IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETER BRINCKERHOFF, Plaintiff, v. TEXAS EASTERN PRODUCTS PIPELINE COMPANY, LLC; ENTERPRISE PRODUCT PARTNERS L.P.; ENTERPRISE PRODUCTS GP, LLC; EPCO, INC.; DAN L. DUNCAN; JERRY E. THOMPSON; W. RANDALL FOWLER; MICHAEL A. CREEL; RICHARD H. BACHMANN; RICHARD S. SNELL; MICHAEL B. BRACY; and MURRAY H. HUTCHISON; Defendants, TEPPCO PARTNERS, L.P., Nominal Defendant.	)	C.A. No. 2427-VCL

MEMORANDUM OPINION AND ORDER

Submitted: August 14, 2008
Decided: November 25, 2008

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LAMB, Vice Chancellor.

A limited partnership and its related entities move to dismiss the breach of fiduciary duty claim against certain directors as well as all disclosure claims in the complaint in this action. As to the fiduciary duty claim, for the purposes of a motion to dismiss, the court finds the allegation that "the board of directors" authorized the transactions at issue is sufficient identification of individual directors serving on the board at that time. As to the disclosure claims, the court finds that the complaint fails to point to any material information that was not already in the total mix or cured by the publication of subsequent proxy materials.

I.

A. Parties

The plaintiff, Peter Brinckerhoff, is currently and has been an owner of TEPPCO Partners L.P. units since 1999. He owned 38,400 TEPPCO units as of the filing of the amended complaint in this case.

TEPPCO, the named nominal defendant in this case, is an oil and gas master limited partnership organized in Delaware. TEPPCO's units are traded on the New York Stock Exchange under the ticker symbol "TPP."

The defendants in this case are Texas Eastern Products Pipeline Company, LLC ("TEPPCO GP"), a Delaware limited liability company and TEPPCO's general partner; Enterprise Products Partners, L.P., a publicly traded Delaware limited partnership, whose units are traded on the New York Stock Exchange

under the ticker symbol "EPD;" Enterprise Products GP, LLC ("Enterprise GP"), a Delaware limited liability company and the general partner of Enterprise; and EPCO, Inc., a Texas corporation that provides administrative functions for TEPPCO, TEPPCO GP, Enterprise, and Enterprise GP.

Brinckerhoff also names the following individuals as defendants. Dan Duncan is the Chairman of EPCO, a director of Enterprise GP, and a manager of both TEPPCO and TEPPCO GP. At the time of the filing of the amended complaint, Duncan directly or indirectly owned approximately 147 million limited partnership units of Enterprise and approximately 17 million limited partnership units of TEPPCO. Jerry Thompson, Randall Fowler, Michael Creel, Richard Bachmann, Richard Snell, Michael Bracy, and Murray Hutchison (collectively, the "TEPPCO GP directors") all served on TEPPCO GP's board of directors on the date of the filing of the original complaint. Snell, Bracy, and Hutchison were during the relevant time and currently are members of TEPPCO GP's Audit and Conflicts Committee ("ACC"). Fowler, Creel, and Bachmann (collectively, the "February 2006 directors") served on TEPPCO GP's board of directors from February 2006 until they resigned on December 29, 2006.

B. Background

On February 24, 2005, Duncan, through entities he controlled, acquired TEPPCO GP. Thereafter, TEPPCO GP entered into an administrative services

agreement (the "ASA") with EPCO, retroactive to the acquisition date, whereby EPCO agreed to perform management, administrative, and operating functions for TEPPCO. In February 2006, the directors of TEPPCO GP caused the company to waive a provision of the ASA so that TEPPCO could have overlapping directors with other entities controlled by Duncan.

On February 13, 2006, TEPPCO entered into a letter of intent with Enterprise regarding a 60% expansion of TEPPCO's Jonah Gas Gathering Company, and on August 1, 2006 the parties signed a definitive joint venture agreement (the "Jonah transaction").[1] On March 31, 2006, TEPPCO sold to Enterprise its ownership interest in a silica gel natural gas processing plant in Opal, Wyoming for $38 million (the "Opal transaction").

