STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

IN RE ITC HOLDINGS CORPORATION SHAREHOLDER LITIGATION

Case No. 16-151852-CB
Hon. James M. Alexander

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OPINION AND ORDER RE: THE FORTIS AND ITC DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

This matter is before the Court on the Fortis and the ITC Defendants' motions for summary disposition. ITC Holdings Corporation is a publicly traded Michigan company based in Novi that is the largest independent electric transmission company in the United States. Defendants are the directors of ITC and a set of companies that have agreed to acquire ITC.

Generally, this case was brought on claims that the Director Defendants owe fiduciary duties of loyalty and care to all ITC shareholders. In the context of this proposed acquisition, Plaintiff claims that said fiduciary duties require that the Directors "to act reasonably to obtain the best value for the company's shareholders and to disclose all material facts in their possession." Plaintiff claims, however, that the Directors "failed to do either of those things" – instead catering to their own interests.

Specifically, Plaintiff alleges that the Directors protected themselves in the deal by "ensuring the Board and ITC management would be paid ***all cash*** for their vested and unvested stock options, restricted stock and performance shares," along with other cash payments, in an amount totaling over $133 million in cash. But, when it comes to ITC public shareholders, Plaintiff claims that Fortis is

only offering 50% cash and another 50% in Fortis stock as consideration. As a result, Plaintiff claims that ITC's public shareholders bear the risk of depreciation in Fortis' shares – while ITC's directors and management collect full cash payments. Plaintiff also alleges that the Defendants withheld material information about the proposed acquisition from stockholders.

On these general allegations, Plaintiff asserts claims both "derivatively on behalf of ITC Holdings" and "individually and on behalf of all other similarly situated shareholders of ITC." (First Amended Complaint at ¶ 1). Specifically, Plaintiff alleges claims for (Count I) Breach of Fiduciary Duty against the Individual Defendants;[1] (Count II) Aiding and Abetting Breaches of Fiduciary Duty against the Fortis Defendants; (Count III) a derivative claim for Breach of Fiduciary Duty against the Individual Defendants; and (Count IV) a derivative claim for Unjust Enrichment against the Individual Defendants.

Plaintiff claims that he made a demand on the Board on February 11, 2016 under MCL 450.1493a, which generally requires a 90-day period between a written demand and the filing of any derivative action. But Plaintiff filed the present suit on March 4, 2016 – just 22 days later – claiming that he was "[c]oncerned by the risk of irreparable harm" of an "imminent shareholder vote and closing of the Proposed Acquisition" by not filing the suit when he did.

Both the ITC and Fortis Defendants now move for summary disposition based, in part, on the argument that Plaintiff lacks standing to pursue his claims because the same are derivative (not direct) in nature. As a result, Defendants argue, because Plaintiff failed to comply with the 90-day statutory waiting period, he lacks standing to file the present lawsuit.

The ITC Defendants also argue that they are entitled to summary disposition because (1)

1 The "Individual Defendants" are ITC Board members. They are Joseph Welch, Albert Ernst, Christopher Franklin, Edward Jepsen, Dave Lopez, Hazel O'Leary, Thomas Stephens, G. Bennett Stewart III, and Lee Stewart.

Plaintiff's claims are subject to an exculpatory provision, (2) the business judgment rule bars Plaintiff's claims, (3) Plaintiff's criticisms of "reasonable and customary deal protections" do not state a claim, and (4) Plaintiff's claims of material misstatements and omissions in Fortis's F-4 are meritless. And the Fortis Defendants also argue that they are entitled to summary of Plaintiff's aiding and abetting breach of fiduciary duty claim for a variety of other reasons.

The ITC Defendants seek summary under MCR 2.116(C)(8), and the Fortis Defendants move for summary under (C)(5) and (C)(8).

