

**IN THE CIRCUIT COURT  
FOR BALTIMORE CITY, MARYLAND**

<b>CURTIS J. TIMM, ET AL.</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No:</b>
	)	<b>24C-11-008391</b>
<b>IMPAC MORTGAGE HOLDINGS, INC., ET AL.</b>	)	
	)	
<b>Defendants</b>	)	
	)	

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**CURTIS J. TIMM'S REPLY TO THE MEMORANDA FILED BY IMPAC MORTGAGE  
HOLDINGS, INC. AND CAMAC FUND LP REGARDING HIS MOTION FOR CLASS  
CERTIFICATION AND OTHER RELIEF**

Plaintiff, Curtis J. Timm ("Timm") by his undersigned attorneys, hereby files this Reply Memorandum to the Response Memoranda filed by Impac Mortgage Holdings, Inc. and Camac Fund LP's regarding his Motion for Class Certification and Other Relief.

**I. INTRODUCTION**

This memorandum sets forth Timm's response to the arguments raised by Defendant, Impac Mortgage Holdings, Inc. ("Impac") and Intervenor Plaintiff, Camac Fund LP ("Camac"), in their memoranda filed on January 18, 2022. All parties agree that class certification is appropriate under Maryland Rule 2-231(c)(2). The parties disagree on the following issues: (1) Timm's request for dividends after 2009; (2) the definition of the proposed class; (3) the appointment of class representative and class counsel; (4) Timm's request that the costs of the notice and administration of the class be paid by Impac; (5) Timm's request for interest on the

unpaid dividends; and (6) Timm's request for an incentive award. As set forth more fully below, as well as in Timm's prior memoranda, all of Timm's arguments are supported by the applicable case law, the facts of the case and equity.

## **II. ARGUMENT**

### **A. THE DEFINITION OF THE PROPOSED CLASS**

Both Impac and Camac request that the class include all current and former Series B preferred shareholders, while at the same time arguing that former shareholders are not entitled to receive any compensation from the common fund to be created in this class action proceeding. The applicable case law, to which all parties cite, is clear that the right to a dividend on a particular share of stock transfers with its ownership. *Wilcom v. Wilcom*, 66 Md.App. 84, 97-99 (1986). Given the undisputed state of the law, it does not make legal or practical sense to include former Series B shareholders in the proposed class.

Impac also opposes Timm's request to exclude any current or former officers, directors, partners, and employees of Impac Mortgage Holdings, Inc. from the proposed class. Exclusion of Impac-affiliated shareholders is appropriate because those corporate officers who participated in the invalid attempt to amend the 2004 Articles Supplementary should not benefit from this class action. Courts routinely certify classes which exclude defendants and their affiliates. *In re Motorola Sec. Litig.*, 644 F.3d 511

(7th Cir. 2011); *Waldman ex rel. Elliott Waldman Pension Tr. v. Riedinger*, 423 F.3d 145, 153 (2d Cir. 2005); *In re Royal Ahold N.V. Securities & Erisa Litigation*, 2006 WL 132080 (D. Md. Jan. 9, 2006).

**B. THE APPOINTMENT OF CLASS REPRESENTATIVE AND CLASS COUNSEL.**

Impac and Camac argue that Timm is not an appropriate class representative. Timm incorporates by reference the arguments set forth in his Memorandum in Support of his Motion for Class Certification and Other Relief ("Timm Mem.") and his Memorandum in Response to Camac Fund LP's Motion to Certify Class ("Timm Opp.") demonstrating that he would be a competent class representative and class counsel. Timm Mem. 10-13, Timm Opp. 2-8.

Camac argues that *pro se* litigants cannot serve as class representatives and cites to William Rubenstein, 1 *Newberg on Class Actions* § 3:79 (5th ed. 2021) ("Newberg"). Newberg is a treatise on federal class actions and does not discuss class actions in Maryland state courts. Moreover, none of the reported cases collected in § 3:79 involved a competent lawyer seeking to be appointed class representative *pro se*. In fact, many of the cases cited in Newberg were brought by *pro se* prisoners. *E.g.*, *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975).

Timm is not an incarcerated individual with no legal training or experience. He has more than thirty years' experience as a corporate and trial lawyer. Timm Mem. Ex. B. ¶¶ 3-7. Moreover,

Timm has spent over a decade tirelessly litigating this case to restore the rights of the Series B shareholders under the 2004 Articles Supplementary. *Id.* Without Timm's timely filed complaint and unwavering dedication, there would be no recovery for Series B Preferred Shareholders. Neither Impac nor Camac cite to any binding legal authority which would prohibit Timm from acting as both class representative and class counsel.

