

**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**

Before the court is Plaintiff's Motion to Revise the Court's January 28, 2013 Order. (Pleading No. 32). Plaintiff seeks partial reconsideration of the court's decision that entered summary judgment for defendants on some of the claims asserted by plaintiff. Defendants have filed a response, and plaintiff has filed a reply. No hearing is required. For the reasons set forth below, plaintiff's motion will be denied.

As set forth in length in the court's Memorandum Opinion of January 28, this suit seeks to challenge certain amendments to the charter of defendant Impac Mortgage Holdings, Inc. that removed rights and protections afforded to the company's preferred stock. Plaintiff is an owner of Impac preferred stock, and defendants are Impac and eight members of its Board of Directors. The preferred stock was created in 2004 through two separate Articles Supplementary amending Impac's charter. The first Articles Supplementary created 7,500,000 shares of 9.375% Series B Cumulative Redeemable Preferred Stock, and the second Articles Supplementary reclassified and designated 5,500,000 shares of authorized but unissued Preferred B stock as 9.125% Series C Cumulative Redeemable Preferred Stock.

In May of 2009, Impac announced a tender offer for the preferred shares. The offer was linked to a consent solicitation, which required any shareholder who submitted shares in response to the tender offer to consent to certain amendments to the Articles Supplementary. In essence, the proposed amendments stripped the Preferred B and C shares of almost all of their preferred rights.

The transaction was undertaken pursuant to the terms and conditions of an Offering Circular applicable to both series of Preferred Shares and separate but identical Letters of Transmittal and Consent for the two series. Impac offered to purchase outstanding shares of Preferred B and C stock, under certain conditions, which included the approval of the transaction by a majority of the common shareholders and 66 2/3% of the preferred shareholders. Participating preferred shareholders were required to tender their shares together with the applicable Letter indicating their consent to the Depositary selected by Impac to manage the transaction, American Stock Transfer & Trust Company. Upon successful completion of the tender offer, the shares of preferred stock that were tendered and accepted for purchase by Impac would become authorized but unissued shares. In the offering documents, Impac advised shareholders that upon successful completion of the consent solicitation and tender offer, Impac anticipated that remaining holders of preferred stock would be left with an "illiquid investment indefinitely."

The combined offer to purchase and consent solicitation expired on 9:00 a.m. on June 29, 2009. On that same day, Impac announced that shareholders had tendered an aggregate of approximately 67.7% of the preferred stock and that Impac was amending its charter to modify the terms of each series of preferred stock. The amendments to the charter were filed that day.

Plaintiff filed this lawsuit on December 7, 2011, seeking declaratory relief and compensatory and punitive damages. The complaint contains six counts. Count I alleges that Impac failed to receive the requisite number of votes to amend the Articles Supplementary. Count II alleges that even if Impac did receive the requisite number of votes, the votes are invalid because Impac owned the shares at the time of the vote. Count III alleges that defendants breached their fiduciary duty and duties of good faith and fair dealing owed to plaintiff. Counts IV and VI ask for certain ancillary relief based on the requested adjudication that the amendments are invalid. Count V asserts a punitive damages claim.

Defendants filed a motion to dismiss on February 27, 2012, to which plaintiff responded on April 30, 2012. Defendants filed a reply in support of the motion to dismiss on May 31, 2012, and the court held a hearing on the motion on June 28, 2012. The court filed a written opinion on January 28, 2013. The court denied the motion with respect to the claims asserted against Impac in Counts I, IV and VI.<sup>1</sup> However, the court determined that summary judgment should be granted for defendants on Counts II, III and V.

Plaintiff seeks reconsideration of a portion of the court's order, specifically the grant of summary judgment on Count II and on the claim of breach of fiduciary duty based on coercion included in Count III. He contends that the court violated Rule 2-322(c) by converting the motion to dismiss to a motion for summary judgment without giving the parties notice of its intent to do so. He further argues that the court failed to allow him the opportunity to demonstrate that material factual issues preclude summary judgment. He requests that the court vacate the order and allow him to conduct discovery before it rules on summary judgment. The court will consider plaintiff's arguments as to Rule 2-322(c), Count II and Count III in turn.

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<sup>1</sup> At the hearing, plaintiff conceded that Counts I, II, VI, and IV are not applicable to the individual defendants.

