UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXAS PACIFIC LAND TRUST and, solely in their respective capacities as trustees for Texas Pacific Land Trust, DAVID E. BARRY and JOHN R. NORRIS III, Plaintiffs, v. ERIC L. OLIVER, Defendant. and ERIC L. OLIVER, SOFTVEST, L.P., HORIZON KINETICS LLC, and ART-FGT FAMILY PARTNERS LIMITED, Counterclaim Plaintiffs, v. DAVID E. BARRY and JOHN A. NORRIS III, in their individual capacities and in their capacities as trustees for the Texas Pacific Land Trust, Counterclaim Defendants.	Case No. 3:19-CV-01224-B

MEMORANDUM OF LAW OF DEFENDANT ERIC L. OLIVER IN SUPPORT OF HIS FED. R. CIV. P. 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS DISMISSING PLAINTIFFS' FEDERAL SECURITIES CLAIMS

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June 17, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes, Rules and Regulations

TABLE OF ABBREVIATIONS

AC	Plaintiffs' Amended Complaint, dated May 22, 2019 (Dkt. 15)
Declaration of Trust	Declaration of Trust, dated February 1, 1888 (Dkt. 15, Ex. A)
Defendant	Eric L. Oliver
Exchange Act	Securities Exchange Act of 1934, as amended
Horizon	Horizon Kinetics LLC
Incumbents	David E. Barry and John R. Norris III
ISS	Institutional Shareholder Services Inc.
Kelley Drye	Kelley Drye & Warren LLP
Plaintiffs	Texas Pacific Land Trust and, solely in their capacities as Texas Pacific Land Trust trustees, David E. Barry and John R. Norris III
PSLRA	Private Securities Litigation Reform Act of 1995, as amended
Santa Monica	Santa Monica Partners, L.P.
SEC	U.S. Securities and Exchange Commission
Section 13(d)	15 U.S.C. § 78m(d)
Section 14(a)	15 U.S.C. § 78n(a)
SoftVest	SoftVest, L.P. and SoftVest Advisors, LLC
Tessler LPs	ART-FGT Family Partners Limited and Tessler Family Limited Partnership
TPL or Trust	Texas Pacific Land Trust
TPR	Texas Pacific Railway Co.
UGLIC	Universal Guaranty Life Insurance Company

INTRODUCTION

On April 8, 2019, Plaintiffs David E. Barry and John R. Norris III, trustees of Plaintiff Texas Pacific Land Trust, formally commenced a proxy campaign to elect their hand-picked nominee for a vacant trustee position and defeat the candidacy of Defendant Eric L. Oliver, a long-time TPL shareholder. Plaintiffs filed a definitive proxy statement with the SEC and provided official notice of a special meeting on May 22 for TPL shareholders to cast their votes. On May 21, after more than six weeks of soliciting proxies, Plaintiffs realized Mr. Oliver had accumulated an insurmountable electoral lead. Rather than respect the shareholder franchise, Plaintiffs filed this lawsuit and purported to indefinitely postpone the May 22 meeting. In reality, Plaintiffs had no authority to postpone the meeting without shareholder approval. TPL's shareholders proceeded with the meeting and voted to elect Mr. Oliver by a nearly 2-to-1 margin. But Plaintiffs refuse to welcome Mr. Oliver as TPL's new trustee. Instead, Plaintiffs continue to press their alternate reality, stating as recently as last week they were "obliged to remind shareholders that the proxy solicitation is suspended while the litigation is pending." Ex. 54.[1]

As a pretext for displacing the voice of TPL's shareholders, Plaintiffs claim that the solicitation materials filed in support of Mr. Oliver's candidacy (including the definitive proxy statement which was extensively reviewed by federal securities regulators before mailing) made "material misstatements" that "must be corrected to ensure that all of the Trust's shareholders have the opportunity to vote . . . on a fully informed basis." ¶ 56. Plaintiffs' disclosure claims suffer from multiple fatal defects, including that no individual or entity with standing to assert a claim under Section 14(a) of the Securities Exchange Act of 1934, *i.e.*, a TPL shareholder with

[1] All references in the form "Ex. __" are to the exhibits to the request for judicial notice filed contemporaneously with this motion. All references in the form "¶ __" are to the paragraphs of the Amended Complaint. All references in the form "AC, Ex. __" are to the exhibits of the Amended Complaint.

voting rights, has joined this suit, and that the Section 13(d) and 14(a) claims are moot because Defendant publicly disseminated Plaintiffs' Complaint to TPL's shareholders so that they could review and evaluate for themselves Plaintiffs' alternate view of the "facts."

It is not just legal doctrines that compel dismissal. Plaintiffs' pleading is larded with makeweight and conclusory allegations, but devoid of facts showing that any of Defendant's statements were actually false or misleading. For example, Plaintiffs' Section 13(d) claim is premised solely on their speculation that, despite openly disclosing that owners of more than 25% of TPL's shares were coordinating as a "group," Mr. Oliver concealed two "hidden" group members owning less than 1% of TPL's shares in order to "mislead Trust shareholders." ¶¶ 43(d)-(e), 91, 95, 105, 107. Each of the alleged "hidden" members publicly disclosed their stock ownership and their support for Mr. Oliver's candidacy, and Plaintiffs allege no facts to show that they did so out of some secret conspiracy with Mr. Oliver in violation of Section 13(d).

Plaintiffs' Section 14(a) claim is equally spurious. For the vast bulk of alleged misstatements, Plaintiffs do not deny the facts stated, but simply proffer that Defendant "omitted" some response or justification Plaintiffs wanted shareholders to hear. Others are not even statements of fact, but argument or statements of belief with which Plaintiffs disagree. It is not Defendant's duty to anticipate, adopt, and disclose Plaintiffs' opposing views. In a proxy contest, Plaintiffs had a forum to air those views—the myriad proxy materials they disseminated to TPL's shareholders—and during the six-week proxy solicitation period, Plaintiffs inundated TPL's shareholders with 49 different proxy solicitation materials, Exs. 5-53, including the entire content of a website created to solicit shareholders. *See* https://www.trusttpl.com.

Plaintiffs' contrived claims are nothing but a stalling tactic. Despite their claims of irreparable harm arising out of alleged misstatements dating back to March 25, 2019, ¶¶ 89, 101,

and demands for injunctive relief, Plaintiffs did not file suit until May 21, on the eve of the scheduled shareholder vote, and, to this day, have not moved for injunctive relief. Having lost the debate before TPL's shareholders, Plaintiffs should not be permitted to frustrate the exercise of those shareholders' rights through meritless and harassing litigation.

