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CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs,	*	**FOR**
v.	*	**BALTIMORE CITY**
IMPAC MORTGAGE HOLDINGS, INC.	*	**Case No. 24-C-11-008391**
	*	
Defendant.	*	

* * * * * * * * * * *

CAMAC FUND LP'S MOTION TO CERTIFY CLASS, APPOINT CLASS REPRESENTATIVE AND LEAD COUNSEL, PRELIMINARILY DETERMINE RIGHT TO RECEIVE DIVIDENDS, AND SET FINAL JUDGMENT HEARING

Plaintiff, Camac Fund LP ("Camac"), by its undersigned counsel, moves to certify a class, appoint Camac class representative and its attorneys Lead Counsel, preliminarily determine the right to receive dividends, and set a Final Judgment Hearing, and states as follows:

1. This case involves a challenge by stockholders to an attempt by the defendant, Impac Mortgage Services, Inc.'s ("Impac") to amend the rights of its Series B Preferred ("Series B") stockholders as set forth in its Articles Supplementary. Among other things, the amendment sought to make the dividends on the Series B stock non-cumulative.

2. The Court has ruled that the amendment was not validly amended and, as a result, the original Articles Supplementary remained in force, and the cumulative nature of the dividends was restored.

3. The Court ruled that three quarters of dividends were owed to Series B stockholders but did not determine which stockholders were the proper recipients of the dividends. The Court deferred making that determination and also deferred ruling on the

previously-filed Plaintiffs' Motion for Class Certification.

4. Because this case satisfies the requirements of subpart (b) of Rule 2-231, and because Impac acted on grounds generally applicable to the class of Series B stockholders thereby making final injunctive and declaratory relief appropriate with respect to the class as a whole, this case should be certified as a (c)(2) class action, with the class defined as: "All owners of Series B Preferred stock of Impac Mortgage Holdings, Inc. from the close of the tender offer on June 29, 2009, until the date of the class certification order."

5. Camac moves that the Court approve a Notice Program to provide direct notice to the current Series B stockholders and public notice to prior stockholders through: Impac's website, the website of a notice administrator, the filing of a form 8-K with the SEC, issuance of a press release, and publication in Investor's Business Daily, and avers that this notice is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to be heard.

6. Camac, having been a plaintiff in this case since 2014, is an adequate class representative and is qualified to be appointed class representative. His counsel, Tydings & Rosenberg LLP ("Tydings"), successfully argued the motions that resulted in multiple benefits, financial and otherwise, to the Series B stockholders. Further, Tydings wrote the briefs and successfully argued the case in both appellate courts. Tydings has committed significant resources to the prosecution of this case and has amply demonstrated its fitness to serve as Lead Counsel. Consequently, Camac moves that it be appointed Class Representative and that Tydings be appointed Lead Counsel.

7. Because the right to receive a dividend is governed by whether one is a stockholder of record when the dividend is declared, and because the right to receive

accumulated dividends travels with the stock, Camac moves that the Court preliminarily determine that the stockholders as of the date that the three quarters of dividends are declared should receive those dividends.

8. Camac moves that this Court set a Final Judgment Hearing, after notice is given to the Class pursuant to the Notice Program described above, at which the Court will determine the recipients of the three quarters of dividends and award attorney's fees and expenses to Lead Counsel to be paid from the common fund that will be payable to Series B stockholders.

WHEREFORE, for the reasons stated above, and those in the accompanying Memorandum of Law, this Court should enter an Order:

(a) Certifying the class defined as: "All owners of Series B Preferred stock of Impac Mortgage Holdings, Inc. from the close of the tender offer on June 29, 2009, until the date of the class certification order" and approving the Notice Program;

(b) Appointing Camac Fund LP as class representative and its attorneys as Lead Counsel;

(c) Preliminarily finding that the three quarters of dividends should be paid to those stockholders who own the stock when the dividends are declared; and

(d) Setting a Final Judgment Hearing at which the Final Judgment Order, in the form attached to the Proposed Order as Exhibit A, shall be entered finally determining the recipients of the three quarters of dividends and awarding Lead Counsel fees and expenses.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF CAMAC FUND LP'S MOTION TO CERTIFY CLASS, APPOINT CLASS REPRESENTATIVE AND LEAD COUNSEL, PRELIMINARILY DETERMINE RIGHT TO RECEIVE DIVIDENDS, AND SET FINAL JUDGMENT HEARING

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I. INTRODUCTION

Plaintiffs, stockholders of Series B Preferred stock of Impac Mortgage Holdings, Inc. ("Impac"), have successfully challenged an attempt by Impac to amend its Articles Supplementary and thereby eliminate their right to cumulative dividends. This Court, as affirmed by both appellate courts, has ruled the amendment invalid, and the stockholders' right to cumulative dividends has been restored. This Court, among other relief, determined that dividends for three quarters, totaling $1,169,985.94, must be paid. All other issues in the case were resolved and only two issues remain:

1. While all parties agree that the recipients of that payment should be those stockholders who own Series B stock when the dividend is declared, Impac is concerned that it could be exposed to competing claims to those dividends by certain former stockholders. *See* Defendant Impac Mortgage Holding's Qualified Partial Opposition to Class Certification (Docket 93/1), Impac Mortgage Holding's Opening Position Regarding Count I, IV, VI

Remedies (filed March 16, 2018, but not reflected on CaseSearch docket). A judicial determination of the proper recipients of the relief already ordered by the Court, that is binding on potential claimants, is an appropriate means to address Impac's concerns. This binding determination can be achieved by the Court making a preliminary determination, certifying a class action and allowing potential claimants to present their arguments, if any, to the Court for resolution.

2. Counsel for plaintiff, Camac Fund LP ("Camac"), has since 2013 invested over 3,000 hours of time and nearly $20,000 in expenses in the successful litigation of this case. In addition to the payment of the three quarters of dividends mentioned above, an additional benefit to the Series B stockholders is the reinstatement of the right to preferred dividends. Those dividends are cumulative, currently exceed $18 million, and will increase by $1,559,581 per year. Counsel seeks an award of reasonable fees from the common fund that this litigation has provided to the stockholders, and the stockholders are entitled to an opportunity to be heard on the amount of those fees. Again, the certification of a class, and notice to the class members with an opportunity to present their views on an application for the award of fees, is a means to rule on the request for an award of fees from the funds to be paid to Series B stockholders.

Accordingly, Camac moves for class certification and to be appointed class representative with its attorneys appointed lead counsel and requests that lead counsel be permitted to move for an award of fees from the common fund. Camac also asks that this Court preliminarily determine that the proper recipients of the three quarters of dividends are those stockholders as of the date that the dividend is declared. Finally, Camac asks this Court to approve the form of notice attached as Exhibit B to the Proposed Order and set a Final Judgment Hearing to enter final orders on the remaining issues.

II. FACTUAL AND LEGAL BACKGROUND

This case was filed on December 7, 2011, by Plaintiff, Curtis Timm ("Timm"), an owner of several thousand shares of two series of preferred stock issued by Impac. (Docket 1/0). Camac filed a Complaint in Intervention on March 5, 2014. (Docket 41/0).[1] The two stock series at issue were designated by Impac as the "Series B Preferred" ("Series B") stock and "Series C Preferred" stock ("Series C"). When issued in 2004, each series provided for the payment of a fixed dividend each quarter. The Articles Supplementary governing each series provided that dividends were cumulative if unpaid and, if six quarters of dividends to a series were unpaid, the stockholders of that series had the right to elect two directors. And Impac was prohibited from repurchasing stock of a series without paying all accrued dividends to that series' stockholders.

The Complaint challenged a May 2009 tender offer pursuant to which Impac repurchased shares of the two series at tremendously discounted prices, linked with a "Consent Solicitation" that required tendering stockholders to consent to a number of amendments to the respective share's Articles Supplementary. According to the summary included by Impac in its Offering Circular, the effect of the transaction and these amendments was to, among other things:

1. Make future dividends non-cumulative;
2. Eliminate provisions prohibiting payment of dividends on junior stock and prohibit the purchase or redemption of junior or parity stock if full cumulative dividends for all past dividend periods are not paid or declared and set apart for payment;
3. Eliminate the provision prohibiting the Company from redeeming less than all of the outstanding Preferred Stock if full cumulative dividends for all past dividend periods have not been paid or declared and set apart for payment; and
4. Eliminate the right of Preferred Stock to elect two directors if dividends are in arrears for six quarterly periods.

The amendments were applicable to both Series B and Series C. The Complaint alleged

[1] Camac's Complaint was mostly identical to Timm's except it did not include Timm's claim for punitive damages. The two complaints will be referred to collectively as "the Complaint."

that the amendments were not properly authorized and, therefore, were ineffective.

In response to Timm's initial Complaint, Defendants[2] filed a motion to dismiss or, in the alternative, for summary judgment. (Docket 19/0). This Court granted the motion with respect to all claims involving the Series C shares and as to all claims against individuals, but only as to some of the claims involving the Series B shares (the "2013 Order"). (Docket 19/1). Three counts remained, all of which turned on the meaning of the Voting Rights Provision contained in the Series B Articles Supplementary. The threshold issue in these three counts was whether Impac could amend the Series B Articles with a 2/3 vote of the Series B and Series C preferred shares combined, or if the amendment required 2/3 vote of the Series B alone.[3] The Court found that the Voting Rights Provision was ambiguous and required extrinsic evidence to determine its meaning.

Timm filed a motion to revise the adverse rulings, which was denied. (Docket 32/0, 32/3). Impac then filed a motion for summary judgment as to all remaining counts. (Docket 39/0). At that time, Timm terminated the representation of his original counsel and retained new counsel, Thomas J. Minton. Mr. Minton and Camac's attorneys undertook extensive discovery, including numerous depositions (fact and expert) that were taken in California, New York, and Maryland. On March 9, 2015, Plaintiffs jointly opposed Impac's Motion for Summary Judgment and filed their joint cross-motion seeking judgment in their favor on the remaining counts. (Docket 39/1, 94/0). In addition, plaintiffs filed a motion for class certification on March 31, 2015. (Docket 93/0). On June 12, 2015, counsel for Camac argued the cross-motions for

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[2] In addition to Impac, officers and/or directors of Impac were sued for breach of fiduciary duty/violation of good faith and fair dealing. Additionally, Timm sued them for punitive damages. This Court dismissed the claims against the individual defendants, leaving Impac as the sole defendant.

[3] There was no dispute that fewer than two-thirds of the Series B shares voted to amend the Articles Supplementary. Timm unsuccessfully argued that, for a multitude of reasons, the vote was improper and ineffective even as to the Series C shares.

summary judgment. Thereafter, on April 24, 2017, Timm terminated the representation of Mr. Minton (Docket 113/0) and proceeded *pro se*, until October 27, 2021, when Timm's current counsel entered their appearance.

On December 29, 2017, this Court issued a Memorandum Opinion and Order denying Impac's motion for summary judgment and granting Plaintiffs' cross-motion for summary judgment. (Docket 94/7). As a result, this Court held that Impac breached its contract (the Articles Supplementary) and that the Series B amendments were therefore invalid and the 2004 Articles Supplementary remained in full force and effect. Further briefing and proceedings to determine the relief plaintiffs were entitled to receive followed.[4] The Court then entered an Order dated July 16, 2018, corrected on July 24, 2018, that in relevant part:

1. Declared that the Series B Articles Supplementary required the consent of two-thirds of the Series B shares to amend the Articles, that the 2009 amendments were not validly adopted because fewer than two-thirds of the Series B shares consented, and that the 2004 Articles remained in full force and effect, thereby reinstating the rights of Series B to cumulative dividends.

2. Ordered Impac to hold a special election for the Series B shareholders to elect additional directors because over six quarters of dividends remained unpaid.

3. Ordered that Impac is required to pay dividends on the Series B shares for the second, third, and fourth quarters of 2009 because Impac had repurchased shares in October 2009 while dividends for those quarters had not been paid.

4. Ordered that the judgment is final in accordance with Rule 2-602(b).

(Docket 132/2, 132/4).

[4] Timm, proceeding *pro se,* also filed a number of motions and letter requests repeatedly asking the Court to reconsider its earlier rulings. All such motions and requests were denied.

As this Court explained in its Memorandum Opinion of July 16, 2018, the issue of who is entitled to the three quarters of dividends remained, as did a claim for attorneys' fees, and those issues required class proceedings. *Id.* at 11-13. However, recognizing that an appeal would be filed, the Court deferred ruling on the class certification motion. Impac filed an appeal from the Court's judgment invalidating the Series B amendments, and Timm filed a cross-appeal. (Docket 32/2).[5] The Court of Special Appeals affirmed. *Impac Mortgage Holdings, Inc. v. Timm, et al.,* 245 Md.App. 84 (2020). Impac petitioned the Court of Appeals for *certiorari,* which was granted. *Impac Mortgage Holdings, Inc. v. Timm, et al.,* 469 Md. 656 (2020). That Court also affirmed. *Impac Mortgage Holdings, Inc. v. Timm, et al.,* 474 Md. 495 (2021).

As discussed, only two issues remain for adjudication, both of which require class proceedings. The first is to whom the three quarters of dividends are to be paid. All parties agree that the proper recipients are those who hold the Series B shares when the dividends are declared. However, Impac is concerned that it may be exposed to multiple payments if stockholders who owned shares at or around the time of Impac's repurchase on October 21, 2009 (as a result of which the three quarters of dividends should have been declared and paid), were to claim that they are entitled to the dividends even if they no longer own shares. Impac therefore desires a ruling on this issue and wants that ruling to be binding on potential claimants. The second issue is the payment of attorneys' fees. As a result of this litigation, a common fund was created, and owners of Series B shares will receive substantial benefits. First, they will receive the immediate benefit of being paid three quarters of dividends, totaling nearly $1.2 million. Second, the long-term benefit of their continuing right to cumulative dividends has been restored which may, in the future, result in payments to them that they would never have received but for

[5] This Court stayed the election of directors that it had ordered pending resolution of the appeal process. (Docket 135/5).

the litigation. Third, they have regained the right to representation on the Board which, even though it does not have a direct financial result, is of substantial value. Because of the successful result of the litigation, a common fund exists from which fees of the attorneys responsible for the result can and should be paid. Class certification is appropriate so that the class members can be heard on both issues. Therefore, Camac seeks certification of a class defined as:

> **All owners of Series B Preferred stock of Impac Mortgage Holdings, Inc. from the close of the tender offer on June 29, 2009, until the date of the class certification order.**

III. THIS CASE IS PROPERLY CERTIFIED AS A CLASS ACTION AND NOTICE MUST BE GIVEN TO MEMBERS OF THE CLASS

A. Introduction

The certification of this proposed Class is controlled by Maryland Rule 2-231 which, in all substantive aspects, parallels Rule 23 of the Federal Rules of Civil Procedure. Given the substantial congruence between the two rules, in the absence of specific Maryland authority analyzing the requirements of Maryland Rule 2-231 the Court may look to federal jurisprudence addressing elements of Fed.R.Civ.P. 23 that are identical or similar to components of the Maryland Rule. *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 724, 752 A.2d 200, 219 (2000) ("*Angeletti*").[6]

As with Federal Rule 23, the requirements for certification are set out in two parts. First, subpart (b) describes four essential prerequisites to all class certifications:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[6] A leading treatise notes that, with Maryland's adoption of Rule 2-231, "...standards are now provided for establishing class actions, and the body of law that has developed in the federal courts is useful in interpreting this rule." P. Niemeyer and L. Schuett, *Md. Rules Commentary* at p. 159 (3rd Ed. 2003).

Rule 2-231(b).[7]

If these essential prerequisites are met, subpart (c) of the Rule provides three alternative certification criteria. Only one of the three needs be satisfied in order to proceed as a class action. The one applicable here is (c)(2):

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; ...

Camac seeks certification under subpart (c)(2) of the Rule, because the declaratory and injunctive relief that has been ordered and remains to be ordered results from the ruling applicable to the class as a whole -- the Series B Articles Supplementary were not properly amended in the transaction of June 2009. The Court has ordered injunctive and declaratory relief, pursuant to which Impac will be required to take certain actions - specifically, the declaration and payment of three quarters of dividends (though to whom has yet to be determined).

Several preliminary considerations to the certification decision are worthy of note. First, the Supreme Court has observed that "[c]lass actions serve an important function in our system of civil justice," *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 (1981), recognizing that the class action device often may be necessary to fully implement private rights of action. *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, *reh'g. denied,* 446 U.S. 947 (1980). This recognition acknowledges that the right to collective action permits plaintiffs to "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." *Id.* at 338.

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[7] Maryland Rule 2-231 was amended in 2019 by adding a new subparagraph (a). All references in the original Motion for Class Certification to Rule 2-231(a), and its subparts, are now governed by Rule 2-231 (b). Similarly, what had been referred to as a (b)(2) class is now a (c)(2) class.

Second, the determination of class certification is committed to this Court's sound discretion. *Gulf Oil,* 452 U.S. at 100. A decision to grant class certification is not a final order; it "may be conditional and may be altered or amended before the decision on the merits." Rule 2-231(d). Therefore, in a close case, certification should generally be granted because the Court retains the ability to mold or modify any class certification order to the evolving circumstances of the case. *Eisenberg v. Gagnon,* 766 F.2d 770, 785 (3d Cir.), *cert. denied,* 474 U.S. 946 (1985); *See Spark v. MBNA Corp.*, 178 F.R.D. 431 (D. Del. 1998); *Jordan v. Global Natural Resources, Inc.*, 102 F.R.D. 45, 49 (S.D. Ohio 1984). Moreover, subpart (g) of Rule 2-231 gives the Court broad authority to enter appropriate orders governing the conduct of the case as a class action to ensure both efficiency and fairness to the parties and to the class members.

Finally, while Camac bears the initial burden of advancing reasons why a putative class action meets the requirements of the Rule, the burden is not a heavy one. *See Piel v. National Semiconductor Corp.,* 86 F.R.D. 357, 368 (E.D. Pa. 1980). As noted by a leading commentator on class action procedure, once a plaintiff has demonstrated a preliminary showing that the requirements of the Rule can be satisfied, the burden is upon the defendants to demonstrate otherwise. William B. Rubenstein, 3 Newberg on Class Actions § 7:22 (5th ed., December 2021 Update). In establishing this "preliminary showing," "[a] court should accept the putative class representative plaintiffs' allegations as true." *Angeletti,* 358 Md. at 726-27. In this case, Impac does not oppose class certification and in fact itself proposed that the Court make a ruling as to the recipients of the dividends that would be binding on the class of Series B stockholders. *See* Defendant Impac Mortgage Holding's Qualified Partial Opposition to Class Certification (Docket 93/1), Impac Mortgage Holding's Opening Position Regarding Count I, IV, VI Remedies. Indeed, this Court recognized that "Impac agrees as to the need for a determination, through class proceedings, of the identity of the persons entitled to dividends." July 16, 2018,

Memorandum Opinion, p. 14. (Docket 132/2).

B. The Proposed Class Satisfies the Requirements of Subpart (b) of Rule 2-231

1. Subpart (b)(1) - - Numerosity

The focus of the numerosity requirement of Rule 2-231(b)(1) is judicial economy. The rule does not set forth a precise numerical standard, but presents "an impracticability of joinder requirement, of which class size is an inherent consideration. . . ." 1 Newberg, *supra,* §3:11. This Court may make "common sense assumptions" about the numerosity requirement, *Snider v. Upjohn Co.,* 115 F.R.D. 536, 539 (E.D. Pa. 1987) (citations omitted), and it is permissible at this stage to estimate class size. *See In re ORFA Sec. Litig.* 654 F.Supp. 1449, 1464 (D. N.J. 1987).

The Rule does not require that joinder be impossible, merely impracticable, and joinder is generally considered to be impracticable when the procedure would be "inefficient, costly, time-consuming, and probably confusing." *McMahon Books, Inc. v. Willow Grove Assocs.,* 108 F.R.D. 32, 35 (E.D. Pa. 1985). With this consideration in mind, courts have found that class sizes of 25 - 50 satisfy the requirement. *See, Riordan v. Smith Barney,* 113 F.R.D. 60, 62 (N.D. Ill. 1986).

There are nearly seven hundred thousand shares of Series B stock outstanding. In shareholder actions, numerosity is generally considered satisfied in this circumstance, where those shares are or were held by hundreds or thousands of individual shareholders. (The precise number is unknown to Camac but is likely known to Impac). See, e.g. *In re Lawson Software, Inc.,* 2011 WL 2185613 at *2 (Del. Ch. May 27, 2011); *In re Cox Radio, Inc. Shareholders Litig.,* 2010 WL 1806616 at *8 (Del. Ch. May 6, 2010).

2. Subpart (b)(2) -- Commonality of Issues

Rule 2-231(b)(2) requires only that there be a single common question of law **or** fact in order for the court to certify a class action. *German v. Federal Home Loan Mortgage Corp.*, 885

F. Supp. 537, 553 (S.D.N.Y. 1995), citing *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D. N.Y. 1992); *McCoy v. Ithaca Housing Auth.*, 559 F. Supp. 1351, 1355 (N.D. N.Y. 1983). Here, all questions of both law **and** fact are entirely common to the class. The relief that has already been entered – invalidation of the purported amendment and restoration of the 2004 Articles – is entirely common to the class, as are the right to elect directors, the right to the three quarters of dividends, and the right to receive any future payments of dividends.

Subpart (b)(2) of the Rule imposes no requirement that all class members share identical claims; factual differences among class members do not defeat class certification. *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994); *Angeletti,* 368 Md. at 734-35.[8]

The Complaint alleges a series of acts by the Defendants that affected Camac and all Series B stockholders in precisely the same manner – they purported to strip the stockholders of their right to cumulative dividends. The claims spawned by these operative facts, and the defenses that were asserted to those claims, were "common," as that term is used in Rule 2-231(b)(2), because resolution of those common issues as to any one Series B stockholder effectively produces a resolution as to all members of the Class. This Court has ruled that Impac breached its contract and has determined the relief that results from that breach, and it is now necessary to determine what stockholders are entitled to that relief – that determination will be common to all stockholders. Similarly, an award of attorneys' fees and the determination of the funds from which it is paid will be common to all stockholders who receive dividends. A cohesive, integrated resolution of these common issues is best provided through the class action

[8] Here, not all class members will be the beneficiaries of the rights restored to the Series B. Only stockholders at the time of the election will be permitted to elect directors, only stockholders at the time future dividends are declared will receive those dividends and, as all parties will urge the Court to find, only stockholders at the time the three quarters of dividends are declared should receive those dividends. But, as stated, certain stockholders may disagree as to the third point.

mechanism, and a (c)(2) certification offers the superior method of resolution of this litigation with respect to the claims remaining to be adjudicated. The underlying factual and legal issues in this action easily satisfy the "commonality" standard of Rule 2-231(b)(2).

3. Subpart (b)(3) -- Typicality of claims.

The typicality prerequisite of Rule 23(a) has been construed to require that the relief sought would benefit all class members and that no individual claim within the class be so unique as to impair the necessary alignment of interests. *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156 (1974). "[A] general course of conduct by the opposing party which affects the entire class to the same or similar degree, will substantiate the appropriateness of class action status." *Ramirez v. Webb*, 102 F.R.D. 968, 971 (W.D. Mich. 1984), citing *Kaufman v. Lawrence*, 76 F.R.D. 397 (S.D.N.Y. 1977).

Courts recognize that the typicality requirement tends to merge with commonality since the same facts and legal issues often satisfy both prerequisites. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 158 n. 13 (1982). Both serve as guideposts for determining whether the named plaintiff's claims and the class claims are so interrelated that the interests of the absent class members will be fairly and adequately protected. *Id.* Here, Camac has been affected by the acts and omissions of Impac in precisely the same manner as the other Series B stockholders because those alleged acts and omissions have been directed at Camac and the other members of the Class *as stockholders*. As to the issue of who receives the three quarters of dividends, the determination of Camac's rights will be identical to the determination of the rights of all stockholders – either, as the parties agree and the law supports – stockholders at the time the dividends are declared will receive the dividends, or other stockholders will receive them. Camac's claims are, therefore, typical of the claims of the Class as contemplated by subpart (b)(3) of the Rule.

Subpart (b)(4) – Adequacy of Representation, will be addressed in Section III.A. below.

C. Class Certification is Appropriate Under Subpart (c)(2) of Rule 2-231

Subpart (c)(2) of Rule 2-231 provides that, once the prerequisites of subpart (b) are satisfied, the court may certify a class when:

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

When Plaintiffs filed their joint Motion for Class Certification in 2015, Camac and Timm both sought certification under (c)(2) because all of Impac's acts complained of in the Complaint were directed towards Series B stockholders as a whole and the acts were "generally applicable" to all members. Most importantly, as Plaintiffs argued in that motion, the appropriate remedy in the case was declaratory and injunctive relief. Indeed, that is the relief that was requested in the Complaint and granted by this Court. Almost three years later, Timm sought to recant his position on class certification. In his Motion to Rescind Orders filed on February 26, 2018 (referenced in Docket 124/0), Timm withdrew his Motion for Class Certification, apparently contending that a claim for damages remains in this case. He reiterated his withdrawal of his support for the Motion in his March 16, 2018, brief, seemingly on the theory that the claims relating to the Series C would be reinstated on appeal (which did not occur). (Docket 126/4).[9] In his "Response to Defendants' [sic] and Camac March 2018 Briefs," filed March 27, 2018 (Docket 126/7), he asserted that "injunctive relief by ordering Defs to pay the Pfd B shareholders damages" could be ordered, and that "Pl will know after this curt [sic] rules currently, whether the Pl class can agree to a Rule 2-231[c](2) certification." *Id.* at 13-15. Camac has maintained

[9] This, and other docket references to certain of Timm's filings, may be incorrect because the CaseSearch references are difficult to reconcile with the titles of the filings.

its support throughout this case for a (c)(2) certification and, because the only relief that remains is declaratory and injunctive, that certification is appropriate.

Under this subpart of the Rule, "[a] court must determine (1) whether Defendant has acted on grounds "generally applicable to the class as a whole," and if so, (2) whether declaratory or final injunctive relief is the appropriate and primary remedy for the … claim." *In re Managed Care Litigation,* 209 F.R.D. 678, 682-683 (S.D. Fla. 2002); *see also* 7A Wright, Miller & Kane, *Federal Practice and Procedure,* § 1775 (2nd ed. 1986). Such relief is not only the appropriate and primary remedy here, it is the remedy that this Court has already granted.

As stated, the (c)(2) requirement that the relief is declaratory and injunctive contemplates that, through a single injunction or declaration, the court can provide relief that redresses injury to the group as a whole, as opposed to individual harm. *Holmes v. Cont'l Can Co.,* 706 F.2d 1144, 1155 (11th Cir. 1983). This is precisely what occurred here – the underlying breach of contract claim was applicable to the Series B stockholders as a whole, and the only remaining issues – the payment of the three quarters of dividends and award of attorneys' fees – require a judicial decree that "redress[es] group as opposed to individual injuries," *id.,* rendering (c)(2) certification appropriate. "The remedy sought by the … Class is a group remedy that will not entail complex individualized determinations. Therefore, Rule 23(b)(2) is satisfied. …" *In re Piedmont Office Trust,* 264 F.R.D. 693, 700 (N.D. Ga. 2010)

In sum, the absent Series B stockholders should have an opportunity to be heard on the issues that remain, and a (c)(2) class is the appropriate vehicle to provide that opportunity. As stated above, Camac's burden to support class certification is not a heavy one, and the burden then shifts to the defendant to show why certification should not be granted. Here, Impac supports the certification of a class to protect itself from multiple claims for the same dividends.

Therefore, (c)(2) certification should be granted.

D. The Definition of the Class

The class should be defined as:

> All owners of Series B Preferred stock of Impac Mortgage Holdings, Inc. from the close of the tender offer on June 29, 2009, until the date of the class certification order.

Although all parties agree that the class members who should obtain the relief involving payment of accrued dividends are those who own the shares when the dividend is declared, the judgment that will direct to whom the dividends are distributed will be dispositive of the rights of all shareholders who were affected by Impac's wrongful acts and who might press a contrary view. Impac repurchased stock on October 21, 2009, and failed to declare and then pay the three quarters of dividends due as a result of the repurchase, which was contrary to its obligations under the 2004 Articles Supplementary. It is certainly conceivable that stockholders who held stock at the time that the dividends should have been declared and paid, but later sold their stock, may claim that they are entitled to those dividends. They should, as class members, have an opportunity to be heard, as this Court's ruling on who is to receive those dividends will be dispositive of their rights.

E. The Court Should Approve the Proposed Notice Program

Maryland Rule 2-231(g)(2) provides that a court may enter an order requiring that notice be given to a class "in the manner the court directs to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." Unlike a (c)(3) class, a (c)(2) class does not **require** that notice be given. Nevertheless, notice here is **appropriate** for a final determination of both remaining issues. If the Court agrees that the dividends go to stockholders at the time the

dividends are declared, Camac, if it holds its stock when that occurs, would receive the dividends, while members of the class who no longer are holders would not. In light of Impac's concern of competing claims to the dividends, notice to all class members, with an opportunity to be heard, is fair and appropriate. Similarly, since Camac's counsel will be seeking an award of fees and expenses from the common fund of dividends to be paid now and in the future, the Series B shareholders whose dividends will be reduced by the amount of those fees should have an opportunity to be heard.[10]

Due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice has been found to satisfy these requirements by filing a Form 8-K with the SEC, posting the notice on the company's website, issuing a press release, and posting the notice on the lead counsel's website. *Fire & Police Retiree Health Care Fund v. Smith*, Civil Action No. CCB-18-3670, 2020 U.S. Dist. LEXIS 217892, at *11-12 (D. Md. Nov. 20, 2020). In addition to these methods, publishing notice in Investor's Business Daily has been found to be appropriate. *In re India Globalization Capital, Inc.*, No. DKC 18-3698, 2020 U.S. Dist. LEXIS 77190, at *13-14 (D. Md. May 1, 2020); *In re Am. Capital S'holder Derivative Litig.*, No. 11-2424 PJM, 2013 U.S. Dist. LEXIS 90973, at *6 (D. Md. June 26, 2013).

Here, a Notice Program is necessary to give class members the opportunity to be heard on the remaining issues – the recipients of the three quarters of dividends, and the amount and payment of attorneys' fees, and the proposed Notice Program described below is reasonably

[10] If the court does not certify a class, Camac reserves the right to move this Court for an award of fees and expenses from the common fund, because its work has yielded a substantial common benefit for all of the Series B stockholders.

calculated to apprise the class members of the pendency of the action and afford them the opportunity to present their objections. Providing notice to **current** stockholders will not be difficult – it is believed that Impac has information to identify those stockholders, and they can likely be contacted both directly and by the publication methods proposed. It will be more challenging to notify stockholders from 2009 – it is Camac's understanding that no records are available to reflect Series B stockholders at that time. Therefore, the best practicable means to reach that group is through public notice. Specifically, in addition to direct notice, either by email or mail to current stockholders, Camac proposes public notice as follows:

(a) Notice on Impac's website;

(b) Notice on the notice administrator's website;

(c) Impac filing a form 8-K with the SEC;

(d) Issuing a press release; and

(e) Publishing notice in Investor's Business Daily.

