

**CURTIS J. TIMM**  
4732 While Tail Lane  
Sarasota, FL 34238

**On Behalf of Himself and  
All Persons Similarly Situated**

**Plaintiff,**

**v.**

**IMPAC MORTGAGE HOLDINGS, INC.**  
19500 Jamboree Road  
Irvine, CA 92612

**Serve on:     The Corporation Trust**  
                  351 W. Camden St.  
                  Baltimore, MD 21201

**JOSEPH R. TOMKINSON**  
19500 Jamboree Road  
Irvine, CA 92612

**WILLIAM S. ASHMORE**  
19500 Jamboree Road  
Irvine, CA 92612

**TODD R. TAYLOR**  
19500 Jamboree Road  
Irvine, CA 92612

**RONALD M. MORRISON**  
19500 Jamboree Road  
Irvine, CA 92612

**LEIGH J. ABRAMS**  
19500 Jamboree Road  
Irvine, CA 92612

**JAMES WALSH**  
19500 Jamboree Road  
Irvine, CA 92612

**FRANK P. FILIPPS**  
19500 Jamboree Road  
Irvine, CA 92612

\*     **IN THE**  
\*     **CIRCUIT COURT**  
\*     **FOR**  
\*     **BALTIMORE CITY**  
\*     **CIVIL NO. \_\_\_\_\_**

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\*     **JURY TRIAL DEMANDED**

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and  
  
STEPHAN R. PEERS  
19500 Jamboree Road  
Irvine, CA 92612

Defendants.

\* \* \* \* \*

**CLASS ACTION COMPLAINT**

Plaintiff, for his class action complaint, alleges the following upon information and belief, except for those allegations that pertain to Plaintiff, which are alleged upon personal knowledge:

**NATURE OF THE ACTION**

1. This is a class action based upon the breach of the provisions of two written contracts, each of which created a separate class of preferred stock.

2. Impac Mortgage Holdings, Inc. ("Impac" or the "Company") is a Maryland corporation, headquartered in Irvine, California. In 2004, Impac twice amended its governing charter first by filing Articles Supplementary to create 7,500,000 shares of 9.375% Series B Preferred Stock ("Preferred B") and later in 2004 by filing Articles Supplementary to create 5,500,000 shares of 9.125% Series C Cumulative Redeemable Preferred Stock ("Preferred C") (collectively, the "Preferred B and C shares"). The Preferred B and Preferred C shares were perpetual preferred having \$25 face and redemption value. Under the Articles Supplementary for each of the Preferred B and C shares, dividends in a fixed amount were to be paid quarterly and were cumulative; meaning that if the Company failed to pay any dividend, the dividend continued to be payable and the Company could not pay a dividend on its common stock or take other specified corporate actions until all past accrued dividends on the Preferred B and C shares were paid in full.

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3. Impac sold 2 million shares of Preferred B for \$25 per share in a public offering in 2004, and 4.47 million shares of Preferred C for \$25 per share in a later second public offering, raising a total of \$161.7 million from new investors in the Preferred B and C shares.

4. To induce investors to buy the preferred stock, each share of Preferred B paid a quarterly 9.375% dividend or \$2.34 per year and each share of Preferred C paid a quarterly 9.125% dividend or \$2.28 per year. Additionally, each of the Articles Supplementary creating the Preferred B and C shares provided a number of protections to the holders, including that dividends on the Preferred B and C shares were cumulative and had to be paid on a priority basis before any dividends were paid on its common shares, and that the holders of the Preferred B and C shares were entitled to elect two directors to the board if such cumulative dividends remained unpaid for six quarters.

5. On June 29, 2009, Impac filed two unauthorized amendments to its charter purporting to amend the Articles Supplementary of the Preferred B and Preferred C shares. These amendments eliminated virtually every valuable right of the holders of the Preferred B and C shares, including the right to receive cumulative priority dividends, preference rights and other valuable rights.

6. In an attempt to get legal authorization to approve these amendments, Impac linked a consent solicitation to amend the Articles Supplementary of the Preferred B and C shares to a tender offer in which Impac offered to purchase the Preferred B shares for \$0.29297 per share and the Preferred C shares for \$ 0.28516 per share. The linked consent solicitation/tender offer was a “vote buying” scheme, in which holders of the Preferred B and C shares who tendered into the offer were required to vote, through “exit consents,” for amendments to the terms of the Articles Supplementary that eliminated the future voting rights of the Preferred B and C shares they were tendering. And because the shareholders of the Preferred B and C shares who were tendering

were selling all of their shares back to the Company, those shareholders no longer had any financial or economic interest in the outcome of the vote. Thus, the vote was specifically designed to, and in fact did, evade the statutory prohibition on the corporation voting its own shares and interfered with the voting rights of non-tendering holders of the Preferred B and C shares.

7. Furthermore, a condition of the tender offer was that at least two-thirds of the holders of the Preferred B and at least two-thirds of the holders of Preferred C shares tender, with the purpose of obtaining sufficient “exit consents” to eliminate the valuable quarterly dividends, preference rights, voting rights and other valuable rights of preferred holders refusing to tender their shares. In this way, the linked tender offer/consent solicitation was deliberately structured to coerce the preferred shareholders into tendering for reasons other than the economic merits of the transaction and into voting for amendments to the terms of the Articles Supplementary of the preferred shares they were selling. Holders of the Preferred B and C shares had to tender or face the prospect of losing virtually all of the economic value of their shares. Impac advised in the solicitation offering documents that, upon successful completion of the tender/consent solicitation, holders of the remaining perpetual preferred stock would have “an illiquid investment indefinitely.” Prior to the tender offer, Preferred B shares traded around \$1.20 per share and the Preferred C shares traded around 50¢-60¢ per share--substantially higher than the tender offer prices. However, Preferred B and Preferred C holders, faced with the threat of losing the total value of their shares if they did not tender, were purposefully pressured into tendering into the offer for reasons other than the economic merits of the offer, and, thus, into providing consents to amend and terminate the economic rights applicable to the remaining holders.

