unambiguous in its terms, (2) which defendant expected and could have foreseen would be relied upon by plaintiffs, (3) who relied upon the promise, (4) to their detriment.

Moore v. Illinois Bell Telephone Co., 155 Ill.App.3d 781, 508 N.E.2d 519, 521, 108 Ill.Dec. 358, 360 (2d Dist.1987). The Court will address the five representations *seriatim.*

First, GECC allegedly told H & G, sometime in November or early December, 1987, that GECC " could provide the financing needs (except all equity) for the acquisition within the short time frame demanded." (Complaint ¶ 28(a).[FN3]) The Magistrate found that this statement was not an unambiguous promise and that plaintiff failed to detrimentally rely on it. The Court agrees on both grounds. The Magistrate noted that, at face value, the statement is only that GECC "could" provide the financing, not that it "would" do so. H & G argues that this is unhelpful hairsplitting, and adds that it is prepared to amend its complaint to replace "could" with "would."

The Court does not agree that the "could"/" would" distinction is unhelpful. There is a vast difference between a statement of capability and a statement that one will in actuality perform. The Court does recognize that in some contexts "could" is used when "would" is intended. However, even

if "could" is read as "would" in this case, the Court finds that the elements of promissory estoppel have not been alleged. The statement is woefully vague. It was made in the context of ongoing negotiations, and it specified none of the essential terms of the transaction. It thus was not an unambiguous promise, as is necessary to state a claim for promissory estoppel. *See Phillips v. Britton,* 162 Ill.App.3d 774, 516 N.E.2d 692, 700, 114 Ill.Dec. 537, 545 (5th Dist.1987).[FN4] Furthermore, even if it were a sufficiently clear promise to satisfy the first element, H & G was not justified in relying on it under these circumstances. *See Delcon Group, Inc. v. Northern Trust Corp.,* No. 2-88-0432, slip op. at 13 (2d Dist. Aug. 25, 1989) (plaintiffs not justified in relying on statements that bank had committed or agreed to lend money when parties never agreed on essential terms). Finally, as the Magistrate points out, H & G cannot have detrimentally relied on a promise which was not unfulfilled. GECC *did* provide the financing needs for the acquisition.[FN5] The Court thus agrees with the Magistrate that the first representation cannot support a claim for promissory estoppel.

***2** The second alleged representation is that GECC "would agree to a 1% transaction fee to H & G for its investment banking services and preparation of management for the transaction, its business strategies and analysis." (Complaint ¶ 28(b).) This representation was also made in late November or early December, 1987. (Complaint ¶ 13.[FN6]) The Court agrees with the Magistrate that this was not an unambiguous promise. If the deal had fallen through at that point-before H & G recommended GECC to Management and before the December 15 letter of intent, certainly H & G would not contend that GECC was liable for the fee. The only fair inference from the complaint is that payment of the fee was contingent upon a successful transaction in which H & G acted as an investment banker. The representation was thus not an unambiguous promise which would support a claim of promissory estoppel. Furthermore, it appears from the briefs that the fee was not to be paid by GECC but rather was to be paid by Wickes, and that GECC simply agreed to approve Wickes' payment of the fee. This version is consistent with the complaint, which is ambiguous on this issue. Because the complaint does not allege that GECC ever failed to give such approval, it cannot be said that H & G detrimentally relied on any promise to give such approval. The Court thus finds that the second representation does not support a claim for promissory estoppel.

The third alleged representation is that GECC stated it "would agree to a fee for Bank of Boston because of the resources and time Bank of Boston devoted to the transaction." (Complaint ¶ 28(c).) This statement is even further from an unambiguous promise than is the preceding one, for it does not specify any amount for the fee. Furthermore, the briefs are inconsistent as to whether this fee was to be paid by GECC or by Wickes, and the complaint does not allege sufficient facts from which the Court can conclude that this representation was never fulfilled. The Court finds-for reasons similar to those with respect to the second statement-that the third statement cannot support a claim of promissory estoppel.