The proposed Notice, Exhibit B to the Proposed Order Certifying a Class and Setting Further Proceedings, will define the Class, explain all Class Members' rights, the scope and impact of the issues that have been, and remain to be, decided, and the applicable deadlines for submitting objections, and it will describe in detail the relief granted and to be granted, including the preliminary determination of the recipients of the three quarters of dividends. The Notice will also plainly indicate the time and place of the Final Approval Hearing and explain the methods for objecting to the resolution of the remaining issues. Camac submits that the proposed Notice Program adequately protects the interests of absent Class Members and should be approved.

IV. PLAINTIFF CAMAC IS AN ADEQUATE REPRESENTATIVE AND SHOULD BE APPOINTED CLASS REPRESENTATIVE, AND ITS COUNSEL SHOULD BE APPOINTED LEAD COUNSEL.

A. Camac Has Demonstrated Its Qualifications for Appointment as Class Representative.

A straightforward two-part test governs the "adequacy of representation" component stated in Rule 2-231(b)(4). First, there can be no conflicts between the interests of the representative plaintiff(s) and the interests of the class. Second, the representative plaintiff must be committed to vigorously prosecuting the interests of the class through experienced, qualified counsel. *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions,* 148 F.3d 283, 312 (3rd Cir. 1998); *see Sentner v. Gen. Motors Corp.*, 532 F.2d 511, 524-525 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *Ramirez v. Webb*, 102 F.R.D. at 971. These requirements are directed to due process concerns and are intended to assure that absent class members, who will be bound by the result of the litigation, are protected by a vigorous and competent prosecution of the case by someone who shares their interests. *See,* 1 Newberg, *supra*, § 3.72; *see also*, *George v. Baltimore City Public Schools*, 117 F.R.D. 368, 371 (D. Md. 1987).

As noted above, Camac's interests in this litigation are directly aligned with its fellow Impac Series B shareholders who are the absent Class members, so no conflicts exist. And Camac is represented by counsel who have many years of both individual and collective experience representing classes, including shareholders and/or partners in fiduciary duty cases in this State and others. *See* Exhibit 1 (Declaration of Daniel S. Katz); Section IV.B., *infra.*.

The particular qualifications of Eric Shahinian (principal of Camac) are worth noting. Adequacy under (b)(4) is sometimes challenged on the assertion that the named plaintiff needs to demonstrate a deeper understanding of the claims raised in the suit. *See. E.g., In re Piedmont Office*

Trust, Inc. Sec. Litig., 264 F.R.D. at 699-700.[11] No such argument can be raised here. Mr. Shahinian has amply demonstrated a sophisticated understanding of the complex issues attendant to shareholder litigation, and the facts of this case.

Mr. Shahinian is a principal in Camac Partners LLC which manages plaintiff Camac. He started in the investment business in 2009 as an analyst and formed Camac Partners in 2011. Camac is a private investment firm and currently owns 246,110 shares of Impac Series B Preferred stock, or 37 percent of the outstanding B shares. Those shares were purchased beginning in 2012. Exhibit 2 (Affidavit of Eric Shahinian).

Mr. Shahinian explained his reasons for having Camac intervene in this action:

> I recognized that we own a fairly large stake in the preferreds. As a result felt that it would be important to get involved.... For purposes of furthering our view on the case, assisting in any way possible. Aligning the views of what I believe other preferred stockholders believe toward the case. We would be a fair representative.

(Exhibit 3, Deposition of Eric Shahinian, p. 28).

In testifying at deposition about his interpretation of the Voting Rights Provision, Mr. Shahinian noted that the Prospectus was the "key" document informing his understanding as to the necessity of a separate two-thirds vote by the Series B stockholders in order to approve the amendments to the Series B Articles Supplementary. (Ex. 3, p. 76). Notably, in its Opinion affirming the requirement for a two-thirds vote by the Series B, the Court of Appeals placed great weight on the language of the Prospectus Summary. *Impac*, 474 Md. 544-545.

As discussed in more detail below, Camac and its counsel shared with Mr. Minton the burden

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[11] As in *Piedmont Office Trust,* courts usually reject the argument "as long as the plaintiff has some basic knowledge of the lawsuit and is capable of making intelligent decisions based upon his lawyer's advice. . . .." *Kaplan v. Pomerantz,* 131 F.R.D. 118, 122 (N.D. Ill. 1990); see, *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373, 86 S.Ct. 845, 851 (1966); *In re Universal Service Fund Telephone Billing Practices Litigation*, 219 F.R.D. 661, 671 (D. Kan. 2004).

of litigation while Mr. Minton was representing Timm and, since Mr. Minton's representation was terminated, have alone pulled the laboring oar in this action, including the handling of the remedy phase of the case and the two appeals that followed.

Finally, as holder of 37% of the outstanding shares of Series B, Camac is the largest stockholder who has participated in this litigation (and is probably the largest holder of Series B shares). This fact alone weighs heavily in favor of appointing Camac class representative for the class, and Tydings & Rosenberg as lead counsel. Facing a similar question, Judge Audrey Carrion, in her Memorandum Opinion dated June 1, 2011, in *In re Constellation Energy Group, Incorporated Shareholder Litigation*, Case No. 24-C-11-003015 ("*Constellation*"), found persuasive the rebuttable presumption contained in the Private Securities Litigation Reform Act of 1995 ("PSLRA") that "'the most adequate plaintiff in any private action ... is the person or group of persons that[, among other requirements,] ... has the largest financial interest in the relief sought by the class.'" Judge Carrion observed that the PSLRA's provision "was enacted to ensure that the selection of lead plaintiff and lead counsel rests on factors other than how quickly a plaintiff has filed a complaint." This Court further held that the "intent of the U.S. Congress in enacting the PSLRA is consistent with the purpose of Maryland Rule 2-231 to ensure that this Court selects class counsel and class representatives who are best able to fairly and adequately represent all members in the class. *See Worsham v. Americor Lending Group, Inc.*, 2008 Md. Cir. Ct. LEXIS 5, at *14 (2009). Indeed, this Court finds that the class member with the largest financial stake in a given case may often be the member most capable of participating in and managing class action litigation." *Id.*, at 6.

Camac recognizes that, as a current stockholder, it may receive dividends that other class members – those who owned shares in 2009, when the three quarters of dividends should have been declared and paid but were not – may not receive. This is not an impediment to its appointment as

class representative. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlier individual claims." *Angeletti,* 358 Md. at 737 (quoting 1 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 3.13, at 3-76 to 3-77 (3d. ed. 1992)). *See also, Armstrong v. Davis,* 275 F.3d 849, 869 (9th Cir. 2001), which explained that typicality does not require "that the plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries resulted from the same, injurious course of conduct." Whoever this Court determines is the correct recipient of the three quarters of dividends, Camac is the appropriate class representative.

In sum, Camac is a sophisticated investor, and Mr. Shahinian is familiar with the issues and has participated in the litigation. Camac is undoubtedly the plaintiff with the largest stake in the litigation and is committed to litigating the case to conclusion for the benefit of all of Impac's Series B stockholders. Camac is not only an adequate representative but is ideally positioned to represent the Class's interests on the two remaining issues.[12]

B. Tydings, Having Represented Camac and the Interests of all B Stockholders in this Case Since 2013, and Having Successfully Argued the Series B Case Before the Trial Court and the Two Appellate Courts, Has Amply Demonstrated its Fitness to Serve as Lead Counsel.

Maryland Rule 2-231 governs class certification in Maryland. Unlike the Federal Rules of Civil Procedure, the Maryland Rule on class actions does not contain a specific provision for the appointment of class counsel. However, Maryland Rule 2-231(g) (1) permits the court to

[12] If Camac and its counsel are not appointed to lead the class, or if its counsel does not otherwise receive a fee from the common fund, then Camac is prepared to pay its lawyers from its recovery, and dividends received by Camac should not be reduced to pay fees that may be awarded to any other counsel. Similarly, if Camac and its counsel are appointed, it will not seek to have the dividends received by Timm reduced to pay an award of fees to Camac's counsel.

enter orders "determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument." Accordingly, it is appropriate to enter an order that appoints lead class counsel in order to avoid duplicative proceedings and allow for the effective representation of the class. In making the decision about lead counsel for the class, it is appropriate for this court to look at federal law on similar issues.

Federal Rule 23 contains specific guidance on the appointment of lead counsel and should be considered by the Court here. Fed. R. Civ. P. 23(a)(4) has been used to determine the adequacy of class counsel. Under that rule, courts look to the quality of the briefs and arguments in the case. 1 Newberg, *supra*, at § 3:76. Indeed, "high-quality lawyering will weigh in favor of finding counsel adequate." *Id.* Additionally, Fed. R. Civ. P. 23(g)(1)(A) specifically provides the criteria that a court must consider in appointing lead counsel, including "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class."[13] And, as discussed above, it is appropriate to consider the number of shares held by the counsel's client in appointing class representative and class counsel. Consideration of these factors demonstrates that Tydings is the most qualified to bring this action to conclusion on behalf of Camac and the Series B shareholders of Impac.

1. Tydings' Work Has Substantially Advanced the Litigation, and Has Produced Successful Results for the Class.

The first factor under Fed. R. Civ. P. 23(g)(1)(A) focuses on the work counsel has done to advance the litigation. "The adequacy of counsel requirement is satisfied where the class

[13] This Rule establishes different standards depending on the number of applicants for lead counsel. For purposes of this motion, Camac assumes that its attorneys will be the sole applicant. If there are other applicants, Camac will address the relative qualifications in its response.

attorneys are experienced in the field or have demonstrated professional competence in other ways, such as by the quality of the briefs and arguments during the early stages of the case." *D.S. ex rel S.S. v. New York City Dept. of Educ.*, 255 F.R.D. 59, 74 (E.D.N.Y. 2008) (internal quotation omitted). *See also Jones v. Government Employees Insurance Company*, 2019 WL 1490703, at *5 (M.D. Fla. 2019) (explaining that the court is required to consider the quality of counsel's litigation efforts so far in determining adequacy of representation by class counsel). To date, as set forth in Exhibit 1, Tydings' work has included:

a. With Mr. Minton, deposing Impac's fact witnesses, and defending plaintiffs' depositions, in New York and California.

b. Primarily drafting, with Mr. Minton's input, the mediation statement, and participating in mediation with Mr. Minton.

c. Analyzing numerous articles supplementary and prospectuses of numerous other REITs to compare to Impac's and to use in deposition of Impac's expert witness and in cross-motion for summary judgment.

d. Deposing Impac's expert witness.

e. Primarily drafting, with Mr. Minton's input, plaintiffs' cross-motion for summary judgment and reply.

f. Providing input into motion for reconsideration and motion for class certification, both of which were primarily drafted by Mr. Minton.

g. Successfully arguing cross-motions for summary judgment.

h. Although the Complaint sought two quarters of dividends as a result of Impac's repurchase of stock in October 2009, Tydings determined that three quarters, not two, were actually owed – a difference of nearly $400,000 to the Class.

i. Writing and arguing motions, memoranda, and oppositions to motions and memoranda regarding relief to be granted, and successfully arguing that three full quarters of dividends are owed.

j. Writing and filing opposition to Impac's motion to stay.

k. Writing and filing Camac's brief and successfully arguing appeal before Court of Special Appeals.

l. Writing and filing opposition to Impac's petition for *certiorari.*

m. Writing and filing Camac's brief, and successfully arguing before the Court of Appeals on Camac's behalf and Timm's behalf.

n. Performing extensive research throughout the eight years of its involvement in this case.

The quality of these litigation efforts speaks for itself, as Tydings lawyers have secured victories for their client – and the class, if certified - in all three Maryland courts to address this action. And, under Rule 23(a)(4), it cannot be doubted that the quality of the briefs and arguments in the case militate in favor of Tydings' appointment. Without question, Tydings has provided "high-quality lawyering" and that has resulted in substantial benefit to the Class. Thus, the quality and success of the work performed strongly favors the appointment of Tydings as Class Counsel.

2. Tydings is Well-Qualified and Will Continue to Devote the Necessary Resources to Bring this Action to Conclusion.

The second and third Fed. R. Civ. P. 23(g)(1)(A) factors address counsel's relevant class action experience and knowledge of applicable law. *See* firm resume of Tydings attached to the Declaration of Daniel S. Katz as Exhibit A. These factors strongly favor appointment of proposed Lead Counsel because they are uniquely qualified to lead this litigation. Tydings is a

highly regarded complex and class action firm with a well-known record of success pursuing financial, accounting, director duty and securities matters which are highly relevant to this litigation and have successfully litigated many other class action claims.

The final factor under Fed. R. Civ. P. 23(g)(1)(A) concerns the resources counsel will commit to the case. The treatise Newberg on Class Actions explains, "when counsel has already devoted significant effort or resources to the prosecution of the action prior to submitting a class certification motion, courts will usually presume that counsel will continue to devote the same level of resources going forward and this presumption weighs in favor of a finding of adequate representation." 1 Newberg, *supra,* § 3:74. As of November 30, 2021, Tydings has devoted over 3,000 hours of work to this case and has incurred nearly $20,000 in expenses.[14] Thus, this factor also strongly supports the appointment of Tydings as Lead Counsel because its commitment to this case to date demonstrates that it has the resources and personnel necessary to pursue a case of this magnitude and to bring it to conclusion. *See Buonasera v. Honest Company, Inc.*, 318 F.R.D. 17, 19 (S.D.N.Y. 2016) ("[I]t is evident from the work that Proposed Interim Counsel have undertaken to investigate the claims at issue here that they are willing to expend substantial resources in representing the class."); *Pritchard v. County of Erie*, 269 F.R.D. 213, 218 (W.D. N.Y. 2010) (finding counsel adequate in part because "there can be no question that they have already committed substantial resources to representing the class"); *D.S. ex rel. S.S.*, 255 F.R.D. at 74 (finding proposed counsel adequate in part because "[t]hey have invested extensive time, money, and effort in identifying and investigating potential claims in this class action").

Tydings has met all of the factors that courts consider in appointing lead counsel. Simply

[14] The expenses may increase due to the Notice Program.

stated, its work has been successful in both the liability phase and relief phase of this case. It has achieved substantial benefits for its client and the Class. Tydings should be appointed lead counsel if this Court grants class certification.

V. RESOLUTION OF THE REMAINING ISSUES

A. The Stockholders Who Own the Stock When the Dividends Are Declared Are Entitled to the Three Quarters of Dividends.

This Court has ordered Impac to pay the three quarters of dividends that should have been declared and paid due to its repurchase of shares of Series B in October 2009. Impac, in a number of papers filed in this litigation, has expressed concern that Series B stockholders may have competing claims for those dividends – *i.e.*, those who owned the stock at the time of the repurchase but no longer do, versus current stockholders who did not own stock in October 2009. Under Maryland law, the right to receive payment of a dividend is governed by whether one is a stockholder of record when the dividend is declared. *Wilcom v. Wilcom*, 66 Md. App. 84, 97 (1986) ("[T]he dividend belongs to him who is the owner at the time it is declared."). Further, the date that determines which "stockholders are entitled to…[r]eceive a dividend," or the "record date," "may not be prior to the close of business on the day the record date is fixed." Md. Code. Ann. Corps. & Assoc. § 2-511(b). Thus, although this Court has ordered that Impac is required to declare and pay the three quarters of dividends, that act has not yet occurred. When the dividends are paid, in order to comply with Maryland law, they must be paid to stockholders of record as of that future declaration date.

In this regard, Maryland corporate law is in line with the well-settled principle that the right to receive accumulated dividends is a right that transfers with the stock. Even though Impac's obligation to declare dividends *arose* when it purchased shares of Series B stock on October 21, 2009, the right to *receive* the dividends passed with the stock, and the dividends are

properly payable to those who own the shares when the dividends are declared. "When a share of stock is sold, the property rights associated with the shares, including any claim for breach of those rights and the ability to benefit from any recovery or other remedy, travel with the shares." *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1050 (Del. Ch. 2015).[15]

In *In re Activision*, the Delaware Chancery Court was tasked with, among other things, determining whether the right to bring a claim relating to stock ownership remains with the selling stockholder or is transferred with the stock to the acquiring stockholder. The Chancery Court held that the claim belonged to the acquiring stockholder, *id.*, and in support cited a provision in the Delaware Uniform Commercial Code that reads: "... a purchaser of a ... security acquires all rights in the security that the transferor had or had power to transfer." 6 Del. C. § 8-302(a). The Chancery Court also noted that "... Delaware has a longstanding rule that claims are freely assignable and can be asserted by the acquirer if the right of action is the type of claim that would survive the death of the transferor and pass to his personal representative. By statute, all causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive." *Id.* at 1050 – 51 (citations and internal quotation marks omitted). Maryland law is in accord with law cited in *In re Activision*, and the same result should follow.

Specifically, § 8-302 of the Maryland Uniform Commercial Code provides that a purchaser of a security "acquires all rights in the security that the transferor had or had power to transfer." Md. Code Ann., Com. Law § 8-302 (a). In addition, "[a] chose in action, whether arising in tort or ex contractu, is generally assignable. The only limitation, in the absence of a contrary statutory provision, is that the right of action be of a sort which would survive the death

[15] "In the absence of Maryland precedent on a corporate law question, this Court has turned to the decisions of the Delaware courts, which are known 'for their expertise in matters of corporate law.' *Kramer v. Liberty Property Trust*, 408 Md. 1, 24, 968 A.2d 120 (2009) (characterizing Delaware law as 'highly persuasive' due in part to the expertise of Delaware courts on corporation law)." *Impac Mortgage Holdings, Inc., supra,* 474 Md. at 542, n. 41.

of the assignor and pass to his personal representatives." *Med. Mut. Liab. Ins. Soc'y v. Evans*, 330 Md. 1, 29 (1993) (quoting *Summers v. Freishtat*, 274 Md. 404, 407 (1975)). And under Maryland law, as under Delaware law, "...a cause of action at law," such as the breach of contract claim asserted by Plaintiffs, "...survives the death of either party." Md. Code Ann., Cts. & Jud. Proc. § 6-401(a).

Some stockholders who would have had the right to receive dividends when they should have been declared and paid because of the October 2009 repurchase may have since sold their shares. If they did, the right to receive those dividends transferred to their purchasers and any subsequent purchasers, so the current Series B stockholders and, specifically, those who will own the shares when those dividends are declared, should be the recipients of the dividends. Nevertheless, to facilitate resolution of this issue and to allay Impac's concerns about competing claims to the dividends, Camac urges that the Series B stockholders who might raise such a claim be given notice and an opportunity to be heard.

B. If appointed Class Counsel, Tydings Intends to Seek an Award of Reasonable Attorneys' Fees.

As set forth in the proposed Order Certifying a Class and Setting Further Proceedings, and its Exhibits, if appointed Lead Counsel, Tydings will ask this Court to include a provision stating that Lead Counsel shall serve and file their opening brief in support of its motion for attorneys' fees and expenses no later than 60 days before the Final Judgment Hearing. If appointed Lead Counsel, Tydings intends to request, in its motion, an award of attorneys' fees and expenses in an amount not to exceed $2,800,000. Tydings will seek an order that provides that any award of fees and expenses shall be paid from the common fund, or common benefit, that it obtained for the Class in this litigation—specifically, it will request that (a) one-third (1/3) of the three quarters of dividends, plus any expenses awarded by the Court, shall be paid by

Impac to Tydings and deducted from the amount of those dividends; and (b) one-third (1/3) of any future dividends or distributions of property in lieu of or attributable to the payment of dividends to holders of Series B shall be paid by Impac to Tydings from such dividends or distributions until the amount awarded by the Court has been paid in full.

The Common Fund Doctrine has been long recognized by Maryland appellate courts and by the United States Supreme Court. The doctrine "'rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.'" *Garcia v. Foulger Pratt Development, Inc.*, 155 Md. App. 634, 671 (2003) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). As explained in *Boeing*, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Id.* at 478.

Through the efforts of Camac's counsel and, until early 2017, the efforts of Timm's counsel, Series B stockholders have received substantial economic benefit – an immediate benefit in the amount of $1,169,985.93, and a restoration of their right to cumulative dividends, currently in excess of $18 million, and increasing by more than $1.5 million each year. In addition, the successful result in this case has also restored other rights, including the right of the Series B stockholders to elect two directors when dividends are unpaid for six quarters. While corporate governance reform of this nature is an extremely valuable right that can be considered in evaluating the quality of the resolution of the case, *Fire and Police Retiree Health Care Fund v. Smith*, 2020 U.S. Dist. LEXIS 217892 *, 2020 WL 6826549 (D. Md. Nov. 20, 2020), it does not directly result in an economic benefit to the Series B stockholders. In its motion, Camac will go into far greater detail about the appropriateness of a fee awarded from the common fund, as

well as how the amount and method of payment should be calculated.

VI. CONCLUSION

For the reasons stated above, this Court should enter an Order:

(a) Certifying the class and approving the Notice Program;

(b) Appointing Camac Fund LP as class representative and its counsel as lead counsel;

(c) Preliminarily finding that the three quarters of dividends should be paid to those stockholders who own the stock when the dividends are declared; and

(d) Setting a Final Judgment Hearing at which the Final Judgment Order, in the form attached to the Proposed Order as Exhibit A, shall be entered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2021, copies of the foregoing Motion to Certify Class, Appoint Class Representative and Lead Counsel, Preliminarily Determine Right to Receive Dividends, and Set Final Judgment Hearing, Memorandum of Law in Support Thereof, Exhibits, Appendix of Unpublished Cases, and [Proposed] Order Certifying a Class and Setting Further Proceedings were sent by electronic mail, and first-class mail, postage prepaid, to:

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CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs,	*	**FOR**
v.	*	**BALTIMORE CITY**
IMPAC MORTGAGE HOLDINGS, INC.	*	**Case No. 24-C-11-008391**
Defendant.	*	

* * * * * * * * * * *

REQUEST FOR HEARING

Plaintiff, Camac Fund LP ("Camac"), by its undersigned counsel, hereby requests a hearing on its Motion to Certify Class, Appoint Class Representative and Lead Counsel, Preliminarily Determine Right to Receive Dividends, and Set Final Judgment Hearing.

Respectfully submitted,

John B. Isbister, CPF #7712010177
Daniel S. Katz, CPF 8011010192
Timothy R. VanCisin, CPF #1912180188
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Counsel for Plaintiff Camac Fund L.P.

EXHIBIT 1

CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs,	*	**FOR**
v.	*	**BALTIMORE CITY**
IMPAC MORTGAGE HOLDINGS, INC.	*	**Case No. 24-C-11-008391**
	*	
Defendant.	*	
	*	

* * * * * * * * * * * *

DECLARATION OF DANIEL S. KATZ IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

Daniel S. Katz, being duly sworn, deposes and says:

1. I am a partner in the law firm of Tydings & Rosenberg LLP ("Tydings"), counsel of record to plaintiff, Camac Find LP ("Camac"), in the above-captioned action (the "Action"). I submit this Declaration in support of Camac's Motion to Certify Class, Appoint Class Representative and Lead Counsel, Preliminarily Determine Right to Receive Dividends, and Set Final Judgment Hearing in connection with this litigation. My firm's resume is attached hereto as Exhibit A.

2. My firm undertook this action on an entirely contingent basis in June 2013. Since then, my firm's involvement in the litigation has been extensive. Until his representation was terminated in April 2017 by co-plaintiff, Curtis Timm, we worked closely with Mr. Timm's then-counsel, Thomas J. Minton. I have primarily handled the litigation on behalf of Tydings, but others in my firm have also participated. While Mr. Minton was in the case, Tydings' work included:

a. With Mr. Minton, deposing Impac's fact witnesses, and defending plaintiffs' depositions, in New York and California.

b. With Mr. Minton's input, drafting the mediation statement, and participating in mediation with Mr. Minton.

c. Analyzing numerous articles supplementary and prospectuses of numerous other REITs to compare to Impac's and to use in deposition of Impac's expert witness and in cross-motion for summary judgment.

d. Deposing Impac's expert witness.

e. Drafting, with Mr. Minton's input, plaintiffs' cross-motion for summary judgment and reply.

f. Providing input into plaintiffs' motion for reconsideration and motion for class certification, both of which were primarily drafted by Mr. Minton.

g. Successfully arguing the cross-motions for summary judgment.

3. Tydings received the Court's ruling granting our cross-motion for summary judgment and denying Impac's motion for summary judgment and plaintiffs' motion for reconsideration in December 2017. By that time, Mr. Timm had terminated Mr. Minton's representation. Thereafter, until Mr. Timm recently retained counsel, he proceeded *pro se*. Tydings' work thereafter included:

a. Although the Complaint sought two quarters of dividends as a result of Impac's repurchase of stock in October 2009, I determined that three quarters, not two, were actually owed – a difference of nearly $400,000 to the Series B stockholders.

b. Writing and arguing multiple motions, memoranda, and oppositions to motions

and memoranda regarding relief to be granted, which successfully resulted in the Court's Order granting the relief that we sought – namely, entry of declaratory and injunctive relief requiring payment of three full quarters of dividends and an election of directors.

c. Writing and filing the opposition to Impac's motion to stay.

d. Writing and filing Camac's brief and successfully arguing the appeal before Court of Special Appeals.

e. Writing and filing the opposition to Impac's petition for certiorari.

f. Writing and filing Camac's brief, and successfully arguing before the Court of Appeals on Camac's behalf and Timm's behalf.

g. Performing extensive research throughout the seven years of its involvement in this case.

3. As of November 30, 2021, Tydings has devoted over 3,000 hours of work to this case and has incurred nearly $20,000 in expenses. Additional expense may be incurred as a result of the Notice Program.

4. As reflected above, Tydings has committed an extraordinary amount of resources to this case since 2013. We remain committed to committed whatever resources are needed to bring this case to its conclusion.

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information and belief.

Executed this 17th day of December, 2021, at Baltimore, Maryland.

DANIEL S. KATZ

Biography of TYDINGS & ROSENBERG LLP

Tydings & Rosenberg LLP and its predecessor firms have practiced law in Maryland and surrounding jurisdictions for over eighty years. Millard E. Tydings, a four-term United States Senator from Maryland, was among its founders. Currently, the firm has nearly forty lawyers and is engaged in general civil practice. More than half of the firm's practice consists of litigation, including antitrust, products liability, securities, commercial, and ERISA litigation, at both trial and appellate levels. That litigation has included the representation of parties in class actions, particularly securities and ERISA class actions and actions involving corporate takeovers and derivative suits. The successfully concluded class actions and derivative cases include:

In Re Forest City Realty Trust, Inc. Class Action Stockholder Litigation, Circuit Court for Baltimore City, Case no. 24-C-17-001424 (counsel for plaintiff in class and derivative action).

Lee v. Osiris Therapeutics, et al., Circuit Court for Howard County, Case No. 3-C-16-108356 (counsel for plaintiff in shareholder action to compel corporation to hold annual meeting).