A (C)(5) motion challenges whether a plaintiff lacks the legal capacity to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). And a (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When considering a (C)(8) motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corr*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). Additionally, when considering a (C)(8) motion, the court considers only the pleadings. MCR 2.116(G)(5).[2]

I. Direct or Derivative?

It makes sense to first address the argument that Plaintiff lacks standing to pursue his claims because he failed to comply with MCL 450.1493a before filing his derivative claims. The cited statute provides (emphasis added):

A shareholder may not commence a **derivative** proceeding until all of the following

2 But "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

have occurred:

> (a) A written demand has been made upon the corporation to take suitable action.
>
> (b) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

As stated, Plaintiff issued his written demand on February 11, 2016 and filed the present suit 22 days later (on March 4, 2016). Defendants claim that all of Plaintiff's claims are derivative in nature, and as a result, his failure to comply with the 90-day waiting period before filing suit is fatal.

Plaintiff responds that Defendants' argument fails because "most of [his] claims are, in fact, direct." And assuming arguendo they weren't, Plaintiff claims that "the 90-day limit does not apply to [his] derivative claims because waiting for the 90-day period to expire would result in irreparable injury."

Initially, the Court notes that the term "derivative proceeding" is defined by the Business Corporation Act as "a civil suit **in the right of** a domestic corporation or a foreign corporation that is authorized to or does transact business in this state." MCL § 450.1491a(a) (emphasis added).

Indeed, "a suit **to enforce corporate rights** or **to redress or prevent injury to the corporation**, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Michigan Nat Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989) (emphasis added). But "[t]he general rule is inapplicable where the individual shows a violation of a duty owed directly to him," i.e., a direct claim. *Id.*[3]

3 See also *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003), reasoning:

> The doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee. *Michigan Nat'l Bank v. Mudgett*, 178

In contrast, "where the alleged injury to the individual results **only from the injury to the corporation**, the injury is merely **derivative** and the individual does not have a right of action against the third party." *Michigan Nat Bank*, 178 Mich App at 680 (emphasis added).[4]

Based on the foregoing, the Court finds that the proper focus when examining whether an action presents direct or derivative claims is who suffered the alleged injury – the shareholder directly or the corporation.

This finding is also consistent with the Delaware law – which both sides claim that Michigan Courts look to for guidance on issues of unsettled Michigan corporate law.[5] In *Parnes v Bally Entmt Corp*, 722 A2d 1243, 1245 (Del 1999), the Supreme Court of Delaware considered whether a shareholder class action challenge to a merger was a direct or derivative claim.

The *Parnes* Court reasoned:

> A derivative claim is one that is brought by a stockholder, on behalf of the corporation, to recover for harms done to the corporation. . . .
>
> Stockholders may sue on their own behalf (and, in appropriate circumstances, as representatives of a class of stockholders) to seek relief for direct injuries that are independent of any injury to the corporation. *Parnes*, 722 A2d at 1245.

Mich.App. 677, 679, 444 N.W.2d 534 (1989). [But] an exception exists when the individual can show a violation of a duty owed directly to the individual that is independent of the corporation.

4 Further, Black's Law Dictionary (10th ed.) defines "Direct Action" as "A lawsuit to enforce a shareholder's rights against a corporation." While "Derivative Action" is defined as "A suit by a beneficiary of a fiduciary **to enforce a right belonging to the fiduciary**; esp., **a suit asserted by a shareholder on the corporation's behalf** against a third party (usu. a corporate officer) because of the corporation's failure to take some action against the third party." Black's Law Dictionary (10th ed.) (emphasis added).

5 Both the Fortis Defendants and Plaintiff cite to *Glancy v Taubman Centers, Inc*, 373 F3d 656, 674 (CA 6 2004) for this proposition, and the ITC Defendants cite numerous Delaware cases. The *Glancy* Court noted: "There is no Michigan corporate law on this specific question. In the absence of clear Michigan law on matters of corporate law, Michigan courts often refer to Delaware law." *Glancy*, 373 F3d at 674, n. 16; citing, inter alia, *Russ v. Fed. Mogul Corp,* 112 Mich App 449; 316 NW2d 454, 457 n. 1 (1982).

The *Parnes* Court acknowledged there is often difficulty in determining "whether a stockholder is challenging the merger itself, or alleged wrongs associated with the merger, such as the award of golden parachute employment contracts." *Id*. at 1245. But "[i]n order to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price." *Parnes*, 722 A2d at 1245.[6] This, Plaintiff claims, is precisely the case here.