**Rule 2-322(c)**

The court concluded that conversion of the motion to dismiss to a motion for summary judgment was required because both parties referred to and relied upon materials that were extraneous to the complaint. In the complaint plaintiff relies on and quotes certain provisions of the Articles Supplementary (Complaint ¶¶ 31, 42, 51, 53, 54, 75), the Offering Circular and Letters of Transmittal and Consent through which Impac completed the consent solicitation and tender offer (Complaint ¶¶ 52, 55, 56, 58, 60, 67), and several of Impac's Form 10-K, Form 10-Q and other filings with the SEC (Complaint ¶¶ 32, 40, 41, 44, 45). In support of the motion to dismiss, defendants submitted eleven exhibits, which included the complete documents to which plaintiff referred in the complaint. These exhibits were the Articles Supplementary creating the Preferred B shares (Exhibit A); the Articles Supplementary creating the Preferred C shares (Exhibit B); the Tender Offer statement (Schedule TO) for the purchase of the Series B and C shares (Exhibit C); the Offering Circular (Exhibit D); the Letter of Transmittal and Consent for Series B shares (Exhibit E); the Letter of Transmittal and Consent for Series C shares (Exhibit F); Form 8-K dated June 29, 2009 (Exhibit G); Form 10-K for the fiscal year ended 12-31-08 (Exhibit H); Form 10-Q for the quarter ended 3-31-09 (Exhibit I); the articles of amendment for the Series B shares (Exhibit J); and the articles of amendment for the Series C shares (Exhibit K). Exhibits C, D, E, F, G, H, and I were all copies of documents on file with the SEC.

Plaintiff did not object to defendants' introduction of matters outside of the complaint, and in his opposition to the motion to dismiss he relied upon several of defendants' exhibits. Plaintiff submitted two exhibits in support of his reply memorandum: excerpts from Impac's Form 10-K for the fiscal year ended 12-31-09 (Exhibit A) and from Form 10-K for the fiscal year ended 12-31-10 (Exhibit B).

Rule 2-322(c) provides in pertinent part:

If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

The rule requires that if the court decides to convert a motion to dismiss to a motion for summary judgment it must give the non-moving party a reasonable opportunity to present pertinent material. Plaintiff argues that the reasonable opportunity language of the rule “includes notice that the Court intends to convert the motion and the ability to conduct discovery on, and present evidence with respect to, any material facts.” Motion to Revise at 6. The authorities do not support plaintiff’s claim that a reasonable opportunity requires a specific advance notice. In *Hrehorovich v. Harbor Hosp. Center, Inc.*, 93 Md. App. 772 (1992), the court rejected a similar argument:

Appellant further complains that the trial court's action of transmuting the motion to dismiss into a motion for summary judgment was improper because the court did not adequately notify the parties of its intention to consider appellees' extraneous materials. Appellant argues that if he had known that the trial court would use the appellees' supplemental allegations of fact in deciding the motion to dismiss, he would have presented to the court his ““evidence, testimony and documents”” that refute appellees' arguments. In our view, however, the record is clear that appellant was sufficiently aware of the trial court's ability to consider the motion as one for summary judgment, and appellant cannot now claim that the trial court's action was improper.

We do not consider it unreasonable to assume that appellant knows the law, including the Maryland Rules of Procedure. From its unambiguous language, Rule 2-322(c), on its face, informs the appellant that a trial court may transmute a motion to dismiss into a motion for summary judgment. We find further support for our conclusion in this record in that the trial judge did not immediately exclude the outside matters referred to

by appellees, and that the court even accepted another exchange of documents by the parties before rendering its decision. From this action, we, as well as appellant, can reasonably infer that the lower court might be considering the additional information.

93 Md. App. at 785-786. Furthermore, before the court will conclude that the conversion of the motion to dismiss to a motion for summary judgment requires reversal of its decision, it must be convinced that plaintiff was prejudiced by the conversion. *Cf. Worsham v. Ehrlich*, 181 Md. App. 711, 723 (2008); *Boucher Inv., L.P. v. Annapolis-West Ltd. Partnership*, 141 Md.App. 1, 11-12 (2001).

Here the parties were well aware of the fact that the court would consider the documentary items that each party presented to the court. Consideration of those items was inescapable because plaintiff's claims rested upon the contents of those items. There was no dispute about the genuineness of those items, or what they contained, nor was there any dispute that they embodied the transaction that plaintiffs sought to challenge. Rule 2-322(c) was brought into play because the court was unwilling to accept defendants' theory that plaintiff's quotation from the terms of the documents incorporated the entire documents into the complaint.<sup>2</sup> In the court's view, the issue turns here on whether plaintiff can show that there is any additional information that could be submitted to the court on summary judgment that would be material to the issues posed by the motion (considered under the strictures of Rule 2-501), including any possibility that discovery would generate information that would bear upon its resolution. In this case, as will be seen, there is no such possibility, because the issues that were decided by the court were legal in nature and do not depend on any facts that could be developed in discovery.