The Police Retirement System of St. Louis v. William C. Erbey, et al., Circuit Court for Baltimore City, Case No. C-24-C-15-000223 (counsel for plaintiff in shareholder's derivative action);

In Re: Coventry Health Care, Inc. ERISA Litigation, United States District Court for the District of Maryland (counsel for plaintiffs and interim liaison counsel for plaintiffs, ERISA class action);

In Re American Realty Capital Trust, Incorporated Shareholder Litigation, Circuit Court for Baltimore City (counsel for plaintiffs, shareholder class action);

In Re Nationwide Health Properties, Inc. Shareholder Litigation, Circuit Court for Baltimore City, Maryland (counsel for plaintiff and liaison counsel for plaintiffs, shareholder class action);

In Re Constellation Energy Group, Incorporated Shareholder Litigation, Circuit Court for Baltimore City, Maryland (counsel for plaintiffs, shareholder class action);

In Re Walker v. Constellation Energy Group, Inc., *et al.*, United States District Court for the District of Maryland, No. 1:11-cv-02165-WDQ (counsel for plaintiffs, securities);

In Re Integral Systems Inc. Shareholder and Derivative Litigation, Circuit Court for Howard County, Maryland, (counsel for plaintiffs, shareholder class action);

In Re Martek Biosciences Corporation Shareholders Litigation, Circuit Court for Howard County, Maryland, (counsel for plaintiffs, shareholder class action);

In Re Mutual Funds Investment Litigation, United States District Court for the District of Maryland, MDL 1586, (Plaintiffs' Administrative Chair and Plaintiffs' Liaison Counsel);

EXHIBIT A

In re Black & Decker Shareholder Litigation, United States District Court for the District of Maryland, Civil Action No. WMN-09-3011 (counsel for plaintiffs, securities);

In Re Federal National Mortgage Association ERISA Litigation, United States District Court for the District of Columbia, Consolidated Civil Action No. 04-1784 (RJL) (liaison counsel for plaintiffs, ERISA);

In Re Allied Capital Corporation Shareholder Litigation, Circuit Court for Montgomery County, Maryland, Civil Action No. 322839-V (Plaintiffs' co-lead counsel, shareholder class action);

In Re Sourcefire, Inc. Securities Litigation, United States District Court for the District of Maryland, Civil Action No. JFM-07-1210 (liaison counsel for plaintiffs, securities);

In Re Martek Biosciences Corp., Securities Litigation, United States District Court for the District of Maryland, Civil Action No. MJG-05-1224 (liaison counsel for plaintiffs, securities);

Reichart v. Carramerica Realty Corporation, Circuit Court for Baltimore City, Case No. 24-C-06-002569 (represented plaintiffs in shareholder class action);

Cuti v. Anthony, Circuit Court for Baltimore City, Case No. 24-C-06-008163 (counsel for plaintiffs, in shareholder class action);

In re Safenet, Inc., Derivative Litigation, United States District Court for the District of Maryland, Civil Action No. L-06-1408, and Circuit Court for Hartford County, Case No.: 12-C-06-1358 (counsel for plaintiffs, derivative action);

Downham v. Noia, *et al.*, United States District Court for the District of Maryland, Civil Action No. AMD 1:05-cv-00978 (counsel for plaintiff, derivative action);

In Re Gables Residential Trust Shareholder Litigation, Circuit Court for Baltimore City, Case No. 24-C-05-006000 (counsel for plaintiffs, breach of fiduciary duty);

Sekuk Global Enterprises Profit Sharing Plan v. Reckson Associates Realty Corp., Circuit Court for Baltimore City, Case No. 24-C-03007496 (liaison counsel for plaintiffs, derivative action);

In Re Creditrust Corporation Securities Litigation, United States District Court for the District of Maryland, Civil Action No. MJG-00-2174 (plaintiffs, securities);

Allen v. Price Legacy Corp., Circuit Court for Baltimore City, Case No. 24-C-04-007204 (plaintiffs, breach of fiduciary duty);

In re Chateau Communities, Inc., Shareholders Litigation, Circuit Court for Baltimore City, Case No. 24-C-03006333 (counsel for plaintiffs, breach of fiduciary duty);

In re Homestead Village Shareholder Litigation, Circuit Court for Baltimore City, Case No. 24-C-00-001556 (counsel for plaintiffs, fraud);

In Re Manugistics Group, Inc. Securities Litigation, United States District Court for the District of Maryland, Civil Action No. 98-CV-1881 (FNS), (liaison counsel for plaintiffs, securities);

Lipstein v. MCFN, Inc., Circuit for Frederick County, Maryland, Case No. 96-2079-CV (counsel for plaintiffs, fraud);

Goldenberg v. Marriott PLP Corporation, United States District Court for the District of Maryland, Civil Action No. PJM-95-3461 (counsel for plaintiffs, real estate limited partnership, fraud);

In Re: Cryomedical Sciences, Inc. Securities Litigation, United States District Court for the District of Maryland, Civil Action No. AW-94-873 (liaison counsel for plaintiffs, securities);

In Re: Kirschner Medical Corporation Securities Litigation, United States District Court for the District of Maryland, Civil Action No. WN-90-858 (liaison counsel for plaintiffs, securities);

In Re: USF&G Securities Litigation, United States District Court for the District of Maryland, Civil Action No. B-90-2992 (liaison counsel for plaintiffs, securities);

United Apple Sales Incorporated Profit Sharing Trust U/A Dtd 8/1/71, *et al.* v. Marriott Corporation, et al., United States District Court for the District of Maryland, Civil Action No. H-92-2858 (liaison counsel for plaintiffs, securities);

In Re: Jiffy Lube Securities Litigation, United States District Court for the District of Maryland, Civil Action No. JHY-89-1939 (liaison counsel for plaintiffs, securities);

In Re: RAC Mortgage Investment Corporation Securities Litigation, United States District Court for the District of Maryland, Civil Action No. K-89-1796 (liaison counsel for plaintiffs, securities);

Becker v. James C. Marshall, *et al.*, (Residential Resources) Circuit Court for Baltimore City, Case No. 89-107131 CL 91848 (plaintiffs, breach of fiduciary duty);

Rubin v. Louisiana Land, Circuit Court for Baltimore City, Case No. 84-202031 CL 23303 (plaintiffs, breach of fiduciary duty);

In Re: Alleco Shareholders' Litigation, Circuit Court for Prince George's County, Case No. 88-02940 (plaintiffs, breach of fiduciary duty);

Lepow Equities Corp. v. First Maryland Bank Corp., Circuit Court for Baltimore City, Case No. 88-260070 (liaison counsel for plaintiffs, fraud);

CertainTeed/St. Gobain Stockholders' Litigation, Circuit Court for Baltimore City, Case No. 88-05064 CL 77969 (liaison counsel for plaintiffs, fraud);

Butowsky v. Prince George's County Board of Realtors, United States District Court for the District of Maryland, Civil Action No. K-71-1068 (counsel for plaintiffs, antitrust);

In Re: Montgomery County Real Estate Antitrust Litigation, United States District Court for the District of Maryland, Civil Action No. B-77-513 (liaison counsel for plaintiffs, antitrust);

In Re: Independent Gasoline Antitrust Litigation, (MDL 267) (liaison counsel for plaintiffs, antitrust);

Caplan v. T. Rowe Price & Associates, United States District Court for the District of Maryland, Civil Action No. Y-79-1434 (liaison counsel for plaintiffs, securities);

Mutual Shares Corp. and E.A. Greenfield v. Amdisco Corp., *et al.*, Circuit Court for Baltimore City, Case No. 122A 844 A-62522 (counsel for plaintiffs, securities);

Edward A. Taubman v. McCormick & Co., Inc. *et al.*, United States District Court for the District of Maryland, Civil Action No. HM-82-01482 (liaison counsel for plaintiff, securities);

The partners who have worked on this matter and their biographical information are:

John B. Isbister – Mr. Isbister is a partner at Tydings & Rosenberg LLP. He graduated from the University of Maryland in 1975 and the University of Maryland School of Law in 1977. He served as law clerk for the late Honorable David T. Mason, Court of Special Appeals in Maryland. He is a member of the bars of the State of Maryland and the District of Columbia. He has served as counsel (including liaison counsel) in all of the above-referenced actions, except *In re Creditrust* and *Goldenberg v. Marriott PLP*. Mr. Isbister served as plaintiffs' liaison counsel and Plaintiffs' Administrative Chair in *In Re Mutual Funds Investment Litigation*, MDL – 1586 (USDC MD). He is listed by *Benchmark Litigation* since 2010 as a "local litigation star" in the State of Maryland for his complex litigation practice and has been cited in Best Lawyers in America since 2008. For 2012, Best Lawyers designated him as "Lawyer of the Year" in "Mass Tort Litigation/Class Actions—Defendants Lawyer" in the Baltimore area.

Daniel S. Katz- Mr. Katz is a partner at Tydings & Rosenberg LLP. He graduated from University of Maryland in 1977, and the University of Maryland School of Law in 1980. He was admitted to practice in Maryland in 1980. He practices in the areas of commercial litigation, tort litigation, securities litigation, class action litigation, and professional malpractice litigation. He has served as counsel in some of the various class actions listed above. He was selected to Maryland Super Lawyers from 2009 through 2016. He successfully argued a motion for summary judgment on the issue of liability in *Curtis J. Timm and Camac Fund LP v. Impac Mortgage Holdings, Inc.*, Circuit Court for Baltimore City, Case No. 24-C-11-00839, which decision was affirmed by the Maryland Court of Special Appeals, *Impac Mortgage Holdings, Inc. v. Timm, et al.*, 245 Md.App. 84 (2020), and by the Maryland Court of Appeals, *Impac Mortgage Holdings, Inc. v. Timm, et al.*, 474 Md. 495 (2021).

EXHIBIT 2

CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
	*	**CIRCUIT COURT**
On Behalf of Themselves and All Persons Similarly Situated,	*	**FOR**
Plaintiffs,	*	**BALTIMORE CITY**
v.	*	**Case No. 24-C-11-008391**
IMPAC MORTGAGE HOLDINGS, INC.	*	
	*	
Defendant.	*	

* * * * * * * * * * *

AFFIDAVIT OF ERIC SHAHINIAN

I, Eric Shahinian, make oath in due form of law as follows:

1. I am over 18 years of age and am competent to testify to the matters and facts hereinafter set forth.

2. I am the founder and managing member of Camac Partners LLC, which is the manager of Camac Fund, LP (collectively "Camac"). Camac is an investment management firm based in New York, which specializes in long-duration investments on behalf of family offices, high net worth individuals, and institutions. Prior to founding Camac, I was an analyst at Kingstown Capital, an investment firm, from 2009 to 2011. I have extensive and successful experience representing shareholder interests in a variety of public company governance matters, including litigation situations and proxy campaigns.

3. Camac currently owns 246,110 of the outstanding 665,592 shares of Impac Mortgage Holdings, Inc. Series B Preferred stock. These shares were purchased over time, beginning in 2012.

4. I am requesting that Camac be appointed Class Representative in this case. Throughout the course of this litigation, I have been committed to vigorously prosecuting the interests of the Series B stockholders and will continue to do so if appointed Class Representative. I recognize that the remaining issues in the case, if and when a class is certified, are (a) to whom the three quarters of dividends that were triggered when Impac repurchased Series B shares in October 2009 are to be paid, and (b) what, if any, attorneys fees should be awarded. As to the first issue, I understand that, based upon the law, my attorneys and the other parties in this case believe that the proper recipients are those stockholders who own shares when Impac declares the dividends. However, I recognize that it is possible that stockholders who owned shares when those dividends could have been declared after the repurchase, and have since sold their shares, may believe that they are entitled to the dividends, although that belief is, based on my understanding of the law, legally incorrect. Regardless of how the Court rules on this issue, if appointed Class Representative, Camac will be guided by the best interest of the Class and will continue, as it has done to date, to prosecute the action vigorously on behalf of the Class.

5. I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of this document are true.

Date: 12-14-21

Eric Shahinian

#5273394v.1
#5274678v.1

EXHIBIT 3

In The Matter Of:

CURTIS J. TIMM and CAMAC FUND, LP

v.

IMPAC MORTGAGE HOLDINGS, INC.

SHAHINIAN, ERIC - Vol. 1

January 14, 2015

MERRILL CORPORATION
LegaLink, Inc.
20750 Ventura Boulevard
Suite 205
Woodland Hills, CA 91364
Phone: 818.593.2300
Fax: 818.593.2301

ERIC SHAHINIAN

litigation? 14:11:07

A. Yes. 14:11:07

Q. How did you -- strike that. 14:11:08

Why did you move to intervene? 14:11:10

A. We recognized that, by we I mean myself, I recognized that we own a fairly large stake in the preferreds. As a result felt that it would be important to get involved. 14:11:15 14:11:17 14:11:24 14:11:28 14:11:29

Q. Any other reasons? 14:11:33

A. I mean really the reason surrounding that. 14:11:34 14:11:38

Q. What is that? 14:11:39

A. For purposes of furthering our view on the case, assisting in any way possible. Aligning the views of what I believe other preferred stockholders believe toward the case. We would be a fair representative. 14:11:40 14:11:41 14:11:44 14:11:49 14:11:52 14:11:55

Q. Anything else? 14:11:58

A. That's all I can think of. 14:11:59

Q. Okay. Did you read the Intervention Complaint before it was filed? 14:12:00 14:12:02

A. I don't recall. I believe so. 14:12:03

ERIC SHAHINIAN

opinion with respect to the Series B voting rights. 15:11:38 15:11:41

A. Uh-huh. 15:11:42

Q. Can we agree what I am referring to is what we just described, you first forming the opinion the 2009 tender violated the Series B voting rights with respect to the two-thirds issue that is still at issue in this case? 15:11:42 15:11:44 15:11:45 15:11:48 15:11:51 15:11:53

A. Sure. Noting there is not defined time frame, I don't recall specific date, but general time frame, sure. 15:11:54 15:11:56 15:11:58

Q. Sure. What documents had you reviewed or analyzed at the time of first forming that opinion? 15:12:02 15:12:03 15:12:05

A. I believe it was the Prospectus that was the key document for that. 15:12:06 15:12:11

Q. Any other documents? 15:12:14

A. I also read the tender documentation that had gone forth. 15:12:16 15:12:18

Q. Any other documents? 15:12:21

A. Related specifically to that, not that I can recall. 15:12:22 15:12:25

Q. Anything else, a document, not 15:12:27

CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs,	*	**FOR**
v.	*	**BALTIMORE CITY**
IMPAC MORTGAGE HOLDINGS, INC.	*	**Case No. 24-C-11-008391**
	*	
Defendant.	*	
	*	

* * * * * * * * * * *

APPENDIX OF UNPUBLISHED CASES CITED IN CAMAC FUND LP'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CERTIFY CLASS, APPOINT CLASS REPRESENTATIVE AND LEAD COUNSEL, PRELIMINARILY DETERMINE RIGHT TO RECEIVE DIVIDENDS, AND SET FINAL JUDGMENT HEARING

Plaintiff, Camac Fund LP, respectfully submits the following unpublished cases in their Memorandum of Law:

1. *Fire & Police Retiree Health Care Fund v. Smith,* 2020 U.S. Dist. LEXIS 217892 *; 2020 WL 6826549 (D. Md. November 20, 2020).

2. *In re Am. Capital S'holder Litig.,* 2013 U.S. Dist. LEXIS 90973*, 2013 WL 3322294 (D. Md. June 28, 2013).

3. *In re Constellation Energy Group, Incorporated Shareholder Litigation*, Circuit Court for Baltimore City, Case No. 24-C-11-00315 (June 1, 2011).

4. *In re India Globalization Capital, Inc.*, 2020 U.S. Dist. LEXIS 77190 *; 2020 WL 2097641 (D. Md. May 1, 2020).

5. *Jones v. Government Employees Insurance Company*, 2019 WL 1490703 (M.D. Fla. April 4, 2019).

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Counsel for Plaintiff, Camac Fund LP

Fire & Police Retiree Health Care Fund v. Smith

United States District Court for the District of Maryland

November 20, 2020, Decided; November 20, 2020, Filed

Civil Action No. CCB-18-3670

Reporter

2020 U.S. Dist. LEXIS 217892 *; 2020 WL 6826549

FIRE AND POLICE RETIREE HEALTH CARE FUND, SAN ANTONIO, et. al. v. DAVID D. SMITH, et al.

Prior History: *Fire & Police Retiree Health Care Fund v. Smith, 2019 U.S. Dist. LEXIS 212155, 2019 WL 6702440 (D. Md., Dec. 9, 2019)*

Core Terms

settlement, plaintiffs', proposed settlement, Parties, attorney's fees, lodestar, percent, corporate governance, Consolidated, reforms, notice, stockholders, incentive award, fee award, courts, shareholder, expenses, merger, preliminary approval, discovery, Tribune, derivative action, class action, negotiations, monetary, cases, cross-check, multiplier, damages, terms

Counsel: **[*1]** For Fire and Police Retiree Health Care Fund, San Antonio, Plaintiff: Christopher Orrico, Lauren Ormsbee, Jeroen van Kwawegen, PRO HAC VICE, Bernstein Litowitz Berger and Grossman LLP, New York, NY; John Michael Pardoe, Zuckerman Spaeder, Baltimore, MD; Cyril Vincent Smith, III, Zuckerman Spaeder LLP, Baltimore, MD.

For Norfolk County Retirement System, derivatively on behalf of Sinclair Broadcast Group, Inc., Consol Plaintiff: Christopher Orrico, PRO HAC VICE, Bernstein Litowitz Berger and Grossman LLP, New York, NY; John Michael Pardoe, Zuckerman Spaeder, Baltimore, MD; Nathaniel L Orenstein, LEAD ATTORNEY, PRO HAC VICE, Berman Tabacco, Boston, MA.

For David D. Smith, Frederick G. Smith, J. Duncan Smith, Robert E. Smith, Howard E. Friedman, Daniel C. Keith, Christopher S. Ripley, Sinclair Broadcast Group, Inc., Defendants: Sima Gavriella Fried, LEAD ATTORNEY, Scott H Marder, Thomas & Libowitz, P.A., Baltimore, MD; Scott B Luftglass, PRO HAC VICE, Fried Frank Harris Shriver and Jacobson LLP, New York, NY.

For Martin R. Leader, Lawrence E. McCanna, Defendants: Aaron Marcu, Kimberly Zelnick, PRO HAC VICE, Freshfields Bruckhaus Deringer LLP, New York, NY; David Livshiz, PRO HAC VICE, Freshfields **[*2]** Bruckhaus Deringer US LLP, New York, NY; Justin Akihiko Redd, Kramon & Graham, P.A., Baltimore, MD; Philip M Andrews, Kramon and Graham PA, Baltimore, MD.

Judges: Catherine C. Blake, United States District Judge.

Opinion by: Catherine C. Blake

Opinion

MEMORANDUM

Now pending and ready for resolution in this consolidated shareholder derivative action is the plaintiffs' motion for final approval of settlement, fee award, and incentive awards (ECF 94). A hearing on the matter was held on October 27, 2020. For the reasons stated herein, the motion will be granted in part and denied in part. The settlement will be approved, the incentive awards will be approved, the expenses will be approved, and the fee award will be approved, but in a reduced amount of $7.4 million.

FACTS AND PROCEDURAL HISTORY

Sinclair Broadcast Group, Inc. ("Sinclair") is a telecommunications company and the largest owner of local television stations in the country. Though the company has thousands of shareholders, it is a closely held corporation in which founder Julian Smith's four sons exercise significant control. Together, the four Smith brothers, defendants David D. Smith, Frederick G. Smith, J. Duncan Smith, and Robert E. Smith, comprise fifty **[*3]** percent of Sinclair's Board of Directors and control approximately seventy-five percent of shareholder votes.

In 2017, Sinclair agreed to acquire Tribune Media Company ("Tribune") in a $3.9 billion merger. The merger agreement required Sinclair to divest certain television stations to independent third parties in order to obtain Federal Communications Commission ("FCC") and Department of Justice ("DOJ") approval. Sinclair proposed multiple divestitures to companies and individuals with close ties to the Smith family. After the FCC found a substantial and material question of fact as to whether Sinclair misrepresented material facts in its attempt to consummate the merger with Tribune, the FCC voted to refer the proposed merger to an Administrative Law Judge. Thereafter, Tribune pulled out of the merger and sued Sinclair in the Delaware Chancery Court alleging breach of contract and claiming damages in excess of $1 billion. Sinclair ultimately settled the Tribune lawsuit for $60 million, paid a $48 million fine to the FCC, and entered into a consent decree with the FCC imposing certain disclosure, reporting, and training requirements on Sinclair. At the center of the consent decree was **[*4]** a requirement to hire a Chief Accounting Officer to implement new compliance procedures, oversee the compliance training of relevant personnel, and to submit compliance reports to Sinclair's Board of Directors and to the FCC.

This case involves two consolidated shareholder derivative actions brought by Fire and Police Retiree Health Care Fund, San Antonio and Norfolk County Retirement System on behalf of Sinclair in the aftermath of the failed Tribune merger and the FCC consent decree. The plaintiffs allege the defendant members of Sinclair's Board of Directors breached fiduciary duties. Sinclair filed a motion to dismiss, which this court denied on December 9, 2019. Thereafter, the parties engaged in mediation and settlement talks. As a result, the parties reached a tentative settlement wherein the defendants would be released from liability in exchange for (1) a monetary settlement of $24.86 million, $4.36 million of which would be contributed by defendant David D. Smith and $20.5 million of which would be funded by Sinclair's insurance carriers, and (2) a promise to enact corporate governance reforms targeted at preventing a recurrence of the kinds of problems that led to the failed **[*5]** Tribune merger. The corporate governance reforms center around a promise to create a Regulatory Committee of the Board of Directors to facilitate communication between the new Chief Accounting Officer and the Board of Directors at large and to "strengthen Sinclair's internal controls, enhance communication . . . [and] ensure greater independence." (ECF 94-1, Pl.'s Mem. in Support of Mot. for Final Approval, at 25-28, 30). But they also

include: the creation of a Nomination and Corporation Governance Committee to "ensure that the Board is comprised of qualified, and when appropriate, independent directors"; the appointment of a Chief Compliance Officer to develop the company's compliance program; revisions to the corporation's policies concerning transactions with related persons; and revisions to the corporations' Code of Business Conduct and Ethics. (*Id.* at 27-28).

On July 23, 2020, the plaintiffs moved for preliminary approval of the proposed settlement. On August 6, 2020, this court granted the motion for preliminary approval, ordered that the plaintiffs provide notice to shareholders in a number of ways, and scheduled a fairness hearing. The plaintiffs have issued notice and no objections to **[*6]** the settlement have been recorded. On September 15, 2020, the plaintiffs moved for final approval of the proposed settlement. The court held a fairness hearing on the final approval on October 27, 2020, and the matter is now ready for resolution.

ANALYSIS

I. PROPOSED SETTLEMENT

Federal Rule of Civil Procedure 23.1 provides that a derivative action "may be settled, voluntarily dismissed, or compromised only with the court's approval." This occurs in two stages. First, at the preliminary approval stage, the court's role is to determine whether there exists probable cause to submit the proposal to members of the class and to hold a full-scale hearing on its fairness. *Erny on behalf of India Globalization Capital, Inc. v. Mukunda, No. DKC-18-3698, 2020 U.S. Dist. LEXIS 117936, 2020 WL 3639978, at *1 (D. Md. July 6, 2020)*.[1] At that stage, the crucial inquiry is "whether the proposed settlement is fair, adequate, and reasonable." *In re Mid-Atlantic Toyota Antitrust Litig., 564 F. Supp. 1379, 1383 (D. Md. 1983)* (citing *In re Corrugated Container Antitrust Litig., 643 F.2d 195, 207 (5th Cir. 1981))*.[2] At the final approval stage, the standard and the factors to be considered are "exactly the same" as during the preliminary approval stage. *Erny, 2020 U.S. Dist. LEXIS 117936, 2020 WL 3639978, at *2*. Courts in this circuit typically bifurcate this analysis by inquiring first into the fairness and then into the adequacy of the proposed settlement. *See 2020 U.S. Dist. LEXIS 117936, [WL] at *2-3*; *Mid-Atlantic Toyota, 564 F. Supp. at 1383*.

A. Fairness

The court believes the proposed settlement, which resulted **[*7]** from serious and sustained negotiation, is fair. To assess the fairness of a proposed settlement, courts must determine that that settlement "was reached as a result of good-faith bargaining at arm's length, without collusion[.]" *In re Jiffy Lube Sec. Litig., 927 F.2d 155, 158-59 (4th Cir. 1991)*. This determination requires an examination of (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the particular area of the class action litigation. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig., 952*

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[1] Unpublished opinions are cited for the soundness of their reasoning, not for their precedential value.

[2] Cases involving settlement under *Rule 23(e)* of nonderivative class actions are relevant by analogy in the derivative context and will be cited herein. *See* Wright & Miller, 7C Fed. Prac. and Proc. Civ. § 1839 (3d ed.) (updated 2020).

F.3d 471, 484 (4th Cir. 2020). The purpose of this inquiry is "to protect against the danger of counsel—who are commonly repeat players in larger-scale litigation—from 'compromising a suit for an inadequate amount for the sake of insuring a fee.'" In re Am. Capital S'holder Derivative Litig., No. 11-2424-PJM, 2013 U.S. Dist. LEXIS 90973, 2013 WL 3322294, at *3 (D. Md. June 28, 2013) (quoting Mid-Atlantic Toyota, 564 F. Supp. at 1385).

Nothing in the record before the court even hints at collusion. Instead, this proposed settlement, which was negotiated separately from and was not conditioned upon approval of the proposed award of attorneys' fees, is clearly the result of arm's length bargaining. (ECF 94-1 at 36 n.15). Plaintiffs' counsel spent months participating in negotiations and informal discovery with counsel **[*8]** for Sinclair's Special Litigation Committee ("SLC"). (*Id.* at 18). They also conducted some formal discovery, and though the scope of discovery was limited, this case featured a fully briefed motion to dismiss and accompanying oral arguments. (*See* ECF 24; ECF 26; ECF 38; ECF 40; ECF 44; ECF 45; ECF 65). After surviving the motion to dismiss, counsel participated in mediation sessions with mediator Robert A. Meyer. (ECF 62; ECF 94-1 at 21-22). Following mediation, counsel spent an additional 45 days negotiating the details of the proposed stipulated settlement. (ECF 94-1 at 37-38). As a result of their efforts, plaintiffs' counsel secured fairly significant corporate governance reforms and monetary concessions. (*Id.* at 38). Finally, the declarations of plaintiffs' counsel establish that they are highly qualified and experienced litigators. (*See generally* ECF 94-2). In sum, the proposed settlement was procedurally fair.

B. Adequacy

The court believes the proposed settlement, which secures for Sinclair and its stockholders a sizeable monetary award as well as significant governance reforms, is adequate. To determine the adequacy of a proposed settlement, courts must ensure that "the settlement is proportionate **[*9]** to the strength (and weakness) of the plaintiff's case." Am. Capital, 2013 U.S. Dist. LEXIS 90973, 2013 WL 3322294, at *3. To do this, courts must weigh five factors: (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement. *See* Lumber Liquidators, 952 F.3d at 484; *see also* Singleton v. Domino's Pizza, LLC, 976 F. Supp. 2d 665, 679 (D. Md. 2013).

The first three factors, which all concern the relative strengths and weaknesses of the plaintiffs' case, weigh in favor of settlement. The plaintiffs survived a motion to dismiss on the issue of whether they had satisfied the demand requirement of Fed. R. Civ. P. 23.1, thus demonstrating some early success. But further discovery remained to be taken on the status of the SLC and its composition, and even overcoming the initial demand requirement is no guarantee of success on the merits. After all, "[t]he doctrine of demand futility, the business judgment rule, and the generally uncertain prospect of establishing a breach of fiduciary duties combine to make shareholder derivative suits **[*10]** an infamously uphill battle for plaintiffs." In re Fab Universal S'holder Derivative Litig., 148 F. Supp. 3d 277, 281-82 (S.D.N.Y. 2015). As plaintiffs' counsel notes, if Sinclair's SLC were to recommend dismissal of this action and if the court were to decide that the SLC was duly authorized under Maryland law, then the SLC's choice to dismiss the suit might be protected by the business

judgment rule. (*See* ECF 94-1 at 41). This would make it very difficult for the plaintiffs to prevail. And the cost of bringing this litigation closer to or all the way to trial would be substantial, as a significant amount of discovery would remain to be done, and further dispositive motions would likely be filed. Continuing the litigation also would delay, or perhaps even preclude, the implementation of the substantive corporate governance reforms which the company is otherwise ready to adopt pursuant to the terms of the proposed settlement. *See* Fab Universal, 148 F. Supp. 3d at 282 ("A number of risks are posed by continued litigation, while settlement assures broad corporate reform.").

Next, the fourth factor is relatively neutral. The monetary portion of the settlement ($24.86 million) would not make Sinclair insolvent, as it would be satisfied by insurance proceeds and by contributions from defendant David D. Smith.[3] The **[*11]** plaintiffs speculate that an award of damages at trial would constitute a greater demand on Sinclair's insurance coverage and could make it difficult to fulfill a judgment. (ECF 94-1 at 44). Finally, and significantly, this proposed settlement remains unopposed. "The complete lack of shareholder objection to this settlement weighs in favor of approval." Fab Universal, 148 F. Supp. 3d at 282; *see also* Lumber Liquidators, 952 F.3d at 485-86 (citing cases demonstrating that an objection rate of less than one percent weighs in favor of adequacy).

Accordingly, nothing in the record indicates that this proposed settlement is substantively inadequate or disproportionate to the strengths and weaknesses of the plaintiffs' case.

C. Notice

The court finds that notice of the proposed settlement was adequate. Federal Rule of Civil Procedure 23.1 requires that "[n]otice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders . . . in the manner that the court orders." And due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

This court ordered that notice to stockholders was to **[*12]** be provided by several methods: (1) Sinclair was to disclose the terms of the Settlement by filing a Form 8-K with the SEC; (2) Sinclair was to post the Notice and Stipulation on Sinclair's website; (3) Sinclair was to release the Notice and Stipulation on a nationally recognized newswire; and (4) plaintiffs' lead counsel was to post the Notice and Stipulation on their respective websites. (ECF 91, Preliminary Approval Order, ¶ 7).

The parties complied with the court's requirements: the notice and stipulation was, on August 10, 2020, filed via a Form 8K with the SEC, published in a press release on PR Newswire, and posted on the Investor Relations sections of Sinclair's corporate website as well as on plaintiffs' counsel's websites. (*See* ECF 94-2, Smith Decl., ¶¶ 46-47). The notice adequately summarized the terms of the proposed settlement in a manner that would allow those who opposed it to lodge an objection. (*See* ECF 94-1 at 34-35). Finally, the deadline for filing objections was September 29, 2020, affording any interested party fifty days to learn of the proposed

[3] The court notes that personal contributions from directors, so rarely obtained, are significant. *See* T. Joo, *Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955, 966 n.38 (2005). This fact provides additional support for the adequacy of the settlement.

settlement and file an objection. (*See* ECF 91 ¶ 8). This notice regime is substantially similar to the one approved **[*13]** in *In re India Globalization Capital, Inc., Derivative Litig. No. DKC-19-3698, 2020 U.S. Dist. LEXIS 77190, 2020 WL 2097641, at *4 (D. Md. May 1, 2020)*. Accordingly, notice was issued in the manner ordered by the court and was reasonably calculated to afford interested parties an opportunity to present their objections.

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For the reasons just described, the court finds that the settlement is fair, adequate, and reasonable, and that notice was sufficient. The proposed settlement will be approved.

II. ATTORNEYS' FEES

"It is for the district court in the first instance to calculate an appropriate award of attorney's fees." *Carroll v. Wolpoff & Abramson, 53 F.3d 626, 628 (4th Cir. 1995)*. Though the Fourth Circuit Court of Appeals has not announced a preferred method for calculating an award of attorneys' fees in common fund class actions, courts in this circuit generally use a percentage of recovery method, which may be cross-checked by the lodestar method. *See Singleton, 976 F. Supp. 2d at 681*.

In this case, the plaintiffs seek an $8.167 million award to be paid out of the $24.86 million settlement fund and to cover their attorneys' fees, their litigation expenses, and the plaintiff incentive awards. (ECF 94-1 at 46-47; ECF 89-2, Stipulation, ¶ 18). Across all firms, plaintiffs' counsel invested 3,865.9 hours for a total lodestar of $2,449,656.50, plus **[*14]** expenses of $71,355.89. (ECF 94-1 at 58; ECF 94-2 at 40). Deducting from the total fee award the reasonable litigation expenses of $71,355.89, the plaintiffs seek attorneys' fees totaling $8,095,644.11. Putting aside for now the uncertain value of the corporate governance reforms, the attorneys' fees sought by the plaintiffs represents 32.6 percent of the settlement fund, or a lodestar multiplier of 3.30. The court will consider the reasonableness of this proposed award under a percentage of recovery method with a lode-star cross-check.

A. Percentage of Recovery Method

Attorneys' fees awarded under the percentage of recovery method are often between 25 percent and 30 percent of the value of the common fund.[4] Ann. Manual for Complex Litigation § 14.121 (4th ed.); *see also Singleton, 976 F. Supp. 2d at 684*. Courts in this circuit have analyzed the following seven factors from *Singleton v. Domino's Pizza* to determine the reasonableness of a fee award using a percentage of the recovery method: (1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity **[*15]** and duration of the case; and (7) public policy. *976 F. Supp. 2d at 682*; *see also Kelly v. Johns Hopkins Univ., No. 16-cv-2835-GLR, 2020 U.S. Dist. LEXIS 14772, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020)*. Notably, though, fee award reasonableness factors need not be applied in a formulaic way because each case is different—and in certain cases, one factor may outweigh the rest. *Singleton, 976 F. Supp. 2d at 682*.