The fourth statement is that GECC "would consummate the transaction on substantially the same terms (as to capitalization and management equity position, etc.) to which Bank of Boston had agreed." (Complaint ¶ 28(d).) H & G specifically admits that GECC did in fact consummate the transaction on substantially the same terms. (Complaint ¶ 24.) Thus even assuming that a promise to complete the transaction on "substantially the same terms" is specific enough to be an unambiguous promise, there cannot be detrimental reliance, because the promise was fulfilled. The Court thus concludes that the fourth statement does not support a claim for promissory estoppel.

The fifth alleged representation is that GECC " would finance the acquisition at a purchase price of $350,000,000 on substantially the same terms and conditions as set forth in its letter, Exhibit B, and as it ultimately agreed and closed upon." (Complaint ¶ 28(e).) This allegation does not appear to focus on the difference between the $350,000,000 figure and the ultimate $320,000,000 price, because, as indicated above, H & G admits that the transaction

was finally consummated on substantially the same terms as were originally discussed notwithstanding the difference in the two figures. Furthermore, to the extent that H & G may be focusing on the difference between the two figures, any reliance on the $350,000,000 figure would be unreasonable, in light of the December 11 letter's provision that it "is not intended to and does not create any binding legal obligation on the part of either party." (Complaint, Ex.B at 6.) [FN7] *See Runnemede Owners, Inc. v. Crest Mortgage Corp.*, 861 F.2d 1053, 1059 (7th Cir.1988) (party may not justifiably rely on oral assertions contrary to provisions of written contract). Furthermore, as GECC points out, the complaint's statement of facts refers to discussions of "prices in the range of $300,000,000 to $350,000,000" during November, and does not refer to a purchase price of $350,000,000 until the December 11 letter. Thus ignoring the difference between the two figures, the fifth statement, like the fourth, cannot support an estoppel claim because it was not an unambiguous promise and because, even if it were considered to be such a promise, it was fulfilled.[FN8]

***3** It is clear from the allegations in the complaint that the statements relied on in support of H & G's estoppel claim were all made in the context of preliminary negotiations. They were clearly intended to be non-binding statements of intent which would become binding only when a written contract was finalized. If a contract had been executed, H & G would not need to rely on these preliminary negotiations in support of an estoppel claim. However, the representations which it allegedly relied on are not the cause of its harm. H & G complains that GECC represented it would consummate the transaction within certain general parameters. GECC did so; H & G's real complaint is that it was not part of the deal when the transaction was completed. H & G was not left out because GECC failed to consummate the transaction on substantially the terms that were discussed. Rather, H & G was frozen out because it was fired by its own client when negotiations stalled due to differences over the exact purchase price. It is clear from the complaint and its exhibits that the exact purchase price was subject to further negotiations, so H & G cannot complain of GECC's insistence on the $320,000,000 figure, which H & G admits is "substantially" the same as the price originally discussed. What H & G is left with, then, is its displeasure with its client for being fired when the negotiations stalled. To the extent this termination was wrongful, H & G may have a claim against its client.[FN9] To the extent it was caused by tortious interference from GECC, it may have a claim against GECC under Count II, if the essential elements are satisfied. At least as alleged in this complaint, H & G does not have a remedy on the basis of promissory estoppel. However, the Court will dismiss Count I without prejudice to allow H & G to replead, assuming that H & G may do so within the strictures of Fed.R.Civ.P. 11.

REPORT AND RECOMMENDATION

ELAINE E. BUCKLO, United States Magistrate.

Hayes & Griffith, Inc. ("H & G") has filed a two count complaint seeking damages from GE Capital Corporation ("GECC"), allegedly stemming from both parties' participation in the leveraged buyout of a division of Wickes Companies, Inc. (" Wickes") by management employees. H & G is a Delaware corporation with its principal place of business in Chicago, Illinois. Complaint ¶ 1.[FN1] GECC is a New York corporation with its principal place of business in Stamford, Connecticut. Since the amount in controversy is greater than $10,000.00, jurisdiction is proper based on diversity of citizenship, and venue is proper in this district. This matter has been referred to me for a report and recommendation on the defendant's motion to dismiss H & G's complaint for failure to state a claim upon which relief can be granted.