On April 20, 2006, TEPPCO GP offered to relinquish certain of its distribution rights[2] in exchange for approximately 13 million TEPPCO limited partnership units and certain amendments to TEPPCO's partnership agreement (collectively, "the proposals").[3] The proposed amendments to TEPPCO's partnership agreement included a reduction in the percentage of units required to approve conflicted transactions from 66⅔% to an absolute majority.

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[1] The complaint points out that the letter of intent contemplated a *financing* joint venture, while the formal agreement was an *ownership* joint venture. The complaint also notes that Duncan attempted to purchase Jonah in 2001, but was outbid by TEPPCO.

[2] TEPPCO GP offered to relinquish its right to receive 50% of all of TEPPCO's quarterly distributions above $0.45 per unit.

[3] TEPPCO GP later increased its demand to 14.1 million units.

Brinckerhoff filed a complaint on September 18, 2006 as a class action on behalf of TEPPCO unitholders and derivatively on TEPPCO's behalf. In his original complaint, Brinckerhoff alleged that the defendants breached their fiduciary duties by causing TEPPCO to enter into grossly unfair transactions, including the Jonah and Opal transactions. Brinckerhoff also alleged that the proxy statement issued in connection with TEPPCO's proposed amendment of its partnership agreement contained insufficient and misleading disclosures. On October 5, 2006, TEPPCO made public filings which contained supplemental disclosures and included the complaint as an exhibit. On November 17, 2006, TEPPCO answered the complaint and on the same day the other defendants filed motions to dismiss.

On October 26, 2006 and November 30, 2006, the TEPPCO unitholders met to vote on TEPPCO GP's proposals from April of that year. Both meetings were adjourned and scheduled to reconvene. After the November 30 meeting, TEPPCO GP filed additional proxy materials consisting of a one-page letter to the unitholders from TEPPCO GP's President and CEO, Jerry Thompson, that accompanied a one-page letter from Duncan to Thompson. Thompson's letter, addressed to the TEPPCO unitholders, cited some of the benefits of the proposals and urged unitholders to vote in favor of the proposals. In addition, Thompson's letter directed unitholders to refer to the previous proxy materials and introduced

Duncan's letter as reflecting Duncan's views on the importance of the vote. Duncan's letter also cited certain claimed benefits of TEPPCO GP's proposals.[4] The TEPPCO meeting reconvened on December 8, 2006 and the owners of at least 66⅔% of the outstanding TEPPCO units approved the proposals.

On July 12, 2007, Brinckerhoff filed an amended complaint which removed certain defendants and modified the disclosure claims in light of the supplemental disclosures made in October 2006. The revised disclosure claims focus on Duncan's letter alleging that it presented an actionably one-sided view of the proposals. The defendants then moved to dismiss all claims made against the February 2006 directors and the disclosure claims contained in count III as to all defendants. Following briefing, oral argument was held on August 14, 2008.

II.

The defendants move to dismiss certain claims of the amended complaint pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The legal framework governing motions to dismiss under Rule 12(b)(6) is well settled. In considering such a motion, the court must accept as true all well-pleaded factual allegations and must draw all reasonable inferences in

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[4] The benefits to TEPPCO that Duncan cited are (1) reducing distributions paid to TEPPCO GP, (2) decreasing TEPPCO's cost of capital, (3) increasing the TEPPCO limited partner units owned by TEPPCO GP, thus further aligning the interests of TEPPCO and TEPPCO GP, and (4) updating TEPPCO's governance structure to be more in line with other publicly traded partnerships.

favor of the plaintiff.[5] However, the court "is required to accept only those reasonable inferences that logically flow from the face of the complaint and is not required to accept every strained interpretation of the allegations proposed by the plaintiff."[6] In addition, "[c]onclusory allegations unsupported by facts contained in a complaint . . . will not be accepted as true."[7] The court must consider the "various factual permutations reasonably possible within the framework of the plaintiff's allegations," and dismissal under Rule 12(b)(6) is inappropriate unless the court determines that the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[8]

III.

