

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

**Plaintiffs,**

**v.**

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

**Defendant.**

**IN THE**

**CIRCUIT COURT**

**FOR BALTIMORE CITY**

**Case No. 24-C-11-008391**

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**MEMORANDUM OPINION**

On remand from the Court of Appeals of Maryland, Plaintiff Curtis J. Timm filed a Motion for Class Certification and Other Relief (Paper No. 165), and Plaintiff Camac Fund LP (“Camac”) filed a Motion to Certify Class, Appoint Class Representative and Lead Counsel, Preliminarily Determine Right to Receive Dividends, and Set Final Judgment Hearing (Paper No. 164). Defendant Impac Mortgage Holdings, Inc. (“Impac”) filed a combined Responding Position Regarding Plaintiffs’ Respective Motions for Class Certification and Other Relief (Paper No. 165/1). Plaintiff Camac filed an opposition to Plaintiff Timm’s motion (Paper No. 165/4), and Plaintiff Timm filed a reply memorandum to both Camac’s and Impac’s arguments (Paper No. 165/3). Plaintiff Timm filed a response to Plaintiff Camac’s motion (Paper No. 164/2), and Plaintiff Camac filed a reply memorandum in support of its motion (Paper No. 164/3). The Court conducted a hearing on the motions on February 18, 2022 by remote electronic means pursuant to Maryland Rule 2-802 using Zoom for Government. All parties appeared by counsel.

The action reaches the point of class certification in an unusual procedural posture. Almost all of the issues have been adjudicated on the merits not only at the trial level but also on both levels of appeal. Remaining to be determined is only whether a class of Plaintiffs should be

certified, the parameters of the class and its representatives, one issue of the appropriate final relief, and a request for attorneys' fees and expenses. All other issues were determined by this Court (W. Michel Pierson, J.), certified for immediate appeal, and affirmed by both the Court of Special Appeals and the Court of Appeals. *Impac Mortgage Holdings, Inc. v. Timm*, 474 Md. 495 (2021). The course of the proceedings is stated fully in the Court of Appeals decision, and the Court will describe only the key features here.

Plaintiff Timm filed the initial complaint in this action in December 2011. Plaintiff Camac intervened as a Plaintiff in 2013. Together, though sometimes contentiously with one another, they have sustained years of litigation. Both Plaintiffs own Series B Preferred stock in Defendant Impac Mortgage Holdings, Inc. They have contended successfully that Impac ineffectively attempted to alter the preferred terms of their shares in 2009. Impac's efforts were ineffective because just short of the required two-thirds of the Series B shares were voted in favor of the corporate charter amendment. Impac argued that the votes of Series B and Series C shares should be tallied together, producing a combined vote that crossed the two-thirds threshold. Plaintiffs argued that the votes by Series B and Series C shareholders had to be tallied separately, producing approval by the Series C shareholders but disapproval by the Series B shareholders. All three levels of courts agreed with Plaintiffs, albeit for slightly different reasons.

In this Court, Judge Pierson decided some of the merits issues in a December 29, 2017 Memorandum Opinion (Paper No. 94/7) on cross-motions for summary judgment. In that decision, Judge Pierson construed the key voting rights provision in ¶ 6(d) of the Articles Supplementary governing the Series B stock. The Court adhered to its previous conclusion that the provision is ambiguous, concluded that the extrinsic evidence provided by the parties did not

resolve the ambiguity, and then construed the provision against Impac based on the Court's conclusion that Impac should be considered the drafter of the provision. Based on this conclusion, Judge Pierson granted summary judgment for Plaintiffs and against Defendant on the meaning of the voting rights provision.<sup>1</sup> The Court specified that "[t]he precise relief to be granted in light of this determination will be the subject of further proceedings." Paper No. 94/7 at p. 44.

After additional briefing, Judge Pierson took up the issue of relief in a July 16, 2018 Memorandum Opinion (Paper No. 132). The Court made very clear what was being decided and what was left to be decided:

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.

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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 a claim for attorneys' fees.

Paper No. 132 at pp. 4-5, 11. The Court was equally clear on the purpose for certifying all of the rulings made up to that point as final for purposes of immediate appeal pursuant to Maryland Rule 2-602(b):

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<sup>1</sup> The Court also denied a motion seeking revision of an earlier ruling and granted Defendant's motion to strike an amendment to the complaint.

