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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Lawrence B. **SEIDMAN**, Plaintiff-Respondent,
v.
SPENCER SAVINGS BANK, S.L.A.; Raymond Baumkirchner; Gerald M. Bedrin; Joseph C. D'Autorio; Mildred P. Damiano; Jose B. Guerrero; Peter J. Hayes; Everett E. Kunkel; Nicholas Lorusso; and Robert Motta, Defendants-Appellants.
In re Application Pursuant to N.J.S.A 17:12b-38, Et Seq. for Approval of Amendments to **Spencer** Savings Bank, S.L.A.'s Bylaws in Sections 31 and 46.
Lawrence B. **Seidman**, Plaintiff-Appellant,
v.
Spencer Savings Bank, S.L.A.; Raymond Baumkirchner; Gerald M. Bedrin; Joseph C. D'Autorio; Mildred P. Damiano; Jose B. Guerrero; Peter J. Hayes; Everett E. Kunkel; Nicholas Lorusso; and Robert Motta, Defendants-Respondents.

Argued Oct. 21, 2009. ☐ Remanded Nov. 9, 2009. ☐ Re-argued April 28, 2010. ☐ Decided July 27, 2010.

West KeySummary

1 **Banks and Banking**
Incorporation and Organization
Banks and Banking
Officers and Agents
Building and Loan Associations
Amendment or Repeal
Building and Loan Associations
Wrongful Acts

Directors of savings bank, a mutual association governed by the Savings and Loan Act, breached their fiduciary duty to depositors by adding an amendment to a bylaw in an attempt to keep outside investors from gaining participation on the board. The bylaw amendment had no rational relationship to any of the issues involving bank governance and created a barrier against the efforts of depositors to gain a seat for themselves on the board of directors if they were unknown to the current nominating committee.

On appeal from the Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-190-04 (A-0167-07T2 and A-1343-07T2) and the New Jersey Department of Banking and Insurance (A-1036-07T2).

Attorneys and Law Firms

Michael M. Horn and Richard A. Beran argued the cause for appellants (A-0167-07T2)/respondents (A-1036-07T2 and A-1343-07T2) **Spencer** Savings Bank, S.L.A.; Raymond Baumkirchner; Gerald M. Bedrin; Joseph C. D'Autorio; Mildred P. Damiano; Jose B. Guerrero; Peter J. Hayes; Everett E. Kunkel; Nicholas Lorusso and Robert Motta (McCarter & English, LLP, attorneys; Mr. Horn, of counsel; Mr. Beran and Steven A. Beckelman, on the brief).

Peter R. Bray argued the cause for respondent (A-0167-07T2)/appellant (A-1036-07T2 and A-1343-07T2) Lawrence B. **Seidman** (Bray, Miller & Bray, L.L.C., attorneys; Mr. Bray on the brief).

Gregory M. McHugh, Deputy Attorney General, argued the cause for respondent (A-1036-07T2) New Jersey Department of Banking and Insurance (Paula T. Dow, Attorney General, attorney; Melissa H. Raksa, Deputy Attorney General, of counsel; Sharon L. Young, Deputy Attorney General, on the brief).

Before Judges STERN, SABATINO, and J.N. HARRIS.

Opinion

PER CURIAM.

*1 These three consolidated proceedings involve the corporate governance-specifically, the nomination of directors-of a vanishing species among New Jersey's thrift financial institutions: a mutual savings and loan association. The litigation includes journeys to both the Chancery Division and the New Jersey Department of Banking and Insurance. This appeal constitutes the third review of the main

parties' dispute by this court. *See* ***Seidman*** *v.* ***Spencer*** *Sav. Bank, S.L.A.*, No. A-3899-04T5 (App.Div. March 23, 2006) (***Seidman*** *1*); ***Seidman*** *v.* ***Spencer*** *Sav. Bank, S.L.A.*, No. A-0167-07T2, A-1036-07T2, and A-1343-07T2 (App.Div. Nov. 9, 2009) (***Seidman*** *2*).[1] Because we fully explained the procedural backdrop and detailed the factual landscape of these appeals in ***Seidman*** *2*, we will not repeat them again here, except in a summary fashion to the extent necessary in order to explain our rulings. After a thorough appraisal of the entire record-particularly with the beneficial assistance of the thoughtful and comprehensive arguments put forth by the parties-we affirm in all respects.