For all the reasons herein, the Court should enter judgment on the pleadings dismissing with prejudice Plaintiffs' federal securities claims (Counts I and II of the Amended Complaint).

FACTUAL BACKGROUND

I. Texas Pacific Land Trust

In 1871, Texas Pacific Railway Co. was granted land under federal charter. ¶ 17. When TPR went bankrupt, TPR's bondholders were awarded the land and, in 1888, created TPL to liquidate these assets and return the proceeds to the former bondholders, who became TPL's shareholders. *Id.* Today, TPL's assets include 900,000 acres in West Texas, from which TPL derives income from oil and gas royalties, revenues from easements, grazing leases, land sales, water sales and royalties, and interest. ¶¶ 18, 20. TPL is publicly traded on the NYSE. ¶ 10.

II. After The Chair Of TPL's Board Of Trustees Resigns, Plaintiffs Summarily Reject Mr. Oliver And Announce Their Intent To Call A Special Meeting To Elect Preston Young

On February 25, 2019, Maurice Meyer III, the Chair of TPL's Board, resigned. ¶ 19; AC, Ex. C. TPL's two remaining trustees were Plaintiffs John R. Norris III and David E. Barry. ¶¶ 11-12, 19. TPL's Declaration of Trust "requires three Trustees," ¶ 19, and provides that, upon a trustee's resignation, "a successor shall be elected at a special meeting of the certificate holders by a majority in the amount of the certificate holders present in person or by proxy." AC, Ex. A at 4. Trustees may call meetings, but must publish "[n]otice of such meeting[s]." *Id.*

Following Mr. Meyer's resignation on February 25, 2019, Allan Tessler, a beneficial owner of TPL shares through the Tessler LPs, asked Mr. Barry to consider Eric L. Oliver as a

nominee to succeed Mr. Meyer. ¶ 25. Mr. Oliver is 60 years old and the President of SoftVest Advisors, LLC, a registered investment adviser that provides services to clients with investments in oil and gas minerals and royalties. SoftVest L.P., a SoftVest Advisors client, is TPL's fourth-largest investor. ¶ 13; AC, Ex. D at 10. Messrs. Barry and Norris requested that Mr. Oliver provide a short bio, which Mr. Oliver delivered on February 28, 2019. ¶ 26; AC, Ex. C at 5.

On March 4, 2019, just days after receiving Mr. Oliver's bio, and without requesting further information or responses to any questionnaire, Messrs. Barry and Norris ("Incumbents") rejected Mr. Oliver and announced their nomination of 39-year-old Preston Young to a lifetime appointment as trustee, Ex. 1 at 2, "despite [Mr. Young] having no experience in the oil & gas industry or as a public company director, as well as potential ties to one of the incumbent trustees." AC, Ex. D at 21. Mr. Young is the regional managing partner of a company that manages buildings owned by Sidra Real Estate, Inc. Mr. Barry is Sidra's President. *Id.* at 3, 13; Ex. C at 3–4. On March 4, Incumbents also announced that "the Trust will call a special meeting . . . to be held in Dallas, Texas, on May 8, 2019." ¶¶ 26, 37; Ex. 1 at 2.

III. Owners Of More Than 25% Of TPL's Shares Publicly Disclose An Agreement To Support The Election Of Mr. Oliver As Trustee

On March 15, 2019, SoftVest disclosed in a Schedule 13D filing that it intended to nominate Mr. Oliver for trustee at the May 8, 2019 special meeting, ¶ 27, and to "solicit proxies from beneficial owners of Shares to vote for the election of Mr. Oliver." Ex. 55. SoftVest further disclosed that it had entered into a Cooperation Agreement with the Tessler LPs and Horizon, TPL's largest shareholder, to support the election of Mr. Oliver and that, as a result, Mr. Oliver, SoftVest, Mr. Tessler, the Tessler LPs, and Horizon "may be deemed to have formed a 'group' pursuant to [SEC] Rule 13d-5(b)(1)" (collectively, the "Investor Group"). *Id*. As

disclosed in the filing, Horizon owned approximately 23.2% of TPL's shares and Mr. Oliver, SoftVest, and the Tessler LPs owned approximately 2% of TPL's shares. *Id.*

IV. Plaintiffs Postpone The Special Meeting To May 22, 2019 In Order To Wage A Proxy Contest Against Mr. Oliver

On March 25, 2019, TPL announced that it was postponing the special shareholder meeting, which had not yet been formally called and noticed, from May 8 to May 22. ¶ 37. Although Incumbents had expressly declined to consider Mr. Oliver's nomination just three weeks earlier, TPL's March 25 press release claimed the postponement was needed to "provide the Trustees with sufficient time to consider [Mr. Oliver's] nomination." Ex. 2.

Just three days later on March 28, TPL filed a preliminary proxy statement stating that "[t]he Trustees do not endorse Mr. Oliver" and "strongly recommend" that shareholders elect Mr. Young. Ex. 3. Earlier that same day, Kelley Drye—the law firm that promotes Mr. Barry as "a partner in the firm's New York office," Exs. 73-74—sent Mr. Oliver *for the first time* a 66-page "Trustee Questionnaire." ¶ 41; AC, Ex. F. Despite having already summarily rejected Mr. Oliver, Plaintiffs claim that the questionnaire was sent to Mr. Oliver in order to discharge their "duties pursuant to the Trust's governing documents, to ensure that trustees are not disqualified, both with respect to capabilities and personal character and integrity." ¶¶ 43, 114. The questionnaire, however, stated that its "purpose" was to collect information for TPL to use in its proxy statement—*i.e.*, in its campaign against Mr. Oliver. AC, Ex. F at 1. Plaintiffs also claim that the questionnaire was needed "to secure a fully informed shareholder vote," but have never publicly disclosed even their own candidate's questionnaire, if it exists. ¶ 43.

In a March 28 letter, Mr. Oliver called out the Incumbents for attempting to impose an onerous new burden as part of their proxy campaign against him:

> I am confused as to why you would now — after previously summarily rejecting my candidacy in less than four days — want to try to re-write history by having

> your lawyers send to me the attached questionnaire. You already made a decision regarding my nomination and your intent to oppose it. In fact, your own advisors' statements to the press over the last few days, including their statements to have been hired to run a "proxy contest," further confirm this point.
>
> Rest assured, I will directly provide to TPL investors all information they need from me in order to make an informed decision at the special meeting regarding my nomination. Similarly, I hope that you make all proper disclosures regarding Mr. Young.

Ex. 57; ¶¶ 16, 41, 80.