The court agrees with Impac<sup>[2]</sup> 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.

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The rulings made by the court resolve all issues arising from the complaint, save for the issues requiring certification of a class. . . . 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.

*Id.* at 12-13. Judge Pierson accordingly entered a Judgment Order (Paper No. 132/2) on July 16, 2018 and a further Order (Paper No. 132/4) correcting an error on July 24, 2018. The Court explicitly designated the Judgment Order as a final judgment pursuant to Maryland Rule 2-602(b). Defendant Impac appealed, and Plaintiff Timm filed a cross-appeal. At Impac's request, the Court stayed its injunction requiring the election of two board members by the Series B shareholders.

The Maryland Court of Special Appeals affirmed Judge Pierson's decisions on all issues raised. *Impac Mortg. Holdings, Inc. v. Timm*, 245 Md. App. 84 (2020), *aff'd on other grounds*, 474 Md. 495 (2021). On Defendant Impac's appeal of the primary issue requiring construction of the Articles Supplementary, the court concluded that the provision is unambiguous, but agreed

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<sup>2</sup> Plaintiffs also advocated an immediate appeal, but they urged a different procedural route to that end.

with the result that a two-thirds vote of the Series B shares tallied separately was needed for approval of the amendments. *Id.* at 107-15. The court then considered issues raised on appeal by Plaintiff Timm. *Id.* at 102-04. The court rejected Plaintiff Timm's challenge to the Circuit Court's grant of summary judgment on Count II based on the paucity of his arguments, *id.* at 117, and held that the Circuit Court did not abuse its discretion in declining to reconsider that summary judgment ruling and in ruling on all of Plaintiff Timm's other arguments in support of Count II, *id.* at 117-24. The court briefly rejected Plaintiff Timm's arguments against the Circuit Court's grant of summary judgment on Count III, noting that Mr. Timm in his opening brief did not "cite any case law or develop any legal argument concerning the legal theories underlying Count III that he asserted in the Complaint" and that in his reply brief he barely "mention[ed] the legal theories," with no support or development of the arguments. *Id.* at 125. Finally, the court discussed and rejected four additional arguments raised by Plaintiff Timm. *Id.* at 125-26.

Only Defendant Impac petitioned for *certiorari* from the decision of the Court of Special Appeals. *Impac Mortg. Holdings, Inc. v. Timm*, 474 Md. 495, 532 (2021). The Court of Appeals granted the petition and affirmed the results from both the Circuit Court and the Court of Special Appeals, although for slightly different reasons. Because only Defendant Impac sought review, the Court considered only the proper construction of the voting rights provision in the Articles Supplementary. Siding with the Circuit Court and disagreeing with the Court of Special Appeals, the Court concluded the provision is ambiguous. *Id.* at 534-39. Departing from the reasoning of the Circuit Court, the Court concluded that the ambiguity was resolved by resort to

extrinsic evidence and therefore did not require the additional step of construing the provision against its drafter.<sup>3</sup> *Id.* at 539-46.

Two important conclusions for the current status of this action arise from this procedural history. First, Judge Pierson correctly and carefully isolated the three issues remaining to be decided: (1) class certification; (2) the identity of the persons entitled to dividends on the Series B shares; and (3) attorneys' fees. Second, because Judge Pierson certified all other issues for immediate appeal and appeals were taken, all other issues have been finally decided in this action. The Court of Special Appeals and Court of Appeals decisions of those issues are the law of the case and are not open for further consideration by this Court. *See LVNV Funding LLC v. Finch*, 463 Md. 586, 606 (2019) (observing that the Court of Appeals, on second round of appeals, could entertain issue it had declined to address on the first appeal, but lower courts had been bound by the first appellate decision of that issue).

## DISCUSSION

### A. Class Certification

For class certification to be possible under Maryland Rule 2-231, the parties must satisfy all four basic requirements of Rule 2-231(b) and at least one of the categories of permissible class actions identified in Rule 2-231(c). *Creveling v. Gov't Emps. Ins. Co.*, 376 Md. 72, 88-90 (2003); *Silver v. Greater Baltimore Med. Ctr., Inc.*, 248 Md. App. 666, 689-90 (2020). All parties agree both that the four threshold Rule 2-231(b) requirements of numerosity, commonality, typicality, and representativeness are satisfied and that this action is appropriately

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<sup>3</sup> The Court agreed with the Circuit Court that, if that final step of analysis were necessary, Impac would be considered the drafter of the provision and the ambiguity would be resolved against Impac's position. *Id.* at 546.

classified as a non-opt-out class action for declaratory or injunctive relief under Rule 2-231(c)(2). The Court still must be satisfied that all these requirements are met.