A. Count I: Breach Of Fiduciary Duties And Acts Of Bad Faith

The defendants move to dismiss count I (breach of fiduciary duties and acts of bad faith) against the February 2006 directors claiming that the complaint does not plead adequate facts regarding the February 2006 directors' involvement in the Jonah and Opal transactions.[9] As discussed below, the allegations of the

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[5] *See e.g., N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla,* 930 A.2d 92, 97 (Del. 2007) ("Even vague allegations are well-pleaded if they give the opposing party notice of the claim.").

[6] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

[7] *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'n Corp.*, 672 A.2d 35, 38 (Del. 1996)).

[8] *Gen. Motors*, 897 A.2d at 168; *In re Primedia Inc. Deriv. Litig.,* 910 A.2d 248, 256 (Del. Ch. 2006).

[9] The defendants did not move to dismiss similar claims against the directors on the ACC, suggesting that the defendants merely contest the adequacy of the plaintiff's pleading regarding the involvement of the February 2006 directors in the transactions and not the adequacy of the underlying breach of fiduciary duty claim.

complaint, which cite "the defendant directors of TEPPCO GP" as the persons responsible for approving the transactions, are sufficient to survive a challenge under Rule 12(b)(6).

The original complaint alleged that the ACC approved the Jonah and Opal transactions. Brinckerhoff modified his allegations in the amended complaint and now alleges that the ACC recommended the transactions and the TEPPCO GP board, which included the February 2006 directors, approved them.[10]

In their opening brief, the defendants criticize the complaint for not pleading more particularized facts regarding whether and to what extent the February 2006 directors participated in the Jonah and Opal transactions. In their reply brief, the defendants focus on the fact that Brinckerhoff had 10 months between the filing of his original and amended complaints to flesh out the February 2006 directors' involvement, if any, in the transactions and therefore should not be entitled to any favorable inferences. The defendants further criticize Brinckerhoff for failing to use the "tools at hand" to determine whether the February 2006 directors

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[10] As noted by the defendants, some paragraphs in the amended complaint still allege that the transactions were "approved" by the ACC. But the amended complaint also alleges that prior to the December 2006 amendments to TEPPCO's partnership agreement, the ACC lacked authority to "take any action or give any approvals" and that the ACC merely "recommended [the Jonah and Opal transactions] to the [TEPPCO GP] board of directors." Am. Compl. ¶ 38. Additionally, a number of paragraphs clearly state that "the defendant directors of TEPPCO GP" approved the transactions. Am. Compl. ¶¶ 53, 56, 57. The amended complaint, read as a whole, indicates that the TEPPCO board was responsible for the ultimate approval of the Jonah and Opal transactions.

"attend[ed] board meetings in which the Jonah and Opal transactions were discussed and approved; actively participate[d]; vote[d] on the transactions; discuss[ed] the transactions with their fellow board members or otherwise attempt[ed] to influence them; and [had] special knowledge or perspective regarding these transactions by virtue of their positions as senior officers of Enterprise."[11] Because the complaint fails to allege such basic details relating to the involvement of the February 2006 directors, the defendants argue that the court should reject Brinckerhoff's more general allegations as strained and conclusory.

Brinckerhoff correctly responds that his allegations are sufficient to survive a motion to dismiss. The complaint's allegations that "the defendant directors of TEPPCO GP" approved the transactions, adequately put the February 2006 directors on notice of the claims against them.[12] Additionally, after making such allegations, Brinckerhoff is entitled to the reasonable inference that the February

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[11] Def.'s Reply Br. at 3-4. *See Gen. Motors*, 897 A.2d at 171 ("This Court has frequently stated that the plaintiffs must use the 'tools at hand' to develop the necessary facts for pleading purposes.").

[12] Consistent with the liberal pleading standard of Court of Chancery Rule 8(a), "[a] complaint need only give general notice of the claim asserted and will not be dismissed unless it is clearly without merit, either as a matter of law or fact." (citations omitted). *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985). In his amended complaint, Brinckerhoff alleges: "the defendant directors of TEPPCO GP caused TEPPCO to enter into [the Jonah] letter of intent" (¶ 39); "whereupon the defendant directors of TEPPCO GP, including the members of the ACC, caused TEPPCO to waive the requirement of the fairness opinion and proceeded with the [Jonah] Joint Venture Agreement" (¶ 53); "the TEPPCO GP defendant directors and EPCO employees, standing on both sides of the [Opal] transaction, negotiated a grossly inadequate price" (¶ 56); and "the TEPPCO directors' decision to sell the Opal plant and gas processing rights was made in conscious disregard for the best interest of TEPPCO and its public unitholders" (¶ 57).