8. Impac’s proposed amendments to the Articles Supplementary of each class of preferred shares sought to eliminate all economic value of such class of preferred stock by:

- making future dividends non-cumulative;

- eliminating provisions prohibiting payment of dividends on junior stock (*i.e.*, common stock) and prohibiting purchase and redemption of junior or parity stock if full cumulative dividends for all past periods are not paid or set apart;
- eliminating premiums payable upon liquidation or dissolution of Impac;
- eliminating the provision prohibiting Impac from electing to redeem preferred stock prior to the fifth anniversary of the issue date;
- eliminating the provision prohibiting Impac from redeeming less than all of the outstanding preferred stock if cumulative dividends are unpaid;
- eliminating the right of preferred holders to elect two directors if dividends are in arrears for six quarterly periods; and
- eliminating the right of preferred holders to consent or approve the issuance of preferred stock that is senior to the Preferred B and Preferred C shares.

9. Plaintiff brings this action to invalidate the amendments to the terms of the Articles Supplementary of the Preferred B and C shares for the following reasons.

10. First, the amendments to the Articles Supplementary of the Preferred B shares required the consent of holders of two-thirds of the Preferred B shares. Even if the exit consents could be validly counted to amend the terms (which, as described below, they could not), Impac did not obtain the necessary two-thirds consent of the Preferred B holders as is evidenced by Impac's admission in its SEC filings that 1,323,844 shares out of the then-outstanding 2,000,000 shares were tendered. Accordingly, Impac did not obtain the requisite vote necessary to approve amendments to the terms of the Articles Supplementary of the Preferred B shares, and the purported amendments are invalid.

11. Second, with respect to each class of the Preferred B and C shares, Impac designed the tender transaction so that the consents were not validly given by the tendering shareholders at any time *before* the Company accepted the shares for purchase. In order to tender shares and consent to the amendments, each shareholder was required to execute a Letter of Transmittal and

Consent, which appointed a Depositary to act as escrow agent for the tendered shares for a period of time until they were accepted for purchase by Impac. This document included an agreement to consent to the amendments to the shares being sold. However, the agreement to sell and consent to the amendments was an executory, revocable agreement that did not become effective unless and until the Company accepted the shares for purchase. When the shares were accepted for purchase by Impac, the shares became unissued. Although the selling shareholders authorized the Depositary to execute the consents to the amendments for the shares sold, that authorization did not take effect until the shares had been accepted for purchase by Impac. But once the tendered shares were accepted for purchase by Impac, they were no longer outstanding, and thus could not be voted. Thus, purported votes on behalf of the tendering holders could not be counted towards the two-thirds approval necessary to amend the terms of either series of preferred.

12. This defect could not be remedied despite Impac's attempt to avoid this result by inserting contrary language in the Letter of Transmittal and Consent agreement. The Letter of Transmittal and Consent agreement stated that *after* the shares had been accepted for purchase, the Depositary could go back and consent to the amendments to Preferred Shares "immediately prior to the Company's acceptance for purchase of the shares," which action was unequivocally impossible and therefore could not have occurred. Once an event has occurred, it is impossible to do something *immediately before* an event (the stock's purchase) that has already occurred. Furthermore, even if the tendered shares remained issued and outstanding after Impac accepted them for purchase (which they did not), they could not be voted under Maryland corporate law which prohibits a corporation from directly or indirectly voting its own stock. Accordingly, Impac did not obtain the necessary vote to approve the amendments for either the Preferred B or Preferred C shares.

13. Third, the combined consent solicitation/tender was a coercive vote buying scheme,

and a breach of fiduciary duty and the duties of good faith and fair dealing inherent in the Articles Supplementary of the Preferred B and C shares. For this reason, the amendments were invalid.

14. As a result of the unauthorized amendments, Impac was able to eliminate any obligation to the preferred shareholders, whom the Company had induced to invest \$161.7 million, for a total redemption price of a mere \$1.3 million (plus unpaid dividends to the date of tender).

15. The Preferred B shareholders and Preferred C shareholders have been deprived of their common law and contractual rights under the Articles Supplementary of the Preferred B and C shares as a result of Impac's invalid vote, improper amendments, and unfair tender offer/consent solicitation. Through this lawsuit Plaintiff seeks a remedy for these wrongful actions.

#### **PARTIES**

16. Plaintiff, Curtis J. Timm is, and at all relevant times has been, the owner of shares of Impac Preferred B and Preferred C stock.

17. Impac is a publicly-traded company specializing in mortgage and real estate related services. The Company is incorporated under the laws of Maryland and headquartered at 19500 Jamboree Road, Irvine, California.

18. Defendant Joseph R. Tomkinson has been the Company's Chief Executive Officer and Chairman of the Board since 1998. Tomkinson owns 236,375 shares of Impac common stock, representing 3% of the Company.

19. Defendant William S. Ashmore has been the Company's President and a Director since 1997. Ashmore owns 214,462 shares of Impac common stock representing 2.7% of the Company.

20. Defendant Todd R. Taylor has been the Company's Chief Financial Officer and an Executive Vice President since 2008.

21. Ronald M. Morrison has been an Executive Vice President, as well as the

Company's General Counsel and Secretary, since 2001. Morrison owns 49,392 shares of Impac common stock.