Some years after *Parnes*, the Supreme Court of Delaware further clarified the proper analysis to distinguish between direct and derivative claims, holding "[t]he analysis must be based solely on the following questions: Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy?" *Tooley v Donaldson, Lufkin & Jenrette, Inc*, 845 A2d 1031, 1035 (Del 2004). As stated, this analysis is consistent with the "injury" focus of Michigan courts. See *Michigan Nat'l Bank*, 178 Mich App at 679-680.

As the *Tooley* Court concluded, "The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Tooley*, 845 A2d at 1039.

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6 Other states have similarly held. See *Rael v Page*, 147 NM 306, 311; 222 P3d 678, 683 (N.M. 2009) (concluding "a stockholder who directly attacks the fairness or validity of a merger alleges a direct injury to the stockholders, not the corporation"); *Higgins v New York Stock Exch, Inc*, 10 Misc 3d 257, 274; 806 NYS2d 339 (N.Y. Sup. Ct. 2005) (holding that claims challenging the fairness of a merger tainted by conflicts of interest and at an unfair price "have sufficiently stated a direct claim"); *Shenker v Laureate Ed, Inc*, 411 Md 317, 328-29; 983 A2d 408, 414 (Md. App. 2009) (holding "where corporate directors exercise non-managerial duties . . . such as negotiating the price that shareholders will receive for their shares in a cash-out merger transaction, after the decision to sell the corporation already has been made, they remain liable directly to shareholders for any breach of those fiduciary duties"); and *Elloway v Pate*, 238 SW3d 882, 900 (Tex App 2007) (citing *Parnes*, 722 A2d 1243 with approval and reasoning "A stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such claim even after the merger at issue has been consummated. To state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty in unfair dealing and/or unfair price.").

Plaintiff claims that the Individual Defendants owed him the duty to "disclose fully and fairly all material information within the board's control when it seeks shareholder action (in this case, a shareholder vote)," citing *Berman v Gerber Products Co*, 454 F Supp 1310, 1319 (WD Mich 1978) (reasoning "There can be no doubt that corporate officers and directors have a high fiduciary duty of honesty and fair dealing with shareholders. Under the applicable Michigan law, it is clearly recognized that directors and officers are fiduciaries, and their dealings with the corporation and its stockholders are rigorously scrutinized."), citing *Thomas v Satfield Co*, 363 Mich 111; 108 NW2d 907 (1961).[7]

Plaintiff alleges that, despite requesting the same, the Individual Defendants failed to disclose "any information about the discussions or negotiations that led to the Board and Company management receiving all-cash consideration in exchange for their stock options, restricted stock and performance shares when public shareholders received a combination of cash and Fortis shares."

Plaintiff further alleges that there were no disclosures about "how and when negotiations occurred regarding the agreement that all members of ITC's executive management would continue in their current positions at the surviving company after the Proposed Acquisition and that Welch would become a director of Fortis if he ceased serving as ITC's CEO."

Plaintiff argues that these omissions are material because "if discussions regarding individual opportunities were taking place at the same time as discussions on the substantive (e.g., price) terms of the Proposed Acquisition, a reasonable shareholder would want to know of the obvious possibility

7 See also *Chen v Howard-Anderson*, 87 A3d 648, 687 (Del Ch 2014), which appropriately reasoned:

> When directors submit to the stockholders a transaction that requires stockholder approval, such as a merger, [t]he directors of a Delaware corporation are required to disclose fully and fairly all material information within the board's control. A fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. (internal citations and quotations omitted).

that the Director Defendants effectively agreed to a lower payment to the Company's public shareholders in exchange for their own private post-merger benefits." The Court agrees.

Based on the foregoing, accepting all well-pled allegations as true and construing them in a light most favorable to Plaintiff, the Court finds that Plaintiff has adequately pled the breach of a fiduciary duty owed **directly** to himself (and other similarly situated shareholders).

With respect to the alleged injury, Plaintiff claims that he would receive half cash and half Fortis stock in the Proposed Merger. As a result, Plaintiff alleges that **he** bears the risk of a Fortis stock decline. This allegation of harm is personal to Plaintiff.

Based on the foregoing, the Court finds that Plaintiff's First Amended Complaint largely alleges that the board breached a duty owed to him (and other similarly situated stockholders) and he suffered an injury that is independent of any alleged injury to the corporation.

