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

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MEMORANDUM OPINION

In this purported class action suit, Plaintiff seeks to challenge certain amendments to the charter of Defendant Impac Mortgage Holdings, Inc. that removed rights and protections afforded to the company's preferred stock. Plaintiff, Curtis J. Timm, is an owner of Impac preferred stock. Defendants are Impac Mortgage Holdings, Inc. (hereinafter "Impac") and eight members of Impac's Board of Directors (hereinafter the "Individual Defendants," and collectively with Impac "Defendants"). The case is before the court on Defendants' Motion to Dismiss. A hearing was held on the motion on June 28, 2012. For the reasons that follow, the motion will be treated as a Motion for Summary Judgment, which will be granted in part and denied in part.

Background

The following discussion of the background leading up to the contested charter amendments is necessary to provide context; more detailed facts and the relevant contract language will be discussed in the context of Plaintiff's allegations.[1] Impac is a Maryland corporation headquartered in Irvine, California that provides real estate and mortgage related

[1] The majority, if not all of the background facts, are alleged in the Complaint and nothing in the background is disputed by the parties.

services. Impac is a publicly traded company capitalized with common stock and two classes of preferred stock. Impac created the preferred stock in 2004 by filing two separate Articles Supplementary, which amended the Impac charter. The first Articles Supplementary created 7,500,000 shares of 9.375% Series B Cumulative Redeemable Preferred Stock (hereinafter "Preferred B"), and the second Articles Supplementary reclassified and designated 5,500,000 shares of authorized but unissued Preferred B stock as 9.125% Series C Cumulative Redeemable Preferred Stock (hereinafter "Preferred C" and together with the Preferred B, the "Preferred Stock" or "Preferred Shares"). Also in 2004, Impac issued and sold two million shares of Preferred B and 4.47 million shares of Preferred C for $25 per share in two separate public offerings, raising a total of $161.7 million from the sale of Preferred B and C stock.

Among other terms and conditions, the Articles Supplementary conferred upon the Preferred Shares certain preferences, specific voting powers, and conversion and other rights. More specifically, the Articles Supplementary provided the Preferred Shares with a $25.00 liquidation preference, and a cumulative preferred quarterly dividend at the rate of 9.375% of the $25.00 liquidation preference (approximately $2.34) per year for the Preferred B stock, and 9.125% of the $25.00 liquidation preference (approximately $2.28) per year for the Preferred C stock. The Articles Supplementary required Impac to pay or set apart the dividends for the Preferred B and C stock before any dividends could be paid on common stock or before any Impac stock could be redeemed. The Articles Supplementary also provided preferred stockholders with the right to elect two directors to Impac's board, in the event that a dividend was not declared or set aside for either Preferred B or C stock for six quarters.

In March of 2009, Impac was capitalized by 7,618,146 shares of issued and outstanding common stock, 2 million shares of Preferred B stock, and 4.47 million shares of Preferred C

stock. Impac had not declared a dividend on the Preferred B and C stock for the quarters ending December 31, 2008 and March 31, 2009 and indicated in an SEC filing for the quarter ending March 31, 2009 that it had, "no present intentions to pay dividends on the Series B and Series C Preferred stock." Compl. ¶ 32. As of the quarter ending March 31, 2009, Impac estimated total stockholder equity in the company, previously valued at $1 billion, to be around $9 million. Impac's status as a real estate investment trust, which required distribution of 90% of its annual profits, had been terminated by the board of directors. The Preferred Shares had been delisted by the New York Stock Exchange. Immediately prior to the tender offer and consent solicitation that are the subject of this lawsuit, Preferred B shares traded on the pink sheets for approximately $1.20 per share, while Preferred C shares traded for approximately $0.50 - $0.60 per share.

Against this backdrop, Impac sought to reduce the obligations it owed to the holders of Preferred B and C stock. In May of 2009, Impac announced a tender offer for the Preferred Shares in which it offered to purchase shares of Preferred B for $0.29297 per share and shares of Preferred C for $0.28516 per share. The offer was linked to a consent solicitation, which required any shareholder who submitted shares in response to the tender offer to consent to certain amendments to the Preferred Articles Supplementary. In essence, the proposed amendments stripped the Preferred B and C shares of almost all of their preferred rights, including the cumulating and preference rights for the Preferred B and C dividends, the ability of Preferred B and C shareholders to elect directors in the event of nonpayment of dividends, and the prohibition on issuance of stock senior to the Preferred B and C shares.

The transaction was undertaken pursuant to the terms and conditions of the Offering Circular applicable to both series of Preferred Shares[2] and separate but identical Letters of Transmittal and Consent for each series (hereinafter the "Letters" and together with the Offering Circular, the "Transaction Documents").[3] Ex. C, Tender Offer Statement, Schedule TO at 1. The Transaction Documents dictated the conditions, timing, and procedure for tender and acceptance of the preferred shares. Pursuant to the Offering Circular, Impac offered to purchase outstanding shares of Preferred B and C stock, under certain conditions, which included the approval of the transaction by a majority of the common shareholders and 66 ⅔% of the Preferred shareholders. Ex. D, Offer to Purchase and Consent Solicitation, p.33. Participating preferred shareholders were required to indicate their consent and tender their shares together with the applicable Letter to the Depositary selected by Impac to manage the transaction, American Stock Transfer & Trust Company (hereinafter the "Depositary"). Upon successful completion of the tender offer, "all shares of Preferred Stock that [were] validly tendered and accepted for purchase by [Impac] in the Offer to Purchase and Consent Solicitation [would] become authorized but unissued shares." Ex. D, at 7; see also Ex. C, Schedule TO, Item 6(b). In the offering documents for the tender offer and consent solicitation, Impac advised shareholders that upon successful completion of the consent solicitation and tender offer, Impac anticipated that remaining holders of Preferred Stock would be left with an "illiquid investment indefinitely."

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[2] The Offering Circular is referred to by the parties as the Offering Circular, the Offer to Purchase and Consent Solicitation, and the Tender Offer and Consent Solicitation. Those terms reference the same document, which is Defendants Exhibit D, and for the purposes of this Motion, the titles will be used interchangeably.

[3] While the language of the Letters of Transmittal and Consent is the same, where reference is made to the an individual series, the Preferred B Letter of Transmittal and Consent refers to Preferred B shares, while the Preferred C Letter of Transmittal and Consent refers to Preferred C shares. Where the Letters of Transmittal and Consent contain identical language and a discussion does not require parsing of the individual series, the Court will refer to the Letters together.

The combined offer to purchase and consent solicitation expired on 9:00 a.m. on June 29, 2009. [4] That same day, Impac filed an SEC Form 8-K with a press release announcing that "holders had tendered an aggregate of approximately 67.7% (4,378,880 shares) 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 June 29, 2009.

Plaintiff did not participate in the tender offer/consent solicitation. As predicted by Impac, Plaintiff and other Preferred Shareholders were left with a significantly devalued investment in the company. Plaintiff filed this lawsuit in the Circuit Court for Baltimore City on December 7, 2011, seeking declaratory relief and compensatory and punitive damages. Defendants filed a Motion to Dismiss on February 27, 2012, to which Plaintiff responded on April 30, 2012. Defendants filed a Reply in support of the Motion to Dismiss on May 31, 2012, and the Court held a hearing on the Motion on June 28, 2012. The complaint contains six counts, which will be addressed in turn below, but the gist of Plaintiff's claims can be summed up as a request that the amendments to the Articles Supplementary be declared invalid and that Defendants be ordered to proceed to act pursuant to the 2004 Articles Supplementary or pay damages for their enactment of invalid amendments.

<u>The Applicable Standard</u>

Defendants seek dismissal of the Complaint pursuant to Md. Rule 2-322(b)(2), arguing that the Complaint fails to state a claim upon which relief can be granted. Upon review of a motion to dismiss for failure to state a claim, "a court must 'assume the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them.'" *Arfaa v. Martino*, 404 Md. 364, 380 (2008) (*quoting Lloyd v. General Motors*

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[4] The Offering Circular provided that the "term 'expiration date' means 9:00 a.m., Eastern Daylight Time, on June

Corp., 397 Md. 108, 121-122 (2007)) (internal citations omitted). The Complaint relies on and quotes certain provisions of the Articles Supplementary, the Offering Circular and Letters of Transmittal and Consent through which Impac completed the consent solicitation and tender offer, and several of Impac's Form 10-K fillings with the SEC. In support of their Motion to Dismiss, Defendants submitted eleven exhibits, which included the complete documents to which Plaintiff referred in the Complaint. In his Opposition, Plaintiff made no objection to Defendants' introduction of matters outside of the Complaint and, in fact, further quoted and relied upon several of Defendants' exhibits. Plaintiff attached two additional exhibits to his Opposition, but those two exhibits were expressly incorporated into the Complaint by reference, pursuant to Rule 2-303(d), by attachment of counsel's affidavit.