Facts [FN2]

The complaint alleges that H & G is an investment banking firm, and that GECC provides financing for leveraged acquisitions through a division, Acquisition Funding Corporation, which analyzes and recommends corporate acquisition

transactions to GECC for financing. Complaint ¶ ¶ 1-3. On February 27, 1987, H & G entered into a written agreement with three management employees ("Management Group") of Wickes. According to the agreement, attached as Exhibit A to H & G's complaint, H & G agreed to serve as the exclusive investment banker representing the Management Group in its contemplated purchase of Wickes Lumber, a division of Wickes. H & G agreed:

***4** "to develop a business plan suitable for presentation to a financial institution, develop management strategy for the purchase of the Division and sale of certain of its assets, develop a strategy for the negotiation with the Company and perform other reasonable and necessary services."

February 27, 1987 letter agreement between Management Group and H & G, ¶ 2, Exhibit A to Complaint. In addition, H & G was to contact financial institutions that had been approved in advance by the Management Group to begin discussions of the financing of the contemplated leveraged buyout. *Id.*

The letter agreement provided that H & G's work leading to a determination of whether the proposed buyout was viable would be done without cost or expense to the Management Group. H & G's fees were to be negotiated once it had been determined that the leverage buyout was viable. *Id.* at ¶ 4. The agreement also provided that if:

"H & G concludes and advises the Management Group that the transaction can be completed either in its presently contemplated form or in a form then specifically proposed by H & G in writing and the Management Group thereafter breaches its obligations under this letter by terminating the services of H & G, selects another investment banker and, within 12 months of the date of this letter, closes a transaction in substantially the same form that H & G has so advised can be completed, H & G shall be entitled to an amount equal to 35% of the investment banking fees paid to such other firm." [FN3]

Id.

The complaint alleges that throughout the spring of 1987, pursuant to its agreement with the Management Group, H & G evaluated the proposed buyout, established a range of purchase prices, and contacted numerous financial institutions in an effort to find financing for the Management Group's proposed acquisition of Wickes Lumber, and concluded that the proposed buyout of Wickes Lumber by management was viable and could be financed. Complaint ¶¶ 7-8. After continuing these efforts throughout the summer of 1987, by November, 1987, H & G had developed a strategy for the acquisition of Wickes Lumber at a purchase price in the range of $300 million to $350 million with a targeted closing date prior to January 31, 1988. Complaint ¶ 10. The complaint also alleges that, at this time, the Bank of Boston was an interested financing institution, and Bain Venture Capital was an interested equity partner. Both had indicated to H & G and to the Management Group that they were ready, willing and able to provide the financing and capital needed for the proposed buyout. *Id.*

However, in mid-November, 1987, H & G learned that GECC had contacted Wickes on a number of occasions, without the Management Group's knowledge, to discuss financing the proposed buyout. H & G and GECC then met several times,

"as a result of expressed preference by Wickes' senior staff members to have the acquisition by [the Management Group] financed by GECC, with which Wickes had had a prior business relationship through the financing of several transactions."

***5** Complaint ¶ 12. The complaint also alleges that during these discussions, GECC represented to H & G that:

"(a) it could provide all of the financing needs (except for the equity which was to made available through Bain) for the acquisition within the short time frame demanded; (b) it would agree to payment of a 1% transaction fee to H & G for its investment banking services; (c) it would agree to payment of a fee for Bank of Boston because of the resources and time Bank of Boston devoted the

transaction; (d) it could consummate the transaction on substantially the same terms (i.e. management ownership interest, etc.) to which Bank of Boston had agreed; and (e) it could perform its obligations and duties timely on account of H & G's positioning of the deal and GECC's close relationship with Wickes."

Complaint ¶ 13. The complaint further alleges that based on these representations, H & G recommended to the Management Group that the proposed buyout be financed through GECC rather than through Bank of Boston. The Management Group accepted this recommendation. Complaint ¶ 13.

