CURTIS J. TIMM, on behalf of himself and all other persons similarly situated	*	**IN THE**
Plaintiff	*	**CIRCUIT COURT**
v.	*	**FOR**
	*	**BALTIMORE CITY**
IMPAC MORTGAGE HOLDINGS, INC., et al.	*	**Case No. 24-C-11-008391**
Defendants	*	

* * * * * * *

MEMORANDUM OPINION

This case involves a challenge by Plaintiffs Curtis J. Timm and Camac Fund LP, holders of preferred stock in Defendant Impac Mortgage Holdings, Inc., to certain amendments to the company's charter that removed rights and protections afforded to the preferred stock. On January 28, 2013, the court granted summary judgment in favor of defendants with respect to all claims, with the exception of those claims based on the contention that the amendments required consent of two-thirds of the shares of Series B Preferred Stock, which was not obtained.[1] Subsequently, Impac filed a Motion for Summary Judgment, seeking judgment on the remaining claims, and plaintiffs filed a Cross-Motion for Summary Judgment, seeking judgment in their favor on those claims. Thereafter, plaintiffs also filed a Motion Pursuant to Rule 2-602(a)(3) for Revision of Partial Summary Judgment for Defendants, seeking reconsideration of the partial summary judgment granted by the January 2013 decision. A hearing was held on these motions. After the hearing, plaintiffs filed an

[1] Although this action was initiated by a single plaintiff, Mr. Timm, Camac Fund LP was later granted leave to intervene as a plaintiff. Impac is the only remaining defendant. A detailed account of the claims that were asserted in the First Amended Complaint is contained in the court's Memorandum Opinion of January 28, 2013.

amendment to the complaint, and Impac filed a motion to strike the amendment. By this Memorandum, the court rules on the pending motions.

I. MOTIONS FOR SUMMARY JUDGMENT

The motions for summary judgment involve the meaning of Paragraph 6(d) of the Articles Supplementary for the Series B Preferred Stock (hereinafter the "Voting Rights Provision"). The Voting Rights Provision provides, in part:

> So long as any shares of Series B Preferred Stock remain outstanding, the Corporation shall not, 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, given in person or by proxy, either in writing or at a meeting (voting separately as a class with all series of Parity Preferred that the Corporation may issue upon which like voting rights have been conferred and are exercisable). . . (ii) 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 or the holders thereof. . .

Plaintiffs contend that the provision requires the consent of the holders of two-thirds of the Series B Preferred Stock. Defendant contends that all that is required is the consent of two-thirds of the holders of the Series B and Series C Preferred Stock voting as a single class, without regard to whether the consent of two-thirds of the Series B holders is obtained. In the January 28, 2013 opinion, the court opined that the provision is ambiguous. Impac's motion for summary judgment is based on the proposition that extrinsic evidence supports its interpretation of the provision. Plaintiffs contend that the provision is not ambiguous, but that if it is ambiguous it should be construed to support their interpretation.

Neither party contends that there is any genuine dispute about the facts that are material to the resolution of the parties' contentions. Each has submitted a variety of materials concerning the extrinsic evidence claimed to bear on the interpretation of the Voting Rights Provision. The following is a brief chronology of relevant events that are the subject of that evidence.

In April 2004, Jonathan Lieberman, Senior Managing Director of Bear Stearns & Co., Inc., made a presentation to Impac soliciting the company's interest in raising capital by issuing preferred stock. The presentation was accompanied by samples of documentation from two recent REIT preferred stock offerings that Bear Stearns had underwritten for other corporate issuers. One was Annaly Mortgage Management, Inc., and the other was MFA Mortgage Investments, Inc.

On April 30, 2004, the Impac Board of Directors adopted resolutions authorizing the creation of the Series B Cumulative Redeemable Preferred Stock, the filing of Articles Supplementary with SDAT, and the public offering of preferred stock to be underwritten by a group of underwriters led by Bear Stearns & Co. and UBS Securities LLC. Impac entered into an underwriting agreement dated May 25, 2004 with Bear Stearns and other underwriters providing for the purchase of shares by the underwriters at a price of $24.2125 per share. As set forth in a prospectus supplement dated May 25, 2004, 2,000,000 shares were offered to the public at a price of $25 per share. Articles Supplementary dated May 25, 2004 were filed with SDAT.

On November 18, 2004, Articles Supplementary were filed creating a second series, the Series C Cumulative Redeemable Preferred Stock. By a prospectus supplement dated November 18, 2004, 4,000,000 shares of Series C preferred stock were offered to the public.

By an Offer to Purchase and Consent Solicitation dated May 29, 2009[2], Impac announced a tender offer for the Series B and Series C Preferred Shares, which was linked to a consent solicitation requiring any shareholder who submitted shares in response to the tender offer to consent to certain amendments to the Preferred Articles Supplementary. The combined offer to purchase and consent solicitation was initially scheduled to expire on June 26, 2009, but the offer was extended, and expired on 9:00 a.m. on June 29, 2009. On that day, Impac filed an SEC Form 8-K with a press release announcing that holders had tendered an aggregate of approximately 67.7% of the Preferred Stock and that Impac was amending its charter to modify the terms of each series of Preferred Stock. The amendments to the charter were filed on the same date.

The Parties' Contentions

Impac submits several categories of extrinsic evidence to support its interpretation of the Voting Rights Provision. These include: statements from the drafters of the Articles Supplementary concerning the creation of the terms of the stock and the purpose and intent of the terms, as well as statements from Impac management about their intent and understanding (p.18); evidence concerning the effect of the NYSE Listed Company Manual (p.19); disclosures by MFA and Annaly concerning later issues of preferred stock by those companies (p.19); evidence concerning voting rights provisions in publicly traded REIT preferred stock issues (p. 20); rules of grammatical construction (p.20); and Impac's conduct in 2009, reflecting its understanding of the meaning of the Voting Rights Provision (p. 22).

[2] Also referred to as the Offering Circular or the Tender Offer and Consent Solicitation.

Plaintiffs submit evidence concerning the Board resolutions; statements contained in the Series B Prospectus Supplement; statements made by Impac at the time of the tender offer; and rules of grammatical construction.

The facts that the court deems to be material in light of the legal principles outlined hereafter will be discussed in connection with the court's analysis of the specific arguments made by the parties. They are drawn from the following items submitted by the parties in support of their respective motions and responses.

– Declarations made under penalties of perjury (submitted by Impac) from Katherine Blair, an attorney who acted for Impac in connection with the creation of the Series B preferred stock; William G. Farrar, who was counsel to a syndicate of underwriters led by Bear Stearns & Co. that purchased the Series B and Series C preferred stock in May 2004 and November 2004; Phillip J. Kardis, an attorney, who worked on the Impac Series B issue and subsequent offerings by Annaly and MFA; Richard Johnson, a senior vice president of Impac; Stephan Peers, a member of the Impac Board of Directors; Katherine A. Rykken, whose declaration is accompanied by a chart of voting provisions contained in selected preferred stock offerings; Michael D. Schiffer, an expert witness retained by Impac, also accompanied by an additional chart of voting provisions; Ronald M. Morrison, Impac General Counsel; and Justin Moisio, Impac's Vice President of Corporate and Investor Relations.

– Transcripts of excerpts from the depositions of ten witnesses: William S. Ashmore (president of Impac), Katherine Blair, William G. Farrar, Richard Johnson, Phillip J. Kardis, Ronald Morrison, Stephan Peers, Michael D. Schiffer, Eric Shahinian (a member of plaintiff Camac Fund, LP), and Curtis J. Timm.

– Documentary evidence: the Bear Stearns & Co. presentation to the Impac Board; the Underwriting Agreement between Impac and the underwriters for the Series B issue; the Impac Series B Articles Supplementary, the Impac Series B Prospectus Supplement; the Impac Series C Articles Supplementary; the Impac Series C Prospectus Supplement; the MFA Series A Articles Supplementary dated April 23, 2004; the MFA Series A Preliminary Prospectus Supplement dated April 19, 2004 (sent by Bear Stearns to Impac on April 19); the MFA Series A Final Prospectus Supplement dated April 22, 2004; the Annaly Series A Final Prospectus Supplement dated March 31, 2004 (sent by Bear Stearns to Impac on April 19); the MFA 2013 Series B Articles Supplementary and Prospectus Supplement; the minutes of the Impac Board meeting of April 30, 2004; the Resolutions of the Impac Board of Directors dated April 29, 2004; the minutes of the Impac Board meeting of May 25, 2004; the consent of the Impac Board of Directors dated May 19, 2004; the Closing Binder Index for the Series B Public Offering; the Offering Circular for the 2009 tender offer; an Impac press release dated May 29, 2009 relating to the tender offer; a second Impac press release dated June 17, 2009 relating to the tender offer; NYSE Listed Company Manual Section 313 (Voting Rights); the Impac Form 10-Q for the quarter ended September 30, 2009; portions of the Impac 2009 Form 10-K; Articles Supplementary for Coresite Realty Corporation Series A; the Prospectus Supplement for Coresite Realty Corp. Series A; the Prospectus Supplement for Vornado Realty Trust Series J; and the Prospectus Supplement for North Star Realty Finance Corp. Series B.

LEGAL STANDARD

Resolution of the parties' competing contentions concerning the meaning of the Voting Rights Provision requires the application of principles of contract law. The law to be applied is the

law of the State of Maryland. In light of the subject matter of the contract, resort to Delaware law may also be appropriate to guide the court. *Kramer v. Liberty Property Trust*, 408 Md. 1, 24-25 (2009). Delaware principles concerning contract interpretation are similar to the Maryland law discussed below. *See, e.g., Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del.1996).

A nice distillation of the Maryland law on this topic is contained in *Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37 (2013):

> Our jurisprudence on contract interpretation is well settled and oft-stated. As is the case with statutory interpretation, "[t]he cardinal rule of contract interpretation is to give effect to the parties' intentions." *Tomran, Inc. v. Passano*, 391 Md. 1, 14, 891 A.2d 336, 344 (2006) (citing *Owens–Illinois, Inc. v. Cook*, 386 Md. 468, 497, 872 A.2d 969, 985 (2005)). Courts in Maryland apply the law of objective contract interpretation, which provides that "[t]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding." *Slice v. Carozza Properties, Inc*., 215 Md. 357, 368, 137 A.2d 687, 693 (1958). *See also Sy–Lene of Washington, Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 166–67, 829 A.2d 540, 546 (2003); *Long v. State*, 371 Md. 72, 84, 807 A.2d 1, 8 (2002). As such, "[a] contract's unambiguous language will not give way to what the parties thought the contract meant or intended it to mean at the time of execution." *Sy–Lene of Washington*, 376 Md. at 167, 829 A.2d at 546. Instead, "[i]f a written contract is susceptible of a clear, unambiguous and definite understanding ... its construction is for the court to determine." *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 251, 768 A.2d 620, 630 (2001) (quoting *Rothman v. Silver*, 245 Md. 292, 296, 226 A.2d 308, 310 (1967)). Our task, therefore, when interpreting a contract, is not to discern the actual mindset of the parties at the time of the agreement, but rather, to "determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated." *General Motors Acceptance v. Daniels*, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985). Additionally, the principles of contract interpretation require that "in ascertaining the true meaning of a contract ... [,] the contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that a

court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Sagner v. Glenangus Farms, Inc.*, 234 Md. 156, 167, 198 A.2d 277, 283 (1964). See also *Tomran, Inc*., 391 Md. at 13–14, 891 A.2d at 344; *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 782, 625 A.2d 1021, 1033 (1993).

Likewise, covenants, a species of contracts, are to be enforced according to the objective intent of the original parties. *See Live Stock Co. v. Rendering Co.*, 179 Md. 117, 122, 17 A.2d 130, 133 (1941) ("It is a cardinal principle ... that the court should be governed by the intention of the parties as it appears or is implied from the instrument itself."); *MIE Properties, Inc.*, 398 Md. at 682 n. 13, 922 A.2d at 524 n. 13 ("Restrictive covenants ... are a species of contract. Thus, they are interpreted in a like manner as other types of contracts."); *see also Anne Arundel Cnty. v. Crofton Corp.*, 286 Md. 666, 673, 410 A.2d 228, 232 (1980) ("[A] court, in construing agreement, must first determine from the language of the agreement itself, what a reasonable person in the position of the parties would have meant at the time the agreement was effectuated.").