1. Results Obtained

Here, the $24.86 million recovery, in addition to the

[4] The plaintiffs cite a range of awards in the Fourth Circuit between fifteen and forty percent. (*See* ECF 94-1 at 53).

corporate governance reforms, is an excellent result for the corporation. The monetary recovery represents nearly a quarter of the readily quantifiable money damages arising out of the failed Tribune merger, which resulted in litigation that Sinclair settled for $60 million and an FCC fine that cost Sinclair another $48 million. While more potentially could have been gained had plaintiffs' counsel brought this case to trial, all could have just as easily been lost. And the corporate governance reforms provide a five-year guarantee that a Regulatory Committee, a majority of whose members will be independent directors, will help to prevent a recurrence of the conduct which led to this litigation. Further, this litigation has resulted in the creation of a new Nomination and Corporation Governance Committee, as well as the appointment **[*16]** of former Judge Benson E. Legg to the SLC and to Sinclair's Board, thus shoring up the Board's independence.

2. Quality of Counsel

Plaintiffs' attorneys are experienced and skilled litigators with substantial experience in shareholder derivative actions, as their resumes and biographies readily demonstrate. Plaintiffs' counsel spent nearly 4,000 hours over the course of two years to investigate, litigate, and settle this case, all while opposing sophisticated and experienced defense attorneys. "[S]ettlement was reached relatively quickly," which "further indicates the attorneys' skills[.]" *Singleton, 976 F. Supp. 2d at 683*.

3. Risk of Nonpayment

"[C]ourts consider the relative risk involved in litigating the specific matter compared to the general risks incurred by attorneys taking on class actions on a contingency basis." *Id.* This includes consideration of "the presence of government action preceding the suit, the ease of proving claims and damages, and if the case resulted in settlement, the relative speed at which the case was settled." *Id.* Here, the plaintiffs benefitted from significant government action preceding the suit: an FCC hearing designation order finding a material question of fact as to whether Sinclair **[*17]** made misrepresentations in its merger bid and a subsequent FCC fine and consent decree. Additionally, given the FCC's monetary recovery and the value of the Tribune settlement, there were readily provable damages of $108 million. Still, plaintiffs' counsel correctly note that a number of obstacles stood in their way—in particular, preventing Sinclair's SLC from terminating the case and overcoming Maryland's business judgment rule—in addition to the difficulties of proving their case on the merits. (*See* ECF 94-1 at 58-59). While there is always risk in fronting the costs of litigation and working on contingency, and while the government by no means did all the heavy lifting for plaintiffs' counsel, the risk of nonpayment was no more serious here than in most other derivative actions, where counsel inevitably must contend with the same demand requirements and business judgment presumptions. Indeed, given the significant government action that preceded this litigation, it may have been slightly less risky.

4. Objections

A "lack of objections tends to show that . . . the requested fee is reasonable for the services provided and the benefits achieved[.]" *Singleton, 976 F. Supp. 2d at 684*. In this case, there have been no **[*18]** objections to the proposed fee award.

5. Awards in Similar Cases

"In considering awards in similar cases, courts look to cases of similar size rather than similar subject matter." *Singleton, 976 F. Supp. 2d at 685*; *see also In re*

Cendant Corp. PRIDES Litig., 243 F.3d 722, 737 (3d Cir. 2001). "It would be nearly impossible for this Court . . . to evaluate hundreds of class action settlements and come up with a median or average fee amount in similar cases[,]" but thankfully "legal scholars have already gathered this kind of empirical data." *Loudermilk Servs., Inc. v. Marathon Petroleum Co., 623 F. Supp. 2d 713, 723 (S.D. W. Va. 2009)*. One such study found that in cases without a fee-shifting mechanism, "the axiomatic one-third fee is inaccurate" and "a fee of 20 to 25 percent of the recovery better describes reality." Eisenberg & Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study*, 1 J. Emp. L. Studies 27, 50 (2004); *see also Stoner v. CBA Info. Servs., 352 F. Supp. 2d 549, 553 (E.D. Pa. 2005)* (noting fee awards have ranged from 15 percent to 40 percent in cases that settled for under $100 million). In a follow-up study, the same authors found that for settlement funds valued between $22.8 million and $38.3 million, the mean attorneys' fees award was 22.1 percent. Eisenberg & Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Emp. L. Studies 248, 265 T.7 (2008). Even in jurisdictions which presume **[*19]** a 33 percent recovery is reasonable, in the class action and derivative action context, where counsel has more control over the litigation and where the potential reward for counsel is much higher, a reduction from 33 percent may be justified. *See, e.g., Loudermilk Servs., 623 F. Supp. 2d at 723-24* (relying in part on empirical studies of similar actions to justify a reduction from the state's 33 percent benchmark to 25 percent in an action that secured a settlement fund worth between $15 million and $25 million). In this case, though the plaintiffs identify several instances where a percentage of recovery of 30 percent to 40 percent has been awarded, there is nevertheless a large discrepancy between the nearly 33 percent recovery sought by plaintiffs' counsel and the mean of 22.1 percent in similarly sized actions.

Determining the reasonableness of the proposed percent of recovery in this case is complicated by the fact that the settlement at issue here includes not only a $24.86 million settlement fund but also corporate governance reforms of uncertain economic value. Though the plaintiffs request the court to value the corporate governance reforms at anywhere from $15 million to $25 million, the court can discern no principled **[*20]** basis on which to accept such a valuation. It is true that the caselaw is replete with attorneys' fee awards that are based on non-monetary settlements, but many of those cases determined a reasonable fee award either through a lodestar calculation or with the aid of expert testimony on the valuation of corporate governance reforms. *See, e.g., In re Schering-Plough Corp. S'holders Derivative Litig., No. 01-1412, 2008 U.S. Dist. LEXIS 2569, 2008 WL 185809, at *4 (D.N.J. Jan. 14, 2008)* (noting that since the settlement did not produce a common fund, the court "must employ the lodestar method to determine the reasonability of the proposed fee award" and approving a multiplier of 1.37); *In re Force Protection, Inc. Derivative Litig., No. 2:08-1907-CWH, 2012 U.S. Dist. LEXIS 207463, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012)* (featuring the testimony of a corporate governance expert, which was ultimately unhelpful in resolving the considerably difficult problem of valuing corporate governance reforms). In this case, there was no expert testimony. Nor is it possible for the court to segregate the hours that plaintiffs' counsel worked on securing corporate governance reforms from the hours that plaintiffs' counsel worked on securing a monetary settlement to perform a lodestar calculation. Thus, while the court is convinced that the corporate governance reforms are of significant value, it is not prepared **[*21]** to place a specific monetary value on the reforms. As a result, even though the court finds that the 32.6 percent recovery sought is at the high end of the range and deviates significantly from the mean, this must be

balanced against the collective weight of the corporate governance reforms and the monetary settlement.

6. Complexity of the Case

In evaluating the complexity and duration of a case, courts consider "not only the time between the filing of the complaint and reaching settlement, but also the amount of motions practice prior to settlement, and the amount and nature of discovery." *Jones v. Dominion Res. Servs., Inc., 601 F. Supp. 2d 756, 761 (S.D. W. Va. 2009)*. "Where discovery is informal and does not involve conflicts over privilege or access to documents, the case is less complex and time consuming." *Id.* "The case is more complex when the applicable laws are new, changing, or unclear." *Id. at 762*. And "[i]n a settlement context, courts may look to whether negotiations were hard fought, complex, or arduous." *Id.* (internal quotations omitted). In this case, plaintiffs' counsel briefed and argued a motion to dismiss, which forced them to contend with the thorny issue of *Rule 23.1*'s demand requirement. Though counsel asserts that demand futility, the business judgment rule, **[*22]** and the uncertain prospect of establishing a breach of fiduciary duties combined to make the case very complex, the motion to dismiss focused on only one of these issues. (ECF 94-1 at 61). Discovery was conducted in this case, which did involve adversarial disputes and the production of privilege logs, but it was largely limited to the issue of the validity of Sinclair's SLC. (*See* ECF 67). And the negotiations in this case appear to have been fairly hard-fought. Thus, while the motions practice and discovery were somewhat limited relative to the issues that may have been presented by the litigation as a whole, this is offset by the fact that settlement was nevertheless contentious.

7. Public Policy

The reasonableness of a fee award must be determined with respect to competing public policy concerns: courts need to strike a balance between encouraging "attorneys [to] continue litigating class action cases that 'vindicate rights that might otherwise go unprotected,' and perpetuating the public perception that 'class action plaintiffs' lawyers are overcompensated for the work that they do.'" *Singleton, 976 F. Supp. 2d at 687* (quoting *Third Circuit Task Force Report, 208 F.R.D. 340, 342 (Jan. 15, 2002)*). Because of the damage caused by the perception that plaintiffs' attorneys receive too **[*23]** much of the funds set aside to compensate victims, lawyers requesting attorneys' fees and judges reviewing those requests must be vigilant "to ensure the fees are in fact reasonable beyond reproach and worthy of our justice system." *Jones, 601 F. Supp. 2d at 765*. In this case, plaintiffs' counsel secured an excellent settlement that includes significant corporate governance reforms that would not have resulted from a trial on the merits. But the court is also aware that a fee award of $8.167 million—nearly a third of the total recovery—may appear unseemly to the general public, even if it appears reasonable to the bar. Based on these competing concerns, "a nominal reduction in the requested fee award is sufficient to account for the [litigation] risks . . . counsel identifies while continuing to promote the policy goals" of encouraging corporate governance reform and "protecting against excessive fees." *Singleton, 976 F. Supp. 2d at 688*.

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In sum, the court finds that the results obtained here, including the significant corporate governance reforms that would not have been obtained through trial, are excellent. The court also finds that skilled counsel worked both efficiently and effectively to reach the settlement in this case. Although this **[*24]** weighs in favor of the proposed award, other factors weigh against such a high award: in particular, awards in similar cases

have not been quite as high as the plaintiffs have requested in this case, and government action preceding this litigation provided the plaintiffs with both a strong foothold on which to commence this litigation and significant leverage for settlement. In light of the foregoing analysis, the court is inclined to approve an award of attorneys' fees slightly lower than the amount the plaintiffs have requested, subject to a lodestar cross-check.

B. Lodestar Cross-check

The purpose of performing a lodestar cross-check is "to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether it is within some reasonable multiplier of the lodestar." *Singleton, 976 F. Supp. 2d at 688*. Where a lodestar is used as a mere cross-check to the percentage of recovery method, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006)* (quoting *In re Worldcom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005)*; ***see also*** *Jones, 601 F. Supp. 2d at 765-66*.

Here, a lodestar cross-check confirms that the proposed fee award is slightly high. Plaintiffs' counsel claim a lodestar of $2,449,656.60 based on 3,865.9 billable hours. (***See [*25]*** ECF 94-1 at 58). The court, for the purposes of the cross-check, accepts those hours and will not scrutinize them. To arrive at the $8,095,644.11 fee award sought by plaintiffs' counsel requires a lodestar multiplier of 3.30. In this district, courts have found lodestars falling between 2 and 4.5 to be reasonable, ***see*** *Singleton, 976 F. Supp. 2d at 689*, but there are also cases where lodestars lower than 2, or even fractional lodestars, have been awarded, ***see*** *Erny, 2020 U.S. Dist. LEXIS 117936, 2020 WL 3639978, at *5* (approving a fractional award of $200,000 where the lodestar was over $390,000); *Cendant, 243 F.3d at 742* (noting cases with multipliers between 1.35 and 2.99). Accordingly, reducing somewhat the lodestar multiplier of 3.30, which sits at the higher end of the range, would be consistent with the reduction suggested by the percentage of recovery analysis above. ***See*** *Kay Co. v. Equitable Prod. Co., 749 F. Supp. 2d 455, 471 (S.D. W. Va. 2010)* (stating that a lodestar multiplier between 2.8 and 3.4—less than counsel had requested—was well within the reasonable range and "undoubtedly high enough to encourage future class action representation and efficient, collegial conduct by attorneys").

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An award of $7.4 million in attorneys' fees, representing a percentage of recovery just under 30 percent of the value of the settlement fund and a lodestar multiplier of just **[*26]** over 3.0, is high enough to encourage meritorious litigation in this area and to adequately compensate counsel for their efforts, while also mitigating against the public perception that attorneys' fees too often diminish the recovery to injured parties. Accordingly, the court will approve an award of $7.4 million in fees, plus the value of the reasonable litigation expenses incurred, for a total of $7,471,355.89.

III. INCENTIVE AWARDS

The court finds that the proposed incentive awards are reasonable. In considering whether an incentive payment to named plaintiffs in a derivative action is warranted, courts should consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Erny, 2020 U.S. Dist. LEXIS 117936, 2020 WL 3639978, at *6* (quoting *Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)*).

An incentive award may be warranted where the plaintiffs have spent time and money "to procure significant corporate governance reforms which will benefit all shareholders, not just themselves." *Id.*

In this case, the fee award sought includes $5,000 incentive awards for each named plaintiff. (ECF 94-1 at 70; ECF 89-2 ¶ 18). Without **[*27]** the participation of these sophisticated institutional plaintiffs, it is not likely that a significant recovery benefitting all of Sinclair's shareholders would have materialized. A $5,000 incentive award appears to be in line with other incentive awards approved in this circuit. *See, e.g., Erny, 2020 U.S. Dist. LEXIS 117936, 2020 WL 3639978, at *6* (approving $1,000 incentive awards for named plaintiffs in the context of a settlement securing corporate governance reforms); *Singleton, 976 F. Supp. 2d at 690-91* (approving $2,500 incentive awards for named plaintiffs in the context of a settlement securing a $2.5 million common fund); *Jones, 601 F. Supp. 2d at 767-68* (awarding $15,000 to each named plaintiff in the context of a settlement securing a fund worth over $40 million). Further, "because the [incentive] award is to be paid out of the award of attorneys' fees, it 'need not be subject to intensive scrutiny, as the interests of the corporation, the public and the defendants are not directly affected.'" *Erny, 2020 U.S. Dist. LEXIS 117936, 2020 WL 3639978, at *6* (quoting *In re Cendant Corp. Derivative Action Litig., 232 F. Supp. 2d 327, 344 (D.N.J. 2002)*). Therefore, the incentive awards are appropriate in this case and will be approved.

CONCLUSION

For the reasons stated herein, the settlement will be approved. Further, the requested expenses of $71,355.89 will be approved, and a total of $7.4 million in attorneys' fees, from which the incentive **[*28]** awards will be paid, will also be approved. A separate order follows.

11/20/20

Date

/s/ Catherine C. Blake

United States District Judge

FINAL ORDER AND JUDGMENT

This matter came before the Court for hearing pursuant to an Order of the Court, dated August 6, 2020, (the "Preliminary Approval Order"), on the application of Plaintiffs in the above-captioned, consolidated derivative action (the "Consolidated Action") for final approval of the proposed settlement (the "Settlement") set forth in the Stipulation and Agreement of Compromise, Settlement and Release, dated July 20, 2020 (the "Stipulation"), which is incorporated herein by reference. Due and adequate notice having been given of the Settlement, as required in the Preliminary Approval Order, and the Court having considered all papers filed and evidence in support of the proposed Settlement, and attorneys for the respective Parties having been heard, and an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Preliminary Approval Order;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. **Definitions**: Unless otherwise defined herein, the capitalized terms used herein shall have the same **[*29]** meanings set forth in the Stipulation and/or the Preliminary Approval Order.

2. **Jurisdiction**: For purposes of effectuating the Settlement, the Court has jurisdiction over the subject matter of the Consolidated Action, and all matters relating to the Settlement, as well as personal

jurisdiction over all of the Parties, including all Sinclair stockholders.

3. **Derivative Action Properly Maintained**: Based on the record in the Consolidated Action, the Court finds that each of the provisions of *Rule 23.1 of the Federal Rules of Civil Procedure* (the "Federal Rules") has been fully satisfied and that the Consolidated Action has been properly maintained according to *Rule 23.1* of the Federal Rules. The Court finds that Plaintiffs and Plaintiffs' Lead Counsel have adequately represented the interests of Sinclair and its stockholders both in terms of litigating the Consolidated Action and for purposes of entering into and implementing the Settlement.

4. **Notice**: The Court finds that the dissemination of the Notice: (a) was implemented in accordance with the Preliminary Approval Order; (b) constituted notice that was reasonably calculated, under the circumstances, to apprise Sinclair Stockholders of: (i) the pendency of the Consolidated Action; (ii) the effect **[*30]** of the proposed Settlement (including the Releases to be provided thereunder); (iii) the application of Plaintiffs' Counsel for an award of attorneys' fees and litigation expenses (as set forth in Paragraph 18 of the Stipulation) (the "Application"); (iv) their right to object to the Settlement and/or the Application; and (v) their right to appear at the Settlement Hearing; (c) constituted due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (d) satisfied the requirements of *Rule 23.1* of the Federal Rules, the United States Constitution, and all other applicable law and rules.

5. **Final Settlement Approval and Dismissal of Claims**: Pursuant to *Rule 23.1* of the Federal Rules, this Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation, the Settlement consideration; the Releases; and the dismissal with prejudice of the Consolidated Action), and finds that the Settlement is, in all respects, fair, reasonable, and adequate to Plaintiffs, Sinclair, and Sinclair Stockholders. This Court further finds the Settlement is the result of arm's-length negotiations between **[*31]** experienced counsel representing the interests of Plaintiffs, Defendants, Sinclair, and Sinclair Stockholders. Accordingly, the Settlement is hereby approved in all respects and shall be consummated in accordance with its terms and provisions. The Parties are directed to implement, perform, and consummate the Settlement.

6. The Consolidated Action and all of the claims asserted against the Defendants in the Consolidated Action by Plaintiffs are hereby dismissed with prejudice. The Parties shall bear their own fees, costs, and expenses, except as expressly provided in the Stipulation or in this Final Order and Judgment.

7. **Binding Effect**: The terms of the Stipulation and of this Final Order and Judgment shall be forever binding on Defendants, Sinclair, Plaintiffs, and all other Sinclair Stockholders, as well as their respective agents, executors, administrators, heirs, successors, affiliates, and assigns.

8. **Release of the Released Defendant Parties**: Upon the Effective Date:

(a) Sinclair and Plaintiffs, and each and every other Sinclair Stockholder derivatively on behalf of Sinclair, and their respective heirs, executors, administrators, predecessors, successors, assigns, and attorneys, **[*32]** in their capacities as such only, by operation of the Stipulation and this Final Order and Judgment and to the fullest extent permitted by law, shall completely, fully, finally and forever release, relinquish, settle, and discharge each and all of (whether or not each of all of the following persons or

entities were named, served with process, or appeared in the Consolidated Action or the Teamsters Action) (i) David D. Smith, Frederick G. Smith, J. Duncan Smith, Robert E. Smith, Howard E. Friedman, Daniel C. Keith, Martin R. Leader, Lawrence E. McCanna, Christopher S. Ripley, Benson E. Legg, and Sinclair; (ii) all past and present officers and directors of Sinclair; and (iii) for each and all of the Persons identified in the foregoing clauses (i) and (ii) (but only to the extent such Persons are released as provided above), any and all of their respective past or present family members, spouses, heirs, trusts, trustees, executors, estates, administrators, beneficiaries, distributees, foundations, agents, employees, fiduciaries, insurers, reinsurers, partners, partnerships, general or limited partners or partnerships, joint ventures, member firms, limited-liability companies, corporations, **[*33]** parents, subsidiaries, divisions, direct or indirect affiliates, associated entities, stockholders, principals, officers, managers, directors, managing directors, members, managing members, managing agents, predecessors, predecessors-in-interest, successors, successors-in-interest, assigns, financial or investment advisors, advisors, consultants, investment bankers, entities providing any fairness opinion, underwriters, brokers, dealers, lenders, commercial bankers, attorneys, personal or legal representatives, accountants and associates (collectively, the "Released Defendant Parties"), from any and all manner of claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, debts, expenses, interest, penalties, sanctions, fees, attorneys' fees, actions, potential actions, causes of action, suits, judgments, defenses, counterclaims, offsets, decrees, matters, issues and controversies of any kind, nature or description whatsoever, whether known or unknown, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, suspected or unsuspected, liquidated or not liquidated, fixed or contingent, including Unknown **[*34]** Claims (as defined in the Stipulation), which were asserted in the Demands, the San Antonio Complaint, the Norfolk Complaint, or the Teamsters Complaint, or which could have been asserted by Plaintiffs or any Sinclair Stockholder derivatively on behalf of Sinclair, or which Sinclair could have asserted directly, in any court, tribunal, forum or proceeding, whether based on state, local, foreign, federal, statutory, regulatory, common or other law or rule, and which are based upon, arise out of, relate to, or involve, directly or indirectly, (i) any transaction, occurrence, fact, disclosure, or non-disclosure alleged or set forth in any of the Demands, the San Antonio Complaint, the Norfolk Complaint, or the Teamsters Complaint; (ii) the Merger, the HDO, the divestitures contemplated by the Merger, the Delaware Action, or the Consent Decree; (iii) the disclosures related to the foregoing; (iv) any litigation or any settlement of any litigation relating to foregoing (including the Delaware Action and the Consent Decree); or (v) the actions, inactions, deliberations, discussions, decisions, votes, or any other conduct of any kind of any director, officer, employee, or agent of Sinclair **[*35]** relating to the foregoing (collectively, the "Released Plaintiffs' Claims"); provided, however, for the avoidance of doubt, the Released Plaintiffs' Claims shall not include (x) the right to enforce the Stipulation or the Settlement or this Final Order and Judgment, or (y) any direct claims of any Sinclair stockholder, including the federal securities laws claims asserted in the action captioned *In re Sinclair Broadcast Group, Inc. Securities Litigation*, Case No. 1:18-CV-02445-CCB.

(b) Sinclair and Plaintiffs, and each and every Sinclair Stockholder derivatively on behalf of Sinclair, and their respective heirs, executors, administrators, predecessors, successors, assigns, and attorneys in their capacities as such only, by operation of the Stipulation and this Final Order and Judgment and to

the fullest extent permitted by law, shall forever be barred and enjoined from commencing, instituting, or prosecuting any of the Released Plaintiffs' Claims against any of the Released Defendant Parties in any forum.

9. **Release of the Released Plaintiff Parties**: Upon the Effective Date:

(a) Defendants and their respective heirs, executors, administrators, predecessors, successors, and assigns, in **[*36]** their capacities as such only, by operation of the Stipulation and this Final Order and Judgment and to the fullest extent permitted by law, shall completely, fully, finally and forever release, relinquish, settle and discharge each and all of Plaintiffs, Plaintiffs' Counsel, and any and all of their respective past or present family members, spouses, heirs, trusts, trustees, executors, estates, administrators, beneficiaries, distributees, foundations, agents, employees, fiduciaries, insurers, reinsurers, partners, partnerships, general or limited partners or partnerships, joint ventures, member firms, limited-liability companies, corporations, parents, subsidiaries, divisions, direct or indirect affiliates, associated entities, stockholders, principals, officers, managers, directors, managing directors, members, managing members, managing agents, predecessors, predecessors-in-interest, successors, successors-ininterest, assigns, financial or investment advisors, advisors, consultants, investment bankers, entities providing any fairness opinion, underwriters, brokers, dealers, lenders, commercial bankers, attorneys, personal or legal representatives, accountants and associates (collectively, **[*37]** the "Released Plaintiff Parties") from any and all manner of claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, debts, expenses, interest, penalties, sanctions, fees, attorneys' fees, actions, potential actions, causes of action, suits, judgments, defenses, counterclaims, offsets, decrees, matters, issues and controversies of any kind, nature or description whatsoever, whether known or unknown, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, suspected or unsuspected, liquidated or not liquidated, fixed or contingent, including Unknown Claims (as defined in the Stipulation), arising out of or relating to the commencement, prosecution, or settlement of the Demands, the Consolidated Action, or the Teamsters Action (collectively, the "Released Defendants' Claims"); provided, however, for the avoidance of doubt, the Released Defendants' Claims shall not include the right to enforce the Stipulation, the Settlement, or this Final Order and Judgment.

(b) Defendants and their respective heirs, executors, administrators, predecessors, successors, and assigns, in their capacities as such only, **[*38]** by operation of the Stipulation and this Final Order and Judgment and to the fullest extent permitted by law, shall forever be barred and enjoined from commencing, instituting, or prosecuting any of the Released Defendants' Claims against any of the Released Plaintiff Parties in any forum.

10. **Award of Attorneys' Fees and Expenses**: Plaintiffs' Counsel are hereby awarded attorneys' fees and litigation expenses in an aggregate amount of $7,471,355.89 (the "Fees and Expenses Award"), to be paid solely from the Settlement Amount, which sum the Court finds to be fair and reasonable. Plaintiffs Fire and Police Retiree Health Care Fund, San Antonio, Norfolk County Retirement System, and Teamsters Local 677 Health Services & Insurance Plan, are each awarded an incentive award of $5,000.00, to be paid out of the Fees and Expenses Award, which sum the Court finds to be fair and reasonable.

11. No proceedings or court order with respect to the Fees and Expenses Award shall in any way disturb or

affect this Final Order and Judgment (including precluding this Final Order and Judgment from being Final or otherwise being entitled to preclusive effect), and any such proceedings or court order shall **[*39]** be considered separate from this Final Order and Judgment.

12. **No Admissions**: Neither this Final Order and Judgment, the Stipulation, nor any act or omission in connection therewith is intended or shall be deemed to be a presumption, concession or admission by: (a) any of the Defendants or any of the other Released Defendant Parties as to the validity of any claims, causes of action, or other issues raised, or which might be or have been raised, in the Consolidated Action or in any other litigation, or to be evidence of or constitute an admission of wrongdoing or liability by any of them, and each of them expressly denies any such wrongdoing or liability; or (b) Plaintiffs as to the infirmity of any claim or the validity of any defense, or to the amount of any damages, or to the underlying facts of this matter. The existence of the Stipulation, its contents or any negotiations, statements, or proceedings in connection therewith, shall not be offered or admitted in evidence or referred to, interpreted, construed, invoked, or otherwise used by any Person for any purpose in the Consolidated Action or otherwise, except as may be necessary to effectuate the Settlement. This provision shall **[*40]** remain in force in the event that the Settlement is terminated for any reason whatsoever. Notwithstanding the foregoing, any of the Released Parties may file the Stipulation or any judgment or order of the Court related hereto in any other action that may be brought against them, in order to support any and all defenses or counterclaims based on *res judicata*, collateral estoppel, good-faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim

13. **Termination of Settlement**: If the Settlement is terminated pursuant to Paragraph 15 of the Stipulation, then (a) this Final Order and Judgment shall be vacated and shall become null and void and of no further force and effect, except as otherwise provided by the Stipulation, and this Final Order and Judgment shall be without prejudice to the rights of Plaintiffs, all other Sinclair stockholders, Sinclair, and Defendants; (b) the Stipulation and the Settlement (including the Releases given pursuant to the terms of the Stipulation) shall be cancelled and shall become null and void and of no force and effect, except as specifically provided in the Stipulation; and **[*41]** (c) the Parties shall be restored to their respective positions in the Consolidated Action immediately prior to the execution of the Stipulation and shall promptly agree on a new scheduling stipulation to govern further proceedings in the Consolidated Action.

14. **Modification of the Stipulation**: Without further approval from the Court, Plaintiffs and Defendants are hereby authorized to agree to and adopt such amendments or modifications of the Stipulation or any exhibits attached thereto to effectuate the Settlement that: (a) are not materially inconsistent with this Final Order and Judgment; and (b) do not materially limit the rights of the Parties, Sinclair, or Sinclair Stockholders in connection with the Settlement. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any provisions of the Settlement.

15. **Retention of Jurisdiction**: Without affecting the finality of this Final Order and Judgment in any way, this Court retains continuing and exclusive jurisdiction over the Parties, Sinclair, and all Sinclair Stockholders for purposes of the administration, interpretation, implementation, and enforcement of the Settlement.

16. **Entry of [*42] Final Judgment**: There is no just reason to delay the entry of this Final Order and Judgment as a final judgment in the Consolidated

Action. Accordingly, the Clerk of the Court is expressly directed to immediately enter this final judgment in the Consolidated Action.

IT IS SO ORDERED.

DATED: 11/20/20

/s/ THE HONORABLE CATHERINE C. BLAKE

UNITED STATES DISTRICT JUDGE

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In re Am. Capital S'holder Derivative Litig.

United States District Court for the District of Maryland

June 26, 2013, Decided; June 28, 2013, Filed

Civ. No. 11-2424 PJM (Lead Case); Civ. No. 11-2428 PJM/AW; Civ. No. 11-2459 PJM; Civ. No. 11-2459 RWT

Reporter
2013 U.S. Dist. LEXIS 90973 *; 2013 WL 3322294

IN RE AMERICAN CAPITAL SHAREHOLDER DERIVATIVE LITIGATION

Core Terms

proposed settlement, settlement, Dividend, shareholders, Plaintiffs', parties, Derivative, Notice, member of the board, adequacy

Counsel: **[*1]** For Henry Butler, derivatively on behalf of American Capital, Ltd. (8:11-cv-02424-PJM), Plaintiff: Daniel Stephen Sommers, Steven J Toll, LEAD ATTORNEYS, Cohen Milstein Sellers and Toll PLLC, Washington, DC; Kip Brian Shuman, Rusty Evan Glenn, PRO HAC VICE, The Shuman Law Firm, Boulder, CO.

For Maria Saenz Briones, derivatively on behalf of American Capital, Ltd., Consol Plaintiff: Daniel Stephen Sommers, LEAD ATTORNEYS, Cohen Milstein Sellers and Toll PLLC, Washington, DC; Kip Brian Shuman, Rusty Evan Glenn, LEAD ATTORNEYS, PRO HAC VICE, The Shuman Law Firm, Boulder, CO.

For Louis Britt, Consol Plaintiff: Francis A Bottini , Jr, LEAD ATTORNEY, PRO HAC VICE, Bottini and Bottini Inc, LaJolla, CA; Thomas Joseph Minton, LEAD ATTORNEY, Kathryn Miller Goldman, Goldman and Minton PC, Baltimore, MD.

For Malon Wilkus, Defendant:John C Massaro, Kavita Kumar Puri, Scott Bernard Schreiber, PRO HAC VICE, Robert A Stolworthy , Jr, Arnold and Porter LLP, Washington, DC.

For Mary C. Baskin, Neil M. Hahl, Philip Harper, Stan Lundine, Kenneth D. Peterson, Jr., Alvin Puryear, John R. Erickson, Ira Wagner, Samuel A. Flax, Richard E. Konzmann, American Capital Ltd., Defendants: Arthur Luk, John C Massaro, **[*2]** Kavita Kumar Puri, Scott Bernard Schreiber, PRO HAC VICE, Robert A Stolworthy , Jr, Arnold and Porter LLP, Washington, DC.

For Malon Wilkus, Consol Defendant: Robert A Stolworthy , Jr, LEAD ATTORNEY, Arnold and Porter LLP, Washington, DC.

For John Koskinen, Interested Party: Robert A Stolworthy , Jr, LEAD ATTORNEY, Arnold and Porter LLP, Washington, DC; Arthur Luk, John C Massaro, Kavita Kumar Puri, Scott Bernard Schreiber, PRO HAC VICE, Robert A Stolworthy , Jr, Arnold and Porter LLP, Washington, DC.