The complaint alleges that after further negotiations, GECC submitted a written proposal to the Management Group (now incorporated as HHB & M, Incorporated) that provided that GECC would finance the acquisition based on a $350 million purchase price, and by which GECC was to receive stock warrants that would enable it to acquire 35% of the fully diluted common equity of Wickes Lumber. This proposal is attached to the complaint as Exhibit B.[FN4] Complaint ¶ 14. The proposal states that "it is not intended to and does not create any binding legal obligation on the part of either party." Proposal, p. 6, ¶ 2, Exhibit B to Complaint. The proposal goes on to state that any commitment by GECC to finance the buyout must be evidenced in a separate writing and must be preceded by the completion of all business and legal due diligence. *Id.*

According to the complaint, on December 15, 1987, Management Group and Wickes executed a letter of intent that summarized the proposed buyout based on a $350 million purchase price,[FN5] and which was to be financed by GECC. The complaint alleges that the December 15, 1987 letter of intent was not contingent upon securing financing. Complaint ¶ 15. However, the letter (attached to the complaint as Exhibit C) states that except for six paragraphs dealing with due diligence, exclusivity, and an agreement to continue to negotiate in good faith, "this letter is not intended to create a binding, legal obligation on the part of either the [Management Group] or Wickes, which obligation will not exist until the definitive agreements are executed and delivered, but merely represents the present intention of the parties hereto. " December 15, 1987 Letter of Intent between Wickes and Management Group at p. 4, Exhibit C to Complaint. Wickes allegedly told H & G, and GECC agreed, that there was no need for a more formal financing commitment letter at that time, and that its December 11 proposal was sufficient and could be relied upon. Complaint ¶ 16. The complaint also alleges that on December 23, 1987, both GECC and the Management Group orally agreed that H & G would receive a 1% fee for services it had rendered in connection with the acquisition. Complaint ¶ 17.

***6** According to the complaint, negotiations continued from mid-December, 1987 to mid-January, 1988, when all documents for closing were nearing completion. However, on January 15, 1988, H & G learned that GECC would not agree to finance the buyout at $350 million, and instead demanded that the purchase price be reduced to $320 million. Complaint ¶ 19. GECC told H & G that the Wickes chairman and another senior staff member had agreed that the price should be lowered, and that Wickes would agree to the price reduction as well as to a change in position on stock warrants. Complaint ¶ 19. GECC consistently assured H & G and the Management Group that the acquisition would be closed by January 29, 1988, and that Wickes would accept the reduced purchase price. Complaint ¶ 20. However, on January 19, H & G learned that Wickes had rejected the renegotiated deal. Complaint ¶ 21. On January 22, 1988, GECC submitted a different proposal to Wickes, which was also rejected after several days of negotiations. Afterward, GECC ignored H & G's efforts to contact it, and the proposed deal collapsed only days before it was to close. Complaint ¶ 22. At that point, the Management Group notified H & G that it would seek other investment bankers, because it had lost confidence in H & G because of its inability to complete the proposed buyout. Complaint ¶ 23. However, the Management Group later completed the buyout in April, 1988, on substantially the same financing and capitalization terms as outlined in the December 11 proposal and the December 15 letter of intent,

except that the final purchase price was for $320 million. While GECC was the lender and a future equity participant in the completed buyout, H & G did not participate in this transaction and did not receive its 1% transaction fee. Complaint ¶¶ 24-25.

Promissory Estoppel

Under Illinois law,[FN6] promissory estoppel requires that there be:

"(1) a promise, unambiguous in its terms, (2) which defendant expected and could have foreseen would be relied upon by plaintiffs, (3) who relied upon the promise, (4) to their detriment."

Moore v. Illinois Bell Telephone Company, 155 Ill.App.3d 781, 508 N.E.2d 519, 521, 108 Ill.Dec. 358, 360 (2nd Dist.1987).[FN7] In its complaint, H & G identifies five representations that GECC allegedly made to H & G, and on which H & G allegedly relied to its detriment in severing its relationship with the Bank of Boston and in failing to pursue other avenues of financing for the buyout of Wickes Lumber. First, H & G alleges that GECC promised that "it could provide the financing needs ... for the acquisition within the short time frame demanded." Complaint ¶ 28(a). According to the complaint, this promise was made in mid to late November, 1987, during initial discussions between H & G and GECC. *See* Complaint ¶¶ 12-13. In the first place, H & G fails to allege that this promise was false or that it otherwise "detrimentally relied" on the alleged promise. Notably, the promise states only that GECC stated that it "could" provide "financing needs," not that it "would" do so. Elsewhere in the complaint, H & G alleges that in fact GECC did finance the acquisition, in April, 1988, and nowhere does it allege that GECC could not have done so earlier, so apparently this is a true statement. The alleged promise is not made actionable by the additional words "within the short time frame demanded." The statement itself does not refer to any time, and while the complaint elsewhere (¶ 10) refers to a targeted closing date "prior to January 31, 1988," there is again no allegation in the complaint that indicates GECC could not have accomplished the financing within this time table.