The parties' disagreements involve (1) the appropriate class definition; (2) which Plaintiff should be designated the representative plaintiff; and (3) who should serve as class counsel. Plaintiff Camac and Defendant Impac argue for a broader class definition that includes all persons who have held Series B shares over the applicable time period since the dispute arose; Plaintiff Timm argues for a class limited to current Series B shareholders, with certain exclusions. Plaintiff Camac and Defendant Impac advance Plaintiff Camac as the appropriate representative plaintiff and Plaintiff Camac's counsel, Tydings & Rosenberg LLP, as appropriate class counsel. Plaintiff Timm advances himself as both the appropriate representative plaintiff and class counsel.

#### **1. Numerosity**

Numerosity under Rule 2-231(b)(1) is easily satisfied. Plaintiff Camac estimates there are almost 700,000 outstanding shares of Series B stock held by hundreds or even thousands of individual shareholders. Even under Plaintiff Timm's narrower class definition, that number of plaintiffs meets the numerosity requirement.

#### **2. Commonality**

Commonality under Rule 2-231(b)(2) also clearly exists. All of the liability issues adjudicated in this action were common to all owners of Series B shares because they involved the voting rights of those owners. More importantly, there remain common issues to be decided concerning which shareholders – current or past – are entitled to relief. As discussed below, the Court preliminarily determines as a matter of law that the dividends that are due must be paid to the owners of the shares on the record date once the dividends are declared. The Court also will

discuss below in connection with the class definition the potential conflict that exists among class members on this point. No matter which class definition is selected, however, the factual and legal issues are common to the class members.

### **3. Typicality**

With respect to typicality under Rule 2-231(b)(3), Plaintiffs Timm and Camac are in the same position. Although Plaintiff Timm owned Series B shares earlier and complains that Plaintiff Camac purchased its Series B shares to buy into this controversy, that distinction is not significant. Both Plaintiffs' claims are typical of the claims of all remaining Series B shareholders. The only potential typicality issue is that their claims are not typical of potential class members who once owned Series B shares but have since sold them. The Court discusses this potential conflict below in connection with the class definition.

### **4. Representativeness**

The two Plaintiffs contend over which of them would be the better representative of the class under Rule 2-231(b)(4). For the reasons discussed below, the Court concludes that Plaintiff Camac is the appropriate class representative. Plaintiff Camac satisfies the requirements of the rule that it will fairly and adequately represent the interests of the other class members and that its attorneys will provide fair representation that extends to the interests of all class members.

### **5. Rule 2-231(c)(2) Class Type**

All parties support certification under the class type provided in Rule 2-231(c)(2). Certification under that subsection is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This is such a case. Defendant Impac acted consistently with respect to all potential class members, and



the injunctive and declaratory relief sought is both indivisible and indicative of the “cohesiveness” that is a hallmark of subsection (c)(2) classes. *Silver v. Greater Baltimore Med. Ctr., Inc.*, 248 Md. App. 666, 712-14 (2020). Defendant Impac took a consistent position with respect to the voting rights of all Series B shareholders, resulting in the courts’ conclusion that it violated the rights of those shareholders. The partial relief already granted and affirmed has been declaratory and injunctive in nature. Although the remaining relief to be implemented involves the payment of money, it will be imposed through injunctive relief to declare and pay the required three quarters of dividends. Most importantly, the legal determination guiding that injunctive relief will be determinative for all potential class members – including some and excluding others. That factor makes this dispute particularly appropriate for resolution in a Rule 2-231(c)(2) class action in which class members cannot opt out of the definitive adjudication of the dispute.

## **6. Class Definition**

As noted, Plaintiff Timm proposes to limit class membership to current Series B shareholders, with certain exclusions. He advances the following class definition:

All current owners of the 9.375% Series B Cumulative Redeemable Preferred Stock excluding any current or former officers, directors, partners, and employees of Impac Mortgage Holdings, Inc. as well as their family members, assigns or entities in which they have a controlling interest.