For Maria Saenz Briones (8:11-cv-02428-PJM), derivatively on behalf of American Capital, Ltd., Plaintiff: Daniel Stephen Sommers, LEAD ATTORNEY, Cohen Milstein Sellers and Toll PLLC, Washington, DC; Kip Brian Shuman, Rusty Evan Glenn, PRO HAC VICE, The Shuman Law Firm, Boulder, CO.

For Malon Wilkus, Mary C. Baskin, Neil M. Hahl, Philip Harper, Stan Lundine, Kenneth D. Peterson, Jr., Alvin Puryear, John R. Erickson, Ira Wagner, Samuel A. Flax, Richard E. Konzmann, American Capital Ltd., Defendants: Robert A Stolworthy , Jr, Arnold and Porter LLP, Washington, DC.

For Louis Britt (8:11-cv-02459-PJM), Plaintiff: Thomas Joseph Minton, Goldman and Minton PC,

Baltimore, MD.

For American Capital, Ltd., **[*3]** A Maryland Corporation, Malon Wilkus, Mary C. Baskin, Neil M. Hahl, Philip Harper, John Koskinen, Stan Lundine, Kenneth D. Peterson, Jr., Alvin Puryear, John R. Erickson, Samuel A. Flax, Richard E. Konzmann, Ira Wagner, Defendants: Robert A Stolworthy , Jr, Arnold and Porter LLP, Washington, DC.

Judges: PETER J. MESSITTE, UNITED STATES DISTRICT JUDGE.

Opinion by: PETER J. MESSITTE

Opinion

MEMORANDUM OPINION

The parties in this consolidated shareholder derivative litigation involving American Capital, Ltd., ("American Capital") have submitted to the Court a Notice and Motion for Preliminary Approval of Derivative Settlement (Paper No. 38). The Court previously **GRANTED** the Motion, and preliminarily approved the Proposed Settlement Agreement (Paper No. 45). This Opinion elaborates upon the reasons for the Court's approval.

I.

Maria Saenz Briones and Louis Britt sued the Board of Directors of American Capital for breach of fiduciary duty and unjust enrichment. The Consolidated Verified Shareholder Derivative Complaint accuses the Board of "affirmatively, expressly, and repeatedly" misrepresenting American Capital's ability to pay dividends, which Plaintiffs claim was the "*raison d'etre*" for the company's existence. As **[*4]** the Board continued to assure investors of American Capital's ability to pay its dividends, the company's share price rose, which Plaintiffs claim triggered multiple rounds of stock sales by various members of the Board. American Capital, it turned out, could not pay some of its dividends; and when the truth came out, the share price plummeted, causing substantial losses to the company and its shareholders. Certain members of the Board, however, had already made substantial sums of money by cashing in on American Capital's artificially inflated price. More importantly, the Complaint alleged that at least some members of the Board knew or should have known about American Capital's inability to pay its dividends.

Although Defendants filed a motion to dismiss to the Complaint, a tentative settlement agreement was reached prior to the filing of Plaintiffs' response. The parties represent that they have engaged in confirmatory discovery and significant arbitration regarding the size of the plaintiffs' fee award.

The instant shareholder derivative litigation is related to a class action direct lawsuit initiated by eligible shareholders against members of the Board; that suit ultimately settled **[*5]** in 2012 for $18 million.

II.

Factual Background

What follows are the key components of the Proposed Settlement Agreement:

- Defendants receive a total release as to all claims that could have been brought against Defendants arising out of the same events;
- Plaintiffs' counsel will be awarded $710,000 in attorneys' fees by Defendants' insurers;
- Each of the named Plaintiffs will receive an award of $1,000;
- Defendants admit no fault;
- "Should the Board of Directors fail to be comprised of a majority of independent directors, as such term is defined at the time by the rules of the NASDAQ stock exchange," American Capital will establish a Dividend Committee, which has the following characteristics, among others:

☐ Its purpose is to "provide guidance to the Board with regard to the orderly declaration of any then-ongoing dividends of the Company's securities";

☐ It has the authority to make recommendations to the Board regarding the payment of dividends, modification to American Capital's current dividend policy, and the timing of public disclosures involving changes to the dividend policy;

☐ If there is a change in control of American Capital, the new Board may exercise its discretion and terminate **[*6]** the Dividend Committee; and

☐ In any event, the Dividend Committee may not exist longer than five years.

• Non-employee directors must, within three years of joining the Board, own American Capital common stock equal to the value of "the lesser of two times the annual cash Board retainer . . . or 5,000 shares"; and

• American Capital must provide annual training to its directors "in current best practices in corporate governance for publicly-traded corporations, with an emphasis on issues relevant to [American Capital's] industry."

The parties will publish a Notice of the Proposed Settlement in *Investor's Business Daily*. The Notice advises eligible shareholders of the existence of the case, the date of the settlement/fairness hearing, and specifies when and how any shareholder may object to the Proposed Settlement Agreement.

III.

Procedural Background

Having received the parties' written submission, the Court determined to hold a hearing at which it could question both parties' counsel about the specifics of the Proposed Settlement Agreement. At the hearing, which was held on 28 March 2013, the Court ordered the parties to file a written supplement to the Proposed Settlement Agreement, setting **[*7]** forth: (1) information about the expertise and qualifications of counsel; (2) clarification regarding the Proposed Settlement Agreement's changes to American Capital's corporate governance structure; (3) a definition of what constitutes an "independent" director for purposes of creation of the Dividend Committee; (4) revision of the Notice so that shareholders can more easily determine the terms of the Proposed Settlement Agreement and the relationship between the shareholder derivative action and the direct action; and (5) a transcript of the Court's hearing that shareholders will be able to access and view.

The parties have submitted the requested information in their Joint Submission on Behalf of All Parties in Further Support of Motion for Preliminary Approval of Settlement (Paper No. 43). The Court has reviewed the parties' supplement and is satisfied that the parties have addressed its concerns.

IV.

"Review of a proposed class action settlement generally involves two hearings." Manual for Complex Litigation (Fourth) § 21.632 (2004) (footnote omitted). The first is a "preliminary fairness" hearing, where the court makes "a preliminary determination on the fairness, reasonableness, **[*8]** and adequacy of the settlement terms" and "direct[s] the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.* The second is the "fairness" hearing, where the court assesses whether the proposed settlement is "fair, reasonable, and adequate" for all class members. *Id.* § 21.634. In the present case, the Court is concerned with the first hearing.

Although the court's "essential inquiry" for both hearings is the same, *i.e.*, "whether the proposed settlement is fair, adequate, and reasonable," *In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379 (D. Md. 1983)*, the court's goal at the preliminary fairness hearing is to assess whether there is "'probable cause' to submit the proposal to

members of the class and to hold a full-scale hearing on its fairness." *Id.* (quoting Manual for Complex Litigation § 1.46 (5th ed. 1982)). Put differently, the court's inquiry is whether there has been a basic showing that the Proposed Settlement Agreement "is sufficiently within the range of reasonableness so that notice . . . should be given." *In re Lupron Marketing and Sales Practices Litigation, 345 F. Supp. 2d 135, 139 (D. Mass. 2004)*.

The **[*9]** preliminary fairness review considers (1) the "fairness" of the settlement, and (2) the "adequacy" of the settlement. *See In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. at 1385*. The "fairness" prong is concerned with the procedural propriety of the proposed settlement agreement, while the "adequacy" prong focuses on the agreement's substantive propriety.

With regard to the "fairness" element, the purpose of the inquiry is to protect against the danger of counsel — who are commonly repeat players in larger-scale litigation — from "compromising a suit for an inadequate amount for the sake of insuring a fee." *Id. at 1383* (quoting *In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305, 315 (D. Md. 1979))*. The court thus considers the following factors: whether the proposed settlement is the product of good faith bargaining at arm's length; the posture of the case at settlement; the extent and sufficiency of discovery conducted; counsel's experience with similar litigation and their relevant qualifications; and any pertinent circumstances surrounding the negotiations. *See id. at 1383-85* (internal citations and quotations omitted); *In re Lupron Marketing and Sales Litigation, 345 F. Supp. 2d at 137*.

As **[*10]** to the "adequacy" prong, the court "weigh[s] the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement." *In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. at 1384* (quoting *In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. at 315-16*). Although the court endeavors not to try the case on its own, it remains tasked with carefully assessing the facts and applicable law to ensure that the settlement is proportionate to the strength (and weakness) of the plaintiff's case. *Id.* The court considers the following factors: "the relative strength of the plaintiffs' case on the merits," *id.* (quoting *In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. at 315-16*); weaknesses in the plaintiffs' case, including proof-related obstacles or particularly strong defenses; the cost of additional litigation; defendants' ability to pay a judgment; and any opposition to the settlement. *See id.; In re Lupron Marketing and Sales Litigation, 345 F. Supp. 2d at 137-38*.

V.

With the foregoing principles in mind, the Court preliminarily approves the Proposed Settlement Agreement for the following reasons.

First, the Court at this stage **[*11]** is satisfied with the fairness of the Proposed Settlement Agreement. Most significantly, this derivative action is collateral to what was a more rigorously litigated direct action that resulted in an $18 million settlement for eligible shareholders; thus, although there was limited litigation in the present derivative action, much of the discovery and bargaining occurred in the direct action.

The Court is also satisfied with Plaintiffs' counsel. They are affiliated with well-regarded law firms with strong experience in corporate and shareholder litigation. The negotiations appear to have been appropriately adverse and at arm's length: for example, one of the key deal points — plaintiffs' attorneys' fees — was litigated before a private arbitrator, a former federal district judge, who arrived at the fee proposed in the Settlement Agreement. Taken together, these factors indicate that the Proposed Settlement Agreement is not the product of procedural impropriety.

The Court is also preliminarily satisfied with the adequacy of the Proposed Settlement Agreement.

Because there was no additional discovery submitted to the Court, the only information the Court has to assess the relative merits **[*12]** of Plaintiffs' case and the value of continued litigation is the 60-page Consolidated Verified Shareholder Derivative Complaint and Defendants' Motion to Dismiss. The Court's review of the Complaint and the Motion to Dismiss leads to the conclusion that, while Plaintiffs' case appeared strong, it faced a serious hurdle because Plaintiffs apparently failed to make a demand to the Board prior to filing suit or demonstrate demand futility consistent with *Rule 23.1 of the Federal Rules of Civil Procedure*. [1] Moreover, reliance on Defendants' representations regarding American Capital's dividend policy ultimately may not have been actionable because the representations may simply have been nothing more than projections. The Court concludes that the Proposed Settlement Agreement tracks an adequate middle path that balances the strengths and weaknesses of Plaintiffs' case, prevents further costly litigation on ambiguous legal issues, and protects shareholders from future similar conduct.

Plaintiffs' counsel maintain that they have not pursued a monetary settlement in this action because any such monies would come from the company's coffers (and effectively the shareholders' pockets), not from the Board members accused of wrongdoing. Accordingly, the settlement's primary contribution to shareholders is the creation of a Dividend Committee tasked with reviewing American Capital's dividend policy and its policy on publicizing information about its dividend policy. Although arguably Plaintiffs' counsel might have been able **[*14]** to secure terms with somewhat more bite, the Court, at this point, is satisfied that the Dividend Committee is at least *within the range* of what can be deemed reasonable and adequate. *See In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. at 1385*. The settlement does provide additional information and oversight of American Capital's dividend practices, which is a topical response to the allegations in the Complaint.

* * *

Because the Court finds the Proposed Settlement Agreement to be within the range of reasonableness and appears to be adequate, the Motion for Preliminary Approval of Derivative Settlement (Paper No. 38) is **GRANTED**.

/s/ PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

June 26, 2013

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[1] *Rule 23.1(b)(3)* requires that the complaint state with particularity "any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders **[*13]** or members" and "the reasons for not obtaining the action or not making the effort." The pleading standard "for excusing demand is defined in a federal derivative action by the law of the State of incorporation," *Weinberg v. Gold, 838 F. Supp. 2d. 355, 357 (D. Md. 2012)*, which, in this case, is Delaware. Plaintiffs were, therefore, required to have plead with sufficient particularity facts that (1) the directors were disinterested and independent, or (2) that the challenged transaction was not the product of a valid exercise of business judgment. *Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000)* (quoting *Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984)*).

	*	**IN THE**
	*	**CIRCUIT COURT**
IN RE CONSTELLATION ENERGY GROUP, INCORPORATED SHAREHOLDER LITIGATION	*	**FOR**
	*	**BALTIMORE CITY, PART 23**
	*	**Case No. 24-C-11-003015**

* * * * * * * * * * * * * *

ORDER

Upon consideration of Plaintiffs Lon Engel and Patricia A. Heinmuller's Motion for Appointment of Lead Counsel (docket # 0002000) filed April 29, 2011, Plaintiffs Argentino and Gordon's Omnibus Opposition to Motions for Appointment of Lead Counsel (docket # 0002004) filed May 24, 2011, Plaintiffs Argentino and Gordon's Amended Motion for Appointment of Co-lead Counsel and Liaison Counsel (docket # 0026000) filed May 23, 2011, Plaintiffs Louisiana Municipal Police Employees Retirement System ("MPERS"), Samuel Montini, W.C. Smith, and John A. Basile's Opposition to Plaintiffs Lon Engel and Patricia A. Heinmuller's Motion for Appointment of Interim Lead Counsel and to the Amended Motion of Plaintiffs Argentino and Gordon for Appointment of Co-Lead and Counsel and Liaison Counsel (docket # 0002005 & # 0002006) filed May 26, 2011, Declaration of Gary E. Mason in Support of Plaintiffs MPERS, Montini, Smith, and Basile's Opposition to Plaintiffs Engel and Heinmuller's Motion for Appointment of Interim Lead Counsel (docket # 0002007) filed May 23, 2011, Plaintiffs Engel's and Heinmuller's Opposition to Plaintiffs MPERS, Montini, Smith, and Basile's Motion to Appoint Lead Plaintiff, Co-Lead Counsel, and Liaison Counsel filed May 23, 2011,[1] Plaintiffs Engel and Heinmuller's Reply to Plaintiffs

[1] This Court notes that Plaintiffs' Motion was filed on May 23, 2011, but was not properly docketed.

Argentino and Gordon's Omnibus Opposition to Motions for Appointment of Lead Counsel filed May 31, 2011,[2] Plaintiffs Argentino and Gordon's Reply in Further Support of their Amended Motion for Appointment of Co-Lead Counsel filed May 31, 2011,[3] Plaintiffs Louisiana Municipal Police Employees Retirement System, Samuel Montini, W.C. Smith, and John A. Basile's Notice of Withdrawal of Motion for Appointment of Interim Lead Counsel filed May 31, 2011,[4] Defendants' Statement on Plaintiffs' Motions for Appointment of Lead and Liaison Counsel filed May 27, 2011,[5] Plaintiffs Engel and Heinmuller's Motion for Leave to File a Sur-Reply to Plaintiffs Argentino and Gordon's Reply in Further Support of their Motion for Appointment of Co-Lead Counsel filed June 1, 2011,[6] Plaintiffs Engel and Heinmuller's Sur-Reply to Plaintiffs Argentino and Gordon's Reply in Further Support of Their Amended Motion for Appointment of Co-Lead Counsel attached as Exhibit A to Plaintiffs Engel and Heinmuller's Motion for Leave to File a Sur-Reply, Plaintiffs Engel and Heinmuller's Motion to Shorten the Time to Respond to their Motion for Leave to File a Sur-Reply filed June 1, 2011,[7] and this Court's finding that a hearing will not aid in the decisional process, it is this 1st day of June 2011, by the Circuit Court for Baltimore City, Part 23 hereby

ORDERED that Plaintiffs Lon Engel and Patricia A. Heinmuller's Motion for Leave to File a Sur-Reply to Plaintiffs Argentino and Gordon's Reply in Further Support of their Motion for Appointment of Co-Lead Counsel, be and the same, is hereby **GRANTED**; and it is further

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[2] This Court notes that Plaintiffs' Motion was filed on May 31, 2011, but was not properly docketed.
[3] This Court notes that Plaintiffs' Motion was filed on May 31, 2011, but was not properly docketed.
[4] This Court notes that Plaintiffs' Motion was filed on May 31, 2011, but was not properly docketed.
[5] This Court notes that Plaintiffs' Motion was filed on May 27, 2011, but was not properly docketed.
[6] This Court notes that Plaintiffs' Motion was filed on June 1, 2011, but was not properly docketed.
[7] This Court notes that Plaintiffs' Motion was filed on June 1, 2011, but was not properly docketed.

ORDERED that Plaintiffs Lon Engel and Patricia A. Heinmuller's Motion to Shorten the Time to Respond to their Motion for Leave to file Sur-Reply, be and the same, is hereby **DENIED**; and it is further

ORDERED that Plaintiffs Lon Engel and Patricia A. Heinmuller's Motion for Appointment of Lead Counsel, be and the same, is hereby **DENIED** for the reasons stated in the accompanying memorandum; and it is further

ORDERED that Plaintiffs Louisiana Municipal Police Employees Retirement System, Samuel Montini, W.C. Smith, and John A. Basile's Motion for Appointment of Interim Lead Counsel, be and the same, is hereby **WITHDRAWN**; and it is further

ORDERED that Plaintiffs Argentino and Grodon's Amended Motion for Appointment of Co-lead Counsel and Liaison Counsel, be and the same, is hereby **GRANTED** for the reasons stated in the accompanying Memorandum Opinion; and it is further

ORDERED that co-lead interim counsel for Plaintiffs in the conduct of the above-captioned consolidated actions are hereby designated as follows:

RIGRODSKY & LONG, P.A.
Seth D. Rigrodsky, Esq.
Brian D. Long, Esq.
919 N. Market Street, Suite 980
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Juan E. Monteverde, Esq.
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Telephone: (212) 983-9330
Facsimile: (212) 983-9331

and it is further

ORDERED that interim co-lead counsel shall have the authority to speak for Plaintiffs in all matters regarding pretrial procedure, trial and settlement negotiations, and shall make all work assignments in such a manner as to facilitate the orderly and efficient prosecution of this litigation and to avoid duplicative or unproductive effort; and it is further

ORDERED that interim co-lead counsel shall be responsible for coordinating all activities and appearances on behalf of Plaintiffs and for the dissemination of notices and orders of this Court to all Plaintiffs. No motion, request for discovery, or other pretrial or trial proceedings shall be initiated or filed by any Plaintiff except through interim co-lead counsel; and it is further

ORDERED that liaison counsel for Plaintiffs in the conduct of the above-captioned consolidated actions is hereby designated as follows:

POWERS & FROST, LLP
Patrick C. Smith, Esq.
Michael A. Stodghill, Esq.
502 Washington Ave., Suite 200
Towson, MD 21204-4530
Telephone: (443) 279-9700
Facsimile: (443) 279-9704

and it is further

ORDERED that Plaintiffs' liaison counsel shall be available and responsible for communications to and from this Court, including distributing orders and other directions from the Court to counsel for all Plaintiffs. Plaintiffs' liaison counsel shall be responsible for creating and maintaining a master service list of all parties and their respective counsel; and it is further

ORDERED that Defendants' counsel may rely upon all agreements made with any of Plaintiffs' interim co-lead counsel, or other duly authorized representative of

Plaintiffs' co-lead counsel, and such agreements shall be binding on all of the Plaintiffs; and it is further

ORDERED that this Order shall apply to each case arising out of the same or substantially same transactions at issue in the above-captioned consolidated cases; and it is further

ORDERED that the hearing set in pursuant this Court's Case Management Order No. 1 regarding the motions addressed herein is hereby **VACATED**; and it is further

ORDERED that this Order is subject to future modification by this Court.

TRUE COPY
TEST
AUDREY J.S. CARRION
Judge's signature appears on original document
24-C-11-003015
FRANK M. CONAWAY, CLERK

CIRCUIT COURT 1983

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Via U.S. Mail and Facsimile

	*	**IN THE**
	*	**CIRCUIT COURT**
IN RE CONSTELLATION ENERGY GROUP, INCORPORATED SHAREHOLDER LITIGATION	*	**FOR**
	*	**BALTIMORE CITY, PART 23**
	*	**Case No. 24-C-11-003015**

* * * * * * * * * * * * *

MEMORANDUM OPINION

This Court responds herein to three separate requests for the appointment of lead counsel in the instant case. Upon consideration of Plaintiffs Lon Engel and Patricia A. Heinmuller's Motion for Appointment of Lead Counsel (docket # 0002000) filed April 29, 2011, Plaintiffs Argentino and Gordon's Omnibus Opposition to Motions for Appointment of Lead Counsel (docket # 0002004) filed May 24, 2011, Plaintiffs Argentino and Gordon's Amended Motion for Appointment of Co-lead Counsel and Liaison Counsel (docket # 0026000) filed May 23, 2011, Plaintiffs Louisiana Municipal Police Employees Retirement System ("MPERS"), Samuel Montini, W.C. Smith, and John A. Basile's Opposition to Plaintiffs Lon Engel and Patricia A. Heinmuller's Motion for Appointment of Interim Lead Counsel and to the Amended Motion of Plaintiffs Argentino and Gordon for Appointment of Co-Lead and Counsel and Liaison Counsel (docket # 0002005 & # 0002006) filed May 26, 2011, Declaration of Gary E. Mason in Support of Plaintiffs MPERS, Montini, Smith, and Basile's Opposition to Plaintiffs Engel and Heinmuller's Motion for Appointment of Interim Lead Counsel (docket # 0002007) filed May 23, 2011, Plaintiffs Engel's and Heinmuller's Opposition to Plaintiffs MPERS, Montini, Smith, and Basile's Motion to Appoint Lead Plaintiff, Co-Lead Counsel, and

Liaison Counsel filed May 23, 2011,[1] Plaintiffs Engel and Heinmuller's Reply to Plaintiffs Argentino and Gordon's Omnibus Opposition to Motions for Appointment of Lead Counsel filed May 31, 2011,[2] Plaintiffs Argentino and Gordon's Reply in Further Support of their Amended Motion for Appointment of Co-Lead Counsel filed May 31, 2011,[3] Plaintiffs Louisiana Municipal Police Employees Retirement System, Samuel Montini, W.C. Smith, and John A. Basile's Notice of Withdrawal of Motion for Appointment of Interim Lead Counsel filed May 31, 2011,[4] Defendants' Statement on Plaintiffs' Motions for Appointment of Lead and Liaison Counsel filed May 27, 2011,[5] Plaintiffs Engel and Heinmuller's Motion for Leave to File a Sur-Reply to Plaintiffs Argentino and Gordon's Reply in Further Support of their Motion for Appointment of Co-Lead Counsel filed June 1, 2011,[6] Plaintiffs Engel and Heinmuller's Sur-Reply to Plaintiffs Argentino and Gordon's Reply in Further Support of Their Amended Motion for Appointment of Co-Lead Counsel attached as Exhibit A to Plaintiffs Engel and Heinmuller's Motion for Leave to File a Sur-Reply, Plaintiffs Engel and Heinmuller's Motion to Shorten the Time to Respond to their Motion for Leave to File a Sur-Reply filed June 1, 2011,[7] and this Court's finding that a hearing will not aid in the decisional process, this Court grants Plaintiffs Engel and Heinmuller's Motion for Leave to File a Sur-Reply to Plaintiffs Argentino and Gordon's Reply in Further Support of their Motion for Appointment of Co-Lead Counsel, denies Plaintiffs Engel and Heinmuller's Motion to Shorten Time to Respond to their Motion for Leave to File a Sur-Reply, denies

[1] This Court notes that Plaintiffs' Motion was filed on May 23, 2011, but was not properly docketed.
[2] This Court notes that Plaintiffs' Motion was filed on May 31, 2011, but was not properly docketed.
[3] This Court notes that Plaintiffs' Motion was filed on May 31, 2011, but was not properly docketed.
[4] This Court notes that Plaintiffs' Motion was filed on May 31, 2011, but was not properly docketed.
[5] This Court notes that Plaintiffs' Motion was filed on May 27, 2011, but was not properly docketed.
[6] This Court notes that Plaintiffs' Motion was filed on June 1, 2011, but was not properly docketed.
[7] This Court notes that Plaintiffs' Motion was filed on June 1, 2011, but was not properly docketed.

Plaintiffs Engel and Heinmuller's Motion for Appointment of Lead Counsel, withdraws Plaintiffs MPERS, Montini, Smith, and Basile's Motion for Appointment of Interim Lead Counsel, and grants Plaintiffs Argentino and Grodon's Amended Motion for Appointment of Co-lead Counsel and Liaison Counsel.

I. ANALYSIS

Pursuant to Maryland Rule 2-231(a), the commencement of litigation on behalf of or against a class of parties is appropriate only where "...the representative parties [are able to] ... fairly and adequately protect the interests of the class." To this end, the Court is authorized to "enter appropriate orders ... determining the course of [class action] proceedings or ... dealing with similar procedural matters." Such procedural matters may include the appointment of interim lead counsel to represent the parties prior to certification of the pending litigation as a class action. *See Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 740 (2000).

As the Court of Appeals acknowledged in *Angeletti*, "[t]here is a dearth of authority in Maryland analyzing the specific requirements of Maryland Rule 2-231." *Id.* at 724. Nevertheless, it is clear that the purpose of the "...adequacy of representation prerequisite..." of Md. Rule 2-231(a) is to ensure "...that both the class representatives as well as class counsel are adequate to represent the interests of all class members." *Id.* at 740. Indeed, in *Worsham v. Americor Lending Group, Inc.*, 2008 Md. Cir. Ct. LEXIS 5 (2008), the Circuit Court for Montgomery County noted that the burden is on class counsel to demonstrate that he can fairly and adequately represent the class pursuant to Md. Rule 2-231. *Id.* at *14 (citing *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481-82 (5th Cir. 2001)).

Furthermore, the language of Federal Rule of Civil Procedure 23 ("FRCP"), which is similar in scope and content to Maryland Rule 2-231, is instructive to this Court's analysis. *See id.* at 724 (citing *Garay v. Overholtzer*, 332 Md. 339, 355 (1993)). Under FRCP 23(g)(3), federal courts are expressly authorized to appoint interim lead counsel "...before determining whether to certify the action as a class action." In selecting lead counsel, the courts are required to consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class...." FRCP 23(g)(1)(A). Federal courts may also choose to consider "...any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class...." FRCP 23(g)(1)(B).

The provisions of FRCP 23 are consistent with the limited Maryland Rule 2-231 and the limited Maryland authority defining the standard to be applied in appointing lead counsel. *See, e.g., Angeletti*, 358 Md. at 724; *Worsham*, 2008 Md. Cir. Ct. LEXIS 5, at *14. Indeed, both FRCP 23 and Md. Rule 2-231 place emphasis on the importance of appointing a representative that is well-situated to represent the entire class. Therefore, the Court's determination of an appropriate interim lead counsel in the instant case focuses primarily on the ability of counsel to fairly and adequately represent the members of the class, as measured by the factors elicited in FRCP 23.

However, in appointing an interim lead counsel, this Court is also mindful of its ultimate responsibility to designate a class representative. Indeed, as indicated *supra*, the purpose of Maryland Rule 2-231(a) is to ensure "...that both the class representatives as

well as class counsel are adequate to represent the interests of all class members." *Angeletti*, 358 Md. at 740. Therefore, this Court's decision regarding the appointment of interim lead counsel is further informed by its consideration of an appropriate class representative for the instant action. Although Maryland authority is relatively limited on this issue, federal case law is persuasive. *See Angeletti*, 358 Md. at 724; *see also Blades v. Woods*, 107 Md. App. 178, 183-84 (1995).

Under federal law, consolidated class action securities litigation is governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The PSLRA creates a rebuttable presumption that "...the most adequate plaintiff in any private action ... is the person or group of persons that[, among other requirements,] ... has the largest financial interest in the relief sought by the class." *See In re Vicuron Pharmaceuticals, Inc. Securities Litigation*, 225 F.R.D. 508, 510 (2004) (quoting 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)). This Court finds persuasive the PSLRA's admonitions regarding designation of a class representative.

Particularly instructive to this Court is the rationale behind the lead plaintiff requirements of the PSLRA. "As explained in the Conference Committee Report, the PSLRA's 'most adequate plaintiff' provision was enacted to ensure that the selection of lead plaintiff and lead counsel rests on factors other than how quickly a plaintiff has filed a complaint." *In re Vicuron*, 225 F.R.D. at 510. Indeed, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the Supreme Court of the United States noted that in enacting the PSLRA, Congress "...aimed to increase the likelihood that institutional investors--parties more likely to balance the interests of the class with the long-term interests of the company [involved in the underlying litigation]--would serve as lead

plaintiffs." *Id.* at 320-21. Likewise, in *Zaltzman v. Manugistics Group, Inc.*, 1998 U.S. Dist. LEXIS 22867 (October 8, 1998), the U.S. District Court for the District of Maryland found that "[b]y establishing the class member with the largest financial stake as the presumptive lead plaintiff, Congress hoped to 'encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class.'" *Id.* at *13 (citing H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 2 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 731).

The intent of the U.S. Congress in enacting the PSLRA is consistent with the purpose of Maryland Rule 2-231 to ensure that this Court selects class counsel and class representatives who are best able to fairly and adequately represent all members of the class. *See Worsham v. Americor Lending Group, Inc.*, 2008 Md. Cir. Ct. LEXIS 5, at *14 (2008). Indeed, this Court finds that the class member with the largest financial stake in a given case may often be the member most capable of participating in and managing class action litigation. *See Zaltzman*, 1998 U.S. Dist. LEXIS 22867, at *13. Therefore, although it is not dispositive of this court's decision, this Court considers the stake of the respective class members in making its selection of lead counsel.

In the instant case, this Court finds that all counsel available to serve as interim lead counsel herein are both distinguished and well-qualified. Therefore, this Court's decision is a difficult one. In choosing between the well-qualified candidates available, this Court applies the "adequacy of representation" requirement of Maryland Rule 2-231 in the context of Maryland case law, the factors elicited by FRCP 23, and other persuasive federal authority. This Court also considers, but does not rest its opinion on, the standards to be applied in selecting a class representative for the instant case.

Upon the balance of the aforementioned factors, this Court finds that Seth D. Rigrodsky, Brian D. Long, Rigrodsky & Long, P.A., Juan E. Monteverde, and Faruqi & Faruqi, LLP are best situated to serve as interim co-lead counsel for the plaintiffs herein. This Court further finds that Patrick C. Smith, Michael A. Stodghill, and Powers & Frost, LLP are best situated to serve as interim liaison counsel. In making this determination, this Court finds particularly persuasive the quality and completeness of the Complaints filed on behalf of Plaintiffs Joann Argentino and Natalie Gordon in civil case nos. 24-C-11-003211 and 24-C-11-003212, respectively. This Court finds that said Complaints most fairly and adequately represent the possible causes of action available to the Plaintiffs herein. Furthermore, this Court is mindful of the fact that, in light of Plaintiffs Louisiana Municipal Police Employees Retirement System, Samual Montini, W.C. Smith and John A. Basile's agreement to work cooperatively with Plaintiffs Joann Argentino and Natalie Gordon in the prosecution of this case, the attorneys appointed herein as co-lead counsel and liaison counsel represent the group of plaintiffs with the largest stake in the instant litigation.