The language of the restrictive covenant is the first source to which we must look in an effort to uncover the intent of the covenanting parties; if the language of the covenant is unambiguous, it is the only source to which we look, except to confirm the plain meaning of the covenant. *Shillman v. Hobstetter*, 249 Md. 678, 688, 241 A.2d 570, 576 (1968) ("In determining the intention of the parties, the language of the instrument is the primary source for that determination."); *see also Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md.App. 636, 654, 46 A.3d 473, 484 (2012) (quoting *Volcjak v. Washington County Hosp. Ass'n*, 124 Md.App. 481, 509, 723 A.2d 463, 477 (1999)) ("The primary source for determining whether the parties intended a third party to have standing to enforce the contractual provisions is the language of the contract itself."). Indeed, we have stated that "[w]here the language of the instrument containing a restrictive covenant is unambiguous, a court should simply give effect to that language 'unless prevented from doing so by public policy or some established principle of law.' " *SDC 214, LLC, v. London Towne Prop. Owners Ass'n*, 395 Md. 424, 434, 910 A.2d 1064, 1069 (2006) (quoting *Miller v. Bay City Prop. Owners Ass'n*, 393 Md. 620, 636, 903 A.2d 938, 948 (2006)); *accord Belleview Constr. Co. v. Rugby Hall Cmty. Ass'n*, 321 Md. 152, 158, 582 A.2d 493, 496 (1990).

As with contracts generally, a covenant is ambiguous if its language is susceptible to multiple interpretations by a reasonable

person. *See Calomiris v. Woods*, 353 Md. 425, 435–36, 727 A.2d 358, 363 (1999) (citing *Heat & Power Corp. v. Air Prods. & Chems., Inc*., 320 Md. 584, 596, 578 A.2d 1202, 1208 (1990); *Truck Ins. Exch. v. Marks Rentals*, 288 Md. 428, 433, 418 A.2d 1187, 1190 (1980)). "An ambiguity does not exist simply because a strained or conjectural construction can be given to a word." *Belleview*, 321 Md. at 159, 582 A.2d at 496. The first step is to "[d]etermine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated," and if "the language of the contract is plain and unambiguous there is no room for construction" *Calomiris*, 353 Md. at 436, 727 A.2d at 363.
"Extrinsic evidence is only utilized when the intent of the parties and the purpose of a restrictive covenant cannot be divined from the actual language of the covenant in question, necessitating a reasonable interpretation of the language in light of the circumstances surrounding its adoption." *MIE,* 398 Md. at 681, 922 A.2d at 523–24 (citing *SDC 214, LLC*, 395 Md. at 434–36, 910 A.2d at 1070–71 (refusing to employ the rule of reasonable construction6 when the restrictive covenant was clear and unambiguous and applying the plain language of the covenant); *Miller*, 393 Md. at 634–35, 637, 903 A.2d at 946–48 (outlining the evolution of the reasonable construction rule and foregoing its application in construing a covenant because the "words used [were] clear and unambiguous")).

First, as we made clear in *MIE*, an ambiguity in the actual language used by the parties should be identified before consulting and introducing extrinsic evidence. See 398 Md. at 681, 922 A.2d at 523–24. Second, once an ambiguity in the language has been identified, extrinsic evidence should be used only to resolve that ambiguity. *See Calomiris*, 353 Md. at 447, 727 A.2d at 369 ("even if the language were ambiguous, parol evidence would be admissible only to resolve the ambiguities and not to contradict unambiguous terms"); *see also Belleview*, 321 Md. at 158, 582 A.2d at 495 (using extrinsic evidence to clarify the meaning of the word "lots" as found in the covenant).

In the case of covenant interpretation, like that of other contracts, extrinsic evidence should answer the question: how would a reasonable person have understood the covenant language at the time it was made? *See Calomiris*, 353 Md. at 441, 727 A.2d at 366 (noting that "extrinsic evidence admitted must help interpret the ambiguous language and not be used to contradict other, unambiguous language").

434 Md. at 51-54.

The extrinsic evidence that the court may consider in attempting to interpret the language of an ambiguous contract includes "evidence of such extrinsic factors as the negotiations of the parties, the circumstances surrounding execution of the contract, the parties' own construction of the contract and the conduct of the parties." *Della Ratta, Inc. v. American Better Community Developers, Inc.*, 38 Md. App. 119, 130 (1977). *See also Mascaro v. Snelling & Snelling*, 250 Md. 215, 229 (1968). The purpose for admitting such extrinsic evidence is to interpret the ambiguous language, not to substitute a wholly unexpressed intention rather than the meaning of the writing. 11 Williston on Contracts § 33:42 (4th ed.).

The Maryland case law does not furnish extensive guidance about how to weigh or assess the significance of different varieties of extrinsic evidence, which obviously depends on the specific setting. Nonetheless, one may generalize that some types of extrinsic evidence are more probative than others. Evidence about the negotiations that shows why certain language was chosen would be of first rank. Evidence about the parties' situation and the external circumstances at the time of the agreement would serve to place the provisions of the agreement in perspective and help the court understand the reasons for provisions in the agreement. *See, e.g., Schapiro v. Jefferson*, 203 Md. 372 (1953). A third example would be evidence of subsequent conduct by the parties that evinced their interpretation of the terms of the agreement before the controversy arose. *Hurt v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co.*, 175 Md. 403 (1938). In each of these instances, contemporaneous circumstantial evidence is more providential than retrospective declarations about what one party thought that the language meant or what its intent was. *See Government Employees Insurance Co. v. Coppage*, 240 Md. 17, 25 (1965); *see also Shiftan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928 (Del. Ch. 2012)(the subjective, unexpressed views of entity managers and the drafters

who work for them about what a certificate means has traditionally been of no legal consequence, as it is not proper parol evidence as understood in our contract law).

If, after consideration of extrinsic evidence, the ambiguity remains, it will ordinarily be resolved against the party who drafted the contract. *E.g., Anderson Adventures LLC v. Sam & Murphy, Inc*., 176 Md. App. 164, 179 (2007); *Clendenin Bros., Inc. v. U.S. Fire Ins. Co.*, 390 Md. 449 (2006); *Collier v. MD-Individual Practice Ass'n, Inc.*, 327 Md. 1, 6 (1992).

In applying the foregoing principles, the court is cognizant of the fact that this case is before it on cross motions for summary judgment. Summary judgment for either party is appropriate only if there is no dispute of material fact and that party is entitled to judgment as a matter of law. *Young v. Anne Arundel County*, 146 Md. App. 526 (2002). Interpretation of a written contract poses a question of law for the court. *Id.* However, interpretation of an ambiguous contract is a question of fact. If the extrinsic evidence presents disputed factual issues, construction of the ambiguous contract is for the trier of fact. Nonetheless, the court may construe an ambiguous contract if there is no factual dispute in the evidence. *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 389 (1985). Accordingly, the court assesses the evidence with the understanding that its role in deciding the motions is not to decide any disputes of fact or to resolve any conflicting inferences that arise from undisputed facts. On the other hand, disputes that do not involve material facts are inconsequential. *Boland v. Boland*, 423 Md. 296, 366 (2011).

ANALYSIS OF CONTENTIONS

With these principles in mind, the court will discuss the parties' contentions.

Ambiguity of the Voting Rights Provision

First, the court will address plaintiffs' contention that the language of the Voting Rights Provision is not ambiguous.

Guided by the principles outlined above, the court previously concluded that the Voting Rights Provision is ambiguous because it is susceptible to more than one interpretation. Mem. Op. 1/28/13 at 16-18. Impac argues that the language found in the parenthetical - "voting separately as a class with all series of Parity Preferred" - modifies the requirement of "the affirmative vote or consent of the holders of at least two-thirds of the shares of the Series B Preferred Stock." Under this reading, the Voting Rights Provision requires only approval of at least two-thirds of all of Impac preferred stock (hereinafter "collective voting rights"). Plaintiffs, on the other hand, argue that the language "the affirmative vote or consent of the holders of at least two-thirds of the shares of the Series B Preferred Stock," requires approval of at least two-thirds of the Series B Preferred Stock alone (hereinafter "separate voting rights").

The Voting Rights Provision is ambiguous because of the conflict between the first clause and the later parenthetical. The first clause expressly requires the consent of two-thirds of the holders of Series B shares. Without the parenthetical the clause would be unambiguous because it could only be read to require the consent of two-thirds of the Series B shares. However, the parenthetical apparently qualifies the first phrase by stating that the Series B shares vote together with other parity shares as a class. Impac's argument that the parenthetical means that the Voting Rights Provision should be read to require the consent of two-thirds of all parity shares requires the reader to substitute for the express language the understanding that it means two-thirds of all parity shares, not two-thirds of Series B shares.

Plaintiffs' argument that the Voting Rights Provision is unambiguous rests on the assertion that the parenthetical does not provide for a class vote of all parity shares but rather concerns the manner of voting. In this reading, the parenthetical merely describes the mechanics of how the vote is conducted, i.e., that the Series B shareholders would vote at the same place and time as other series. This argument is not compelling. While this reading expresses what is, perhaps, one possible meaning, it fails to convince because it does not explain the purpose of such a prescription. The language immediately preceding the parenthetical specifies the time and place of voting, and the provision that the preferred stock vote separately as a class has no apparent significance as a mere regulation of voting procedure. Because plaintiffs do not convince the court that the provision is susceptible of only one meaning, the court rejects plaintiffs' argument that the provision is unambiguous.

Analysis of Extrinsic Evidence

Therefore, the court will turn to the parties' respective contentions concerning the resolution of the ambiguity. Since each party relies on a variety of items of extrinsic evidence in support of its position, the court will analyze each in turn, beginning with the items submitted by Impac.

Extrinsic Evidence Relied On by Defendant

Intent of the drafters/parties

Impac relies on the argument that it was the intent of the parties to the Articles Supplementary to provide for parity voting.[3] Its argument includes evidence of the drafters of the

[3] According to Impac, the parties to the Articles were Impac and Bear Stearns. Under holdings of the Delaware courts involving interpretation of contracts such as these Articles (discussed below at pp. 41-43), the intent of parties such as the issuer and the underwriters is not the relevant intent; instead the reasonable expectations of the holders of the stock are determinative. There is much merit to the logic of these holdings, which would obviate the

document concerning its source and design, as well as statements from Impac corporate officials about their intent.

According to the Declaration of Richard Johnson, who was Impac's Executive Vice President and CFO in 2004, Jonathan Lieberman of Bear Stearns & Co. solicited Impac's interest in issuing cumulative redeemable preferred stock. Lieberman sent Johnson a marketing presentation dated April 14, 2004. At about the same time, he also sent the Prospectus Supplement for an offering from Annaly Mortgage Management, Inc. and one from MFA Mortgage Investments, Inc. as models for Impac's offering. Johnson sent those emails to Katherine Blair. At the April 30 Board meeting, the Board approved resolutions authorizing the creation of the Series B stock, and authorizing management to negotiate the terms of the offering.

Katherine Blair affirmed that she represented Impac in the offering of the Series B Stock. She states that Impac engaged her firm to negotiate the necessary documents with William Farrar, counsel for a proposed syndicate of underwriters. She participated in negotiating the Articles Supplementary, Prospectus Supplement and Underwriting Agreement on Impac's behalf. She was assisted by Impac's Maryland counsel, one of whom was Phillip Kardis. Ms. Blair states that in drafting the Articles Supplementary and Prospectus Supplement the parties largely followed the model of the MFA Series A issue, which was provided by Jonathan Lieberman. She states that she understood that it was important to Bear Stearns that the terms and disclosures of the issue track other recent REIT preferred stock offerings, because that would make it easier to market the stock to investors who had been introduced to this type of offering. Ms. Blair states that the language of

---

occasion to determine this intent. Nonetheless, the court deems it appropriate to discuss this argument on its merits.

the Voting Rights Provision was not designed to confer separate voting rights on Series B "where Impac has issued a series of preferred stock in parity with the Series B having the same voting rights on an action that would affect all preferred stock." Mr. Kardis, who states that he "assisted from time to time," also avers that the language of Section 6(d) was not designed to confer separate voting rights on Series B, standing alone. He states that the parenthetical was "meant to qualify the language preceding the parenthetical. . ." Kardis ¶ 10. The Series B Articles Supplementary permit Impac to issue additional shares of preferred stock that rank in parity with the Series B Stock without consent of the Series B shareholders.