22. Leigh J. Abrams has been a Director of the Company since 2005. Abrams owns 33,960 shares of Impac common stock.

23. James Walsh has been a Director of the Company since 1995. Walsh owns 33,972 shares of Impac common stock.

24. Frank P. Filippis has been a Director of the Company since 1995. Filippis owns 31,935 shares of Impac common stock.

25. Stephan R. Peers has been a Director of the Company since 1995. Peers owns 32,668 shares of Impac common stock.

### **JURISDICTION AND VENUE**

26. This Court has jurisdiction over this matter pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 1-501.

27. This Court has jurisdiction over the Defendants pursuant to MD. CODE ANN., CTS. & JUD. PROC. §§ 6-102 and 6-103 in that Impac is organized under the laws of the State of Maryland and the actions of both Impac and the individual Defendants could only be given effect in Maryland by virtue of Maryland law, and the causes of action alleged herein arise from Defendants' transacting business in Maryland..

28. Venue is proper in the Circuit Court for Baltimore City pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 6-201.

### **SUBSTANTIVE ALLEGATIONS**

#### **A. Background**

29. Impac, through its wholly-owned subsidiaries, provides mortgage and real estate related services, and manages a long-term mortgage portfolio that includes residual interests in



securitizations.

30. To raise additional funds and finance growth, Impac sold the Preferred B and C shares in two public offerings in 2004. As of March 31, 2009 (before the 2009 tender offer), the Company was capitalized with 7,618,146 shares of issued and outstanding common stock, 2 million shares of issued and outstanding Preferred B stock, and 4.47 million shares of issued and outstanding Preferred C stock.

31. To induce investors to supply capital to the Company through the purchase of the preferred stock, holders of the Preferred B and C shares were provided with certain rights and preferences over the common shareholders in supplementary articles to the charter of the Company. Most significantly, to ensure that the preferred shareholders received their quarterly dividends, the Articles Supplementary provided that unless the Company had paid all of its quarterly dividends to the preferred shareholders on a cumulative basis, no dividends or distributions could be made to common shareholders. The Articles Supplementary further provided that, in the event the preferred shareholders were not paid a dividend for six quarters, they would be entitled to elect two directors to Impac's board. Additionally, the Articles Supplementary provided that the Company could not repurchase any stock unless and until the cumulative dividends had been paid to the preferred stockholders.

32. Impac failed to pay quarterly dividends due on the Preferred B and C shares on December 31, 2008 and March 31, 2009, and Impac stated in its SEC Form 10-Q for the period ending March 31, 2009 that it had "no present intentions to pay dividends on the Series B and Series C Preferred Stock."

33. Impac's directors and officers, who were substantial holders of common stock and common stock options, but not owners of any significant amount of preferred stock, sought to extinguish the interests of the preferred shareholders, thereby substantially increasing the value of

the common stock. They sought to eliminate the \$14.9 million annual preferred dividend payments on the Preferred B and Preferred C shares by purchasing the preferred shares at a large discount and by amending each of the preferred articles so as to make future dividends non-cumulative, if any in fact were ever declared. Because the Preferred B and Preferred C shareholders were entitled to priority cumulative dividends, the interests of the Company's common stock holders and the board were adverse to, and in conflict with, the preferred shareholders, especially in the face of dwindling overall equity.

34. To set the stage, the Company marked down its "Total Stockholders' Equity," previously reported at one billion dollars, to just \$9 million dollars as of the quarter ending March 31, 2009.

35. Prior to January 2009, Impac had operated as a real estate investment trust (REIT). Impac's REIT status entitled Impac to be free of corporate income taxes, so long as it distributed 90% of its annual profits to its common shareholders as dividends. As described above, the Articles Supplementary provided that unless the Company had paid all of its quarterly dividends to the preferred shareholders on a cumulative basis, no dividends or distributions could be made to common shareholders. Thus, in order to distribute 90% of its current income to its common shareholders and continue as a REIT, Impac had to pay all of its quarterly dividends owed to the holders of the Preferred B and C shares.

36. In January 2009, the officers and directors, without common stockholder approval, terminated Impac's REIT status. This action eliminated the REIT requirement to distribute 90% of annual income to common stockholders, which eliminated the need to immediately pay quarterly dividends. This action was in addition to Impac's failure to pay quarterly dividends due on the preferred shares due on December 31, 2008 and March 31, 2009, and its announcement that it would not be paying preferred dividends in the future.

37. Next, the Company devised a coercive scheme to eliminate any obligation to pay any return whatsoever to the preferred shareholders. Impac linked a tender offer to purchase the Preferred B and C stock with a consent solicitation, in which tendering shareholders were required to authorize Impac's closing agent to execute, on behalf of the selling shareholder, an amendment to the Articles Supplementary that would eliminate all dividend and other valuable rights of the preferred stock being sold, which amendments would adversely affect only non-tendering Preferred holders.

38. By combining the offer to purchase with the vote to amend the shares, Preferred B and C holders were pressured into tendering their shares and consenting to the amendments for fear that if they did not participate, the amendments would eliminate virtually all economic rights of the Preferred and render them worthless. The offer to purchase expired on June 29, 2009, just one day before another \$3,725,000 dividend payment was due to the holders of the Preferred B and C shares on June 30, 2009.

**B. Less Than Two-Thirds of the Preferred B Holders Participated in the Offer**

39. The Articles Supplementary of the Preferred B shares were not validly amended through the consent solicitation, because Impac did not obtain the consent of two-thirds of the Preferred B shareholders.