*7 Moreover, in seeking recovery under a promissory estoppel theory, H & G must show that GECC's promise was unambiguous. *Phillips v. Britton,* 162 Ill.App.3d 774, 516 N.E.2d 692, 700, 114 Ill.Dec. 537, 545 (5th Dist.1987). In this case, GECC's statement that it could provide all of the financing needs for the Management Group's acquisition of Wickes Lumber within the short time frame demanded is merely a statement of intention, and not a promise that can be enforced. *See Levitt Homes, Incorporated v. Old Farm Homeowner's Association,* 111 Ill.App.3d 300, 444 N.E.2d 194, 204, 67 Ill.Dec. 155, 165 (2nd Dist.1982) (statements by subdivision developer's sales persons that the remainder of homes to be built in the subdivision would be comparable to ones already built expressed only the intention to build some more houses). Further, at that point in time, H & G had only developed a price range of $300 million to $350 million for the purchase of Wickes Lumber, and a targeted closing date "prior to January 31, 1988." Complaint ¶ 10. Given the uncertain status of the buyout in mid-November, 1987, GECC's alleged representation that "it could provide all of the financing needs ... for the acquisition [of Wickes Lumber] within the short time frame demanded" was not the type of unambiguous promise that can be enforced under a promissory estoppel theory.[FN8]

H & G also alleges that GECC represented that "it would consummate the transaction on substantially the same terms (as to capitalization and management equity position, etc.) to which Bank of Boston had agreed." Complaint ¶ 28.[FN9] This is similarly a statement of intention, and thus not an unambiguous promise. Again, also, there is no allegation that the transaction did not close on " substantially the same terms ... as to which Bank of Boston had agreed." Indeed, in its complaint H & G elsewhere alleges that the two transactions were substantially the same. Complaint ¶ 24. Accordingly, this alleged representation cannot serve as the basis for a promissory estoppel cause of

action.

H & G also claims that it relied on GECC's alleged oral representation, in December, 1987, that it would finance the transaction "at a purchase price of $350,000,000 on substantially the same terms and conditions" as set forth in its December 11, 1987 letter of intent. Complaint ¶ 28. However, the reasonableness of H & G's alleged reliance on this oral representation, which occurred after at least two written documents concerning this transaction were presented, specifically stating that they did not create binding obligations, *see* Exhibits B and C to Complaint, is foreclosed by *Runnemede Owners, Inc. v. Crest Mortgage Corporation,* 861 F.2d 1053, 1059 (7th Cir.1988). In that case, the court noted that reliance on oral assertions that are clearly contrary to a contemporaneously executed written contract is not reasonable. *Id. See also St. Joseph Data Service v. Thomas Jefferson Life Insurance Co.,* 73 Ill.App.3d 935, 393 N.E.2d 611, 617-18, 30 Ill.Dec. 575, 581-82 (4th Dist.1979) (in a promissory estoppel cause of action, allegations of reliance that are inconsistent with a written contract can be disregarded). In this case GECC's December 11 financing proposal states that, except for details concerning a deposit, GECC's expenses, indemnification, and confidentiality, the December 11 letter "is not intended to and does not create any binding legal obligation on the part of either party." Exhibit B to Complaint at p. 6, ¶ 2. Given this clear disclaimer of binding effect, H & G could not reasonably rely on GECC's alleged oral representation that the proposal was a binding commitment to finance the buyout at $350 million.

***8** H & G also alleges that GECC in November or early December, 1987, stated that it "would agree to payment of a 1% transaction fee to H & G for its investment banking services." Complaint ¶ 28. Given the fact that this alleged oral representation occurred during preliminary discussions with GECC, at a time when H & G had developed only a range of purchase prices for Wickes Lumber, *see* Complaint ¶ 10, this alleged statement was no more than a statement of GECC's and H & G's then-current expectations regarding the transaction. *See Yardley v. Yardley,* 137 Ill.App.3d 747, 484 N.E.2d 873, 879, 92 Ill.Dec. 142, 148 (2d Dist.1985) (statement in letter that "we believe that an outright distribution would be appropriate" is " no more than a statement of ... current expectations" and not actionable under a theory of promissory estoppel).