V. Plaintiffs File A Definitive Proxy Statement And Solicit Proxies To Vote For Their New Nominee, General Donald G. Cook

On April 8, 2019, Plaintiffs filed a definitive proxy statement for the election of a new trustee and provided "[o]fficial notice" that a special meeting of shareholders would be held at the Dallas office of Sidley Austin LLP on May 22, 2019. Ex. 4. The proxy statement did not mention Mr. Young, and instead identified General Donald G. Cook as their nominee. *Id.*

From April 8 to May 22, Plaintiffs filed 49 different proxy solicitation materials, Exs. 4-52, including press releases, letters, tweets, presentations, and a video that attacked Mr. Oliver's character directly and through innuendo. *See, e.g.*, Ex. 32 ("DID YOU KNOW that Eric Oliver refused to provide any answers to his . . . criminal history, and bankruptcies?"); Ex. 36 ("Mr. Oliver has displayed a worrying lack of concern for proper governance, transparency and legal compliance"); Ex. 29 ("HERE ARE JUST A FEW OF THE THINGS MR. OLIVER HAS NOT TOLD YOU ABOUT HIMSELF"); Ex. 9 (calling Mr. Oliver a "storm on the horizon").

In their April 29 filing, Plaintiffs included a presentation with a section devoted to "The Dissident Campaign and Conflicted Candidate" and "Serious Concerns about Eric Oliver." Ex. 27 at Slides 24-36. One of those purported "concerns" was Plaintiffs' "belief" that, notwithstanding his public disclosure of the Investor Group owning more than 25% of TPL's

shares, Ex. 55, Mr. Oliver secretly "formed an undisclosed group" with two shareholders collectively owning less than 1% of TPL's shares. Ex. 27 at Slides 30-31.

VI. Plaintiffs Attempt To Postpone The May 22 Special Meeting In Order To Buy More Time For Their Proxy Campaign Against Mr. Oliver

On May 8, 2019, after soliciting proxies for a month, Plaintiffs were aware that their campaign against Mr. Oliver was failing. To buy time, Plaintiffs announced that they were going to adjourn the formally noticed special meeting from May 22 to June 6, 2019. ¶ 40.

Although TPL's Declaration of Trust authorizes its trustees to call shareholder meetings, it does not authorize the trustees to adjourn, postpone, or otherwise delay formally noticed meetings without a shareholder vote. AC, Ex. A. On May 10, the Investor Group publicly announced (i) that Incumbents lacked authority to "unilaterally postpone or cancel the Special Meeting, as it has already been properly called and noticed," without shareholder approval; and (ii) that it intended to "submit the Election Proposal to a vote of the holders of Shares present in person or by proxy at the Special Meeting on May 22, 2019." Ex. 64.

VII. Plaintiffs File This Lawsuit And Attempt To Indefinitely Postpone The Special Meeting To Elect A New Trustee

On May 16, 2019, Plaintiffs publicly filed a letter to Mr. Oliver, repeating "concerns" they had previously publicized to shareholders, including in their proxy materials filed on April 29. ¶ 43; AC, Ex. G. On May 20, Mr. Oliver provided specific responses to each "concern" in a letter that was filed with the SEC. Ex. 65. On May 21, just one day after receiving Mr. Oliver's response, and less than 24 hours before the noticed special meeting to elect a new trustee, Plaintiffs filed this lawsuit and purported to indefinitely postpone the shareholder meeting. ¶ 45. The Complaint filed on May 21—nearly two months after the Investor Group filed its preliminary proxy statement—rehashed the "concerns" Plaintiffs previously expressed in their

proxy materials, including in their April 29 filing and their May 16 letter, and asserted claims under Sections 13(d) and 14(a) of the Securities Exchange Act of 1934. Dkt. 1.

On May 21, "[i]n furtherance of full transparency," the Investor Group "publicly filed with the SEC a copy of the Trustees' disclosure complaint so shareholders can review it on their own, and come to their own conclusions." AC, Ex. I; Ex. 66. The Investor Group also reiterated that Incumbents had no authority to adjourn the May 22 special meeting without shareholder approval, and that they would move forward with the election as scheduled. AC, Ex. I; ¶ 47.

VIII. At The May 22 Special Meeting, TPL's Shareholders Overwhelmingly Vote To Elect Mr. Oliver As Trustee

On May 22, 2019, Incumbents unilaterally declined to recognize the special shareholder meeting they had noticed for May 22 at the Dallas office of Sidley Austin LLP. ¶ 48. TPL's shareholders were thus forced to meet "on a different floor of the office building in which Sidley Austin LLP's offices are located." *Id.* Plaintiffs' representatives were present at the meeting, and addressed the meeting participants. TPL's shareholders overwhelmingly voted to elect Mr. Oliver: 3,660,812 shares voted for the election of Mr. Oliver (including shares voted through the proxy management firm), while the firm engaged to collect and tally proxies reported that only 1,994,267 shares had been voted in favor of the election of General Cook. AC, Ex. K.

IX. Plaintiffs File An Amended Complaint To Invalidate The Shareholder Vote

Later on May 22, Plaintiffs filed an Amended Complaint, seeking a declaration that the votes cast by TPL's shareholders at the May 22 meeting are "invalid, null, and void." ¶ 117.

LEGAL STANDARDS ON THIS MOTION

"A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). Thus, dismissal is warranted if a complaint does not contain "enough facts to state a

claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff cannot avoid dismissal with "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Central Laborers' Pension Fund v. Integrated Elec. Servs. Inc.*, 497 F.3d 546, 550 (5th Cir. 2007).

Moreover, where, as here, a private plaintiff alleges Exchange Act claims, the heightened pleading requirements of the PSLRA apply. *Ashford Hosp. Prime Inc. v. Sessa Capital (Master) LP*, 2017 WL 2955366, at *3 (N.D. Tex. Feb. 17, 2017); *Hulliung v. Bolen*, 548 F. Supp. 2d 336, 341 n.4 (N.D. Tex. 2008). Under the PSLRA, a plaintiff must "specify the who, what, when, where, and how of their allegations," *Ashford*, 2017 WL 2955366, at *3, "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, . . . state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u–4(b)(1).

ARGUMENT

I. Plaintiffs' Section 13(d) Claim Should Be Dismissed

Plaintiffs' Section 13(d) claim should be dismissed because (i) Plaintiffs have failed to plead facts showing that Mr. Oliver concealed "hidden participants" in the disclosed Investor Group; (ii) Plaintiffs have failed to plead facts showing any harm, much less the irreparable harm required for the injunctive relief they seek; and (iii) Plaintiffs' claim was mooted when the Investor Group "publicly filed with the SEC a copy of the Trustees' disclosure complaint so shareholders can review it on their own, and come to their own conclusions." AC, Ex. I.