40. The tender offer/consent solicitation expired at 9 AM on June 29, 2009. On that same date, Impac filed a Form 8-K with a press release attached announcing that "holders had tendered an aggregate of approximately 67.7% (4,378,880 shares) of the Preferred Stock" and that "the Company has accepted valid tenders of more than 66 2/3% of the Preferred Stock." Impac further reported that it would pay \$1.3 million for those shares and that "[a]s a result of obtaining the requisite stockholder approval, the Company is amending its Charter to modify the terms of each series of Preferred Stock."

41. The breakdown of the votes between holders of Preferred B shares and holders of Preferred C shares was not revealed in the Form 8-K announcement, but was first revealed two months later, in August 2009, when Impac issued its Form 10-Q for the quarter ending June 30, 2009. The 10-Q reported:

Stockholders of the Company's Series B Preferred Stock tendered 1,323,844 shares at \$.29297 per share for \$388 thousand. Stockholders of the Company's Series C Preferred Stock tendered 3,055,036 shares at \$.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 preferred on its Preferred Stock.

Thus, Impac admitted that it obtained only 1,323,844 consents of the Preferred B shares, which is less than the requisite two-thirds, or 1,333,334, of the 2,000,000 shares outstanding before the sale.

42. Article (6)(d) (Voting) of the Articles Supplementary of the Preferred B shares clearly provides that, "without the affirmative vote or consent of the holders of at least two-thirds of the shares *of the Series B Preferred Stock outstanding* at the time," Impac is not permitted to "amend, alter, [or] repeal any of the provisions of the Charter, so as to materially and adversely affect any preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications, or terms or conditions of redemption of the Series B Preferred Stock." (emphasis added).

43. Impac nonetheless filed the amendments to Preferred B shares as though they were properly authorized by 2/3 or more of the Preferred B holders.

44. In its Form 10-Q quarterly report for the quarter ending September 30, 2009, Impac reported that 676,156 Preferred B shares were outstanding, the same amount reported in its 10-Q for the previous quarter. After the September 2009 10-Q was issued, Plaintiff contacted each of

Defendant Ashmore and Defendant Morrison, who are, respectively, President and Secretary of Impac and signatories to the Articles of Amendment filed on June 29, 2009. Plaintiff advised them that the amendments to Preferred B were invalid because Impac had not obtained consents to those amendments from the required two-thirds of the holders of Preferred B shares. Plaintiff also advised them that all of the consents to amend were invalid, because they were obtained after Impac purchased the Preferred B and Preferred C shares, when neither the selling holders nor the Depositary could consent to the amendments, as the shares had become unissued.

45. Thereafter, instead of withdrawing the invalidly authorized amendments, Impac reported on its 10-K for the year ending December 31, 2009 that only 665,592 shares of Preferred B were outstanding, even though it had reported that 676,156 shares were outstanding in the previous two quarters. Impac did not separately disclose the repurchase of 10,564 shares of Preferred B shares, between September 30, 2009 and December 31, 2009, and the unexplained reported number of outstanding shares set forth in the Form 10-K leaves the potentially misleading appearance that Impac had received more than two-thirds of the initially outstanding 2,000,000 shares of the Preferred B as part of the process of the tender and consent solicitation. Defendant Impac has continued to report in its 10-Qs through the present date, that only 665,592 Preferred B shares are outstanding, although in its 10-K for the year ending December 31, 2010, it inexplicably reported that 676,156 shares were outstanding.

46. Although Impac appears to have made repurchases of additional Preferred B shares after the June 2009 tender offer, that effort does not change the fact that the purported amendments to the Articles Supplementary of the Preferred B shares were totally invalid and of no effect, because Impac did not obtain consents from 1,333,334 shares, as was required.

**C. Preferred B and Preferred C Shares Could Not Be Voted Because They Were No Longer Outstanding After Impac Accepted Them For Repurchase**

47. An additional reason that the purported amendments to the Articles Supplementary were invalid is that the consents were not validly given by the Preferred B and Preferred C holders while the shares were owned by those holders. Impac's arrangement provided that the consents to the amendments would not be given until after the shares were sold to Impac, at which time the shares became unissued, were no longer outstanding, and could not be voted.

48. Impac did not schedule a special meeting of the preferred shareholders to vote on the proposed amendments, nor did the tender offer contain a document for the selling shareholders to execute signifying that they consented to the proposed amendments. This was because Impac realized that no informed preferred shareholder would consent to the amendments that made their shares worthless while they still owned their shares. Thus, the timing of the repurchase of the preferred shares *before* any consents were given was necessary to accomplish the transaction.

49. Also, Impac sought to amend the Articles Supplementary of each class of preferred shares by obtaining the full two-thirds consents of each class. To accomplish this goal, the Company arranged for a Depository to collect and hold the shares that were tendered until the point at which the Company decided to accept them.

50. Although it was a condition of tendering stock that a selling shareholder also had to agree to the proposed amendments, this was merely an executory agreement to do something in the future, only after Impac had purchased all of the tendered stock. The agreement to consent to the proposed amendments simply was not binding and final until the tendered stock was accepted for purchase. This intent and conclusion is clearly confirmed two ways. First, the tendering shareholder could withdraw the tender and consent at any time per the provisions contained in the sixth paragraph of the Letter of Transmittal and Consent. Second, the seventh paragraph of the

Letter of Transmittal and Consent, which covers when the Depositary can (on behalf of the selling shareholder) consent to the amendments, states that the authorization to deliver the consents is “subject to” and only “effective upon, the acceptance for purchase of all of the Series C Preferred stock tendered.”