In addition, the allegation that on December 23, 1987, GECC orally agreed that H & G would receive a 1% fee for services it had rendered in connection with the buyout cannot form the basis for a promissory estoppel cause of action. Promissory estoppel requires detrimental reliance on such a promise by the party to whom it was made. *Moore v. Illinois Bell, supra,* 108 Ill.Dec. at 360. By December 23, 1987, H & G had already severed its relationship with the Bank of Boston, and was no longer pursuing any other avenues of financing. *See* Complaint ¶ 13. Furthermore, nowhere does the complaint allege that H & G had the right to pick the financial institution that would finance the purchase. Nothing in the February 27, 1987 agreement, attached to the complaint, appears to provide that right. Indeed, H & G's complaint alleges that after H & G had obtained a "ready, willing and able" lender in the Bank of Boston, Complaint ¶ 10, "as a result of expressed preference by Wickes senior staff members to have the acquisition by Management financed by GECC," Complaint ¶ 12, it began discussions with GECC. If H & G switched lenders because Wickes and not it was making the decision on this issue, it cannot have changed its position to its detriment because of an alleged promise to pay a 1% fee for services.

I conclude that none of the representations alleged by H & G can form the basis for a promissory estoppel cause of action. Accordingly, I conclude that Count I of H & G's complaint, alleging promissory estoppel, fails to state a claim upon which relief can be granted, and I recommend that GECC's motion to dismiss Count I be granted.

Tortious Interference With Advantageous Business Relation

In Count II, denoted tortious interference with

advantageous business relation, the complaint alleges that based on the facts alleged in Count I, GECC was aware of the favorable prospective business advantage that H & G enjoyed with the Management Group and other entities in regard to the proposed buyout of Wickes Lumber. The complaint alleges that "without privilege to do so," GECC caused the Management Group to terminate the participation of H & G in its acquisition of Wickes Lumber. Complaint ¶¶ 33-34.

***9** Under Illinois law, a cause of action for tortious interference with a prospective economic expectancy:

"must rest upon a plaintiff's reasonable expectations of entering into a valid business relationship, a defendant's knowledge of the expectancy and intentional and malicious interference with the expectancy without just cause, to plaintiff's damage."

Disher v. Fulgoni, 161 Ill.App.3d 1, 514 N.E.2d 767, 781, 112 Ill.Dec. 949, 963 (1st Dist.1987). Within the context of a claim for tortious interference with prospective economic advantage, malice is defined as an intent to do wrongful harm and injury without just cause. *Id.* at 964. A plaintiff alleging such a cause of action must allege facts that "indicate that the defendants acted with the purpose of injuring plaintiff's expectancies." *Crinkley v. Dow Jones and Company,* 67 Ill.App.3d 869, 385 N.E.2d 714, 722, 24 Ill.Dec. 573, 581 (1st Dist.1978). *See also Harsha v. State Savings Bank,* 346 N.W.2d 791, 799 (Iowa 1984) (interference with prospective business relationships requires a showing that the actor had a purpose to injure or destroy the plaintiff's business); *Perry & Co. v. New South Insurance Brokers of Georgia, Inc.,* 182 Ga.App. 84, 354 S.E.2d 852, 857 (1987) (same); *K & K Management v. Lee,* 316 Md. 137, 557 A.2d 965, 976 (1989) (same); *SHV Coal, Inc. v. Continental Grain Co.,* 376 Pa.Supr. 241, 545 A.2d 917, 921 (1988) (same). Further, "intended but purely incidental interference resulting from the pursuit of the defendant's own ends by proper means" is not actionable. *Bank Computer Network Corporation v. Continental Illinois National Bank and Trust Company,* 110 Ill.App.3d 492, 442 N.E.2d 586, 593, 66 Ill.Dec. 160, 167 (1st Dist.1982) (quoting Prosser, *Law of Torts* § 130, at 952 (4th Ed.1971)).

GECC argues that H & G has not alleged that GECC intended to interfere with H & G's alleged expectancy. I agree.