### **C. TIMM'S REQUEST FOR ALL ACCRUED DIVIDENDS**

Impac argues that Timm's request for all accrued dividends is barred by the affirmative defenses of res judicata and collateral estoppel. Res judicata prevents the parties from relitigating any cause of action that is the subject of a final judgment on the merits. *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 392 (2000). Res judicata will bar a claim when (1) it involves the same parties; (2) the claim is identical to one already determined; and (3) there is a final judgment on the merits. *Id.* Collateral estoppel is similar to res judicata but precludes parties from relitigating a legal or factual issue that was determined in an earlier case between the parties. *Id.* at 387. Collateral estoppel will prevent a party from raising an issue when (1) it involves the same parties; (2) the issue is identical with one previously adjudicated; (3) there was final judgment on the merits; and (4) the party raising the issue was given a fair opportunity to be heard on the issue. *Id.* at 390.

Putting aside the applicability of res judicata and collateral estoppel when there is no subsequent lawsuit or cause of action, neither res judicate nor collateral estoppel bar Timm from requesting that Impac pay all accrued dividends, because that issue, along with the identity of the proposed class, appointment of class representative and class counsel, and the other issues addressed in the parties' briefs, remains outstanding. The Court of Special Appeals recognized that the question of whether damages in the form of dividend payments after 2009 would be owed has not yet been decided. *Impac Mortgage Holdings, Inc. v. Timm*, 245 Md. App. 84, 126, n. 23 (2020), *aff'd* 474 Md. 495 (2021). Simply put, this issue is outstanding and is not the subject of a "final judgment".

#### **D. PREJUDGMENT INTEREST**

Impac argues that Timm's request for prejudgment interest is untimely and is barred by res judicata and collateral estoppel. As set forth in Section C of this Memorandum, these arguments are without merit. Timm requested compensatory damages on Count I of his Complaint. Compl. ¶ 88. The purpose of prejudgment interest is to compensate the injured party for the loss of the use of the funds owed. Second, only a partial appealable order has been entered in this action and it has left several issues to be resolved pending class certification. Timm's request for prejudgment interest has not been decided in this action.

Prejudgment interest is allowable as a matter of right when "the obligation to pay and the amount due had become certain, definite, and liquidated by a specific date." *Gordon v. Posner*, 142 Md. App. 399, 437 (2002). The award of interest is appropriate in cases where the court compels the payment of dividends. See *E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 755 F. Supp. 2d 1122, 1130 (D. Nev. 2010); *Flickinger v. Harold C. Brown & Co.*, 789 F. Supp. 616, 622 (W.D.N.Y. 1992); *Giesecke Devrient Mobile Sec. Am., Inc. v. Nxt-ID, Inc.*, No. CV 2020-0664-PAF, 2021 WL 982597, at \*12 (Del. Ch. Mar. 16, 2021).

Impac argues that its obligation to pay dividends was not fixed because the class is still pending certification, "there is no judgment creditor" and "no one is entitled to the funds". Impac's argument contradicts Maryland law regarding the award of prejudgment interest. All parties agree that the current Series B shareholders are entitled to dividends. However, the dividends have not been paid in a timely manner because Impac wrongfully breached the terms of the 2004 Articles Supplementary and intentionally engaged in protracted litigation to delay the payment of the dividends since 2009. After more than a decade of litigation, the payment of those dividends is now being compelled by court order.

Applying the aforementioned facts and circumstances to applicable Maryland law makes it clear the award of prejudgment is

warranted. For the purpose of determining prejudgment interest, an obligation to pay is "fixed" or "liquidated" if the sum is "capable of ascertainment at the time of breach." *Nationwide Prop. & Cas. Ins. Co. v. Selective Way Ins. Co.*, 473 Md. 178, 194 (2021). The relevant question is whether Impac's obligation to pay dividends on the Series B shares was liquidated at the time it repurchased its own stock, on October 21, 2009, in breach of the 2004 Articles Supplementary. Impac's obligation was liquidated on October 21, 2009 because the amount, date, and identity of the persons entitled to those dividends was readily ascertainable. See Timm Mem. Ex. A. ¶¶ 3(a), 3(d). Therefore, prejudgment interest should be awarded.