A. Plaintiffs Have Failed To Plead Facts Showing Any "Hidden" Members In The Disclosed Investor Group

On March 15, 2019, Mr. Oliver and others publicly filed a Schedule 13D, which disclosed a Cooperation Agreement among several TPL shareholders, including TPL's largest shareholder, to elect Mr. Oliver. ¶¶ 27, 91; Ex. 55. Although the Schedule 13D disclosed a "group" comprised of owners of over 25% of TPL, *id.*, Plaintiffs contend that Mr. Oliver concealed two "hidden participants"—Santa Monica and UGLIC—which collectively held *less than 1%* of TPL in order to "mislead Trust shareholders." ¶¶ 43(d)-(e), 91, 95, 105, 107.

Plaintiffs do not plead facts, much less the particularized facts required under the PSLRA, to support their implausible theory. Section 13(d) requires disclosure of a "group" that owns more than 5% of an issuer's registered equity securities. 15 U.S.C. § 78m(d)(1), (3). A "group" exists under Section 13(d) when "two or more persons *agree to act together* for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer." 17 C.F.R § 240.13d-5(b)(1) (emphasis added). The "touchstone" is "that the members combined in furtherance of a common objective." *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 283 (2d Cir. 2011). Indeed, "absent an agreement between [shareholders] a 'group' would not exist." *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F.2d 207, 217 (2d Cir. 1973).

Here, Plaintiffs do not, and cannot, allege that Santa Monica or UGLIC were parties to the disclosed Cooperation Agreement. Instead, Plaintiffs speculate that they were "hidden" group members because "Santa Monica has a longstanding relationship with Horizon Kinetics and its co-founder" and "UGLIC has a longstanding relationship with Defendant." ¶¶ 43(d)-(e), 92, 94. "[S]peculation is not sufficient to get past a motion to dismiss." *Sauceda v. Select Portfolio Servicing, Inc.*, 2014 WL 1247827, at *4 (S.D. Tex. Mar. 25, 2014). Moreover, "[m]ere relationship, among persons or entities, whether family, personal or business, is

insufficient to create the group." *Texasgulf, Inc. v. Canada Dev. Corp.*, 366 F. Supp. 374, 403 (S.D. Tex. 1973). Instead, "[t]here must be agreement to act in concert." *Id.*; *see also Forward Indus., Inc. v. Wise*, 2014 WL 6901137, at *3-4 (S.D.N.Y. Sept. 23, 2014) (dismissing Section 13(d) claim based on business relationships with alleged group members); *Trans World Corp. v. Odyssey Partners*, 561 F. Supp. 1315, 1321-23 (S.D.N.Y. 1983) (same).

Plaintiffs do not identify any agreement between Santa Monica or UGLIC and the Investor Group, yet claim that they were members of the Investor Group simply because they supported Mr. Oliver's candidacy. ¶¶ 43(d)-(e), 92-93. As the SEC has stated, typical proxy solicitation does not constitute group conduct. *See* SEC Release No. 34-39538, 1998 WL 7449, at *10 (Jan. 12, 1998) (stating that shareholder "would not be deemed a member of a group" merely because it was "recipient of soliciting activities" and "grant[ed] a revocable proxy").[2]

Plaintiffs' allegation that "Santa Monica's [public] filing generated the false impression that a major shareholder . . . was supporting Defendant," ¶ 43(d), is not only irrelevant to the issue of whether Santa Monica was a "hidden" member in the disclosed Investor Group, but belied by Santa Monica's filing, which plainly disclosed that it owned but 0.2% of TPL's shares. Ex. 70. And the further allegation that Santa Monica "acquired shares shortly after the Dissident Group launched its proxy contest," ¶ 43(d), is conspicuously vague for a reason—as reflected in Santa Monica's filing, only 10 of its 17,892 shares were purchased after the Investor Group filed its preliminary proxy statement on March 25. Exs. 56, 70; ¶ 30.

Because Plaintiffs have failed to adequately plead facts showing any "hidden" members of the disclosed Investor Group, Plaintiffs' Section 13(d) claim should be dismissed.

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[2] If the rule were otherwise, the April 25, 2019 press release from Mission Advisors, TPL's second largest shareholder, linking to TPL proxy materials, "strongly recommend[ing]" General Cook, and asserting that Mr. Oliver "is grossly unfit for the position and does not understand the business," would render it an undisclosed member of Plaintiffs' own "group." *See* Ex. 72.

B. Plaintiffs Have Failed To Plead Facts Showing Any Harm, Much Less The Irreparable Harm Required For The Injunctive Relief They Seek

Plaintiffs' Section 13(d) claim—a claim they could have made months ago but chose to only make on the eve of the May 22, 2019 shareholder meeting—should also be dismissed for failure to plead any cognizable harm, much less the irreparable harm they contend has resulted from Defendant's allegedly deficient Schedule 13D filing on March 15, 2019. ¶¶ 105, 108.

As the Fifth Circuit has explained, "[t]he sole purpose" of Section 13(d) is to inform investors of the "large, rapid aggregation or accumulation of securities . . . which might represent a potential shift in corporate control." *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984) (citation omitted). It is *not* "a weapon for management to discourage takeover bids or prevent large accumulations of stock." *Id.*

Here, by Plaintiffs' own admission, there was no concealment of the existence of a significant shareholder "group" coordinating to elect Mr. Oliver as trustee. ¶ 27. On March 15, 2019, well before proxy solicitation commenced, Mr. Oliver and others disclosed the Investor Group's Cooperation Agreement and that the group was comprised of beneficial owners of more than 25% of TPL's shares, including TPL's largest shareholder. Ex. 55.

Plaintiffs also admit that Santa Monica and UGLIC publicly disclosed their support for Mr. Oliver's candidacy on April 8 and 16, more than a month before the scheduled shareholder vote on May 22. ¶¶ 43(d)-(e). Santa Monica disclosed it owned 0.2% of TPL's shares. Ex. 70. UGLIC disclosed it owned 39,000 shares, or approximately 0.5% of TPL's shares. Ex. 71.

