IN THE CIRCUIT COURT FOR BALTIMORE CITY

CURTIS J. TIMM, on behalf of himself and all persons similarly situated, Plaintiff, Camac Fund LP, on behalf of itself and all persons similarly situated, Intervener Plaintiff, v. IMPAC MORTGAGE HOLDINGS, INC., Defendant.	**CASE NO. 24-c-11-008391** **IMPAC MORTGAGE HOLDING'S RESPONDING POSITION REGARDING PLAINTIFFS' RESPECTIVE MOTIONS FOR CLASS CERTIFICATION AND OTHER RELIEF** Hearing: February 18, 2022 Time: 2:00 p.m. EST Judge: Hon. Lawrence P. Fletcher-Hill

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I. INTRODUCTION

This brief presents the position of Impac Mortgage Holdings, Inc. ("Impac") in response to the Motions of Plaintiffs Camac Fund LLC ("Camac") and Curtis Timm ("Timm") filed on December 17, 2021 in support of Class Certification and other relief.

Class Certification

Impac concurs in the positions taken by Plaintiff Camac. In summary, the Circuit Court should preliminarily certify a non-opt out class of all Series B Preferred stockholders ("Series B holders") since June 30, 2009 pursuant to Maryland Rule 2-231(c)(2). Notice of two matters should be given to the class:

First, Camac and Impac seek a preliminary determination that current Series B holders—as of a record date to be set after the final class certification hearing—are entitled to the three quarters of dividends, as set forth in the July 16, 2018 Partial Final Judgment ("2009 Dividends"). Dk. 132/2 (7/16/18 Judgment Order, docketed 7/17/18). Those 2009 Dividends arise out of Impac's repurchase of shares of preferred stock in October 2009 ("2009 Repurchase"). They are the final, adjudicated remedy on Plaintiffs' Count IV for breach of the Preferred B and Preferred C 2004 Articles Supplementary ("2004 Articles"), alleging failure to pay those 2009 Dividends at the time of the 2009 Repurchase. The Circuit Court did not determine, however, what group of stockholders are entitled to receive those dividends (*i.e.*, did not identify a judgment creditor), nor did it establish a timetable for Impac's Board of Directors to set a record date fixing the stockholders entitled to be paid dividends.

Second, Camac and Plaintiff Timm each intend to seek attorney's fees as a deduction from the 2009 Dividends to be paid, which is the only "common fund" for recovery in this case.

If any current or former stockholders object on either of these outstanding matters, they should be given an opportunity to be heard before final judgment is entered. Final judgment should address the sole remaining issues of which stockholders are entitled to the 2009 Dividends and any award of attorney's fees. Impac also concurs with the proposed class notice plan advanced by Camac and will cooperate with it.

Impac opposes Timm's proposed class definition on two grounds.

First, it would exclude Impac-related Series B holders. Yet, all Series B holders are necessarily members of any class under Rule 2-231(c)(2). All are bound by the declaratory judgment reinstating the 2004 Series B Articles. Timm conceded this point in 2015 in prior briefing on class certification and also in his opening brief here. Dk. 93/0 (2/27/15 Motion for Class Cert. at 1); Dk. 165/0 (Timm's Motion for Class Certification and Other Relief ("Timm Motion") at 9, 13-16).

Second, Timm's proposed class definition also fails to include former stockholders on and after June 29, 2009. However, *all* current and former holders are bound by the declaratory and injunctive orders in this case and should be included in the class definition. Timm's prior briefing on class certification in 2015 agreed with the broader definition. Dk. 93/0 (2/27/15 Motion for Class Cert. at 1).

Impac also opposes Timm's appointment as a class representative or as class legal counsel. As discussed in Part III.A.2 below, he is not suitable for either role.

Other Issues Raised by Timm

As for the two other issues raised by Timm, Impac opposes his demand for an order directing Impac to pay all accrued dividends since 2009 and prejudgment interest. Dk. 165/0 (Timm Motion at 17-20). Both of these demands are barred by *res judicata* under established Maryland law. The time to seek these remedies on the claims made and finally adjudicated in this case has long-passed.

In summary, Timm did not allege any theory that Impac is obligated to pay all accrued dividends in his Complaint and the parties took no discovery on it. He only began demanding all accrued dividends as "damages" after summary judgment was granted in Plaintiffs' favor on the Series B voting rights in December 2017. Dk. 94/7 (12/29/17 Mem. Op.). The Circuit Court denied his repeated demands, and incorporated its ruling in the July 16, 2018 Partial Final Judgment from which the parties appealed. Dk. 132/2 (7/16/18 Judgment Order, docketed 7/17/18). Timm did not effectively appeal those denials, but nonetheless demanded immediate

payment of accrued dividends on appeal, to the confusion of the Court of Special Appeals ("CSA"). The CSA affirmed the Circuit Court's judgment on all appealed claims. Timm did not pursue a writ seeking further review in the Maryland Court of Appeals. Thus, his claim for all accrued dividends has been extinguished by final judgment and is barred by *res judicata*.

Res Judicata likewise bars Timm's current claim for prejudgment interest. Timm did not seek pre-judgment interest in his Complaint or in briefing remedies before the Circuit Court in 2018, or even on appeal. Under Maryland law, discussed below, Timm is not entitled to prejudgment interest as a matter of right and it would be an abuse of discretion to award it.

Further, both of Timm's new remedy theories would be unavailable, even if they had been timely raised, based on the express terms of the Series B 2004 Articles. Under those Articles, any decision to declare and set aside or issue dividends is a matter of business judgment for Impac's Board of Directors. Timm Motion, Ex. A (2004 Articles ¶ 3(d)). The Articles further expressly provide that *no* interest accrues on dividends that are in arrears. *Id.* ¶ 3(e).

Indeed, the 2004 Articles contractually provide the only remedy available to the Series B holders where, as here, the Board of Directors does not declare dividends for at least six consecutive quarters: *i.e.*, the Series B holders are entitled to demand a special meeting in order elect two directors to the Board. *Id.* ¶ 6(b). Since October 2021, Impac has enabled three special meetings for the Series B to make this election, but the Series B holders have thus far failed to achieve a quorum.[1] Impac has fulfilled its contractual obligations to the Series B holders and has no obligation to pay *all* accrued dividends or *any* interest.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

Timm filed this action in December 2011, challenging Impac's tender offer and solicitation of consents from its Series B and Series C Preferred stockholders, which closed on June 29, 2009. Dk. 1/0 (12/7/11 Timm Compl.). For background, Impac was in hard times in the

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[1] *See* Impac SEC Form 8-K filed Jan. 7, 2022 reporting the third special meeting. www.sec.gov/ix?doc=/Archives/edgar/data/1000298/000110465922002292/tm222131d1_8k.htm

wake of the 2008 financial crisis, which started in the mortgage banking industry and spread throughout the U.S. and global economy. Impac was at the leading edge of the crisis. Its stock had been delisted from the New York Stock Exchange, and it had stopped paying dividends in order to conserve cash. *See* Dk.19/1 (1/28/13 Mem Op. at 2-3). Impac sought to eliminate an overhanging obligation of more than $14 million annually on its outstanding 2004 Preferred Series B and C stock, which was accruing interest at a rate in excess of 9%.

June 2009 Tender Offer and Solicitation

By 2009, the delisted Series B and C Preferred stock was trading over-the-counter at about $1.20 per share for the Series B and $0.50-$0.60 per share for the Series C, with no prospect of dividends for the foreseeable future. *Id.* at 2. Impac offered its preferred stockholders a way out, proposing that it would purchase all tendered shares for payment of the accrued dividends (two quarters) plus a base price—subject to a condition precedent that all tendering stockholders also consent to amendment of the Articles Supplementary. *Id.* at 3-4, 21-23 (describing the condition precedent, which is an established type of private restructuring known as an "exit consent"). Impac's condition precedent to purchase the tendered stock was that holders of two-thirds of the Series B and Series C Preferred, voting together as a class of "Parity Preferred," consent to specified amendments of the Series B and Series C Articles. *Id.* The amendments would, among other things, eliminate cumulative dividends.

Impac's offer was accepted by holders of more than two-thirds of the Series B and C Preferred, counted collectively as a class of Parity Preferred. Holders of a few more than two-thirds of the Series C Preferred and holders of few less than two-thirds of the Series B Preferred tendered and consented. On the basis of the combined consents, Impac amended the Series B and Series C Articles and then bought the tendered stock. *Id.*; *see also* Dk. 94/7 (12/29/17 Mem. Op. at 4). The close of this transaction left 665,592 Series B Preferred and 1,405,086 Series C Preferred outstanding and, thereafter, subject to the terms of the Amended 2009 Articles (or so Impac believed).

October 21, 2009 Stock Repurchase

In October 2009, a little more than three months after the tender offer and consent solicitation closed, Impac responded to a request by a stockholder to repurchase about 21,042 Preferred shares. *See* Dk. 132/0 (7/16/18 Mem Op. at 5-6, 8, docketed 7/17/18). Under the 2004 Articles, Impac would have been required to declare and set aside or pay all accumulated dividends "for past dividend periods and the then current dividend period" before making the purchase. Dk. 165/0 (Timm Motion, Ex. A (2004 Articles ¶ 3(d))). There being no such restriction under the Amended 2009 Articles, Impac purchased the stock on October 21, 2009 without paying any dividends. Dk. 132/0 (7/16/18 Mem. Op. at 8, docketed 7/17/18).

December 2011 Timm Complaint and Claims

In December 2011, Timm, through his then-counsel, filed this lawsuit as a putative class action on behalf of all holders of Series B and Series C Preferred who did not tender their stock in the 2009 transaction. Dk.1/0 (12/7/11 Timm Complaint). Timm named Impac, its Board of Directors and executive management team as defendants and asserted six causes of action:

Count I asserted that Impac breached the Series B 2004 Articles, alleging that Impac was required and failed to obtain the consent of holders of two-thirds the Series B, voting separately from holders of the Series C in order to amend the Series B Articles.

Count II asserted that Impac breached both the Series B and Series C 2004 Articles, alleging that the mechanical process of the tender and consent solicitation was defective, such that there actually were "no consents" and Impac improperly voted the shares itself.

Count III asserted that the individual defendants breached their fiduciary duties, alleging that the 2009 solicitation was illegal "vote buying," unduly coercive and breached the covenant of good faith and fair dealing.

Count IV asserted that Impac breached the 2004 Articles by engaging in the 2009 Repurchase without paying two quarters of accumulated dividends under the 2004 Articles.

Count V asserted a claim for punitive damages against all defendants.

Count VI requested an order that Impac convene a special meeting under the 2004 Articles for the holders of Series B and Series C Preferred stock to elect two directors to Impac's Board of Directors, which had not declared dividends in at least six quarters.

Timm's ***Prayer for Relief*** sought equitable remedies in the form of declarations and injunctions. As a remedy for the 2009 Repurchase, Timm sought a declaration that Impac be required to pay dividends "for the third and fourth quarters of 2009." Dk. 1/0 (12/7/11 Timm Compl., Prayer, ¶ D). He sought compensatory damages *only* "in the event that the declaratory and injunctive relief sought in this action cannot be granted." *Id.* ¶ E. *Timm did not seek payment of accumulated dividends or interest as a remedy for the 2009 Repurchase or any other claim.*

In March 2014, Camac intervened and adopted exactly the same complaint filed by Timm, except omitting Count V for punitive damages. Dk. _ (3/15/14 Camac Complaint).

January 2013 Memorandum Opinion and Order

Dismissing Counts II and III

Meanwhile, Impac had moved to dismiss Timm's complaint for failure to state a claim. Given the parties' mutual extensive reliance on the tender offer and consent solicitation materials and other public filings, the Circuit Court converted the motion to one for summary judgment and issued its Memorandum Opinion and Order on January 28, 2013. Dk. 19/1 (1/28/13 Mem. Op., docketed 1/29/13). As elucidated in a 41-page Opinion, the Circuit Court dismissed Count II, finding no mechanical flaw in the tender and consent process, which was laid-out in the materials on which Timm's claim relied entirely, and dismissed Count III for breach of fiduciary duty. *Id.* at 18-40. With that decision, all individual defendants were dismissed from the case. All claims on behalf of Series C holders also were dismissed. The Series C 2009 Amended Articles, which had been approved by holders of more than two-thirds of the Series C Preferred, remained effective, thereby eliminating the Series C cumulative dividends and certain other rights. The Circuit Court also dismissed the punitive damage claim, Count V. *Id.* at 40-41.

The *only* remaining claims in the case hinged entirely on the outcome of Count I—*i.e.*, interpretation of the Series B voting rights language in the 2004 Articles and, specifically,

whether amendment of Series B 2004 Articles required a separate consent by holders of two-thirds of the Series B Preferred stock. The Circuit Court found the voting rights language "ambiguous" and called for extrinsic evidence in aid of interpretation. *Id.* at 18. Count IV remained as a potential remedy in favor of the Series B holders based on Impac's failure to pay two quarters of dividends in connection with the 2009 Repurchase. Count VI also remained as a potential remedy in favor of the Series B holders to elect two directors based on the failure of Impac's Board of Directors to declare dividends for at least six quarters. *Id.* at 40.

After the January 2013 decision winnowed the case, Impac moved for summary judgment on the Series B voting rights interpretation claim, supported by affidavits. Dk.39/0 (2/26/14 Impac MSJ, docketed 2/28/14). The parties proceeded to discovery on that sole remaining issue. *The parties took no discovery on any "damages" theory, including any theory that Impac was obligated to pay all accrued, unpaid dividends.* Notably, Count III, seeking compensatory damages for breach of fiduciary duty, had been dismissed.

2015 – 2017 Motions for Summary Judgment and Class Certification

After the conclusion of discovery, the parties proceeded with dispositive and class certification motions. Plaintiffs cross-moved for summary judgment on the Series B voting rights interpretation. Plaintiffs also moved to reinstate Count II (on Timm's initiative), which Plaintiffs had pursued in several prior unsuccessful motions and strategies.[2] The Circuit Court heard argument in June 2015 and took these motions under submission.

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[2] To recap briefly, the Court denied Timm's first motion to reinstate Counts II and III in a 14-page Memorandum Opinion and Order dated November 27, 2013. Dk. 32/3 (11/27/13 Mem. Op., docketed 12/6/13). Plaintiffs, led by Timm, continued, however, to seek discovery on Count II. The Circuit Court granted Impac's Motion for a Protective Order on July 24, 2014, limiting discovery from AmStock, Impac's transfer agent. Dk. 44/2 (7/24/14 Motion, docketed 8/4/14). In connection with Timm's push for discovery on Count II, Timm's counsel withdrew from the representation. Dk. 45/0 (7/3/14 Mot. to Strike Attorneys' Appearance). Timm's Class Certification Motion makes a cryptic reference to AmStock and to his displeasure with Impac's counsel. Dk. 165/0 (12/17/21 Timm Motion at 18, n. 4). Timm's theory was that AmStock bore witness to his Count II theory that there had been "no" consents by any Series B or C holders, a position in which he became more entrenched when discovery showed that all of Impac's preferred stock was held electronically in "street name" through brokers and intermediaries. On

Also in 2015, Plaintiffs jointly moved for certification of a non-opt out class of "all owners of Series B Preferred stock of Impac Mortgage Holdings Inc. on or after June 29, 2009 (excluding the Defendants, and current or former officers, directors, partners and employees ...." Dk.93/0 (2/27/15 Motion at 1). Based on Impac's Qualified Partial Opposition (Dk. 93/1 (3/31/15 Opp. at 11-12)), Plaintiffs modified their proposed class definition to remove the exclusion of Impac-related stockholders. Dk. 93/2 (4/22/15 Reply). Plaintiffs also agreed with Impac on the need for a ruling as to what group of stockholders would be entitled to the alleged two quarters of 2009 Dividends (if Plaintiffs were to prevail in reinstating the 2004 Articles). *Id.* at 2. The Circuit Court took class certification under submission without hearing argument.