**E. IMPAC SHOULD BE REQUIRED TO PAY COSTS ASSOCIATED WITH CLASS ADMINISTRATION.**

Courts have discretion to shift the costs of providing notice to the class to the defendant. *Anne Arundel County v. Cambridge Commons L.P.*, 167 Md. App. 219, 234 (2005). Courts find it appropriate to shift the cost of notice to the defendant when the defendant's liability has been established. See, e.g., *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir.2009); *Macarz v. Transworld Sys., Inc.*, 201 F.R.D. 54, 58 (D. Conn. 2001); *Hartman v. Wick*, 678 F. Supp. 312, 328-29 (D.D.C. 1988); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 641 F. Supp. 259, 264 (D. Ariz. 1986); *Catlett v. Missouri Highway and Transp. Comm'n*, 589 F. Supp. 949, 952 (D. Mo. 1984). Courts also shift the cost of

providing notice to the defendant when it can do so more efficiently and cost effectively than the plaintiff. *Anne Arundel County v. Cambridge Commons L.P.*, 167 Md. App. at 234 (trial court did not abuse its discretion by placing burden of providing class notice list on county because it maintained the relevant records). Impac maintains the relevant records required to provide notice and should bear the burden of providing notice to its shareholders.

#### **F. TIMM'S REQUEST FOR AN INCENTIVE AWARD**

Camac opposes Timm's request for an incentive award. Both parties agree that incentive awards are designed to compensate class representatives for work done on behalf of a class. *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015). The parties also agree that what constitutes an appropriate incentive payment depends on "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 483 (D. Md. 2014).

Camac disagrees that Timm is entitled to an award just because "he suffered a wrong others suffered and then brought it to an attorney to prosecute". Camac argues that an incentive award is only appropriate where the plaintiff took a personal risk and states that there was no risk to Timm other than his out-of-pocket expenses. Camac's description of Timm's role in this litigation is



unfair and inaccurate. Timm did not simply hand over his claim to an attorney to prosecute. He worked closely with his counsel and later, represented himself *pro se*. Timm. Mem. Ex. B, ¶ 4. He has risked his time, effort, and money. For more than ten years, Timm has spent over 4,300 hours litigating this case. *Id.* ¶¶ 4-6. He has made trips to Maryland, New York, and California for depositions and meetings and has incurred more than \$14,000 in expenses. *Id.* An incentive award is appropriate given the extraordinary length of this litigation, the time and effort Timm has invested in it, and the benefit he obtained for the class.<sup>1</sup> A shareholder would expect to compensate someone for the efforts expended on their behalf to restore their rights and money.

Courts routinely award incentive payments to plaintiffs who assist in the litigation. *See, e.g. Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 690, 2013 WL 5506027 (D. Md. 2013) (\$2,500 award to plaintiffs who spent a significant amount of time "meeting and communicating with counsel, reviewing pleadings and correspondence, gathering documents" and participating in the

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<sup>1</sup> As described in Section C of Timm's Response Memorandum, Camac only entered the case as an intervenor plaintiff in 2014 when it failed to achieve an individual settlement with Impac. Timm Opp. 6-9. There was no need for Camac to enter the case in 2014 as the matter was being handled by Timm and two qualified attorneys. Finally, Timm finds Camac's statements as to the number of hours its attorneys have expended on the case to be inconsistent with a statement made by Camac attorney Daniel Katz in the month before the December 4, 2020 Court of Appeals hearing when Timm was informed by him that Camac's total fees were approximately \$1 million. Timm finds it highly suspicious that Camac's claims for attorneys' fees have now more than doubled to \$2.8 million. *See* Camac Memo 12/17/21 p. 28.

mediation"); *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 396 (Del. Ch. 2010) (\$100,000 award to plaintiff who spent approximately 1,000 assisting the class counsel with the litigation); *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2012 WL 1655538, at \*8 (Del. Ch. May 9, 2012) (awards of \$35,000, \$20,000, and \$7,500 for plaintiffs who gave depositions and other assistance); *Oliver v. Boston Univ.*, 2009 WL 1515607, at \*1 (Del. Ch. May 29, 2009) (\$40,000 award to plaintiff who approximately 2,000 hours assisting with litigation); *Raider v. Sunderland*, 2006 WL 75310, at \*2 (Del. Ch. Jan. 4, 2006) (\$42,000 award for plaintiff who spent a total of 205 hours on litigation and incurred out-of-pocket expenses of \$1,400). An incentive payment is appropriate given the amount of time, expense, and effort Timm has expended and the outcome of this litigation. Timm has worked arduously to successfully restore the Series B shareholders' rights under the 2004 Articles Supplementary. Timm. Mem. Ex. B, ¶¶ 2-7.

#### **CONCLUSION**

For all of the foregoing reasons, Plaintiff, Curtis J. Timm, respectfully reiterates his request for appointment as class representative and class counsel and for the relief set forth in his Memorandum in Support of his Motion for Class Certification and Other Relief.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'TCS', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 1, 2022 a copy of the foregoing was delivered via electronic mail to:

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