51. Each of the Articles Supplementary filed in 2004 contain specific provisions in Article (6)(d) governing who can vote on amendments that materially affect the rights of the preferred shareholders. In the case of the Preferred C shares, Article 6(d) requires “the affirmative vote or consent of the holders of at least two-thirds of the shares of the Series C Preferred Stock outstanding at the time . . . .” Similarly, in the case of the Preferred B shares, its Article 6(d) requires “the affirmative vote or consent of the holders of at least two-thirds of the shares of the Series B Preferred Stock outstanding at the time . . . .” Amendments therefore are not valid unless the shares that consent to the amendments are “outstanding” at the time.

52. The Depositary closing agent was only authorized to consent to the amendments on behalf of the selling shareholders after Impac had purchased such shares. But the minute Impac purchased the shares, the shares were no longer issued and outstanding, an absolute requirement of being able to vote on amendments. Such shares thereupon became unissued shares, as reported by Impac in its Form 10Q for the period ending June 30, 2009, which neither Impac nor the selling shareholders could vote.

53. Because the shares purchased by Impac immediately became unissued shares, Impac thus treated the transaction as a redemption. Pursuant to the Articles Supplementary of each of the Preferred B and Preferred C shares, the legal effect of redemption is that the shares are no longer outstanding. Article 5(d)(iii) of the Preferred B Articles Supplementary provides:

. . . [F]rom and after the redemption date, dividends shall cease to accrue on such shares of Series B Preferred Stock, shares of Series B Preferred Stock shall no longer be deemed outstanding and all

rights of the holders of such shares will terminate except the right to receive the redemption price.

Thus, when Preferred B shares are redeemed, the seller is no longer a shareholder, cannot vote the acquired shares, and has no further rights other than to collect the purchase price. A similar provision is contained in Article 5(d)(iii) of the Preferred C Articles Supplementary.

54. Similarly, Article 5(f) of the Preferred B Articles Supplementary provides:

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 by 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.

A similar provision is contained in Article 5(f) of the Preferred C Articles Supplementary.

55. In its Offer to Purchase and Consent Solicitation on page 7, Impac likewise makes it crystal clear that upon acceptance for purchase, the Preferred B and would no longer be outstanding and, instead, became “unissued shares”:

Impac Mortgage Holdings, Inc is offering to repurchase all outstanding shares of Series B Preferred Stock and Series C Preferred Stock in a self-tender offer. All shares of Preferred Stock that are validly tendered and accepted for purchase by us in the Offer to Purchase and Consent Solicitation will become authorized *but unissued shares.*” (emphasis added)

56. The same language appears in the Letter of Transmittal indicating that when the tendered shares “were accepted for purchase,” they would become unissued shares. “Unissued shares” unequivocally means that no one owns the stock, it is not outstanding, and, accordingly, no one can vote the shares.

57. That the legal consequence of the repurchase was to convert the tendered Preferred shares from issued and outstanding shares to unissued shares was also confirmed in the special meeting proxy sent to common stockholders who voted on the charter amendments in a separate



vote. That proxy stated that “[s]hares of Preferred Stock that are purchased by us in the Purchase Offer will revert to the status of authorized *but unissued* shares of preferred stock.” (emphasis added). The proxy further stated that “[i]f our stockholders do not approve the modification of the terms of the Preferred Stock, the Preferred Stock will remain issued and outstanding.”

58. To attempt to get around the impossibility of obtaining the consents before purchasing the tendered shares, Impac required every selling shareholder to execute the Letter of Transmittal and Consent agreement under which Impac appointed American Stock Transfer & Trust Company to serve as a “Depository” or their closing agent. The Letter of Transmittal and Consent, however, clearly stated that the tender and consent was “subject to, and effective upon, the acceptance for purchase” of the tendered shares. As a result, the preferred shares continued to be owned by the tendering holders until Impac’s acceptance for purchase. Only upon Impac’s acceptance of the tendered shares for purchase would the sale become final and irrevocable at which time Impac became the legal owner of the tendered shares.

59. Because the Letter of Transmittal and Consent provided that the Depository 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.

61. Moreover, MD. CODE ANN., CORPS & ASS’NS § 2-509(b) prohibits the voting of any “[s]hares of a corporation’s own stock owned directly or indirectly by it . . . .” If Impac had structured the transaction differently so that the preferred shares accepted for purchase had remained outstanding and capable of being voted, the transaction would have violated this Maryland statute that precludes Impac from voting its own shares.

62. The creation of the legal fiction, requiring the Depositary to do the impossible – go back in time after the acceptance of the shares to have the previous owner consent or vote the shares – is evidence that those orchestrating this scheme understood that it was impossible to obtain legal consents and that the purported consents had no legal effect.

63. Because the shares accepted for purchase had no power to vote or consent to amend the Articles Supplementary, either because they were no longer issued and outstanding or because they were owned by Impac, the vote to amend each of the Preferred B and Preferred C shares had

no effect, and the purported amendments were unauthorized, invalid, and did not amend either class of Preferred shares.

**D. The Offer to Purchase Preferred Shares and Consent Solicitation Was an Unfair Vote Buying Scheme That Forced Shareholders to Act Based on Considerations Other than the Economic Merits of the Tender Offer.**

64. The amendments to the Preferred B and Preferred C shares were invalid, not only because Impac did not obtain the necessary consents, but also because Defendants violated their fiduciary duties by linking the consent solicitation and tender offer.

65. The arrangement was an illegal vote buying scheme, in which those who voted for the amendments were paid a price to give their consent, but had no economic interest in the outcome of the vote because they no longer owned any shares.

66. In addition, the arrangement was coercive – it forced holders to participate (by selling out their interest and consenting to amendments) – because holders who did not participate faced a legitimate threat that their interests would be rendered worthless by the other shareholders all facing the same pressure. Holders were asked to choose between accepting the offering price or risk that their securities would be rendered worthless. In connection with that forced tender, shareholders were forced to give the consents that harmed the remaining holders.