2006 directors, who were a part of the TEPPCO GP board at the time of the transactions, participated in approving the transactions.[13] Furthermore, the inference that the February 2006 directors participated in the approval of the transactions is not only one of the "various factual permutations reasonably possible within the framework of the plaintiff's allegations," it is arguably the most reasonable inference, exceeding the requirements to survive a Rule 12(b)(6) motion.[14] Therefore, Brinckerhoff's claims in count I cannot be dismissed.[15]

B. Count III: Disclosure Claims

The next issue before the court is whether Brinckerhoff's disclosure claims can survive the defendants' Rule 12(b)(6) motion to dismiss. The complaint alleges that the defendants' proxy materials related to the proposals contained materially misleading information and omitted material information. Because the complaint fails to properly plead any such violation, count III will be dismissed.[16]

The Delaware Supreme Court has held that the Rule 8(a) notice pleading standard discussed above applies to disclosure cases. The court also stated that in

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[13] "[T]he court must give the pleader 'the benefit of all reasonable inferences that can be drawn from its pleading.'" *Solomon*, 672 A.2d at 38 (quoting *In re USACafes, L.P., Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991)).

[14] *In re Primedia,* 910 A.2d at 256.

[15] *See id.* If the defendants can provide evidence, which they have not yet provided, that the February 2006 directors abstained from voting or were not involved in the transactions, such evidence may be more properly considered at the summary judgment stage or at trial.

[16] Following oral argument, the parties stipulated to the dismissal of count III as against Enterprise and Enterprise GP.

disclosure cases "[t]here may sometimes be a fine line between the obligation to set forth well-pleaded allegations of ultimate fact under Rule 8(a) and the requirement in derivative or fraud cases to set forth facts with particularity."[17] Elaborating further, the court held that a "claim based on disclosure violations must provide some basis for a court to infer that the alleged violations were material. For example, a pleader must allege that facts are missing from the proxy statement, identify those facts, state why they meet the materiality standard and how the omission caused injury."[18] Failure to plead facts showing any one of these elements will make a complaint susceptible to a motion to dismiss.[19] Under Delaware law, an "omitted fact is material if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote."[20] Furthermore, the materiality standard for disclosure claims is often described as requiring a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available."[21]

A disclosure claim may be made by alleging a fiduciary made materially false statements, omitted material facts, or made materially misleading partial

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[17] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 (Del. 1997).
[18] *Id.*
[19] *Wolf v. Assaf*, 1998 WL 326662, *3 (Del. Ch. June 16, 1998) (citing *Loudon*, 700 A.2d at 137-38).
[20] *Loudon*, 700 A.2d at 143.
[21] *Id.*; *see also Rosenblatt v. Getty Oil Co.,* 493 A.2d 929, 944 (Del. 1985); *TSC Indust. v. Northway,* 426 U.S. 438, 449 (1976).

disclosures.[22] Here, the complaint does not allege that the defendants made any materially false statements, but rather relies on allegedly materially misleading partial disclosures and omissions. The complaint's disclosure allegations focus on information related to the Jonah and Opal transactions and on information included in or omitted from Duncan's letter. While it is rare that a plaintiff fails to satisfy the burden of pleading omission, "an inclusion of facts showing that the information was in fact delivered to shareholders in a reasonable manner so that it would be a part of the total mix to be considered by them defeats conclusory claims to the contrary."[23] Here, all material facts alleged were part of the "total mix" before the TEPPCO unitholder vote, either through TEPPCO's September proxy statement or through its October supplemental materials. Additionally, the court declines to view Duncan's letter in isolation, especially in light of the direction to read prior proxy materials in Thompson's letter which attached, referenced, and directly preceded Duncan's letter in the same public filing. Therefore, as more fully discussed below, the disclosure claims will be dismissed.