This Court finds that Plaintiffs Engel and Heinmuller's Sur-Reply to Plaintiffs Argentino and Gordon's Reply in Further Support of their Motion for Appointment of Co-Lead Counsel, while well-crafted, addresses substantive issues regarding the underlying action that do not affect the Court's analysis herein.

II. CONCLUSION

For the preceding reasons, this Court appoints Seth D. Rigrodsky, Brian D. Long, Rigrodsky & Long, P.A., Juan E. Monteverde, and Faruqi & Faruqi, LLP to serve as interim co-lead counsel for Plaintiffs in the conduct of the above-consolidated actions,

and Patrick C. Smith, Michael A. Stodghill, and Powers & Frost, LLP as liaison counsel for Plaintiffs in the conduct of the above-consolidated actions. Counsel's respective responsibilities are described in the attached Order.

ORDERED, this 1st day of June 2011.

TRUE COPY
AUDREY J.S. CARRION
Judge's signature appears on original document

FRANK M. CONAWAY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY 1968

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CIRCUIT COURT FOR BALTIMORE CITY

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Date: **6/1/2011**

Re: ***In re Constellation Energy Group, Inc. Shareholder Litigation (# 24-C-11-003015)***

Pages (including cover): **16**

Comments: **Please see attached Order and Memorandum Opinion**

In re India Globalization Capital, Inc.

United States District Court for the District of Maryland

May 1, 2020, Filed

Lead Case No. DKC 18-3698

Reporter

2020 U.S. Dist. LEXIS 77190 *; 2020 WL 2097641

In re India Globalization Capital, Inc., Derivative Litigation. Lead Case No. DKC 18-3698. This Document Relates to: All Cases

Subsequent History: Motion granted by, Settled by, Dismissed by *Erny v. Mukunda, 2020 U.S. Dist. LEXIS 117936 (D. Md., July 6, 2020)*

Core Terms

settlement, notice, final approval, shareholder, proposed settlement, Parties, objector, individual defendant, derivative, Plaintiffs', corporate governance, preliminary approval, Investor's, mediation, preliminarily, complaints, telephone, terms, derivative action, attorney's fees, fiduciary duty, consolidated, intending, website

Counsel: **[*1]** For Gene Erny, derivatively on behalf of India Globalization Capital Inc., c/o Timothy Brown, Esq., Plaintiff: Gregory Michael Egleston, LEAD ATTORNEY, Gainey Mckenna & Egleston, New York, NY; Thomas James McKenna, PRO HAC VICE, Gainey McKenna & Egleston, New York, NY; Timothy W Brown, PRO HAC VICE, The Brown Law Firm PC, Oyster Bay, NY; Nikoletta Sara Mendrinos, Murphy Falcon and Murphy PA, Baltimore, MD.

For Wasseem Hamdan, Derivatively on Behalf of Globalization Capital, Inc., Consol Plaintiff: Gregory Michael Egleston, LEAD ATTORNEY, Gainey Mckenna & Egleston, New York, NY; Thomas Joseph Minton, LEAD ATTORNEY, Goldman and Minton PC, Baltimore, MD; Thomas James McKenna, PRO HAC VICE, Gainey McKenna & Egleston, New York, NY; Timothy W Brown, PRO HAC VICE, The Brown Law Firm PC, Oyster Bay, NY.

For Ram Mukunda, c/o India Globalization Capital, Inc., Claudia Grimaldi, c/o India Globalization Capital, Inc., Rohit Goel, c/o India Globalization Capital, Inc., Richard Prins, c/o India Globalization Capital, Inc., Sudhakar Shenoy, c/o India Globalization Capital, Inc., Defendants: Matthew Edward Feinberg, LEAD ATTORNEY, PilieroMazza, PLLC, Washington, DC.

For India Globalization Capital, Inc., **[*2]** Defendant: Victoria Ortega, LEAD ATTORNEY, Blank Rome LLP, Washington, DC; Michelle Ann Gitlitz, PRO HAC VICE, Crowell & Moring LLP, New York, NY.

Judges: Hon. DEBORAH K. CHASANOW, United States District Judge.

Opinion by: DEBORAH K. CHASANOW

Opinion

MEMORANDUM OPINION

Presently pending and ready for resolution in this shareholder derivative case is Plaintiff's amended consent motion for preliminary approval of derivative settlement. The issues have been fully briefed, and the court now rules, no hearing being deemed necessary. *Local Rule 105.6.* For the following reasons, the motion will be granted and the settlement will be approved preliminarily.

I. Procedural Background

On November 30, 2018, Plaintiff Gene Erny, derivatively and on behalf of nominal defendant India Globalization Capital, Inc. ("IGC"), filed a Verified Shareholder Derivative Complaint (ECF No. 1) against individual defendants Ram Mukunda, Claudia Grimaldi, Rohit Goel, Richard Prins, Sudhakar Shenoy, (the "Individual Defendants") and nominal defendant IGC. On February 20, 2019, Plaintiff Waseem Hamden filed a similar complaint against the same defendants. (ECF No. 25). The complaints collectively alleged violations of *Sections 10(b)* and *14(a) of the Securities and Exchange Act of 1934*, **[*3]** breach of fiduciary duty, unjust enrichment, and corporate waste. (ECF No. 1, at 61-67; ECF No. 25, at 40-45)[1].

On May 9, 2019, this court consolidated the two cases, with Plaintiff Erny's case being designated as the lead case. (ECF No. 24). On June 6, 2019, Plaintiff Dimple Patel filed a Verified Shareholder Complaint against IGC and the Individual Defendants alleging a breach of fiduciary duty by the Individual Defendants. (ECF No. 31-1, at 4). On February 13, 2020, plaintiffs Erny, Hamden, and Patel jointly filed their unopposed motion for preliminary approval of derivative settlement. (ECF No. 29). On April 30, 2020, after a telephone conference with the court, Plaintiffs filed an amended consent motion. (ECF No. 31). The Plaintiffs submit "that after extensive, arm's-length negotiations, the Parties to the Action have agreed to the Settlement, which, if approved, will fully, finally, and forever resolve, discharge, and settle the Released Claims while providing substantial benefits to IGC." (ECF No. 31-1, at 6).

All three of the Plaintiffs' complaints revolve around much the same conduct: the Individual Defendants' alleged mismanagement of IGC which resulted in material harm to **[*4]** IGC. Specifically, the Plaintiffs allege that the Individual Defendants (1) breached their fiduciary duties by failing to maintain internal controls; and (2) made or caused to be made false or misleading statements regarding IGC's business, operations, prospects and legal compliance. (ECF No. 1 ¶¶ 14, 15; ECF No. 25 ¶¶ 14, 15).

II. The Settlement Process

Plaintiffs describe the process of reaching the parties proposed settlement agreement (the "Settlement Agreement") as follows:

> On June 4, 2019, the parties began discussing a potential mediation to attempt to resolve the claims in all of these derivative actions. Plaintiffs thereafter prepared a detailed set of proposed corporate governance reforms and transmitted them to Defendants. Mediator John R. Van Winkle was retained and an in-person mediation was held on July 31, 2019. The mediation was attended by counsel for the derivative actions and the related securities fraud class action. The derivative Plaintiffs and Defendants, with the help of the Mediator, negotiated the proposed corporate Governance Principles and by the end of the all-day session, had reached an agreement in principal on

[1] References to page numbers in the parties' papers are to the ECF-generated page numbers.

> the scope of the corporate Governance Principles. **[*5]**
>
> Thereafter, the Parties traded drafts and made edits to the suite of corporate Governance Principles and reached an agreement on the exact parameters and language to be used. The Parties also negotiated a written Settlement Agreement and a proposed Order Granting Preliminary Approval to the Settlement, a proposed Notice to the shareholders explaining the proposed settlement, and a Proposed Order Granting Final Approval of the Proposed Settlement. On January 10, 2020, the Parties finalized the Settlement Agreement and all of the related exhibits and executed the Settlement Agreement.

(ECF No. 31-1, at 9).

III. The Settlement Agreement

What follows are the material terms of the parties' proposed settlement agreement (the "Settlement Agreement") as designated by Plaintiffs: (1) Board independence, including the appointment of new directors, implementation of a rotating board chair, limitations on directors' ability to serve on other boards, a requirement that the majority of the board be independent, a requirement that directors retain a set amount of equity in IGC, and mandatory board attendance at at least two executive sessions per year; (2) shareholder input with the board and management; **[*6]** (3) changes to IGC's Audit Committee's charter; (4) the creation of a Disclosure Committee; (5) the regular issuance of Executive Reports as to IGC's financial condition and prospects; (6) the adoption of a formal Whistleblower Policy; (7) improvements to the "Related Party Transaction Policy" in the Audit Committee's charter; (8) enhanced Compensation Committee responsibilities; (9) a new Clawback Policy; (10) the development of a director education program; and (11) a new employee compliance training program. (ECF No. 31-1, at 10-20; ECF No. 31-3).

The Settlement Agreement also provides that IGC shall cause the Defendants' insurers to pay Plaintiffs' counsel's attorney's fees and costs in the amount of $200,000, (the "Fee Award"), which includes a $1,000 payment to each of the Plaintiffs. Plaintiffs do not, however, seek preliminary approval of the fee award. Rather, Plaintiffs seek (1) preliminary approval of the Settlement Agreement independent of the Fee Award, (2) approval of Plaintiffs' form of Notice, and the publication of the Notice as contemplated by the Settlement Agreement, and (3) the scheduling of a hearing to entertain any comments or objections to final approval of **[*7]** the Settlement Agreement and to consider the application of Plaintiffs' counsel for an award of attorneys' fees and expenses, as well as service awards to Plaintiffs. (ECF No. 31-1, at 6-7).

IV. Analysis

Federal Rule of Civil Procedure 23.1 provides that a derivative action "may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." *Fed.R.Civ.P. 23.1(c)*. At the preliminary approval stage, the court assesses the proposed settlement to determine "whether there has been a basic showing that the Proposed Settlement Agreement 'is sufficiently within the range of reasonableness so that notice . . . should be given.' *In re Lupron Marketing and Sales Practices Litigation, 345 F.Supp.2d 135, 139 (D.Mass. 2004)*." *In re Am. Capital S'holder Derivative Litig., No. CIV. 11-2424 PJM, 2013 U.S. Dist. LEXIS 90973, 2013 WL 3322294, at *3 (D. Md. June 28, 2013)*.

Ultimately, in determining whether to approve a settlement pursuant to *Rule 23.1*, "[t]he essential inquiry is whether the proposed settlement is fair, adequate, and reasonable." *In re Mid-Atl. Toyota Antitrust Litig., 564 F. Supp. 1379, 1383 (D. Md. 1983)* (citing *In Re Corrugated Container Antitrust Litigation, 643 F.2d 195, 207 (5th Cir.1981)*; *In Re Beef Industry Antitrust Litigation, 607 F.2d 167, 179-80 (5th Cir. 1979)*; *In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305, 315 (D. Md. 1979)*; Manual for Complex Litigation § 1.46 at 56-57 (5th Ed.1982).

A. Fairness

In assessing the fairness of a proposed settlement, "the purpose of the inquiry is to protect against the danger of counsel **[*8]** — who are commonly repeat players in larger-scale litigation — from 'compromising a suit for an inadequate amount for the sake of insuring a fee.'" *In re Am. Capital, 2013 U.S. Dist. LEXIS 90973, 2013 WL 3322294, at *3* (quoting *In re Mid-Atlantic Toyota Antitrust Litig., 564 F.Supp. at 1385*). In so doing, courts must determine:

> that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation.

In re Jiffy Lube Sec. Litig., 927 F.2d 155, 158-59 (4th Cir. 1991) (citing *In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D.Md.1979)*).

In this case, the court is satisfied, at this stage, that the parties bargained at arms-length and without collusion. While this case is settling "at a very early stage in the litigation and prior to any formal discovery, raising questions of possible collusion among the settling parties. . . any inference of collusion [is] offset by other factors[.]" *Id. at 159*. Mainly, IGC will benefit from the "substantial corporate governance enhancements" envisioned in the Settlement Agreement. (ECF No. 31-1, at 23-24).

"[I]n derivative actions where the harm done is to the corporation, **[*9]** a monetary benefit is not necessary for settlement approval." *In re Fab Universal Corp. S'holder Derivative Litig., 148 F.Supp.3d 277, 280 (S.D.N.Y. 2015)* (citing *Mills v. Electric Auto-Lite Co., 396 U.S. 375, 395, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970)* ("[A] corporation may receive a 'substantial benefit' from a derivative suit ... regardless of whether the benefit is pecuniary in nature.")) Such non-monetary benefits may come in the form of "significant corporate governance reforms." *Id.* The changes to IGC's corporate governance envisioned in the Settlement Agreement are not just "significant," but also "topical response[s] to the allegations in the Complaint[s]." *American, 2013 U.S. Dist. LEXIS 90973, 2013 WL 3322294, at *4*. Plaintiffs summarize those allegations as follows:

> (1) the Company had substantially discontinued the business it was conducting at the time that it was initially listed on the New York Stock Exchange, and was instead engaged in ventures or promotions that had not been developed to a commercial stage or the success of which is problematical; (2) the Company adapted its business model frequently and radically in an attempt to lure investors seeking to capitalize on market fads, such as blockchain and cannabis; (3) the benefits of the Company's relationships with manufacturers, partners, and distributors were overstated in order to create a misleadingly **[*10]** positive impression of IGC's potential commercial success; (4) DaMa Pharmaceutical does not have a long history of

> developing premier pharmaceutical products; (5) as a result of the foregoing, IGC's stock would be suspended from the New York Stock Exchange and potentially delisted; (6) the Company failed to maintain internal controls; and (7) as a result of the foregoing, the Company's public statements were materially false and misleading at all relevant times.

(ECF No. 1, at 5-6). As detailed in the complaints, the Individual Defendants comprised the entirety of IGC's board of directors and none of them were independent. The Settlement Agreement remedies the problem of board independence. In addition, the bulk of Plaintiffs' complaints stem from failures of disclosure; these failures in turn led to the propagation of misleading information regarding IGC. The corporate governance enhancements discussed above significantly bolster IGC's obligations to disclose pertinent information to shareholders. The Settlement Agreement reforms also provide for a stronger Audit Committee, a formal whistleblower policy, and the requirement of accepting shareholder input, all of which are well-targeted **[*11]** fail-safes to the enhanced disclosure requirements. These reforms should go a long way in preventing the kinds of missteps which Plaintiffs allege to have constituted breaches of fiduciary duties.

The court is also preliminarily satisfied with the experience of Plaintiffs' counsel. In addition to the impressive resumes of named counsel in this case, both firms have extensive experience in shareholder derivative litigation. Finally, "[t]he Proposed Settlement was the product of extensive formal mediation aided by a neutral . . . mediator, hallmarks of a non-collusive, arm's-length settlement process." *Fab Universal, 148 F.Supp.3d at 280*.

B. Adequacy

In determining the adequacy of the proposed Settlement, the Court must weigh the following factors: (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement. *Montgomery, 83 F.R.D. at 316*.

Without the benefit of a motion to dismiss — or even an answer to Plaintiffs' **[*12]** complaints — the court is left to analyze the first three factors based on the complaints alone. However, the Court is not permitted to "decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc., 450 U.S. 79, 88 n. 14, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)*. Further, even if this settlement had come at a later stage and the court had more information with which to assess Plaintiffs' claims, "shareholder derivative litigation is notoriously difficult and unpredictable [and therefore] settlements are favored." *Republic Nat. Life Ins. Co. v. Beasley, 73 F.R.D. 658, 667 (S.D.N.Y.1977)* (citations omitted). "The doctrine of demand futility, the business judgment rule, and the generally uncertain prospect of establishing a breach of fiduciary duties combine to make shareholder derivative suits an infamously uphill battle for plaintiffs." *Fab Universal, 148 F.Supp.3d at 281-82*. Given the certainty of the benefits of settlement relative to extended, costly, and unpredictable litigation, the first three factors weigh generally in favor of preliminary approval.

The Plaintiffs' motion does not address the fourth factor. As to the fifth, the Plaintiffs propose — and precedent dictates — that "notice of the proposed settlement . . . be provided to shareholders and a date set for a final hearing to consider final settlement approval." (ECF No.

31-1, at 16). **[*13]** At such a final hearing, objections from other shareholders may well arise, but at this stage, the Settlement Agreement faces no opposition. All told, the court is satisfied that the Settlement Agreement is "at least within the range of what can be deemed reasonable and adequate." *American, 2013 U.S. Dist. LEXIS 90973, 2013 WL 3322294, at *4* (citing *In re Mid-Atlantic Toyota Antitrust Litigation, 564 F.Supp. at 1385*).

V. Notice

"Notice of a proposed settlement ... must be given to shareholders or members in the manner that the court orders." *F.R.C.P. 23.1(c)*." Here, the Settlement Agreement provides that "IGC shall cause a copy of the Notice: (a) to be filed with the SEC on Form 8-K; (b) to be published in a press release; and (c) to be posted, together with this Agreement and its incorporated exhibits, in the 'Investors' section on IGC's website, which posting shall remain on IGC's website through the Hearing Date." (ECF No. 31-3, ¶ 3). The court directs that, in addition to the proposed forms of notice, Plaintiffs shall also cause notice of the proposed settlement to be published in *Investor's Business Daily*. *See, Fab Universal, 148 F.Supp.3d at 282*, *American, 2013 U.S. Dist. LEXIS 90973, 2013 WL 3322294, at *2*. *See also, In re The Cheesecake Factory Inc. Derivative Litig.*, No. CV-06-6234 ABC(MANx), slip op. (C.D. Cal. Mar. 7, 2008) (finding publication of notice of **[*14]** the settlement in Investor's Business Daily met the requirements of RCP 23.1 and due process).

VI. Conclusion

For the foregoing reasons, the motion for preliminary approval of derivative settlement filed by Plaintiffs will be granted. A separate order will follow.

/s/ DEBORAH K. CHASANOW

United States District Judge

ORDER PRELIMINARILY APPROVING SETTLEMENT

This matter came before the Court on the Motion to Enter Order Preliminarily Approving Settlement (hereinafter, the "Motion") filed by Plaintiffs Gene Erny and Wasseem Hamdan, all proceeding derivatively on behalf of India Globalization Capital, Inc. ("IGC"); Defendants, Ram Mukunda, Claudia Grimaldi, Richard Prins, Rohit Goel, and Sudhakar Shenoy (collectively, "Individual Defendants"), and Nominal Defendant, IGC (collectively, the "Parties"). After due consideration of the Motion and the Parties' proposed Settlement Agreement and Release (the "Agreement"), and for good cause, it is this 1st day of May, 2020, by the United States District Court for the District of Maryland, ORDERED as follows:

1. This Court has jurisdiction over the subject matter of this consolidated litigation, comprised of *Erny v. Mukunda, et al.*, originally Case No. **[*15]** 1:18-cv-03698-DKC, filed November 30, 2018 (the "*Erny* Litigation"), and *Hamdan v. Mukunda, et al.*, Case No. 8:19-cv-00493-DKC, filed February 20, 2019, and consolidated into the instant action on May 9, 2019 (the "*Hamdan* Litigation") (collectively the "Consolidated Litigation");[1]

[1] Within five business days of the date the Court enters the Final Order, plaintiff Dimple Patel in *Patel v. Mukunda, et al.*, originally Case No. 8:19-cv-01673-PWG, filed June 6, 2019 ("*Patel* Litigation," together with the Consolidated Litigation, the "Derivative Litigation") will, pursuant to the Agreement, voluntarily dismiss the *Patel* Litigation. Plaintiffs Erny, Hamdan, and Patel are collectively referred to herein as the "Derivative Plaintiffs."

2. This Court preliminarily finds that the proposed settlement and Agreement between the Parties should be approved as being fair, reasonable, adequate, and in the best interests of IGC and its shareholders;

3. This Court preliminarily finds, for purposes of the proposed settlement only, that the *Erny* Litigation and *Hamdan* Litigation each was properly brought pursuant to *Federal Rule of Civil Procedure 23.1* as a shareholder derivative action on behalf of IGC and that plaintiffs Erny and Hamdan fairly and adequately represent the interest of IGC shareholders in enforcing IGC's rights;

4. Pursuant to *Federal Rule of Civil Procedure 23.1(c)*, this Court shall conduct a hearing to determine whether the Parties' settlement shall be granted final approval ("Final Approval Hearing") on Tuesday, June 30, 2020 at 10:00 a.m., in Courtroom 3A of the United States District Court for the District of Maryland (Southern Division), 6500 Cherrywood Lane, Greenbelt, Maryland **[*16]** 20770, or telephonically or by video, as provided elsewhere in this Order, where this Court will consider: (a) whether the Parties' proposed settlement and the Agreement are fair, reasonable, and adequate under the circumstances and in the best interests of IGC; (b) any objections to the settlement or to the Agreement submitted in accordance with the notice issued by IGC to its shareholders; (c) whether a final order substantially in the form of Exhibit D to the Agreement ("Final Order") should be entered, dismissing all claims in each of the *Erny* Litigation and the *Hamdan* Litigation with prejudice and releasing the Released Claims in the Derivative Litigation against the Individual Defendant Released Parties, as those terms are defined in the Agreement; (d) the reasonableness of the Settlement Sum, including the Attorneys' Fees Sum, as those terms are defined in the Agreement; and (e) such other and further matters as may be brought properly before the Court in connection with the Parties' settlement and the Agreement;

5. IGC shall cause notice of the proposed settlement, as required by Section 3 of the Agreement (the "Notice"), including the date and time of the Final Approval Hearing, **[*17]** to be filed on SEC Form 8-K with the U.S. Securities and Exchange Commission; published in a press release and in Investor's Business Daily; and to be posted through the date of the Final Approval Hearing, together with a copy of the Agreement and its incorporated exhibits, in the "Investors" section of IGC's website, within 7 calendar days following entry of this Order. Such Notice shall be substantially in the form of Exhibit B to the Agreement. This Court finds such form and means of Notice to be reasonable and sufficient under the circumstances and to comply with the requirements of *Federal Rule of Civil Procedure 23.1* and of Constitutional due process and to constitute due and sufficient notice to all persons affected by the proposed settlement who may be entitled to participate in the Final Approval Hearing. Non-material changes to the form of the Notice to IGC shareholders may be made upon agreement by the Parties without further approval of this Court;

6. At least 10 calendar days prior to the Final Approval Hearing, counsel for the Individual Defendants and/or counsel for IGC shall file proof by declaration of the filing and publications of the notice and of the posting of the notice and Agreement as set forth **[*18]** in Paragraph 5, above;

7. Any IGC shareholder who wishes to object to the fairness, reasonableness, or adequacy of the settlement or the Agreement or to the proposed Settlement Sum, including the Attorneys' Fees and Expenses Sum, as those terms are defined in the Agreement, may file an objection. An objector must file with the Court a written statement of his, her, or its objection(s): (a) clearly indicating that objector's name, mailing address, daytime telephone number, and e-mail address (if any); (b) stating that the objector is objecting to the proposed

settlement and/or proposed Settlement Sum, including the Attorneys' Fees and Expenses Sum; (c) specifying the reason(s), if any, for each such objection made, including any legal support and/or evidence that such objector wishes to bring to the Court's attention or introduce in support of such objection; and (d) identifying and supplying documentation showing how many shares of IGC common stock the objector owned as of February 13, 2020, when the objector purchased or otherwise acquired such shares, and whether the objector still owns any such shares.

8. The objector must file such objections and supporting documentation with the **[*19]** Clerk of the Court, United States District Court for the District of Maryland (Southern Division), 6500 Cherrywood Lane, Greenbelt, Maryland 20770, not later than twenty-one (21) days prior to the Final Approval Hearing, and, by the same date, copies of all such papers must also be received by each of the following persons:

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The above-referenced individuals' receipt of an objection by facsimile transmission only shall not be deemed a valid and qualifying objection. An objector may file an objection on his, her, or its own or through an attorney hired at his, her, or its own expense. If an objector hires an attorney to represent him, her, or it for the purposes of making such objection pursuant to this paragraph, the attorney must effect service of a notice of appearance on the counsel listed above and file such notice with the Court no later than twenty-one (21) days before the Final Approval Hearing. Any IGC shareholder who does not timely file and serve a written objection complying with the terms of this paragraph shall be deemed to have waived, and shall be foreclosed from raising, any objection to the settlement or to the Agreement, and any untimely objection shall be forever time-barred. Any submissions by the Parties in support of final approval of the settlement shall be filed with the Court and served at least twenty-eight (28) days before the Final Approval Hearing, and any submissions by the Parties in response to objections shall be filed with the Court **[*21]** no later than seven (7) days before the Final Approval Hearing.

9. Any objector who files and serves a timely written objection in accordance with the instructions above and herein, may appear at the Final Approval Hearing either individually or through counsel retained at the objector's expense. For purposes of this Order, the term "appear" shall mean to attend or participate in person at any live court proceeding or to participate telephonically or by video in the event the Court orders any court proceeding to be conducted by telephone or video. Objectors need not appear for the Final Approval Hearing, however, in order to have their objections considered by the Court. Timely objectors or their attorneys intending to appear at the Final Approval Hearing are required to indicate in their written objection (or in a separate writing submitted to the counsel listed in the preceding paragraph no later than twenty-one (21) days prior to the Final Approval Hearing) that they intend to appear at the Final Approval Hearing and identify any witnesses they may call to testify and exhibits they intend to introduce into evidence at the Final Approval Hearing. Objectors or their attorneys intending **[*22]** to appear at the Final Approval Hearing must also, no later than twenty-one (21) days prior to the Final Approval Hearing, file with the Court, and serve upon counsel listed in the above paragraph, a notice of intention to appear, setting forth the name and address of anyone intending to appear. Any objector who does not timely file and serve a notice of intention to appear in accordance with this paragraph shall not be permitted to appear at the Final Approval Hearing, except for good cause shown.

10. Individual Defendants' counsel, IGC's counsel, and Derivative Plaintiffs' counsel shall promptly furnish counsel for all Parties with copies of any and all objections and notices of intention to appear that come into their possession.

11. Pending final determination of whether the settlement and Agreement should be approved, Derivative Plaintiffs and all other IGC Shareholders, and anyone who acts or purports to act on their behalf, shall not institute, prosecute, participate in, or assist in the institution, prosecution, or assertion of, any Released Claim against any of the Individual Defendant Released Parties, as those terms are defined in the Agreement.

12. This Order shall become **[*23]** null and void and shall be without prejudice to the rights of the Parties if the settlement is terminated in accordance with the terms of the Agreement. In such event, Section 10 of

the Agreement shall govern the rights of the Parties.

13. This Order shall not be construed or used as an admission, concession, or presumption by or against any of the Individual Defendant Released Parties of any fault, wrongdoing, breach, or liability or as a waiver by any Party of any arguments, defenses, or claims he, she, or it may have in the event that the Agreement is terminated, nor shall it be used in any manner prohibited by Sections 11 or 12 of the Agreement. In the event this Order becomes of no force or effect, it shall not be construed or used as an admission, concession, or presumption by or against the Individual Defendant Released Parties or the Plaintiffs.

14. All proceedings in this action shall remain stayed until further order of the Court, except as may be necessary to implement the terms of the settlement or comply with the terms of the Agreement and this Order. This Court retains exclusive jurisdiction over the Consolidated Litigation, and each case comprised therein, to consider all further matters **[*24]** arising out of or connected with the Parties' settlement.

15. The Court reserves the right to approve the Agreement and the settlement with modifications agreed to by the Parties and without further notice to any IGC shareholder. The Court further reserves the right to adjourn the date of the Final Approval Hearing without further notice to IGC shareholders. The Court may order that the Final Approval Hearing be held telephonically or by video, without further direct notice to any IGC shareholder. Any IGC shareholder (or his, her, or its counsel) who wishes to appear, as that term is defined herein, at the Final Approval Hearing should consult the Court's calendar and/or the "Investors" section of IGC's website for any change in date, time or format of the Final Approval Hearing. IGC shall update the "Investors" section of its website within one (1) business day with any change in date, time, or format of the Final Approval Hearing. The Court retains jurisdiction to consider all further matters related to the Derivative Litigation, and each case comprised therein, or the settlement or Agreement.

IT IS SO ORDERED.

/s/ Deborah K. Chasanow

United States District Judge

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2019 WL 1490703
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

Maurice JONES, Anthony C. Cook and Micah Bellamy, Plaintiffs,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY and GEICO General Insurance Company, Defendants.

Case No: 6:17-cv-891-Orl-40LRH
|
Signed 04/04/2019

Attorneys and Law Firms

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ORDER

PAUL G. BYRON, UNITED STATES DISTRICT JUDGE

***1** Before the Court are Plaintiffs' Amended Motion for Class Certification (Doc. 119 ("**Motion**")) and responsive filings (Docs. 129, 134, 140). The Court held a hearing on the Motion (Doc. 151); this Order follows.

I. BACKGROUND

In this case, six named Plaintiffs[1] bring suit on behalf of two putative classes against Defendants, Government Employees Insurance Company, GEICO General Insurance Company, and GEICO Indemnity Company (collectively, "**GEICO**" or "**Defendants**"). (Doc. 71). Plaintiffs, who were insureds of GEICO, claim that GEICO failed to pay mandatory title transfer fees and license plate transfer fees ("**title and tag transfer fees**") on first-party total loss auto insurance claims. (*Id.* ¶¶ 1–5). Plaintiffs maintain that GEICO's failure to pay these fees constitutes a breach of contract and violates state law. (*Id.*).

The GEICO insurance policies covering the putative class members' total loss claims (the "**Policies**") had identical essential terms. (Doc. 71, ¶¶ 14–20). Critically, the Policies define actual cash value ("**ACV**") as "the replacement cost of the auto or property less depreciation or betterment." (Doc. 71-1, p. 13; Doc. 119-3, p. 12; Doc. 114-4, p. 13). Because title and tag transfer fees are mandatory costs associated with the purchase or lease of a replacement vehicle after a total loss, these fees are included in "replacement cost" and must be paid under the Policies. (Doc. 119, p. 2; Doc. 119-1). Despite being contractually obligated to pay them, it is GEICO's practice to not pay title and tag transfer fees on total loss claims. (Doc. 119-7, pp. 5–6).