William Farrar affirmed that as counsel to the underwriters he was involved in negotiating and drafting the necessary documentation and interacted with Impac's counsel. He states that Paragraph 6(d) contemplates that the Series B and any parity preferred stock that Impac may later issue will vote together as a class. Mr. Farrar states that the terms of the Series B Preferred Stock were based on an offering by MFA Mortgage Investments, Inc. in April 2004, in connection with which he also represented the underwriters, who were led by Bear Stearns. The MFA Series A Article Supplementary and Prospectus Supplement were used in drafting the Impac Series B Articles Supplementary and Prospectus Supplement.

Ms. Blair states that she understood that Bear Stearns and its attorneys were "representing Impac's counterparty" in the Series B offering; they were representing the interests of those who would be purchasing the stock. Richard Johnson likewise stated that in negotiating the terms of the Series B Stock he "understood that Bear Stearns and its counsel were acting on behalf of all the underwriters as buyers of the preferred stock, and on behalf of the public investors" to whom the

underwriters would resell the stock. [4] Both Mr. Johnson and Ms. Blair affirm that the underwriters' role was reflected in the Underwriting Agreement which Ms. Blair participated in negotiating, pursuant to which the underwriters committed to purchase two million shares at a discount, which they would resell to public investors.

Stephan Peers, a director of Impac since 1995, stated that his understanding was that the Series B and Series C stock "were intended to be the same class of securities and would be entitled to vote in the aggregate as a class separate from the Common Stock." Peers Decl. ¶ 6. William Ashmore stated in deposition testimony submitted by Impac that the intent of the Board was that it did not want to issue multiple series of shares "that did not have a single voting class." Dep. 44.

Beyond the broad and conclusory pronouncements contained in these declarations, there is little or no additional information or documentation about the source and drafting of the language of the Voting Rights Provision. Portions of the depositions of these declarants were submitted to the court. Mr. Kardis stated that he had no recollection of any negotiation about any voting rights provisions (Dep. 29). Ms. Blair denied any recollection of any discussion of the voting rights provisions, and could offer no information relating to the drafting of the documents beyond the fact that the drafters had the MFA and Annaly documents. (Dep. 85). Mr. Farrar stated that the MFA articles were used as a first draft, but recalled no discussion about the voting rights provisions (Dep. 39-41). There is no contemporaneous documentation concerning the drafting of the articles.

[4] Mr. Schiffer also opines that Bear Stearns was acting as a counterparty to Impac in the negotiation of the Articles Supplementary.

The only evidence about the origin of the Voting Rights Provision is that it was based on the MFA Series A Articles. The language of paragraph 6(d) is, in fact, quite similar to the language contained in those Articles. The following shows the differences:

> So long as any shares of Series ~~A~~ B Preferred Stock remain outstanding, the Corporation shall not, without the affirmative vote or consent of the holders of at least two-thirds of the shares of the Series ~~A~~ B Preferred Stock outstanding at the time, given in person or by proxy, either in writing or at a meeting (voting separately as a class, ~~together~~ with all ~~other~~ series of Parity Preferred that the Corporation may issue upon which like voting rights have been conferred and are exercisable)[.]

As stated above, resolving an ambiguity in the language of a written contract does not permit the court to substitute another contract for the written expression under the guise of interpreting an ambiguous contract. Therefore, the evidence must be directed toward explaining what the parties meant in their written expression if that is possible. In considering statements by parties about their intent or statements by drafters about what the language was intended to effect, a retrospective statement about what was intended, unsupported by any contemporaneous evidence, has little probative value, because it flies in the face of the principle that forbids substituting an unexpressed meaning for the language itself.

This outlook affects the weight to be accorded the affidavit evidence of the persons involved in the drafting of the Articles Supplementary, as well as the statements of Impac personnel about their intent. The court accepts as an undisputed fact the statement that the drafters of the Series B Articles did not fashion the language of the Voting Rights Provision for the purpose of conveying separate voting rights.[5] Furthermore, because this case is before the court on summary judgment

[5]It is arguable, given the absence of any documentation contemporaneous with the drafting or any recollection about the actual process, that this statement is nothing more than a

motions, the court must accept at face value the statements of the attorneys that they think that the provision provided for collective voting. However, treating these statements as the equivalent of evidence that the provision was designed to provide for collective voting is more problematic. There is no evidence of any actual negotiation concerning the meaning of this language or even any express consideration of the meaning of this language. The only specific statement is that the provision was copied from the MFA Articles along with all of the other provisions of the Series B Articles, which is supported by the similarity of the provisions. Therefore, the court does not understand the evidence to give rise to the inference that the language of the Voting Rights Provision was specifically drafted for the purpose of adopting parity voting. The most tenable inference from the evidence is that the language was simply copied without any express consideration of its application or meaning on the part of the persons who drafted the Impac Articles. But there is no evidence concerning the process by which the language was drafted for the MFA Articles. The statement that it was intended to provide for collective voting doesn't explain why it was thought to provide for collective voting; it is a statement of the intent of the drafters but it doesn't explain why the way that the language was fashioned was thought to carry out that intent. As a result, the evidence amounts to little more than a statement of the intent of the drafters, which may have a bearing on the resolution of the ambiguity but is not highly probative, and certainly not conclusive.

---

retrospective declaration of intent. In fact, a close reading of the declarations of the drafters is susceptible to the interpretation that their statements express their current opinion about the Voting Rights Provision, and do not suggest any actual consideration of the issue at the time the Articles were drafted, an interpretation supported by their depositions.

NYSE Listed Company Manual Section 313(C)

Impac alleges that the Voting Rights Provision should be interpreted to confer collective voting rights because the provision was drafted to comply with the New York Stock Exchange Listed Company Manual Section 313(C), which is entitled "Preferred Stock, Minimum Voting Rights Required." That section provides, in part:

> Alteration of Existing Provisions–
> Approval by the holders of at least two-thirds of the outstanding shares of a preferred stock should be required for adoption of any charter or by-law amendment that would materially affect existing terms of the preferred stock.
> If all series of a class of preferred stock are not equally affected by the proposed changes, there should be a two-thirds approval of the class and a two-thirds approval of the series that will have a diminished status.

Ms. Blair states that she believes that the Voting Rights Provision "was designed to comply with Rule 313C." Decl. ¶17-18. Likewise, Mr. Farrar states that Paragraphs 6(a) and 6(d) of the Impac Series B Articles were drafted to comply with Rule 313C. Decl. ¶10-11.

Exactly what these statements are intended to mean is not clear. To the extent that Impac's argument implies that Section 313 (C) should be interpreted to require a company to confer collective voting rights except when, and only when, a series of preferred stock would be disparately affected by the proposed action, that contention is plainly at odds with the rule. The rule, as its title connotes, imposes a minimum voting rights requirement. It never suggests that the preferred stockholders can have separate voting rights "only if" that series would be disparately affected. The fact that Section 313 requires separate voting for a series that is disparately impacted by an issue does not establish that it forbids separate voting for a series that is not subject to a disparate impact. In fact, the evidence shows that some preferred stock issues have separate voting in such

circumstances, and there is no suggestion that these issues contravene the rule. In sum, Rule 313 contributes little to the determination of the intention of the drafters.

In its Reply, Impac disclaims such a contention, which leaves open the question of the purpose of these statements. It may be that Impac's argument is that the intention of the drafters was to provide no more than the minimum protections afforded by Section 313 (C). That argument is essentially a restatement of Impac's arguments about the intention of the drafters, discussed previously. It suffers from the same dearth of evidence identified above.

MFA and Annaly Risk Disclosures

As previously noted, the Impac Series B Articles Supplementary are similar to the MFA Series A Supplementary that were adopted in 2004, as well as the Annaly Series A Articles that were adopted in 2004. Impac asserts, and plaintiffs do not dispute, that the Impac Series B Articles were modeled on the MFA Series A Articles. In 2012 and 2013, Annaly and MFA each issued additional series of preferred stock. Specifically, Annaly issued Series C in May 2012 and Series D in September 2012. MFA issued Series B in April 2013.[6] In connection with each of these issues, the Prospectus Supplement disclosed a risk of dilution based on the fact that the issued series of preferred stock voted collectively with other preferred stock.

The Prospectus Supplement for the MFA Series B offering states as follows:

> In addition, although holders of Series B Preferred Stock are entitled to limited voting rights, the Series B Preferred Stock will, subject to certain exceptions (see "Description of the Series B Preferred Stock - Limited Voting Rights" for a description of these exceptions) vote separately as a class along with all other series of our preferred stock that we may issue upon which like voting rights have been conferred

[6] William Farrar stated that the MFA Financial Series B Preferred Stock Articles Supplementary and Prospectus Supplement were based upon the Impac Series C.

> and are exercisable (including, if any shares are then outstanding, our Series A Preferred Stock). As a result, the voting rights of holders of Series B Preferred Stock may be significantly diluted, and the holders of such other series of preferred stock that we may issue may be able to control or significantly influence the outcome of any vote.

Rykken Ex. 31 at 31.16. The Annaly Prospectus Supplement contains similar language. Impac argues that this statement shows that "MFA and Annaly have the same understanding as Impac regarding the meaning and operation of the same voting rights provision." Motion at 12.

How much weight to extend to this proposition is open to question. The statement is an expression of the interpretation by these issuers of these provisions. On the other hand, there is no context for the disclosure and no explanation for why it was made in 2012 and 2013. [7] It has no probative value on the understanding that surrounded the issuance of the Impac Series B in 2004. Notably, neither MFA nor Annaly made any such disclosure at the time of their 2004 issues, and neither did Impac at the time of the issuance of the Series B. However, it could have some minimal probative value in showing an understanding by others concerning such language, a topic considered below in connection with the evidence of other public offerings.

As plaintiffs note, the force of this syllogism is reduced by the fact that there were changes in the language from the MFA and Annaly 2004 issues to the 2012 and 2013 issues.

The changes between the MFA Series A language and the Series B language are significant. The MFA B Articles Supplementary, dated April 12, 2013, provide that amendments may not be made without:

> the affirmative vote or consent of the holders of at least two-thirds of the outstanding shares of Series B Preferred Stock together with the

[7] Mr. Kardis did not remember the origin of the risk disclosure. (Dep. 112).

> holders of all other shares of any class or series of preferred stock ranking on parity with the Series B Preferred Stock with respect to the payment of dividends and the distribution of assets upon liquidation, dissolution or winding up of the Corporation, given in person or by proxy, either in writing or at a meeting (voting as a single class). . .

Rykken Ex. 32 at 32.11. The Annaly changes are less significant. However, the inference that Impac seeks to derive, that the issuers of the later series believe that the Impac Series B language provides for collective voting, has a minimal bearing on the court's resolution of the ambiguity.

Evidence Concerning Language Used by Other Issuers

There are two sources of evidence concerning provisions in Articles Supplementary for preferred stock issued by other Maryland REITS. Impac asserts that this evidence is probative because a reasonable prospective investor would review these provisions and be able to know which ones conferred separate or collective voting rights. It argues that a reasonably prudent person could read publicly available preferred stock offerings and differentiate between provisions that confer separate voting rights and provisions that confer collective voting rights, and that this person would consequently understand the Voting Rights Provision to confer collective voting rights.

The first item is the Declaration of Katherine A. Rykken, an attorney for Impac. Attached to her Declaration is a chart containing excerpts from voting provisions in selected preferred stock offerings. According to Ms. Rykken, the excerpts were selected based on several factors. Some were taken from Articles identified by Bear Stearns as having been underwritten by Bear Stearns prior to May 2004; others were identified based on counsel's review of other REITs to illustrate the contrast between voting provisions under which multiple series are entitled to vote together as a single class and others under which a given series is entitled to vote separately from any other series or class.

Part A includes voting rights provisions from nine issues of preferred stock in 2004, which, she states, illustrate language by which multiple series of preferred stock, defined as "Parity Preferred" or "Parity Stock," are entitled to vote together as a single or separate class. These provisions include the Impac Series B and Series C.

Part B contains voting rights provisions from seven different issuances of preferred stock in 2002, 2003, and 2004, which, according to Ms. Rykken, illustrate language by which a given series of preferred stock is entitled to vote separately from any other series or class of stock.