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<sup>2</sup> The court notes that neither side cited *Smith v. Danielczyk*, 400 Md. 98, 105 (2007) or *Tri-County Unlimited, Inc. v. Kids First Swim School Inc.*, 191 Md.App. 613, 620 (2010).

## **Count II**

The theory of Count II is that the process by which the amendment of the Articles Supplementary occurred was invalid because the shares tendered by preferred shareholders could not be legally voted. This rests on two propositions: first, that shares acquired by Impac became authorized but unissued stock; and second, that Maryland law prohibits a corporation from voting shares that are owned by it. The essential premise for this theory is that the shares were not voted before they were acquired by Impac.

The intended structure of the transaction was for the Depositary to consent to the amendments and then to transfer the shares to Impac. According to defendants, the transaction occurred as follows: (1) each shareholder's consent to the amendments, expressed by the execution of the Consent Letter, and corresponding shares were delivered to the Depositary; (2) the consents and shares delivered by the shareholders became irrevocable on the expiration date and remained irrevocable until 40 business days after the expiration date; (3) 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; and (4) the Depositary then transferred the shares to Impac.

The complaint essentially alleged that the consent could not occur before Impac's acceptance of the shares for purchase, due to the structure of the tender. Plaintiff contended that the consent proxies and economic interest in the shares were inextricably linked or "bundled" -- that because the consents and interest were linked and because Impac would not accept any tendered shares without an accompanying consent, the consents were inextricably bundled to the sale of the shares themselves. Plaintiff asserted that the "bundle" of proxy and rights could only be transferred to Impac upon acceptance for purchase. Plaintiff also contended that the

Depository's consent to the amendments could not occur before the acceptance of the shares for purchase by Impac, because Impac had to accept the shares for purchase before they could be voted.

The court analyzed the instruments and determined that plaintiff's reading was fallacious. It concluded that the irrevocable proxy was transferred to the Depository by shareholders who consented and tendered, while the economic interest in the shares was transferred, through the Depository, to Impac. Consent to the amendments was exercised by the shareholders and the Depository, not by Impac, and Impac did not receive the proxy from the shareholders and decide how to cast the vote. The economic interest was necessarily delivered after the Depository exercised the proxy, because shareholder consent and delivery thereof by the shareholders and Depository were essential conditions precedent to the transfer of the shares. The transaction documents clearly indicate that the requisite consent, the occurrence of which was required, before Impac had a duty to purchase the shares. Accordingly, Impac could not have received the unvoted shares, and it never received or exercised the right to consent to the amendments; rather, it received the shares, once the condition of the charter amendment had been fulfilled.

As the court pointed out, if plaintiff's reading of the documents was correct, then the transaction could not have taken place:

Under Plaintiff's theory, the Depository could not consent absent Impac's acceptance of the shares. If that were the case, the language in the transaction documents that requires consent as a condition precedent to acceptance would be rendered meaningless. Plaintiff's argument that consent was only valid upon purchase of the shares is not reasonable in the context of the requirement that consent be complete before purchase. Under Plaintiff's theory, the Depository could never have consented prior to Impac's acceptance, and Impac could never have accepted prior to the Depository's consent. Accordingly, no transaction could occur, and the entire purpose of the transaction and documents would be defeated.



Opinion at p. 25.

Whether or not the court's reading of the documents was correct, plaintiff's theory stands or falls on the language of the documents themselves. It is a challenge based on the intended structure of the transaction, a contention that the transaction could not be effective to achieve its intended purpose.

In his motion to revise, plaintiff now states that he alleged that as a matter of fact the consent did not occur before the acceptance for purchase. Plaintiff argues that this allegation creates a factual question as to whether the Depositary delivered the necessary consents to Impac before it accepted the shares for purchase. Plaintiff asserts that he specifically argued that none of the documents established a mechanism by which the Depositary would be alerted before Impac's acceptance for purchase. However, reference to the citations for this statement does not bear out plaintiff's characterization.

The first source cited by plaintiff is paragraphs 59 and 60 of the complaint. (Motion to Revise at p. 7). Those paragraphs state as follows:

59. Because the Letter of Transmittal and Consent provided that the Depositary would, on behalf of the selling shareholders, consent to the amendments to the shares Impac had purchased from the selling shareholders, at no point in the transaction did the exiting shareholders actually vote or consent to amend the preferred share terms while their shares were issued and outstanding. Thus, Impac obtained absolutely no valid consents from either the Preferred B holders or the Preferred C holders to amend the terms of those preferreds, and the purported amendments were invalid.