1 Our citation to these unpublished opinions is permitted by *Rule* 1:36-3's recognition of such use in order to identify the appeals' history.

I.

Distilled to its essence, plaintiff Lawrence B. **Seidman** challenges as anti-democratic the adoption and implementation of several by-law amendments put into effect by defendant **Spencer** Savings Bank, S.L.A. (**Spencer**) and its board of directors in 2004 and 2007.[2] These amendments were all approved by the Commissioner of the New Jersey Department of Banking and Insurance (DOBI) as required by *N.J.S.A.* 17:12B-39. Nevertheless, plaintiff asserts that the effect of the amendments works to dilute and disenfranchise the voting rights of **Spencer's** members.

2 **Spencer** is a mutual association governed by the Savings and Loan Act (1963), *N.J.S.A.* 17:12B-1 to -319 ("the SLA"). *See N.J.S.A.* 17:12B-5(31). It operates subject to the examination, inspection, and supervision of the New Jersey Department of Banking and Insurance, *N.J.S.A.* 17:12B-172, through the DOBI's Division of Banking, *N.J.A.C.* 3:3-1.2.

Prior to these amendments, **Spencer's** By-Law 31-relating to nominations for a director's position-commanded that no individual shall be eligible for election unless he or she shall have been nominated in writing either by a majority of the board or by ten percent or more of the votes entitled to be cast by **Spencer's** members. Members were defined as "those in whose names accounts are established either as savings members or borrowing members." *N.J.S.A.* 17:12B-74. Each member enjoyed one vote, regardless of the number of accounts owned, the amount on deposit, or the total indebtedness of the individual to the association.

The 2004 amendment to By-Law 31 changed the grass-roots alternative by increasing the minimum threshold for directorate nominations from ten percent to twenty percent of the votes entitled to be cast by **Spencer's** members.

Plaintiff challenged the adoption of this 2004 amendment in a putative derivative action in the Chancery Division, where-after an interlocutory appeal to this court and a subsequent two-day trial-he succeeded in persuading the court to undo the amendment.[3] The trial judge jettisoned the twenty percent threshold after finding that many **Spencer** board members were unaware of the amendment's underlying rationale or even its gate-keeping effect. The court was rightfully troubled that board members had no idea as to how many votes were necessary to surmount the twenty percent threshold. The trial judge declared:

3 Plaintiff's complaint not only challenged the 2004 amendment, but also sought a declaration that the ten percent requirement was "inoperative." It described even the pre-2004 version of By-Law 31 as "formulated ... [to] improperly and wrongfully entrench[ ] management." The evidence at trial, however, focused primarily upon the twenty percent threshold and the defendants' conduct leading up to its adoption.

> ***2** This amendment bears absolutely no rational[ ] relationship to any of the issues involving bank governance or operation. While it is touted as a way to keep out un-welcomed wealthy outsiders, this amendment has a deleterious [e]ffect on the efforts of the common every day depositor to gain a seat for themselves on the Board of Directors if they are unknown to the current nominating committee.

As a result, the court found that "Board [members have] breached their fiduciary duty to their depositors in their paternalistic attempt to keep 'outside investors' from gaining participation on the Board of Directors in order to maintain their own positions." The board was then ordered to "revisit By-Law 31, examine the[ ] need to amend the [ten percent] requirement previously in place and set forth reasons for any changes recommended or passed." It does not appear that the court expressly retained jurisdiction over the parties, implicitly permitting **Spencer** to later address its By-Law 31 in whatever appropriate and lawful manner it chose. Lastly, the court reallocated reasonable counsel fees in plaintiff's favor because **Seidman's** "litigation provided a benefit not only to him but also to other members of the **Spencer** Savings

Bank interested in obtaining nominations to the Board of Directors." [4]

4 The court entered an order dated August 29, 2007, which provided a reallocation of counsel fees of $55,722.24 plus expenses of $7,286.60, for a total amount due to plaintiff of $63,008.84.