Part C of the Chart, Ms. Rykken states, quotes voting rights provisions from five issues of preferred stock in 2012 and 2013, which like the samples in Part A, illustrate language by which multiple series of preferred stock vote "together as a single or separate class." This includes the MFA and Annaly 2012 and 2013 preferred stock issues.

Part D contains voting rights provisions taken from three issues of preferred stock in 2012, which, like the samples in Part B, illustrate use of language by which a given series of preferred stock is entitled to vote separately from any other series or class of stock.

Part E of the Chart quotes "the only voting rights provision identified as reflecting language by which the given series of preferred stock is entitled to vote both as a separate series and as part of a class with other stockholders on various corporate actions."

The second item is the Declaration of Michael Schiffer, a Maryland lawyer retained by Impac to provide expert opinions concerning the voting rights of the Series B and Series C preferred stock, submitted by Impac with its Opposition/Reply.[8] Mr. Schiffer is offered as a Maryland corporate

[8] Plaintiffs argue that the court should not consider this item because it was not submitted with Impac's Motion for Summary Judgment. However, it may be considered in connection with Impac's opposition to plaintiffs' cross-motion.

expert with more than 16 years of experience with hundreds of preferred stock transactions. Mr. Schiffer opines that the voting provisions contained in paragraph 6(d) contain language commonly used and understood to provide for collective voting by all series of parity preferred stock. He defines commonly used and understood to mean the understanding of those involved in the drafting of preferred stock voting rights – "corporate issuers and their legal counsel, underwriters and their legal counsel, as well as public investors in the context of public offerings." He reviewed the Rykken chart and also reviewed the voting provisions from 34 different Maryland REIT preferred stock issuances on which he worked between 2003 and the date of his Declaration. Attached to his Declaration is a chart showing the voting provisions contained in the respective articles supplementary for those issues. Part I of the chart lists 22 issues for which the voting language is commonly understood as providing for collective voting only. Part II of the chart shows 12 issues for which the language is commonly understood as providing for separate voting only.

Both of these items fail to support Impac's arguments. To the contrary, in the court's view, they undermine its contentions. First, the classifications adopted by Ms. Rykken are questionable. Of the nine provisions included in Part A of the Chart, two are Impac Series B and Series C, and four others (including Annaly and MFA) have language that is similar to Impac's. The basis of her classification of these items as providing for parity voting is not expressly stated. The characterization of articles of other issues that are similar to Impac Series B as providing for collective voting appears to be nothing more than the expression of an opinion unsupported by any reasoning. The fact that other issuers used this language doesn't prove that the language means what the collectors suggest that it means. There is no evidence that any of these provisions has been applied in the context of an actual vote, much less any evidence that an occasion has arisen for an

authoritative determination of its operation.[9] In the absence of such evidence, this collection proves nothing more than the fact that several other issuers employed language which this court has concluded is ambiguous.

Mr. Schiffer opines that the provisions in Part A of the Rykken chart provide for parity voting, just as he opines that the Impac Series B Articles provide for parity voting, and that they are commonly understood to so provide. However, he provides no factual basis for this conclusion, and, indeed, it is not readily apparent what would be the factual basis for such an opinion, in the absence of some indication that an occasion has arisen to form a conclusion on the subject. An expert's opinion is of no greater probative value than the soundness of the reasons given therefor will warrant and an expert's judgment has no probative force unless there is a sufficient basis upon which to support his conclusions. *Beatty v. Trailmaster Products, Inc*., 330 Md. 726, 741 (1993). Such an opinion is not a basis to conclude that there is a material dispute of fact that would preclude summary judgment. *Id.*

More revealing than these opinions is a review of the contents of the provisions in the charts. The first sample provision in the Rykken Chart alleged to confer separate voting rights provides:

> So long as any shares of Series I Preferred Stock remain outstanding, the Corporation shall not, without the affirmative vote of the holders of at least two-thirds of the shares of the Series I Preferred Stock outstanding at the time, given in person or by proxy, either in writing or at a meeting (voting separately as a class)…(ii) amend, alter or repeal the provision of the Charter, whether by merger, consolidation or otherwise, so as to materially and adversely affect any right, preference, privilege or voting power of the Series I Preferred Stock or the holders thereof…

[9] The only evidence of a contemporaneous interpretation of any language as providing for collective voting is the MFA and Annaly risk disclosures, discussed above, which were issued in 2012 and 2013, after the Impac tender offer, and involve later issues.

Avalon Bay Communities Inc. Art. Supp. §8 (c). This provision, specifically the phrase "voting separately as a class," unambiguously confers separate voting rights. The second sample provision that Ms. Rykken characterizes as providing for separate voting rights provides:

> So long as any Series B Preferred Shares remain outstanding, the Trust shall not, without the affirmative vote or consent of the holders of two-thirds of the Series B Preferred Shares outstanding at the time, given in person or by proxy, either in writing or at a meeting (such Series B Preferred Shares voting separately as a class)…(ii) amend, alter or repeal the provisions of the Declaration of Trust or these Articles Supplementary, whether by merger, consolidation, transfer or conveyance of substantially all of its assets, or otherwise…so as to materially and adversely affect any right, preference, privilege or voting power of the Series B Preferred Shares or the holders thereof…

Ramco-Gershenson Properties Trust Art. Supp. §5 (c). The language found in the parenthetical, "such Series B Preferred Shares voting separately as a class," likewise clearly demonstrates that this provision confers separate voting rights.

In comparison, the first sample provision alleged to confer collective voting rights provides:

> So long as any Series D Preferred Shares remain outstanding, the Trust shall not without the affirmative vote or consent of the holders of two-thirds of the Series D Preferred Shares and each other class or series of Parity Preferred Shares outstanding at the time (voting together as a single class), given in person or by proxy, either in writing or at a meeting, be required to…(ii) amend, alter or repeal the provision of the Declaration of Trust or these Articles Supplementary, whether by merger, consolidation, transfer or otherwise, or consummate a merger or consolidation involving the Trust…

Brandywine Realty Trust Art. Supp. §5(d). The second sample provision alleged to confer collective voting rights provides:

> The affirmative vote or consent of at least two-thirds of the votes entitled to be cast by the holders of the outstanding shares of the Series A Preferred Stock and the holders of all other classes or series of Parity Stock entitled to vote on such matters, voting as a single

> class, shall be required to…(ii) amend, alter or repeal any provision of the Charter or Bylaws, whether by merger, consolidation or otherwise, if such action would materially adversely affect the rights, preferences, privileges, or voting powers of the Series A Preferred Stock…

Affordable Residential Communities (Hilltop Holdings) Art. Supp. §6(b). These provisions unambiguously confer collective voting rights. They couple the specified series of preferred shares with other series by the conjunction "and" as well as the placement of the two classes. It also provides that they vote as a single class. The term "together" removes all doubt that the provision was intended to confer anything but collective voting rights. The contrast between these provisions and the language used by Impac is striking.[10] In the latter instance, "two-thirds" precedes only the Series B, and there is no mention of parity preferred until much later in the sentence, after the provision about the time and place of voting. It also omits reference to the two series voting as a single class, and uses the language "separate class," whose meaning is much less definite.[11]

Impac suggests that a reasonably prudent person who read the sample provisions would recognize that the Voting Rights Provision is comparable to the sample provisions that confer collective voting rights. Such a generalization is belied by the divergence among provisions that Ms. Rykken classifies as similar. But a prospective investor could reasonably conclude that entities such

---

[10] Both of these provisions are found in issues from February 2004, before the Impac Series B issue. The Apartment Investment & Management Co. Class U Issue from March 2004 also clearly expresses collective voting.

[11] As plaintiffs note, the language and structure of the seven provisions in Part B that Ms. Rykken classified as providing for separate voting are similar to the Impac provision. Each has, before the parenthetical, virtually identical language: "two-thirds of [the shares of the series at issue] outstanding at the time, given in person or by proxy, either in writing or at a meeting." Impac's use of the words "voting separately as a class" is also similar to the verbiage used in these issues.

as Brandywine and Affordable Residential Communities had parity voting based on their language, which readily allow a reasonably prudent reader to understand the sample provisions to confer collective voting rights. The sample provisions, moreover, demonstrate that such terms are commonly used by Maryland REITs in voting rights provisions to confer collective voting rights. Impac could have easily followed the example of other Maryland REITs and included such terms in the Voting Rights Provision had it intended the provision to confer collective voting rights.

Even more striking than the Rykken chart are the examples provided by Mr. Schiffer's chart of companies that he believes have parity voting rights language. Each of the 22 issues unambiguously requires two-thirds of the vote of the series at issue and each other series, in language similar to the Brandywine and Affordable Residential Communities examples cited above. For example, the 2007 North Star Realty Finance Corp. Series B Articles required: the affirmative vote of "at least 66-2/3 % of the votes entitled to be cast by the holders of Series B Preferred Stock and the Voting Preferred Shares, at the time outstanding, voting as a single class regardless of series." And, as plaintiffs note, all but one of those issues described the preferred shareholders to be voting as a "single class."

In sum, the evidence of other provisions produced by Impac fails to support its contention, and shows that many examples of clear provisions providing for collective voting exist.

Rules of Grammatical Construction

Under this heading, Impac makes two arguments. The first is that an interpretation that affords separate voting rights to the Series B Preferred Stock would read the word "and" into the Articles where it does not appear. Along the same lines, Impac argues that interpreting the Voting Rights Provision to provide for a separate vote by the Series B Preferred would render the Parity

Preferred Vote mathematically superfluous. This is another way of saying that such an interpretation would give no meaning to the qualifying parenthetical. It is true that there is no way to harmonize the parenthetical with the requirement of two-thirds votes of the Series B Preferred Stock. The problem is that Impac's interpretation has the same effect in reverse - it denies meaning to the requirement of two-thirds of the Series B Preferred Stock. Impac wishes to read the language of the Voting Rights Provision as saying: "Two-thirds of the Series B and all other Parity Preferred Stock, voting as a class." That is not what the language says.

Conduct of Impac

Impac also asserts that its conduct in connection with the Offer to Purchase and Consent Solicitation is relevant extrinsic evidence. The Offer was allowed to expire on June 29, 2009, at a time when consents had been returned by two-thirds of the total number of preferred shares, but not by two-thirds of the Series B shares. Impac could have, but did not, extend the expiration date to allow for the receipt of additional consents from Series B shareholders. This conduct, Impac suggests, evidences its understanding of the Voting Rights Provision. Plaintiffs respond that there is no contemporaneous documentation that evidences Impac's belief, and that the failure to extend the expiration date is explained by the fact that Impac would have been required to pay another quarter of dividends in order to purchase the preferred stock.

The court agrees that this evidence supports the inference that Impac believed that the consent of two-thirds of the total number of preferred shares was sufficient to comply with the Voting Rights Provision. The amendment of the charter was an essential component of the tender offer, and Impac would not have intentionally failed to obtain the necessary consents to attain that end. The fact that it would have to pay additional dividends is not significant. However, the fact

of Impac's belief has limited effect, because it goes only to Impac's interpretation of the contract, and says nothing about the interpretation of the other parties.

The second restatement of contracts states: "Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." Restatement (Second) of Contracts § 202(4) (1981). The Restatement goes on to clarify that "The rule of Subsection (4) does not apply to action on a single occasion or to action of one party only; in such cases the conduct of a party may be evidence against him that he had knowledge or reason to know of the other party's meaning, but self-serving conduct is not entitled to weight. *Id.* at cmt g.

Under this rule, Impac's action does not provide compelling evidence of what the parties intended. First, this conduct was that of one party and bolsters its interpretation in a "self-serving" manner. Second, a single act does not constitute repeated actions. A course of performance requires repeated, not isolated conduct that gives the other party an opportunity to object; Impac's conduct did not meet this threshold.

Contemporaneous Expressions of Intent

Plaintiffs cite certain items of extrinsic evidence as supporting their interpretation of the Voting Rights Provision.