Accordingly, Plaintiffs seek to certify Florida and multi-state classes of similarly-situated individuals to recover unpaid title and tag transfer fees after total loss events. (Doc. 119, p. 1). GEICO opposes, advancing numerous arguments as to why Plaintiffs' Motion should be denied in its entirety.

II. STANDARD OF REVIEW

"Questions concerning class certification are left to the sound discretion of the district court." *Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th Cir. 1985). To certify a class action, the moving party must satisfy a number of prerequisites. First, the movant must demonstrate the named plaintiffs have standing and the class is clearly ascertainable. *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009). Second, the putative class must meet all four requirements enumerated in Federal Rule of Civil Procedure 23(a). *Id.* Those four requirements are "numerosity, commonality, typicality, and adequacy of representation." *Id.* (quoting *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003)). Third, the putative class must fit into at least one of the three class types defined by Rule 23(b). *Id.* Relevant to this case, Rule 23(b)(3) permits certification of a class where (1) common questions of law or fact predominate over questions affecting class members individually, and (2) a class action is the superior method for resolving these common questions.

Id. A party moving for certification of a Rule 23(b)(3) class in this Court also faces the added hurdle of proposing a cost-effective means of providing notice to putative class members. M.D. Fla. R. 4.04(b).

***2** Certifying a class involves "rigorous analysis of the [R]ule 23 prerequisites." *Vega*, 564 F.3d at 1266 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)). This inquiry is not a merits determination, though the Court "can and should consider the merits of the case [only] to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Id.* (quoting *Valley Drug*, 350 F.3d at 1188 n.15).

III. DISCUSSION

A. The Proposed Florida Class

Plaintiffs seek to certify the following Florida Class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3):

> All Florida residents insured for PPA [private passenger auto] physical damage coverage by [GEICO] who suffered a first-party loss of a covered owned (i.e., not leased) vehicle at any time during the five (5) years prior to the filing of this lawsuit through the date of class certification, whose claims were adjusted by a Defendant as a total loss claim, whose claims resulted in payment by a Defendant of a covered claim, and who were not paid title fees and/or license plate transfer fees.

(Doc. 119, p. 12–13).

1. Standing

To proceed with certification of this class, named Plaintiffs must have standing. *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1321 (11th Cir. 2008). Prior to summary judgment, these elements are not particularly onerous and will be satisfied by "general factual allegations of injury resulting from the defendant's conduct." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The parties do not dispute this threshold inquiry, and the Court's independent review finds that named Plaintiffs have standing.

2. Ascertainability

"Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." *Little*, 691 F.3d at 1304; *see also John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007). To prove ascertainability, "the class definition [must] contain[ ] objective criteria that allow for class members to be identified in an administratively feasible way." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015). "Identifying class members is administratively feasible when it is a 'manageable process that does not require much, if any, individual inquiry.' " *Id.* (quoting *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014) (per curiam)).[2] The plaintiff must offer more than general assertions that class members can be identified through the defendant's records; "the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Id.* at 948. The Court "need not know the identity of each class member before certification; ascertainability requires only that the [C]ourt be able to identify class members at some stage of the proceeding." *Id.* at 952 (Martin, J., concurring) (quoting Newberg on Class Actions § 3.3 (5th ed.)). In *Roth v. GEICO Gen. Ins. Co.*, the Southern District of Florida found a parallel class of insureds with leased vehicles covered by GEICO policies was ascertainable.[3]

***3** Plaintiffs maintain that the Florida class is ascertainable, and in support submit a declaration from economist Jeffrey O. Martin. (Doc. 119-5 ("**Martin Decl.**")). Mr. Martin sets out a multi-layer, semi-automatic methodology for identifying class members by reference to ten data indicators from GEICO's data and third-party title information. (*Id.*).

Defendants argue that Plaintiffs have not proven ascertainability because they cannot differentiate between owned vehicles (part of the class) and leased vehicles (not part of the class). (Doc. 129, pp. 3–6). GEICO maintains that the Martin declaration is not entitled to consideration because it was untimely filed and, even if it were considered, it does not articulate a sufficiently reliable method for identifying owned vehicles "resulting in a class that is both under and over inclusive."[4] (*Id.*). GEICO also challenges ascertainability on the ground that Plaintiffs have not excluded claims where GEICO paid insureds title and tag transfer fees. (*Id.* at p. 7).

In their Reply brief, Plaintiffs maintain that—even before applying Mr. Martin's methodology—the class is 98.17% ascertained, and the remaining 1.83% of claims represent a *de minimis* amount. (Doc. 134, p. 2). And after applying Mr. Martin's methodology, the Florida class can be identified

with greater certainty. (*Id.*). GEICO does not dispute this characterization in its Surreply, and instead only challenges ascertainability as to the multi-state proposed class.[5] (Doc. 140).

On this record, it appears that the class is ascertainable. An identification rate exceeding 98% assures the Court that the class is ascertainable, if not already substantially ascertained. Further, Plaintiffs identify a thorough methodology for identifying classmembers through the Martin declaration. In short, Plaintiffs met their burden of showing that the class can be ascertained by objective criteria in an administratively feasible way. *See Karhu*, 621 F. App'x at 946.[6]

3. Numerosity

Numerosity requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The general rule is that more than forty members is sufficient to demonstrate that joinder is impracticable. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012). While the party seeking certification need not identify the exact number of members in the proposed class, she cannot rest on "mere allegations of numerosity." *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983). Rather, the movant must provide the court with sufficient proof to support a reasoned finding that the certified class would meet the numerosity requirement. *Vega*, 564 F.3d at 1267.

***4** Plaintiffs assert that "there are approximately 199,485 class members for the class period up through July 13, 2018," per GEICO's records. (Doc. 119, p. 14 (citing Doc. 119-5, ¶ 8)). Defendants do not challenge numerosity. (Doc. 129). This requirement is easily met. *See Marcus*, 687 F.3d at 595.

4. Commonality

Commonality requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This prerequisite does not demand that all questions of law or fact be common among the class members, only that all members base their claims on a common contention that is "capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011). One common question of law or fact is sufficient so long as answering the question is central to determining the validity of all of the class members' claims and will aid in the resolution of the case. *Id.* at 359.

Plaintiffs maintain that all claims share a common question of law: "whether GEICO breached the 'form' insurance Policies by failing to pay title or tag transfer fees on Florida first-party PPA [owned] vehicle total loss claims." (Doc. 119, p. 12). GEICO argues that Plaintiffs' supposed common question can only be answered on a claim-by-claim basis because the value of each claim depends on the insured having a valid Florida license plate at the time of the loss and the insured incurring Florida tag and title fees in the purchase of a replacement vehicle. (Doc. 129, pp. 7–8).

The Court finds that Plaintiffs have satisfied commonality. The question of whether GEICO breached its contractual obligations to insureds by not paying title or tag transfer fees is common to all putative classmembers and "capable of classwide resolution." *See Dukes*, 564 U.S. 338, 349–50. Though Defendants protest that some classmembers paid more than $79.85 and some (who did not replace their vehicle) paid nothing does not affect Defendants' responsibility to pay *mandatory* title and tag transfer fees to all insureds that suffered a PPA total loss claim. In any event, Defendants' merits challenge is best addressed at the summary judgment stage or at trial. *See Vega*, 564 F.3d at 1266. Commonality is met.

5. Typicality

Typicality demands that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This element of certification "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (quoting *Lightbourn v. Cty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)), *cert. denied*, 528 U.S. 1159 (2000). The named plaintiffs' claims do not need to be identical to the claims of the absent class members, but they should "share the same essential characteristics" such that it would make sense for the plaintiffs to act as the class's representatives. *Haggart v. United States*, 89 Fed. Cl. 523, 534 (Fed. Cl. 2009) (quoting *Curry v. United States*, 81 Fed. Cl. 328, 335 (Fed. Cl. 2008)).

In support of the typicality requirement, Plaintiffs contend that the class Plaintiffs' claims were insured by materially

identical GEICO policies, the named Plaintiffs suffered a total PPA loss, and GEICO allegedly breached the Polices in the same way—by failing to pay mandatory title and tag transfer fees. (Doc. 119, p. 17). GEICO disagrees, arguing that each classmember will need to engage in an individual analysis to determine fees owed. (Doc. 129, p. 9).[7]

***5** The named Plaintiffs' claims are typical of the putative class. Like the putative Florida classmembers' claims, named Plaintiffs' claims involve the alleged breach of identical contractual provisions pursuant to GEICO's standard practice. (Doc. 119-3, pp. 12–15; Doc. 119-4, pp. 12–15; Doc. 119-7, pp. 5–6). Because the classmembers' claims are approximately identical and proving the named Plaintiffs' claims would necessarily prove claims classwide, typicality is met. *See Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1337 (11th Cir. 1984) ("[Typicality is met] if the claims or defenses of the class and the class representative[s] arise from the same event or pattern or practice and are based on the same legal theory."); *Haggart*, 89 Fed. Cl. at 534.

6. Adequacy of Representation

The final Rule 23(a) element, adequacy of representation, requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy of representation refers both to the named plaintiff who intends to represent the absent class members and to the lawyers who intend to serve as class counsel. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003). Regarding the latter, class counsel will adequately represent the class if they are "qualified, experienced, and generally able to conduct the proposed litigation." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). This requires the court to evaluate a number of factors, including counsel's knowledge and experience with class action litigation, counsel's knowledge and experience with the substantive law governing the class's claims, the resources available to counsel to pursue the class's claims, the quality of counsel's litigation efforts so far, and any other relevant factor speaking to counsel's ability to represent the class's legal interests. *See* 1 NEWBERG ON CLASS ACTIONS §§ 3:73– 3:79 (5th ed. 2011).

As to the adequacy of the proposed class representative, a named plaintiff will be adequate as long as (1) she is qualified, and (2) she has no substantial conflict of interest with the class. *Valley Drug*, 350 F.3d at 1189. A named plaintiff is qualified if she holds a basic understanding of the facts and legal theories underpinning the lawsuit and is willing to shoulder the burden of litigating on the class's behalf. *See New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007). At the certification stage, inquiry into a proposed representative's qualifications is not especially stringent. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (stating that certification should only be denied for inadequate representation where the plaintiff's lack of knowledge and involvement with the case essentially amounts to abdication of her role in the case), *cert. denied*, 485 U.S. 959 (1988). A named plaintiff will have a substantial conflict of interest which precludes her from acting as class representative when her interests are so antagonistic to the interests of the absent class members that she cannot fairly pursue the litigation on their behalf. *See Griffin*, 755 F.2d at 1533; *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 989 (11th Cir. 2016).

Defendants challenge adequacy of representation, principally arguing that named Plaintiffs cannot adequately represent the class because some classmembers may have incurred different fees or no fees at all if they did not replace the lost vehicle. (Doc. 129, p. 9). The Court disagrees. First, GEICO points to scant evidence that the fees paid by named Plaintiffs and putative classmembers differed. Second, GEICO does not address Plaintiffs' rebuttal, that GEICO was obligated to pay title and transfer fees regardless of whether the vehicle was replaced, negating some of the alleged variation in claim value.

***6** The Court finds the named Plaintiffs are adequate class representatives. The Court does not perceive any conflicts of interest between Plaintiff and the putative class. Additionally, Plaintiffs' counsel is qualified under Rule 23(g)(1) to represent the class. Class counsel is experienced in litigating class actions and has recently enjoyed success in class actions nearly identical to this case. (*See* Doc. 119-1).

7. Predominance and Superiority

In addition to demonstrating standing and satisfying Rule 23(a)'s four prerequisites, a plaintiff must show that the putative class she wishes to certify falls into at least one of Rule 23(b)'s three class types. Rule 23(b)(3) affords class status where (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to

other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These two elements are referred to as "predominance" and "superiority," respectively, and the Court discusses them in turn.

a. Predominance

Predominance refers to the class's cohesion as a whole and examines whether adjudication of members' individual interests on a classwide basis would be appropriate. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In determining predominance, the district court assesses the issues of law and fact likely to arise during the litigation and weighs whether issues common to the class predominate over issues which are unique to each individual class member. *Id.* at 622–23 & n.18. Ultimately, predominance revolves around the quality, rather than the quantity, of the class members' shared interests. *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 272 (4th Cir. 2010). Where the litigation is defined by individualized inquiries regarding the defendant's possible liability to each class member, predominance is lacking and certification should be denied. *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010). However, where the class members seek answers to the same questions and those answers would "have a direct impact on every class member's effort to establish liability," common issues predominate and certification should be granted. *Id.* (quoting *Vega*, 564 F.3d at 1270) (internal quotation marks and emphasis omitted).

Defendants overstate both the number of individual issues and the potential difficulties they may cause. For instance, "thousands of individual file-by-file reviews" (Doc. 129, p. 11) will not be required to address insureds who were paid some amount of title or tag transfer fees. Rather, damage awards to classmembers who received partial payment (the number of which GEICO fails to mention) can be mechanically set off by the amount paid. *See, e.g.*, *Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016) ("[I]ndividual damage calculations generally do not defeat a finding that common issues predominate."). GEICO's challenge to the flat $79.85 Plaintiffs seek for the class is likewise unpersuasive. Plaintiffs maintain that the minimum combined title and tag transfer fees assessed in Florida is $79.85. The Amended Complaint, class definition, and Plaintiffs' briefs are consistent on the point that Plaintiffs only seek to recover this minimum mandatory amount on behalf of the class. That some classmembers may have incurred slightly more fees levied by municipal governments has little bearing on the merits of Plaintiffs' case. Defendants remaining arguments fail to move the needle and are rejected out of hand. Predominance is easily met.

b. Superiority

***7** Superiority refers to whether the class action mechanism "would be the best or the fairest way" to resolve the parties' dispute when compared to available alternatives. *Ungar v. Dunkin' Donuts of Am., Inc.*, 68 F.R.D. 65, 148 (E.D. Pa. 1975), *rev'd on other grounds*, 531 F.2d 1211 (3d Cir. 1976), *cert. denied*, 429 U.S. 823 (1976). Determining superiority requires the court to evaluate the four factors enumerated by Rule 23(b)(3). *See Vega*, 564 F.3d at 1278. These four factors are: (1) the class members' interests in individually controlling the prosecution of their own claims, (2) the extent and nature of litigation already initiated by individual class members, (3) the desirability of concentrating litigation in a single forum, and (4) whether there will be difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)–(D).

Defendants' superiority argument lacks merit. According to Defendants, the Court will need to hold "[t]housands of mini-trials" to determine (i) who is in the class, (ii) whether title and tag fees are owed, and (iii) if so, in what amount. (Doc. 129, pp. 12–13). Not so. Class membership can be ascertained by reference to GEICO's data and title records. Further, Defendants have not shown that an insured must actually incur title and tag fees to be entitled to the same under the Policies. And as to amount, Plaintiffs proffer that they seek $79.85 per classmember, which represents the minimum title and tag transfer fees in Florida.

Tellingly, Defendants ignore the other three factors identified by Rule 23(b)(3) and indeed the very purpose of class action litigation. "The class[ ]action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Class actions mitigate against the unlikelihood that individuals will pursue small claims "by aggregating the relatively paltry potential recoveries into something worth someone's ... labor." *Amchem Prods.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)). The case at bar exemplifies the class action purpose. Plaintiffs seek to certify a class to vindicate approximately 200,000

$79 claims. Defendants' assertion that "individual actions" would be the fairest way to resolve the parties' dispute cannot be taken seriously. The implied expectation that droves of individuals within the putative class would, absent class certification, engage lawyers to pursue $79 claims defies logic. *See Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) ("If every small claim had to be litigated separately, the vindication of small claims would be rare."); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (noting that class actions often involve "an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit").

Reference to the Rule 23(b)(3) factors erases all doubt that superiority is met: (1) the class members' interest in controlling the prosecution of these relatively small claims is low; (2) Plaintiffs have invested substantial time and resources into litigating this action, and several other related class actions are ongoing or already completed; (3) combining the large number of small claims by Florida classmembers in this Court is highly desirable; and (4) there will not be substantial difficulties in litigating these claims together. *See* Fed. R. Civ. P. 23(b)(3).

Thus, the class action method provides a superior method for resolving the parties' dispute, as compared to the available alternatives.

B. The Eight-State Class

***8** Plaintiffs also seek to certify the following eight-state class of individual plaintiffs:

> Residents of the states of Connecticut, Indiana, Maine, New Hampshire, New Jersey, New York, Vermont, and Wyoming insured for PPA physical damage coverage by [Geico] who suffered a first-party loss of a covered vehicle at any time during the applicable statute of limitations in each state through the date of class certification, whose claims were adjusted by a Defendant as a total loss claim, whose claims resulted in payment by a Defendant of a covered claim, and who were not paid title and tag fees mandated on the purchase of a private passenger auto.

(Doc. 134, p. 10). Plaintiffs initially proposed a forty-nine state class (Doc. 119, p. 22), but narrowed the proposition to eight states in their Reply brief. (Doc. 134, p. 10). Plaintiffs purportedly chose these eight states after learning through discovery that Defendants' use substantially similar policy language in these states and "[n]one of these states has any unique state law statute or regulation requiring or precluding payment of title and tag fees as part of ACV." (Doc. 134, pp. 8–10).

In arguing for certification of the eight-state class, Plaintiffs generically assert that "[n]one of these eight states ha[ve] any unique state law statute or regulation requiring or precluding payment of title and tag fees as part of ACV." (Doc. 134, pp. 9–10). Plaintiffs offer no citations to authority showing that each state charged mandatory tag and title transfer fees —a prerequisite to a claim that Defendants owed putative classmembers such fees.[8] Without this information, the Court cannot find that Plaintiffs established commonality or typicality as to the multi-state class.

Plaintiffs have likewise failed to show that the numerosity requirement is met as to the multi-state class. (Doc. 134). While the Court suspects numerosity would be easily met, it is Plaintiffs' burden to affirmatively establish all Rule 23 prerequisites are satisfied. Plaintiffs' motion to certify a multi-state class is thus due to be denied.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiffs' Amended Motion for Class Certification (Doc. 119) is **GRANTED IN PART** and **DENIED IN PART**.

2. The Court hereby certifies a class (the "**Florida Class**") pursuant to Fed. R. Civ. P. 23(b)(3) consisting of the following:

   > All Florida residents insured for PPA [private passenger auto] physical damage coverage by [Geico] who suffered a first-party loss of a covered owned (i.e., not leased) vehicle at any time during the five (5) years prior to the filing of this lawsuit through the date of class certification, whose claims were adjusted by a Defendant as a total loss claim, whose claims resulted in payment by a Defendant of a covered claim, and who were not paid title fees and/or license plate transfer fees.

***9** 3. Elizabeth Sullivan, Anthony Cook, Wilson Santos, Maurice Jones, Anthony Lorenti, and Ashley Barrett are hereby certified as representatives of the Florida Class.

4. Bradley W. Pratt, Esq., Pratt Clay, LLC, Tracy L. Markham, Esq., Avollo & Hanlon, P.C., Andrew Lampros, Esq., Hall & Lampros, LLP, Christopher

Lynch, Esq., Christopher J. Lynch, P.A., Christopher Hall, Esq., Hall & Lampros, LLP, Edmund A. Normand, Esq., and Normand Law PLLC are hereby certified as Class Counsel pursuant to Rule 23(g)(1).

5. On or before April 15, 2019, the parties shall jointly file for approval by the Court a proposed notice to Florida Class members; alternatively, if the parties cannot agree on a proposed notice, Plaintiffs shall file a proposed notice on or before [same day], and Defendants shall file any objections within three (3) days of the filing of Plaintiffs' proposed notice.

DONE AND ORDERED in Orlando, Florida on April 4, 2019. Copies furnished to:

All Citations

Not Reported in Fed. Supp., 2019 WL 1490703

Footnotes

1 Elizabeth Sullivan, Anthony Cook, Wilson Santos, Maurice Jones, Anthony Lorenti, and Ashley Barrett (collectively, "**Plaintiffs**"). (Doc. 71, p. 1).

2 "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007).

3 No. 16-62942-Civ, Doc. 165, p. 7 n.1 (S.D. Fla. May 3, 2018) ("**Roth**"); *see also Roth*, Doc. 267, p. 3 ("[T]he Court finds that a simple back-and-forth process to vet the final list of class members and their damages amounts is not overly burdensome and will result in a final proposed judgment suitable for entry by the Court. The Court will refer this matter to the magistrate judge to supervise this process.").

4 Prior to this hearing, the Magistrate Judge denied Defendant's objection to the timeliness of Mr. Martin's disclosure.

5 However, during the hearing GEICO advanced numerous challenges to Mr. Martin's methodology, which the Court will address in the context of a *Daubert* challenge. In deciding Plaintiff's motion, based upon the record thus far, the Court is satisfied that Mr. Martin has articulated ascertainability via his analysis.

6 That the class is not perfectly defined at this stage does not preclude certification. *See id.* at 952. To the extent there is slight over-and under-representation of owned vehicle insureds in the class, the Court is confident that the parties can cooperate in a "simple back-and-forth process to vet the final list." *See Roth*, Doc. 267, p. 3.

7 GEICO relies on *DWFII Corp. v. State Farm Mut. Auto. Ins. Co.*, 271 F.R.D. 676 (S.D. Fla. 2010), to support its argument that typicality is not met where each "member of the putative class would have to engage in" an individualized analysis involving "different policyholders, different medical services, different billing codes, and different defenses." *Id.* at 688. *DWFII* is inapposite. Although the case at bar involves different policyholders, far fewer individualized inquiries are implicated by this case. Defendants allegedly breached contracts with identical material terms by engaging in a uniform policy to not pay mandatory title and tag transfer fees. This is not a case involving myriad "medical services, different billing codes, and different defenses." *See DWFII*, 271 F.R.D. at 688.

8 Defense counsel raised several additional cogent objections to certification of the multi-state class, including whether the various state law governing the interpretation of contracts favors Plaintiff or Defendant, and whether each state and county charges a tag fee.

End of Document

CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs,	*	**FOR**
v.	*	**BALTIMORE CITY**
IMPAC MORTGAGE HOLDINGS, INC.	*	**Case No. 24-C-11-008391**
	*	
Defendant.	*	
	*	

* * * * * * * * * * * *

[PROPOSED] ORDER CERTIFYING A CLASS AND SETTING FURTHER PROCEEDINGS

Upon consideration of Plaintiff, Camac Fund LP's, Motion To Certify Class, Appoint Class Representative and Lead Counsel, Preliminarily Determine Right to Receive Dividends, and Set Final Judgment Hearing ("Camac Class Motion") and any response thereto, this Court's Memorandum Opinion and Order of December 29, 2017 (Docket 94/7), this Court's Memorandum Opinion and Order of July 16, 2018 (Docket 132/2), this Court's Order of July 24, 2018 (Docket 132/4), the argument of counsel and the record in this case, it is this _____ day of _____, 2022, ORDERED that the Camac Class Motion is GRANTED as follows[1]:

1. The Court finds that each of the pertinent provisions of Rule 2-231 has been satisfied, and that this action should be properly maintained as a class action pursuant to Rule 2-231(b), and (c)(2).

(a) This Action is certified as a non-opt-out class action pursuant to Rule 2-231(b), and 2-231(c)(2) on behalf of **all owners of Series B Preferred stock of Impac**

[1] Unless indicated to the contrary, capitalized terms shall have the same meaning as those in the Memorandum Opinion and Order (Docket 94/7).

Mortgage Holdings, Inc. from the close of the tender offer on June 29, 2009, until the date of the class certification order. (The "Class" or "Class Members").

(b) The Court finds pursuant to Maryland Rule 2-231(b) that:

(i) The Class is so numerous that joinder of all members is impracticable;

(ii) There are questions of law and fact common to the Class, including:

- whether the May 25, 2004, Articles Supplementary for the Series B Cumulative Redeemable Preferred Stock ("Series B") prohibited Impac from adopting the June 29, 2009, amendments to the Series B Articles Supplementary without the affirmative vote or consent of holders of at least two-thirds of the shares of the Series B Preferred stock;
- whether Impac's June 29, 2009, amendments to the Series B Articles Supplementary are void because holders of fewer than two-thirds of the Series B Preferred stock consented to the amendments;
- whether Impac breached the 2004 Series B Articles Supplementary by repurchasing certain Series B shares on October 21, 2009, when cumulative dividends on the Series B had not been or contemporaneously were declared and paid or declared and a sum sufficient for payment thereof was set apart for payment;
- whether the 2004 Series B Articles Supplementary are in effect, such that Impac's failure to declare and pay dividends on the Series B Stock for at least six quarters entitles the holders of Series B Stock to vote for the election of two additional directors at a special meeting called by the holders of record of at least 20% of the Series B stock;

- what Series B stockholders are entitled to the dividends that had not been paid as a result of the October 21, 2009, repurchase of stock by Impac.

(iii) The claims of Class Representative, identified below, are typical of the claims of the Class in that they all arise from the same course of conduct and are based on the same legal theories;

(iv) Class Representative and its designated Lead Counsel, identified below, have, and will, fairly and adequately protect the interests of the Class.

(c) The Court further finds that under Maryland Rule 2-231(c)(2) Defendant Impac acted or refused to act on grounds generally applicable to the Class, satisfying Maryland Rule 2-231(c)(2).

(d) Plaintiff Camac Fund LP is appointed as Class Representative. Tydings & Rosenberg LLP, John B. Isbister and Daniel S. Katz are appointed counsel for the Class ("Lead Counsel").

2. With respect to the remaining issues in this action, the Court shall hold a hearing on _____, 2022, at __:__ _M. ("Final Judgment Hearing") to consider and enter a **Final Judgment Order** substantially in the form attached as **Exhibit A** and to consider any application for an award of attorneys' fees and expenses that may be filed by Class Counsel.

(a) Because this case is certified as a class action pursuant to Rule 2-231(c)(2), members of the Class may not opt out of, or request to be excluded from the Class. Similarly, members of the Class may only object to, or comment on the following issues pursuant the process described in paragraph 2(d) below:

(i) the designation of the subset of class members to whom payment of dividends shall be made pursuant to Section A of the Final Judgment Order, and

(ii) the application for an award of attorneys' fees and expenses that may be requested by Lead Counsel as described below in Paragraphs 3 and 4 and in Section B of the Final Judgment Order.

(b) Within 20 business days of the entry of this Order, Impac shall request that The Depository Trust Company ("DTC") make available to KCC, LLC, or such other notice administrator designated by the parties and the Court ("Notice Administrator"), its stock transfer records and shareholder information in electronic form, to the extent reasonably available, to enable Notice Administrator or its administrative agent to identify record owners and beneficial owners as of the date of this Order and to provide written or electronic communication to those owners with a web address linking to the full Notice. Further, Notice Administrator and Impac will administer the Notice Program as follows:

(i) The Notice, substantially in the form attached as **Exhibit B** to this Order, shall be made available to Class Members in accordance with the Notice Program.

(ii) All record holders who are not or were not also the beneficial owners of Series B Preferred stock shall be requested to forward the Notice to the beneficial owners of those shares within seven days of receipt.

(iii) Notice Administrator shall (a) make additional copies of the Notice available to any record holder who, prior the Final Judgment Hearing,

requests the same for distribution to beneficial owners; or (b) provide additional copies of the Notice to beneficial owners whose names and addresses Notice Administrator receives from record owners.

(iv) Notice Administrator shall host a website that includes a link to the Notice.

(v) Impac shall include a link on its website to the Notice.

(vi) Impac shall file a Form 8-K with the SEC describing the Notice.

(vii) Notice Administrator shall and disseminate a press release describing the Notice to all outlets that it determines to be appropriate.

(viii) Notice Administrator shall cause a summary Notice that provides a web address for the full Notice to be published in *Investor's Business Daily*.

(c) The Court has determined that this form and method of notice is the best practicable, constitutes due and sufficient notice of the Final Judgment Hearing to all persons entitled to receive such notice, and meets the requirements of Rule 2-231, due process, and applicable law. Notice Administrator and Impac shall, at least 15 days before the Final Judgment Hearing, file with the Court appropriate affidavits demonstrating the dissemination of the Notice to the Class as provided in this Order.

(d) As stated in Section A of the Final Judgment Order, this Court has preliminarily determined that the class members to whom the payment of the three quarters of dividends is to be made are those who own shares as of the date on which Impac declares and sets apart a sum sufficient for payment of the dividends. Any person who objects to this designation of the subset of class members to whom

payment of dividends shall be made, or to the award of fees and expenses to Lead Counsel, may appear in person or by counsel at the Final Judgment Hearing, and present evidence or argument that may be proper and relevant; provided, however, that except by order of the Court for good cause shown, no person shall be heard and no papers, briefs, pleading or other documents submitted by any person shall be considered by the Court unless not later than 30 days prior to the Final Judgment Hearing such person files with the Court and serves upon counsel listed below: (i) a written notice of intention to appear; (ii) a statement submitted under penalty of perjury of the number of shares of Impac Series B Preferred stock held by such person, including the date(s) of acquisition and disposition of any such stock, and any and all supporting documents relating thereto; (iii) a statement of such person's objections to the designation of the subset of class members to whom payment of dividends shall be made pursuant to Section A of the Final Judgment Order or the application for award of fees and expenses to Lead Counsel; and, (iv) the grounds for such objections, as well as all documents or writings such person desires the Court to consider. Such filings shall be served by hand or by mail, upon the following counsel:

Tydings & Rosenberg LLP
John B. Isbister, Esq.
Daniel S. Katz, Esq.
1 East Pratt St., Suite 901
Baltimore, MD 21202
Lead Counsel

Troutman Pepper
Pamela S. Palmer, Esq.
350 South Grand Avenue
Two California Plaza, Suite 3400
Los Angeles, CA 90071-3427
Co-counsel for Defendant

Venable LLP
G. Stewart Webb, Esq.
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
Co-counsel for Defendant

(e) Unless the Court otherwise directs, any person who fails to object in the manner described above shall be deemed to have waived the right to object (including any right of appeal) and shall be forever barred from raising such objection in this or any other action. No person shall be entitled to object to the terms of the contemplated Final Judgment Order (**Exhibit A**), any judgment entered thereon, any award of attorneys' fees and expenses, or otherwise may be heard, except by serving and filing a written objection and supporting papers and documents as prescribed above.