Plaintiff Camac proposes the following class definition:

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

Ironically, both Plaintiffs support their positions with the fact that the Court must determine whether the three quarters of dividends that are due will be paid to Series B shareholders of

record when the dividends are declared – presumably closely correlating with current shareholders – or to the owners of Series B shares as of some earlier date. Plaintiff Timm says the class should be restricted to the current shareholders who will receive that relief; Plaintiff Camac says the broader definition is needed both to give shareholders who will be excluded from relief the opportunity to object and to ensure that all Series B shareholders' rights are adjudicated on a binding basis. Defendant Impac supports the broader class definition because it will ensure complete preclusive effect of the judgment on all Series B shareholders.

Plaintiff Camac and Defendant Impac offer the appropriate class definition. The conflicting interests among potential class members is unavoidable. No matter what date of ownership is used to award the dividend relief, some potential claimants for that relief will be excluded from relief. The solution to address that conflict is not for the Court to define it out of existence, as Plaintiff Tim suggests. Deciding which plaintiffs should receive the relief and then excluding the others from the class puts the merits issue before the procedural issue of defining the class. Although this action is unusual in that most of the merits issues have been adjudicated before class certification, this important issue remains. It is important that all plaintiffs who potentially are entitled to that relief have notice by the best means feasible and an opportunity to make their arguments to the Court. Only the broader class definition accomplishes that objective.

#### **7. Class Notice**

Adoption of the broader class definition means it is necessary to give notice to the full class by the best means feasible. The Court is satisfied with the showing by Plaintiff Camac and Defendant Impac that targeted, direct notice can be provided to current Series B shareholders but that it is not feasible to identify all persons who held Series B shares at some time from June 29,

2009 to the present. Those parties have devised an appropriate means to give notice to those class members through their Notice Program including advertising and web site availability. The Court will approve notice by that method with the expense of providing notice paid by Plaintiff Camac and to be included in its request for fees and expenses.

#### **8. Class Representative**

Plaintiff Camac is the most appropriate class representative. Plaintiff Timm deserves credit for initiating this action and for persistence in pursuing it. Plaintiff Camac, however, has demonstrated greater sensibility in the positions it has taken, including avoiding issues now that have already been litigated and adjudicated in this action. Two factors are now particularly important. First, Plaintiff Camac, and not Plaintiff Timm, has advocated a class definition that is more fair to all potential claimants by including all as plaintiffs who will receive notice and have party status in presenting the appropriate final relief positions. Second, Plaintiff Camac brings with it its own counsel relationship. As discussed in the next section, Plaintiff Timm does not currently have counsel who can serve as class counsel.

Plaintiff Timm will still be permitted to participate on his own behalf as a party.

#### **9. Class Counsel**

Plaintiff Timm argues that he should simultaneously serve as both class representative and class counsel. That is impossible. Plaintiff Timm is a retired attorney. He has been represented by counsel at different times in this action. He appeared by counsel at the class certification hearing, but Mr. Costello, who represented him then, made clear that he did not intend to continue to represent Plaintiff Timm through the remaining proceedings in this action. Whatever Plaintiff Timm's abilities are as an attorney, he is not admitted to practice before the Maryland Court of Appeals. He may be effective in advocating for himself, but he is precluded

from representing any other party in this Court, including the other members of a certified class. Even beyond this absolute bar to Plaintiff Timm serving as class counsel, he lacks broader experience in class action litigation and his pattern in this action has often featured asserting positions without well developed support.

In sharp contrast, Plaintiff Camac is represented by Tydings & Rosenberg LLP, with John S. Isbister and Daniel S. Katz as lead counsel. These attorneys and their firm are highly experienced litigators, especially in the areas of class action and shareholders' rights litigation. By their long involvement in this action, they have demonstrated their ability and suitability to serve as class counsel.

**B. Preliminary Determination of Entitlement to Dividend Relief**

The final issue to be determined on the merits in this action is what group of Series B shareholders will be entitled to receive the three quarters of dividends already determined by Judge Pierson (and affirmed on appeal) to be required to be paid. All parties ask that the Court determine this issue on a preliminary basis so that notice of that tentative decision may be given to class members who may object to it. The Court agrees that it is desirable to state a tentative resolution of this issue pending notice and the final hearing.