The April 2004 Board Resolution

In April 2004, the Impac Board of Directors approved and adopted a resolution to create the Series B Preferred Stock. The minutes from the April 30, 2004 meeting state that the Board "discussed the Preferred Offering and authorized management to negotiate the terms of the offering

as long as the interest rate on the Preferred Stock did not exceed 10%. The resolution attached hereto as Exhibit A was thereafter unanimously approved for the offering of Preferred Stock." The resolution specified, *inter alia*, that the Series B Preferred Stock should have "have such preferences, other rights, voting powers, restrictions, limitations as to dividends, qualifications, terms or conditions of redemptions and specifications as are more fully described in Exhibit A attached hereto." Exhibit A to the resolution contained a section entitled "Voting Rights." The provision provides:

> Holders of the Series B Preferred Stock will generally have no voting rights. However, if dividends on any outstanding Series B Preferred Stock have not been paid for six or more quarterly periods (whether or not consecutive), holders of the Series B Preferred Stock, voting separately as a class with the holders of any other classes or series of our equity securities ranking on a parity with the Series B Preferred Stock which are entitled to similar voting rights, will be entitled to elect two additional directors to the Company's board of directors to serve until all unpaid dividends have been paid or declared and set apart for payment. *In addition, the affirmative vote of holders of at least two-thirds of the outstanding shares of Series B Preferred Stock will be required to* (I) authorize or create, or increase the authorized or issued amount of, any class or series of capital stock ranking prior to the Series B Preferred Stock with respect to the payment of distributions or the distribution of assets upon liquidation, dissolution or winding up, or reclassify any of the authorized capital stock of the Company into any such shares, or create, authorize or issue any obligation or security convertible into or evidencing the right to purchase any such shares; or (ii) *amend, alter or repeal any of the provisions of the Amended and Restated Articles of Incorporation of the Company, as amended and supplemented, whether by merger, consolidation* or otherwise, *so as to materially and adversely affect any right, privilege or voting power of the Series B Preferred Stock or the holders thereof*, provided, however, that with respect to the occurrence of any event set forth in (ii) above, so long as the Series B stock remains outstanding with the terms thereof materially unchanged the occurrence of any such event shall not be deemed to materially and adversely affect such rights, preferences, privileges or voting power of and; providing further that any increase in the amount of the authorized Preferred Stock, including the Series B

> Preferred Stock, or the creation or issuance of any additional Series B Preferred Stock or any other series of Preferred Stock, or any increase in the amount of authorized shares of such series, in each case ranking on a parity with or junior to the Series B Preferred Stock with respect to payment of dividends or the distribution of assets upon liquidation, dissolution or winding up, shall be not deemed to materially and adversely affect such rights, preferences, privileges or voting powers.

(Emphasis added).

The April 2004 Board Resolution, including Exhibit A, is a contemporaneous expression of the intent of the Board concerning the rights and protections to be afforded to the Series B Preferred Stock. Exhibit A, which requires "the affirmative vote of holders of at least two-thirds of the outstanding shares of Series B Preferred Stock" to approve charter amendments, unambiguously confers separate voting rights. Accordingly, this resolution can be read as an expression that the Board's intent was to provide for separate voting for the Series B Preferred.

Impac argues that the Board resolutions reflect high level Board authorization of the stock and price, and delegation of other final terms to management negotiation. (Opp. 10). It also notes that the resolution authorizes action by the company's officers to make changes to the terms of the stock and that the actual Articles Supplementary contained the parenthetical. The point, however, is not that the language contained in the term sheet was a final expression of the voting rights or that it supplants the language of the Articles Supplementary. The point is that the expression of the voting rights to be accorded to the Series B Preferred Stock embodied in the resolution clearly provided for separate voting. It contradicts Impac's evidence concerning the intent of the drafters of the Voting Rights Provision. And Impac furnishes no explanation for the phrasing of the resolution.

The Series B Prospectus Supplement

The Series B Prospectus Supplement, dated May 25, 2004 and filed with the SEC, makes two references to voting rights. The first is contained in the section entitled "Prospectus Summary." It states:

> Holders of the Series B Preferred Stock will generally have no voting rights. However, if dividends on any outstanding Series B Preferred Stock have not been paid for six or more quarterly periods (whether or not consecutive), holders of the Series B Preferred Stock, voting separately as a class with the holders of any other classes or series of our preferred stock ranking on a parity with the Series B Preferred Stock which are entitled to similar voting rights, will be entitled to elect two additional directors to the Company's board of directors to serve until all unpaid dividends have been paid or declared and set apart for payment, provided that any such directors, if elected, must not cause us to violate the corporate governance requirement of the New York Stock Exchange that listed companies must have a majority of independent directors. *In addition, the affirmative vote of holders of at least two-thirds of the outstanding shares of Series B Preferred Stock will be required to* (a) authorize or create, or increase the authorized or issued amount of, any class or series of capital stock ranking prior to the Series B Preferred Stock with respect to the payment of distributions and the distribution of assets upon liquidation, dissolution or winding up or reclassify any of our authorized capital stock into such shares, or create, authorize or issue any obligation or security convertible into or evidencing the right to purchase any such shares; or (b) *amend, alter or repeal any of the provisions of our charter so as to materially and adversely affect the Series B Preferred Stock*, provided that any increase or decrease in the amount of the authorized preferred stock, including the Series B Preferred Stock, or the creation or issuance of any additional Series B Preferred Stock or other series of preferred stock that we may issue, or any increase in the amount of authorized shares of such series, in each case ranking on a parity with or junior to the Series B Preferred Stock that we may issue with respect to the payment of distributions and the distribution of assets upon liquidation, dissolution or winding up, shall be deemed to not materially and adversely affect such terms of the Series B Preferred Stock; or (c) enter into, approve or otherwise facilitate a binding share exchange or reclassification involving the Series B Preferred Stock that materially and adversely affects the Series B Preferred Stock or a consolidation, merger or

> similar transaction unless in the case of a binding share exchange, reclassification, consolidation, merger or other similar transactions the shares of Series B Preferred Stock remain outstanding and materially unchanged or, in the case of any such merger or consolidation with respect to which we are not the surviving or resulting entity, the shares are converted into or exchanged for preference securities of the surviving or resulting entity or its ultimate parent, in each case with preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications, and terms or conditions of redemption of the Series B Preferred Stock that are not individually or in the aggregate materially less favorable to the holders of the Series B Preferred Stock.

Prospectus Supplement at S-5 (emphasis added).

The second passage states as follows:

> So long as any shares of Series B Preferred Stock remain outstanding, we will not, 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, given in person or by proxy, either in writing or at a meeting (voting separately as a class with all series of Parity Preferred that we may issue upon which like voting rights have been conferred and are exercisable), . . . (b) amend, alter or repeal any of the provisions of our 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 redemptions of the Series B Preferred Stock . . .

Prospectus Supplement at S-15. This language replicates the language of paragraph 6(d) of the Articles Supplementary.

The summary, considered alone, unambiguously prohibits Impac from taking any of the enumerated actions without the vote of at least two-thirds of the shares of the Series B Preferred Stock.[12] The full description, similar to the Voting Rights Provision, requires "the affirmative vote

[12]Once again, there is no explanation in the record for the content of the summary section. The prospectus supplements for MFA and Annaly that were transmitted by Lieberman to Impac

or consent of the holders of at least two-thirds of the shares of the Series B Preferred Stock." This language, considered alone, unambiguously confers separate voting rights. The language found in the parenthetical, "voting separately as a class with all series of Parity Preferred," considered with the aforesaid language, causes the full description to be ambiguous.

Plaintiffs argue that a reasonable prospective investor would conclude from the summary that the Series B stock had separate voting rights. Impac notes that the summary section is preceded by the following language: "The following is a brief summary of certain terms of this offering. For a more complete description of the terms of the Section B Preferred Stock, see 'Description of the Series B Preferred Stock' in this Prospectus Supplement." Prospectus Supplement at S-4. Therefore, Impac argues, a reasonable investor would also have to read the complete description contained elsewhere in the document, and could not rely solely on the provisions of the summary.

Impac's argument does not blunt the effect of the summary language. Undoubtedly a reader is informed by the language of the summary sections that the summary did not take the place of the complete description of the terms contained elsewhere in the Prospectus Supplement. However, the second section is simply a restatement of the language of the Voting Rights Provision itself, which the court has concluded is subject to conflicting interpretations. The summary section is explicit, and can be read as guidance on the meaning of the voting rights provision. Therefore, the summary section, like the Board Resolution, is evidence that Impac expressed intent to confer separate voting

---

likewise contain two passages relating to voting rights. In each of these the first passage contains no reference to class voting, although that language is somewhat different from the language of the Impac summary section.

rights on the Series B Preferred. Also of significance is the fact that prospective investors could reasonably so read the summary provisions.[13]

Press Releases For Tender Offer

In connection with the 2009 tender offer, Impac issued two press releases, one on May 29, 2009, and a second on June 17, 2009. Each of these press releases stated that the tender was subject to certain conditions, which included the condition "that [the Company] receive valid tenders for at least 66 2/3% of the aggregate liquidation preference of each series of the Company's outstanding Series B and C Preferred Stock. Plaintiffs argue that these press releases betray a recognition that the consent of two-thirds of each series was required to approve the amendments.

In the court's view, these items bear little weight. As plaintiffs recognize, the Offering Circular states that the consent required was that of two-thirds of the entire preferred stock. At most these press releases establish an inconsistency, which does not support any compelling inference about Impac's intent as a matter of law.

Rules of Grammatical Construction

Plaintiffs invoke a rule of grammatical construction known as the last antecedent rule. That is a "generally recognized rule of statutory construction that a qualifying clause ordinarily is confined to the immediately preceding words or phrase-particularly in the absence of a comma before the qualifying clause. . ." *Sullivan v. Dixon*, 280 Md. 444, 451 (1977). Plaintiffs argue, based on this rule, that the qualifying parenthetical - (voting separately as a class . . .) - is confined to the immediately preceding phrase - in writing or at a meeting, and does not refer to the two-thirds requirement. Plaintiffs also suggest that this construction is supported by the fact that in other issues

[13] See authority cited at pp.41-43 concerning the reasonable expectations of investors.

the qualifying language immediately follows the two-thirds requirement, unlike the language in the Voting Rights Provision.

A thorough exploration of the last antecedent rule and its role in contract interpretation was undertaken in *Stanbalt Realty Co. v. Commercial Credit Corp*., 42 Md. App. 538 (1979). As that discussion makes clear, this rule is an aid to interpretation whose utility depends on the circumstances, not an inflexible principle that trumps other indicia of intent. The operation of this rule is more straightforward in cases involving serial lists. *See Kane v. Board of Appeals*, 390 Md. 145, 162 (2005). Its role in interpreting language such as that found in the Voting Rights Provision is less clear. As stated previously, the reasons why the drafters would provide for separate voting at a meeting are unclear. In the absence of any logic to suggest why the drafters would so regulate the manner of voting, the court does not believe that this meaning should be adopted under the rubric of the last antecedent rule.

Construction Against the Drafter

After consideration of the evidence submitted by the parties, the court concludes that it fails to resolve the ambiguity presented by the language of the Voting Rights Provision. Impac's arguments concerning the intent of the drafters are less than conclusive. On the other side are contemporaneous expressions concerning the language that suggest that it provided for separate voting for the Series B stock. Comparison of the language of Paragraph 6(d) with multiple other examples of voting provisions only serves to convince the court that the ambiguity is irremediable. Unlike those clear expressions, Impac's argument would require the court to place a strained interpretation that disregards part of the language. Therefore, the court must apply the rule of construction under which ambiguities are to resolved against the drafter of the contract.

In order to apply that rule, the drafter must be identified. Impac argues that the contract should be construed against plaintiffs. It bases this contention upon its argument that the Articles were drafted by Bear Stearns, and that Bear Stearns was acting on behalf of the purchasers of the stock. For several reasons, this argument is unavailing. First, the argument that Bear Stearns was a party who was representing the purchasers in the negotiation of the contract is not supported by the facts. Second, the argument is contrary to authority from the Delaware courts which the court finds to be convincing.

In presenting its argument concerning the intent of the parties, Impac places great weight on the intent of Bear Stearns. Impac states that Bear Stearns was Impac's "counterparty" in the negotiation and adoption of the Articles Supplementary. It asserts that in negotiating the terms of the Series B preferred stock the underwriters as the initial buyers of the stock "as a matter of law, represented not only themselves but future holders" of the preferred stock. Impac Mot at 18. As authority for this proposition, Impac cites *HF Mgt. Servs. LLC v. Pistone*, 818 N.Y.S.2d 40 (App. Div. 2006).