Thus, even assuming *arguendo* that Santa Monica and UGLIC were members of the Investor Group—which they were and are not—any failure to disclose their membership could not have significantly altered the "total mix" of information given that they hold less than 1% of TPL stock and had publicly disclosed their support for Mr. Oliver. *See Forgent Networks, Inc. v.*

Sandberg, 2009 WL 2927015, at *2 (W.D. Tex. Aug. 27, 2009) (Section 13(d) claim "is only cognizable if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information"); *Treadway Cos., Inc. v. Care Corp.*, 490 F. Supp. 660, 664 (S.D.N.Y. 1980), *aff'd in relevant part*, 638 F.2d 357 (2d Cir. 1980) (non-disclosure of alleged "group" members who own small amount of stock "is nothing more than a de minimis violation of section 13(d), and as such constitutes an inadequate basis upon which to afford injunctive relief").

Because TPL's shareholders were fully informed of all material facts long before the May 22 vote, Plaintiffs do not, and cannot, plead a cognizable harm, much less the irreparable harm required for the injunctive relief Plaintiffs seek at this late hour. *See Gearhart*, 741 F.2d at 715 ("[A]n injunction will issue for a violation of § 13(d) only on a showing of irreparable harm to the interests which that section seeks to protect . . . . Those interests are fully satisfied when the shareholders receive the information required to be filed."); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 420 (S.D.N.Y. 1982) (injunction under Section 13(d) is not supported where "[t]he public is not being deprived of any material information").

C. Plaintiffs' Claim Was Mooted By Defendant's Public Dissemination Of Their "Hidden" Group Member Allegations

Plaintiffs' Section 13(d) allegations were also publicly disclosed long before the May 22 vote. Indeed, in proxy materials publicly filed on April 29, Plaintiffs relied on disclosures by the Investor Group, Santa Monica, and UGLIC on March 15, April 8, and April 16, respectively, to express their "belief" that Santa Monica and UGLIC were "undisclosed members" of the disclosed Investor Group. Ex. 27 at Slides 30–31. Moreover, on the same day Plaintiffs filed this lawsuit, the Investor Group publicly filed Plaintiffs' Complaint in proxy materials so that TPL's shareholders could assess Plaintiffs' allegations on their own. Ex. 66; AC, Ex. I.

The Investor Group's prompt dissemination of Plaintiffs' Complaint mooted Plaintiffs' Section 13(d) claim because a defendant is not required "to admit allegations that it denies" or to make a "confession of judgment" that it "violated federal securities law." *Taro Pharm. Indus. v. Sun Pharm. Indus.*, 2010 WL 2835548, at *9, *13 (S.D.N.Y. July 13, 2010). Instead, where there is a "dispute as to facts or an alleged legal violation," Section 13(d) "only requires disclosure of the dispute." *Id*.; *accord Avnet v. Scope Indus.*, 499 F. Supp. 1121, 1125-26 (S.D.N.Y. 1980) (disclosure of "conflicting positions taken by the parties" mooted Section 13(d) claim). By publicly filing Plaintiffs' Complaint, the Investor Group fully informed investors of the parties' dispute and mooted Plaintiffs' claim. *See Lions Gate Entm't Corp. v. Icahn*, 2011 WL 1217245, at *1 (S.D.N.Y. Mar. 30, 2011) (Section 13(d) claim mooted because plaintiff's complaint attached to SEC filing); *Vestcom Int'l v. Chopra*, 114 F. Supp. 2d 292, 300 (D.N.J. 2000); *Weeden v. Cont'l Health Affiliates*, 713 F. Supp. 396, 400 (N.D. Ga. 1989).

II. Plaintiffs' Section 14(a) Claim Should Be Dismissed

Plaintiffs' Section 14(a) claim should be dismissed because (i) Plaintiffs have no standing to bring a Section 14(a) claim; (ii) Plaintiffs' claim was mooted when Defendant publicly filed Plaintiffs' Complaint in his proxy materials; and (iii) Plaintiffs have failed to plead facts showing an actionable misstatement or omission.

A. Plaintiffs Have No Standing To Bring A Section 14(a) Claim

There is no express private right of action under Section 14(a) of the Exchange Act. Rather than "open a Pandora's box by extending" the judicially created private right of action under Section 14(a) to "any person potentially injured by a proxy statement," the Fifth Circuit has made clear that only stockholders "with voting rights" have standing to pursue a Section 14(a) claim. *7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 229–30 (5th Cir. 1994) (citing *Virginia Bankshares, Inc., v. Sandberg*, 501 U.S. 1083, 1106–08 (1991)).

Plaintiff TPL is an issuer, not a shareholder with voting rights. In dismissing a Section 14(a) claim at the pleading stage, Judge Godbey explained that a "corporation with no voting rights in its own stock . . . lacks standing to bring a claim under section 14(a)" because Section 14(a) "protect[s] only interest-holders with voting rights." *Ashford*, 2017 WL 2955366, at *9.

The Amended Complaint does not allege that Messrs. Barry or Norris are TPL shareholders, but expressly states that each "brings this suit *solely in his capacity as a Trustee*." ¶¶ 11–12 (emphasis added). Plaintiffs do not, and cannot, allege that, Messrs. Barry or Norris had any voting rights in their capacities as trustees. *See 7547 Corp.*, 38 F.3d at 229–30 (unit holders who were not entitled to vote at meeting did not have standing under Section 14(a)).

Because "voting rights are critical to standing under section 14(a)," *id.*, none of the three Plaintiffs in this action have standing to bring a Section 14(a) claim.

B. Plaintiffs' Claim Was Mooted By Defendant's Public Dissemination Of Plaintiffs' Complaint

Plaintiffs' Section 14(a) claim is also moot. In their proxy materials, Plaintiffs repeatedly accused Mr. Oliver of misconduct. For example, Plaintiffs accused Mr. Oliver of "potential fraudulent misrepresentations" and purported to "set[] the record straight" on a number of allegedly inaccurate statements by the Investor Group. Ex. 27 at Slides 27, 34-36; *see also* Exs. 19, 29, 36. In their Complaint, Plaintiffs rehashed the same allegedly misrepresented or omitted information and purported to "set the record straight" by asserting a Section 14(a) claim. Dkt. 1, ¶¶ 83-89. Rather than try to conceal those allegations, the Investor Group promptly disseminated them to TPL's investors by filing Plaintiffs' Complaint on the same day it was filed, and before the May 22 meeting. Ex. 66; AC, Ex. I. This mooted Plaintiffs' Section 14(a) claim.