3. Lead Counsel will seek an order that provides that an award of fees and expenses be paid from a portion of the common fund – the payment of the dividends from the second, third, and fourth quarters of 2009 and the continued accrual and payment of dividends or distributions of property in lieu of or attributable to the payment of dividends - that they obtained for the Class in this litigation. The amount of attorneys' fees and expenses and the method of payment will be determined by the Court at the Final Judgment Hearing. Lead Counsel will seek an award of attorneys' fees in the amount of one-third (1/3) of any and all dividends that are declared and paid on Series B Preferred Stock, and distributions of property in lieu of or attributable to the payment of dividends, until the fees and expenses awarded by the Court have

been paid in full. Lead Counsel will be requesting that the attorneys' fee and expenses awarded to it by the Court be paid as follows: (a) one-third (1/3) of the dividends to be paid pursuant to Section A of the Final Judgment Order plus the expenses awarded by the Court, shall be paid by Impac to Lead Counsel and deducted from the amount of those dividends; and (b) one-third (1/3) of any future dividends or distributions of property in lieu of or attributable to the payment of dividends to holders of Series B stock shall be paid by Impac until the amount awarded by the Court has been paid in full. In all events, the total payment of attorneys' fees and expenses shall not exceed the amount awarded by the Court and the method of payment will be determined by the Court at the Final Judgment Hearing. Lead Counsel have advised the Court that they intend to apply for an award of attorneys' fees and expenses in an amount not to exceed $2,800,000.

4. Lead Counsel shall serve and file their opening brief in support of their motion for attorneys' fees and expenses no later than 60 days before the Final Judgment Hearing. Any member of the Class may obtain a copy of the brief at the courthouse or by accessing the website of Notice Administrator at _____. Any objection to that motion shall be filed no later than 30 days before the Final Judgment Hearing. Lead Counsel shall file any reply brief in response to any objection to their application for attorneys' fees and expenses no later than 15 days prior to the Final Judgment Hearing.

5. The Court may, for good cause, extend any of the deadlines set forth in the Order without further notice to the Class.

_____

Judge, Circuit Court for Baltimore City

EXHIBIT A

EXHIBIT A

CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
	*	**CIRCUIT COURT**
On Behalf of Themselves and All Persons Similarly Situated,	*	**FOR**
Plaintiffs,	*	**BALTIMORE CITY**
v.	*	**Case No. 24-C-11-008391**
IMPAC MORTGAGE HOLDINGS, INC.	*	
	*	
Defendant.	*	

* * * * * * * * * * * *

[PROPOSED] FINAL JUDGMENT ORDER

It is this _____ day of _____, 2022, ORDERED that, for the reasons stated in the Memorandum Opinion and Order dated January 28, 2013 (Docket 19/1), the Memorandum Opinion and Order dated November 27, 2013 (Docket 32/3), the Memorandum Opinion and Order dated December 29, 2017 (Docket 94/7), the Memorandum and Order dated July 16, 2018 (Docket 132/2), the Order dated July 24, 2018 (Docket 132/4), and the opinion of the Court of Appeals in *Impac Mortgage Holdings, Inc. v. Timm, et al.,* 474 Md. 495 (2021), having considered Camac Fund LP's, Motion To Certify Class, Appoint Class Representative and Lead Counsel, Preliminarily Determine Right to Receive Dividends, and Set Final Judgment Hearing ("Camac Class Motion") and the argument of counsel thereon, and having heard and considered any objections made by members of the Class, FINAL JUDGMENT shall be entered pursuant to Maryland Rule 2-601 with respect to the Class Action Complaint in Intervention filed by Camac Fund LP ("Camac Complaint") (Docket 41/0). Plaintiff Curtis Timm ("Timm") is a member of the Class that has been certified, and the claim that he asserts in Count IV of his complaint (Docket 1/0) is the same as the claim asserted in Count IV of the Camac Complaint. Accordingly, this judgment shall also apply to Count IV of the Timm Complaint. As set forth in

the Introduction below, final judgment has previously been entered as to all of Timm's claims as well as to Camac's claims with the exception of the determination of who are the recipients of the dividends ordered to be paid in Count IV, and any claims for legal fees and expenses.

INTRODUCTION

1. This Court, in an Order dated July 16, 2018 ("July 16, 2018, Final Judgment Order") ordered that:

"1. It is hereby adjudged, declared and decreed (a) that Section 6(d) of the Series B Articles Supplementary required the consent of two-thirds of the Series B shareholders to the amendments to the Articles Supplementary that were submitted to shareholders in 2009; (b) that the purported amendments to the Series B Articles Supplementary filed in 2009 were not validly adopted because fewer than two-thirds of the Series B shareholders consented; and (c) that the Series B Articles Supplementary adopted in 2004 remain in full force and effect.

2. Judgment is entered in favor of Defendants Joseph R. Tomkinson, William S. Ashmore, Todd R. Taylor, Ronald M. Morrison, Leigh J. Abrams, James Walsh, Frank P. Filipps and Stephan R. Peers on all claims asserted against them in the complaints of Plaintiff Curtis Timm and Plaintiff Camac Fund LP.

3. Judgment is entered in favor of Defendant Impac Mortgage Holdings, Inc. on the claims asserted in Counts II, III and V of the complaint of Plaintiff Curtis Timm and the claims asserted in Counts II and III of the complaint of Plaintiff Camac Fund LP.

4. Impac is hereby ordered to hold a special election in accordance with Section 6(b) of the Articles Supplementary within sixty (60) days of the date of this order.

5. It is hereby adjudged, ordered and decreed that Section 3(d) of the Articles Supplementary requires Impac to pay dividends on Series B shares for the first, second and third quarters of 2009.

6. This judgment is final in accordance with Rule 2-602(b).

7. Costs shall be evenly divided among the parties."

2. By Order of July 24, 2018, this Court corrected paragraph 5 in the July 16, 2018, Final Judgment Order to provide that the dividends are for the second, third, and fourth quarters of 2009.

3. Also on July 16, 2018, this Court entered an Order denying Timm's "Motion Regarding Court Opinion Dated December 29, 2017 Relative to Pfd Series B Issues."

4. On September 5, 2018, this Court entered an Order denying Timm's "Request to modify July 16, 2018 Judgments."

5. Impac appealed the July 16, 2018, Final Judgment Order, and Timm cross-appealed. The Court of Special Appeals affirmed. *Impac Mortgage Holdings, Inc. v. Timm, et al.*, 245 Md.App. 84 (2020).

6. Impac petitioned for *certiorari* to the Court of Appeals, which petition was granted. *Impac Mortgage Holdings, Inc. v. Timm, et al.*, 469 Md. 656 (2020). The Court of Appeals affirmed. *Impac Mortgage Holdings, Inc. v. Timm, et al.*, 474 Md. 495 (2021).

7. This Court, on _____, entered an Order certifying a class, appointing Class Representative and Lead Counsel, and setting further proceedings. (Docket ___).

ORDER

A. DISTRIBUTION OF THREE QUARTERS OF DIVIDENDS

As to Count IV of the Camac Complaint, it is not disputed that in the fourth quarter of 2009, Impac Mortgage Holdings, Inc. redeemed, purchased, or otherwise acquired for

consideration certain shares of Series B and Series C Preferred stock. Accordingly, pursuant to Section (3)(d) of the May 25, 2004, Articles Supplementary for the Series B Preferred stock, it is ORDERED that an injunction in favor of the plaintiff Class is entered mandating that:

1. Within 10 days after this Order reaches finality, meaning 31 days after its docketing with no appeal having been taken, or all appeals having been resolved or exhausted, subject to the exception set forth in Section B.2 below, Impac Mortgage Holdings, Inc., shall declare and set apart a sum sufficient for payment of Series B Preferred Stock dividends at 9.375% interest for the quarters ending June 30, 2009, September 30, 2009, and December 31, 2009 ["Series B Dividends"];

2. Within 10 days after the acts described in Section A.1. above, Impac Mortgage Holdings, Inc. shall pay the Series B Dividends to those stockholders who hold Series B stock as of the date on which Impac Mortgage Holdings, Inc. declares and sets apart a sum sufficient for payment of the Series B Dividends as defined in Section A.1. above, with such payment subject to payment of counsel fees and costs pursuant to Section B.1 below.

B. COUNSEL FEES AND COSTS

1. The Court grants the motion for an award of fees and expenses to Class Counsel. Class Counsel is awarded attorneys' fees and expenses in the amount of $_____ ("Counsel Fee"). The Court finds this sum to be fair and reasonable. From the distribution of the Series B Dividends described in Section A above, Impac shall withhold one-third, or $_____,[1] plus $_____ in reimbursement of expenses and remit it to Lead Counsel at such time that the dividends are paid to the recipient shareholders in accordance with Section A.2. above. Thereafter, in the event of any future payment of dividends or distributions of property in

[1] Lead Counsel is not seeking fees based upon payment of dividends to Curtis Timm.

lieu of or attributable to the payment of dividends to Series B shareholders, with the exception of such payments or distributions to Curtis Timm, Impac shall withhold one-third of each payment or distribution, and remit it to class counsel at such time that the dividends are paid or distributions of property made to the Series B shareholders, with such withholding to continue until the entire Counsel Fee is paid.

2. The effectiveness of Section A of this Final Judgment Order shall not be conditioned upon or subject to the resolution of any appeal from the Final Judgment Order that relates solely to the issue of Lead Counsel's application for an award of attorneys' fees and expenses; however, Impac shall hold in escrow from any such payment or distribution the amounts that would be designated as Counsel Fee in Section B.1 above until the conclusion of any such appeal at which time Impac shall pay to Lead Counsel any Counsel Fees determined to be payable after the appeal, with the balance to be distributed to the Series B stockholders.

_____

Judge, Circuit Court for Baltimore City

EXHIBIT B

EXHIBIT B

CURTIS J. TIMM and CAMAC FUND LP	*	**IN THE**
Plaintiffs,	*	**CIRCUIT COURT**
v.	*	**FOR**
IMPAC MORTGAGE HOLDINGS, INC.	*	**BALTIMORE CITY**
	*	**Case No. 24-C-11-008391**
Defendant.	*	
	*	
	*	

* * * * * * * * * * *

NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED JUDGMENT, FINAL JUDGMENT HEARING AND RIGHT TO APPEAR

TO: ALL PERSONS AND ENTITIES WHO HELD OR ACQUIRED SERIES B PREFERRED STOCK OF IMPAC MORTGAGE HOLDINGS INC. (TICKER SYMBOL: IMPHP) AT ANY TIME FROM THE CLOSE OF THE TENDER OFFER ON JUNE 29, 2009, UNTIL THE DATE OF THE CLASS CERTIFICATION ORDER.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS WILL BE AFFECTED BY THE LEGAL PROCEEDINGS IN THIS LITIGATION. IF YOU WERE NOT A BENEFICIAL HOLDER OF SERIES B PREFERRED STOCK OF IMPAC MORTGAGE HOLDINGS INC. BUT HELD SUCH STOCK FOR A BENEFICIAL OWNER DURING THE RELEVANT TIME PERIODS, YOU ARE DIRECTED TO TRANSMIT THIS DOCUMENT TO SUCH BENEFICIAL OWNER.

This Notice is given pursuant to an Order of the Circuit Court for Baltimore City, Maryland (the "Court"), in accordance with Rule 2-231 of the Maryland Rules, to inform you of certain proceedings in the above-captioned consolidated action (the "Action"). If you were not a beneficial owner of Series B Preferred stock of Impac Mortgage Holdings Inc. ("Impac" or the "Company") held of record by you at any time from the close of the tender offer on June 29, 2009, until the date of the class certification order, but held such Impac Series B Preferred stock

for a beneficial owner, you are directed to forward this Notice to the beneficial owner within seven days. If additional copies of the Notice are needed for forwarding to such beneficial owners, any requests for such additional copies may be made to the following:

_____.

There will be a hearing (the "Hearing") before the Court on _____, 2022, at _____, in the Circuit Court for Baltimore City, Maryland, 111 N. Calvert Street, Courtroom ___, Baltimore, MD 21202, to determine whether the proposed Final Judgment Order in the Action, described below, should be entered as a Final Judgment for the Class (defined below), and whether the request by counsel for Class Representative and the Class for an award of attorneys' fees and expenses should be granted. It is not necessary for any member of the Class, or any other shareholder of Impac, to appear at the Hearing. See THE HEARING, below.

Background of the Litigation

1. Defendant, Impac Mortgage Holdings, Inc. is a Maryland corporation that issued two series of Preferred stock, Series B and Series C, in 2004. The Series B Preferred stock was authorized by Impac's Board of Directors and issued in May 2004. Series C Preferred was authorized and issued in November 2004.
2. Each series of Preferred stock had its own Articles Supplementary that granted the shareholders certain dividend, voting, and other rights. The two series had different interest rates. Under the Articles Supplementary for each series, subject to qualifications, the holders were entitled to receive "when and as authorized by the Board of Directors" dividends in a fixed amount payable quarterly in arrears. The dividends were cumulative, meaning that if the Company did not declare and pay quarterly dividends, they continued to accrue and accumulate. The Company could not pay a dividend on its common stock

or take other specified corporate actions until all accrued dividends on the Preferred stock were declared and paid or set aside. And, if six quarters of dividends were in arrears, a special meeting could be called by at least 20% of the preferred shareholders to vote to elect two additional directors to the Board.

3. On May 29, 2009, Impac launched a tender offer for all of the Series B and Series C Preferred stock, which Impac stated was conditioned upon the consent by at least 66 2/3% of the holders of Series B and Series C voting together to amend the Series B and Series C Articles Supplementary. Impac offered to purchase Series B shares for $0.29297 per share and Series C shares for $0.28516 per share and to pay all accrued and unpaid dividends on all Parity Preferred stock (including untendered stock), if the tender offer and consent solicitation closed on the terms set forth in the Offering Circular.

4. Section 6(d) of the 2004 Series B Articles Supplementary states, in pertinent part:

> . . . So long as any shares of Series B Preferred Stock remain outstanding, the Corporation shall not, without the affirmative vote or consent of the holders of at least two-thirds of the shares of the Series B Preferred Stock outstanding at the time, given in person or by proxy, either in writing or at a meeting (voting separately as a class with all series of Parity Preferred that the Corporation may issue upon which like voting rights have been conferred and are exercisable), … (ii) amend, alter or repeal any of the provisions of the Charter, so as to materially and adversely affect any preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications, or terms or conditions of redemption of the Series B Preferred Stock or the holders thereof…" (hereafter, the "Voting Rights Provision").

Identical language, except with a reference to Series C in place of the reference to Series B, was set forth in the 2004 Series C Preferred Articles Supplementary.

5. Impac's Offer to Purchase and Consent Solicitation ("Offering Circular"), stated that tendering Series B and Series C stockholders were required to consent to proposed amendments to the terms of the Series B and Series C Articles Supplementary as a condition to validly tendering their stock to Impac for purchase. The proposed amendments were to do the following:
    a. make future dividends non-cumulative;
    b. eliminate the provisions prohibiting payment of dividends on junior stock and the purchase or redemption of junior or parity stock, if full cumulative dividends are not paid or declared and set apart for payment;
    c. eliminate any premiums payable upon the liquidation, dissolution or winding up of the Company, the right to which expired in 2009;
    d. eliminate the provision prohibiting the Company from electing to redeem Preferred Stock prior to the fifth anniversary of the issue date;
    e. eliminate the provision prohibiting the Company from redeeming less than all of the outstanding Preferred Stock if full cumulative dividends for all past dividend periods have not been paid or declared and set apart for payment;
    f. eliminate the right of holders of Preferred Stock to elect two directors if dividends are in arrears for six quarterly periods; and
    g. eliminate the right of holders of Preferred Stock to consent or approve the authorization or issuance of preferred stock senior to the Preferred Stock.
6. On June 30, 2009, Impac announced that on June 29, 2009, in connection with the Offer to Purchase and Consent Solicitation for its Series B and Series C Preferred Stock, the Company had received consents from holders of in excess of 66 2/3% (two-thirds) of the

outstanding shares of the Preferred Stock, counting Series B and Series C together. The Company did not claim to have received consents from holders of two-thirds of the Series B Preferred Stock. The Company also announced that holders of more than 50% (fifty percent) of the common stock had voted in favor of the proposed amendments, which was an additional requirement for Impac to amend the Articles Supplementary.

7. On June 29, 2009, the Company filed Articles of Amendment to the terms of each of the Series B and Series C Preferred Stock Articles Supplementary.

The Litigation

8. On December 7, 2011, plaintiff Curtis Timm ("Timm") filed a complaint containing six counts ("Counts") contesting the effectiveness of the Preferred Stockholder consents to amend the Series B and Series C Articles Supplementary.

9. Defendants filed a motion to dismiss the entire complaint, including all six Counts.[1] The Court treated the motion as one for summary judgment and granted judgment, in part, for the Defendants on Counts II, III and V. In a Memorandum Opinion and Order dated January 28, 2013, the Court dismissed all claims involving the Series C Preferred stock (Counts II and III), leaving as the sole issue the Series B voting rights as described in Count I, IV, and VI (discussed below).

10. Timm filed a motion with the Court to reconsider dismissal of Counts II and III (concerning the validity of the consents of any holders of the Preferred Stock), which was denied by the Court in a Memorandum Opinion and Order dated November 27, 2013.

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[1] In addition to suing Impac, the Timm Complaint named members of Impac's board of directors. The Court dismissed the claims against the directors, leaving Impac as the sole defendant.

11. In March 2014, plaintiff Camac Fund LP ("Camac"), another holder of Series B and C Preferred Stock, filed a complaint in intervention asserting the same allegations and causes of action as Timm, with the exception of Timm's Count V for punitive damages. Camac, as did Timm previously, sought to proceed with the case as the representative of a class action on behalf of the holders of Series B and C Preferred Stock.

12. After the Court's ruling on summary judgment in January 2013, three Counts remained unresolved concerning the Series B Preferred Stock. Plaintiffs asserted that the language of the voting rights provision in the Series B Articles Supplementary required the holders of two-thirds of the Series B Preferred Stock to vote or consent to the 2009 amendments, and that, absent that, consent of two-thirds of the Series B and Series C combined was not sufficient to amend the Series B Articles.

13. Plaintiffs contended that the voting rights language meant that Impac could not adopt the proposed amendments affecting the rights of the Series B Preferred Stock without the vote of two-thirds of the shares of the Series B. Impac contended that the language of the voting rights provision allowed it to adopt the proposed amendments to the Series B Articles without two-thirds of the Series B consent if it received two-thirds consent from the holders of the Series B and the Series C, counted together as a class of Parity Preferred. The major issue that remained to be resolved by the Court was interpretation of the Series B voting rights provision.

14. As to the Series B Preferred, the Timm and Camac complaints alleged (in Counts I, IV, and VI of the Timm complaint and Counts I, IV and V of the Camac complaint) as follows: that (a) the Series B Articles Supplementary required the separate consent of

two-thirds of the Series B shares in order to amend the Series B Articles Supplementary, (b) because Impac did not receive consents from two-thirds of the Series B shares, the 2009 amendment to the Series B Articles was ineffective, (c) Impac breached the 2004 Series B Articles Supplementary by adopting the 2009 amendments, rendering those amendments invalid, (d) Impac breached the 2004 Series B Articles Supplementary by repurchasing certain Preferred Stock in the fourth quarter of 2009 (after the 2009 amendments) without having paid full cumulative dividends to the holders of Series B Preferred, (d) as a result, Impac was required to pay dividends for the third and fourth quarters of 2009[2] to holders of Series B Preferred stock and (e) holders of at least 20% of the Series B Stock were entitled to call a special meeting to elect two additional directors to Impac's Board of Directors once six quarters of dividends were in arrears.

15. The Court had concluded in its Opinion and Order dated January 29, 2013, that the voting rights provision in the 2004 Articles Supplementary for Series B, paragraph 6(d) was "not unambiguous" and required extrinsic evidence to determine its meaning. The parties conducted extensive discovery, including 11 depositions, on the issue of the meaning of the voting rights provision.

16. Impac filed a Motion for Summary Judgment on the Series B voting rights issue. Plaintiffs filed an opposition and a Cross-Motion for Summary Judgment. Impac filed an Opposition to the Cross-Motion and Reply Memorandum in support of its motion. Plaintiffs filed a Reply Memorandum in support of their Cross-Motion.

[2] Thereafter, counsel for Camac determined that the dividends that were required to be paid were for the second, third, and fourth quarters of 2009, which the Court ultimately ordered.

17. On February 27, 2015, both plaintiffs Timm and Camac filed a motion for class certification and sought to be appointed together as representative plaintiffs of the Class. Impac filed a Qualified Partial Opposition to that motion, and plaintiffs filed a reply memorandum.

18. On April 1, 2015, plaintiffs also filed a motion asking the Court to revise its Opinion and Order of January 29, 2013, and to reinstate Count II of the complaints, claiming that no consents were validly given by Series B or Series C holders. Impac filed an opposition memorandum and plaintiffs filed a reply memorandum. Impac's Motion and plaintiffs' Cross-Motion for Summary Judgment on Count I were argued by Camac's counsel and plaintiffs' Motion to reinstate Count II was argued by Timm's then-counsel,[3] on June 12, 2015.

19. On December 29, 2017, the Court issued a Memorandum Opinion and Order ruling on some of the outstanding Motions. The Court granted Plaintiffs' Cross-Motion for Summary Judgment and denied Impac's Motion for Summary Judgment and held that the voting rights provision required Impac to obtain consent from holders of two-thirds of the Series B Preferred prior to amending the Series B Articles Supplementary and, because it failed to do so, the Series B Articles Supplementary were not validly amended. The Court also denied Plaintiffs' Motion to reinstate Count II.

20. Thereafter, the parties filed multiple papers addressing the remedies to be granted, as well as motions and requests by Timm to reconsider prior rulings. After considering these papers, and the argument of the parties, this Court entered a Memorandum Opinion and

[3] Timm had terminated the representation of his prior counsel on July 3, 2014.

Judgment Order on July 16, 2018, which Order was corrected by Order dated July 24, 2018.

21. In its July 16, 2018, Order, as corrected, the Court (a) declared that, with respect to the Series B Preferred stock, the 2009 amendments to the Articles Supplementary were not validly adopted and the Articles Supplementary adopted in 2004 remain in full force and effect, (b) entered judgment in favor of individual defendants on all claims asserted against them, (c) entered judgment in favor of Impac on the claims asserted in Counts II, III, and V of the Timm Complaint and in Counts II and III of the Camac Complaint, (d) ordered Impac to hold a special election in accordance with Section 6(b) of the Articles Supplementary, and (e) ordered that the Articles Supplementary required Impac to pay dividends on Series B shares for the second, third, and fourth quarters of 2009. The Court resolved all issues with the exception of (a) a determination of which Series B stockholders would receive the three quarters of dividends, (b) what, if any, attorneys' fees would be awarded, and (c) the certification of a class. The Court ruled that all other issues in the case had been decided and entered a final judgment on those issues.

22. Impac filed an appeal from the Court's decision and Timm filed a cross-appeal. The Court of Special Appeals affirmed this Court's orders. Impac petitioned to the Court of Appeals for a writ of *certiorari*, which was granted. The Court of Appeals then affirmed this Court's orders.

23. Camac filed a Motion to Certify Class, Appoint Class Representative and Lead Counsel, Preliminarily Determine Right to Receive Dividends, and Set Final Judgment Hearing

("Camac Class Motion"). Timm filed _____. All parties responded to each motion and a hearing was held and the Camac Class Motion was granted.

SUMMARY OF THE TERMS OF THE CLASS ORDER

24. The Order Certifying a Class and Setting Further Proceedings dated _____, 2022 (the "Class Certification Order"), has been filed with the Court and is available for your inspection as discussed below under the heading, "INQUIRIES." The following is only a summary of its terms.

    a. In accordance with the terms of the Class Certification Order, the Court has certified the Action as a non-opt-out class action, meaning that class members will be bound by the final judgment entered in the Action.

    b. The Class Certification Order certified the Action as a class action pursuant to Maryland Rule 2-231(c)(2), on behalf of a class consisting of any person or entity who held, purchased or otherwise acquired Series B Preferred Stock of Impac Mortgage Holdings, Inc. from the close of the tender offer on June 29, 2009 until the date of the Class Certification Order (the "Class"). The Class Certification Order also designated Camac as the Class Representative and designated Camac's counsel, Tydings & Rosenberg LLP, John B. Isbister and Daniel S. Katz, as Lead Counsel.

    c. The Court has scheduled a hearing on _____ to consider and enter a Final Judgment Order (Exhibit A to the Class Certification Order) that would require Impac, within 10 days after entry of that Order, to declare and set apart a sum sufficient for payment of Series B Preferred Stock dividends at 9.375% interest for the quarters ending June 30, 2009, September 30, 2009, and December 31,

2009 ["Series B Dividends"] and, within 10 days thereafter, to pay the Series B Dividends to those holders of Series B stock as of the date on which Impac declares and sets apart a sum sufficient for payment of those dividends, subject to any award of counsel fees to be determined and withheld and paid from said payments. If the Final Judgment Order is entered, not all members of the class will be entitled to receive the Series B Dividends.

d. The Court has preliminarily determined, as set forth in the proposed Final Judgment Order, that the Series B Dividends should be payable to the holders of Series B Preferred Stock as of the date on which Impac declares and sets apart a sum sufficient for payment of those dividends. Nevertheless, class members may disagree, and they are free to comment. Based on the input of the parties and any members of the Class who wish to comment, the Court will finally determine the appropriate recipients following the hearing. See THE HEARING, below.

e. Also at the Hearing, the Court will consider Lead Counsel's application for attorneys' fees and litigation expenses. Lead Counsel have advised the Court that they intend to apply for an award of attorneys' fees and expenses in an amount not to exceed $2,800,000. Lead Counsel will seek an order that provides that any award of fees and expenses be paid from the common fund that they obtained for the Class in this litigation—specifically, they will seek an award of reimbursement of expenses and a portion (not to exceed 33 1/3%) of any and all of the Series B Dividends as described in subparagraphs c and d above, as well as from any future payment of dividends or distributions of property in lieu of or attributable to the payment of dividends to Series B shareholders that are paid or

distributed until the fee awarded by the Court has been paid in full. Both the amount of any attorneys' fee and expenses to be awarded to Lead Counsel and the method of payment will be determined by the Court at the Final Judgment Hearing.

THE EFFECT OF THE FINAL JUDGMENT ON YOUR RIGHTS

25. If the Court enters the Final Judgment Order (Exhibit A to the Class Certification Order), then Impac will be required to pay the Series B Dividends, as discussed in paragraph 24 above (and Section A of the Final Judgment Order). Depending on the Court's decision on the right to, and amount and method of payment of attorneys' fees, the amount of the Series B Dividends received by members of the Class who, as determined by the Court, are entitled to receive them, may be subject to an award of attorneys' fees that would be withheld from the Series B Dividends and paid to Lead Counsel, as may subsequent payments or distributions to members of the Class. The Final Judgment Order shall be binding on all members of the Class, including those who were not holders as of the date determined by the Court to be entitled to the Series B Dividends, and is binding on the successors and assigns of all members of the Class.

THE HEARING

26. As set forth above, the Court has scheduled a Hearing, which will be held on _____, 2022, at _____, in the Circuit Court for Baltimore City, 111 N. Calvert Street, Courtroom ___, Baltimore, MD 21202, to determine whether the Final Judgment Order, substantially in the form of Exhibit A to the Class Certification Order, should be entered, and whether the request by Lead Counsel for an award of attorneys'

fees and expenses should be granted and, if so, the amount of fees and expenses and method of payment.

27. It is not necessary for any member of the Class, or any other shareholder of Impac, to appear at the hearing. The Class will be represented at the hearing by Lead Counsel, John B. Isbister and Daniel S. Katz of Tydings & Rosenberg LLP, or their successor(s).

28. Any Class member may appear at the hearing, in person or by counsel, and show cause why the Final Judgment Order should or should not be entered, why the Series B Dividends should or should not be paid to holders of Series B Preferred Stock as of the date on which Impac declares and sets apart a sum sufficient for payment of the Series B Dividends, why an award of attorneys' fees and expenses to Lead Counsel or their successor(s) should or should not be granted, as requested; provided however, that no member of the Class shall be heard or entitled to contest the approval of the terms and conditions of the proposed Final Judgment, or the requested attorneys' fees or expenses, without permission of the Court, unless: On or before thirty (30) calendar days prior to the hearing, such Class member files with the Court and serves, by hand delivery or first class mail, upon counsel listed below: (i) a written notice of intention to appear; (ii) a statement submitted under penalty of perjury of the number of shares of Impac Series B Preferred stock held by such person, including the date(s) of acquisition and disposition of any such stock, and any and all supporting documents relating thereto; (iii) a statement of such person's objections to the designation of the subset of class members to whom payment of the Series B Dividends shall be made pursuant to Section A of the Final Judgment Order or the application for award of fees and expenses to Lead Counsel pursuant to Section B of the Final Judgment Order; and (iv) the grounds for such

objections and the reasons that such person desires to appear and be heard, as well as all documents or writings such person desires the Court to consider, upon:

Tydings & Rosenberg LLP
John B. Isbister, Esq.
Daniel S. Katz, Esq.
1 East Pratt St., Suite 901
Baltimore, MD 21202
Counsel for Plaintiff Camac

Troutman Pepper
Pamela S. Palmer, Esq.
350 South Grand Avenue
Two California Plaza, Suite 3400
Los Angeles, CA 90071-3427
Co-counsel for Defendant

Venable LLP
G. Stewart Webb, Esq.
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
Co-counsel for Defendant

and file said notice, statement of ownership, objections, papers and briefs with the Clerk, Circuit Court for Baltimore City, Maryland, 111 N. Calvert Street, Baltimore, MD 21202.

29. Any member of the Class who does not make his, her or its objection in the manner provided above shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the Final Judgment Order, or the award of attorneys' fees and expenses, or any other relevant matters unless otherwise ordered by the Court, and shall also be foreclosed from appealing from any judgment or order entered in the Action.

ATTORNEYS' FEES

30. Lead Counsel have not received any payment for their services in pursuing the claims asserted in the Action, nor have they been compensated for their litigation expenses. Lead

Counsel intends to move the Court, no later than 60 days before the Final Judgment Order, for an award of attorneys' fees and the reimbursement of expenses as described in paragraph 24.e. above. Lead Counsel will not seek attorneys' fees and expenses other than the amount approved by the Court.

INQUIRIES

31. For a more detailed statement of the matters involved in the proposed Final Judgment Order, you are referred to the pleadings, and to all other papers and documents filed with the Court in the Action, which may be inspected during normal business hours at the Circuit Court for Baltimore City, 111 N. Calvert Street, Baltimore, MD 21202.

SHOULD YOU HAVE ANY QUESTIONS CONCERNING THIS NOTICE, THIS ACTION, THE FINAL JUDGMENT ORDER OR THE HEARING, YOU SHOULD RAISE THEM WITH YOUR OWN COUNSEL OR DIRECT THEM TO PLAINTIFF'S COUNSEL, JOHN B. ISBISTER, DANIEL S. KATZ, OR TYDINGS & ROSENBERG LLP, IN THIS ACTION, AT THE ADDRESS SET FORTH ABOVE. PLEASE DO NOT CONTACT THE CLERK OF THE COURT.

BY ORDER OF THE COURT

Dated: _____

_____
Judge, Circuit Court for Baltimore City