Pistone involved an issue of disqualification of an underwriter's due diligence counsel from representing another party in a suit against the issuer, and the question was whether a fiduciary relationship between the underwriter and the issuer should be imputed to counsel. The Appellate Division decided that the underwriter did not occupy a fiduciary relationship with an issuer, noting that the relationship was better characterized as adversarial because "the statutorily-imposed duty of underwriters is to investors." 818 N.Y.S.2d at 43. The statutorily imposed duty to which the court referred is the "underwriter's responsibility to prepare a registration statement providing full and adequate information to investors concerning the issuing company and the distribution of the

securities." *Id.* That this duty does not necessarily preclude a conclusion that an underwriter has a fiduciary relationship with an issuer is made clear by *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (N.Y. 2005), which was the subject of discussion by the *Pistone* court. In *EBC I*, an action was brought against Goldman, Sachs & Co., the lead managing underwriter of an initial public stock offering, alleging, among other things, breach of fiduciary duty. The Court of Appeals held that the claim stated a cause of action based on the assertion of the existence of an advisory relationship that was independent of the underwriting agreement and allegations that the plaintiff was "induced to and did repose confidence in Goldman Sachs' knowledge and expertise . . ." *Id.* at 20. The Court held that "[t]o the extent that underwriters function, among other things, as expert advisors to their clients on market conditions, a fiduciary duty may exist." *Id.* at 21. Furthermore, the Court stated that recognition of a fiduciary duty to this extent "is not in conflict with an underwriter's general duty to investors under the Securities Act of 1933 to exercise due diligence in the preparation of a registration statement." *Id.* at 20.

Read in context, therefore, *Pistone* does not stand for the proposition that Impac suggests. Impac does not explain why the duty of preparing a registration statement providing full and adequate information to investors necessarily makes the underwriters the "counterparties" to the issuer. Impac asserts that no fiduciary relationship existed between it and the underwriters because "[t]he only agreement between Impac and Bear Stearns is the standard, arms-length Underwriting Agreement for Impac to sell, and the underwriters to buy, Impac's preferred stock" Reply Memo at 13-14. Whether or not that was the only formal agreement, the undisputed evidence compels the conclusion that Bear Stearns was not a party to the Series B Articles, and instead functioned as an advisor to Impac.

In its marketing presentation, Bear Stearns presented itself as an expert source for Impac in the creation and marketing of preferred stock. It supplied model terms to Impac, and recommended that Impac follow those terms to make the stock easier to market. The fact that Bear Stearns gave advice to Impac about how the terms of the Articles should be modeled supports the conclusion that it was an adviser, not a counterparty. The fact that Impac followed Bear Stearns' advice shows that it relied on Bear Stearns' knowledge and expertise.

Conversely, the fact that Bear Stearns wanted standard provisions to make the issue more readily acceptable to buyers does not mean that it was standing in the shoes of the buyers as a party. That fact is equally consistent with a role as an expert advisor. Moreover, the fact that Bear Stearns wanted standard features doesn't establish that it was seeking to maximize the interests of the public investors. In fact, one of the selling points touted by Bear Stearns was its ability to effect lower dividend yields on the stock.

In any event, this issue does not, in the court's opinion, turn on the technical issue of whether Bear Stearns could be labeled a fiduciary. The characterization of Bear Stearns' role as that of a party does not fit the facts. The counterparties to the contract embodied in the Articles Supplementary were the holders of the preferred shares whose rights were fixed by the Articles. It was not contemplated that Bear Stearns, which purchased the shares in its role as underwriter, would be a holder of the preferred stock. To the contrary, the entire purpose of the underwriting arrangement was for Bear Stearns to resell the stock to others who would be the holders of the stock. It was they, not Bear Stearns, who would be affected by the terms of the Articles. It is entirely artificial to portray Bear Stearns as a party to the contract. The fact that Impac's declarants assert a belief that Bear Stearns was Impac's counterparty is entitled to no weight and does not change this

conclusion. Apart from the fact that they offer no explanation for this belief[14], their beliefs must yield to the actual facts that define the parties' roles.

The facts relating to the creation of the issue make it appropriate to consider the holdings of several Delaware cases that reject the application of the customary model of contract formation in a context such as this one. In *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 397 (Del. 1996), the issue presented involved ambiguous language in a certificate fixing the conversion rights of preferred shareholders. The court stated: "When a contract is ambiguous, a court normally relies upon extrinsic evidence of the parties' intent. Such a course is not appropriate in this case for two reasons. First, such an investigation would reveal information about the thoughts and positions of, at most, the issuer and the underwriter. Whether these parties can legitimately be viewed as "negotiating" indenture provisions is a subject of some dispute. . . . " *Id.* at 397. Referring to the well-accepted principle that ambiguities in a contract should be construed against the drafter, the court opined that the issuer of securities is better able to clarify unclear terms in advance and therefore should bear the drafting burden that this principle would impose upon it. *Id* at 398-399. The court also stated that "when faced with an ambiguous provision in a document such as the Certificate, the Court must construe the document to adhere to the reasonable expectations of the investors who purchased the security and thereby subjected themselves to the terms of the contract." *Id*. at 399. The court cautioned against allowing this principle to become a short-cut for avoiding the sometimes difficult task of determining expectations, but applied it as a last resort because the language of the certificate presented a hopeless ambiguity.

---

[14] Despite extensive questioning on this subject, Ms. Blair's deposition testimony reveals no basis for the statements to this effect in her declaration.

The Delaware Supreme Court reinforced this approach in *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37 (Del. 1998). It stated:

> A court considering extrinsic evidence assumes that there is some connection between the expectations of contracting parties revealed by that evidence and the way contract terms were articulated by those parties. Therefore, unless extrinsic evidence can speak to the intent of *all* parties to a contract, it provides an incomplete guide with which to interpret contractual language. Thus, it is proper to consider extrinsic evidence of bilateral negotiations when there is an ambiguous contract that was the product of those negotiations, as in [*Eagle Industries, Inc. v. DeVilbiss Health Care*, 702 A.2d 1228 (Del 1997)]
>
> .
>
> On the limited record before us in this case, however, it appears that the 1,850 investors comprising the limited partnership reacted to a "take it or leave it" proposal by the General Partner without meaningful individualized negotiations. Because the articulation of contract terms in this case appears to have been entirely within the control of *one party*—the General Partner—that party bears full responsibility for the effect of those terms. Accordingly, extrinsic evidence is irrelevant to the intent of all parties at the time they entered into the agreement.

707 A.2d at 43 (emphasis in original). In *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539 (Del. 2013), the court fashioned a somewhat different application of these principles in a case involving publicly held securities. It noted that "an inquiry into what the parties intended would serve no useful purpose, because it would yield information about the views and positions of only one side of the dispute . . . This case does not fit the conventional model of contracts 'negotiated' by and among all the interested parties. Here, important parties in interest—the holders of the securities—were neither consulted about, nor involved in the drafting of [the agreements] Therefore, a different interpretive approach is needed—one that will take into account the public securityholders' legitimate contractual interests." *Id*. at 551. While the court noted that such an approach implicated the rule of construction that ambiguities in a contract will

be construed against the drafter, it decided to apply a "narrower application of that principle require[ing] that a contract which creates rights in public securities investors be interpreted to give effect to those investors' reasonable expectation." It identified the same reason relied on in *Kaiser* and other cases – that the issuer could have easily drafted the language in a straightforward manner. 65 A.3d at 552.

The court is convinced by this authority that it is appropriate to construe the Voting Rights Provision against Impac. Impac as the issuer of the Series B Preferred Stock bears responsibility for the language; plaintiffs bear none. Impac was in a position to adopt Articles that did not suffer from this ambiguity. Language that avoided this ambiguity was readily available.

In its Opposition/Reply Memorandum, Impac advances the argument that in order to prevail plaintiffs are required to show that their claimed right "clearly exists." Opp/Reply at 27. This argument is based on case law statements to the effect that the rights of preferred shareholders must be "clearly expressed with definiteness and certainty and will not be presumed." *Jolly Roger Fund, LP v. Prime Group Realty Trust*, 2007 Md. Cir. Ct. LEXIS 10 (2007). Those rulings are based on the principle that stock preferences are in derogation of the common law principle that all stock enjoys equal rights. *See also Warner Communications Inc. v. Chris-Craft Industries, Inc.*, 583 A.2d 962 (Del. Ch.1989); *Elliott Associates, L.P. v. Avatex Corp*., 715 A.2d 843 (Del. 1998); *Greenmont Capital Partners I, LP v. Mary's Gone Crackers, Inc*., 2012 WL 4479999 (Del. Ch. 2012). In *Shiftan v. Morgan Joseph Hldgs., Inc*., 57 A.3d 928 (Del. Ch. 2012), the court supposed that this principle conflicts with the rules relating to construction of an ambiguous contract against its drafter, but found it unnecessary to resolve this conflict.

This court does not conclude that this principle has application under the circumstances of this case. This rule operates to forestall the implication of rights that are not set forth in the corporate documents defining the stock's terms. Read in context, this principle is not so much a rule of contract interpretation as it is a recognition that the preferred stock, the source of whose rights is entirely contractual, is not entitled to the expansion of rights beyond the determinate bounds of the contractual provision. It does not displace the body of law relating to how to resolve difficulties arising from a contract whose ambiguity can be laid at the feet of the issuer, which had the power to avoid any such ambiguity. Therefore, this principle does not relieve Impac from the application of the rule providing that ambiguous language is construed against the drafter.

Conclusion

For these reasons, the court concludes that as a matter of law the Voting Rights Provision must be construed to require the consent of two-thirds of the Series B Preferred Stock in order to effect an amendment of the charter provisions relating to the Stock. The court determines that there is no dispute that there was not consent from two-thirds of the Series B Preferred shareholders, as required by the terms of the Articles Supplementary. Plaintiffs' Motion for Summary Judgment will be granted and Impac's Motion for Summary Judgment will be denied. The precise relief to be granted in light of this determination will be the subject of further proceedings.

II. MOTION PURSUANT TO RULE 2-602(a)(3) FOR REVISION OF PARTIAL SUMMARY JUDGMENT FOR DEFENDANTS

Also pending before the court is Plaintiffs' Motion Pursuant to Rule 2-602(a)(3) for Revision of Partial Summary Judgment for Defendants. (This motion will hereinafter be referred to as "Motion for Revision" to distinguish it from the Motion to Revise the Court's January 28, 2013 Order, which will be referred to as "Motion to Revise).

The Motion for Revision seeks reinstatement of Count II. The claim set forth in Count II of the complaint was that the structure of the transaction as arranged by the transaction documents was ineffective because the shareholder consents to the amendments did not occur before the acceptance of the shares for purchase by Impac. The terms and conditions of the transaction were set forth in an Offering Circular and separate but identical Letters of Transmittal and Consent for each series of preferred shares, pursuant to which Impac offered to purchase outstanding shares of Preferred B and C stock. In addition to the approval of the transaction by a majority of the common shareholders, the transaction depended on the tender of their shares by 66 ⅔% of the preferred shareholders and the approval by the preferred shareholders of amendments to the Articles Supplementary that defined the rights of the preferred shares. Participating preferred shareholders were required to indicate their consent and tender their shares to the Depositary selected by Impac to manage the transaction, American Stock Transfer & Trust Company. According to the transaction documents, upon successful completion of the tender offer, all shares of Preferred Stock that were validly tendered and accepted for purchase by Impac would become authorized but unissued shares.

Count II of the Complaint alleged that defendants did not obtain sufficient consents of either the Preferred B or the Preferred C holders to approve the amendments. The theory of Count II was that the consents did not occur before Impac owned the tendered shares. In support of that theory, plaintiff lodged a wide variety of attacks upon the structure of the transaction. Paragraph 92 of the complaint alleged: "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 time 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 Maryland law. This allegation was based on paragraphs 58 and 59 of the complaint, which challenged the transaction structure as set forth in the transaction documents, specifically the Letter of Transmittal and Consent. The court rejected plaintiffs' contention that the transaction did not function in the manner contemplated by defendants. It held that plaintiffs' interpretation of the transaction's structure was fallacious and not supported by the terms of the instruments.