60. Impac admitted that the legal effect of its "acceptance" of the shares for purchase caused the shares to become unissued, and they were therefore not outstanding and not capable of consenting or voting. Impac cannot avoid the consequence of its desire to accept the shares before voting them (in order to guarantee that it acquires sufficient shares to satisfy the two-thirds vote requirement) by attempting to create the fiction that, after

acceptance of the shares, they were voted or deemed to be voted “immediately prior to the Company’s acceptance for purchase.” The purported instruction in the seventh paragraph of the Letter of Transmittal for the Depositary to vote the shares *immediately before* Impac’s acceptance directly contradicts the actual events as set forth in the Letter of Transmittal - that Impac’s acceptance was the first occurrence, and a condition to the vote, and the Depositary therefore could not have then gone back in time to vote the shares. The preferred holders’ promises to authorize the Depositary to consent to the amendments were subject to, and only effective upon, Impac first accepting the tendered shares for purchase. That had to occur before the Depositary was authorized to do anything. At that time, however, the shares no longer had the power to vote or consent, because the shares had become unissued and it was too late for the tendering shareholder (or the Depositary on the tendering shareholder’s behalf) to vote them.

Complaint at p. 17-18 (emphasis in original). It is apparent from a review of these allegations that plaintiff’s averment in the complaint was that, based on the terms of the instruments themselves, the transaction did not function in the manner that Impac intended it to function. These allegations do not bear the interpretation that there is a factual allegation that the parties did not perform the transaction in the manner instructed by the instruments.<sup>3</sup>

Plaintiff also refers to his argument in support of his opposition to defendants’ motion to dismiss. (Motion to Revise at p.7). The passages to which he refers are as follows:

The Letter of Transmittal made clear that the amendments to the charter would be filed only if the Company accepted the tendered shares for purchase:

[i]f the Company receives the requisite approvals of the Proposed Amendments from the Holders of the Preferred Stock and if a sufficient number of shares of the Preferred Stock have been tendered and *accepted* in the Offer to Purchase and Consent Solicitation, the Company intends to execute and file Articles of Amendment promptly following the Expiration Date. . . .

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<sup>3</sup> Plaintiff also refers to paragraphs 39-43 of the complaint as support for this argument (Motion to Revise at p.2), but those paragraphs contain no content relevant to the argument.

Def. Ex. E at p. 6; Def. Ex. F at p. 6. (emphasis added); *see also* Compl. ¶ 50. Furthermore, the Depositary had no authority to deliver the consents if the shares were not “accepted for purchase;” to the contrary, the Depositary’s authority to consent was “automatically revoked if the Company does not accept for purchase the [tendered shares].” *See* Def. Ex. E at p. 6; Def. Ex. F at p. 6; *see also* Compl. ¶ 50.

The Letter of Transmittal provided for no communication between the Company and the Depositary other than the Company’s “acceptance for purchase.” *See* Def. Ex. E at p. 6; Def. Ex. F at p. 6. Nonetheless, the Letter of Transmittal purported to authorize the Depositary to do something that was impossible - to deliver the shareholders’ consent to the proposed amendments “immediately prior to the Company’s acceptance for purchase.” *See* Def. Ex. E at p. 6; Def. Ex. F at p. 6.

Opposition to Motion to Dismiss at p.13. Once again, these words simply do not bear the interpretation that plaintiff now seeks to place upon them. Plaintiff did not argue that the Depositary did not do something that was contemplated by the documents. It is apparent that plaintiff’s theory was that the Depositary *could* not do what was necessary for the transaction to be effective, because what the instruments contemplated was impossible. That theory is based on the contents of the transaction documents themselves, not on the fact of whether the Depositary did or did not deliver the consents before Impac accepted the shares for purchase.

In short, none of the claims asserted in the complaint rested on the theory that plaintiff now espouses to support his argument that discovery is required. The supposed factual questions identified in the Motion to Revise are not material, because the claims that plaintiff asserted do not turn upon these questions. Accordingly, the court rejects the argument that summary judgment was erroneously granted on Count II.

### Count III

Count III asserts that defendants breached fiduciary duties owed to plaintiff and other preferred shareholders by engaging in illegal vote buying, impermissible coercion, and self-

dealing. In the motion for reconsideration, plaintiff challenges the court's resolution of the issue of impermissible coercion on the ground that the court improperly resolved a factual dispute.