In the complaint, ¶ 26, H & G alleges that GECC

"knowingly misrepresented its position and its intention to complete the transaction in level of approval received, and led all parties to believe that they would fund the acquisition at this price, and then informed H & G and other parties Wickes would agree to a reduced price, when in fact it had not and did not."

While this paragraph may allege that GECC used improper means in negotiating its financing of the proposed buyout of Wickes Lumber, this paragraph does not allege that its intent in so doing was to interfere with H & G's business relations. Similarly, in the complaint, ¶ 34, H & G alleges that:

"[b]y its actions heretofore described, GECC without privilege to do so, caused and induced Management and prospectively Bank of Boston and the investment and financial community to cease or diminish transactions favorable to H & G, including the participation of H & G in the acquisition of Wickes Lumber Division and future sale of certain of its assets."

Again, this paragraph does not allege any facts that indicate that GECC's intent was to interfere with H & G's business relations. While one can infer from the complaint that H & G may have been injured because GECC failed to finance the buyout in January, 1988, H & G has not alleged that its injury was anything more than an incidental result of GECC's pursuit of its own ends. *Bank Computer v. Continental Illinois, supra,* 66 Ill.Dec. at 167. *Compare Derson Group, Ltd. v. Right Management Consultants, Inc.,* 683 F.Supp. 1224, 1229 (N.D.Ill.1988) (denying motion to dismiss tortious interference with business relationship count

because complaint alleged that defendant knowingly and intentionally interfered with plaintiff's business). I conclude that, taking the factual allegations in the complaint and the inferences that can be drawn from those allegations in the light most favorable to H & G, Count II fails to state a claim for tortious interference with prospective business advantage, and I recommend that GECC's motion to dismiss Count II be granted with leave to amend to properly allege a claim for tortious interference with advantageous business relation, assuming H & G can do so consistent with Rule 11, Fed.R.Civ.P.

FN1. The Magistrate's Report and Recommendation is attached hereto as Exhibit A.

FN2. Analysis of H & G's complaint has been made more difficult by its vagueness with respect to those representations. For instance, the dates of the representations are not always specified-rather, the complaint alleges that they were made " repeatedly and consistently." (Complaint, ¶ 28.) Furthermore, the exact content of the representations is not always clear, as evidenced by the "could"/"would" problem. (*See infra* at p. 3)

FN3. Direct quotes are from the complaint but are not alleged to be word-for-word quotations of GECC's representations.

FN4. *See also Goldstick v. ICM Realty,* 788 F.2d 456, 462 (7th Cir.1986). H & G argues that *Goldstick* supports its position because the court found a promise that " something would be worked out" sufficient to support an estoppel claim. However, the court in *Goldstick* found that the promise was capable of being interpreted as an unambiguous statement that the defendant would agree, at the least, to certain minimum terms, given the factual context alleged. The Court does not find the allegations in H & G's complaint to provide similar support for an unambiguous promise in this case.

FN5. Although it did so later than the end of January, as was originally contemplated, the alleged representation does not specify a date. Furthermore, to the extent H & G complains that the "time frame" aspect of the statement is significant, the Court agrees with the Magistrate that the statement as alleged was not a promise but rather a description of GECC's ability or a statement of GECC's then-current expectations. *See Yardley v. Yardley,* 137 Ill.App.3d 747, 484 N.E.2d 873, 879, 92 Ill.Dec. 142, 148 (2d Dist.1985). In H & G's brief, it asserts that it was essential for the deal to close by the end of January. However, there is no allegation in the complaint of an unambiguous promise to close a deal by January 31; indeed, it is difficult to imagine that such a promise could be alleged because it takes at least two parties to close a deal.

FN6. The complaint also alleges that "[o]n or about December 23, 1987 both GECC and Management orally agreed that H & G would receive a 1% fee for services it rendered in connection with acquisition." (Complaint ¶ 17.) The Court assumes that it is the earlier representation, not the later one, which H & G asserts in support of its promissory estoppel claim. The later representation occurred after H & G had recommended GECC to Management. Furthermore, it was apparently supported by consideration, and presumably if H & G were suing based on this representation it would have brought its action as breach of contract.