Because the court will consider Defendants' exhibits, the motion will be treated as a motion for summary judgment, pursuant to Rule 2-322(c), which provides, in relevant part:

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

Without addressing Rule 2-322(c), Defendants argue that on a motion to dismiss the court can and should review the language of relevant agreements in considering the sufficiency of the Complaint. Defendants assert that Plaintiff should not be permitted to selectively quote the language of documents upon which his claims rely, and they contend that any discussion or quotation of a document by Plaintiff "effectively" incorporates the document by reference[5] into

26, 2009," unless extended by Impac. Ex. D at 32. Impac's subsequent SEC filings identify the Expiration Date as June 29, 2009. Ex. G, Form 8-K, dated June 29, 2009.

[5] Defendants also assert that any document identified by Plaintiff was incorporated by reference, but they offer no support for that theory of incorporation by reference and this argument directly contrasts Plaintiff's express incorporation by reference in his Opposition.

the Complaint and entitles Defendants to show the court the actual language or the complete context in which it was used.[6] No such rule exists in Maryland. *Hrehorovich v. Harbor Hospital Ctr., Inc.*, 93 Md. App. 772, 780-781 (1992); *see also Hudson v. Prime Retail*, *Inc.*, 2004 Md. Cir. Ct. LEXIS 26 (Cir. Ct. Balt. City April 1, 2004).

In their Reply, Defendants attempt to bolster their argument by pointing out that Plaintiff does not dispute that the Court can review the documents, and Plaintiff does rely on Defendants' exhibits throughout his Opposition. Even if Plaintiff concedes Defendants' argument that they may complete the record with matters outside of the Complaint, if those matters are considered by the court, "the motion shall be treated as one for summary judgment...." *Muthukumarana v. Montgomery County*, 370 Md. 447, 474-75 (2002); *Hrehorovich v. Harbor Hospital Center, Inc.*, 93 Md. App. 772, 782 (1992) (quoting Md. Rule 2-322(c)).

In considering a motion for summary judgment, "the court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "The threshold issue in a proper motion for summary judgment, therefore, is whether a significant factual dispute exists." *Warner v. German*, 100 Md. App. 512, 516 (1994). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111 (1985). "Moreover, factual disputes, and the inferences reasonably to be drawn from the facts, are

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[6] In support of this proposition, Defendants direct the court to several cases that stand for the general proposition that a complaint is properly dismissed when unambiguous contract language contradicts a plaintiff's allegations, but none of the cases cited by Defendants supports the proposition that a court should consider matters outside of the complaint on a motion to dismiss, nor do Defendants offer any other support for the proposition that the mention of or quotation from a document "effectively" incorporates the document by reference in the Complaint.

resolved in favor of the party opposing summary judgment and against the moving party." *Rite Aid Corp. v. Hagley*, 374 Md. 665, 684 (2003).

The Plaintiff's Allegations

The Complaint contains six counts. Count I alleges that Impac failed to receive the requisite number of votes to amend the Articles Supplementary. Count II alleges that even if Impac did receive the requisite *number* of votes, the votes are nonetheless invalid because Impac owned the shares at the time of the vote. Count III alleges that Defendants breached their fiduciary duty and duties of good faith and fair dealing owed to Plaintiff. Count IV assumes that the amendments will be declared invalid and asserts a breach of contract claim based upon Impac's repurchase of additional Preferred Shares in violation of the Articles Supplementary as they existed prior to the amendments. Count V asserts a punitive damages claim. Finally, Count VI, like Count IV, assumes that the Amendments will be declared invalid, and requests that the Court order Impac to call a meeting so that the remaining Preferred shareholders can exercise the right to elect directors that they held prior to the amendments. Plaintiff seeks declaratory relief for Counts I, II, and III in the form of a declaration that the amendments to the Articles Supplementary were improper. Plaintiff has also requested class certification.

At the hearing, Plaintiff conceded that Counts I, II, VI, and IV are not applicable to the Individual Defendants, and judgment will be granted in favor of the Individual Defendants on those counts. The Breach of Fiduciary Duty claim in Count III is only applicable to the Individual Defendants, and judgment will be granted in favor of Impac on that claim.

Counts I and II

Plaintiff's first two counts find fault with the mechanics of the offer and consent process. In Count I, Plaintiff contends that Impac breached the terms of the Preferred B Articles Supplementary by implementing invalid and unauthorized amendments to the Articles. The Articles Supplementary allow material, adverse amendments only upon approval by two-thirds of the affected shares, and Plaintiff argues that Defendants simply did not have enough Preferred B votes to amend the Articles for the Preferred B shares.[7] The parties agree that, while holders of all Preferred Stock tendered an aggregate of approximately 67.7% (4,378,880 shares) of the outstanding shares in response to the tender offer[8], the breakdown of the tendered shares reveals that Preferred B holders tendered only 66.2% (1,323,844 of 2,000,000) of the outstanding Preferred B shares.[9] Plaintiff asserts, and Defendants acknowledge, that the number of tendered Preferred B shares alone fell short of the requisite 66.67% of outstanding shares necessary to accomplish a materially adverse amendment to the Articles Supplementary.

Defendants argue that plain language of the Articles Supplementary defeats Plaintiff's claim. According to Defendants, the number and percentage of consenting Preferred B shares alone is irrelevant because the Articles Supplementary allow (and in fact, require) voting of Preferred B and C shares together as a class. Under this interpretation of the Articles Supplementary, the only vote tally that matters is the total percentage of all Preferred Shares that

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[7] The record reflects that holders of Preferred C stock tendered 3,055,036 of approximately 4,470,600 shares, and the parties agree that a sufficient number of Preferred C shares consented and were tendered.

[8] Following the close of the Tender Offer and Consent Solicitation on June 29, 2009, Impac announced in a press release, filed with an SEC Form 8-K that "holders had tendered an aggregate of approximately 67.7% (4,378,880 shares) of the Preferred Stock."

[9] Plaintiff discusses several fluctuations in the number of outstanding B shares reported by Impac in subsequent SEC filings. Although Plaintiff hints at an accusation of impropriety as evidenced by these fluctuations, he never comes out and says it, and Impac concedes that the number of B shares tendered at closing was 1,323,844. Accordingly, any change in the number of outstanding shares after the closing date of the offer is relevant only to a discussion of Impac's alleged breach of the Articles Supplementary by additional share repurchase after the closing date and such allegations will be addressed in turn in the Court's treatment of Count IV.

were tendered and consented, and failure to obtain consents from holders of two-thirds of the Preferred B shares alone does not prevent a valid amendment of the Articles.

Preferential stock rights are contractual in nature and therefore are governed by the express provisions of a company's certificate of incorporation, in this case the Articles Supplementary. *Elliott Associates, LP v. Avatex Corp.*, 715 A. 2d 843, 825-853, n.46 (Del. 1998)(*quoting Rothschild Int'l Corp. v. Liggett Group Inc.,* 474 A.2d 133, 136, (Del Supr 1984)). Maryland follows the objective theory of contract interpretation, under which the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the parties' intent, if the contract language is clear and unambiguous and free of fraud, duress or mistake. *DeLeon Enterprises, Inc. v. Zaino*, 92 Md. App. 399, 407 (1992). If "doubt arises from the writing itself as to what the parties meant by the language employed," the contract language will be considered ambiguous, and extrinsic evidence will be admitted to determine the intent of the parties. *Id.; see also PaineWeber Inc. v. East*, 363 Md. 408 (2001).

Article 6 of the Preferred B Articles Supplementary governs the voting rights of the Preferred B shares and provides that "holders of the Series B Preferred Stock will not have any voting rights, except as set forth [therein]."[10] Ex. A & B, Articles Supplementary §(6)(a).[11] With regard to material, adverse charter amendments, Article 6(d) provides:

> 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*

[10] The Articles Supplementary for the Preferred C shares contain virtually identical language with regard to voting rights of Preferred C shares.

[11] Because a set of complete contract documents was submitted by Defendants, references and citations to exhibits are references to Defendants' exhibits, unless otherwise stated.