The Court also notes that Defendants' reliance on *Elsman v Standard Federal Bankcorporation*, unpublished opinion per curiam of the Court of Appeals, issued March 26, 1999 (Docket No. 206512) is misplaced because the same is distinguishable from the present case. In *Elsman*, "plaintiffs alleged that defendants engaged in mismanagement, waste of corporate assets, and diminution of stock value." As a result of the defendant director's mismanagement and waste, the plaintiffs claimed they were harmed by the diminution in stock value.

Thus, because the plaintiffs alleged harm to the corporation that ultimately affected them as shareholders, the *Elsman* panel's conclusion (that the "plaintiffs' claims are derivative inasmuch as they allege violations of duties owed to the corporation that caused injury to the corporation itself") is consistent with the law applied by this Court. *Elsman* does not demand a different conclusion in this case.

For all of the above reasons, the Court concludes that Plaintiff's claims are largely direct in nature, and his failure to wait the 90-day period before filing suit does not rob him of standing.

II. Irreparable Harm Exception.

As stated, Plaintiff's First Amended Complaint asserts claims both "derivatively on behalf of ITC Holdings" and "individually and on behalf of all other similarly situated shareholders of ITC." (First Amended Complaint at ¶ 1).

With respect to derivative claims, Plaintiff argues that a "narrow subset" of his claims are, in fact, derivative. As an example, Plaintiff alleges that the Merger Agreement "contains a termination and expense fee provision that requires the Company to pay Fortis $245 million if the Proposed Acquisition is terminated in favor of a superior proposal." Should the Court enjoin said provision, then the benefit of not having to pay said money would accrue to the company, which would make the same derivative in nature.

But, Plaintiff argues, he still did not have to comply with the 90-day waiting period in MCL 450.1493a(b) because said statute provides an exception when "irreparable injury to the corporation would result by waiting for the expiration of the 90-day period." And, Plaintiff claims, conducting the pending shareholder vote without full disclosure amounts to said irreparable injury.

In support, Plaintiff cites to *ODS Techs, LP v Marshall*, 832 A2d 1254, 1262-63 (Del Ch 2003) (internal citations and quotations omitted), which reasoned:

> The threat of an uniformed stockholder vote constitutes irreparable harm. [I]t is appropriate for the court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected. Otherwise this Court is forced to engage in an imprecise and inefficient method by which to remedy disclosure deficiencies. Especially where, as is the case here, the Court must "unscramble the eggs" and conduct a post-hoc reorganization of a standing board.

In their motion, the ITC Defendants argue that "the shareholder vote and closing are not imminent," and therefore, there can be no irreparable injury.

The Court will note that, at an unrelated May 11, 2016 motion hearing, attorney Eric Landau (on behalf of the outside directors) represented to the Court that "in this case, irreparable harm could not have been demonstrated, and cannot now be demonstrated. We have no shareholder vote that has been scheduled."

Oddly, Plaintiff claims that just six days later, on May 17, 2016, "defendants disclosed that they will hold ITC's shareholder meeting to vote on the Proposed Acquisition on June 22, 2016." As a result, Plaintiff argues, had he waited the 90 days to file the present lawsuit, he may have missed his opportunity to stop the proposed shareholder vote.

For the foregoing reason, Plaintiff argues that he complied with MCL 450.1493a's requirements by filing suit when it was necessary to prevent irreparable injury. The Court agrees.

Because the Court is convinced, for purposes of the present motion, that Plaintiff has sufficiently established irreparable injury in the form of proceeding on an imminent shareholder vote, Plaintiff's claims do not fail because he did not wait 90-days post demand to file suit.

III. Exculpatory Provision

The ITC Defendants next argue that MCL 450.1209(1)(c) bars Plaintiff's claims. The cited statute provides:

> The articles of incorporation may contain any provision not inconsistent with this act or another statute of this state, including any of the following:
>
> . . .
>
> (c) A provision eliminating or limiting a director's liability to the corporation or its shareholders for money damages for any action taken or any failure to take any action as a director, except liability for any of the following:

> (i) The amount of a financial benefit received by a director to which he or she is not entitled.