1. Information Related To The Jonah And Opal Transactions

The Jonah and Opal transactions were not subjects of the proposals, yet Brinckerhoff alleges that the defendants should have disclosed more information

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[22] *Oliver v. Boston Univ.*, 2000 WL 1091480 at *8 (Del. Ch. 2000).
[23] *Wolf,* 1998 WL 326662, *3.

regarding these transactions. He reasons that the proposals would make conflict-of-interest transactions easier to approve in the future, therefore a reasonable stockholder would want details on past conflict-of-interest transactions, such as Jonah and Opal. While the proxy materials do discuss the Jonah and Opal transactions,[24] Brinckerhoff argues the defendants should have provided additional details.[25]

Such details were provided by TEPPCO to the unitholders. On October 5, 2006, more than two months before the final vote on the proposals, TEPPCO attached the original complaint as an exhibit to a Form 8-K which announced the filing of the lawsuit. TEPPCO also posted the complaint on its website. The same day, TEPPCO filed (and presumably distributed) supplemental proxy materials that both summarized the original complaint and referred unitholders to the two locations where the entire complaint could be found. The original complaint

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[24] Generally the court may not consider documents extrinsic to the complaint when deciding a Rule 12(b)(6) motion. The court may depart from this general rule when "the document is integral to a plaintiff's claim and incorporated into the complaint" or when "the document is not being relied upon to prove the truth of its contents." The proxy materials fall under both exceptions. *See Orman*, 794 A.2d at 15-16.

[25] As to the Jonah transaction, Brinckerhoff alleges that the defendants should have disclosed the failure to obtain a fairness opinion, the valuation method used to calculate the price Enterprise paid, a carve-out of Enterprise's right of first refusal for the benefit of Duncan and his family interest, and that Jonah was released as a guarantor of TEPPCO's debt. As to the Opal transaction, Brinckerhoff claims that the defendants should have disclosed that they paid substantially more for an allegedly comparable gas processing rights agreement two months before the Opal transaction.

contains the substance of each disclosure that Brinckerhoff claims the defendants should have made.[26]

In his brief, Brinckerhoff argues that "the proxy materials painted a misleadingly positive picture of the Jonah and Opal transactions and therefore a reasonable unitholder evaluating the proposals would have had no reason to believe that Duncan and Enterprise had dealt with TEPPCO unfairly in previous conflict-of-interest transactions."[27] This is simply not true. The proxy materials did not characterize the transactions as good deals for TEPPCO.[28] Quite the contrary, the original complaint, which was included in the supplemental proxy

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[26] The original complaint specifically addresses each of the issues Brinckerhoff claims the defendants should have disclosed, except for the "comparable" gas processing rights agreement Enterprise entered two months before the Opal transaction. TEPPCO unitholders were clearly made aware of that possibility by the allegation in the original complaint that "[t]he sales price for . . . [Opal] was unfairly low. The price was 5.9 times EBITDA for the [Opal] plant (for the first three months of 2006, annualized). By contrast TEPPCO's enterprise value is about 12 times EBITDA." Compl. ¶ 64. If TEPPCO were seeking approval on the Opal transaction, this disclosure may have been required, but here the connection to the proposals is far too tenuous. Also, given the disclosure of the complaint which calls into question the fairness of the Opal transaction, disclosure of this "comparable" transaction would not materially change the "total mix" of available information.

[27] Pl.'s Opp. Br. at 15.

[28] The Jonah and Opal disclosures are merely factual and do not describe the deals positively or negatively. The entire disclosure regarding the Opal transaction reads: "On March 31, 2006, we sold our ownership interest in Jonah Gas Gathering Company's Pioneer silica gel natural gas processing plant located near Opal, Wyoming, together with rights to process natural gas originating from the Jonah and Pinedale fields, located in southwest Wyoming, to an affiliate of Enterprise Products Partners for $38.0 million. The Pioneer plant was not an integral part of our midstream segment operations, and natural gas processing is not a core business for us. The sales proceeds were used to fund growth capital expenditures, partially reduce amounts outstanding under our revolving credit facility and for general partnership purposes." TEPPCO Partners, L.P., Other Definitive Proxy Statements (Form DEF 14A) at 8 (September 11, 2006). The discussion of the Jonah transaction is longer, but similarly contains no opinion as to whether the transaction was a good or bad deal for TEPPCO.

materials, characterized the Jonah and Opal transactions as extremely unfair to TEPPCO. Additionally, the complaint fails to plead any specific facts to support the conclusion that the proxy materials painted a misleadingly positive picture of the transactions.

