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11 Attorneys for Defendants/Third-Party Claimants
12 Impac Secured Assets Corp., Impac Funding Corporation
13 and Impac Mortgage Holdings Inc.

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 CITIGROUP GLOBAL MARKETS INC.,
17 a New York corporation,

18 Plaintiff,

19 vs.

20 IMPAC SECURED ASSETS CORP., a
21 California corporation; IMPAC FUNDING
22 CORPORATION, a California corporation;
23 IMPAC MORTGAGE HOLDINGS INC., a
24 Maryland corporation; and DOES 1-100,

25 Defendants.

26 IMPAC SECURED ASSETS CORP., a
27 California corporation; IMPAC FUNDING
28 CORPORATION, a California corporation;
IMPAC MORTGAGE HOLDINGS INC., a
Maryland corporation,

Third-Party Claimants,

vs.

Case No. CV11-4514 MRP (JCx)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
APPROVAL OF SETTLEMENT AND
DETERMINATION OF
REASONABLENESS PURSUANT TO
SECTION 3(A)(10) OF THE
SECURITIES AND EXCHANGE ACT
OF 1933**

Date: January 24, 2013

Time: 1:30 p.m.

Ctrm: 12

Complaint Filed: May 25, 2011
Trial Date: None Set



1 THACHER PROFFITT & WOOD LLP, a
2 New York Limited Liability Partnership;
3 RICHARD SIMONDS JR., an individual,
4 VINTAGE FILINGS LLC, a New York
5 Limited Liability Company, and ROES 1 –
6 10,

7 Third-Party Defendants.

8 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

9 **PLEASE TAKE NOTICE** that on January 24, 2013 at 1:30 p.m., or as soon
10 thereafter as the matter may be heard, in Courtroom 12 of the United States District
11 Court of the Central District of California before the Honorable Mariana R. Pfaelzer,
12 312 N. Spring Street, Los Angeles, California, 90012, Defendants Impac Mortgage
13 Holdings, Inc., Impac Funding Corporation, and Impac Secured Assets Corp.
14 (collectively “Impac”) hereby move the Court for an Order approving the settlement
15 agreement (the “Settlement Agreement”) between Plaintiff, Citigroup Global Markets,
16 Inc. (“CGMI”) and Impac, as well as a determination by the Court, pursuant to section
17 3(a)(10) of the Securities Act of 1933 (hereafter “Section 3(a)(10)”), that the terms of
18 the Settlement Agreement, including the terms and conditions of the proposed issuance
19 of stock to CGMI, are fair as to CGMI.

20 This motion (the “Approval Motion”) is based on this Notice of Motion, the
21 following Memorandum of Points and Authorities, the concurrently filed declaration of
22 Paul A. Christensen, the papers, records, and pleadings on file with the Court in this
23 matter, and such other matters the Court deems appropriate for consideration.

24 This Approval Motion is made following lengthy negotiations between CGMI
25 and Impac which culminated with the December 20, 2012 execution of the Settlement
26 Agreement, and the parties’ agreement therein to mutually request the Court’s approval
27 and determination of fairness as to the terms and conditions of the Settlement
28 Agreement under Section 3(a)(10).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The purpose of this Approval Motion is to obtain: (1) approval by the Court of the Settlement Agreement between CGMI and Impac; and (2) a determination by the Court that the terms and conditions of the issuance and exchange of securities in IMH, as provided for in the Settlement Agreement, are fair as to CGMI for purposes of section 3(a)(10) of the Securities Act of 1933, which provides for an exemption from registration under circumstances such as this, where shares are issued in connection with a settlement agreement. Under section 3(a)(10), the Court may determine that the issuance of securities as payment to settle a claim is fair, provided that the party for which the securities will be issued (CGMI) has an opportunity to be heard. Here, CGMI and Impac both believe the Settlement Agreement, including the terms and conditions for issuance of IMH shares to CGMI, is fair as to CGMI. After several months of negotiations, with each side represented by litigation counsel and securities counsel, on December 20, 2012, CGMI and Impac finalized the Settlement Agreement whereby CGMI will receive consideration over time either by cash installments or through the issuance of Impac Mortgage Holding (“IMH”) common stock, or a combination of cash and stock. In the Settlement Agreement, CGMI agreed that it shall either “join in” the instant Approval Motion “or submit a separate request that the Court grant such approval and determination.” Settlement Agreement, ¶ 9. Pursuant to the Settlement Agreement, Impac requests the Court approve the Settlement Agreement and issue a determination that it is fair as to Citigroup.

II. FACTUAL BACKGROUND

On or about May 25, 2011, CGMI filed the above-captioned lawsuit against Impac, alleging violations of sections 18 and 20 of the Securities and Exchange Act of



1 1934, as well as state law claims for negligent misrepresentation related to a pooling
2 and servicing agreement for the 2007-3 Impac Secured Assets Trust. Dkt. No. 1. On
3 May 3, 2012, the Court granted CGMI’s motion for partial summary judgment as to
4 Impac’s liability. Dkt. No. 100. This ruling left open several issues, including a
5 potential award of damages, costs, and attorneys’ fees. On August 21, 2012, CGMI
6 filed a motion for summary judgment as to damages, seeking a damages award of
7 nearly four million dollars. Dkt. No. 128. On October 2, 2012, Impac filed an
8 opposition to CGMI motion. Dkt. No. 136. During this same time period, the parties
9 were engaging in settlement discussions which ultimately resulted in the Settlement
10 Agreement.

11 On December 20, 2012, the Settlement Agreement was executed by CGMI and
12 Impac. The Settlement Agreement is premised on mutual consideration, including
13 Impac’s promise to pay CGMI \$3.1 million in stock and/or cash, and CGMI’s
14 agreement to release its claims against Impac as provided in the Settlement Agreement.
15 *See* Declaration of Paul A. Christensen (“PAC Decl.”) Exh. 1. On December, 21, 2012,
16 the parties filed a joint notice of settlement and stipulation for approval of the
17 Settlement Agreement, as well as a request to remove the partial summary judgment
18 motion from the Court’s calendar. Dkt. No. 146. That same day, Impac submitted a
19 “no-action request letter” to the SEC, as also required by the Settlement Agreement,
20 requesting the SEC confirm: (a) that its staff “will not recommend any enforcement
21 action” if, following approval of the Settlement Agreement and its fairness by the
22 Court, the parties proceed with the issuance and sale of shares as contemplated by the
23 Settlement Agreement; and (b) that its staff “concur[s] with” CGMI’s and Impac’s view
24 that the procedures contemplated by the Settlement Agreement are in conformity with
25 the rules and provisions of the Securities Act. *See* PAC Decl. Exh. 2.

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1 Via this Approval Motion, the parties now request that the Court conduct a
2 hearing and, after such hearing, approve the Settlement Agreement and issue a
3 determination that it is fair as to CGMI for purposes of section 3(a)(10).

4
5 **III. THE SETTLEMENT AGREEMENT IS FAIR AS TO CITIGROUP**

6 As CGMI and its sophisticated securities and litigation counsel all agree, the
7 Settlement Agreement, including the terms and conditions for the issuance of IMH
8 stock to CGMI thereunder, are fair as to CGMI. Section 3(a)(10) provides, in pertinent
9 part, that registration and other requirements of the Securities Act “shall not apply to”:

10 any security which is issued in exchange for one or more bona
11 fide outstanding . . . claims . . . where the terms and
12 conditions of such issuance and exchange are approved, after
13 a hearing upon the fairness of such terms and conditions at
14 which all persons to whom it is proposed to issue securities in
15 such exchange shall have the right to appear, by any court...
16 of the United States... authorized by law to grant such
17 approval.

18 15 U.S.C.A. § 77c (10). Section 3(a)(10) allows securities to be issued (as here) as part
19 of a resolution of a claim against the issuer, provided the Court determines the issuance
20 of the securities is fair as to the party receiving the securities. See Staff Legal Bulletin
21 No. 3A (CF) (June 18, 2008) See PAC Decl. Exh. 3. Additionally, issuers may make a
22 no-action request with the Division of Corporation Finance to ensure section 3(a)(10)’s
23 exemption may be utilized. Courts reviewing the “fairness” of the terms of a settlement
24 must: (i) find that the terms and conditions of the exchange are fair as to those to whom
25 the securities will be issued (here only CGMI); and (ii) be advised before the hearing
26 that the issuer will rely on the Section 3(a)(10) exemption based on the court’s approval
27 of the transaction (an element satisfied by the filing of this motion). *Id.* The Court’s
28



1 determination must be made after a hearing which is open to all persons to whom
2 securities will be issued in the proposed exchange (*i.e.*, to CGMI), and the persons
3 receiving the securities through such issuance must receive adequate notice and must
4 not be impeded from appearing. *Id.*

5 These requirements are met here and/or will be met at the proposed hearing. Per
6 the terms of the recently executed Settlement Agreement, the parties have agreed that
7 Impac shall issue shares of IMH common stock to CGMI (and/or make cash payments
8 to CGMI) in exchange for certain consideration from CGMI, including the release of its
9 claims against Impac under the terms set forth in the Settlement Agreement. CGMI is
10 the sole recipient of IMH shares to be issued under the Settlement Agreement and
11 agreed in the Settlement Agreement to seek the relief requested herein either by joining
12 this motion or submitting a separate request that the Court grant such approval. CGMI
13 has adequate notice of the hearing for this Approval Motion via the Court's electronic
14 case-filing (ECF) system, and will be allowed to appear and be heard at the hearing. By
15 agreeing to the terms of the Settlement Agreement CGMI has confirmed its belief that
16 the terms and conditions of the Settlement Agreement, including those related to the
17 issuance of IMH shares to CGMI, are fair. Additionally, by virtue of this Approval
18 Motion, the Court has been advised that Impac will rely on the Section 3(a)(10)
19 exemption based on the Court's approval of the transaction.

20 21 **IV. CONCLUSION**

22 For the reasons set forth above, and in accordance with Section 3(a)(10) of the
23 Securities Act of 1933, Impac respectfully requests that this Court enter a written order:
24 (i) approving the Settlement Agreement between CGMI and Impac; and (2) making a
25 determination that the terms and conditions of the issuance and exchange of securities
26 in IMH provided for in the Settlement Agreement are fair as to CGMI.

1 Dated: January 3, 2013

2 CALL & JENSEN
3 A Professional Corporation
4 Mark L. Eisenhut
5 Paul A. Christensen

6 By: s/ Mark L. Eisenhut
7 Mark L. Eisenhut

8 Attorneys for Defendants/Third-Party Claimants
9 Impac Secured Assets Corp., Impac Funding
10 Corporation and Impac Mortgage Holdings Inc.
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