Taro is instructive. There, the plaintiff accused defendant of myriad misrepresentations and asserted claims under Section 14(e) of the Exchange Act, which prohibits material

misstatements by tender offerors. Despite the panoply of alleged misrepresentations, the court dismissed the Section 14(e) claim as moot because the defendant publicly filed the plaintiff's complaint and investors could review and evaluate plaintiffs' allegations for themselves:

> [T]he underlying purpose of [Section 14(e)] is to make sure that pertinent information is placed before the shareholders of the tender offer target so that they can decide for themselves what they wish to do. . . .
>
> Sun's annexation of the Complaint to its tender offer did just that. The Complaint lays out in extensive detail all of Taro's allegations concerning Sun . . . [Section 14(e)] does not require that a tender offeror such as Sun admit to the substantive merits of incumbent management's allegations. . . .
>
> Because annexation of the Complaint to Sun's tender offer is sufficient to cure any [alleged Section 14(e)] violations, Taro's [Section 14(a)] Act claim will be dismissed as moot.

2010 WL 2835548, at *9-17.

The same reasoning applies here. The purpose of Section 14(a) is to have pertinent information placed before shareholders "so that they can make an informed and meaningful choice among alternative courses of actions." *Freedman v. Barrow*, 427 F. Supp. 1129, 1145 (S.D.N.Y. 1976). That purpose has been met because TPL's shareholders were fully informed of Plaintiffs' side of the story, through both Plaintiffs' proxy materials and the Investor Group's proxy materials, which disseminated Plaintiffs' Complaint to TPL shareholders the day this lawsuit was filed. Accordingly, Plaintiffs' Section 14(a) claim should also be dismissed as moot.

C. Plaintiffs Have Failed To Adequately Plead An Actionable Misstatement Or Omission

Even if Plaintiffs had standing to bring a Section 14(a) claim, and even if Plaintiffs' claim were not moot, dismissal would still be warranted because Plaintiffs have failed to adequately plead an actionable misstatement or omission of material fact.

In the proxy solicitation context, a fact is only "material" if "there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable

investor as having significantly altered the 'total mix' of information made available," *Braun v. Eagle Rock Energy Partners, L.P.* 223 F. Supp. 3d 644, 651 (S.D. Tex. 2016) (citation omitted), *appeal docketed*, No. 19-20298 (5th Cir. May 1, 2019), and would have "influenced" a reasonable investor against the proposal for which the investor's proxy was sought. *Panella v. Tesco Corp.*, 2019 WL 1606349, at *3-4 (S.D. Tex. Mar. 29, 2019). The "total mix" of information includes "information that is and has been in the readily available general public domain and facts known or reasonably available to the shareholders." *Braun*, 223 F. Supp. 3d at 652 (citation omitted). "Vague" expressions, statements of mere "puffery," and "generalized . . . statements about a company, its management, competitive strengths, or future prospects, are immaterial, since the market relies on specific facts." *Steinberg v. BPO Mgmt. Servs., Inc.*, 2010 WL 1330971, at *5 (N.D. Tex. Mar. 12, 2010).

There is no generalized duty to disclose all potentially material information. *See Panella*, 2019 WL 1606349, at *4. Thus, an alleged omission is only actionable if "SEC regulations specifically require disclosure . . . or the omission makes other statements in the proxy statement materially false." *Id.* at *3-4; *see also* 17 C.F.R. § 240.14a–9.

Moreover, a statement of opinion or belief is not actionable unless a plaintiff pleads particularized facts showing "both that the speaker did not actually believe it, and that the statement expressed something false about its subject." *Hohenstein v. Behringer Harvard Reit I, Inc.*, 2014 WL 1265949, at *10 (N.D. Tex. Mar. 27, 2014).

Plaintiffs proffer a litany of supposed misstatements and omissions. None are actionable.

TPL's Business: In an April 23, 2019 press release, the Investor Group, advocating for the adoption of the "disclosures, controls and governance of a modern operating corporation," stated that when TPL was formed more than 130 years ago in 1888 its "sole intended purpose . . .

was to provide an orderly liquidation of the land that secured defaulted bonds on the T&P Railway." Ex. 61 at Slide 5 (emphasis added). The group added, however, that given subsequent evolution in TPL's activities, "[w]e believe that there is no precedent for a company engaged in these active business activities to be structured as a business trust." *Id.*

In an attempt to contrive a claim, Plaintiffs proclaim that "it could not be more plain that the Trust did not have a 'sole intended purpose' of 'liquidation.'" ¶ 76. Yet Plaintiffs' own proxy materials, filed less than a week later on April 29, called TPL a "liquidating trust" that "does not have the capital needs that a corporate structure typically provides, reflecting the Trust's longstanding primary mission: to return cash to shareholders." Ex. 27 at Slide 16; *see* AC, Ex. D at 1, 13, 15. Similarly, in prior interviews with the financial press, TPL executives stated that "[t]he purpose of the Trust was to liquidate the lands," Ex. 68 at 1, and that "our business since 1888 has been 'going out of business.'" Ex. 69 at 3. Unless Plaintiffs are now claiming that TPL's own representations to investors were false, Defendant's description of TPL's historical purpose is not a misstatement that "must be corrected to ensure that . . . shareholders have the opportunity vote for a trustee . . . on a fully informed basis." ¶¶ 56, 76.[3]

Plaintiffs also fail to manufacture a claim based on Defendant's statements about TPWR, TPL's wholly owned water provider. The Investor Group expressed its "belie[f]" that TPWR's activities "could create various risks for the Trust, such as risks related to workers compensation, leaks or rupturing of pipelines." Ex. 58 at 1; ¶ 65. Plaintiffs do not allege that there are no such risks, and fail to plead any facts showing that Investor Group does not genuinely believe the risks

[3] Nor did Defendant mislead investors about TPL's "business model" in an April 9 press release that described wells drilled on, and oil produced from, TPL's land. ¶ 64. As reflected in TPL's own proxy materials, TPL earns income via royalties from oil and gas operations on TPL's land. *See* Ex. 20; Ex. 27 at Slides 9, 11. It is implausible that a reference to "the Trust's oil production," rather than oil produced on Trust land, could have confused any shareholder, much less influenced a reasonable shareholder to vote against Plaintiffs' nominee.

exist. *See Hohenstein*, 2014 WL 1265949, at *10. Instead, Plaintiffs complain that disclosure of the risks "paint[s] an overly-precarious picture." ¶ 65. Plaintiffs' belief that TPWR's benefits outweigh its risks does not make Defendant's belief false, and the proper forum for Plaintiffs to make their case was in their own proxy materials, which they did. Ex. 27 at Slide 34.