67. Impac admitted in the offering materials that the purpose of the tender/consent solicitation was to eliminate any economic obligations of the Company to the preferred stockholders, and that the amendments to the Articles Supplementary would materially adversely affect the rights of holders of the Preferred B and C shares that did not participate. It further admitted that the price offered had no relationship to the market price of the shares and that it did not obtain a third party determination that the tender offer and consent solicitation was fair to the preferred stock holders. Impac also stated that it would not apply to list the remaining outstanding preferred shares on any national securities exchange and that it did not expect there to be an active

market for trading the preferred shares after a successful tender offer, which would leave holders of the remaining preferred stock with “an illiquid investment indefinitely.”

68. Maryland law prohibited Impac from directly or indirectly voting its own shares. MD. CODE ANN., CORPS & ASS'NS § 2-509(b). Yet Impac arranged the consent solicitation so that it was the only party interested in the vote, since holders who purportedly voted had no interest in the outcome. Impac sought to end-run the contract protections of the preferred holders, by directing the vote for its own benefit, which is explicitly prohibited under Maryland law.

69. The linked tender offer/consent solicitation unfairly influenced the outcome of the vote, and violated Defendants' fiduciary duties and obligations of good faith and fair dealing pursuant to the governing instruments of the preferred shares.

**E. The Consequences of the Invalid Amendments and Impac's Prohibited Repurchases**

70. A total of 2,091,720 shares of Preferred B and Preferred C stock were outstanding immediately following Impac's invalid amendments to the Articles Supplementary. Those shares have been unfairly and unlawfully stripped of their valuable dividend and voting rights and, with no substantive economic rights and no active or liquid trading market, their value is close to nil.

71. Shortly after the June 29, 2009 announcements of the amendments, Impac's common stock quadrupled in value, thus enriching the common stockholders and the individual defendants who owned the common stock and had stock options. Also, Impac's two principals, Defendant Tomkinson and Defendant Ashmore, were each further awarded a \$600,000 bonus for implementing this scheme to eliminate the rights of preferred holders.

72. Impac admitted in its quarterly report for the period ending June 30, 2009 that the Preferred B holders tendered 1,323,844 shares, and that as of June 30, 2009, 676,156 shares of Preferred B and 1,415,564 of Preferred C shares were issued and outstanding.

73. As of September 30, 2009, as reported by the Company's quarterly report filed for

that period, there remained 676,156 shares of Preferred B and 1,415,564 shares of Preferred C outstanding.

74. On March 16, 2010, Impac filed its annual report with the SEC for the year ending December 31, 2009. In that report, it stated that as of December 31, 2009, there were 665,592 shares of Preferred B issued and outstanding, indicating that the Company had repurchased 10,564 additional shares of Preferred B between September 30 and December 31 of 2009. It further indicated that there were 1,405,086 shares of Preferred C outstanding at the end of 2009, indicating that the Company had repurchased an additional 10,478 shares of Preferred C between September 30 and December 31 of 2009.

75. Section 3(d) of the Articles Supplementary of the Preferred B shares provides that Impac shall not redeem, purchase, or otherwise acquire any shares of stock ranking junior or on parity with such Preferred B shares “unless full cumulative dividends on the Series B Preferred Stock have been or contemporaneously are declared and paid [or set aside for payment].” In other words, the specific provisions of the Preferred B shares preclude Impac from acquiring any Preferred B or Preferred C shares unless they have paid or set aside all accrued dividends on all Preferred B shares. Similarly, section 3(d) of the Articles Supplementary of the Preferred C shares provides that Impac shall not redeem, purchase, or otherwise acquire any shares of stock ranking junior or on parity with such Preferred C shares “unless full cumulative dividends on the Series C Preferred Stock have been or contemporaneously are declared and paid [or set aside for payment].”

76. The Company did not declare or pay the full cumulative dividends before its purchase of the Preferred B and Preferred C shares in the fourth quarter of 2009, and was therefore prohibited from making those purchases.

## **CLASS ACTION ALLEGATIONS**

77. Plaintiff brings this action as a direct action, because it involves injury directly to the holders of the Preferred B and Preferred C stock, and the Company's common stockholders, far from being injured, are being unfairly and wrongfully benefited by the acts alleged in this Complaint. Plaintiff brings this action on his own behalf and as a class action, pursuant to MD. RULE 2-231 on behalf of (i) all holders of the Preferred B stock of Impac ("Preferred B Class"), and (ii) all holders of Preferred C stock of Impac ("Preferred C Class," and together with the Preferred B Class, the "Classes"). Plaintiff class consists solely of Preferred B and Preferred C shareholders who did not sell their stock or in any way participate in the tender/solicitation offer dated May 29, 2009. Excluded from the Classes are Defendants, the predecessors, successors, parents and subsidiaries of Defendant Impac, the current or former officers, directors, partners, and other employees of the Defendants, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns; and any entity in which Defendants have or had a controlling interest. This action is properly maintainable as a class action for the reasons set forth below.

78. The members of each Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that there are hundreds or over a thousand or more members in each proposed Class. Record owners and other members of each Class may be identified from records maintained by Impac or its transfer agent and may be notified of this pending action by mail, using the form of notice similar to that customarily used in class actions.

79. Plaintiff's claims are typical of the claims of the members of each Class as all members of the Classes are similarly affected by Defendants' wrongful conduct.

80. Plaintiff will fairly and adequately protect the interests of the members of each Class. Plaintiff is a member of both Classes and will vigorously represent the interests of each category of Class member in the same manner as Plaintiff's own interest will be represented. Plaintiff knows of no conflicts or antagonisms between his individual interests and those of other Class members, and Plaintiff has retained counsel competent and experienced in class action and securities litigation.