The ITC Defendants argue that ITC's Articles of Incorporation were amended in 2005 in a way that "tracks the statutory language, exculpating the directors for breaches of fiduciary duty except for intentional infliction of harm on the corporation or its shareholders."

But, Plaintiff responds, he pleads said exception in his First Amended Complaint – that the Individual Defendants have received a "financial benefit . . . to which [they are] not entitled" as contemplated by MCL 450.1209(1)(c)(i).

Indeed, accepting all well-pled allegations as true and construing them in the light most favorable to Plaintiff, the Court finds that Plaintiff adequately pleads that the Individual Defendants have received a financial benefit to which they were not entitled, such that the Court cannot conclude that the exculpatory provision found in MCL 450.1209(1)(c) or ITC's articles of incorporation bars Plaintiff's claims.

IV. Business Judgment Rule

The ITC Defendants next claim that the business judgment rule bars Plaintiff's lawsuit. Michigan law recognizes that "directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve." *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978). As stated, this duty includes "a high fiduciary duty of honesty and fair dealing with shareholders." *Berman*, 454 F Supp at 1319.

The Business Judgment Rule doctrine, however, "[i]n the absence of bad faith or fraud, a court should not substitute its judgment for that of corporate directors," and therefore, "[a] court

should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs." *In re Estate of Butterfield,* 418 Mich 241, 255; 341 NW2d 453 (1983).

But in this case, accepting all well-pled allegations as true and construing them in the light most favorable to Plaintiff – which is required when examining summary motions under the (C)(8) standard – the Court finds that Plaintiff adequately alleges bad faith or fraud. Specifically, Plaintiff alleges "that the Individual Defendants had a financial interest in the Proposed Acquisition and that the Individual Defendants acted in the bad faith pursuit of those self-interests at the expense of the public shareholders."

As a result, the Court cannot conclude as a matter of law that Defendants' actions were protected by the business judgment rule, and Defendants' motion on this issue is DENIED.

V. Unfair Process and Disclosure Claims

The ITC Defendants next argue that Plaintiff's unfair process and disclosure claims fail. But, Defendants do so, in part, by challenging Plaintiff's factual allegations – wholly improper under the (C)(8) standard.

For example, referring to Plaintiff's unfair process claims, Defendants argue that Plaintiff "cast[s] conclusory and unsupported aspersions about the motivations of the directors," and "Plaintiff makes other wholly conclusory arguments regarding the Board's motivation for recommending this transaction, including that CEO Welch would be saved from termination by the merger." And with respect to Plaintiff's disclosure claims, Defendants argue, in part, that Plaintiff "simply makes up facts in his brief."

It is improper for the Court to rule on a (C)(8) motion that challenges Plaintiff's factual

allegations. Rather, when considering a (C)(8) motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163.

For this reason, the ITC Defendants' motion on these issues is DENIED.

VI. Fortis Defendants' Motion re: Aiding and Abetting

Finally, the Fortis Defendants seek summary of Plaintiff's aiding and abetting breach of fiduciary duty claim because (1) Plaintiff fails to allege facts necessary to pursue a direct claim for aiding and abetting, (2) Plaintiff fails to state a claim that the directors breached any fiduciary duties, and (3) Plaintiff independently fails to state a claim for aiding and abetting.

The Court first notes that the Fortis Defendants' first two arguments regarding a direct claim and alleged breaches of fiduciary duties by ITC's directors are rejected as reasoned above.

This leaves only the Fortis Defendants' third argument in favor of summary – that Plaintiff fails to adequately state a claim for aiding and abetting a breach of fiduciary duty because "Plaintiff fails to allege a single fact supporting a claim that the Fortis Defendants knew of, or took any action to substantially assist, any alleged breach of fiduciary duty by ITC's directors."

Both sides cite *In re NM Holdings Co, LLC*, 411 BR 542 (ED Mich 2009), aff'd 622 F3d 613 (CA 6 2010) for the elements for such a claim. These elements are:

> (1) breach of a fiduciary duty by a person, (2) the defendant's knowledge and substantial assistance or encouragement of the person's breach of fiduciary duty, and (3) resulting harm.
>
> *In Re NM Holdings*, 411 BR 551-552, citing *LA Young Spring & Wire Corp. v. Falls*, 307 Mich 69, 106-107, 11 NW2d 329 (1943); Restatement (Second) of Torts § 876(b) (1979).