There is no factual basis whatsoever for Plaintiffs' claim that the Investor Group misled shareholders into thinking that it was "fully committed to keeping [TPWR] a part of [Trust] operations for the long-term future." ¶ 87. Instead, consistent with its stated belief that TPWR's activities posed risks to TPL, the Investor Group stated that it would "assess various types of water ventures to limit risk and maximize long term growth," *id.*, and that all options, including the sale of TPWR, would be on the table. *See* Ex. 55 (disclosing intent to "focus[] on the establishment of an experienced team around TPL's new water business, with clearly defined goals and objectives, ***or otherwise considering the separation or sale of such business*** to a third party . . . ."); Ex. 58 at 2 ("Mr. Oliver is committed to actively encouraging [TPL] to evaluate the existing water business and . . . ***determine if it is advisable to grow operations*** internally, partner with a strategic partner, ***or sell the water rights to a third party*** . . . .") (emphases added).

The Incumbents' Accountability To TPL Shareholders: Plaintiffs take issue with two statements in Defendant's proxy materials concerning the frequency of TPL shareholder meetings: (i) that "[m]eetings of holders of Shares only occur when a new trustee needs to be elected to fill a vacancy"; and (ii) that TPL "has only held four shareholder meetings in thirty years." ¶¶ 73-74. Plaintiffs do not allege any facts showing that either statement is false; instead, Plaintiffs aver the Declaration of Trust permits meetings to be called by trustees or requested by shareholders. *Id.* Of course, that meetings *could have* been called does not mean they *were* called, and Plaintiffs' *non sequitur* does not render Defendant's statements false.

Plaintiffs also take issue with an April 23, 2019 proxy filing in which the Investor Group expressed its opinion that "poor governance and lack of accountability" had resulted in "questionable business decisions" and "conflicts of interest," and that "the conduct of incumbent trustees during this proxy campaign" evidenced a "[t]otal disregard for investors' view and rights." ¶¶ 61, 81, 83; Ex. 61 at Slide 6. The Investor Group's statement of opinion is not actionable unless Plaintiffs plead particularized facts showing that the Investor Group did not genuinely hold the opinion. *Hohenstein*, 2014 WL 1265949, at *10. The Amended Complaint is devoid of any such facts. And with good reason. The April 23 filing explains in detail the bases for the group's opinion. *See, e.g.,* Ex. 61 at Slides 24-32.

Plaintiffs also complain about Defendant's statement in the April 23 filing that current stock ownership by "Management & Trustees" reflects "a dramatic decline and the lowest level over the past 30 years." Ex. 61 at Slide 26; ¶ 77. Defendant's statement was not rendered misleading by the failure to disclose that "there are only two incumbent Trustees" or that one of them "previously represented the Trust as its attorney and had a policy of not purchasing shares of his clients." ¶ 77. Nor were Defendants' statements that the Incumbents "increase[ed] management pay over 10x" or "increased their own pay 52x" rendered false by the failure to disclose that "the Trust has seen unprecedented value maximization" or that the Trustees' increase of their own pay was "an inflation adjustment." ¶ 82. Plaintiffs were free to make these points in their proxy materials, and did, but cannot require Defendant to divine and disclose the way in which they might attempt to justify their decisions. *See Panella*, 2019 WL 1606349, at *4 (no disclosure required unless "necessary" to make statement "not misleading").

The Incumbents' Selection Of General Cook: Plaintiffs admit Incumbents "chose General Cook, a candidate suggested by a legal advisor." ¶ 78. Defendant's statement in a press

release that Incumbents "hand-picked" General Cook "at the suggestion of their outside legal advisor" was not rendered false by the failure to disclose Plaintiffs' contention that General Cook was selected "only after a thorough search and review process." *Id.* Moreover, Plaintiffs could, and did, explain to shareholders their supposed "search process." Ex. 4 at 9-11.

The Incumbents' Engagement With TPL Shareholders: Without identifying any allegedly false statement, Plaintiffs claim that Defendant had a freestanding obligation to disclose the details of three conversations between TPL representatives and Horizon. ¶ 58. That is not the law. *See Panella*, 2019 WL 1606349, at *4. To the extent Plaintiffs believe those conversations show they engaged with Horizon in "good faith" or "fully and fairly assessed" the Investor Group's proposed measures, ¶ 58, they were free to make their case to TPL's shareholders, and did. Ex. 4 at 9-10. In any event, the Investor Group's proxy statement disclosed the group had "engaged with the trustees and other representatives of the Trust . . . to discuss various opportunities to maximize the value of the Trust," including the subjects of TPL's three conversations with Horizon. *Compare* ¶ 58, *with* Ex. 58 at 2, 9-10.

Plaintiffs also misguidedly criticize the Investor Group's disclosure that "[i]n 2016, SoftVest LP and ART-FGT suggested that the Trust actively consider converting some or all of its operations into a master limited partnership," but that "[g]iven various changes to US tax laws effected since 2016, . . . the [group] at this time are not suggesting that the Trust effect a conversion." Ex. 58 at 2. The Investor Group did not claim that it "came to the conclusion on its own," ¶ 59, nor would such information be material to investors.

The Incumbents' Conduct In The Proxy Solicitation: Plaintiffs claim that an April 15, 2019 press release "falsely accuse[d] the Trust of being 'unwilling to provide' a list of the non-objecting beneficial owners of shares of the Trust (the 'NOBO List')." ¶ 60. Plaintiffs do not,

and cannot, allege that TPL ever provided the NOBO List. To the extent they believe there is a justification for withholding the NOBO List, they are free to try to explain it. Indeed, they tried to do so at least twice in their proxy materials. ¶ 60. The Investor Group was not required to repeat that explanation in its own materials. *Id.*; *see Braun*, 223 F. Supp. 3d at 652 (dismissing claims where "the relevant information . . . was publicly available in other disclosures," as one is not "required to address [investors] as if they were children in kindergarten").

Plaintiffs also have not identified an actionable misstatement in a March 28 letter sent in response to Plaintiffs' lawyers sending Mr. Oliver a 66-page "Trustee Questionnaire" nearly a month after Plaintiffs had already *rejected* his candidacy. ¶ 80; Ex. 57. Plaintiffs plead no facts showing that the quoted excerpts from the letter—including that Defendant "question[ed]" the tactics of Plaintiffs' lawyers, "hope[d]" that Plaintiffs would make all proper disclosures regarding Mr. Young, and believed that Plaintiffs' advisors "appear to be confused or misinformed"—were both subjectively and objectively false. And their conclusory assertion that the statements "have no factual basis" or "impugn the integrity of the Trustees,"[4] ¶ 80, does not remotely satisfy their pleading burden. *See Hohenstein*, 2014 WL 1265949, at *10.