FN7. The letter continues:

This letter is not and is not to be construed as a commitment, offer, agreement-in-principle or agreement ("Commitment") by GECC to provide financing. Any Commitment by GECC would be evidenced in a separate writing and would be preceded by the satisfactory completion of all business and legal due diligence, including

evaluations of management, credit review and analysis and a field survey, and the receipt of all requisite approvals by GECC management, and its effectiveness would be conditioned upon the prior execution and delivery of final legal documentation acceptable to all parties and their counsel. This letter may be amended or supplemented only in a writing signed by AFC [a subsidiary of GECC] or GECC.

FN8. H & G suggests that the Court should focus on whether GECC reasonably expected H & G to rely upon GECC's representations, citing *Vincent DiVito, Inc. v. Vollmar Clay,* 179 Ill.App.3d 325, 534 N.E.2d 575, 577, 128 Ill.Dec. 393, 395 (1st Dist.1989); *Swansea Concrete Products, Inc. v. Distler,* 126 Ill.App.3d 927, 467 N.E.2d 388, 81 Ill.Dec. 688 (5th Dist.1984); and *Bank Computer Network Corp. v. Continental Illinois Nat'l Bank,* 110 Ill.App.3d 492, 442 N.E.2d 586, 66 Ill.Dec. 160 (1st Dist.1982). However, because H & G has failed to satisfy other elements of promissory estoppel, the Court need not reach this element.

FN9. GECC states that H & G has received $500,000 in compensation from its client.

FN1. The caption of the complaint denotes H & G as an Illinois corporation. Whether it is an Illinois or Delaware corporation does not affect diversity of citizenship of the parties.

FN2. As always on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the factual allegations in the complaint, as well as the inferences that can be drawn from those factual allegations, must be accepted as true for the purposes of this motion.

FN3. Since, as will be seen shortly, the acquisition of Wickes Lumber by the Management Group finally took place in April, 1988, more than 12 months from the date of this letter agreement, this clause restricting H & G's ability to seek damages from the Management Group to a 12-month period from the date of the letter probably explains why H & G is not seeking damages from the Management Group in this lawsuit.

FN4. I note that while the complaint alleges that GECC's proposed financing is based on a $350 million purchase price, the proposal itself does not specifically mention that figure.

FN5. Actually, the December 15, 1987 letter provides that the purchase price will be "based upon an estimated Effective Date net book value of $250,000,000 or *such other amount as shall be agreed upon,*" plus $100,000,000. Exhibit C to Complaint at p. 1, ¶ 3 (emphasis added).

FN6. Both parties agree that Illinois law applies to this action.

FN7. H & G cites *Payne v. Mill Race Inn,* 152 Ill.App.3d 269, 504 N.E.2d 193, 199, 105 Ill.Dec. 324, 330 (2nd Dist.1987) in support of its estoppel claim. *See* Memorandum in Opposition at 9. However, that case deals with the doctrine of equitable estoppel. *Payne v. Mill Race Inn, supra,* 105 Ill.Dec. at 330. Equitable estoppel is a doctrine that prevents a party from asserting his or her rights where the assertion of those rights would work a fraud or an injustice on another party, *Martin Brothers Implement Company v. Diepholz,* 109 Ill.App.3d 283, 440 N.E.2d 320, 324, 64 Ill.Dec. 768, 772 (4th Dist.1982), and is essentially a tort doctrine. *Goldstick v. ICM Realty,* 788 F.2d 456, 463 (7th Cir.1986). In this case, H & G is not using its estoppel claim to prevent GECC from asserting any rights. Rather, it is affirmatively seeking to enforce alleged promises made by GECC to H & G. Thus, Count I is properly characterized as a promissory estoppel claim.

FN8. H & G also argues in its brief, at 14-15, that GECC's alleged promise to finance the buyout was "consistent with custom and usage in the industry." However, there are no allegations in the complaint regarding H & G's reliance on industry custom, or as to what industry custom is. Arguments made in a brief not based on allegations in the complaint are not properly before me. *Westland v. Sero of New Haven, Inc.*, 601 F.Supp. 163, 166 (N.D.Ill.1985).

FN9. In paragraph 13 of its complaint, H & G alleges only that Wickes said it "could " accomplish this goal.

N.D.Ill.,1989.
Hayes & Griffith, Inc. v. GE Capital Corp.
Not Reported in F.Supp., 1989 WL 135246 (N.D.Ill.)

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