Plaintiff's claim of impermissible coercion relies on Delaware precedent that holds that actions by corporate directors that operate inequitably to induce shareholders to tender shares for reasons unrelated to the economic merits of the offer can form a basis for a claim of breach of fiduciary duty. The parties cited, and the court reviewed, a series of Delaware cases on the theme of inequitable coercion. *See AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103 (Del. Ch. 1986); *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1061 (Del. Ch. 1987); *Katz v. Oak Industries, Inc.*, 508 A.2d 873 (Del. Ch. 1986); *In Re General Motors Class H Shareholder Litigation*, 734 A.2d 611 (Del. Ch. 1999); and *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104 (Del. Ch. 2007).

The principles applicable to coercion claims were summarized in *Gradient*. As Vice-Chancellor Parsons stated in that case, a claim of wrongful coercion rests not simply upon the concept of coercion, but requires "wrongful" or "actionable" coercion. A finding of wrongful coercion requires not simply that shareholders do not have a choice, but also action taken by the board to rig the choice artificially. As the discussion in *Gradient* reflects, the distinction between wrongful coercion and coercion that is not wrongful is a subtle one; it is not a bright line test. Differentiating actionable coercion from coercion that is not actionable is ultimately dependent on the conscience of the equity court. *See also Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1061 (Del. Ch. 1987)(the "standard applicable to the [preferred shareholder's] claim of inequitable coercion is whether the defendants have taken actions *that operate inequitably* to induce the preferred stockholders to tender their shares for reasons unrelated to the economic merit of the offer.")(emphasis added). Determining whether

defendants' conduct meets that standard requires the court to engage in a process of balancing and weighing the particular facts relating to the transaction to determine if the standard of inequitable conduct is met. That determination is heavily dependent on nuanced differences between the circumstances of each case and the details of the conduct at issue.

It was in this context that the court referred to factual distinctions between this case and the precedent cited by plaintiff. Those factual distinctions are not "disputed facts" in the sense in which that term is used in Rule 2-501 or the precedent applying that rule. Whether a tender offer is actionably coercive is ultimately a legal determination, and the fact that the determination may require the court to balance the effect of the specific facts to determine whether they add up to conduct that is inequitable does not alter the fact that it is a question of law. As such, it is susceptible to determination by the court as a matter of law on a motion for summary judgment, and the fact that it involves balancing various undisputed facts to determine whether the standard has been met does not convert it to a question of fact if the underlying first level facts are undisputed. Here there is no dispute as to the first level facts. The only issue is how the court should weigh those facts to determine whether the transaction crosses the line.

In the motion to revise, plaintiff argues that the court did not address the "factual question" of the complete elimination of the economic rights of the preferred shares, arguing that such elimination is different from a reduction in share value. He states that the complaint makes factual allegations to support the inference that shareholders were coerced into tendering by the prospect of losing all of their economic rights. He asserts that unlike the cases cited by defendants there was no potential that the firm's prospects would be improved or that non-tendering holders could participate in the improved prospects of the enterprise.

These arguments illustrates the court's point. All of these facts are facts that were fully apparent to the parties, and none of them is the subject of any dispute. The additional facts that plaintiff identifies as possible subjects of discovery would not affect the balancing process under the Delaware precedent that the court applied. For this reason, the court concludes that no further factual development is required, whether or not the balance struck by the court is ultimately determined to be correct.

### **Conclusion**

The court concludes that no error occurred because plaintiff has not demonstrated that he could adduce any information that is pertinent to the decision to grant summary judgment. Plaintiff's position depends on the characterization of the court's decision as one that resolved factual issues. But, in fact, the questions that the court resolved were questions of law that turned upon the undisputed terms of the instruments that comprised the transaction that plaintiff seeks to challenge. For the reason, plaintiff's motion must be denied.

Dated: November 27, 2013

**W. MICHEL PIERSON, Judge**  
Judge's signature appears on original document

Judge W. Michel Pierson

**CURTIS J. TIMM, on behalf of himself** \*

**and all other persons similarly situated,** \*

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\* \* \* \* \*

**ORDER**

For the reasons stated in a Memorandum Opinion of even date, it is, this 27<sup>th</sup> day of November, 2013, ORDERED that the Motion to Revise the Court's January 28, 2013 Order. (Pleading No. 32) is DENIED.

Judge, W. Michel Pierson  
Judge's Signature appears on the  
Original document only. \_\_\_\_\_