Schedule 14A: Plaintiffs erroneously claim that Investor Group's proxy materials violated Item 5(b)(1)(iii) of Rule 14a-101 because they did not state whether any members of the group had been the subject of a criminal conviction in the last ten years. ¶ 89. No member of the Investor Group was the subject of a criminal conviction in the last ten years, and Item 5(b)(1)(iii) of Rule 14a-101 plainly states that "[a] negative answer [to the question of whether a

[4] Defendant's statements questioning the tactics of Plaintiffs' lawyers pale in comparison to Plaintiffs' over-the-top attacks on the character and integrity of Mr. Oliver. Plaintiffs called Mr. Oliver a "Conflicted Nominee," claimed that he had a "pattern of self-dealing and lack of transparency," and insinuated that Mr. Oliver had a "criminal history." Exs. 9, 27-28, 32.

proxy participant has been convicted in a criminal proceeding] need not be included in the proxy statement or other soliciting material." 17 C.F.R. §240.14a-101.

Plaintiffs also erroneously claim that the Investor Group violated Item 4(b) of Rule 14a-101, ¶ 90, which requires disclosure "[i]f regular employees . . . have been or are to be employed to solicit security holders." 17 C.F.R. §240.14a-101. Plaintiffs do not identify any "regular employees" of the Investor Group who were employed to solicit security holders. Nor could they. The Investor Group engaged an outside solicitation firm. Ex. 58 at 10.

Plaintiffs' claim for failure to disclose Santa Monica and UGLIC as Schedule 14A "participants," ¶¶ 88, 105, is based on the same inadequate allegations as Plaintiffs' claim for failure to disclose them as Schedule 13D "group" members, and should be dismissed for the same reasons. *Forward*, 2014 WL 6901137, at *3-4 (dismissing Section 13(d) and 14(a) claims for alleged undisclosed Schedule 13D "group" members and Schedule 14A "participants").

The Proxy Vote: Citing a "notes" paragraph of Rule 14a-9, Plaintiffs claim it is *per se* misleading to make a statement regarding the results of a proxy solicitation prior to a shareholder meeting. ¶ 67. Indeed, Plaintiffs go so far as to say that any comments made "prior to a meeting" are "prohibited by Rule 14a-9." ¶ 69. But the "notes" paragraph Plaintiffs cite does not make or reflect any such *per* se rule; instead, it merely provides "examples" of what "*may* be misleading," "depending upon particular facts and circumstances." *See Mgmt. Assistance Inc. v. Edelman*, 584 F. Supp. 1016, 1020 (S.D.N.Y. 1984) ("predictions regarding the results of a solicitation are not materially misleading or otherwise actionable under rule 14a-9."). Here, Plaintiffs have failed to plead facts showing that any challenged statements were misleading.

Plaintiffs take issue with a May 8 press release in which Defendant merely "disagree[d]" with Plaintiffs' opinion that "this will remain a close election," ¶ 70, but plead no facts showing

that Defendant did not genuinely disagree with Plaintiffs' opinion. *Hohenstein*, 2014 WL 1265949, at *10. Plaintiffs also take issue with a *Bloomberg* article published at 5:19 p.m. on May 21, the eve of the May 22 special meeting, following Plaintiffs' filing of this lawsuit. ¶ 68; AC, Ex. J. Plaintiffs claim Mr. Oliver "poison[ed] the electorate" because "he asserted that the Dissident Group 'has sufficient votes to win the trustee seat, based on preliminary tallies.'" ¶ 68. Even putting aside that Plaintiffs quote the *Bloomberg* reporter, not Mr. Oliver, AC, Ex. J, Plaintiffs conspicuously fail to allege that the totals provided to both sides by the outside proxy management firm showed that Defendant was mistaken. Nor do Plaintiffs plead any facts showing that a press release issued after the special meeting inaccurately reported the vote count. Instead, Plaintiffs fault Defendant for not adopting Plaintiffs' litigation position that "no valid vote was conducted." ¶ 69. That is not the law. *See Brown v. Brewer*, 2010 WL 2472182, at *24 (C.D. Cal. June 17, 2010) (alleged omissions that were "not necessarily *facts*, but rather factual *allegations* . . . could not have been material" prior to adjudication of parties' dispute); *Avnet*, 499 F. Supp. at 1125 ("the purpose of the disclosure provisions of the securities laws" is "disclos[ure] to the investor [of] the facts as truly believed by the discloser").[5]

Plaintiffs claim it was misleading for the Investor Group to not disclose in an April 16 video that it "intends to seek reimbursement from the Trust for the costs of its solicitation if the election of Defendant is successful." ¶ 85. But, in its definitive proxy statement disseminated to TPL's investors just a week earlier on April 9, the Investor Group stated that "[t]o the extent legally permissible, if successful in the election of Mr. Oliver, the Participants currently intend to

[5] Plaintiffs' vague allegation about supposedly misleading "email headings" the Investor Group purportedly "arrang[ed]" to have sent, ¶ 71, does not identify the words in even one such heading, who actually sent the emails, or when the emails were sent, and thus fails to satisfy even the most basic requirement that Plaintiffs "specify the who, what, when, where, and how of their allegations." *Ashford*, 2017 WL 2955366, at *3.

seek reimbursement from the Trust for the costs of this solicitation." Ex. 58 at 10. There is no liability for failure to repeat "previously disclosed information." *Braun*, 223 F. Supp. 3d at 652.

Finally, Plaintiffs' allegation that the April 16 video misled investors into believing the Investor Group was "not in opposition to the Trust with respect to the nomination of Trustees" is silly. ¶ 86. The video, like all of the Investor Group's proxy materials, existed only to make clear to investors that Mr. Oliver was running for trustee in opposition to the Trustees' nominee. Ex. 60. Indeed, Mr. Oliver's remark in the video that "I'm not a dissident" was part of broader response to pejorative attacks that had been levied against him by the Trustees.[6]

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts I and II of the Amended Complaint with prejudice and award such other and further relief as it deems appropriate.

Dated: June 17, 2019

Respectfully submitted,

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[6] Mr. Oliver's broader remarks were: "It's April 16th . . . the day after the letter you received from the trustees just talking about what a bad guy I am. So I wanted you to see me first hand. That I don't have any horns. I don't have a pitchfork. I'm not a dissident. I'm not an activist. As a matter of fact, my wife wishes I was more active on yard day and taking the trash out. But my sole goal and sole purpose in this election is to maximize value for all shareholders." Ex. 60 at 2.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, a true and correct copy of the foregoing document was served through the Court's CM/ECF System on all counsel of record.

/s/ Robert C. Walters
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