> *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 of conditions of redemption of the Series B Preferred Stock or the holders thereof…

Art. Supp. §6(d)(ii)(emphasis added). Defendants assert that the parenthetical language requires the Preferred B shares to vote as a class with all series of Parity Preferred. "Parity Preferred" is defined in section 6(b) of the Articles Supplementary, in context of dividend default. Should Impac fail to pay dividends for 6 quarters,

> "the holders of such shares of Series B Preferred Stock (voting separately as a class with *any other classes or all other series of our preferred stock ranking on a parity with the Series B Preferred Stock as to the payment of distributions and the distribution of assets upon liquidation* ("Parity Preferred"), upon which like voting rights have been conferred and are exercisable…"

Art. Supp. §6b. The Preferred C Shares rank on a parity with the Preferred B shares as to the payment of distributions and the distribution of assets upon liquidation, and therefore meet the definition of Parity Preferred as they relate to the Preferred B shares.[12]

Plaintiff concedes that section 6(b) calls for a class vote under certain circumstances but maintains that a class vote is not applicable in this instance for several reasons. First, Plaintiff asserts that the Preferred B and C shares do not have "like voting rights" in this transaction. He argues that Preferred C shares cannot have like voting rights as Preferred B shares because they have *no* voting rights with regard to Preferred B shares. The Preferred C Articles Supplementary grant nearly identical voting rights as those in the Preferred B Articles, and they

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[12] The Articles Supplementary for the Preferred C shares expressly include the Preferred B shares in the definition of Parity Preferred. Section (6)(b) of the Preferred C Articles Supplementary, which discusses the voting rights of the Preferred C shares in the event of a dividend default, provides that Preferred C shares, "(voting separately as a class with any other classes or all other series of our preferred stock, including the 9.375% Series B Cumulative Redeemable Preferred Stock (as defined in the Charter), ranking on a parity with the Series C Preferred Stocks as to the payment of distributions and the distribution of assets upon liquidation ("Parity Preferred"), upon which like voting rights are conferred and exercisable)," will be entitled to vote for the election of additional directors of the Corporation. Def. Ex. B at 7.

provide that the Preferred C holders have no rights, except as set forth in the Preferred C Articles Supplementary. With regard to the right to vote on charter amendments, Article 6(d) of the Preferred C Supplementary provides:

> So long as any shares of Series C 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 C 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 of conditions of redemption of the Series C Preferred Stock or the holders thereof…

Def. Ex. B at 8. Plaintiff reasons that, because Preferred C Shares have no voting rights unless granted by the Articles Supplementary and because the Preferred C Articles Supplementary do not explicitly grant voting rights for amendments that affect Preferred B shares, holders of Preferred C shares have no right to vote on amendments that affect the Preferred B Articles Supplementary.

The plain language of the Articles Supplementary, however, does not require that Preferred C holders be granted the express right to vote on amendments to the Preferred B articles; rather, it requires that, in order to vote as a class, Preferred B and C shares must have voting rights that are "like" one another. The words employed in a contract are to be given their ordinary and usual meaning, in light of the context within which they are employed. *Wells v. Chevy Chase Bank F.S.B*, 363 Md. 232, 251 (2001). The Oxford Dictionary defines like as "(of a person or thing) having similar qualities or characteristics to another person or thing." Plaintiff does not offer any explanation of the context of the word "like" that would render it susceptible to a different meaning. The Preferred B and Preferred C holders are being asked to

vote on a transaction that will affect the same preferences in the same way for both series. The voting rights for both series clearly have similar characteristics to one another under the facts of this transaction, and accordingly they have 'like" voting rights in this transaction.

Plaintiff argues that this interpretation of the charter would lead to the absurd result of allowing implementation of a proposal that would eliminate the rights of only one series of preferred shares by soliciting the votes of a different, unaffected class of shares. This argument does not hold water. Plaintiff's hypothetical presents an example of an instance in which the unaffected series would *not* share "like voting rights" with the affected series. If Impac were to solicit consent for a such a proposal, the unaffected series would not be granted any right to vote under the charter, much less a vote on similar issues or of similar effect as the vote of the affected shares, and thus would not have "like voting rights." It is precisely because Impac sought to affect the rights of both series here in an identical manner that the two series have "like" voting rights and therefore vote as a class.

Moreover, Plaintiff's reading of the class voting provision would render it meaningless. "It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions, must be given meaning, and force and effect, if that can consistently and reasonably be done. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable." *DeLeon Enterprises, Inc. v. Zaino, supra,* 92 Md. App. at 407 (*quoting Orkin v. Jacobson*, 274 Md. 124, 130 (1975)). Plaintiff's argument would conclude that Preferred C shares would never have the ability to participate in a class vote on amendments to the Preferred B Articles Supplementary. If this were the case, the class voting provision in Art. 6(d) would be meaningless as applied to section 6(d)(ii) because, under Plaintiff's theory, the two series will never have like voting rights.

An interpretation of the phrase "like voting rights" as similar voting rights gives the phrase meaning.

Plaintiff acknowledges that Preferred B and C shares have like voting rights with regard to every other matter upon which the shares are able to vote (with the exception of material charter amendments), which includes the right to elect directors in the event of a dividend default, the right to approve the issuance of stock ranking higher than the Preferred B and C shares, and the right to approve a reclassification, binding share exchange, consolidation or merger. Plaintiff's argument is belied by his own logic. He asserts that, while the Preferred B and C shares are in the exact same position with regard to a dividend default, the issuance of shares ranking higher than the Preferred B and C and the right to approve a merger or reclassification, they are not in the same position with regard to the charter amendments at issue here. Plaintiff is correct that Section 6(b) of both series' Articles Supplementary, which grants voting rights in the event of a dividend default, expressly grants the right for each preferred series to vote together for the election of directors, regardless of the series that is effected by the dividend default. It provides that, "[w]henever dividends on any shares of Series B Preferred Stock or *any series of Preferred Stock ranking on parity as to payment of dividends with the Series B Preferred Stock shall be in arrears* for six or more quarterly periods," the holders of such shares, voting as a class with all other series of Parity Preferred, upon which like voting rights have been conferred and are exercisable, shall have the right to elect two additional directors to the Impac board. The Articles do not, however, grant each series express voting rights for a reclassification in Section 6(d)(i) or a binding share exchange in 6(d)(iii) involving the other series. While it may be a stretch to imagine a scenario under which Impac could authorize shares ranking prior to the Preferred B shares that would not similarly affect the

Preferred C shares, it is certainly possible that Impac could attempt to complete a share exchange or merger that only affected one series of Preferred shares. In the event of a share exchange or merger, the only reasonable result of the term "like voting rights" would limit the rights of each series to approve the merger or exchange, unless the rights of that series was affected. The inclusion of "like voting rights" appropriately limits the ability of one Preferred series to vote on the rights of the other series, unless the rights of both series are equally affected.

A brief review of Section 10.04 of the Model Business Corporation Act reinforces the reasonableness of Impac's voting scheme.[13] Section 10.04(a) of the Model Act entitles holders of a class to a class vote on certain amendments, including amendments which would change the rights or preferences of all or part of the shares of the class.[14] and provides "(c) If a proposed amendment that entitles the holders of two or more classes or series of shares to vote as separate voting groups under this section would affect those two or more classes or series in the same or a substantially similar way, the holders of shares of all the classes or series so affected must vote together as a single voting group on the proposed amendment, unless otherwise provided in the articles of incorporation or required by the board of directors." The Model Act's default requirement that affected series vote in a single voting group if they are affected by an amendment in the same way provides additional support, in the context of general corporate law, for the interpretation of "like voting rights" as voting rights that are similar to or the same as one another.

[13] Maryland has not adopted Section 10.04. While it is not being cited as binding on the court and is not determinative of the outcome of this case, it provides context for the reasonableness of the language in the Articles Supplementary.

[14] Section 10.04 provides, in part: "If a corporation has more than one class of shares outstanding, the holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by this Act) on a proposed amendment to the articles of incorporation if the amendment would… (3) change the rights, preferences, or limitations of all or part of the shares of the class;…"

Plaintiff next argues that, even if the Preferred B and Preferred C shares had a right to vote as a class to approve the amendments for both series of stock, they did not in fact do so, because the language of the Preferred C Letter of Transmittal and Consent limits the right of the Preferred C holders to consent with regard to Preferred C shares only. Ex. F at 2,5. This argument is without merit. The Offering Circular and Letters of Transmittal and Consent informed shareholders that although each shareholder was entitled to vote only on the shares that it owned individually, both Articles Supplementary would be amended based upon the outcome of the consent vote. Moreover, the nature of a class vote by its definition alone contemplates that the votes of each series within a class will be tallied together.

Finally, Plaintiff argues that, even if Articles Supplementary required the two series to vote as a class, the Articles Supplementary expressly require "the affirmative vote or consent of at least two-thirds of the shares of the series B Preferred Stock outstanding at the time." According to Plaintiff, the language granting a class vote does not relieve Impac of the necessity of obtaining consent of two-thirds of the Preferred B shareholders. The parties did not cite, and the court was unable to locate, a case which analyzed a similar argument regarding a class voting provision.

Plaintiff suggests that the language is at the very least ambiguous because contract terms should be construed against the drafter. The principle that contract terms should be construed against the drafter is a rule of construction that applies only after it is determined that the contract terms are ambiguous; it is not relevant to that determination. *See Labor Ready, Inc. v. Abis*, 137 Md. App. 116, 134 (2001) ("Only if the fact-finder cannot resolve the ambiguity after considering extrinsic evidence may this rule of contract interpretation be applied.")