81. The Defendants in this action have acted on grounds generally applicable to the Classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the rights of the members of the Classes as whole. Certification is therefore appropriate under MD. RULE 2-231(b)(2).

82. Common questions of law and fact exist as to all members of the Classes and predominate over any questions solely affecting individual members of the Classes, making certification appropriate under MD. RULE 2-231(b)(3). Among the questions of law and fact common to the Classes are:

- (a) whether under the Articles Supplementary of the Preferred B, Impac obtained the required number of votes or consents to legally authorize and approve the amendments to the provisions of Preferred B Articles filed on or about June 29, 2009;
- (b) whether under the Articles Supplementary of the Preferred C, Impac obtained the required number of votes or consents to legally authorize and approve the amendments to the provisions of the Preferred C Articles filed on or about June 29, 2009;
- (c) whether Impac's acceptance for purchase of the shares that were tendered by preferred holders caused those shares to thereafter become unissued or not capable

of being voted either because they were no longer outstanding and/or because they were owned by the Company;

- (d) whether the linked tender offer/consent solicitation was an unfair vote buying scheme that interfered with the voting rights of non-tendering preferred shareholders, a scheme by which shareholders were forced to tender their shares and consent to the amendments that would affect only non-tendering preferred shareholders, and a scheme that violated the fiduciary duties and/or duties of good faith and fair dealing owed by Impac and its directors and officers to the preferred holders;
- (e) whether members of each Class are entitled to have their rights restored under the governing instruments of the Preferred B and Preferred C shares because the Articles Supplementary were not validly amended on June 29, 2009 or thereafter; and
- (f) whether, in the event that the rights of members of each Class cannot be restored, members of the Classes are entitled to recover damages and, if so, the proper measure of damages.

83. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small where few shares are owned, the expense and burden of individual litigation make it impossible for members of each Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.



### **COUNT I**

#### **(Breach of Articles Supplementary Requiring Approval of Preferred B Shareholders)**

84. Plaintiff re-alleges the preceding paragraphs as if fully set forth herein.

85. In order to amend the terms of the Articles Supplementary for the Preferred B shares, Defendants were required to obtain the consents of holders comprising 1,333,334 Preferred B shares.

86. Defendants did not obtain sufficient Preferred B consents to approve the materially adverse amendments.

87. Defendants breached the terms of the Articles Supplementary for the Preferred B shares by implementing invalid and unauthorized amendments.

88. Plaintiff and the Preferred B Class are entitled to relief reinstating the terms of the Articles Supplementary that were eliminated by the purported vote and ordering Defendants to pay damages.

### **COUNT II**

#### **(Breach of Articles Supplementary)**

89. Plaintiff re-alleges the preceding paragraphs as if fully set forth herein.

90. Defendants did not obtain sufficient consents of either the Preferred B or the Preferred C holders to approve the materially adverse amendments to the terms of those preferreds.

91. Defendants nonetheless amended the terms of the Articles Supplementary for each of the Preferred B and Preferred C shares, and justified those invalid amendments by counting as valid consents purported consents on behalf of shares that were no longer issued and outstanding.

92. In order to validly amend the preferred shares as contemplated, the Articles Supplementary of each class required the vote of at least two-thirds of the outstanding shares of that class of preferred shares. Defendants did not obtain any votes, let alone the necessary votes or

consents of two-thirds of the outstanding shares because (1) by the terms of the Transmittal Letter, no action occurred or could occur until the tendered shares had been accepted by Impac, but at that point the shares had become unissued shares, with no power to vote or consent; and/or (2) following acceptance of the tender, Impac owned the shares and was precluded from voting them by MD. CODE ANN., CORPS & ASS'NS § 2-509(b).

93. Thus, the purported amendments implemented by Impac that eliminated the preference, dividend, and voting rights of the preferred shares were invalid and not properly authorized.

94. Plaintiff and each of the Preferred B Class and the Preferred C Class are entitled to relief reinstating the terms of the Articles Supplementary of each class that were eliminated by the purported vote of the Preferred B and the Preferred C holders and ordering Defendants to pay damages.

**COUNT III**  
**(Breach of Fiduciary Duty/Violation of Good Faith and Fair Dealing)**

95. Plaintiff re-alleges the preceding paragraphs as if fully set forth herein.

96. The Defendants have a fiduciary duty and a contractual obligation of good faith and fair dealing in connection with the Articles Supplementary of each class of preferred shares. Those obligations precluded Impac from engaging in the linked tender offer/consent solicitation, which was an illegal “vote buying” scheme that interfered with the voting rights of preferred holders and unfairly influenced the vote. Tendering preferred shareholders were asked to consent to amendments in which they had no interest, and which would adversely affect only the non-tendering preferred shareholders. Also, preferred shareholders faced a legitimate threat that their economic rights would be virtually eliminated and that their shares would become completely illiquid if they did not participate in the offer. They were therefore pressured into tendering and

voting for reasons unrelated to the economic merits of the offer.

97. The transaction was self-dealing by the directors and officers, who were significant owners of common stock and thus benefited from the elimination of the preference, dividend, and voting rights of the preferred holders.

98. Thus, the tender offer/consent solicitation violated Defendants' fiduciary duty and duty of good faith and fair dealing owed to the holders of those preferred shares.

99. Plaintiff and the Classes are entitled to relief declaring that the tender offer/consent solicitation for each class of preferred shares was invalid, as a breach of Defendants' duties, and annulling the amendments. In the alternative, if such equitable relief cannot be granted, Plaintiff and the Classes are entitled to an award of damages as a result of the implementation of the unauthorized amendments.