2. Duncan's November 30, 2006 Letter

Most of the remaining disclosure allegations are based on omissions from and allegedly misleading information in Duncan's November 30, 2006 publicly filed letter to Thompson.[29] The threshold issue before the court is whether it is appropriate to review Duncan's letter in conjunction with the earlier proxy materials disseminated in September and October 2006. The court finds that it is appropriate to do so.

Thompson's one-page letter, which was publicly filed with Duncan's letter, urges unitholders to vote their proxies and promotes the benefits of the proposals. Thompson's letter directs unitholders to refer to the earlier proxy materials for additional information before to voting.[30] Additionally, Thompson's letter refers

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[29] Brinckerhoff does not challenge the disclosures in Thompson's letter.

[30] Brinckerhoff cites *Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 126 (Del. Ch. 1986) in arguing that the unitholders who purchased TEPPCO stock between September 11, 2006 and November 30, 2006 would not have received the earlier public disclosures, thus increasing the risk that they would not have a chance to review those disclosures. Here, Thompson's letter would alert any new unitholders to the need to obtain the earlier proxy materials. Also, the earlier proxy materials are easily accessible on the SEC's website—Thompson specifically provides the date of the proxy statement and the proxy statement was filed only a few weeks before his letter. When *Weinberger* was decided in 1986, such materials were not so easily available.

unitholders to Duncan's letter, which was enclosed in the same proxy materials. Thompson's letter clearly states that Duncan's letter simply sets forth Duncan's views on the importance of the vote.

Brinckerhoff argues that the court should consider Duncan's November 30, 2006 letter standing alone, apart from other proxy materials sent to unitholders in September and October of that same year. Thus viewed in isolation, the complaint claims that Duncan's letter is misleading and full of holes. Furthermore, Brinckerhoff argues that it would take a "super shareholder" to refer back to the earlier proxy materials to fill in those holes before voting. In support of his argument, Brinckerhoff relies on *ODS Technologies, L.P. v. Marshall*.[31] In *ODS*, the defendants argued that two agreements, attached as exhibits to a Form 10-K, contained the information that the plaintiff alleged was undisclosed in the proxy materials. The 10-K was incorporated by reference into the proxy materials, but the exhibit agreements were sent to stockholders in an unrelated distribution over two years earlier. Additionally, "the portions of those agreements relevant to a reasonable shareholder [were] neither highlighted nor mentioned directly in connection with the [a]mendments."[32] Moreover, the *ODS* court was doubtful that a reasonable stockholder would know the information was relevant to the

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[31] 832 A.2d 1254.
[32] *Id.* at 1262.

amendments it was asked to vote on, even after a thorough reading of both agreements.[33]

Here, the defendants are not seeking to pull information into the "total mix" that may or may not have been gleaned from reading a two-year old exhibit to a public filing, as was true in the *ODS* case. Rather the defendants here ask the court to consider as part of the "total mix" the actual proxy materials filed mere weeks before Duncan's letter. In addition, given the brevity and partisan tone of Duncan's letter, a reasonable unitholder was not likely to rely on the letter in isolation. Even if a unitholder were tempted to do so, Thompson's letter specifically directs the reader to the earlier proxy materials for additional information and alerts the reader that Duncan's enclosed letter merely represents Duncan's personal views. For all these reasons, the court will not examine Duncan's letter in isolation, but, instead, as a part of the total mix of information available to unitholders.[34]

Once the additional proxy materials are included in the total mix, all of Brinckerhoff's allegations regarding it fall away. Brinckerhoff's specific criticisms of Duncan's letter can be summarized as follows:

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[33] *See id.*

[34] *Cf*, *Wolf*, 1998 WL 326662, *3 ("[T]he directors mere failure to organize the documents to meet the plaintiff's best case scenario for maximizing the clarity of the information presented does not constitute the kind of omission or misleading half-truth that invokes this Court's equity jurisdiction.").