On December 29, 2017, the Circuit Court issued its Memorandum Opinion resolving the cross-motions for summary judgment and Plaintiffs' Motion for Revision to reinstate Count II. Dk. 94/7 (12/29/17 Motion). Finding that the voting rights language was "ambiguous," the Circuit Court analyzed the extrinsic evidence and held for Plaintiffs that the Series B holders were entitled to a separate two-thirds vote on Impac's 2009 proposal to amend the Series B 2004 Articles. The Circuit Court found that the 2009 Amendments were invalid and reinstated the Series B 2004 Articles. *Id.* at 44. The Circuit Court denied Plaintiffs' motion to reinstate Count II and granted Impac's Motion to Strike Plaintiffs' interlineation of the Complaints to add a new version of Count II. *Id.*at 59-60; *see* note 2, *supra.*

The proceedings then moved into a new phase in which the Circuit Court directed the parties to brief *all* outstanding issues, including remedies. *See* Dk. 124/0 (2/28/18 Order, docketed 3/1/18). This process culminated in the July 16, 2018 Judgment Order (as amended July 24, 2018), entering Partial Final Judgment on Counts I, II, III and V in accordance with

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April 1, 2015, Plaintiffs moved to reinstate Count II based on AmStock's enigmatic response to a subpoena, and unilaterally attempted to interlineate the Complaint to amend it to add in a version of Count II as new Count VII. Dk. 109/0 (4/15/16 Motion to Strike Amended Complaint). In its Memorandum Opinion of December 29, 2017, the Circuit Court granted Impac's Motion to Strike the interlineation and denied Plaintiffs' Motion for Revision to revive Count II. Dk. 94/7 (12/29/17 Mem. Op. at 44-61).

Rule 2-602(b) for immediate appeal. Dk. 132/2 (7/16/18 Judgment Order, docketed 07/17/18), Dk. 132/4 (7/24/18 Order correcting clerical error, docketed 7/26/18).

For purposes of this Circuit Court's analysis of *res judicata* collateral estoppel, discussed below, we recount those 2018 proceedings, where Timm raised *for the first time* a demand for "damages" and all accrued dividends. Timm had dismissed his second legal counsel in mid-2017, and he appeared *pro se* throughout the remedies briefing phase in 2018 and the entire appellate process. Dk. 113/1 (5/12/17 Order striking counsel, docketed 5/15/17).

Timm's 2018 Demands for Accumulated Dividends

In an untitled motion dated February 26, 2018, Timm, for the first time, demanded that a "jury trial" be set to determine damages on the Series B shares—repeatedly pointing to all accrued, unpaid dividends since 2009—and declaring that Defendants had "confiscated the dividends" and "falsely and criminally claimed the Pfd B shares were legally amended making them worthless." Dk. 126/0 (2/26/18 Untitled Motion at 9, 15-19, docketed 3/12/18). Timm argued again for reinstatement of Counts II and III, albeit on a previously unalleged securities fraud theory, and purported to withdraw the 2015 class certification motion. *Id.* at 2-5, 8-10.

Following a telephonic status conference (during which it became apparent that Timm had not filed the February 26 Motion), the Circuit Court issued a scheduling order instructing him to file it and directing the parties to address "the issues of relief and any related issues on or before March 16," as well as respond to Timm's Motion and file any replies by March 28 (later adjusted to March 30) for a hearing on April 16. Dk. 124/0 (2/28/18 Order, docketed 3/1/18). [3]

On March 16, in opposition to Timm's February 26 Motion, Camac challenged Timm's purported attempt to withdraw the class certification motion and also rebutted the basis for his demand for a jury trial on damages, stating as follows:

> In fact, what counsel discussed with Timm was that (a) *both Complaints* ***sought damages only in the event that declaratory and injunctive relief could not be***

[3] On March 16, Impac and Camac responded to Timm's untitled motion and submitted briefs on remedies, and Timm filed a new brief. Dks.126/0 – 126/10.

> *granted* and (b) with the exception of dividends that were owed as a result of Impac's purchase of preferred stock [in 2009]. *Consequently, as much as Camac would like to recover damages ... on the present state of the record the existing claims have not sought damages.*

Dk. 126/1 (3/16/18 Camac Opp. at 3, docketed 3/16/18) (emphasis added).

Impac's March 16 brief likewise addressed Timm's shift in position on class certification (discussed in Part III.A.1, below), and pointed out that his call for reinstatement of Count III as a basis for compensatory damages (and of Count VI for punitive damages) amounted to an unalleged securities fraud claim, which could only have pursued in federal court and would be barred by the federal five-year statute of repose. Dks. 126/2-3 (3/16/18 Impac Opp. at 8-10).

In the March 16 briefs, both Impac and Camac addressed the issue of dividends based on the 2009 Repurchase. Impac advanced avoidance theories or, alternatively, pro ration of the fourth quarter 2009 dividend. Dks. 126/2-3 (3/16/18 Impac Opp. to Timm's Motion, at 8-10). Camac argued that Impac was liable for a full three quarters of 2009 dividends (up one from the two quarters demanded in the Complaints). Dk. 126/1 at 3 (3/16/18 Camac Opp. to Timm's Motion, docketed 3/16/18). Timm's March 16 brief, on the other hand, argued again for reinstatement of Count II and Count III, demanded a "jury trial on damages," and "*an order requiring Impac to immediately pay all accrued and unpaid dividends and immediately commence paying the quarterly dividends*" to the Series B holders. Dk. 128/0 (3/16/18 Memorandum of Law at 6-7 ¶¶ 4, 8) (emphasis added).

The March 30 briefs by Camac and Impac continued to focus on final judgment process, class certification and the 2009 dividends. Dks. 126/0 – 126/10. Timm, on the other hand, continued to focus on reinstatement of Counts II and III, demand for a trial on damages (based on unalleged theories of fraud) and demand that Impac "*immediately commence paying the quarterly dividends*" and pay "*all accrued but unpaid past dividends.*" Dk. 126/7 (3/30/18 Response to Defendants' and Camac Brief at 12 & 13, docketed 4/3/18) (emphasis added).

Following a hearing on April 16, the Circuit Court issued its Judgment Order on July 16 (corrected for clerical error on July 24) and Memorandum Opinion. Dk. 132/0 (7/16/18 Mem. Op., docketed 7/17/18); Dk.132/2 (7/16/18 Order, docketed 7/17/18); Dk. 132/4 (7/24/18 Correction of Order, docketed 7/26/18). The Circuit Court entered Partial Final Judgment for immediate appeal on Counts I, II and III, and, further "*adjudged, ordered and decreed that Section 3(d) of the Articles Supplementary requires" that Impac's dividend obligation based on the 2009 stock repurchase was for three full quarters, ending June 30, September 30 and December 31, 2009*. The Circuit Court did not resolve the question of to whom the dividends would be paid and did not order class certification, expressly reserving those two issues pending appeal. Dk. 132/0 (7/16/18 Mem. Op. at 11-12, docketed 7/17/18).

Importantly, the Circuit Court acknowledged Timm's insistent demands for payment of *all* accrued dividends, observing: "He argues that Impac should be required to pay accumulated dividends, without explaining the basis for this demand." *Id.* at 4. By separate Order of July 16, the Circuit Court expressly denied Timm's February 26 Motion, where Timm first demanded payment of the accrued dividends and a jury trial on damages. Dk.132/2 (7/16/18 Order, docketed 7/17/18). Timm subsequently filed a letter request to the Circuit Court asking for an appealable judgment granting or denying his request for an order that Impac "*immediately commence payment of all accumulated dividends*." Dk. 134/0 (8/4/18 Correspondence, docketed 8/8/18) (emphasis added). By Order of September 5, 2018, the Circuit Court denied Timm's letter motion, stating: "In the court's view, the Judgment Order disposes of all claims asserted by Timm, and there are no outstanding claims. Accordingly, this letter request is treated as a motion to revise judgment and DENIED." Dk. 134/1 (9/5/18 Order, docketed 9/7/18).

This issue of accrued dividends received two more airings before the parties reached the Court of Special Appeals. In response to Impac's motion to stay the special election of two directors pending appeal (Dk. 135/0 (8/9/18 Motion to Stay)), Camac requested a bond for $15 million to cover all accrued dividends. Dk. 135/1 (8/21/18 Camac Opp.). Timm also filed an opposition mentioning dividends. Dk. 135/2 (8/21/18 Timm Opp.). Impac argued in reply that

there was no bonding requirement, as there was no judgment creditor for the three quarters of dividends, nor any obligation to pay accumulated dividends, either by court order or under the terms of the 2004 Articles. Dk. 135/3 (8/24/18 Reply at 2-3). On September 5, the Court granted Impac's motion to stay and declined to impose a bond. Dk. 135/5 (9/5/18 Order at 4.)

Timm aired the issue one more time in a separate Motion to Require Bond, which rehashed his arguments that Impac was obligated to pay all unpaid, accumulated dividends. Dk. 145/0 (10/2/18 Motion, docketed 10/9/18). Impac opposed. Dk. 145/1 (10/19/18 Impac Opposition). Timm replied. Dk. 145/4 (10/23/18 Reply, docketed 11/2/18). The Circuit Court denied Timm's motion. Dk. 145/2 (10/29/18 Order, docketed 10/30/18).

This concluded the proceedings in the Circuit Court.

Timm's Cross-Appeal to the Court of Special Appeals ("CSA")

Impac appealed the summary judgment ruling on Count I to the CSA, arguing that material issues of fact precluded summary adjudication. Impac did not appeal the portion of the Partial Final Judgment on Count IV that the 2009 Repurchase triggered an obligation to pay three quarters of dividends. The CSA affirmed the Circuit Court's judgment on Count I, albeit on a different ground, finding that the Series B voting rights provision "unambiguously" called for approval of the 2009 proposed amendments by holders of two-thirds of the Series B Preferred. *Impac Mortgage Holdings, Inc. v. Timm*, 245 Md. App. 84, 108-115 (2018).

As for Timm's cross-appeal, the CSA called out his failure to comply with Maryland Rule 8-504(a)(3) requiring a statement of the question presented and the legal propositions and facts at issue. 245 Md. App. 84, at *103 & n.15. The CSA soldiered on, however, offering an extended analysis of the issues presented by Timm for appeal "[a]s best we can discern," which consisted of challenges to the Circuit Court's summary judgment in favor of Impac on Count II, denial of Plaintiffs' Motion for Revision of Count II, and grant of Impac's Motion to Strike the attempted interlineation of the Complaints. *Id.* at 103-04. The CSA did not find any appeal from Circuit Court's judgment on Count IV that Impac owed three quarters of dividends a remedy for the 2009 Repurchase. *See id.* Other than finding the Series B voting rights language to be

unambiguous (which led to the same result on Count I), the CSA "affirm[ed] the judgment [of the Circuit Court] in all other respects," necessarily including Count IV. *Id.* at 91, 102.

Timm's opening brief to the CSA, attached as Exhibit 1 hereto, focused primarily on his efforts to overturn the judgment on Count II. He argued that Impac had obtained "no" consents from any Series B or Series C stockholders, largely because there was no evidence of written consents, and Impac's depositary in the transaction (AmStock), had provided a confusing, later clarified, affidavit on its role. (The Circuit Court's December 29, 2017 Memorandum Opinion explained in detail why the Court did not reinstate Count II on this basis. Dk. 94/7 (12/29/17 Mem. Op. at 44-59), recounted in the CSA's decision, 245 Md. App. at 118-125).

The CSA affirmed dismissal of Counts II and III. 245 Md. App. 84, at *115-125. The CSA found that Timm had waived his challenge to the judgment on Counts II and III because he failed to present sufficient argument in his appellate briefs. *Id.* at 117 (Count II) and 125 (Count III). Nonetheless, the CSA aired Timm's arguments at considerable length in concluding that the Circuit Court did not err in its rulings. *Id.* at 115-125.

Timm also peppered his appellate briefs with references to his claim for accumulated dividends, but failed to direct the CSA to the Circuit Court's denials of these claims in 2018. *See* Exhibit 1 Timm's CSA Opening Brief at 1, 3, 12, 13, 15. Citing no authority, Timm simply declared in bold font that "Impac is required by law, and must immediately PAY IN CASH, the 'Preferred B' annual dividends on 665,000 shares that are in arrears. This is in excess of approximately $14.9 MILLION CASH." *Id.* at 3 (emphasis in original).

The CSA rejected "other" issues raised on appeal by Timm (claims for punitive damages, fraud and attorney's fees). *Id.* at *126. The CSA acknowledged Timm's assertion that Impac owed dividends accruing since 2009, but found no decision on point to review. *Id.* at *126 & n. 23. Thus, even if Timm had intended to appeal the Circuit Court's judgment on Count IV, he waived the appeal by failing to comply with Maryland Rule 8-504(a)(3) to make any such intention clear. He did not seek reconsideration of the CSA's decision, or seek any further writ of

review by the Maryland Court of Appeals. Accordingly, all decisions of the Circuit Court appealed by Timm were affirmed by the CSA and became final.

Impac, on the other hand, filed a Petition for Writ of Certiorari to the Maryland Court of Appeals seeking review of the Circuit Court's and CSA's decisions on Count I, the Series B voting rights. The Court of Appeals granted the Petition and, after briefing and argument, issued its decision, finding—contrary to the CSA— that the voting rights language was ambiguous. The Court of Appeals affirmed the Circuit Court's decision, however, on other grounds. *Impac Mortg. Holdings Inc. v. Timm*, 474 Md. 495 (2020). Thus, here and now on remand, the Circuit Court's Partial Final Judgment of July 18, 2018 stands affirmed in all respects.

III. ARGUMENT

A. Impac's Position Regarding Plaintiffs' Class Certification Motions

1. Impac Concurs with Camac's Proposed Certification under Rule 2-231(c)(2) of a Non-Opt Out Class of Series B Holders since June 30, 2009, Not Excluding Defendants

All parties agree that a non-opt out class should be certified under Rule 2-231(c)(2), which is suitable where, as here, a defendant "has acted 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." Impac concurs with Camac's proposed class definition, which is consistent with the definition proposed by Plaintiffs in 2015. Camac proposes: "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." Camac Cert. Opening at 7.

Impac objects to Timm's proposed class definition, however, because he would exclude all former stockholders as well as "Defendants and the current and former officers, directors, partners, and employees" of Impac. There is no rational basis for these exclusions. The preferred stock rights of Impac-affiliated Series B holders are governed by the same 2004 Articles as non-Impac-affiliated stockholders. The rights and interests of all Series B holders are in common. All are bound by the declarations and injunctions declaring the Series B voting rights and

determination of dividends due based on the 2009 Repurchase. All have the right to vote on election of Series B directors. There is no basis to exclude Impac-affiliated stockholders from the class definition, and to do so would be inconsistent with certification under Rule 2-231(c)(2). Both Timm and Camac agreed with these points in 2015, as Plaintiffs wrote:

> Impac notes that a (b)(2) [now (c)(2)] certification will bind all Preferred B shareholders to the same relief under Count I regarding the validity of the proposed amendments to the Articles Supplementary. *Plaintiffs agree, and propose that for purposes of any initial class notice, there be no exclusions from the class definition.*

Dk. 93/2 (4/22/15 Pl. Reply at 1) (emphasis added).

Impac also objects to Timm's proposal to exclude former stockholders from the class definition. They too are bound by the Circuit Court's rulings on Counts I and IV. There is no dispute, of course, that former stockholders have no right to elect directors under Count VI—they do not. With respect to Count IV, however, they are bound by any ruling that only *current* stockholders are entitled to the three quarters of 2009 Dividends. All parties agree that the right to dividends travels with transfer of the stock. *Wilcom v. Wilcom*, 502 A.2d. 1076, 1083 (Md. App. 1986) ("[T]he dividend belongs to him who is the owner at the time it is declared."). If any former Series B holder disagrees, however, they may be heard and will be bound, thereby avoiding any conflicting claims to the common fund of 2009 Dividends.

Impac further notes that there is no provision in Maryland law or the 2004 Articles that would allow Impac to declare and pay dividends as of a record date in the past. The 2004 Series B Articles provide only for payment of dividends when Impac's Board of Directors declares a dividend as of a future record date.[4] The Maryland Code similarly allows payment of dividends,

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[4] The 2004 Articles Supplementary, paragraph 3(a), state that dividends for Series B "shall be cumulative … and shall be payable quarterly in arrears on March 31, June 30, September 30, and December 31 of each year." Paragraph 3(a) further states that the record date "shall be the first day of the calendar month on which the applicable Dividend Payment Date falls or on such other date designated by the Board of Directors … that is not more than 60 nor less than 10 days

but only as of a future record date. MD. CODE ANN., CORPS. & ASSOC. § 2-511. Thus, here, any proposed payment of dividends to past owners could present a potential claim by current Series B holders. In concept, Impac is indifferent as to which stockholders would receive the 2009 Dividends, but not indifferent to a hypothetical dispute over allocation, or to being forced to undertake a burdensome allocation. Accordingly, the definition of the proposed class should reflect the full scope of potentially interested current and former Series B holders.

2. Timm Should Not be Appointed as a Class Representative and Cannot serve as *Pro Se* as Class Counsel

Impac objects to Timm's request for appointment as class representative and as class counsel on two grounds:[5]

First, Timm's legal counsel is unwilling to serve as class counsel and Timm himself, as a retired lawyer without a Maryland law license, is not qualified to serve as class counsel. Timm Cert. Opening at 12 & n. 2. Timm has identified no other lawyer for the class counsel role. He cannot serve unrepresented and he has expressed some hostility to Camac's counsel, as reflected in his *pro se* filings. *See, e.g.*, Dk. 126/0 (2/26/18 Motion at 11-16, docketed 3/12/18).

Second, relatedly, at this stage of the proceedings, cooperation among the parties on the way forward to finality is important. Given Timm's evident desire to bring forth new issues in this case and continue to litigate, as well as the divergence of views between Camac and Timm going back to 2015, Impac is concerned that putting Timm in the position of class representative with power over the direction of the final steps will lead unnecessarily to costly and burdensome extended proceedings. If he is not class representative, Timm still would be free, of course, to continue to weigh-in as a party and objector, if he wishes.

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prior to such Dividend Payment Date." These provisions provide only for a future record date for declaration of dividends.

[5] Impac's 2015 Qualified Opposition to Class Certification raised additional issues regarding Timm. His atypical views of important aspects of the case, and evident unwillingness to heed his counsel's advice remain concerns. Dk. 93/1 (3/31/15 Impac Qualified Opp. at 5-6).

Camac, on the other hand, has presented itself as a financially sophisticated party. Camac has the largest stake of any single holder in the Series B stock and works with established legal counsel at the Tydings & Rosenberg firm, which in the opinion of Impac's counsel, well-qualified to represent a class. Further, the Tydings firm led the issues on which the Series B holder prevailed--that is, the successful appeal of Count I regarding Series B voting rights and n obtaining a final judgment for three quarters of 2009 Dividends on Count IV.

3. Impac Concurs with Camac's Proposed Preliminary Class Certification Order, Preliminary Ruling on Entitlement to 2009 Dividends, Final Hearing Procedure and Proposed Notice Program

Impac concurs with Camac's proposal for resolution of the remaining issues. There should be a preliminary ruling as to whom the 2009 Dividends are owed, followed or accompanied by preliminary class certification of a non-opt out class of current and former Series B holders since June 29, 2009, followed by notice to the class and opportunity to be heard before final judgment on the remaining issue on distribution of the 2009 Dividends and Plaintiffs' motion for attorney's fees from the common fund.

As part of the notice program, Impac agrees that notice by publication is the best and most reasonable way to attempt to reach the former stockholders, the most relevant of whom would be anyone who owned stock in the second half of 2009 and later sold. There is no means to give direct notice to such persons because, based on the investigation of counsel, the relevant stockholder intermediaries do not typically maintain records older than seven years back.

4. The Cost of Class Notice Should be Paid by Plaintiffs

Plaintiffs and the common fund should bear the cost of providing notice to the class. Plaintiffs both acknowledge and agree on the general rule in Maryland—that "the cost and resultant task of effectuating class notification devolve on the plaintiff." *Anne Arundel Cty. v. Cambridge Commons*, 167 Md. App. 219, 233 (2005). Impac has no objection if Plaintiffs wish to defray that cost to the common fund. Indeed, Camac requests that expenses be paid out of the common fund. DK. 164/0 (12/17/21 Camac Cert. Opening at 28). Timm asks that Impac be ordered to pay the cost of class notice, but cites two cases that do not support the request. Dk.

165/0 (12/17/21 Timm Cert. Opening at 23). In *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 665, 690 (D. Md. 2013), the court ordered deduction of notice costs from the common fund, and in *Krell v. Prudential Ins. Co. of Am*, 148 F. 3d 283, 329 (3d Cir. 1988), the defendant agreed to pay the notice expenses pursuant to a settlement. Neither Plaintiff advances any authority for Impac to pay the notice cost.

Impac will of course cooperate with providing Plaintiffs' counsel and any class notice administrator with a list of known current record holders of Series B Preferred.

5. Timm's Request for Fees is Premature

Timm appears to make a premature motion for attorney's fees based on a common fund that does not exist and would include all dividends accrued since 2009. Dk. 165/0 (12/17/21 Timm Cert. Opening at 20-21). Plaintiffs should be directed to file their respective motions for fees after a preliminary ruling on class certification, including appointment of lead counsel, and ruling on which stockholders are entitled to the 2009 Dividends, so that a class notice may provide accurate information about the anticipated attorney's fee requests.

B. Timm's Demand for All Accrued Dividends is Barred by *Res Judicata* and Collateral Estoppel and Precluded by the 2004 Articles

For the first time, in these post-appeal proceedings, Timm raises an entirely new theory for a remedy for Impac's 2009 Repurchase (Count IV). He asserts—with no citation to authority—that payment of all accrued dividends to date is a "condition precedent" for a "valid" repurchase back in 2009. Dk. 165/0 (12/17/21 Timm Cert. Opening at 17). He concedes, however, that the repurchase is done, and cannot be unwound or rescinded,[6] and that at the time of the repurchase only three quarters of dividends were accrued. *Id.* He posits nonetheless that the repurchase "cannot be effective" until Impac sets aside a sum sufficient of payment of "all past dividends through the current dividend period." *Id.*

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[6] Issues of rescission and invalidity were aired at length in the 2018 remedies briefs by Camac and Impac and incorporated in the Memorandum Opinion supporting the Partial Final Judgment. *See* Dk. 132/0 (7/16/18 Mem Op. at 5-10, docketed 7/17/18).

This argument is a plain misreading of the 2004 Articles, which required payment of dividends for "all *past* dividend periods and *the then current dividend period*" – a phrase that has been finally adjudicated to mean the second, third and fourth quarters of 2009, when Impac made the October 21, 2009 Repurchase. *See* Dk. 165/0 (Timm Motion, Ex. A (2004 Articles ¶ 3(d)); Dk. 132/0 (7/16/18 Mem Op. at 9, docketed 7/17/18, affirmed on appeal). The Circuit Court analyzed three provisions of the 2004 Articles, each calling for calculation of dividends due upon different triggering events, and concluded that the relevant provision—here, paragraph 3(d)—required payment of "the entire quarter of dividends in which the triggering event occurred"—to wit, the fourth of 2009 when Impac made the repurchase. *Id.* Timm did not present any legal or factual basis for any error in this ruling on appeal to the CSA, nor further pursue reversal of this decision to the Maryland Court of Appeals. The Circuit Court's decision is final and binding.

Thus, Timm is barred by established Maryland law of *res judicata* and collateral estoppel from now attempting to litigate a new remedy for the 2009 Repurchase. R*es judicata* applies:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not...permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. . . . *[R]es judicata applies ...not only to the points upon which the court was required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation ...*"

Gonsalves. v. Bingel, 194 Md. App. 695, 704 (2010) (emphasis added), *quoting State v. Brown*, 64 Md. 199, 204 (1885); *Alvey v. Alvey*, 225 Md. 386, 391 (1961) (same quote, citing multiple case sources).

In *Gonsalves*, plaintiffs were sellers of real property who won a money judgment for breach of a purchase contract and recovered a promised deposit and interest. They were barred

by *res judicata* from recovering in a second action for additional contract damages after they sold the property for less money than the defendant had promised. 194 Md. App. at 701-03, 711. Finding that *res judicata* applied, the Circuit Court recounted the three basic elements, reported in numerous cases: (1) the second action involves the same parties, (2) presents the same underlying claim, and (3) is the subject of final judgment by a court of competent jurisdiction. *Id.* at 709.[7] Plaintiffs argued that they should not be barred because the court in the first action erroneously denied their motion for leave to amend to add the additional damages claim. *Id.* But the remedy for that error was *appeal*, not splitting their cause of action and remedies into a multiple proceedings on the same underlying transaction. *Id.* at 716-719.

Maryland courts have adopted the "transactional" approach under the Restatement (Second) of Judgments § 24 to analyze whether two claims are identical for purposes of the *res judicata* bar. *Kent County Board of Education v. Bilbrough*, 309 Md. 487, 499 (1987) ("We therefore generally approve of the approach to resolving the question of identity of claims found in § 24 of the Restatement"). Under that analysis, "when a valid and final judgment rendered in an action extinguishes the plaintiff's claim ... the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Id.* at 498 (quoting Restatement). In short, a plaintiff may not relitigate a claim by spitting legal theories after judgment. *Id.* at 500; *see also Alvey*, 225 Md. at 390 ("The doctrine of *res judicata* applies is that a judgment between the same parties...is a final bar...not only as all matters that have been decided...but as to all matters which with property could have been litigated[.]").

Here, Timm has had his day in court against Impac with respect to remedies on Count I and calculation of dividends due on Count IV. Final judgment has been entered on his claim for

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[7] *See also Boyd v. Bowen*, 145 Md. App. 635, 655 (2002) ("the doctrine of *res judicata*, also called claim preclusion, applies to the parties to a second suit are the same in privity with the parties to a first suit, the fires and second suits present the same claim or cause of action, and there is a final judgment rendered on the merits in the first suit, by a court of competent jurisdiction" citing numerous cases).

dividends as a consequence of Impac's 2009 Repurchase and is extinguished. Timm cannot now raise a new theory that Impac's obligation for the 2009 Repurchase is *all* accrued dividends. To the extent that Timm made various motions and demands for all accrued dividends on other theories in 2018, those proceedings were resolved against him, fully and finally by denial orders and incorporated in the July 16, 2018 Partial Final Judgment, and were not reversed on appeal.

For the sake of completeness, Timm's new accrued dividends claim may also be barred by *collateral estoppel*, a variety of *res judicata* known as "issue preclusion." The theories are slightly different. Ae explained in *Boyd v. Bowen*, 145 Md. App. 635, 655 (2002): *res judicata* or "claim preclusion" "encompasses all rights the plaintiff to remedies against the defendant respecting all or any part of the transaction [and therefore] bars subsequent litigation not only of what was decided...but also what could have been decided in that original action." 145 Md. App. at 656. The doctrine of collateral estoppel "or issue preclusion" arises when "a determination of fact that was actually litigated ...between parties is conclusive in a second suit on a different cause of action between same parties[.]" *Id.* at 657. Although Timm has not filed a different suit, the amount that Impac owes in dividends based on its 2009 Repurchase is a fact *actually litigated* in this case. It was decided—*i.e.*, Impac owes three quarters of dividends.

Finally, Timm's argument that Impac has the money to pay *all* accrued dividends (citing Impac's SEC disclosure) is irrelevant because the claim is barred. Timm Motion at 19. For the record, however, Impac notes that Timm's contention is not founded on any evidence. Impac's SEC disclosure that "judgments or settlements" are not expected to have a "material adverse effect on its financial position" clearly has no reference to any $15 million judgment for accrued dividends, as no such judgment exists. Any decision to declare and set aside or pay dividends is in the discretion of Impac's Board of Directors, as reflected in the 2004 Articles. Dk. 165/0 (Timm Motion, Ex. A (Articles ¶ 3(a))(dividends are payable "when and as authorized by the Board of Directors out of funds legally available for the payment of dividends").

C. Timm's Demand for Prejudgment Interest is Barred by *Res Judicata* and Precluded by the 2004 Articles

Also for the first time in this case, Timm demands prejudgment interest at 6% on all accumulated dividends. Dk. 165/0 (Timm Motion at 19). This claim also must be rejected.

First, the claim is barred by *res judicata* under the principles discussed above. Timm never raised prejudgment interest as remedy for Count I or as part of Count IV (or any other claim) in this case—not in the Complaint, not in the briefing on remedies in 2018, not on appeal, nowhere. A valid and final judgment has been rendered which extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction … out of which the action arose." *Kent County*, 309 Md. at 500 (quoting Restatement).

Second, even if the claim were not barred by *res judicata*—which it is—Maryland law only allows pre-judgment interest as of right "when the obligation to pay and the amount due" are "liquidated by a specific date," as stated in *Gordon v. Posner*, 142 Md. App. 399, 437 (2002), cited in Timm's Motion at 19. Here, Impac has no obligation to pay all accrued dividends, and its obligation to pay the three quarters of 2009 Dividends is not yet fixed. The Circuit Court has not yet identified a judgment creditor, as Impac pointed out in opposition to Plaintiffs' request for a bond pending appeal, which was denied. Dk. 145/1 (10/19/18 Opposition to Motion to Require Bond at 2-3); Dk. 145/2 (10/30/18 Order Denying Motion to Require Bond). As Impac explained, an appeal bond is not proper where there is no specific judgment-beneficiary; that is because a bond must identify the beneficiary to be paid by the surety. *See, e.g., Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 259, 492 A.2d 1306, 1309 (1985) ("A contract of suretyship is a tripartite agreement among a principal obligor, his obligee, and a surety."). By analogy, there is no judgment creditor for the 2009 Dividends.

For the same reason, the rationale behind prejudgment interest does not apply here. The rationale for prejudgment interest is that the debtor is depriving the counterparty of the productive use of the funds. *Bruxton v. Bruxton*, 363 Md. 634, 654 (2001) (prejudgment interest is "to compensate the aggrieved party for the loss of the use of the principal liquidated sum

found due it and the loss of income from such funds." Citation omitted.). Here, there is no judgment creditor for the 2009 Dividends and the date on which the dividends must be paid is not fixed; thus, no one is entitled to the funds.

Third, while pre-judgment interest may be awarded as a matter of discretion in certain cases, any such award here would be an abuse of discretion. *Id.* at 656. Not only is the interest claim foreclosed by *res judicata*, it is precluded by the express terms of the 2004 Series B Articles. Section 3(e) of the Articles governing "Dividends," expressly states that "*[n]o interest, or sum of money in lieu of interest, shall be payable in respect of any dividend payment or payments of Series B Preferred Stock which may be in arrears*." Dk. 165/0 (Timm Motion, Ex. A (Articles ¶ 3(e) at 2-3) (emphasis added)). Maryland courts respect contractual terms governing interest on any obligation. *See Noyes Air Conditioning Contractors, Inc. v. Wilson Towers Ltd. P'ship*, 122 Md. App. 283, 294 (1998) (awarding pre-judgment interest at the contract rate, noting that court "may not alter the terms of a valid contract as a matter of discretion"). Here, the contract provides for *no interest*.

Dated: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2022, a true and correct copy of the foregoing document titled Impac Mortgage Holding's Responding Position Regarding Class Certification Motions and Other Issues was served upon counsel of record via United States Mail to the following:

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EXHIBIT 1

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2018

No. 2119

IMPAC MORTGAGE HOLDINGS, INC.,
APPELLANT,

v.

CURTIS J. TIMM, *et al.*,
APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(The Honorable W. Michel Pierson)

BRIEF OF APPELLEE AND APPENDIX
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Curtis J. Timm On Behalf of
Himself and All Persons Similarly Situated

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STATEMENT OF THE CASE

Introduction

This is a class action that involves two preferred stocks which are cumulative, redeemable stocks sold by Impac Mortgage Holdings, Inc., a Maryland corporation. (E0039) This is a breach of contract case in which Impac Mortgage tried to re-write the Preferred B by-laws to their benefit and took away those shareholders' cumulative dividend payments going on eleven years. These payments amount to approximately $14, 900,000.

QUESTIONS PRESENTED

For the first five years, Impac paid their Preferred B Shareholders their quarterly dividends. After June 29, 2009, they changed the seven rights and provisions of the 2004 Form of Articles Supplementary for Series B. They stopped paying the dividends. They claimed the changes they made were legitimate and tried to deceive the shareholders into selling their shares for pennies while taking away their protective rights. We have proved that the illegal changes created are false and that there are no valid changes.

The Appellant brief is about voting but the main issue is that there are no votes. The judgment in favor of the Plaintiffs should remain intact and the required annual dividends and other provisions restored.

STATEMENT OF FACTS

1. Form of Articles Supplementary Series

On May 25, 2004, Impac sold 2,000,000 shares of 9.375% Series B Impac preferred stock ("Preferred B"). (E0046, E0380, E0388, E0940, E0948)

2. Form of Articles Supplementary Series C

On November 18, 2004, Impac sold 4.47 million shares of 9.125% Series C Preferred stock ("Preferred C"). (E0046, E1163, E1172)

3. Cumulative and Redeemable

On the 2004 "Preferred B" or "Preferred C", Impac was paid $25 per share. Except for the dividend rate and the date the shares could be redeemed, the terms of "Preferred B" or "Preferred C" was identical. The "Preferred B" and "Preferred C" were cumulative and were paid quarterly at the end of that month.

Both Impac "Preferred B" and "Preferred C" were "Redeemable." The benefit for Impac was that the **"preferreds never had to be repaid or returned or repurchased"** for the initial $25 redemptive value. On the other hand, the shareholder relied on receiving only the dividends paid by Impac. (E0380-88, E1163-72)

4. Share Cost The overall share cost for Impac was about $50 million for "Preferred B" Shares and about $112 million for the "Preferred C" Shares, together totaling $161.8 million. The annual cost of the dividend for Impac was about $14.9 million. (E2053-54)

5. Impac Illegal Coercive Scheme

After 4.5 years, Impac grew tired of paying these dividends and devised a clever but **illegal coercive scheme** to eliminate both the $161.8 million in preferred liabilities and the perpetual obligation to pay $14.9 million annually in preferred dividends. (E2054) For almost 5 years Impac paid the preferred dividends without fail. The

cumulative dividends were paid on the last day of each quarter. In December 31, 2008, after paying the first three quarters, Impac ceased paying the "Preferred B" dividends and "Preferred C" dividends. To this day, there remain 41 unpaid quarterly, cumulative dividends.

Impac is required by law, and must immediately PAY IN CASH, the "Preferred B" annual dividends on 665,000 shares that are in arrears. This is in excess of approximately $14.9 MILLION CASH. It is preposterous that after almost eleven years the shareholders have not been paid. Isn't that stealing?!

6. One Billion Sixty Million Losses

After 2007, Impac accomplished their objectives by using creative accounting. To be able to ultimately purchase the preferred shares for pennies, it was necessary to represent that Impac had virtually no assets or ability to pay the preferred dividends. They reduced the amount of their **"shareholder equity"** from **one billion sixty million dollars** to just thirty million dollars in their 10-K, filed on Dec. 31, 2007. This is a loss of about 1 billion thirty million in stockholders' equity. **This was an unprecedented reduction.**

Despite the one billion sixty million dollar "loss" in 2007, Impac was able to pay all the quarterly "Preferred B" dividends and "Preferred C" dividends. In addition, Joseph R. Tomlinson, Chairman and William S. Ashmore, President were paid $1 million plus annual salaries, and given bonuses of $1 million each by Impac. **This poses two questions: What is going on? What is Impac doing?**

7. August 2008 Crash

In the last part of 2007, and after January 2008, Impac saw the mortgage crisis coming and prepared for it. Smartly, they sold 90 percent of their total assets and mortgage business all over the country. In addition, they released 1000 of their employees. By about December 2018, their staff had been reduced to about 80 employees.

When the August 2008 crash occurred, they were not like the other ill-prepared mortgage companies. About November of 2008, Impac informed the SEC and shareholders that they would no longer be able to pay the preferred dividends.

8. Dividend Payments

In its SEC Form 10-Q in 2009, Impac said that it had, "no present intentions to pay dividends on the Series B and Series C Preferred Stock." (E0046) These actions and Impac's false claims destroyed the preferreds' public trading prices, reducing the price of the Pfd B Shares and Pfd C Shares to around one dollar per share.

9. May 29, 2009 - Offer to Purchase For Cash

With preferred shares at about one dollar, on May 29, 2009, Impac solicited the preferred shareholders to grant them a free option of an "Offer to Purchase For Cash" and "Consent Solicitation." (E0791) This expired on June 29, 2009. The Offer was to repurchase all Pfd B shares for about 29 cents per share and all Pfd C shares for about 28 cents per share. (E0789) In May 29, Impac claimed, "As of March 30, 2009, the Company had stockholders' equity of $9.0 million with an aggregate of $6.2 billion of liabilities." (E0799) The average preferred stockholder was led to believe Impac was

virtually bankrupt. Impac, years later, admitted in their Form 10-K that the $6.2 billion in liabilities were all nonrecourse to the Company. They could never be collected from Impac. Impac also warned in the May 29 solicitation that upon completion of the Offering, the preferred shares would likely be delisted from public trading. This never occurred. On page 5 and 6 of this document it reads: (E0794-5)

> In order to tender shares in the Offer to Purchase and Consent Solicitation, you must consent and authorize the Depositary to consent on your behalf to the Proposed Amendments by executing letters of transmittal and consent or request that your broker or nominee tender and consent on your behalf. No meeting has been held in conjunction with the Consent Solicitation. Consents may only be submitted on the terms set forth in the Offering Circular.
>
> . . . American Stock Transfer and Trust Company is acting as the Depositary for the Offer to Purchase and Consent Solicitation (the "Depositary").

10. Written Consent Solicitation

On page 14 of the same Offering document, in the questionnaire section, it asks, "Do I have to deliver my consent in the Consent Solicitation in order to tender my shares of Preferred Stock validly in the Offer to Purchase and Consent Solicitation?" (E0803)

> "Yes. You must consent to the Proposed Amendments in order to tender your shares of Preferred Stock in the Offer to Purchase and Consent Solicitation. Your participation in the Offer to Purchase and Consent Solicitation is conditioned on your execution of a **written consent** approving the Proposed Amendments"...

11. SEC Form 8-K- Morrison

At 6 a.m. in California on the morning of June 29, 2009, (9 a.m. New York time), Impac sold the rights to the Preferred B Shares and Preferred C shares for $0.29 and $0.28. (E0877) This was the option price stated in the May 29, 2009 Offer to Purchase

Ronald M. Morrison, Executive Vice President and General Counsel of Impac, authorized the shares and sent the Form 8-K to the SEC (E0880). On this date at Impac, nothing involved with the Pfd B Shares and Pfd C Shares ever occurred. Form 8-K stated: (E0878)

"Item 3.03 Material Modification to Rights of Security Holders.

On June 29, 2009, in connection with the Offer to Purchase and Consent Solicitation (as further described in Item 8.01 herein) for its 9.375% Series B Cumulative Redeemable Preferred Stock and 9.125% Series C Cumulative Redeemable Preferred Stock collectively, the "Preferred Stock"). Impac Mortgage Holdings, Inc. (the "Company") received consents from holders of the Preferred Stock in excess of 66 2/3% of the outstanding shares of Preferred Stock required to amend the Company's charter to modify the terms of each series of Preferred Stock.
The proposed amendments were also approved by holders of the Company's common stock at the Company's special meeting of stockholders held on June 29, 2009.

On June 29,2009, the Company filed Articles of Amendment to its charter with the State Department of Assessments and Taxation of Maryland to modify the terms of each of its 9.375% Series B Cumulative Redeemable Preferred Stock and 9.125% Series C Cumulative Redeemable Preferred Stock as follows: (E0878)

- **make dividends non-cumulative;"**

(This bullet point is one of seven amendments.)

With its false claims and actions, the 8-K conned "67.7%" of the total preferred shareholders into selling their shares at the option prices **costing Impac a mere $1.3 million.** The owners of 2.076 million Pfd B Shares and Pfd C Shares refused to sell their shares at this ridiculous price.

Secondly, the seven Proposed Amendments (E0878) eliminated the dividend obligation and virtually all other protective provisions making the preferred shares, if

amended, worthless. The Articles Supplementary, of the 7 amendments of the 2.076 million Pfd B Shares and Pfd C Shares identically require each to be approved in writing, by the owners of 2/3 or more of the preferred shareholders adversely affected by the amendments. **This did not occur.**

Morrison's claims were an outrageous lie designed solely to fool everyone into believing the preferred shares were validly amended and now worthless—the final objective of Impac's criminal scheme. It fooled Judge W. Michel Pierson, who apparently could not believe a NYSE company would make such a false claim on such a crucial issue. It also deceived so many preferred shareholders.

Knowingly, false claims are a **violation of 18 US Code Sec 1001**, punishable by large fines and up to five years imprisonment. To lie in the Form 8-K and to file the unapproved amendments, **Morrison was paid $900,000** per year for five years by allegedly broke Impac. The statute of limitations for prosecuting violations of 18 US Code, Sec. 1001 is five years. Solely relying on the false claims in the Form 8-K and deceiving most everyone, Impac never made a single effort to obtain any consents from the preferred shareholders.

12. Judge Pierson's Early Rulings

After two rulings in January 28, 2013 (E0078-118) and November 27, 2013, (E0119-33) Judge Pierson's rulings made the same decisions in the Class action case. He assumed that everything printed on the SEC Form 8-K from June 29, 2009, (E0877) was correct and everything that Impac Vice President, Ronald Morrison attested to had occurred. (E0880) Summarizing, some of the provisions in "Item 3.03 Material

Modification to Rights of Security Holders" of Form 8-K, the judge believed Impac allegedly received consents from the shareholders of Pfd B Shares and Pfd C Shares and received votes in excess of 66 2/3% (E0878) even though **Impac didn't actually do this.**

Impac claimed in the 8-K that they filed Articles of Amendment to their charter, amending the seven rights(E0878) in the article supplementary of the May 29, 2009 Offering Circular even though they did not. Remember on page 14 of that same circular that in order to tender your shares of the Preferred Stock was conditioned on your execution of a written consent approving the Proposed Amendments. (E0802)

Page 14 of the Circular also asks, "What is Consent Solicitation?" It is soliciting consents from shareholders to amend the charter terms and modify the dividend, liquidation premium and voting rights. (E0802) To complete the purchase of the Preferred Stock, Impac was required to receive the requisite approvals of the Proposed Amendments from the holders of the Preferred B Shares and Preferred C Shares. The shareholders never agreed to these changes of any kind, so for this reason, there are not any votes. To be truthful, Morrison should have reported in the SEC Form 8-K that there were no valid changes.

Judge Pierson was misled and said nothing. He accepted and agreed that all of the items on the 8-K (E0877) happened but they did not. He did not check the **"facts" like asking to see the actual signed consents** and shareholder names, and verifying the voting percentage or anything else.

Morrison's claims are false. Where are those consents that Ronald M. Morrison attested to? If the judge had listened to the Plaintiff's pleas about Morrison's 8-K

fabrications then in his rulings of 2013, Morrison could have been held accountable for his actions. He could have been fined or spent up to five years in prison before the statute of limitations expired in the that five year window of time. Instead, Morrison is rewarded for his behavior, receiving his $900,000 each year for five years.

From those incorrect accounts, Judge Pierson granted Impac a summary judgment which eliminated Count II (Preferred C), Count III (Breach of Fiduciary Duty/Violation of Good Faith and Fair Dealing), and Count V (Punitive Damages) from the case. (E0118)

13. Depositary and Letter of Transmittal and Consent

For a few months in 2014, when the Plaintiff attorneys contacted American Stock Transfer and Trust Co. (the so called "depositary" named in the Offering circular) (E0794), about deposing them, Amstock wondered why they were being contacted. They said they weren't involved; they never heard about Impac. Amstock was later subpoenaed in March 2015 about what they were **not** involved in. (App 1)

The **Letter of Transmittal and Consent** is the sole document each selling shareholder was requested to execute in order to transfer Preferred B Shares and Preferred C Shares and consent to the amendments, according to the Offering documents. (E0794, 0802) These Letters of Transmittal were never signed by the Depositary or Impac or anyone else because they didn't exist. The seller of the selling shares never had an agreement with American Stock Transfer and Trust Company (Amstock) or Impac for this Offering.

14. Morrison Deposition

In January 2015, *Impac's general counsel and corporate secretary, Ronald Morrison, underscored this* point in deposition, as follows: (App 11, 15) (E1557-8)

> Q:... Did he [Mr. Timm] ask you at any point where the consents were, the written consents that you received on the vote?
> A: No.
> Q: And where are they?
> A: I don't know. Wherever they got sent back to.
> Q: *I mean, the depositary took in the consents, correct?*
> A: Yes.
> Q: And did what with them?
> A: I don't know. The written consents?
> Q: Yes.
> A: Some consents- I think some consents were oral. I think they can take them both ways.
> Q: But in terms of the actual documentation of the paper-
> A: Whatever the actual documents were, I don't know what happened *to them. I don't know if we got them or the depositary* or-kept them. ...
>
> Q: Okay. Have you ever seen the letters of transmittal that were sent back by shareholders with the consent?
> A: No.
> Q: Do you know whether anybody working for you in any of the departments you manage saw them? [He had earlier testified that he managed Impac's Legal Department, Compliance, Investor *Relations, Human Relations, and Client Administration].*
> A: I don't know.
> Q: You wouldn't have required anyone from investor relations or the legal department or compliance [to] go take a look at these that were mailed back?
> A: I didn't instruct anybody to do so.

In the Offering Circular to the Preferred B Shares and Preferred C Shares, it was **required that the consent solicitation include the Depositary. (E0794, E0802)** Since signing the SEC, Form 8-K on June 29, 2009, Morrison perjured, fabricated, and perpetrated this fraud. Because the information on the Form 8-K was fabricated, the only

valid thing that really happened on June 29, 2009, was that the Offer to Purchase for Cash expired.

In the **sixty** plus pages of the Preferred B and Preferred C stock Offer documents of May 29, 2009, the Depositary of Impac is listed **over and over again as American Stock Transfer and Trust** (Amstock) (E0795, E0802, E0811, E0835, E0844). Amstock never knew about the Letter of Transmittal and Consent Agreements, or any of the lengthy parameters for shareholders to sell their preferred shares. There was no agreement under this Offer with shareholders or American Stock Transfer and Trust. Amstock had no **involvement with shareholder votes** regarding the "Offer to Purchase" and "Consent Solicitation." (App 3, 24) Defendants never used Amstock and never sent Amstock copies of the Letter Agreements. Additionally, **Impac never advised Amstock they were secretly using Amstock's name.** They never made any efforts to obtain consents from anyone.

This is documented in the American Stock Transfer's subpoenaed affidavit dated March 12, 2015 by Lindsay Kies, Relationship Manager. This subpoena was not included in the record extract by Impac. (App 2-3, 6, 15, 17)

> "Amstock served as depositary agent only for the transaction described in the subpoena, and had no involvement with the shareholder votes."

For about six years, **Impac misrepresented their role with American Stock Transfer and Trust Company (the Depositary).** Judge Pierson failed to address this case for another **two and a half years.**

15. Maryland Rule 2-602

In the spring of 2015, Defendant's attorneys abandoned their false claims made in their motion to dismiss after Plaintiff filed Amstock's affidavit and excerpts from Morrison's deposition *that he did not know where any consents were.*(E1557) (App 11)

In the April 2, 2015 Memorandum of Law In Support of Plaintiffs' Motion Under Rule 2-602 and May 15, 2015 Plaintiffs' Reply Memorandum in Support of Their Motion for Rule 2-602 Relief, Plaintiff proved that the above rule was corrected. (App 4-18, App 19-33) Morrison knew Impac couldn't prove that they had executed Letters of Transmittal and Consent. Eventually on July 16, 2018, Judge Pierson ruled: (E2139)

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

Once Pam Palmer, Impac's lead attorney, read the March 12, 2015 Lindsey Kies affidavit, she changed her story. She agreed like Morrison, that there were no consents or votes from Amstock. Pam Palmer lied. She knew for years Impac didn't use Amstock. Then Pam Palmer changed her story again, and her new claim in 2015, was that they "just discovered" they received the consents electronically in 2009.

On December 29, 2017, Judge Pierson addressed the electronic votes, He ruled,

> "Plaintiff's assert that the Articles Supplementary require a vote or consent at a meeting, and the electronic voting procedures do not comply with this requirement. They also question certain aspects of the electronic voting process." (E2034)

One has to wonder why Pam Palmer isn't leading the appeal.

16. Judge's Final Rulings

On July 16, 2018, the judge granted that 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." This did not occur. Also, the purported 2009 amendments to the Series B Articles Supplementary were not validly adopted because less than two-thirds of the Series B shareholders consented. In addition, he entered a final judgment in accordance with Maryland Rule 2-602 and that the Series B articles Supplementary adopted in 2004 remain in full force. (E2138)

Additionally, on the above date, Judge Pierson ordered that Impac is required to pay dividends on Series B shares for the first, second and third quarters of 2009. This ruling should include the unpaid dividends through the present time. Also, due to the voting rights section 6(B) of the 2004 Form of Articles Supplementary of Pfd B on dividends, in arrears more than six quarterly periods, Judge Pierson ordered a special election in accordance within 60 days of this order. (E2139)

17. Redemption and Acquisition- Art. 5(f)

To understand this case, you can't talk about Preferred B without talking about Preferred C because the same rules apply to both separate series created in 2004, on different dates. You must understand the section of the 2004 "Preferred B" Form of Articles Supplementary labeled, (5) Redemption (f) *Status of Redeemed Shares*.

> "Any shares of Series B Preferred Stock that shall at any time have been redeemed or otherwise acquired by the Corporation shall, after such redemption or acquisition, have the status of authorized but unissued preferred stock, without designation as to series until such shares are once more classified and designated as part of a particular series by the Board of Directors." (E0385)

Under 5(f) status of redeemed shares in each of the Impac separate 2004 Forms of Articles Supplementary for "Preferred B" stock or "Preferred C" stock, it is understood that once a Preferred share becomes a Treasury Stock or reacquired stock (a stock which

was bought back by the issuing Company), **it becomes unissued and thus has no voting power**. Additionally, in the 2004 Form of Articles Supplementary of those same documents, there is no mention of a "Depositary" or a "Letter of Transmittal" and "Consent." (E0380-88)

They never existed as part of these documents in regards to relinquishing your shares. Even if the shares remained issued and outstanding after Impac accepted them for purchase, they could not be voted under Maryland corporate law, which prohibits a corporation from directly or indirectly voting its own stock. (E0057)

To approve the Amendments to the Articles Supplementary on the 2009 Offering Circular, it required a vote of two-thirds of the Preferred B Shareholders. Even if the exit consents could be validly counted to amend the terms, which is impossible due to the reasons stated above, Impac did not obtain the necessary two-thirds vote. In Impac's admission in its SEC filings of the 2009 Offer to Purchase, 1,323,844 shares out of the then-outstanding 2,000,000 shares were tendered. This was reported in Impac's 2009 annual report. (App 35) **This is not two-thirds and therefore, is invalid for more than just doing inaccurate math.**

With respect to each class of the Preferred B Shares and Preferred C Shares of 2009, to tender shares and consent to the amendments, each shareholder was required to execute a written "Letter of Transmittal" and "Consent." No Letters of Transmittal and Consent were produced, since none exist. There are no consent agreements in any of the 2004 Articles Supplementary of "Preferred B" or "Preferred C." In the 2004 documents about voting rights, there is no mention of a "Depositary" and the shareholders who

purchased the "Preferred B" Shares or the "Preferred C" Shares from the initial offerings did not agree to this. (E0385-86) There was no two-thirds vote of any kind, whatsoever.

18. Dividends in Arrears

The Preferred B did not receive the unpaid dividends of about $14,900,000 that are required to be paid on 665,000 shares. Presently, there are 41 missed quarterly dividends. For the past ten years, this would amount to about $6.65 million per year. It is unrealistic to believe Impac could not come up with that type of money when Morrison received $900,000 per year for five years and Tomkinson and Ashmore received $1million plus salaries and $1million bonuses.

In the July 16, 2018 ruling, Judge Pierson "decreed that Section 3(d) of the Articles Supplementary requires Impac to pay dividends on series B shares"...

In addition, on the same ruling in section 1, the judge ordered as follows: (E2138)

> **(c) that the Series B Articles Supplementary adopted in 2004 remains in full force and effect.**

This ruling means that in all these years and this appeal, there have been no changes. These cumulative dividends which are mandatory, were supposed to be paid starting June 30, 2009. This has been decided by Judge Pierson.

By not receiving the mandatory 9.375% per year, Series B, cumulative dividends, Impac has been able to use that money to the detriment of the Preferred Shareholders. To this end, **$7.50 per share (15 percent)** should be added to the settlement price owed. Cumulative does not mean waiting to pay ten plus years. We plead with the court to grant us our request to be paid immediately.

19. Attorney Fees

Throughout my 35 years of work experience, I was lead attorney and principal partner in my thirty person law firm. I have spent many years handling federal and corporate cases all over the country at the regional and national level. Additionally, I have been in the brokerage business carrying securities licenses in Florida and that of a NASD Principal. Due my background, I am fully qualified in this area.

In this case, I have done 95% of the work and almost all the ideas are my own. I am not just the pro se Attorney; I am the attorney in this case representing the class of Shareholders. I strongly recommend my fees be determined by adding at least 20% to the price per share settlement. This well-deserved amount is for ten, going on eleven years, of countless hours of hard work and waiting on all the delays, and inconsistent rulings by the court, and for proving the fraud perpetrated by Impac.

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The following attorneys will need to be paid separately based on their hourly rates. They worked on this case in the early stages long before the Appeal.

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Attorneys Appellee Camac Fund L.P.

20. Summary

At 6:00 a.m.in California, on the morning of June 29, 2009, the only action that occurred on this date was that supposedly 67.7% of the shareholders, who had Preferred B Shares and Preferred C Shares, sold their preferred stock for the low price of approximately $0.29 and $0.28. (E0879)

After the Preferred B Shares and Preferred C Shares mentioned above, were sold, the reported date of the SEC Form 8-K was June 29, 2009. (E0877) This was prepared by Ronald M. Morrison. Under the Signature section it states, … "the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized". This was then dated June 30, 2009 by Ronald M. Morrison. (E0880)

In Item 3.03 and Item 5.03 of the 8-K, the Articles of Amendment to its charter of the seven provisions and rights stated, were modified and incorporated. Those proposed amendment changes did not happen and there was never an agreement to make those alterations. There was no vote to count. (E0878)

Once the shares were sold, they immediately became treasury stocks. Once this occurred, they could not be voted on so therefore, nothing happened. This is proven in the 5(f). *Status of Redeemed Shares* section of the 2004 "Preferred B" Form of Articles Supplementary. (E0385)

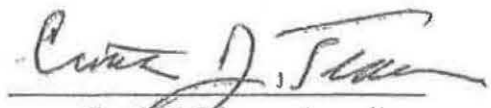
Even if the shares remained issued and outstanding after Impac accepted them for purchase, they could not be voted under Maryland corporate law. This prohibits a corporation from directly or indirectly voting its own stock. (E0057)

CONCLUSION

The guts of this case are that there are no consents, no witnesses and no votes. We proved that Preferred B and Preferred C abide by the same Articles Supplementary created at their 2004 issuances. No declaration presented by Impac, and no witness in this case, has claimed to have seen or received any written consents. No written consent from any shareholder, and no written consent from the Depositary, was ever delivered to Impac. (App 10) Nothing Impac said was correct; they are liars and they got away with it. This was a well-orchestrated scheme that has been unveiled.

You can lie in sworn forms and in depositions and briefs, **but the record cannot and does not lie**. The record conclusively proves that in almost eleven years, Defendants, Impac, have not been able to produce any consents from the Preferred B Shareholders or the Preferred C Shareholders; written, oral or electronic. There being no consents, it is impossible that the Preferred B Shares or Preferred C Shares were validly amended.

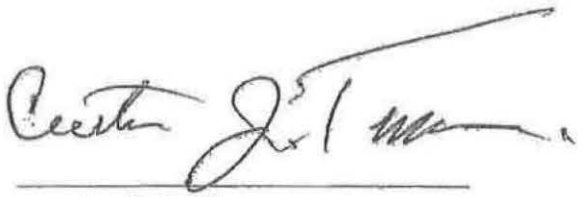
Respectfully Submitted,



Curtis J. Timm, Appellee

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This document contains 4786 words, excluding the parts exempted from the word count by Rule 8-303.
2. This document complies with the font, spacing, and type size requirements stated in Rule 8-112.



Curtis J. Timm

CERTIFICATE OF SERVICE

I HEARBY CERTIFY that, on this 22nd day of June, 2019, two copies of the foregoing Brief of Appellee Curtis J. Timm and two copies of the Appellee Brief with an Addendum were mailed first-class, postage prepaid, along with a PDF electronic copy sent by email, to the following persons:

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Curtis J. Timm

TEXT OF CITED STATUES AND RULES

Statues

18 US Code Sec 1001

Makes it a crime to: 1) knowingly and willfully; 2) make any materially false, fictitious or fraudulent statement or representation; 3) in any matter within the jurisdiction of the executive, legislative or judicial branch of the United States.

Md. Code Ann., Corps. & Ass'ns § 2-509(b)

Shares of a corporation's own stock owned directly or indirectly by it may not be voted at any meeting and may not be counted in determining the total number of outstanding shares entitled to be voted at any given time.

Rules

Md. Rule 2-602

(a) Generally. Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action.

APPENDIX

NOTE: STAMPED SUBPOENA IS NOT TO BE USED TO OBTAIN MEDICAL RECORDS FROM HOSPITALS

Circuit Court For Baltimore City
Frank M. Conaway, *Clerk*
111 N. Calvert St. - Room 462
Baltimore, Md. 21202

Case Number 24-c-11-008391

urtis Timm and Camac Funding LP

Vs.

( ) Civil

mpac Mortgage Holdings, Inc.

SUBPOENA

TO: American Stock & Transfer, Company, LLC

YOU ARE HEREBY COMMANDED TO: ( ) Personally appear; ( ) Produce documents and or objects only; ( ) Personally appear and produce documents or objects;

at Pepper Hamilton, The New York Times Bldg., 620 8th Ave., 37th Floor, New York, NY 10018
(Place where attendance is required)

on Thursday the 15th day of January, 20-15, at 9:00 a.m./p.m.

YOU ARE COMMANDED TO produce the following documents or objects:

ll communications between the deponent and Impac Mortgage Holdings, Inc. regarding instructions to how shareholder votes were to be processed, talliedm and how such tallies were to be communicated to Impac in connection with the transaction in JUne 2009 re: Pfd B shares, Pfd C share

Subpoena requested by ( ) Plaintiff; ( ) Defendant; and any questions should be referred to:

Thomas J. Mimon 410-783-7575
(Name of Party or Attorney, Address and Phone Number)

Date Issued 12-15-14

FRANK M. CONAWAY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY 1983

(Signature & Seal)

NOTICE:

1. YOU ARE LIABLE TO BODY ATTACHMENT AND FINE FOR FAILURE TO OBEY THIS SUBPOENA.
2. This subpoena shall remain in effect until you are granted leave to depart by the Court or by an officer acting on behalf of the Court.
3. If this subpoena is for attendance at a deposition and the party served is an organization, notice is hereby given that the organization must designate a person to testify pursuant to Rule 2-412(d).

SHERIFF'S RETURN

( )-Served and copy delivered on date indicated below.
( )-Unserved, by reason of _____

Date: _____ Fee: $ _____ _____
Sheriff

Original and one copy needed for each witness
CC-30

MARYLAND RELAY SERVICE VOICE 1-800-735-2258

IN THE CIRCUIT COURT FOR BALTIMORE CITY

CURTIS J. TIMM, on behalf of himself and all persons similarly situated, Plaintiff, CAMAC FUND LP 25 Tudor City Pl. New York, NY 10017 On Behalf of Itself and All Others Similarly Situated Intervener Plaintiff v. IMPAC MORTGAGE HOLDINGS, INC., et al., Defendants.	)	**CASE NO. 24-c-11-008391** Action Filed: December 7, 2011 Judge: Hon. W. Michel Pierson

AFFIDAVIT IN RESPONSE TO SUBPOENA

State of New York
County of Kings

Lindsay Kies, a duly authorized employee of American Stock & Transfer & Trust Company, LLC, being sworn, deposes and states the following:

1. I am over 18 and am competent to make this Affidavit.
2. I am providing this Affidavit in response to a subpoena issued by Plaintiff Curtis Timm to American Stock & Transfer & Trust Company, LLC ("AmStock"), a copy of which is attached hereto as Exhibit 1.
3. AmStock has conducted a diligent search for responsive documents and does not believe that it has in its possession any documents from Impac Mortgage Holdings, Inc. ("Impac") that are responsive to the subpoena.

4. AmStock served as depositary agent only for the transaction described in the subpoena, and had no involvement with the shareholder votes.

I swear under penalty of perjury that the foregoing statements are true to the best of my knowledge.

Dated March 12th, 2015 by: _____

Name: Lindsay Kies
Title: Relationship Manager

IN THE CIRCUIT COURT FOR BALTIMORE CITY

CURTIS J. TIMM, on behalf of himself and all persons similarly situated, Plaintiff, CAMAC FUND LP On Behalf of Itself and All Others Similarly Situated Intervener Plaintiff v. IMPAC MORTGAGE HOLDINGS, INC., et al., Defendants.	**CASE NO. 24-c-11-008391** Action Filed: December 7, 2011 Judge: Hon. W. Michel Pierson

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION UNDER RULE 2-602

I. Introduction

It was a central tenet of this Court's ruling on Impac's motion to dismiss that the validity of the transaction at issue depended on the preferred shareholders' appointment of the Depositary as attorney-in-fact and proxy, and the fulfillment of that role by the Depositary by consenting to amendments to the Articles Supplementary on the shareholders' behalf immediately prior to Impac's accepting of the shares for purchase. Attached hereto as Exhibit 1 is the Depositary's affidavit establishing that the Depositary "had no involvement with the shareholder votes." The Depositary did not consent to the amendments, and never delivered a written consent, or the shareholders' written consents, to Impac at any time. The factual basis for the Court's earlier

ruling is invalid, and the Court should vacate its grant of partial summary judgment entered in favor of Impac in January 2013 on Count II of the complaint.[1]

II. *Legal Standard*

The Court's power to revise its earlier judgment is plenary. Unlike Fed. R. Civ. P. 54 (b), which in some Circuits requires new evidence before an earlier partial judgment can be revisited, Rule 2-602(a)(3) gives this Court the ability to revise its judgment at any time, and for any reason. *Smith-Myers Corp. v. Sherrill,* 209 Md. App. 494, 519, 60 A.3d 90 (2013), citing *Bliss v. Wiatrowski, 125 Md. App. 258, 266-67, 724 A.2d 1264 (1999).*[2] *Even if a stricter standard* applied, however, Plaintiffs meet it with this new evidence dated March 12, 2015, the result of a subpoena process that began on December 15, 2014.

III. Analysis

A. <u>The evidence eliminates the basis for the Court's original ruling</u>

The genesis of the Depositary's sworn affidavit is rooted in this Court's analysis in its opinion of January 2013, and Impac's statements about the timeline involved in the shareholder vote. The Court wrote: "The Transaction Documents dictated the conditions, timing, and procedure for tender and acceptance of the preferred shares.... Participating preferred shareholders were required to indicate their consent and tender their shares together with the *applicable Letter to the Depositary selected by Impac to manage the transaction, American Stock* Transfer & Trust Company (hereinafter the "Depositary)." (Op., p. 4). Impac said: "The

[1] The Depositary made this affidavit in response to a subpoena that asked for information and documents relative to how the votes on the transaction were communicated to Impac. The subpoena is attached to the affidavit. The subpoena proved futile to the extent it sought documents, because the Depositary has none. The Depositary appears to have merely acted, and *believes it acted, only as transfer agent for the shares.*

[2] For a discussion of the different federal standards, see *In re K-V Pharmaceutical Co. Sec. Litig.,* 2014 WL 2559137 at *3 (E.D. Mo. June 6, 2014).

transaction was structured so that Impac would accept the stock only after the Depositary delivered the consent to amend the Charter." (Impac Reply Brief, p. 14). Accepting that premise, the Court ruled that: "[W]hile a shareholder acknowledged its consent by executing the applicable Letter, the Depositary also needed to consent to or, at the very least, transmit shareholder consent to Impac." (Op., pp. 24-25 n. 16).

The March 12, 2015 affidavit of the Depositary proves that the voting process did not follow that script. The Depositary did not consent to the amendments, and did not deliver any written consents to Impac. The Depositary's affidavit directly contradicts Impac's factual predicate, that "[t]he Depositary played a central role in effectuating the transaction as an agent of both Impac and the tendering stockholders, including assuring that the stockholder's consent was obtained and validly delivered." (Impac Reply brief, p. 11). This averrment by Impac is untrue because the Depositary "had no involvement with the shareholder votes."

The Depositary was undoubtedly confused even to receive a subpoena relative to proxy voting. Impac has produced its agreement with the Depositary. (Ex. 3). Impac's memorandum in support of its Motion to Dismiss stated that, based on the language of the Offering Circular[3], "[o]nly... upon Impac's determination that the conditions of its offer had been met was the Depositary instructed first to exercise the stockholder's consent to amendment and then to 'accept' the stock and pay for it." (p. 3). But, the "Depositary Agreement" never mentions that instruction to the Depositary.[4]

---

[3] The Offering Circular is already in evidence.

[4] In lieu of a "properly completed and duly executed Letter of Transmittal (or facsimile thereof)," the Depositary was allowed to "enter into agreements or arrangements with a Book-Entry Transfer Facility which, among other things, provide that (1) delivery of an Agent's Message will satisfy the terms of the Offer...." (Ex. 2, p. 2, ¶ 2(iii)). The Offering Circular, at pp. 36-37 describes the required contents of an Agent's Letter, and the Depositary Agreement (¶ 4(b), p. 3) requires the Depositary to make the initial determination whether any Agent's Letter complied

B. Factual and procedural background

This court determined in ruling on Impac's motion to dismiss that, as to Impac's Preferred C amendments, Impac necessarily received the required number of written consents to approve the proposed amendments as set forth in the Offering Circular. In its tender offer, Impac sought from the preferred shareholders grants of options to purchase their outstanding Preferred B shares for $.029297 per share and their outstanding Preferred C shares for $.028516 per share. The tender offer originally was set to expire at 6:00 AM, Pacific Daylight Saving Time, June 26, 2009. It was later extended to 6:00 AM, Pacific Daylight Saving Time, June 29, 2009, one day before an additional quarterly dividend would accrue.

In the Court's memorandum opinion, the Court determined that it was an essential condition precedent to Impac's purchasing any shares that the required number of tendering preferred shareholders had to have first consented to the proposed amendments. As the Court wrote, "[t]he [shareholders'] economic interest was necessarily delivered [to Impac] *after* the Depositary exercised the proxy because shareholder consent **and delivery thereof** by the shareholders **and the Depositary** were essentially conditions precedent to the transfer of the shares." (Op., p. 21; emphasis added). The Depositary did not exercise or deliver any proxy.

The Court found support for its conclusion upon the provisions set forth on page 5 of the Offering Circular:

> We are seeking consents from holders of the Preferred Stock to amend certain provisions and to eliminate other provisions applicable to each series of Preferred Stock....
>
> If we do not receive the requisite consent from the holders of the Preferred Stock... then this Offer to Purchase and Consent Solicitation will **automatically terminate and we will not**

---

with the terms and conditions of the Offering Circular. Apparently, the Depositary never did so, since it "had no involvement with the shareholder votes."

> **purchase any tendered shares** or pay the accumulated and unpaid dividends on the Preferred Stock." (Emphasis added).

In light of this "automatic" termination provision, the Court could have logically concluded that, since Impac had purchased all shares tendered on June 29, 2009, it must follow that Impac had received the required number of consents. However, the evidence now shows that this is not what happened. The Depositary did not consent to the amendments on behalf of the shareholders. The Depositary did not forward any written consents to Impac. Impac never received the requisite number of consents.

The Letter of Transmittal makes the requirement of Depositary consent clear. The Letter states, on page 5, that: "The undersigned understands and agrees that tenders of shares of Preferred Stock in the Offer to Purchase and Consent Solicitation **will authorize the Depositary to execute and deliver a written consent approving the Proposed Amendments with respect to the shares of Preferred Stock tendered on the undersigned's behalf.**" Despite this clear requirement, Impac amended the Articles Supplementary, without having received any consent, either executed or ~~delivered~~ ~~by~~ the Depositary.

In addition, the "automatic termination" provision was waived by Impac. Impac always reserved the right to delete, waive, or amend any of the conditions and provisions contained in the Offering Circular in any manner, at any time, in Impac's sole discretion. That unilateral right is first spelled out on page 5:

> At any time, our Board of Directors (the "Board") may determine that we will make less than all of the proposed modifications under the Proposed Amendments, extend the June 26, 2009 expiration date for the approval of the Proposed Amendments and the completion of the Offer to Purchase and Consent Solicitation, change the terms of the Offer to Purchase and Consent Solicitation or undertake a combination of the foregoing.

Impac's rights are spelled out again on pages 34, 39, and several other pages of the Offering Circular, and include, the right at any time to: "amend or make changes to the terms of the Offer to Purchase and Consent Solicitation including the conditions to the Offer to Purchase and Consent Solicitation...."

The Letter of Transmittal and Consent Agreement (hereafter the Letter Agreement) was not attached to the Offering Circular. Promulgated later, it did not contain the "automatic termination" condition found in the Offering Circular.[5] Instead, the Letter Agreement provided on page 5, paragraph 4 that the "Holders of at least 66 2/3% of the outstanding Preferred Stock must tender their shares or the Company will not be obligated to purchase any shares." There is no mention of consent in that sentence, and no mention of automatic termination anywhere in the Letter. Instead, when it promulgated the Letter Agreement, Impac reserved the right to buy as many shares as it could at the hugely discounted price, consents or no consents.[6]

The contrary provisions of the later-promulgated Letter Agreement obviously superseded the provisions of the Offering Circular that were omitted in the Letter Agreement; the Letter Agreement was the only agreement proffered to the tendering preferred shareholders. Consents

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[5] The Letter Agreement is also on file already and part of the record.

[6] In its opinion, the Court appeared to accept the same financial premise for the tender offer that Impac reported to its shareholders in order to induce the tender at the tremendous discount. The Court wrote: "As of the quarter ending March 21, 2009, Impac estimated that total shareholder equity in the company, previously valued at $1 billion, to be around $9 million." (Op., p. 3). Plaintiffs attempted to ask Impac's chief financial officer about that representation, but he was instructed not to answer questions about Impac's accounting practices, as they allegedly went beyond the scope of the issue before the Court on summary judgment. (Ex. 3). As reported in various public filings, however, the situation was far from dire. The Company's President and CEO were both paid bonuses of $600,000 for successfully mounting the tender offer transaction. By 2014, Impac had over 500 employees. In recent SEC filings, Impac has reported that the CEO and President each make $2 million dollars a year and that their in house legal counsel, Mr. Morrison, was being paid $900,000 per year. Impac pays its four "outside directors" as much as $300,000 per year, an unusually high amount in the industry. At least part of funding for these compensation deals comes from not paying the preferred dividends for the past 6 years.

from two-thirds of the shareholders were not required in order for Impac to reap the economic benefit of the tender offer. There can be no doubt now that a legitimate vote on amendments to the Articles Supplementary was never the principal concern for Impac. Impac wanted most of all to be able to buy out over $160 million in shareholder liabilities for just a little over 1% of that amount. That explains the change in terms from the Offering Circular, which states that, "[i]f we do not receive the requisite consent from the holders of the Preferred Stock, ...then this Offer to Purchase and Consent Solicitation will automatically terminate and **we will not** purchase any tendered shares ...," (p. 5) and the Letter of Transmittal and Consent which states that, absent the tender of 66 2/3% of the preferred shares, "the Company **will not be obligated to** purchase any shares." (p. 5, par 4). (Emphasis added). The former was far too restrictive. The Letter Agreements gave Impac everything it wanted, without regard to the vote.[7]

C. **There are no consents in the record**

Since it considered the actual vote a matter of only secondary importance, it is not surprising that Impac handled the voting process haphazardly at best. Whether Impac actually received the required written affirmative consents executed by the Depositary and delivered "immediately before" purchase can no longer be considered a disputed question of fact. The required written consents executed by the preferred shareholders, or given by the Depositary on behalf of the tendering shareholders, are not in evidence. No declaration presented by Impac, and no witness in this case, has claimed to have seen or received the written consents. No

[7] Simple math demonstrates why the ability to purchase was more important to Impac than the vote. Suppose that only 50% of the 6.2 million preferred shares were tendered with consents. Under the terms of the Offering Circular, the tender offer would automatically terminate, preventing Impac from purchasing the 3.1 million shares tendered at a tremendous discount. If Impac could purchase these shares, they would eliminate about $81M in preferred liabilities and the perpetual obligation to pay about $7.4 M in annual dividends to those tendering shareholders at a cost of less than $1 million dollars. The Company could not afford to forego that opportunity.

written consent from any shareholder, and no written consent from the Depositary, was ever delivered to Impac.

Impac's general counsel and corporate secretary, Ronald Morrison, underscored this point in deposition, as follows:

> Q:... Did he [Mr. Timm] ask you at any point where the consents were, the written consents that you had received on the vote?
> A: No.
> Q: And where are they?
> A: I don't know. Wherever they got sent back to.
> Q: *I mean, the depositary took in the consents, correct?*
> A: Yes.
> Q: And then did what with them?
> A: I don't know. The written consents?
> Q: Yes.
> A: Some consents – I think some consents were oral. I think they can take them both ways.
> Q: But in terms of the actual documentation of the paper –
> A: Whatever the actual documents were, I don't know what happened to them. *I don't know if we got them or the depositary* or – kept them. ...
>
> Q: Okay. Have you ever seen the letters of transmittal that were sent back by shareholders with the consent?
> A: No.
> Q: Do you know whether anybody working for you in any of the departments you manage saw them? [He had earlier testified that he managed Impac's Legal Department, Compliance, Investor *Relations, Human Relations, and Client Administration*].
> A: I don't know.
> Q: You wouldn't have required anyone from investor relations or the legal department or compliance [to] go take a look at these that were mailed back?
> A: I didn't instruct anybody to do so.

(Ex. 4, pp. 85-87).

D. <u>*The voting protocol reinforces the lack of any written consents*</u>

In the ten years after being formed in the middle 1990s, Impac's management had built a company that had "shareholder equity" of more than $1 billion as of Dec. 31, 2006 even though

as a REIT it was required to distribute 90% of its after-tax earnings to shareholders. During this period, Impac originated mortgages having a face amount of over $9 billion dollars. When it came time to promulgate the Letter Agreements, therefore, Impac's savvy management realized that it would be economically foolish to require that the tendering shareholders must first consent to the amendments that made their stock worthless and if they did not, the tender offer would automatically terminate. Impac's management concluded that that they would have to first purchase all shares tendered by each shareholder. Impac would then provide in the Letter Agreements that the Depositary would have to consent to the amendments on behalf of the tendering shareholder. But, the Depositary never did so...

Once the holders of two thirds of the preferred shares of each series approved the amendments, those amended shares became essentially worthless. Thereafter, there would have been no economic incentive for Impac to purchase the amended shares. Upon amendment of the Articles, Impac would also not have to pay any accrued dividends, which the holders of the amended shares could never collect. That alone would save Impac another $7.4 million dollars. After having obtained consents to the amendments making the preferred shares worthless, Impac would likely exercise its right to terminate the offer without purchasing a single share.

So, Impac never made a real effort to obtain the consents; Impac never called a special meeting of the preferred stockholders to vote on the amendments, and it did not send a simple consent form approving the amendments to the preferred stockholders to be signed and returned directly to Impac. Impac never even required a tendering shareholder to execute a simple consent to the amendments to be escrowed with the tendered stock and bill of sale that could be delivered to Impac thereafter.

To achieve the goal of eliminating preferred shareholder equity, Impac concocted a procedure involving the Depositary which would execute and deliver a written consent. The Letter Agreements made it clear, repeatedly, that the Depositary, acting under a power of attorney, would attempt to consent to the amendments on the shareholder's behalf. (*See*, Letter Agreement p. 5, par. 2: "tenders of shares ... will authorize and deliver a written consent approving the Proposed Amendments with respect to the shares of Preferred Stock so tendered on the undersigned's behalf ... Holders ... may not tender ... without delivering their authorization to the Depositary to execute and deliver a written consent ..."; "... this tender and grant of authorization to consent are irrevocable ..."; p. 6, paragraph 2: "... authorization to consent thereby delivered ..."; "[t]he undersigned hereby irrevocably constitutes and appoints the Depositary as its agent and attorney-in-fact ... to ...consent to and approve the Proposed Amendments on behalf of the undersigned, ... make ... and deliver on behalf of the undersigned any written consent ...")

The Letter Agreement's priority, however, was the tender. It stated:

> Subject to, and effective upon, the acceptance for purchase of all of the ... Preferred Stock tendered by this Letter of Transmittal and Consent in accordance with the terms and conditions of the Offer to Purchase and Consent Solicitation (and **authorization to consent** thereby delivered), the undersigned hereby tenders, transfers, sells, assigns and transfers to or upon the order of the Company, all right title and interest in and to the shares...tendered by this Letter of Transmittal and Consent and releases and discharges the Company from any and all claims the undersigned may have now, or may have in the future, arising out of, or related to, the shares of ... Preferred Stock. (Emphasis added).

There were no conditions on that tender, except acceptance of the shares by Impac. The Letter Agreement makes no reference to any condition precedent which, if not satisfied, would mandate "automatic" termination of the offer. This change ultimately allowed Impac to

eliminate, for only a few million dollars, $112 million in preferred shareholder liabilities, and the perpetual obligation to pay about $10 million annually in dividends.[8]

The Letter Agreement was designed to attempt to "authorize and direct the Depositary to execute and deliver a written consent to the Proposed Amendments on such Holder's behalf...." But the Depositary never did so. On page 6, the 8th paragraph of the Letter sets forth the duties of the Depositary and states when they were to be performed. The first two items in the paragraph, however, relate solely to the purchase and transfer of the shares. First, upon Impac's *purchase of the shares, the shareholder irrevocably assigned, transferred, and conveyed all right,* title, and interest in the tendered shares to Impac. Second, the shareholder gave Impac a general release from all claims the shareholder may have had by reason of having owned the transferred shares. Third, the shareholder "hereby consents to the amendments", and...." **hereby revokes any proxy heretofore given** with respect to the Proposed Amendments." (bold added) At this *stage in the process, the Depositary was only concerned with the first two provisions providing* for the transfer of title to the shares to Impac. It carried out its duties regarding transfer and the sale was complete.

The fifth listed item states that the shareholder "hereby irrevocably constitutes and appoints the Depositary as its agent and attorney-in-fact" to do the following things: (1) deliver

[8] Once Impac purchased the tendered securities at the conclusion of the tender offer at 6:00 am on June 29, 2009, Impac would lose any possibility of thereafter obtaining valid consents to the amendments. In order to consent to the Proposed Amendments, the consenting shareholder had to be the present holder of outstanding preferred stock at the time the written consent was executed and delivered to Impac. Second, Article 5 (f) of both Articles Supplementary provided that once Impac purchased the preferred shares, those shares became authorized but unissued stock (treasury stock). Impac confirmed their understanding of this provision on page 7 of the Offering Circular. Thus, Impac probably never expected to receive any consents to the amendments. It explains why there was no administrative provisions which would allow the *Depositary to deliver 500-1,000 written consents to Impac "immediately prior" to Impac's* purchase of those shares. It also explains why Impac has never moved for summary judgment by filing the consents it claims to have received.

the tendered shares and executed bills of sale to Impac; (2) present the tendered stock for transfer on the books of DTC; (3) present the tendered stock for transfer and to transfer the stock on the books of the Company. These first three duties are impossible unless Impac has purchased all of the tendered shares. They are consistent with the Depositary Agreement, and with the affidavit provided by the Depositary.

Fourth, the Depositary was authorized to "immediately prior to the Company's acceptance for purchase of the Series C Preferred Stock tendered, consent to and approve the Proposed Amendments." But it was too late, because the Depositary could not go back in time and do something before something that already had occurred. If there were any doubt, the Depositary's affidavit proves that the Depositary never even tried to consent to the amendments, before or after the transaction was complete.

Fifth, the Depositary was to execute and deliver to Impac on behalf of the shareholder any written consent to approve the amendments. The Articles Supplementary require that written consents had to be actually delivered to Impac. The Depositary never did so. No consents are in evidence. No one at Impac even claims to have seen such consents.

E. Other relief

The new evidence (*i.e.*, the Affidavit of the Depositary and Mr. Morrison's testimony) conclusively establishes that there are no consents to the Preferred B and Preferred C amendments. None were ever delivered to Impac by the Depositary, before or after Impac had purchased all tendered shares. None have been offered in evidence. Fully knowing this fact, Impac nevertheless filed the amendments to both Preferred Stock Series Articles Supplementary. In addition, Impac falsely stated the following in its Form 8-K filed June 29, 2009, in Item 3.03.

> Impac Mortgage Holdings, Inc. (the Company) **received consents** from the holders of the Preferred Stock in excess of 66 2/3% of the

> outstanding shares of the Preferred Stock required to amend the Company's charter to modify the terms of each series of Preferred Stock.

The public statements that Impac had ***received*** *written consents from two-thirds of the* Preferred shareholders, and therefore that both amendments were valid and legally amended, are knowingly totally false and fraudulent, and should entitle the Plaintiffs and the class to seek damages from the individual Defendant officers and directors of Impac who made these statements. The deliberate falsification of these critical facts would also support a demand for *punitive damages if the finder of fact believed that the misstatements in public filings* were the result of actual malice. If this Motion is granted, therefore, Plaintiffs will ask the Court to reinstate Counts III and V, or to issue an Order requiring Impac to show cause as to why those counts should not be reinstated for trial.

IV. Conclusion

Impac's brief in support of the present motion for summary judgment includes the following: "It is undisputed that Impac amended the Series B (and Series C) Articles Supplementary based upon more than two-thirds consent of the Parity Preferred." The assertion is disputed. It is now clear that the Court based its ruling on Impac's Motion to dismiss on a false premise. The Court accepted Impac's argument that "the consents were executed by the Preferred Shareholders and delivered to Impac prior to Impac's acceptance of the stock for purchase." Consents were not delivered to Impac. According to Impac, "after the expiration date, and immediately prior to Impac's acceptance of the shares, the Depositary consented to the amendments on behalf of the requisite amount of shareholders...." (Op., pp. 18-19). The Depositary did not do so. "To enable the Depositary to full [sic] its role, the consenting stockholders appointed the Depositary to 'make, execute, sign, acknowledge, verify,

swear to and deliver on behalf of the undersigned any written consent of the stockholders of the Company to approve the Proposed Amendments.'..." (Op., p. 24). The Depositary did not do any of those things. The Court wrote that "[t]he economic interest was necessarily delivered after the Depositary exercised the proxy...." (Op., p. 21). The Depositary never exercised the proxy.[9]

The Depositary affidavit calls into question not only the crucial timeline upon which Impac's argument depends, but the legitimacy of the entire vote. More than three years after this litigation was filed, Impac has still never produced – in discovery or in motions practice – a single consent form signed by any preferred shareholder. Ronald Morrison, Impac's general counsel and secretary, has never seen them. He has never asked anyone in the departments he manages, (Legal, Compliance, Investor Relations, Human Relations, and Client Administration) to compile or review them. He even testified that "some consents were oral." (Ex. 4). Which consents? Who recorded them? How were they recorded? What provision of the Articles Supplementary permitted such consents?

The Depositary did not record any consents, oral or otherwise. No record of consents, written or oral, has been produced. There is no record of the Depositary's having consented to the amendments on behalf of any shareholder, "immediately prior" to Impac's acceptance of the shares, or at any other time. The Depositary "had no involvement with the shareholder votes."

The sole purpose of Impac's pending motion for summary judgment, which Plaintiffs have opposed in a separate pleading filed before the Depositary's affidavit was available, is to win approval of the scheme by which Impac confiscated over $51 million in shareholder equity, and over $27 million in accrued dividends, from shareholders who did not participate in the

[9]And, in paragraph 8 of the Letter Agreements, after Impac had purchased the tendered shares, the tendering shareholder specifically revoked any proxy theretofore given.

offer. If Impac is successful in pulling off this scheme, there could be broader implications in the market for preferred shares. The owners of preferred shares worth billions of dollar and the companies who issued these shares will want to know if Impac has devised a method that would legally allow the issuers to appropriate the investments of the shareholders, eliminate their requirement to pay accrued but unpaid dividends, and void contractual provisions requiring future payments of dividends all without paying the remaining preferred shareholders a single cent. What company would not jump at the chance to eliminate tens of millions of dollars in shareholder equity for pennies on the dollar, if it could do so by concocting a successful voting scheme that stripped the preferred shares of all of their value without the necessity of a vote by the preferred shareholders?

The Impac Articles Supplementary, however, require "an affirmative vote or consent... given in person or by proxy, either in writing or at a meeting...." (¶6(d)). There was no meeting. There are no written consents. The Depositary never exercised any proxy and cannot produce a single document relative to the communication of a consent vote to Impac.

As this Court wrote: "Preferential stock rights are contractual in nature and therefore are governed by the express provisions of a company's certificate of incorporation, in this case the Articles Supplementary." (Op., p. 9). In light of the Depositary's affidavit, Impac cannot show that it met the most basic pre-requisite of a valid vote, i.e., the written consent or written proxy vote of two-thirds of either the Preferred B or Preferred C shareholders. For this reason, the Court's earlier ruling should be vacated, and Count II of the Complaint should be reinstated.

Respectfully submitted,

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Thomas J. Minton

IN THE CIRCUIT COURT FOR BALTIMORE CITY

CURTIS J. TIMM, on behalf of himself and all persons similarly situated, Plaintiff, CAMAC FUND LP Intervener Plaintiff v. *IMPAC MORTGAGE HOLDINGS, INC.*, et al., Defendants.	)	**CASE NO. 24-c-11-008391** Action Filed: December 7, 2011 Judge: Hon. W. Michel Pierson

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR RULE 2-602 RELIEF

I. Introduction

When the Court granted an early summary judgment in favor of Impac as to the Plaintiffs' claim challenging the legitimacy of the process by which preferred shareholders were asked to consent to amendments that stripped their shares of almost all of their preferred rights, it did so on the basis of the three documents that established that process, an Offering Circular, a Letter of Transmittal and Consent, and Articles Supplementary. The binding, contractual voting requirement is set forth in the latter. Thus, to enact the amendment, the Articles Supplementary required "the affirmative vote or consent of the holders of at least two-thirds of the shares of the Series B [Series C] Preferred Stock outstanding at the time, given in person or by proxy, either in

writing or at a meeting...." (Mem. Op. Jan. 28, 2013, p. 10).[1] "Participating shareholders were required to indicate their consent and tender their shares together with the applicable Letter to the Depositary...." *(MO-1, p. 4).*

The Court now knows that "participating shareholders" did nothing of the sort. For three years, Impac consistently maintained that the Letters of Transmittal, with their grant of power of attorney to the Depositary, constituted the "consent, ... by proxy, ... in writing" that the Articles Supplementary required. "Each tendering shareholder conferred irrevocable authority upon a Depositary to consent.... Only then, upon Impac's determination that the conditions of its offer had been met, was the Depositary instructed first to exercise the shareholder' consent to the amendment, then to 'accept' the stock and pay for it." (Impac Memo in Support of Motion to Dismiss, February 29, 2012, p. 3).[2] Accepting Impac's version of the consent procedure, this Court held: "while a shareholder acknowledged its consent by executing the applicable Letter, the Depositary also needed to consent or, at the very least, transmit shareholder consent to Impac. MO-1 p. 24, n. 16.

Nearly three years after Impac crafted this narrative, Plaintiffs issued a simple subpoena to the Depositary, focused on a narrow aspect of the consent process. Plaintiffs wanted to test Impac's assertion, made in the pending motion for summary judgment, that "Impac and its outside counsel received nearly daily reports from [the Depositary] updating the number and percentage of shares of Preferred Stock that had been tendered, **with consents**.... **Responses** of the Series B and Series C were counted in the aggregate toward the two-thirds threshold." (Impac Memorandum in Support of Motion for Summary Judgment, February 26, 2014, p. 13,).[3]

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[1] The Memorandum Opinion of January 28, 2013 will be abbreviated hereafter as MO-1. The Court's Memorandum Opinion of November 27, 2013 will be abbreviated as MO-2.
[2] The Impac memo in support of its original motion to dismiss will be referred to hereafter as Impac-1.
[3] The Impac memo in support of the pending motion for summary judgment will be referred to hereafter as Impac-2.

The subpoena produced nothing but consternation for the Depositary. There were no "consents." There were no "responses." The most fundamental requirements and attributes of the voting process had been repeatedly misstated by Impac in its pleadings and briefs. None of what Impac said happened actually did happen.

In this circumstance, Plaintiffs' Rule 2-602 motion seeks appropriate relief. The entry of summary judgment in favor of Impac should be reconsidered and vacated, because the evidence now before the Court is totally contrary to what Impac represented to the Court and what the Court described and relied upon in its ruling. *See, e.g., Azarian v. Witte*, 140 Md. App. 70, 86, 779 A.2d 1043 (2001), *aff'd*, 369 Md. 518, 801 A.2d 160 (2002) ("Moreover, appellee's resubmission of his [earlier denied] motion was entirely appropriate, given the additional information elicited from [an expert witness].")

Remarkably, Impac's response to the 2-602 Motion proves the point. The factual predicate for the Plaintiff's motion is not only unchallenged; it is confirmed. The factual predicate for the Court's decision is therefore conceded by all parties to be erroneous. Impac instead seeks affirmation of the judgment based on a new, incomplete, and un-scrutinized representation of what their new set of facts will show. That change in tactics, however, merely illustrates the necessity of vacating the earlier judgment. Moreover, as seen below, the new argument and facts now advanced by Impac are insufficient to permit this Court to conclude that either two-thirds of the Series B or two-thirds of the Series C shares validly consented to the amendments.

II. Analysis

A. Impac's and the Court's reliance on the role of the Depositary

Prior to filing its response to this Motion, Impac's strongest efforts in this case were aimed at defending the truthfullness of what has now been revealed to be an imaginary voting *protocol involving the Depositary. Examples abound and a few are listed hereafter:*

- "Stockholders were required to deliver the stock **and consents** by the 'Expiration Date....'" (Impac-1, p. 10; emphasis added).

- "Holders of Preferred Stock who wanted to accept Impac's offer were required to tender their stock **and consents**...." (Impac-1, p. 12; emphasis added).

- "By **signing** the Consent Letter, a holder 'consents to and approves the Proposed Amendments.'" *(Impac-1, p. 12; emphasis added).*

- "The Consent Letter expressly lay[s] out the same sequence of events: 'The undersigned hereby irrevocably constitutes and appoints the Depositary as its agent and attorney in fact ... to ... (4) immediately prior to the Company's acceptance for purchase ... consent to and approve the Proposed Amendments on behalf of the undersigned.'" (Impac-1, p. 13).

- "[H]olders of Preferred Stock could **only** tender shares by **executing** the Consent Letter...." *(Impac-1, p. 22; emphasis added).*

- "[C]onsent was effective immediately upon **execution** of the Consent Letter...." (Impac-1, p. 22).

- "The Depositary was instructed to consent to the Proposed Amendments on behalf of the selling shareholder 'immediately prior to the Company's acceptance for purchase of the shares.'... To enable the Depositary to fulfill its role, the consenting stockholders appointed the Depositary to 'make, execute, sign, acknowledge, verify, swear to and deliver on behalf of the undersigned any written consent of the stockholders of the Company to approve the Proposed Amendments.'" (Impac-1, p. 24).

- "[Plaintiff's] argument would require that the sequence of consent and purchase set forth in the stockholders' Letter of Consent be read in reverse and contrary to the express language. The stockholders **authorized and instructed the Depositary, as their agent, to deliver their consent 'immediately prior' to Impac's 'acceptance for purchase.'**[3] (Impac-1a, p. 2; emphasis added).[4]

  "Plaintiff disregards the parties' express instructions to the Depositary to **deliver consents** 'prior to' acceptance of the stock...." (Impac-1a, p. 11).

[4] Impac-1a is the Reply in Support of the Motion to Dismiss, dated May 31, 2012.

- "Impac closely monitored stockholder responses. Impac and its outside counsel received nearly daily reports from [the Depositary] updating the number and percentage of shares of Preferred Stock that had been tendered **with consents.**" (Impac-2, p. 13;emphasis added).

  In an SEC form 8-K filed June 29, 2009 Impac stated that "the Company **received consents from the holders** of the Preferred Stock in excess of 66 2/3% of the outstanding shares of Preferred Stock required to amend the Company's charter to modify the terms of each series of Preferred Stock." (emphasis added)

- **"Instructions to the Depositary Properly Sequence the Events of Consent and Acceptance for Purchase."** (Impac-1a; p. 11 heading).

If the above statements do not summarize Impac's entire argument in support of its motion to dismiss, the following statement does, and forms the linchpin for the Court's eventual ruling: "The Depositary played a central role in effectuating the transaction as an agent of both Impac and the tendering shareholders, including assuring that the stockholder's consent was obtained and validly delivered." (Impac-1a, p. 11). This led the Court to describe Impac's argument as follows:

"[T]he consents were **executed by the Preferred Shareholders and delivered to Impac** prior to Impac's acceptance of the stock for purchase.... [E]ach shareholder's consent to the amendments, **which was expressed by and effective immediately upon the execution of the Consent Letter,** and corresponding shares **were delivered to the Depositary**... [and] immediately prior to Impac's acceptance of the shares, **the Depositary consented to the amendments** on behalf of the requisite amount of shareholders...." (MO-1, pp. 18-19; emphasis added).

In reliance on Impac's representations about the specific and "central" role of the Depositary, the Court held that: "Participating preferred shareholders were required to indicate their consent and tender their shares **together with the applicable Letter to the Depositary** selected by Impac to manage the transaction...." (MO-1, p. 4; emphasis added). Further:

"[W]hile a shareholder acknowledged its consent by executing the applicable Letter, **the Depositary also needed to consent to or, at the very least, transmit shareholder consent to Impac.**" *(Mem. Op., pp. 24-25 n. 16; emphasis added).*

Having been confronted by undisputed evidence that its representations to the Court were false, Impac now pivots and says that: (1) as of September 2008, it knew that no shareholders would ever execute a Letter of Transmittal and Consent – they were instructed **not** to do so (on page 2 of Impac/Moisio Ex. 4B: "DO NOT COMPLETE THE LETTER OF TRANSMITTAL AND CONSENT."); *(2) the Depositary did not act as attorney-in-fact for any shareholder at any* time; (3) the Depositary did not deliver a single consent to Impac, ever; nor did it ever "vote or consent" to the amendments on behalf of the shareholders; (4) Impac never instructed the Depositary to deliver consents "immediately prior" to Impac's acceptance of the shares for purchase (or at any time).

None of these crucial actual facts would have been revealed to the Court by Impac if the Depositary had not been subpoenaed and, in response, given an affidavit. These facts are now conceded. These revelations necessitate the Court's revisiting its earlier decision, and vacating it under the broad discretion granted under Rule 2-602, because the decision rests entirely upon a false construct that Impac advanced repeatedly, and strenuously, in support of the motion.

B. The present state of the evidence on the role of the Depositary

The Depositary has given two affidavits in this matter. The first supports Plaintiffs' argument: the Depositary "had no involvement with the shareholder votes." The second does not rebut the first or clarify it. It contains two substantive paragraphs, numbered 3 and 4. Number 3 does not say anything of value – the first sentence is incomprehensible. It merely *refers to the Depositary Agreement between Impac and AmStock, a copy of which Plaintiffs*

filed with their Motion because it supports the argument for revocation of the summary judgment order. Number 4 states that AmStock *was not* the Information Agent for the transaction which everyone who read the Offering Circular knew, and refers again generally to the Depositary Agreement. Nothing in that second affidavit is relevant to the matter at hand, which is whether Impac received valid consents to the amendments from two-thirds of each of the Preferred B and Preferred C shares "outstanding at the time," and "given... in writing or at a meeting." (Art. Supp., § 6(d)).

Impac has never produced any evidence of written consents. If Impac had actually received the required number of timely delivered written consents to their Proposed Amendments, a few weeks after Plaintiff filed this class action, Impac would have moved for summary judgment on all counts. In support of that motion, Impac would have included copies of those consents proving that the amendments were validly approved. They never took this totally logical step because they never received a single consent because they simply do not exist. The Depositary has stated that it cannot produce any consents, and Impac has now confirmed this fact. Not a single witness has testified by affidavit or by deposition that written consents to the amendments exist. Impac now argues only that the Depositary was authorized by the Depositary Agreement to accept an "Agent's Message" from the DTC reflecting that tendering shareholders agreed to be bound by the terms of the Tender Offer, but the Depositary does not say that it received or examined any Agent's Messages, the DTC has not testified that it generated any, and it is not clear that the DTC was even asked to do so.

Impac's new reliance on this alternative method of consenting to amendments raises more questions than answers. First, if Impac **received** such Agent's Messages, as required, where are they? Second, the Agent's Message, in and of itself, does not constitute a consent to

the amendments satisfying the requirements of the Articles Supplementary. not a written consent itself. Only the Depositary the Depositary was authorized by the tendering shareholders to *attempt to deliver written consents to the Proposed Amendment on behalf of the shareholder.* In fact, if the spreadsheet is the only information it communicated to Impac, the Depositary never even identified the actual shareholders who had tendered their shares, but merely bundled institutional tenders to arrive at a monetary figure that Impac would have to pay. This omission made it impossible for Impac to determine that the tendering shareholder was the owner of then *outstanding shares of either Preferred B or Preferred C shares. The ownership of outstanding* shares was an absolute requirement to consent to amendments under the provisions of Article 6 (d) of the Articles Supplementary.

All shares tendered to Impac for possible purchase were tendered under the terms and provisions of the applicable Letter Agreements, including those that were supposedly executed *and sent to institutional holders by beneficial owners. Those binding Letter Agreements solely* authorized the Depositary to attempt to consent to the proposed amendments but the Depositary never did. The record in this case proves that the Depositary had no involvement with any vote. No written consent from the Depositary to Impac has been produced. No Agent's Message to the Depositary has been produced. The Depositary denies any involvement with any vote.

C. The Offering Circular and Mr. Moisio's affidavit

No matter what Impac now claims regarding the actual receipt of consents, it is the Depositary whom the documents solely authorize and required to give and deliver that consent. The Offering Circular that Mr. Moisio discusses in his affidavit underscores the point at page 38: "By tendering your shares **and delivering your consent** as set forth above, you irrevocably ***appoint the Depositary*** *and its designees as your attorneys-in-fact …with respect to your shares*

of Preferred Stock tendered **and accepted for purchase by us.**"[5] (Emphasis added). Since the Depositary disavows undertaking any act as attorney-in-fact or proxy in respect of the consent needed to enact the amendments, and since Impac has never been able to produce any written consents from the Depositary on behalf of any shareholders, the Court cannot reasonably conclude that Impac's tender offer and consent solicitation process resulted in the "vote or consent," "in writing," from the "Series B [Series C] Preferred Stock outstanding at the time," that the Articles Supplementary required. All roads lead back to the Depositary, whose original testimony could not be stronger, and whose second affidavit really says nothing of substance.

Mr. Moisio's affidavit discusses the process described on pages 36-37 of the Offering Circular by which shares could be tendered through the DTC. But the discussion is incomplete because "consents" are not even discussed. For example, the section never mentions the method by which *consents* were to be communicated, *in writing* per the Articles Supplementary, to Impac. On page 36, the Offering Circular states that the shareholder "should instruct its bank, broker, or other nominee to make the appropriate election on its behalf...." A careful reading of those two pages reveals that there is absolutely no references to the method of consenting to amendments. In fact, the words "consent" or "consenting" do not appear in any form on those two pages except the word consent appears is in the title *Effect of Tenders and Consents*. Additionally, Impac presents no evidence or proof that anyone involved in the DTC's ATOP system attempted to consent to the amendments on behalf of the tendering shareholders.

Indeed, the Moisio affidavit is also devoid of any mention that Impac received any consents. He was the person in Impac that was receiving the regular reports from AmStock of the

[5] In other words, as Plaintiff argued from the outset, the appointment of AmStock as attorney-in-fact and proxy was only irrevocable when Impac "accepted" the shares for purchase, i.e., before the termination of the tender offer. This is further explained hereafter.

number of shares being tendered and surely would have seen any written consents that AmStock or DTC or any broker would have delivered to Impac.

Mr. Moisio's testimony about the actual communications from the Depositary regarding the tender offer is also totally deficient. He testifies that Exhibit 8 is a "report and spreadsheet from AmStock showing cumulative Preferred Stock tenders *and consents*." (emphasis added) But the claim that the spreadsheet information included the number of tendering shareholders who consented is just made up by Mr. Mosio as there is nothing in those spreadsheets about the *number of tendering shareholders who allegedly consented to the amendments. The spreadsheet* document only shows the numbers of shares tendered by the institutional holders and, per the cover email to which it was attached, fixes a figure to be paid by Impac for the shares. The last column of the spreadsheet, which is supposed to show the number of beneficial owners for whom the tendering institution acted, is left blank. The actual shareholders are not identified or *accounted for anywhere, and "consent" is not even mentioned. Impac's desperate attempt to be* able to claim that the spreadsheets are written evidence of consents fails for these and other reasons.

D. **The requirements of the Articles Supplementary**

In the absence of a special preferred shareholders' meeting to vote on and approve the *amendments, each Articles Supplementary in Article (6)(d), required amendments to be* approved by written consents executed by two-thirds or more of the shareholders who were the owners and holders at the time the consents were executed and delivered to Impac. Thus, the sole issue before this Court is whether Impac received, on or before June 29, 2009, a sufficient number of written consents. If not, the Articles Supplementary were not lawfully amended.

Impac now concedes that it has known since June 29, 2009 that it did not receive any written consents from the Depositary who was supposed to be, pursuant to the terms of the Letter of Transmittal and Consent, appointed attorney-in-fact by **all** shareholders for purposes of executing and delivering the necessary, written consent to Impac. If there was another way for consent to be delivered to Impac, Impac has not shown what it is, since both Moisio Exhibits 4A and 4B adopt the protocol by which the Depositary delivers written consents. Impac's own documents demonstrate how flawed the voting process was. Before the Offering Circular and Letter Agreements were prepared, the Depositary told Impac that: "When a broker tenders through that [DTC's ATOP] system, it is with the **understanding** that they duly consent **as outlined in the Offer documents.**" (Emphasis added). In other words, the Depositary never intended to act as attorney-in-fact, and the Depositary and Impac were both positioned merely to assume consent based on *broker* transfers of shares, not based on *shareholders'* written consents or written consents to be executed and delivered by the Depositary. Impac and AmStock appear to be complicit in accepting and implementing a voting procedure that was certain NOT to comply with the Articles Supplementary, while creating enough paperwork to create the illusion of compliance.

In contrast with the approach taken by Impac during the first three years of this litigation, when Impac consistently touted the role and the significance of the Depositary in delivering legitimate, written consents to Impac, Impac now asks the Court to approve a different set of procedures for consenting not authorized by the Articles Supplementary which, in practice, were totally ignored. Impac now merely makes the naked claim that all tendering shareholders consented, but offers no proof other than a spreadsheet enumerating and putting a monetary value on the shares that various institutions tendered. Impac presents no evidence of what any

alleged electronic consents stated, or whether or how they were scrutinized by the Depositary. Impac offers no proof that electronically transmitted consents were received by the institutional *holders, transmitted to the Depositary, or resulted in Agent's Messages that complied with the* terms of the tender offer.

The Articles Supplementary do not authorize electronic consents. Consents must be "in writing." Impac could have amended their Articles to provide for electronic consents but they did not. This is probably because electronic consents are subject to computer glitches, power *failures and loss of electronic data because of viruses and innumerable other reasons. Impac* needed written consents to count, to determine that the party consenting was a then holder of outstanding shares, that the signature of the party consenting matched the signature on file, that the consent was to all or just part of the Proposed Amendments etc. etc. In sum, Impac cannot show that there was a "vote or consent," "in writing," by the "holders of at least two-thirds of the *shares of the Series B [Series C] Preferred Stock outstanding at the time." Impac and AmStock* assumed consent based on the *brokers'* tender of shares. So, Impac does not now provide the Court with proof of a legitimate vote under the Articles Supplementary, because it cannot.

Apart from the fact that the Depositary's supposed involvement in the consent process was nothing more than a fanciful, theoretical method of complying with the Articles *Supplementary, the complexity of any shareholding voting, particularly through the DTC's* ATOP system, would require a lot more than the barebones affidavit testimony Impac has submitted. For example, while Impac blandly notes in its opposition that the DTC is able to process consents, Impac does not refer to any of the DTC's procedures for doing so. Those procedures are summarized in the DTC materials available on line. The summary is attached *hereto as Exhibit 1.*

The DTC first requires that the issuer or its agent establish a record date. Did Impac or AmStock do so? There is no evidence that they did. Second, the DTC states that "it is *preferable that consents be emailed to" a DTC web address. Again, there is no evidence that this* occurred. The DTC then has an accessible website for "Proxy Web Services," access to which is apparently password protected, but there is no evidence as to whether any of the brokers who tendered shares for themselves or for actual shareholders actually made use of it. The DTC also provides that "[c]onsents may be sent to the following address [at 55 Water Street, in New York *City]," but the actual evidence proves that no written consents exist in this case.*

At a minimum, therefore, the evidence that Impac has now filed in support of the summary judgment it seeks to maintain is woefully inadequate, because it does not begin to establish compliance with any of the DTC's policies and procedures regarding consent solicitations. Moreover, if AmStock was supposed to work with DTC on Impac's behalf, the *affidavit of the AmStock official is of no help on this point. The affidavit recognizes the* Depositary Agreement but is carefully worded to say only that AmStock's "role" is set forth therein, not that AmStock undertook any activity in furtherance of that role. Impac's reliance on the Depositary Agreement between Impac and AmStock is misplaced. That agreement does not contain a single word about consents or the Depositary executing and delivering such consents. *One is left to presume that, consistent with the Email from AmStock quoted in the Moisio* affidavit, AmStock was always content not to be involved in shareholder consent or transfers if *book entry* shares through the DTC system.

Depositary could take no action until after Impac purchased all tendered shares, thus, the Depositary could not consent to amendments before Impac purchased the shares tendered

This simple and totally logical statement is proven at least three different ways. **First**, the Letter Agreements made it perfectly clear in the first and eighth paragraphs of that agreement

that Impac **had to first purchase** all shares that were tendered by each shareholder before the Depositary would be appointed attorney-in-fact and could take any action thereunder. After the *selling shareholder had sold and assigned their shares to Impac and given Impac a general* release, the shareholder for the first time consented to the amendments and appointed the Depositary as their agent to attempt to execute and deliver consents to the amendments to Impac. At this time, Impac was the sole owner of the shares and the former shareholder had no right to consent to amendments or authorize the Depositary to consent to the amendments on their behalf. **After** *such purchase,* ***no valid consent could ever be obtained by Impac.*** This was because Article 5 (f) of the Articles Supplementary provided that once Impac purchased the shares, they became authorized but unissued shares that no one could vote. Article 5 (d) (iii) further provided that all rights of the holder "shall terminate except the right to receive the redemption price." Par 6 of the Letter Agreements authorized the tendering shareholder in *their sole discretion to withdraw their tender offer and corresponding consent at any time prior to* Impac purchasing those shares. The effect on the Depositary was to eliminate any ability of the Depositary to take any action with respect to the escrowed shares *until after Impac had purchased those shares.*

Finally, **If Impac did not elect to purchase the tendered shares,** the Letter Agreements *terminated and the shares tendered thereunder had to be returned to the preferred shareholder* who had tendered those shares. At the top of page 36 of the Offering Circular under Termination, Impac states the following:

If we do not accept any tendered shares of the Preferred Stock for purchase,...we will return certificates for such shares .....(or in the case of shares of Preferred Stock tendered through DTC.....those shares of Preferred Stock will be credited to an account maintained within DTC as soon as practicable following expiration or termination of the Offer to Purchase and Consent Solicitation."

The bottom line is that once Impac purchased the tendered, it was impossible thereafter to obtain consents to the amendments meeting the requirement of the Articles Supplementary.

Impac's new argument both concedes the point made in Plaintiffs' Rule 2-602 Motion, and obscures what transpired in the 2009 transaction. The Depositary was to act as attorney-in-fact for all shareholders, whether they signed the Letter of Transmittal and Consent, or whether the institutions holding their shares appointed the Depositary for them. The Depositary did not exercise that power at any time, but merely transmitted information to Impac regarding the number of shares tendered. *How then, could Impac determine that two-thirds of the* holders of the Series B and Series C Preferred shares provided consent to the proposed amendments, in writing, delivered to Impac by current holders of the outstanding shares? The answer is that Impac could not and did not do so, and Plaintiffs' motion for Rule 2-602 relief should be granted.

Respectfully submitted,

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2009 Annual Report

In May 2009, the Company exchanged an aggregate of $51.8 million in trust preferred securities of Impac Capital Trusts #1 and #3 for junior subordinated notes with an increased aggregate principal balance of $62.0 million and a maturity date in March 2034. Under the terms of the exchange, in consideration for the increase in principal, the interest rate for each note was reduced from the original 8.01 percent to 2.00 percent through 2013 with increases of 1.00 percent per year through 2017. Starting in 2018, the interest rates become variable at 3-month LIBOR plus 375 basis points. In connection with the exchange, the Company paid a fee of $0.5 million.

In June 2009, the Company purchased and canceled $1.0 million in outstanding trust preferred securities of Impac Capital Trust #4 for $150 thousand.

In July 2009, the Company became current and is no longer deferring interest on its remaining trust preferred securities.

In August 2009, the Company purchased and canceled $2.5 million in outstanding trust preferred securities of Impac Capital Trust #4 for $375 thousand.

As a result of the restructuring of $51.8 million and the cumulative purchases and cancelation of $36.5 million in outstanding trust preferred securities, the Company reduced its annual interest expense obligation from $7.8 million to approximately $2.0 million. At December, 31, 2009, the Company has $8.5 million in outstanding trust preferred securities of Impac Capital Trust #4 and $62.0 million in outstanding junior subordinated notes.

Preferred stock

In June 2009, the Company completed the Offer to Purchase and Consent Solicitation (the "Offer to Purchase") of its 9.375% Series B Cumulative Redeemable Preferred Stock and 9.125% Series C Cumulative Redeemable Preferred Stock. The Series B Preferred Stock had a liquidation preference of $50 million and the Series C Preferred Stock had a liquidation preference of $111.8 million, for a total of $161.8 million. Upon expiration of the Offer to Purchase, holders of approximately 67.7% of the Preferred Stock tendered an aggregate of 4,378,680 shares. Stockholders of the Company's Series B Preferred Stock tendered 1,323,844 shares at $0.29297 per share for $388 thousand. Stockholders of the Company's Series C Preferred Stock tendered 3,055,036 shares at $0.28516 per share for $871 thousand. The aggregate purchase price for the Preferred Stock was $1.3 million. In addition, in connection with the completion of the offer to purchase the Company paid $7.4 million accumulated but unpaid dividends on its Preferred Stock. With the total cash payment of $8.7 million, the Company eliminated $109.5 million of liquidation preference on its Preferred Stock. After the completion of the Offer to Purchase, the Company has outstanding $52.3 million liquidation preference of Series B and Series C Preferred Stock, but as discussed below is not obligated to pay dividends on such preferred stock.

In connection with the Offer to Purchase, the Company filed Articles of Amendment to its charter with the State Department of Assessments and Taxation of Maryland to modify the terms of each of its 9.375% Series B Cumulative Redeemable Preferred Stock and 9.125% Series C Cumulative Redeemable Preferred Stock to (i) make dividends, if any, non-cumulative, (ii) eliminate the provisions prohibiting the payment of dividends on junior stock and prohibiting 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, (iii) eliminate any premiums payable upon the liquidation, dissolution or winding up of the Company, (iv) eliminate the provision prohibiting the Company from electing to redeem Preferred Stock prior to the fifth year anniversary of the issuance of such Preferred Stock, (v) 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