**COUNT IV**  
**(Breach of Articles Supplementary Prohibiting Repurchase of Preferred Shares Without Payment of Cumulative Dividends)**

100. Plaintiff re-alleges the preceding paragraphs as if fully set forth herein.

101. In the fourth quarter of 2009, Impac purchased or otherwise acquired 10,564 shares of Preferred B shares and 10,478 shares of Preferred C shares, without paying or declaring the full cumulative dividends for those classes of stock. This action violated Section 3(d) of the Articles Supplementary of each of the Preferred B shares and the Preferred C shares.

102. The dividends on the 665,592 shares of Preferred B and 1,405,086 shares of Preferred C still outstanding amount to \$ 348,438 and \$713,433, respectively, per quarter. Impac has not declared and paid at least two such quarterly dividends depending when the Preferred B and Preferred C shares were acquired. The total accrued dividends on Preferred B and Preferred C that are presently due and payable amount to \$2,123,742 for two quarters.

103. Impac must immediately declare and pay the cumulative dividends that were payable for the two quarters that preceded Impac's purchase of stock.

**COUNT V**  
**(Punitive Damages)**

104. Plaintiff re-alleges the preceding paragraphs as if fully set forth herein.

105. The Defendants' actions were designed with a specific intent to injure the Plaintiff and the holders of Preferred B or Preferred C shares who did not agree to the tender offer. Defendants intended to injure those holders by stripping them of all of their economic rights and evading the payment of dividends that had been contractually guaranteed to such holders. Defendants admitted their intent to injure the remaining holders of the Preferred B and Preferred C stock when they told common shareholders that the purpose of their conduct was to eliminate the obligation to pay dividends to the preferred shareholders and otherwise strip them of their rights.

106. Defendants further intended to evade Maryland's statutory prohibition on the voting of shares by a corporation, a prohibition designed to prevent precisely the conduct of Defendants in this action – the acquisition by a corporation of its own shares in order to vote those shares to the detriment of the other holders.

107. Defendants' conduct constitutes actual malice, and Plaintiff and the Classes are entitled to an award of punitive damages arising out of such conduct.

**COUNT VI**  
**(Preferred B and C Shareholders are Immediately Entitled to Elect Two Directors to Impac's Board of Directors)**

108. Plaintiff re-alleges the preceding paragraphs as if fully set forth herein.

109. The Articles Supplementary for each of the Preferred B and Preferred C provides in Article (6)(b) that if Impac fails to pay six or more quarterly dividends to the holders, those holders shall have the right to elect two directors to Impac's Board of Directors.

110. Impac has failed to pay the Preferred B and Preferred C dividends due June 30, September 30, 2009 and December 31, 2009. They failed to pay all four dividends due in 2010, and they have failed to pay the March 31, 2011, June 30, 2011, and September 30, 2011 dividends. This totals ten dividends which are in arrears.

111. The vote for the two additional directors shall occur at a special meeting called by the holders of record of at least 20% of the preferred shares.

112. Plaintiff is presently not aware of the names and addresses of the present holders of Preferred B and Preferred C shares but alleges that at least 20% of such holders would agree to immediately call for a special meeting to elect two directors to Impac's Board.

113. Plaintiff is entitled to relief declaring that, with the consent of 20% of the Preferred B and Preferred C holders, he may call a special meeting of the holders to elect two directors, because the purported amendments to Preferred B and Preferred C are invalid, and because Impac has failed to pay at least six quarterly dividends to the holders of Preferred B and Preferred C shares.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for relief and judgment, as follows:

A. Determining that this action is a proper class action under MD. RULE 2-231, that Plaintiff is an appropriate class representative for each of the Classes, and that his counsel are appropriate Class Counsel;

B. Declaring that the Articles Supplementary of each of the Preferred B shares and the Preferred C shares were not amended in any respect and further declaring the rights of the holders of Preferred B and Preferred C shares under the Articles Supplementary;

C. Enjoining the Defendants from taking any action inconsistent with the rights of the Preferred B and Preferred C shareholders as they existed under the Articles Supplementary

adopted in 2004;

D. Declaring that the Defendants violated their fiduciary duties in connection with the tender offer/consent solicitation, and invalidating any purported amendment to the Articles Supplementary resulting from the consent solicitation undertaken in connection with the tender offer;

E. Requiring Defendants to declare and pay cumulative dividends on the Preferred B and Preferred C shares for the third and fourth quarters of 2009, as a result of Defendants' illegal purchase of shares of preferred stock during the fourth quarter of 2009;

F. In the event that the declaratory and injunctive relief sought in this action cannot be granted, awarding compensatory damages in favor of Plaintiff and the other members of the Classes against Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

G. Reinstating the original terms under the Preferred B and Preferred C Articles Supplementary;

H. Awarding Plaintiff and the Classes punitive damages in an amount to be determined at trial;

I. Authorizing Plaintiff and the Classes to set a date for the immediate election of two additional directors to Impac's Board of Directors;

J. Awarding Plaintiff and the Classes their reasonable costs and expenses incurred in this action, including attorneys' fees and expert fees; and

K. Such other and further relief as the Court may deem just and proper.

Dated: December 7, 2011

Respectfully submitted,



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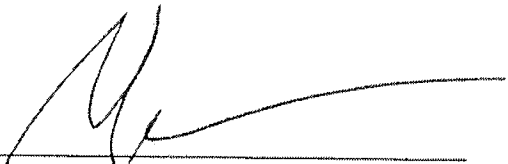
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**DEMAND FOR JURY DEMAND**

Plaintiff hereby demands a trial by jury.

  
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Steven D. Silverman