"It is a well-established rule [in Maryland] that '[a]s between successive owners of a share, the dividend belongs to him who is the owner at the time it is declared; and this is true although there is a future day of payment.'" *Wilcom v. Wilcom*, 66 Md. App. 84, 97 (1986) (quoting *Northern Central Dividend Cases*, 126 Md. 16, 29 (1915)). Also, in Maryland as in other jurisdictions governed by basic Uniform Commercial Code provisions, "a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer." Md. Code, Com. Law § 8-302(a). In a Delaware case supported in part

by the same Uniform Commercial Code provision in Delaware law, the Chancery Court concluded: “When a share of stock is sold, the property rights associated with the shares, including any claim for breach of those rights and the ability to benefit from any recovery or other remedy, travel with the shares.” *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1050 (Del. Ch. 2015).

The Court therefore tentatively and preliminarily agrees with the parties that the three quarters of dividends already determined to be due must be paid to the Series B shareholders of record when those dividends are actually declared. Even though the right to receive those dividends attached to the shares in 2009, both the deferred declaration date and the principle that the right travels with the shares through successive ownership support conferring the right to that relief on the current shareholders (determined by the record date to be established) rather than on the individuals who owned the stock in 2009 (or some intermediate date).

Since the hearing on the pending motions, Defendant Impac has notified the Court of a proposed restructuring transaction through which all Series B shares will be extinguished. That transaction is expected to close in September, before the final hearing will occur in this action. The Court proposes for the parties’ consideration the possibility of the Court issuing partial, final injunctive relief before that hearing that would require Defendant Impac to declare the three quarters of dividends in the near future, before the planned transaction closes, but also require that Defendant Impac actually pay the dividends into an acceptable escrow facility pending final adjudication of the recipients of those dividends. This approach might have the virtue of fixing the record date and the dividend obligation without prejudice to final adjudication of the appropriate recipients of the dividends after any objections have been made. The Court asks the

parties to be prepared to discuss this possibility at a conference to establish the schedule for the Notice Program and the final hearing.

**C. Other Relief Sought by Plaintiff Timm**

In his motion, Plaintiff Timm seeks several items of monetary relief on a class basis beyond the payment of three quarters of dividends as previously determined to be required by Judge Pierson. The simple answer to all of these requests is that the time to assert them has passed. Judge Pierson carefully ensured that both Plaintiffs had an opportunity to advance all claims for relief of any type, and the Court then adjudicated those claims and incorporated the results into its orders certified for immediate appeal. The appellate courts considered and resolved all points of appeal. Thus, all issues except those explicitly reserved by Judge Pierson have been finally adjudicated and are not open for reconsideration or expansion by this Court. All of Plaintiff Timm's additional claims for relief will be denied.

**D. Petitions for Attorneys' Fees, Expenses, and Other Payments**

Both Plaintiffs have indicated their intentions to file petitions for payment of attorneys' fees and expenses. Plaintiff Timm has also indicated his intention to seek a monetary award based on his actions as a plaintiff. It is desirable that the maximum amounts sought by any Plaintiff be determined so they can be described and included in the class notice pending final adjudication. The Court therefore will require that any such petition be filed by August 12, 2022 and that it include the exact amount requested, which will define the maximum amount that can be allowed.

**CONCLUSION**

For all these reasons, the Court will issue a separate order certifying the Plaintiff class based on the definition proposed by Plaintiff Camac, designating Plaintiff Camac and its counsel,

Tydings & Rosenberg LLP, as the representative plaintiff and class counsel, approving the Notice Program proposed by Plaintiff Camac and Defendant Impac, preliminarily determining entitlement to receive the dividends to be declared, and requiring Plaintiffs to file petitions for fees, expenses, and any monetary awards. The Court will also conduct a conference with all parties in the next week to establish the required notices, the schedule for the Notice Program, the date of the final hearing, and other issues.

July 22, 2022

Judge Lawrence P. Fletcher-Hill

Judge's Signature appears on the  
original document

Judge Lawrence P. Fletcher-Hill

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**TRUE COPY**  
**TEST**  
*Marilyn Bentley*  
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