Following the entry of summary judgment on Count II, plaintiff filed a Motion to Revise, asking the court to reconsider its ruling. Among the many contentions made in that motion was the argument that plaintiffs had asserted as a matter of fact that the consent did not occur before the acceptance for purchase. Plaintiff also sought discovery on this subject. Notwithstanding the characterization of the allegation as an assertion of fact, the court's review of the complaint showed that it simply rested on the argument that the transaction documents, based on their terms, did not create a mechanism for the Depositary to be alerted before Impac's acceptance for purchase. The court denied the Motion to Revise, concluding that the complaint did not support the construction placed upon it in the Motion to Revise.

In the Motion for Revision, plaintiffs assert that new evidence reveals that the factual predicates for the ruling of January 28, 2013 were untrue. Specifically, the motion states that the Depositary who was supposed to have acted as attorney-in-fact for shareholders, in order to consent to the amendments to the Articles Supplementary on their behalf, did not do so. In support of the motion plaintiffs attach an affidavit from Lindsay Kies, an employee of American Stock Transfer & Trust Company, LLC. The affidavit states that it was provided in response to a subpoena issued by Curtis Timm to AmStock. The subpoena seeks discovery of "all communications between

[AmStock] and [Impac] regarding instructions as to how shareholder votes were to be tallied, processed, and how such tallies were reported to Impac in connection with the transaction in June 2009 involving Series B preferred and Series C preferred shares of Impac." In the affidavit Ms. Kies states that "AmStock does not believe that it has in its possession any documents from [Impac] that are responsive to the subpoena," and that "AmStock served as depositary agent only for the transaction described in the subpoena and had no involvement with the shareholder votes."

Plaintiffs argue that this affidavit proves that the voting process did not follow the procedure outlined in the court's opinion.[15] The affidavit, plaintiffs say, contradicts Impac's argument that the Depositary played a role in effectuating the transaction by assuring that consent was obtained and validly delivered, and shows that this averment is untrue because the affidavit states that the Depositary had no involvement with shareholder votes. Plaintiffs argue that the affidavit proves that the Depositary did not consent to the amendments and did not deliver any written consents to Impac, and that Impac's argument that the Depositary played a role is rebutted by the statement that the Depositary had no involvement with the shareholder vote. This is buttressed, according to plaintiffs, by the fact that the Depositary Agreement between Impac and AmStock (which they submit) does not mention any instruction to the Depositary to first exercise the consent and then accept the stock, as found in the language of the Offering Circular.

Plaintiffs also state that no written consent from any shareholder and no written consent from the Depositary was ever delivered to Impac. Noting that there are no consents in the record, plaintiffs point to an excerpt from the deposition testimony of Impac's General Counsel, Ronald

[15] Plaintiffs also argue that because this information renders the prior evidence to be "knowingly totally false and fraudulent" they will also ask the court to reinstate Counts III and V.

Morrison. In that excerpt, Mr. Morrison said that he did not know where the "written consents" were located at the time of the deposition. (This exchange apparently related to a conversation between Mr. Timm and Mr. Morrison, whose relevance is not apparent from the excerpt.) He stated that he did not know what happened to the actual documents, and that he had never seen the letters of transmittal that were sent back by shareholders.[16]

In response to the Motion, Impac submits a number of exhibits. They include a second affidavit from Lindsay Kies, which, she states, supplements the affidavit previously provided in response to the subpoena. She asserts that her prior statement that AmStock had no involvement with the shareholder votes refers to the fact that AmStock was not the Information Agent for questions and direct communications with shareholders, and that AmStock's role in connection with the tenders and consents is set forth in the Depositary Agreement, the Offer to Purchase and the Letters of Transmittal.

Impac also submits the Declaration of Justin Moisio, the Vice President of Corporate and Investor Relations for Impac. Mr. Moisio states that AmStock's role in the 2009 Offer was performed pursuant to a Depository Agreement between the parties, which is attached to the Declaration. He asserts that AmStock (which is Impac's stock transfer agent) had advised Impac that none of Impac's Preferred Stock was held in the form of physical stock certificates. Amstock

---

[16] In addition to these contentions, much of the motion is devoted to rehashing the arguments made previously that the procedure created by the offering documents was ineffective to accomplish the transaction in the manner contemplated thereby. The motion also recounts plaintiffs' views about Impac's motives and the veracity of the business justifications for the transaction. Whatever may be the economic merits of these arguments, the court previously rejected the allegations of breach of fiduciary duty based on the court's understanding of the relevant case law. In consequence, the question now before the court only involves compliance by Impac with the provisions of the contractual terms.

informed Impac that Amstock would not be receiving physical documents from tendering shareholders, as they would be handled electronically through the Depository Trust Company using the Automated Tender Offer System. Mr. Moisio further asserts that AmStock was required under the Depositary Agreement to report on the cumulative tally of Preferred Shares that had been validly tendered each day. Attached to the Affidavit is a report and spreadsheet from AmStock showing the number of preferred shares tendered as of June 26, 2009, with a daily report that reflects each tender transaction from June 4 through June 26 (with the names of the shareholders redacted).

Impac argues that the items relied upon by plaintiffs establish no new facts that contradict the factual predicates for the court's previous rulings. It contends that no physical written consents were delivered because all of the preferred shares were held in book-entry form. It notes that the transaction documents make express provision for tender and consent in the case of shares held in such form, and states that the conditions of valid tender applied equally to the electronic book-entry procedures. It also notes that the Offering Circular provides for DTC to transmit an Agent's Message to the Depositary that the participant has agreed to be bound by the terms of the applicable Letter of Transmittal. The terms of the transaction documents state that the advice by the transfer agents that the shareholder had instructed the shares to be tendered in accordance with terms of the offering constituted compliance with the procedures for tendering of consent.

In their Reply Memorandum, plaintiffs argue that Impac's response establishes that the transaction did not happen as previously asserted by Impac. Plaintiffs state that Impac has never produced any evidence of written consents because written consents do not exist. They also argue that the Depositary does not say that it received or examined any Agent's Messages. They assert that the Agent's Message does not constitute a consent to the Amendments. They attack the affidavit

from Mr. Moisio because it does not discuss consents. The Reply Memorandum, like the Motion for Revision, also contains lengthy passages repeating the arguments made to the court at the time of the initial motion to dismiss about why the design of the transaction was fatally flawed.

Discussion

Because the order granting summary judgment in favor of defendants did not dispose of all claims against all parties, it is not a final order, and is subject to revision under the terms of Rule 2-602(a)(3). The motion is committed to the court's "very broad" discretion to modify the order if that action is in the interest of justice. *Banegura v. Taylor*, 312 Md. 609, 619 (1988)*; see also Henley v. Prince George's County*, 305 Md. 320, 328 (1986). Having considered the extensive arguments of plaintiffs in support of the motion, as well as Impac's responses, the court is firmly convinced that revisiting the decision granting summary judgment on Count II is not in the interest of justice.

The Motion for Revision, the Reply Memorandum and plaintiffs' oral argument upon the motion embody a variety of arguments. Among them, the court perceives the following:

The affidavit of Leslie Kies establishes that the Depositary performed no function because the affidavit states that AmStock had no involvement with shareholder votes.

The deposition testimony of Ronald Morrison establishes that the transaction did not occur because Mr. Morrison stated that he did not know the location of any written consents.

The court's grant of partial summary judgment was based on the understanding that written consents were executed by preferred shareholders and that written consent to the amendments was made by the Depositary. However, neither occurred because there were no written consents from either.

The electronic voting procedures do not establish consent by the shareholders to the amendments. A variety of arguments are included within this contention. Plaintiffs assert that the Articles Supplementary require a vote or consent at a meeting, and the electronic voting procedures do not comply with this requirement. They also question certain aspects of the electronic voting process. The court will address each argument in turn.

First, to the extent that plaintiffs contend that Ms. Kies' first affidavit should be read to support the conclusion that nothing ever happened, the court rejects that contention. The affidavit itself is somewhat enigmatic. It consists of a single sentence, and the meaning of "shareholder votes" is not self-evident. The affidavit says that Amstock served as depositary agent only for the transaction described in the subpoena, which is "the transaction in June 2009 involving Series B and Series C preferred shares of Impac." As such, the affidavit is open to the interpretation that is furthered by Ms. Kies' subsequent affidavit, i.e., that the term "shareholder votes" employed in the subpoena was understood to mean the common shareholder votes. In any event, the affidavit is contradicted by the terms of the Depositary Agreement, which placed upon AmStock the responsibility to accept consents, as well as the evidence that AmStock reported to Impac that tenders were received. Whether those tenders embodied consents will be discussed below.

Second, in the court's view, the record supports plaintiffs' assertion that there are no physical Letters of Transmittal that were returned. The court will also assume that Amstock never delivered a physical consent to the amendments to Impac. The explanation for this fact is that the preferred shares were all held in book-entry form, and the transaction documents do not call for physical Letters of Transmittal to be returned by shareholders who held their shares in such form.

The transaction documents make provision for a tender of shares by a manually submitted Letter of Transmittal and Consent or by a book-entry transfer. The following language appears in the Offering Circular:

> *Valid Tenders of Preferred Stock.* In order for a stockholder validly to tender shares of Preferred Stock pursuant to the Offer to Purchase and Consent Solicitation, the applicable letter(s) of transmittal and consent (or a manually signed photocopy), properly completed and duly executed, together with any required signature guarantees (or, in the case of a book-entry transfer, an Agent's Message (defined below) in lieu of the letter(s) of transmittal and consent) and any other documents required by the applicable letter(s) of transmittal and consent must be received by the Depositary at the address set forth on the back cover of this Offering Circular and either (a) the share certificates evidencing tendered Preferred Stock must be received by the Depositary at this address or (b) the Preferred Stock must be tendered pursuant to the procedure for book-entry transfer described below and a Book-Entry Confirmation must be received by the Depositary, in each case prior to the expiration date, subject to the guaranteed delivery procedures described below. The holder may change its election prior to the expiration date of the Offer to Purchase and Consent Solicitation by submitting to the Depositary a properly completed and signed revised letter(s) of transmittal and consent.
>
> *Book-Entry Transfer.* The Depositary will establish an account with respect to the Preferred Stock at DTC, the book-entry transfer facility, for purposes of the Offer to Purchase and Consent Solicitation within two business days after the date of this Offering Circular. If a holder's shares of Preferred Stock are held through a bank, broker or other nominee, the holder should instruct its bank, broker or other nominee to make the appropriate election on its behalf when they tender shares through DTC. The holder may change its election by causing a new Agent's Message with revised election information to be transmitted through DTC. Any financial institution that is a participant in the system of DTC may make a book-entry delivery of Preferred Stock by causing DTC to transfer those shares of Preferred Stock into the Depositary's account at DTC in accordance with DTC's procedures for transfer. However, although delivery of Preferred Stock may be effected through book-entry transfer at DTC, either the applicable letter(s) of transmittal and consent (or a manually signed photocopy), properly completed and duly executed, together with any required signature guarantees, or an

> Agent's Message in lieu of the letter(s) of transmittal and consent, and any other required documents, must, in any case, be received by the Depositary at its address set forth on the back cover of this Offering Circular prior to the expiration date, subject to the guaranteed delivery procedure described below. Delivery of documents to DTC does not constitute delivery to the Depositary.
>
> The term "Agent's Message" means a message, transmitted by DTC to and received by the Depositary and forming a part of a Book-Entry Confirmation, that states that DTC has received an express acknowledgment from the participant in DTC tendering shares of Preferred Stock that are the subject of such Book-Entry Confirmation, that the participant has received and agrees to be bound by the terms of the applicable letter(s) of transmittal and consent and that we may enforce this agreement against the participant.

Exhibit 2 at 36-37. The following language appears in each Letter of Transmittal and Consent, within the section entitled "Instructions Forming Part of the Terms and Conditions of the Offer to Purchase and Consent Solicitation:"

> If you are not a holder of record of Series B Preferred Stock, please contact your broker, bank or other nominee for further instructions. Brokers, banks or other nominees that are tendering by book-entry transfer to the Depositary's account at DTC may tender Series B Preferred Stock through the DTC ATOP, for which the Offer to Purchase and Consent Solicitation will be eligible. DTC ATOP instructions should include the name and taxpayer identification number of any beneficial owner tendering shares. DTC will then send an Agent's Message to the Depositary. The term "Agent's Message" means a message transmitted by DTC, received by the Company and forming part of the book-entry confirmation, to the effect that: (I) DTC has received an express acknowledgment from a participant in ATOP that it is tendering shares and submitting authorizations to consent to the Proposed Amendments with respect to the Series B Preferred Stock that is the subject of such book-entry confirmation; (ii) such participant has received and agrees to be bound by the terms of the Offer to Purchase and Consent Solicitation for the Series B Preferred Stock being tendered; and (iii) the agreement may be enforced against such participant. **Accordingly, this Letter of Transmittal and Consent need not be completed by a Holder tendering through ATOP.** However, the Holder will be bound by the terms of the Offer to Purchase and Consent Solicitation.