The Fortis Defendants argue that Plaintiff has failed to adequately plead the requisite

"knowledge of" or "substantial assistance or encouragement of" the ITC directors' alleged underlying breach.

Applying Michigan law, the United States District Court for the Eastern District of Michigan opined that, if it were addressed, Michigan would adopt the standard that "Actual knowledge of the tort itself is necessary to impose liability on the alleged aider and abettor." *Fremont Reorganizing Corp v Duke*, 811 F Supp 2d 1323, 1346 (ED Mich 2011). This "actual knowledge" requirement is also consistent with Delaware law. *Malpiede v Townson*, 780 A2d 1075, 1098 (Del 2001) (concluding "we agree with the trial court's conclusion that the plaintiffs' aiding and abetting claim fails as a matter of law because the allegations in the complaint do not support an inference that Knightsbridge knowingly participated in a fiduciary breach.").

In his response to the Fortis Defendants' motion, Plaintiff only offers speculation and conjecture – using phrases like "it is reasonable to infer" and "it is possible." Plaintiff further summarizes his argument as follows:

> In short, the Amended Complaint supports the reasonable inference that the Fortis Defendants knew facts that were of material importance to ITC's public shareholders, knew that the Director Defendants failed to disclose those facts and consciously participated in the failure to disclose those facts because they knew disclosing them would make shareholders more skeptical of the Proposed Acquisition.

In this case, a careful review of the First Amended Complaint reveals that Plaintiff merely pleads legal conclusions (rather than factual allegations) that support his claim that the Fortis Defendants aided and abetted alleged breaches of fiduciary duty of the ITC directors. While a (C)(8) motion requires the Court to accept "all well-pled factual allegations" as true, it does not require the Court accept all pled legal conclusions as true.

Rather, Plaintiff's First Amended Complaint alleges that Fortis made three distinct proposals

to acquire ITC – one dated January 11, 2016; one dated January 15, 2016; and one dated February 3, 2016. Plaintiff alleges that Fortis withdrew its first offer, the Board rejected the second, and the Board accepted the third proposal.

These allegations are indicative that the accepted proposal was the product of arm's-length negotiations. And such negotiations are inconsistent with participation in a fiduciary breach. Despite Plaintiff's claim otherwise, the only reasonable inference is that the Fortis Defendants were attempting to acquire ITC at the best possible price.

Plaintiff fails to plead any facts supporting its legal conclusion that the Fortis Defendants knew of, or took any action to substantially assist, any alleged breach of fiduciary duty by ITC's directors. Instead, Plaintiff simply offers mere speculation, which is insufficient to survive summary.

For the foregoing reasons, accepting all well-pled allegations as true and construing them in the light most favorable to Plaintiff, the Court finds that Plaintiff's aiding and abetting claim against the Fortis Defendants fails as a matter of law. Therefore, the Court GRANTS said Defendants' motion for summary disposition under (C)(8) and DISMISSES Plaintiff's First Amended Complaint against the Fortis Defendants only.

But as in any summary motion brought under (C)(8), the Court Rules require that the Court "shall give the parties an opportunity to amend their pleadings." MCR 2.116(I)(5).

For this reason, Plaintiff must be provided with the opportunity to amend his Complaint to properly allege an aiding and abetting claim. Plaintiff has 14 days to so amend. Should Plaintiff fail to amend its Complaint within 14 days, the Fortis Defendants' motion is GRANTED, and Plaintiff's Complaint against the Fortis Defendants is DISMISSED.

VII. Conclusion

To conclude, the ITC Defendants' motion for summary disposition is DENIED in its entirety.

The Fortis Defendants' motion for summary disposition, however, is GRANTED, and Plaintiff's Complaint as to the Fortis Defendants only is DISMISSED. But, as stated, the Court will hold this ruling for 14 days to provide Plaintiff with the opportunity to amend his Complaint to properly allege his aiding and abetting claim.

IT IS SO ORDERED.

June 8, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge