

**CURTIS J. TIMM, on behalf of himself
and all other persons similarly situated
Plaintiff**

v.

**IMPAC MORTGAGE HOLDINGS, INC.,
et al.
Defendants**

**IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY
Case No. 24-C-11-008391**

* * * * *

MEMORANDUM OPINION

Following the court's Memorandum Opinion of December 29, 2017 deciding the parties' cross-motions for summary judgment, the parties briefed their positions on the subject of the remaining actions to be taken by the court. A hearing was held on April 16, 2018. This opinion sets forth the court's rulings on those issues.

Background

Impac is a publicly traded company capitalized with common stock and two classes of preferred stock, the 9.375% Series B Cumulative Redeemable Preferred Stock, and the 9.125% Series C Cumulative Redeemable Preferred Stock. The two series of preferred stock were created in 2004 by separate Articles Supplementary amending the charter. The material terms of the respective Articles Supplementary are identical. In 2009, Impac announced a tender offer for the preferred shares, which was linked to a consent solicitation requiring any shareholder who tendered shares to consent to certain amendments to the Articles Supplementary. Upon expiration of the offer, Impac announced that "holders had tendered an aggregate of approximately 67.7% (4,378,880 shares) of the Preferred Stock" and that Impac was amending its charter to modify the terms of each series of preferred stock. The amendments were filed on June 29, 2009. Although the holders of Series B and Series C preferred stock collectively tendered an aggregate

of approximately 67.7% of the outstanding shares, Series B holders tendered only 66.2% of the outstanding Series B shares.

A class action complaint with six counts was filed on behalf of plaintiff Timm against Impac and its directors, asserting that the amendments to the Articles Supplementary were invalid. In addition to the contention that there were not sufficient consents from the Series B shares to permit the amendments to the Series B Articles, the complaint alleged that the votes to amend both the Series B and Series C Articles were invalid for other reasons, and that the defendants had breached fiduciary duties and duties of good faith and fair dealing.

The defendants filed a motion to dismiss, which was treated as a motion for summary judgment. The court granted judgment in favor of defendants on all claims, with the exception of the claim that the amendments to the Series B Articles Supplementary were invalid due to the failure to receive consent of two-thirds of the Series B shares. As a result, the following claims against Impac remained:

Count I, alleging that the purported amendment of the Series B Articles was ineffective because of the failure to obtain sufficient consents.

Count IV, alleging that as a result of a repurchase of shares by Impac in the fourth quarter of 2009, Impac is required to pay cumulative dividends to series B shareholders.

Count VI, alleging that as a result of the failure to make dividend payments, Impac is required to hold a special election and allow the Series B shareholders to elect two additional directors.

Plaintiff Timm filed a motion for reconsideration (Motion to Revise the Court's January 28, 2013 Order (No. 32)), which was denied. Thereafter Camac Fund, LLP was permitted to intervene as a plaintiff, and filed a class action complaint, similar but not identical to plaintiff

Timm's complaint.¹ After discovery, the parties filed cross-motions for summary judgment on the outstanding claims. In addition, plaintiffs filed another motion seeking reconsideration of the court's rejection of the other claims. (Plaintiffs' Motion Pursuant to Rule 2-602(a)(3) for Revision of Partial Summary Judgment for Defendants (No. 97)).

By opinion dated December 29, 2017, the court ruled that amendment of the 2004 Series B Preferred Stock Articles Supplementary required consent of two-thirds of the Series B Preferred Shareholders, and that, in consequence, Impac's attempt to amend the Articles in 2009 was ineffective. The court denied Impac's motion for summary judgment and granted plaintiffs' cross-motion for summary judgment. The court denied the motion for reconsideration.

Thereafter the parties filed a series of memoranda addressing issues about the action to be taken in light of that ruling. In addition, plaintiff Timm filed another motion asking the court to reconsider again the decision on the other claims. (Motion Regarding Court Opinion Dated December 29, 2017 Relative to Pfd Series B Issues (No. 126)).

Plaintiff Camac asserts that plaintiffs are entitled to a declaration that the 2009 Amendment was ineffective and that the 2004 Articles are in full force and effect, and that plaintiffs are entitled to an injunction requiring an election of directors. Camac also contends that the court should determine the amount of the dividend that is payable and the identity of the shareholders who are entitled to the dividend. Camac suggests that the court should certify a class consisting of Series B shareholders who may be entitled to the dividends, and that Impac should be required to pay the cost of giving notice to class members.

¹ The Camac complaint is essentially identical to the Timm complaint, except for the omission of Count V of the Timm complaint, which seeks punitive damages. Count V of the Camac complaint is the same as Count VI of the Timm complaint.

Impac contends that the October 2009 repurchase of shares was ineffective because it was never authorized by Impac's Board of Directors. It further argues that the 2009 repurchase may be rescinded. Impac asserts that if the court accepts either of these propositions, that ruling would eliminate any obligation on the part of Impac to declare 2009 dividends.

Camac and Impac agree, to some extent, that the court should rule in a manner that facilitates appellate review. However, they disagree about how that should be accomplished. Camac suggests that the court should issue a declaratory ruling and an injunction requiring election of directors. Impac argues that the court should not issue an injunction at this time, but should certify its ruling on the declaratory judgment as final under Rule 2-602. Camac argues that no certification under Rule 2-602 is necessary if the court issues an injunction, because an injunction is immediately appealable. Camac suggests that the court should certify a class now, whereas Impac argues that certification of a class should wait until after appellate review of the court's ruling on the merits.

Most of plaintiff Timm's briefing relates not to the issues of the relief to be granted, but to his contention that the court's rulings are erroneous. To the extent that he offers arguments on the issues before the court, he supports Camac's argument that a special election should be required, and opposes Camac's request for class certification. He argues that Impac should be required to pay all accumulated dividends, without explaining the basis for this demand.

Discussion

For the reasons set forth below, the court will enter a declaratory judgment that the 2009 amendments to the Series B Articles Supplementary are invalid due to the failure to obtain consent of two-thirds of the Series B shares. The court will also declare that the Series B shareholders are entitled to dividends for three quarters of 2009. The court will enter an injunction requiring the

election of two directors by the Series B shares. The court will direct the entry of partial final judgment embodying all of the rulings made to date. The court will not certify a class at this time.

Motion for Reconsideration

At the hearing of April 16, 2018, the court ruled from the bench that plaintiff Timm's current motion for reconsideration was denied. A written order embodying this ruling will be entered.

Declaratory Judgment (Count I)

Camac requests that the court enter a declaratory judgment in accordance with its determination that the 2009 amendments to the Series B Articles Supplementary were ineffective and that the 2004 Series B Articles Supplementary are still in force. Impac agrees that such a judgment should be entered based on the court's ruling on summary judgment. Therefore, the court will enter a declaratory judgment effectuating that determination.

Requirement of Dividends (Count IV)

The Series B Articles Supplementary place limitations on Impac's ability to repurchase its preferred stock. They state:

[U]nless full cumulative dividends on the Series B Preferred Stock have been or contemporaneously are declared and paid or declared and a sum sufficient for the payment thereof is set apart for payment for all past dividend periods and the then current dividend period, . . . [no] shares of Common Stock, or any shares of preferred stock of the Corporation ranking junior to or on parity with the Series B Preferred Stock . . . [shall] be redeemed, purchased or otherwise acquired for any consideration . . . by the Corporation. . .

Articles Supplementary, Series B Preferred Stock, § 3(d).

In 2009, Impac purchased 10,564 shares of Series B preferred Stock and 10,478 shares of Series C preferred stock. Believing itself to be operating under the 2009 amended Articles, Impac did not make the dividend payments required under the 2004 Articles Supplementary. The parties

dispute whether a dividend is required under the terms of section 3(d) and, if required, the extent thereof.

Impac does not dispute the fact of the purchase of shares in 2009. Nor does Impac contend that a determination requiring it to pay dividends is not an appropriate remedy to effectuate the terms of the Articles. In its briefing, Impac challenges the relief requested by plaintiffs on two grounds. The first is that the repurchase was ineffective because Board authorization was required for the repurchase and none occurred. The second is that the repurchase is subject to rescission. However, at the hearing, Impac's counsel represented that because the other party to the transaction would not agree to rescission the second ground was withdrawn.

Requirement of Dividends

Impac argues that it should not be required to pay a dividend because the 2009 repurchase did not comply with Md. Code, Corp. & Assn's Art. § 2-310(a)(1). That section provides: "Subject to the provisions of its charter and § 2-311 of this subtitle, if authorized by its board of directors, a corporation may acquire the corporation's own shares." Impac asserts (without any supporting evidence) that its board did not authorize the 2009 purchase. Therefore, according to Impac, the 2009 repurchase was invalid, precluding responsibility for a dividend under section 3(d).

Camac notes that Impac has never previously advanced the contention that the purchase was invalid, despite the fact that from the outset of the litigation Count IV of the Timm complaint alleged that Impac owed dividends as a result of the purchase. Camac also argues that this contention amounts to an affirmative defense of ultra vires or illegality, neither of which was raised in Impac's Answer. See Rule 2-323(g). Nor did Impac raise this contention in response to plaintiffs' cross-motion for summary judgment.

In the court's view, the failure to assert this contention as an affirmative defense or to raise it previously bars Impac from making this defense now.² Impac asserts that the transaction was not authorized by the Board of Directors. While there may be no reason to dispute this assertion, there are other aspects of this defense that could require further exploration. As set forth below, the absence of a Board resolution as such is not necessarily conclusive on the issue of authorization. If the court were to permit Impac to assert this defense, presumably plaintiffs would be entitled to reopen discovery to explore facts that bear on this issue.

Furthermore, the defense is dubious on its merits, for at least two reasons. Impac states that the lack of board authorization is an historical fact. However, the purchase itself is also an historical fact. This case does not involve a challenge to the purchase of shares; the issue here is whether the purchase engaged the terms of section 3(d) of the Articles Supplementary. Even assuming that it is a transaction that could be subject to challenge because of the lack of Board authorization, it is nonetheless an extant transaction. A different case might be presented if the purchase had been rescinded, but it has not, and there is no reason for the court to treat it as though it did not occur.

As Camac points out, section 2-310 does not require that board authorization take a particular form. A substantial case can be made that Impac's board implicitly authorized or ratified the transaction. Several cases hold (albeit not in this specific connection) that directors ratify or authorize actions taken by corporate officers when they have knowledge of those actions, fail to object, and reap the benefits of the transaction. See *Linden Homes, Inc. v. Larkin*, 231 Md. 566, 570 (1963); *Edelhoff v. Horner-Miller Straw-Goods Mfg. Co.*, 86 Md. 595 (1898); *Tower*

² A similar issue was presented in *Reed & Fibre Products Corp v. Rosenthal*, 153 Md. 501, 514 (1927). At that time the statute required the consent of two-thirds of a corporation's shareholders for a repurchase. The court held that compliance with the condition was presumed, imposing on the corporation the duty to plead and prove the defense of ultra vires. 153 Md. at 514.

Oaks Blvd., LLC v. Procida, 219 Md. App. 376, 405 (2014). Impac makes the argument that the purpose of the statute is to restrict purchases by a corporation of its own stock. That is the overall purpose of the statute, but the court is not convinced that the requirement of board authorization is necessarily essential to that purpose. The purpose of the limitation upon purchase of its own stock by a corporation is to protect other shareholders. Nothing in this statutory purpose would be advanced by holding that the provisions of Section 3(d) were not engaged by the transaction.

For these reasons, the court holds that the provisions of section 3(d) are applicable and require the payment of dividends.

Number of Quarters

Camac claims that Impac owes dividends for three full quarters of 2009 – the second quarter (ending June 30), the third quarter (ending September 30) and the fourth quarter (ending December 31). Impac argues that it only owes dividends (if at all) through October 21, 2009, the date when the stock was repurchased. According to the 2004 Articles Supplementary, in the event of a repurchase of shares, the preferred shareholders are owed “full cumulative dividends on . . . all past dividend periods and the then current dividend period.” Articles Supplementary, Series B Preferred Stock, § 3(d). The parties dispute the meaning of this phrase and consequently how many months of dividends must now be paid. Specifically, Camac claims that “the then current dividend period” refers to the entirety of the quarter during which the repurchase was made, while Impac claims that it refers only to the period before and including the repurchase date.

The phrase “full cumulative dividends on . . . the then current dividend period” could credibly be interpreted in either party’s favor. One ready source to ascertain the meaning of the language is to look to other language in the Articles. *Finci v. Am. Cas. Co. of Reading, Pennsylvania*, 323 Md. 358, 369 (1991); *Boston Sci. Corp. v. Mirowski Family Ventures, LLC*,

227 Md. App. 177, 197 (2017). The Articles describe four events that trigger payment of dividends and by examining them, the meaning of section 3(d) can be discerned.

In addition to section 3(d), the phrase “full cumulative dividends on . . . the then current dividend period” appears in section 5(b), referring to redemption instead of repurchase of stock. The Articles Supplementary twice refer to a different method for calculating dividends after a triggering event. If the corporation is liquidated, dissolved, or wound down, preferred shareholders will receive “an amount equal to any accrued and unpaid dividends (whether or not declared) to the date of payment.” Articles Supplementary § 4(a). If the corporation redeems any of its preferred stock, the holder of that stock will receive “accumulated and unpaid dividends to and including the redemption date.” Articles Supplementary § 5(c)

All parties agree that the dividends referred to by Articles Supplementary § § 4(a) and 5(c) are calculated up to the date of the triggering event but do not include the rest of the quarter. Therefore, the court concludes that the parties to the Articles Supplementary knew how to create a dividend payout that clearly stopped at the triggering event. In light of that clarity, the Article’s phrasing in section 3(d) of “full cumulative dividends on . . . the then current dividend period” must mean something different. Contrasting “full cumulative dividends” to section 4(a)’s “accrued and unpaid dividends,” section 3(d) appears to require the entire quarter of dividends in which the triggering event occurred. This interpretation reconciles sections 4(a), 5(b), 5(c), and 3(d).

Impac points to the provisions of sections 5(a) and 5(c). However, the provisions of 5(a) and 5(c) address the issue of dividends to be paid on shares that are called for redemption. Section 5(b), on the other hand, involves the payment of dividends to shareholders other than the shareholders whose shares are redeemed. The difference in treatment is consistent with the

distinction between the language of sections 3(d) and 5(b) on the one hand, and sections 4(a) and 5(c) on the other. In the event of a liquidation or redemption, dividends should only be paid so long as the shareholder remains a shareholder. The shareholders covered by sections 3(d) and 5(b) continue to be shareholders.

In consequence, the court concludes that Impac owes the preferred shareholders unpaid dividends for the full fourth quarter, in addition to the second and third quarters.

Special Election of Directors (Timm Count VI and Camac Count V)

Impac's 2004 Articles Supplementary, which remain in force and govern the rights of the Series B preferred stockholders, state: "Whenever dividends on any shares of Series B Preferred Shares . . . shall be in arrears for six or more quarterly periods . . . the holders of such shares . . . will be entitled to vote for the election of a total of two additional directors of the Corporation . . . at a special meeting called by the holders of record of at least 20% of the Series B Preferred Stock . . ." Articles Supplementary § 6(b). There is no dispute that Impac has not paid dividends for more than six quarterly periods. Under the express terms of the Articles Supplementary, the Series B preferred shareholders are entitled to elect two directors to the Board of Directors.

Plaintiffs seek an injunction compelling Impac to comply with this provision. They point out that on February 9, 2018 Camac, which holds 33.2 % of the Series B Preferred Shares, wrote to Impac to call a special meeting. Impac responded that the court "has not yer (sic) issued an injunctive order or final judgment." Plaintiffs suggest that this suggests the necessity of a court order.

While Impac does not dispute the operation of section 6(b), it opposes an injunction on the ground that it would provide plaintiffs with "relief that cannot be unwound" in the event of a reversal on appeal. It argues that a reversal might call into question actions taken by the board

while the two directors participate. Therefore, it argues that the court should forbear to order a special election.

This argument does not rebut the substance of plaintiffs' position. The parties' rights are governed by the terms of the Articles Supplementary, which are contractual. The plain terms of the Articles confer a right to the election of two directors. The logic of the court's holding that the 2004 Articles remain in effect compels the conclusion that this relief is required.

Impac's argument is that the prospect of an appeal means that relief should not be made effective until that appeal is resolved. That is not an argument on the merits; it is an argument for the court to stay the effect of its decision pending the resolution of its appeal. That argument does not counsel the court to refrain from granting full relief on plaintiffs' claims in accordance with the logic of its decision. Instead, it is an argument for a post-judgment stay of the court's order.

Rule 2-632 makes provision for stay of enforcement of orders pending appeal. That is the appropriate forum for the court to weigh any considerations bearing on whether this relief should be immediately effective. Furthermore, that rule furnishes a procedure for the parties to litigate the stay issue in the Court of Special Appeals if this court determines that a stay is not appropriate.

Impac is required by its Articles Supplementary to seat two directors elected by the preferred shareholders. Since it has failed to do so, the court will enter an order requiring Impac to comply with the Articles by holding an election and seating the elected directors.

Entry of Partial Final Judgment

The court's rulings to date do not resolve all of the issues necessary to the conclusion of the litigation in this court. The primary issue remaining for resolution is the identity of the persons entitled to dividends on Series B shares. The parties agree that this issue requires class proceedings. In addition, there will be claims for attorneys' fees.

Generally an appeal is permitted only after entry of final judgment, which is a judgment that resolves all claims. See Rule 2-602(a). The parties agree that final judgment is not appropriate at this time due to the necessity to resolve the issue of who is entitled to dividends, which requires class proceedings. They also agree that an appeal at the present time would promote judicial economy, but advance different routes to achieve that result. Camac argues (in its opening brief) that a declaratory judgment would be immediately appealable, as would an injunction. Impac agrees that an injunction would be immediately appealable, but states that it is not clear that a declaratory judgment would be immediately appealable in the absence of a judgment that resolves all issues. Impac requests that the court enter a declaratory judgment, that it enter judgment in favor of Impac on Counts II and III, and certify the judgment as final under Rule 2-602(b).

An injunction is immediately appealable. Md. Code, Courts Art. §12-303(3)(i). The court does not accept Camac's argument that a declaratory judgment would be immediately appealable in the absence of a final judgment. Camac rests its position on Md. Code, Courts Art. § 3-411. This argument has been specifically rejected by *Maryland State Board of Educ. v. Bradford*, 387 Md. 353, 385 (2005). Camac states that if the court rejects this argument it agrees that certification under Rule 2-602(b) is in order. It also does not oppose certification of the judgments of non-liability on Counts II and III.

The court agrees with Impac that judicial economy requires that the court's interpretation of the voting rights provision be squarely presented for decision on appeal along with any injunctive order. Furthermore, in the court's view, judicial economy dictates that the determination of Counts II and III be presented for appeal at the same time as its decision on the voting rights provision. The ultimate relief to be awarded depends on the resolution of the other

claims made by plaintiffs, which challenge the effectiveness of the amendments on other grounds, as well as the rights of the Series C shareholders.

The policy of Rule 2-602, which generally precludes appeals from any decision that adjudicates fewer than all of the claims in an action, is to promote judicial economy by avoiding piecemeal appeals. The appellate courts have made clear that the certification permitted by Rule 2-602(b) should be used sparingly “so that piecemeal appeals and duplication of efforts and costs in cases involving multiple claims or multiple parties may be avoided.” *Murphy v. Steele Software Systems Corp.*, 144 Md. App. 384, 393 (2002). “A common factor in the cases in which piecemeal certification has been permitted is the potential that delay of the appeal may work an economic hardship upon one or more of the parties.” *Id.*

The rulings made by the court resolve all issues arising from the complaint, save for the issues that require certification of a class. As such, the court’s ruling partakes of finality. Allowing an appeal of these rulings prior to class certification has the potential to save significant expense, and more importantly, potentially wasted expense. If Impac prevails on appeal, no class proceedings will be required. On the other hand, if the court’s rulings on Counts II or III are overturned, the class will potentially include Series C shareholders. In either of those events, any class proceedings undertaken prior to the resolution of the appeal would entail unnecessary effort and expense. Furthermore, the remaining issues to be decided are severable from the issues that the court has determined to date, meaning that there will be no duplication of appeals.

The court’s analysis is supported by *Len Stoler, Inc. v. Wisner*, 223 Md. App. 218 (2015), a case that is similar to this one in many respects. In that case, the Court of Special Appeals approved the trial court’s decision to certify the judgment as final under Rule 2-602(b), finding that delay of the appeal “would have imposed a harsh impact on the litigants, namely, the economic

impact of litigating the class certification motion,” that the issue that was the subject of the appeal would be considered in a subsequent appeal, that disposition of the remaining claim - the class certification motion - would not moot the need for an intermediate appeal, and that the appeal would not require the Court of Special Appeals to determine issues still before the trial court. 223 Md. App. at 228. Those conclusions apply with equal force in this case.

For these reasons, the court expressly determines that there is no just reason for delay, and that the judgment to be entered will be certified as final under Rule 2-602(b).

Class Certification

Each complaint requested the certification of a class of shareholders under Rule 2-231(b)(2) and (b)(3), as did Camac’s previously filed motion for class certification. The parties dispute whether a class should be certified at this time.

In its opening brief, Camac asserts that certification of a class is necessary to the determination of the identity of the shareholders who are entitled to payment of dividends. Camac states that its position is that the dividends are payable to current shareholders, but suggests that persons who held shares at other times may claim entitlement to the dividends. It also states that class proceedings will be necessary to the court’s consideration of its claim for counsel fees. Camac requests that the court certify a class, give notice and allow all claimants to assert their positions, following which the court may make a ruling on these issues. Impac agrees as to the need for a determination, through class proceedings, of the identity of the persons entitled to the dividends. The parties disagree about who should be required to advance the cost of notice to class members. While the parties agree that notice to any class should be postponed until after the appeal, Camac asserts that the court should certify a class now and defer any further action.

During the April 16, 2018 hearing, all parties took the position that, in the event that the court certified a class, the court should not order notification of the class members. As the court cannot define the class of potential beneficiaries at this time, the party assigned to notify the class members could not perform that duty effectively. Nonetheless, Camac seeks class certification with itself as the class representative. In its papers and at hearing, Camac did not specify whether it desires certification under Md. Rule 2-231(b)(2) or Md. Rule 2-231(b)(3). A class must be given notice if certified under Md. Rule 2-231(b)(3), but under Md. Rule 2-231(b)(2) notice is discretionary. Md. Rule 2-231(e).

The court sees no reason to certify a class at this time. Camac does not articulate any ends that certification would serve, aside from a symbolic victory. As Impac points out, the court's declaration inures to the benefit of all Series B shareholders even without class certification, and conversely certification has the potential to bind class members to an adverse ruling on appeal, without any notice to them, a result that gives the court pause. Even assuming that certification under Md. Rule 2-231(b)(2) is available and that notice to the class members would not be required, certifying a class of undefined beneficiaries will not further the current litigation in any material way. Therefore, the court declines the request to enter class certification at this time.

Conclusion

A separate order will be entered embodying the rulings that are the subject of this opinion.

Dated: _____

July 16, 2018

**TRUE COPY
TEST**

Marilyn Bentley

MARILYN BENTLEY, CLERK

W. Michel Pierson
Judge's Signature Appears
On Original Document

Judge W. Michel Pierson