> Delivery of documents to DTC does not constitute delivery to the Depositary.
>
> **If the Holder beneficially owns shares of Series B Preferred Stock that are held through a bank, broker or other nominee and the Holder wishes to tender those shares of Series B Preferred Stock and deliver the Holder's consent, the Holder should contact the nominee promptly and instruct it to tender the Holder's shares of Series B Preferred Stock on the Holder's behalf.**

Exhibit 3A at 10-11 (emphasis in original).

The Depositary Agreement between Impac and AmStock effectuates these terms. The Agreement provides that AmStock will act as depositary in connection with Impac's offer to purchase the preferred shares upon the terms and conditions set forth in the Offer to Purchase and Consent Solicitation dated May 29, 2009 and in the related Letters of Transmittal and Consent, and that it is authorized and directed to accept tenders of shares made pursuant to the terms and conditions of the Offer. (¶ 1). Tenders of shares may be made only as set forth in the Offer to Purchase, and shares shall be considered validly tendered only if (in the case of book-entry shares) Amstock receives a book-entry confirmation and an Agent's Message. The Agreement acknowledges that AmStock may enter into arrangements with a Book-Entry Transfer Facility which provide that delivery of an Agent's Message will satisfy the terms of the Offer with respect to the Letter of Transmittal. (¶ 2). Amstock is authorized and directed to examine any Agent's Message received by it to determine if it believes a tender of shares may be defective, and is not authorized to accept any tender that is not in accordance with the terms and conditions of the Offer or is defective, in the absence of a written waiver from Impac. (¶ 4) AmStock is required to furnish a daily report of the number of shares tendered each day, and the number of shares about which it has

questions concerning the validity of the tender. (¶ 7). The Agreement goes on to make provision for payment for accepted shares (¶ 10) and actions to be taken if shares are not accepted (¶ 11).

These instruments expressly provide a process for tender of shares through a book-entry delivery, as opposed to a manual delivery. They also provide that an Agent's Message serves in lieu of a Letter of Transmittal and Consent. Furthermore, the Letter of Transmittal says that while the Letter of Transmittal need not be completed in the case of a book-entry delivery, the holder will be bound by the terms of the Letter of Transmittal and Consent.

Plaintiffs correctly observe that all of the language in the opinion granting summary judgment on Count II (which they quote at length), as well as defendant's argument (which they also quote at length) spoke about the return of written consents in terms of the Letter of Transmittal. Plaintiffs interpret Impac's arguments as false in the light of the realization that consents were delivered by means of a book-entry electronic voting procedure instead of the return of physical Letters of Transmittal and Consent. The court does not view this retrojection as undermining the veracity of the argument that was made by Impac. Those arguments must be read in the context of the issues that were before the court upon the Motion to Dismiss. Plaintiffs' attack upon the transaction at that time focused upon the provisions of the transaction documents dealing with Letters of Transmittal and Consent. Given that context, the fact that Impac's arguments responded in kind does not establish an intent to hoodwink the court nor that they were inaccurate. For the reasons stated below, the court believes that the provisions of the documents relating to electronic voting incorporate the provisions of the Letter of Transmittal and Consent. Therefore, the court's conclusions rejecting plaintiffs' arguments that the design of the transaction was fatally flawed apply with equal force

notwithstanding the fact that physical Letters of Transmittal and Consent were not returned. If the court's conclusions are read in light of this fact, they are equally valid as in their original expression.

At the time, apparently no one focused on the fact that shareholders who held their shares in book-entry form would not be using the physical Letter of Transmittal. However, that fact was plainly apparent from the contents of the Letter of Transmittal and the Offering Circular themselves. Furthermore, it appears from the Moisio affidavit, as well as the Prospectus Supplements from the original issues, that all of the preferred stock was held in book-entry form.[17] Impac's argument was phrased in the way that it was because the allegations of the complaint focused on the terms of the Letter of Transmittal. Accordingly, the fact that there were no written consents in the form of executed Letters of Transmittal does not by itself affect the court's ruling. However, plaintiffs make a number of arguments to the effect that tender through the book-entry procedures does not constitute consent as required either by the Articles Supplementary or the transaction documents themselves, which the court will now consider.

It seems to the court that the procedure established by the Offering Circular and the Letter of Transmittal constitutes consent to the amendments sufficient to comply with the requirements of the Articles Supplementary. Holders or beneficial holders were advised by the terms of the Letter of Transmittal that they could not tender their shares without also consenting to the amendments and that tender of shares also constituted consent to the amendments. The Letter of Transmittal also informed shareholders that if their shares were held in book-entry form that the tender and consent would be made through the book-entry procedures set forth in the Offering Circular. The Offering

[17] Presumably that fact was known by plaintiffs as shareholders.

Circular provided that if shares were tendered through book-entry procedures an Agent's Message would take the place of delivery of a written Letter of Transmittal.

These procedures form the electronic equivalent of the physical delivery of executed Letters of Transmittal, and the court sees no reason why they do not comply with the terms of the Articles Supplementary and supply written consent by the shareholders to the amendments. Plaintiffs argue that the submission through electronic procedures does not comply with the requirements of the Articles Supplementary that the consents be in writing. However, the Maryland Uniform Electronic Transactions Act, Commercial Law Art. § 21-106, provides that if a law requires a record to be in writing an electronic record satisfies the law. It bears repeating that shareholders who submitted tenders electronically did so with the understanding that the Letters of Transmittal specified that their tender constituted consent. That, it seems to the court, establishes that the intended and understood effect of their action was to consent.

Plaintiffs also argue that the grant of summary judgment should be revisited because of the lack of actual evidence in the record concerning some features of the operation of the transaction. Specifically, plaintiffs argue that if Impac received Agents' Messages they are not in the record. The court previously rejected plaintiff Timm's argument that the complaint actually alleged that the transaction did not occur as provided for by the documents. The court also rejected his attempt to undertake discovery in order to search for evidence to support a claim that had not been alleged in the Complaint. The argument that the absence of Agents' Messages in the record is fatal to Impac's contention is the equivalent of the argument previously made that plaintiffs should be entitled to take discovery in order to assess whether or not a cause of action exists. The court again rejects plaintiffs'

proposal that discovery should be employed to ascertain whether or not plaintiffs have a cause of action.[18]

Plaintiffs' argument that if Impac had received the required number of timely delivered written consent it would have moved for summary judgment on that basis and would have included copies of those consents is disingenuous. As stated many times, plaintiff never alleged in the complaint that Impac had not received the required number of written consents, and there was no reason for Impac to move for summary judgment on that basis. Again, this is an attempt to assert a new cause of action based on hypothetical assertions of fact.

Plaintiffs also question aspects of the electronic voting process. They refer to the DTC procedures for processing consents, and allege that the electronic voting did not comply with these procedures. For example, plaintiffs point to the fact that the DTC requires that the issuer establish a record date. It is plainly apparent that this provision has no application in the case of this tender offer. Impac's offer was directed to shareholders holding shares "as of the expiration of the Offer to Purchase." A record date makes no sense under these circumstances.

Perhaps the most serious argument raised by plaintiffs is that the Depositary did not evidence consent to the amendments. On the state of the current record there is no evidence that the Depositary transmitted a consent, and the evidence in the record concerning what information was transmitted to Impac - the record of tenders - does not include any evidence of consent by the Depositary itself. Therefore, the court must consider whether the absence of consent by the Depositary is fatal to the validity of the transaction.

---

[18] The court notes plaintiffs' assertion that the discovery that they pursued did not violate the court's prior orders.

Notably, the Articles of Supplementary require consents only by the shareholders. As stated above, it is the court's conclusion that the tender in electronic form constituted consent by the shareholders because of the provisions of the Offering Circular and Letters of Transmittal. As the court observed in the Memorandum Opinion of January 28, 2013, the letters provided that execution and delivery of a Letter of Transmittal constituted a shareholder's consent to the proposed amendments and would also authorize and direct the Depositary to execute and deliver a written consent to the proposed amendments on such holder's behalf. The Opinion also stated, in the course of a discussion of the parties' respective interpretations of the transaction documents that the "Letters purport to act both as a consent to the amendments and an authorization to depositary to consent or deliver the shareholder's consent. Thus, while a shareholder acknowledged its consent by delivering the applicable Letter, the Depositary also needed to consent or, at the very least, transmit shareholder consent to Impac." Memorandum Opinion at 24-25 n. 16. To this extent, an act that was provided for by the terms of the offer - a consent by the Depositary itself - was not performed. Impac suggests that the language of the Letters of Transmittal provided that the preferred shareholders merely authorized the Depositary to consent for them, and did not establish a requirement that the Depositary itself consent. This argument seems to the court to carry the day. To the extent that the court held that the Depositary was required to consent, there does not appear to be any reason in the transaction that the Depositary's consent would be essential. If the court is correct that the shareholders had manifested their consent, nothing in the Articles requires the Depositary's consent as well, and its absence is not fatal.

For these reasons, the Motion for Revision will be denied.

III. MOTION TO STRIKE AMENDED COMPLAINT AND MOTION FOR SANCTIONS

After the hearing upon the motions for summary judgment and the Motion for Revision, and while the motions were *sub curia*, plaintiffs filed an Amendment of the Complaint by Interlineation. Defendant filed a Motion to Strike Amended Complaint and Motion for Sanctions. Plaintiffs have filed opposition to these motions and Impac filed a reply.

The amendment includes a series of factual allegations and a claim based upon them that is entitled "Count VII." In summary, it is alleged that no holder of preferred stock tendered a consent to the charter amendments by executing the Letter of Transmittal and Consent; that the Depositary considered tender to be tantamount to consent, and had no procedure in place to verify the adequacy of consents; that this procedure was contrary to the terms of the Tender Offer and the terms of the Articles Supplementary that require consent in writing; that "on information and belief" the Depositary did not review or accept any Agent's Messages; and that the Depositary did not act as attorney in fact for any shareholders to consent. It is asserted, based on these allegations, that no valid consents were made by holders of Series B or Series C preferred stock, in consequence of which the amendments to the Articles are invalid.

Impac's motion to strike asserts that the amendment is an attempt to resurrect the claim asserted in Count II of the complaint, and notes the previous rulings of the court rejecting the theories on which Count II was based. New Count VII, it states, is old Count II as "imagined" by the Motion to Revise. Impac argues that allowing the amendment would cause it prejudice. Impac also asserts that the court should award sanctions because the amendment is baseless and unjustified. Plaintiffs respond that the purpose of the amendment is to place before the court a "well-pled, factual foundation" for a claim in the event that the court were to grant the Motion to Revise. Their intent,

they state, is to conform the pleadings to the newly discovered facts that were the basis of that motion. If the court denies the Motion to Revise, the claims will be preserved for appeal. Plaintiffs argue that given the limited purpose of the amendment sanctions are unjustified, as they had no intent to reassert a claim previously barred by the court.

Amendments are to be liberally granted in order to effect justice. That liberality is not limitless. An amendment should be denied when it is futile. *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 673 (2010). In this case, the court has ruled, by denying the Motion for Revision, that plaintiffs are not entitled to assert the claim that is the subject of the proposed amendment, rendering the proposed amendment futile. This ruling mandates that the motion to strike be granted. However, sanctions are inappropriate in light of the stated reasons for the amendment.

IV. CONCLUSION

In accordance with the foregoing conclusions, Defendant's Motion for Summary Judgment will be denied, and Plaintiffs' Cross Motion for Summary Judgment will be granted. In accordance with Rule 2-501(g), the court specifies that the issue of whether the amendments received necessary consent by the Series B shareholders is not in dispute. Additionally, Plaintiffs' Motion for Revision will be denied. Defendant's Motion to Strike will be granted, and the court will order the amendment stricken. Finally, Defendant's Motion for Sanctions will be denied. An order will be issued consistent herewith. Further proceedings will be scheduled to determine appropriate relief.

Dated:_____ _____

Judge W. Michel Pierson