(1) The letter fails to mention that the proposals would seriously restrict the unitholders from challenging the actions of TEPPCO GP;

(2) it fails to mention Duncan previously bid for Jonah in 2001;

(3) it fails to mention that the units Duncan would receive are immediately liquid assets that trade on the New York Stock Exchange;

(4) it states that the proposals would lower TEPPCO's cost of capital, but does not mention why TEPPCO nevertheless sold Jonah and Opal despite the company's lower cost of equity capital;

(5) it does not provide a full picture of Duncan's interest in TEPPCO relative to Enterprise and its affiliates; and

(6) it does not mention that the proposals gave Duncan "carte blanche in dictating future TEPPCO resolutions" because the TEPPCO employees and TEPPCO GP directors were all beholden to and controlled by Duncan.

Information related to numbers (1) and (5) was disclosed in the September proxy statement and/or the October supplemental materials.[35] To the extent the

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[35] As to number (1), the September proxy materials disclosed that "[t]he additional units would also increase the voting power held by EPCO and its affiliates, making it more difficult for [TEPPCO's] public unitholders to block actions proposed by our general partner." The proxy materials also addressed the fact that "unitholders would lose the right to claim that a resolution of a conflict of interest was not fair and reasonable to [TEPPCO] if that determination were made by the Audit and Conflicts Committee and the unitholders could not show bad faith on the part of the Audit and Conflicts Committee." Further, as to number (5), the September proxy materials state that "[TEPPCO's] general partner is an indirect subsidiary of EPCO and is owned by DFI, an affiliate of EPCO and a privately held company controlled by Dan L. Duncan." In addition, the original complaint discusses Duncan's ownership interests in detail.

Jonah and Opal transactions (numbers (2) and (4)) were related to the proposals, such information was clearly set forth in the original complaint. TEPPCO's October 5, 2006 supplemental proxy materials summarized the complaint and directed unitholders to multiple locations where the full complaint was publicly available. As to number (3), the proxy materials stated Duncan would receive TEPPCO units and TEPPCO unitholders should know that those units trade on the New York Stock Exchange and are liquid. Number (6) is flatly untrue as the proposals do not appear to give Duncan "carte blanche in dictating future resolutions."

3. Self-Flagellation

The remaining allegation in count III also fails to state a claim upon which relief can be granted. Brinckerhoff alleges that "[t]he proxy materials disseminated to the unitholders failed to provide complete disclosure of Duncan's intentions and business plan with regard to TEPPCO, namely that Duncan intended to cause TEPPCO to transfer all or substantially all of TEPPCO's midstream assets to Enterprise or other entities controlled by Duncan."[36] Essentially, Brinckerhoff claims Duncan should have disclosed his alleged intention to loot TEPPCO in favor of companies in which he has larger holdings. There is no evidence that Duncan has or had such an intention. TEPPCO has been operating under the

[36] Am. Compl. ¶ 89.

amended partnership agreement, which includes the proposals at issue in this case, for nearly two years and there has been no allegation of looting by Duncan during that time period.[37] Under Delaware law, Duncan need not engage in "self-flagellation" in his disclosures and draw legal conclusions implicating himself in a potential breach of fiduciary duty from surrounding facts and circumstances.[38] Looting TEPPCO in favor of Enterprise would clearly be a breach of Duncan's fiduciary duties as a manager of TEPPCO. While disclosure of all material facts relevant to the proposals is required by Delaware law, disclosure of some alleged and unfounded future intent to breach fiduciary duties is certainly not.[39]

IV.

For the foregoing reasons, the defendants' motion to dismiss count I of the amended complaint is DENIED. The defendants' motion to dismiss count III of the amended complaint is GRANTED. IT IS SO ORDERED.

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[37] The Jonah and Opal transactions occurred *before* the passage of the proposals.
[38] *Stroud*, 606 A.2d at 84 n.1; *see also In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1074 (Del. Ch. 2001).
[39] *Stroud,* 606 A.2d at 84 n.1.