A contract provision is ambiguous "if it is subject to more than one interpretation when read by a reasonably prudent person." *John l. Mattingly Const. Co., Inc. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 327 (2010)(quoting *SyLene of Washington, Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 167 (2003). To conclude that the provision in question is unambiguous, the court must conclude that the two-thirds requirement is susceptible of only one interpretation. Defendants urge a reading of section 6(d) under which the parenthetical class voting provision modifies the requirement for a minimum of two-thirds of the Preferred B shares. Under this reading, the Articles Supplementary could be understood to require a vote of two-thirds of the entire class. However, the language of section 6(d) can also be reasonably interpreted to require approval specifically by two-thirds of each class, regardless of the class voting requirement. Notwithstanding the class voting parenthetical, the language of section 6(d) also states that no amendment shall occur "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." The specific requirement of two-thirds of the Preferred B shares precludes a conclusion, based on the words of the Articles Supplementary alone, that the language is unambiguous.

In contrast to the two-thirds voting requirement in section 6(d), section 6(b), which grants voting rights in the event of a dividend default, merely provides that if Impac failed to pay dividends on preferred shares for six or more quarters, "the *holders of such shares* of Preferred B [or C] shares," voting together as a class with all series of Parity Preferred, "will be entitled to vote for the election of a total of two additional directors of the Corporation." Ex. A, B at 7. Section 6(b) grants a class vote but does not contain a specific minimum vote requirement for each series of stock. An additional and perhaps more telling contrast is contained in the

combined Tender Offer and Consent Solicitation applicable to both shares. The Offering Circular explains the voting rights in the context of a charter amendment as follows:

> So long as and shares of the 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 Preferred Stock outstanding at the time*, given in person or by proxy, either in writing or at a meeting (voting separately as a single class with all series of Parity Preferred that we may issue upon which like voting rights have been conferred and are exercisable), …amend, alter, or repeal any of the provisions of our Charter so as to materially and adversely affect any preferences…of the Preferred Stock.

Defendants argue that the Offering Circular reflects the understanding and assumption that the Preferred B and C shares would vote as a class. The voting rights of the shares, however, are defined in the Articles Supplementary and cannot be altered by the Offering Circular. While Defendants might prefer that the Articles Supplementary required a vote of two-thirds of Preferred Stock, rather than two-thirds of Preferred B and two-thirds of Preferred C shares, they do not clearly do so. The plain language of the Articles Supplementary calls for "at least two-thirds of the shares of the Series B Preferred Stock outstanding at the time…" in order to approve an amendment, and how the import of those words can be modified by the class voting provision is not self-apparent.

Because section 6(d) of the Articles Supplementary is ambiguous, its meaning cannot be fixed as a matter of law without consideration of extrinsic evidence to determine the parties' intent with regard to the provision. Accordingly, summary judgment will be denied as to Count I.

Count II

Count II of the Complaint attacks the process by which the Articles Supplementary were amended. Plaintiff contends that, even if Impac received enough consents to amend the Articles Supplementary, the amendments are nonetheless invalid because Impac owned Preferred Shares

at the time of the vote on the amendments. The Articles Supplementary provided that any shares of Preferred Stock that shall have been "…otherwise acquired by the Corporation shall, after such … acquisition, have the status of authorized but unissued preferred stock…" Art. Supp §5(f), Ex. A, at 6; Ex. B at 7. Moreover, Maryland law prohibits a corporation from voting shares of its stock that are owned by it. Md. Ann. Code, Corps. & Ass'ns Art. §2-509(b).

Defendants maintain that the consents were executed by the Preferred Shareholders and delivered to Impac prior to Impac's acceptance of the stock for purchase. According to Defendants, the transaction occurred as follows: (1) each shareholder's consent to the amendments, which was expressed by and effective immediately upon the execution of the Consent Letter, and corresponding shares were delivered to the Depositary; (2) the consents and shares delivered by the shareholders became irrevocable on the expiration date and remained irrevocable until "40 business days after the expiration date," or July 25, 2009; (3) after the expiration date, and immediately prior to Impac's acceptance of the shares, the Depositary consented to the amendments on behalf of the requisite amount of shareholders;[15] and (4) the Depositary then transferred the amended shares to Impac.

Plaintiff alleges several flaws in Defendants' purported timing of the transaction. He begins by arguing that the consent proxies and economic interest in the shares were inextricably linked or "bundled." He contends that because the consents and interest were linked and because Impac would not accept any tendered shares without an accompanying consent, the consents were inextricably bundled to the sale of the shares themselves. Defendants do not, and cannot, deny that the offering documents linked the consents to the tendered shares, and the

[15] The Offering Circular provided that, "…if all conditions to the Offer to Purchase and Consent Solicitation have either been satisfied or waived, promptly after the expiration of the Offer to Purchase and Consent Solicitation, we will file Articles of Amendment with the SDAT and then accept for purchase all shares validly tendered and not properly withdrawn by notifying DTC and the Depositary of our acceptance." Ex. D, p.32

Offering Circular and Letters of Transmittal and Consent provide that shareholder proxies were "coupled with an interest in the tendered shares of Preferred Stock." Ex. D at 38. Plaintiff also asserts that the "bundle" of proxy and rights could only be transferred to Impac upon acceptance for purchase.

Plaintiff cites *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377 (Del. 2010) as an analogous "bundle of rights" case in which the court rejected form over substance agreements when assessing whether a sale of stock has taken place. In *Crown*, the court considered whether or not a stock sale violated a Restricted Stock Grant Agreement. Several groups of shareholders were attempting to solicit consents. The consent at issue, solicited by Take Back EMAK, LLC (TBE), was to remove incumbent directors and elect three directors to the board. In order to obtain sufficient consents, a director and representative of TBE entered into an agreement with a shareholder to purchase "…all rights to receive all other shares of the Company that the Seller is or may hereafter be entitled or permitted to sell, transfer or assign…" The agreement also provided an irrevocable proxy to TBE, which TBE used to consent to the TBE solicited proposal. *Id*. at 384. The agreement was intended to and did avoid a restrictive agreement that prevented the shareholder from transferring his shares before a certain date in the future. By requiring the seller to execute an irrevocable proxy and acquiring a future interest in the shares, the buyer obtained the formal voting rights in the shares as well as an economic interest. The court held that, by reconnecting the economic ownership to the voting rights, via the irrevocable proxy, "the Purchase Agreement *immediately* conferred upon [the buyer] the functional equivalent of 'full ownership… There was nothing for [the seller] to transfer to [the buyer] in the future, other than bare legal title." *Id*. at 391. In so holding, the *Crown* court found that the Purchase Agreement violated the Restricted Stock Grant Agreement.

In this case, as in *Crown*, consenting shareholders appointed the Depositary as their attorney-in-fact with respect to the tendered shares of Preferred [B or C] stock, "*such power of attorney being deemed to be an irrevocable power coupled with an interest*, subject only to the right of withdrawal described in the Offering Circular, to (1) deliver the tendered shares of Series [B or C] to the Company…(6) receive all benefits and otherwise exercise all rights of ownership if the tendered shares of Series [B or C] Preferred Stock, all in accordance with the terms and conditions of the Offer to Purchase and Consent Solicitation and (7) to do and perform each and every act and thing whether necessary or desirable to be done, as fully as the undersigned might or could do if personally present at a meeting of stockholders of the Company or otherwise." Ex. E, F at 6 (emphasis added). This case is distinguishable from *Crown*, however, by use of the Depositary. The voting rights and economic interest in *Crown* were transferred together directly from seller to buyer, who voted the shares himself. Here, the shareholders themselves made the decision whether or not to consent. The irrevocable proxy was then transferred to the Depository for delivery, while the remaining interest in the shares was transferred, through the Depositary, to Impac. Consent to the amendments was exercised by the shareholders and the Depositary, but not by Impac, and at no time did *Impac* receive a proxy from the shareholders and decide how to cast the vote.

The economic interest was necessarily delivered after the Depositary exercised the proxy because shareholder consent and delivery thereof by the shareholders and Depositary were essentially conditions precedent to the transfer of the shares.

> A condition precedent has been defined as 'a fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance of a promise arises… The question whether a stipulation in a contract constitutes a condition precedent is one of construction dependent on the intent of the parties to be gathered from the words they have employed and, in case of ambiguity, after resort to the other permissible aids to interpretation.

> Although no particular form of words is necessary in order to create an express condition, such words and phrases as 'if' and 'provided that,' are commonly used to indicate that performance has expressly been made conditional.'

B & P Enterprises v. Overland Equipment Co., 133 Md. App. 583, 606 (2000) (*quoting Chirichella v. Erwin*, 270 Md. 178, 182 (1973)). Generally, when a condition precedent is unsatisfied, the corresponding contractual duty of the party whose performance was conditioned on it does not arise. *Id.* (citing *NSC Contractors, Inc. v. Borders,* 317 Md. 394, 405 (1989); *Laurel Race Course, Inc. v. Regal Constr. Co.,* 274 Md. 142, 154 (1975)). The Transaction Documents clearly indicate that the requisite shareholder consent was a fact, the occurrence of which was required, before Impac had a duty to purchase the shares. There is ample language in the Offering Circular and Letters of Transmittal and consent to support such an interpretation:

- Impac was "not obligated to accept for payment, purchase, or pay for, and may delay the acceptance of, any shares of Preferred Stock tendered pursuant to the Offer to Purchase and Consent Solicitation…, if at any time on or after the date of this Offering Circular and prior to the expiration of the Offer to Purchase and Consent Solicitation, any of the following conditions shall exist: …(d) less than 66 2/3% if the outstanding shares of Preferred Stock…are tendered;…" Ex. D, p.33.

- "If any of the conditions to the Offer to Purchase and Consent Solicitation are unsatisfied on the expiration date and we do not or cannot waive such conditions, the Offer to Purchase and Consent Solicitation will expire and we will not accept for purchase the shares of Preferred Stock that have been validly tendered." Ex. D, p.33.

- "Notwithstanding any other provision of this Offering Circular, purchase of Preferred Stock accepted pursuant to the Offer to Purchase and Consent Solicitation will in all cases only be made after timely receipt by the Depositary of …(ii) the applicable letter(s) of transmittal and consent." Ex. D, p. 37.

The shares could not have been transferred without consent, and consent was a condition precedent to purchase. Accordingly, Impac could not have received the unvoted shares, and it never received or exercised the right to consent to the amendments; rather, it received the full shares, once the condition of the charter amendment had been fulfilled.

Plaintiff next argues that the Letters of Transmittal and Consent "clearly stated that the tender and consent was 'subject to, and effective upon, the acceptance for purchase' of the tendered shares." Complaint, ¶ 58. Such statement is by no means clear. The Letters of Transmittal and Consent state as follows:

> *Subject to and effective upon, the acceptance for purchase of all of the Series B [or Series C] Preferred Stock tendered by this Letter of Transmittal and Consent* in accordance with the terms and conditions of the Offer to Purchase and Consent Solicitation (and authorization to consent thereby delivered), the undersigned hereby tenders, sells assigns, transfers to or upon the order of the Company, all rights, title and interest in and to the shares of Series B [or Series C] Preferred Stock tendered by this Letter of Transmittal and Consent, and releases and discharges the Company from any and all claims the undersigned may have now, or may have in the future, arising out of, or related to, the shares of Preferred B Stock. The undersigned hereby consents to and approves the Proposed Amendments, described in the Offering Circular… The undersigned hereby irrevocably constituted and appoints the Depositary as its agent and attorney-in-fact…"

Ex. E & F, Letters of Transmittal and Consent at 6. The phrase "subject to and effective upon the acceptance for purchase of stock" clearly modifies the first sentence of the quoted paragraph, in which the undersigned "tenders, sells, assigns," or transfers right title and interest in the shares to Impac. Plaintiff asserts that because the economic interest in the shares was bundled with the consent proxies, consent was also "subject to" acceptance for purchase. The plain language of the Letters contradicts Plaintiff's assertion. The phrase is not repeated and it cannot reasonably be read to refer to subsequent sentences in the paragraph, which provide that the undersigned "hereby" consents to the amendments and appoints the Depositary as its attorney-in-fact. To the extent that Plaintiff is arguing that the consent is also subject to and effective upon acceptance for purchase based solely on the language in the preceding sentence, that argument is defeated by the plain language of the contract.

Regardless of the "bundle of rights," Plaintiff also argues that the amendments are invalid because shareholder authorization to the Depositary was revocable. The Complaint alleges that any shareholder consent was not binding until the tendered stock was accepted for purchase because the tendering shareholder could withdraw the tender and consent at any time. This argument is directly contradicted by the language of the Letters of Transmittal and Consent. Impac informed each shareholder that, by executing the Letter of Transmittal and Consent, "… you irrevocably appoint the Depositary and its designees as your attorneys-in-fact and proxies…to the full extent of your rights with respect to your shares of Preferred Stock tendered and accepted for purchase by us." Ex. D, p.38. However, the transaction documents also stated that

> the Preferred Stock tendered pursuant to the Offer to Purchase and Consent Solicitation may be withdrawn and, as a result, the corresponding consent revoked, *at an time on or prior to the expiration date*…and unless theretofore accepted for purchase and not returned as provided for in the Offering Circular, may also be withdrawn after the expiration of 40 business days after the commencement of the Offer to Purchase and Consent Solicitation…

Id. *See also* Exs. E & F, Letters of Transmittal and Consent at 5. This language clearly provides that Preferred Shareholders could revoke consent only on or before the expiration date or forty days after the commencement of the offer. Accordingly, there was a period of time following the expiration date during which the shares and consent were irrevocable, and the consents and tenders were binding as to shareholders during that time.

Even if the consents were irrevocable by the *shareholders*, Plaintiff asserts that the consents were nonetheless revocable by an Impac failure to accept. He asserts, therefore, that the Depositary had no authority to deliver the consents in the absence of Impac's acceptance for purchase. The Offering Circular informed shareholders that appointment of the Depositary as attorney in fact and proxy "will be automatically revoked if [Impac does] not accept for purchase

shares of Preferred Stock that you have tendered." Ex. D, Tender Offer and Consent Solicitation at 38; *See also* Ex. E & F., Letters of Transmittal and Consent at 6 ("Such appointment will automatically be revoked if the Company does not accept for purchase shares of Series B [or C] Stock that a Holder has tendered.") Based upon this language, Plaintiff contends that the Depositary was not authorized to deliver consents to Impac at any time before Impac's acceptance of the shares because at no time was the Depositary assured that its authorization was valid and would not be automatically revoked.[16]

Defendants counter that the automatic revocation provision simply preserved the respective rights of Impac and the tendering shareholders in the event that Impac rejected the tender for any reason, such as bad documentation or a failure to meet the conditions of purchase. According to Defendants, this provision had no bearing on the instruction to the Depositary that the Depositary will be empowered to "consent to the Proposed Amendments with respect to [] shares of Preferred Stock tendered in the Offer to Purchase and Consent Solicitation immediately prior to our acceptance for purchase of the shares of the Preferred Stock that [holders] have tendered." Ex. D at 38.

Considering the transaction documents as a whole, Defendants offer the only plausible interpretation of the language authorizing the Depositary to consent. Under Plaintiff's theory,

[16] The parties disagree about whether or not shareholder execution of the Letters constituted actual shareholder consent sufficient in and of itself to amend the Articles Supplementary. Plaintiff argues that an amendment required either consent or delivery of consent by Depositary, acting on the authority granted to it by the shareholders in the Letters. The Letters provide that the "undersigned understands and agrees that tender of shares of Preferred Stock in the Offer to Purchase and Consent Solicitation will authorize the Depositary to execute and deliver a written consent approving the Proposed Amendments with respect to the shares of Preferred Stock so tendered on the undersigned's behalf." Ex. E& F at 5. The Letters also provide that the "execution and delivery of this Letter of Transmittal and Consent will constitute a Holder's consent to the Proposed Amendments and will also authorize and direct the Depositary to execute and deliver a written consent to the Proposed Amendments on such Holder's behalf…" *Id.* at 3. As the above excerpts indicate, 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 executing the applicable Letter, the Depositary also needed to consent or, at the very least, transmit shareholder consent to Impac.

the Depositary could not consent absent Impac's acceptance of the shares. If that were the case, the language in the transaction documents that requires consent as a condition precedent to acceptance would be rendered meaningless. Plaintiff's argument that consent was only valid upon purchase of the shares is not reasonable in the context of the requirement that consent be complete before purchase. Under Plaintiff's theory, the Depositary could never have consented prior to Impac's acceptance, and Impac could never have accepted prior to the Depositary's consent.[17] Accordingly, no transaction could occur, and the entire purpose of the transaction and documents would be defeated.

Plaintiff also asserts that even if Impac did not directly own the shares held by the Depositary, it owned them indirectly, and was, therefore, prohibited from voting them by Maryland law. Md. Ann. Code, Corps. & Ass'ns Article, §2-509(b) provides:

> (1) Shares of a corporation's own stock owned directly or indirectly by it may not be voted at any meeting and may not be counted in determining the total number of outstanding shares entitled to be voted at any given time unless they are held by it in a fiduciary capacity, in which case they may be voted and shall be counted in determining the total number of outstanding shares at any given time.
> (2) Shares of its own stock are considered owned indirectly by the corporation if owned by another corporation in which the corporation owns shares entitled to cast a majority of all the votes entitled to be cast by all shares outstanding and entitled to vote.

Plaintiff suggests that, by including "indirectly" in section 2-509(b), the General Assembly cast a broad net to cover mechanisms that would evade the statute's purpose. Plaintiff includes in those mechanisms an instance in which a corporation is required, by contract, to purchase its own shares. Plaintiff states that at the expiration of the Tender Offer

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[17] Plaintiff urges the Court to conclude that logical conclusion of his argument is that consent occurred after acceptance. The transaction documents are clear, however, that there could be no acceptance without prior consent: "If any of the conditions to the Offer to Purchase and Consent Solicitation are unsatisfied on the expiration date and we do not or cannot waive such conditions, the Offer to Purchase and Consent Solicitation will expire and we will not accept for purchase the shares of Preferred Stock that have been validly tendered." Ex. D, p.33.

period, there were no conditions of the Tender Offer that had not been met, and accordingly Impac was required to purchase the shares. He argues that Impac owned the entire economic interest and risk in the shares, and was, therefore, the indirect owner of the shares. The problem with this argument is that, as stated above, one condition of the Tender Offer that needed to be satisfied was consent to the amendments. Whether that condition was satisfied at the expiration or shortly after the expiration, it necessarily preceded Impac's ownership of an economic interest in the shares. Accordingly, the shares were not owned by Impac at the time of the vote.

Moreover, there is no evidence that the legislature intended to adopt Plaintiff's broad interpretation of the phrase "indirect ownership" in section 2-509(b)(2). In pursuing the real goal of statutory interpretation, the discernment of the intent of the legislature, the inquiry begins with the words of the statute and, when they are clear and unambiguous, it ends there, as well. A court neither adds nor deletes words to or from a clear and unambiguous statute to give it a meaning not reflected by the words used by the legislature, and will not engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning. *Taylor v. NationsBank, N.A*, 365 Md. 166 (2001). There have been no cases in Maryland interpreting the indirect ownership provision of section 2-509 and a review of the legislative history of the statute provides few clues as to the legislature's intended use of the word "indirectly." A provision similar to the current section 2-509(b) has appeared in the Code dating back to at least 1931. There is no indication in the legislative history, however, as to how "indirectly" is defined, other than the addition of language explicitly defining indirect ownership to mean shares owned by another corporation in which the corporation owns shares entitled to cast a majority of all the votes entitled to be cast by all shares outstanding and entitled to vote.

Several Delaware cases have considered the history of statutes preventing corporations from voting their own shares, which have their origins in common law.[18] *See Speiser v. Baker*, 525 A.2d 1001, 1009 (Del. Ch. 1978)("It is not to be tolerated that a Company should procure stock in any share which its officers may wield to the purposes of an election.")[19]; *In re Best Lock Corp. Litigation*, 845 A. 2d 1057, 1088 (Del. Ch. 2001)("The central evil that both the cases upon which statutes such as Section 160(c) are premised and to which the statute itself is directed, is the use of the corporation's own capital to allow incumbent corporate directors to control the voting of the corporation's stock. Such arrangements deprive holders of the company's voting securities of their proportionate voice in the governance of the enterprise. In their various guises, such arrangements have been condemned by American courts for almost two centuries."). The cases indicate that the harm historically sought to be remedied by corporate voting prohibition statutes involved instances in which the corporation controlled the vote, rather than the actual shares. That harm is not present in this case because the vote outcome was dependent upon on the number of consents tendered by shareholders themselves. In this case, even if the corporation acquired an interest in some shares, it never received any interest in shares of holders, such as Plaintiff, who "voted" "no" by refusing consent. Plaintiff again ignores the fact that the decision of whether or not to consent rested with the shareholder. Thus, Plaintiff's allegation of a technical flaw in the timing of ownership does not amount to an allegation that Impac's indirect ownership influenced the outcome of the vote. Although

[18] These cases interpreted the Delaware statute that is analogous in purpose to section 2-509. *See* 8 Delaware Code §160(c) ("Shares of its own capital stock belonging to the corporation or to another corporation, if a majority of the shares entitled to vote in the election of directors of such other corporation is held, directly or indirectly, by the corporation, shall neither be entitled to vote nor be counted for quorum purposes. Nothing in this section shall be construed as limiting the right of any corporation to vote stock, including but not limited to its own stock, held by it in a fiduciary capacity.") While the language and thus the interpretation of the Delaware statute differs from section 2-509, the general history of similar types of statutes in American law is useful.

Plaintiff alleges that Impac indirectly voted the shares through vote buying and coercion, he makes those allegations under a breach of fiduciary duty standard and not under section 2-509. As the *Bestlock* court stated in dicta, "the fiduciary duty of corporate officers and directors remains as the background protection to shareholder interests against arrangements that, while not violating the language of Section 160(c), nevertheless do improperly deploy corporate assets for the purpose of controlling the vote of the corporation's own stock." *Bestlock*, 845 A.2d at 1090.

Absent any evidence of legislative intent to prohibit a situation in which there was an actual vote by shareholders as a condition precedent to a transfer of shares to the corporation, the court will not extend the statute to construe "indirectly" to include shareholder decisions that are linked to an acquisition of shares by a corporation.

The Breach of Duty Claims

Plaintiff's third count alleges breach of duty claims against Impac and the Individual Defendants. Plaintiff asserts that Impac breached a contractual duty of good faith and fair dealing owed to Plaintiff. "Maryland contract law generally implies an obligation to act in good faith and deal fairly with the other party or parties to a contract," which "governs the manner in which a party may exercise the discretion accorded to it by the terms of the agreement." *Questar Builders, Inc. v. CB Flooring, LLC*, 978 Md. 241, 273 (2009). "[T]he covenant of good faith and fair dealing "does not obligate a [party] to take affirmative actions that the [party] is clearly not required to take under [the contract]… Rather, the duty simply prohibits one party to a contract from acting in such a manner as to prevent the other party from performing his obligations under the contract." *Blondell v. Littlepage*, 413 Md. 96, 114 (2010) (*quoting Parker*

[19] The *Speiser* opinion provides a comprehensive history of statutes prohibiting corporations from voting their own shares.

v. Columbia Bank, 91 Md. App. 346, 366 (1992)). While the duty prohibits a party from doing anything to prevent other parties from receiving the benefits and entitlements of the agreement, it "is not understood to interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise." *Parker*, 91 Md. App. at 366.

Defendants argue, correctly, that the Articles Supplementary explicitly permitted material, adverse amendments, provided that such amendments were approved by two-thirds of the Preferred shareholders. Accordingly, the parties clearly contemplated the risk that Impac might propose amendments that would materially and adversely affect the Preferred Shareholders' rights under the Articles Supplementary. The contract contained an express voting requirement designed to protect shareholders' rights in the event of an adverse amendment. While Impac may have been required to act in good faith to allow a fair vote on the amendments, once a fair vote occurred, the duty of good faith and fair dealing did not require Impac to relinquish its contract rights to amend the Articles. The court will not add a new contractual obligation to limit material and adverse amendments that are expressly allowed in the contract. *Parker, supra*. Absent a finding that Impac used unfair or illegal measures to accomplish the amendments, in the form of vote buying or coercion, Plaintiff has not demonstrated that Impac acted in any way to frustrate the purpose of or the parties' expectations under the contract.

Breach of Fiduciary Duty

Plaintiff asserts that the individual Defendants breached fiduciary duties owed to Plaintiff and the Preferred Shareholders by engaging in illegal vote buying, impermissible coercion, and self-dealing. Without identifying a particular fiduciary duty that the Individual Defendants owed him, he contends that directors of a corporation have a general duty to ensure fair voting

procedures. He argues that based upon this general duty, the court can inquire into whether the directors abided by the relevant ground rules in conducting a vote. Although Plaintiff does not cite binding Maryland authority that clearly establishes a duty to ensure a fair vote, at least one other Maryland trial court has considered Delaware law persuasive on this point. *Shaker v. Foxby Corp.*, 2005 Md. Cir. Ct. LEXIS 16 (Cir. Ct. Balt. City March 15, 2005). The *Shaker* Court relied upon a Delaware case, which held that "[i]n the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards of providing for and conducting corporate elections." *Id.* (*quoting Aprahamian v. HBO & Company*, 531 A.2d 1204 (Del. Ch. 1987)). The *Shaker* court was persuaded that Maryland courts would recognize similar protections of shareholder voting rights and denied a motion to dismiss a claim that alleged unfair voting procedures based upon certain notice provisions in Foxby's by-laws.

Defendants argue that Plaintiff cannot assert a breach of duty claim because preferred stock rights are governed solely by contract, rather than by fiduciary duties. While Defendants are correct that rights that are conferred solely upon the preferred shareholders by the express terms of the charter are contractual in nature, "preferred shareholders share the same right as common shareholders to be free from wrongful coercion in a stockholder vote." *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 117 (Del. Ch. 2007). Defendants also question whether Plaintiff has successfully pleaded a breach of duty as a stand-alone claim and assert that Plaintiff has failed to overcome the presumption granted by the business judgment rule that the Impac directors acted in good faith and in the best interests of the company. Md. Ann. Code, Corps. & Ass'ns. Art. section 2-405.1(e). A lengthy analysis of the applicability of

the Business Judgment Rule to this case in unnecessary, however, because Plaintiff has not demonstrated that the vote was tainted by illegal vote buying or impermissible coercion.

Illegal Vote Buying

Plaintiff asserts that the tender offer and consent solicitation constituted illegal vote buying. Vote-buying is "simply a voting agreement supported by consideration personal to the stockholder, whereby the stockholder divorces his discretionary voting power and votes as directed by the offeror." *Schreiber v. Carney*, 447 A.2d 17, 23 (Del. Ch. 1982). Although vote buying is not necessarily illegal, it must be examined in light of its object or purpose, *Id.* at 25, and vote-buying "is illegal per se if its object or purpose is to defraud or disenfranchise" voters. *Id.* at 24. Plaintiff argues that the tender offer and consent solicitation here disenfranchised shareholders because Impac indirectly voted the shares.

Plaintiff begins his analysis with the argument that the alleged vote-buying in this transaction was impermissible because it prevented Plaintiff from relying on the independent judgment of his fellow shareholders. He cites, among other cases, *Chew v. Inverness Management Corporation*, 352 A. 2d 426, 430 (Del. Ch. 1976)("any agreement by a stockholder to sell his vote or to vote in a certain way, for a consideration personal to himself is contrary to public policy and void") and *Macht v. Merchants Mortgage & Credit Co.*, 194 A. 19 (Del. Ch. 1937)("To allow voting rights that are bought to be exercised is against public policy, and would be in fraud of the other stockholders."). To the extent that Plaintiff is relying on the policy rationale underlying the rule that vote-buying is *per se* illegal, it has been rejected. The *Schreiber* court rejected as obsolete the notion that each stockholder is entitled to the personal judgment of each other stockholder (and that any agreement among stockholders frustrating it is invalid). *See Schreiber v. Carney*, 447 A.2d at 25 (citing 5 Fletcher *Cyclopedia Corporations*

(Perm. Ed.) §2066. Finding that such a rationale is both impracticable and impossible for modern corporations, the court chose instead to focus on the reason for the vote buying transaction. *Id*. Moreover, absent fraud or disenfranchisement, "Maryland stockholders have the right "to cast [their] votes, or to grant a proxy or otherwise transfer [their] right to vote, in any way [they] decide[] and for any reason or no reason." *Hudson v. Prime Retail*, *supra*, 2004 Md. Cir. Ct. LEXIS 26 at*43.

Plaintiff's argument that the purpose of the transaction in this case was disenfranchisement fails because all preferred shareholders were offered the same deal and therefore an opportunity to vote on that deal. Plaintiff asserts that Impac controlled the vote and had "an economic interest that was diametrically opposed to the preferred shareholders who would continue to own their own shares and be affected by the outcome." Plaintiff argues further that, as a result of Impac's vote-buying, Impac's interest in voting the shares of the tendering shareholders were not aligned with the remaining preferred holders. What Plaintiff fails to acknowledge is that, regardless of Impac's interest in the outcome of the vote, each individual shareholder retained the ability to accept or reject Impac's offer. Plaintiff asserts that tendering shareholders were asked to consent to amendments in which they had no interest, and which would adversely affect only the non-tendering shareholders. At the time the consents were executed, however, all of the Preferred Shareholders had the same economic interest in the outcome of the transaction as he did. That some Preferred holders made a different decision than Plaintiff does not mean that they were not given an offer on the same terms as Plaintiff. In essence, preferred stockholders here could rely upon the independent judgment of other stockholders to take or reject the Impac offer upon the same terms offered to every stockholder. Accordingly, this case is distinguishable from those in which a small stockholder is

disenfranchised because his vote will be overshadowed by the swing vote of a large stockholder whose vote alone has been bought. At least one court has held that a public offer to all holders on the same terms and conditions precludes a conclusion that the offer disenfranchises any vote. *Kass v. Eastern Airlines, Inc.*, 1986 Del. Ch. LEXIS 486 at *12 (Del. Ch. Nov. 14, 1986). It is difficult for Plaintiff to argue that any Preferred Shareholder was disenfranchised in a transaction that depended on the outcome of a vote of all Preferred Shareholders, each of whom shared Plaintiff's economic interest in the transaction and was aware of and able to consider the terms of the offer.

Coercion

Plaintiff has also failed to show that the Tender Offer and Consent Solicitation were impermissibly coercive. Maryland courts have not considered a coercion claim of this nature. Under Delaware law, the "standard applicable to the [preferred shareholder's] claim of inequitable coercion is whether the defendants have taken actions that operate inequitably to induce the preferred stockholders to tender their shares for reasons unrelated to the economic merit of the offer." *Gradient O.C. Master, Ltd.,* 930 A.2d at 117, quoting *Eisenberg v. Chicago Milwaukee Corp.,* 537 A.2d 1051, 1061 (Del. Ch. 1987). Two classes of situations have been found to deprive a tender offer of its voluntary nature: cases involving materially false and misleading disclosures, and cases where the offer, by reason of its terms or the circumstances under which it is made, is wrongfully coercive. *Eisenberg,* 537 A.2d at 1056.

Plaintiff argues that the Impac tender offer and consent solicitation transaction falls under the second class of coercive transactions because it was structured to coerce the preferred holders

to tender due to the threat of elimination of their dividend and preference rights.[20] He relies on several cases in which courts have found inequitable coercion to exist. He cites *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103 (Del. Ch. 1986) as a case in which the court made a factual finding that a self-tender offer was coercive because:

> a Current shareholder who elects not to tender into the self-tender is very likely, upon consummation of the Company Transaction, to experience a substantial loss in the market value of his holdings." The only way, within the confines of the Company Transaction, that a shareholder can protect himself from such and immediate financial loss, is to tender into the self-tender so that he receives his pro rata share of the cash distribution…

Id. at 113. That language may support Plaintiff's theory at first glance, but *AC Acquisitions* is distinguishable from this case because the self-tender at issue was a board's defensive measure to an outside tender offer, which the court considered under the standard announced in *Unocal Corp v. Mesa Petroleum Co., 493 A.2d 946* (Del. 1985).[21] The court found that the otherwise reasonable self-tender was responsive to and coerced shareholders away from the outside offer. *AC Acquisitions* at 114. The court acknowledged that a board is entitled to respond to an outside tender offer. "But, *in that special case* [of a response to an outside offer], a defensive step that includes a coercive self-tender timed to effectively preclude a rational shareholder from accepting an any-and-all offer cannot … be deemed to be reasonable in relation to any minimal threat posed by stockholders by such offer." *Id*. (emphasis added). Thus, although the *AC Acquisitions* court made a factual finding of coercion, the self-tender was invalidated as an

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[20] In a footnote to his Opposition, Plaintiff says that he does not concede that the disclosures in the Transaction Documents were accurate. He does not, however, assert any facts or make an argument to support a conclusion that the disclosure was materially false or misleading.

[21] *Unocal* created a two-pronged test to measure a board's action designed to defeat a threatened change in control. *AC Acquisitions*, 519 A.2d at 111 (*citing Unocal*, 493 A.2d at 954). Under *Unocal*, there must be some basis the for board to conclude that a proper corporate purpose is served by implementation of the defensive measure, and the measure must be reasonable in relation to the threat posed by the change in control that instigates the action. *Id.*

unreasonable and unfair defensive measure under *Unocal*, and does not support Plaintiff's theory that any offer which reduces share value for those who do not accept is coercive.

Plaintiff suggests that the court in *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051 (Del. Ch. 1987) concluded that a self-tender for preferred shares was inequitably coercive when the directors "disclosed that they intended to seek to eliminate a valuable attribute of the preferred stock, namely its NYSE listing." *Id.* at 1061. The decision in *Eisenberg*, however, was based upon the *threat* that the directors intended to seek delisting, rather than a simple disclosure that the shares could be delisted. The court found that the timing of the offer to coincide with the lowest stock price levels in four years and the business judgment of the directors not to pay dividends alone were not enough to make the offer inequitably coercive, even though they reduced preferred stockholders' ability to realize return on their investment for the foreseeable future. The problem was that the *only apparent purpose* of the disclosure of the company's intent to delist the shares was to induce shareholders to tender, and "on that basis" the court concluded that the offer was inequitably coercive. *Id*. at 1062.

E.P. Kahn v. United States Sugar Corporation, 11 Del. J. Corp. L. 908 (Del.Ch. 1985), is similarly unpersuasive. The *Kahn* court found that a corporation's self-tender offer was coercive because of the highly leveraged nature of the transaction, but the court did not engage in a detailed coercion analysis and also found failures in the corporation's disclosures regarding the tender offer price. *Id.* at 917. Notably, the court did *not* find statements in the proxy, which indicated that stockholders who did not tender would end up owning shares with a greatly diminished value, to have been inadequate, improper, or coercive. *Id*. at 918.

Plaintiff urges the court to adopt a rule, based upon the holdings in *AC Acquisitions*, *Eisenberg*, and *Kahn,* that any transaction in which a failure to tender leaves a holder with

securities that are significantly devalued creates a situation in which shareholders are inequitably coerced into tendering their shares. Because those holdings relied in part on the unique factual circumstances concerning the transactions at issue, the court declines to adopt Plaintiff's expansive reading of those cases, and will not adopt a black letter rule under which any transaction that leaves non-tendering holders with shares of diminished value, without more, is inequitably coercive.

Defendants rely heavily on *Katz v. Oak Industries, Inc.*, 508 A.2d 873 (Del. Ch. 1986), *In Re General Motors Class H Shareholder Litigation*, 734 A.2d 611 (Del. Ch. 1999) and *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104 (Del. Ch. 2007). *Katz* involved an exchange offer for certain debt securities that was conditioned on the consent of tendering security holders to proposed amendments that removed significant negotiated protections to the Company's long term debt. The tenders and the amendments were necessary to achieve a reduction in debt, which was a condition to an acquisition and stock purchase agreements that provided a much needed influx of cash to the struggling company. The plaintiff sought to enjoin the exchange offer and consent solicitation on the ground that it forced bondholders to tender and consent, and benefitted Oak's common stockholders at the expense of debt securities holders. *Id.* at 878. The court held that duties to bondholders are contractual in nature and not fiduciary, and that no legal wrong exists, therefore, in maximizing shareholder benefit at the expense of bondholders, absent some requirement to that effect in the contract. The court also concluded that the linking of the exchange offer and consent solicitation did not involve the risk that bondholder interest will be affected by a vote involving anyone with a financial interest in the subject of the vote, other than a bondholder's interest – "not only will proposed consents be granted or withheld only by those with a financial interest to maximize the return on their

investment in Oak's bonds, but the incentive to consent is equally available to all members of each class of bondholders." *Id*. at 881. Ultimately, the exchange offer's success depended upon the ability and willingness of the issuer to extend an offer that will be a financially attractive alternative to holders. *Id*.

The *General Motors* court reviewed a complex merger transaction that required the shareholders at issue to approve a merger that waive charter protections which would otherwise have been available to them. The court rejected a coercion claim where it was alleged that shareholders were forced to choose between acquiescing to a unilateral elimination of lucrative recapitalization rights or blocking the transaction and squandering the potentially enhanced stock values realizable therefrom. *Id*. at 620. The plaintiff also argued that, due to a change in tax law, any future transaction would have a less favorable tax treatment than the one that was up for a vote. The transaction was not coercive because the stockholders had a free choice between maintaining their current status and taking advantage of the new status offered by the transaction. *Id*. at 621. The court distinguished cases in which there was a threat of retribution if the transaction *was defeated* because such threats left the stockholders with a choice between a new position and a compromised position. *Id*.

Gradient involved a share exchange in a complex debt restructuring of an overly leveraged company. The plaintiffs, preferred shareholders, contended that the transaction was impermissibly coercive because depending on the level of participation in the offer, preferred shareholders faced the devaluation of their shares caused by an elevation of other shares, elimination of certain protective covenants, or both. The plaintiffs asserted that any elevation would push them "out of the money." The court considered numerous coercion cases, including the cases cited by Plaintiff and Defendants here and found that the exit consents were not

actionably coercive. The court characterized the coercion allegation as the plaintiffs' attempt to "put one foot in a new bargain, and still keep the other foot in the previous game by hedging, through the related covenant protection, the original bargain." *Id.* at 122. Shareholders, "in the aggregate, [were] free to choose between accepting new debt securities (by tendering one's shares) or staying in one's place (and refusing to tender)." *Id.* If the required number of shareholders tendered, "elimination of non-tendered shares covenants [was] merely an effect of the reality that a majority of the [preferred] peers have disagreed with the non-tendering shareholders and concluded that accepting the Exchange Offer is in their best interest." *Id.* With regard to the elevation provision, the court noted that plaintiffs did not have the right, as one of the options available to them to maintain the status quo. The result is that they must choose between two alternatives, both of which have pros and cons depending on each investor's views as to the prospects of the company. *Id.* at 124.

In this case, plaintiff is correct that the non-tendering shareholders would be left with devalued shares if the offer were successful. The outlook for the Preferred shares, however, was not particularly bright prior to the Tender Offer and Consent Solicitation. The value of the Preferred Shares had decreased significantly prior to the offer, the stock had been delisted from the New York Stock Exchange, and Impac had not paid dividends for several quarters. Preferred holders were, in the aggregate, required to choose between accepting approximately $0.29, plus the payment of outstanding dividends, in exchange for their shares, or maintaining their already devalued position by rejecting the offer. The fact that enough shareholders chose to tender their shares in order to make the transaction successful is a reflection of their view as to the prospects of Impac and the value of the Preferred shares. Nearly one third of the Preferred Shareholders had a different view of the Preferred stock's prospects and decided to take their

chances that the value of the Preferred stock would improve. Although Impac stated that non-tendering holders would hold an illiquid investment indefinitely, such a statement reflected the truth of the outcome of a successful transaction rather than a threat of company action in reaction to a particular outcome of the vote. Absent a black letter rule that any possible devaluation of shares following a tender offer dictates a finding of inequitable coercion, Plaintiff has not alleged any facts to show that the tendering Preferred shareholders were actionably coerced.

Finally, Plaintiff has abandoned any stand-alone self-dealing claim he may have alleged. He merely states that Impac's management personally profited from their fiduciary breach and that the purpose of the Individual Defendants' scheme was to redistribute value from the hands of the Preferred Stockholders to the hands of the common stockholders. He makes no further argument other than a footnote, in which he states that *Eisenberg*, *AC Acquisitions*, and *Kahn* all indicate that designing a coercive tender offer is a fiduciary breach, even when there is no director self-interest.

Absent a basis to find that Impac or the other defendants unfairly influenced the vote to approve the Tender Offer and Consent Solicitation, Plaintiff's breach of duty claims fail. Accordingly, judgment will be granted in favor of all Defendants with regard to Count III.

<u>The Breach of Contract Claims in Counts IV and VI</u>

Plaintiff's breach of contract claims in Counts IV and VI are based upon Defendants' actions after the Tender Offer and Consent Solicitation, which violated the provisions of the Articles Supplementary as they existed prior to the Amendments that were purportedly enacted as a part of the Tender Offer and Consent Solicitation. In Count IV, Plaintiff alleges that Defendants breached the Articles Supplementary by repurchasing shares in the fourth quarter of

2009 without paying cumulative dividends. In Count VI, Plaintiff alleges that the preferred shareholders are immediately entitled to elect two directors to Impac's board of directors because Impac has failed to pay dividends for six consecutive quarters. The parties agree that, under the Articles Supplementary as they existed prior to the purported amendments, Impac's failure to pay dividends would prevent a stock repurchase and would entitle the preferred shareholders to elect two directors to the board. Defendants assert that the Articles Supplementary were amended and that the amended Articles removed the protections for the preferred stock upon which Plaintiff relies in Counts IV and VI. Because the court has denied summary judgment on Count I, the issue of whether the Articles Supplementary were validly amended is open, and judgment cannot be granted on Counts IV and VI on this basis. Accordingly, summary judgment on Counts IV and VI will be denied.

<u>Count V: Punitive Damages</u>

In Count V, plaintiff seeks punitive damages. Plaintiff acknowledges that recovery of punitive damages requires a showing of actual malice, which is present when a defendant acts with the purpose of deliberately and willfully injuring the plaintiff. *See, e.g., Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249 (2004). Plaintiff seeks to meet this standard through allegations that Defendants intended to injure holders of Preferred B and Preferred C shares by stripping them of all of their economic rights. Apart from the fact that conclusory allegations are insufficient to state a claim under Maryland pleading standards, these allegations are insubstantial, and simply seek, without a colorable basis in fact, to convert a garden variety breach of contract claim into a claim for punitive damages. *Cf. Wills Family Trust v. Alloy*, 2009 Md. Cir. Ct. LEXIS 1 * 12 (January 23, 2009). Therefore, summary judgment will be granted for defendants on this claim.

Conclusion

For these reasons, summary judgment for all defendants will be granted on Counts II, III, and V. Summary judgment for all defendants other than Impac will be granted on Counts I, IV and VI. Summary judgment on the claims asserted against Impac in Counts I, IV and VI will be denied. A separate order will be entered.

Dated: January 28, 2013 /s/

Judge W. Michel Pierson