Defendants filed a notice of appeal from the trial court's orders that (1) concluded that the amendment to By-Law 31 had wrongfully disenfranchised the institution's members; (2) required the board to develop another by-law and for the DOBI to review that new proposal; and (3) awarded counsel fees and expenses. ***Seidman*** *v.* ***Spencer*** *Sav. Bank, S.L.A.*, No. A-0167-07T2.

Meanwhile, the board went ahead and enlisted outside advisors to help its reconsideration of the nomination process for directors. It thereupon formulated a slightly different approach that itself engendered additional litigation. Clinging to its view that **Spencer** needed protection from plaintiff's corporate acquisitiveness, the board's solution was to adopt a new amendment to By-Law 31, which adjusted the minimum percentage of members who had to acquiesce in a director's nomination to fifteen percent. The Commissioner approved the amended by-law as not inconsistent with **Spencer's** enabling legislation, and plaintiff appealed that administrative determination to this court. *In re Application Pursuant to N.J.S.A. 17:12B-38, et seq.*, No. A-1036-07T2. [5]

5 Initially, the cursory rationale of the Commissioner was insufficient for our appellate review. Following the remand in November 2009, we now have been provided with a detailed analysis by the Acting Commissioner of the DOBI dated February 1, 2010, which ratified, and explained more fully, the basis for the earlier approval of the fifteen percent requirement contained in the 2007 amendment to By-Law 31.

We ordered a remand in November 2009 for an agency proceeding that ultimately produced an eighteen-page written Decision on Remand from the DOBI. It focused upon the new fifteen percent requirement, but commented as well (at our invitation) upon the initial 2004 by-law amendment that had increased the nomination threshold to twenty percent. In both instances, the DOBI concluded that "from a regulatory perspective both the [fifteen] and [twenty] percent standards were deemed acceptable." The stated rationale for this conclusion was that "[e]ach amendment was found to be 'not in conflict with the Act [the SLA].' " The Decision on Remand commented favorably upon **Spencer's** use of outside advisors before deciding to adopt the 2007 amendment and expressly noted-without the benefit of an evidentiary hearing-that "the [fifteen percent] nomination requirement is achievable and not unduly burdensome ... [and is] not consider[ed] ... an attempt at disenfranchisement."

***3** After the board adopted the 2007 amendment containing the fifteen percent requirement, plaintiff next sought the immediate intervention of the Chancery Division. He invoked the court's jurisdiction, not by commencing a new action, but instead through the prosecution of an application in aid of litigant's rights. [6] He claimed that the new amendment continued to disenfranchise **Spencer's** members' right to vote. He sought the court's assistance in obtaining independent oversight over the board's by-law amendment process by requesting the appointment of a committee to propose a more suitable replacement by-law.

6 We do not share plaintiff's perspective that his application involved an emergent situation that would allow the trial court to consider the matter by means of an order to show cause. *R.* 4:67-1(a); *see also Solondz v. Kornmehl*, 317 *N.J.Super.* 16, 20, 721 A.2d 16 (App.Div.1998). Because the trial court ultimately treated the matter as if it were a conventional motion, plaintiff's inappropriate reliance upon *Rule* 4:67-1(a) was harmless.

Plaintiff came away empty-handed from his *Rule* 1:10-3 application. The Chancery Division judge-also without an evidentiary hearing but "[u]pon review of the minutes of various meetings and opinion letters from [c]orporate counsel"-held that, because the fifteen percent requirement was the product of a "thorough investigation," and "**Spencer** Savings Bank has complied with the Court's [o]rders," no further relief was needed or appropriate. The court did not address-to the extent the issue was even before it at that time-a claim that the fifteen percent requirement was the result of a new or continued breach of fiduciary duty. Significantly, the court explained, "unless the Board's action is so frivolous or clearly arbitrary, a Court should defer to the Board and the Commissioner of Banking [and Insurance]." Plaintiff appeals from this determination of the Chancery Division. ***Seidman*** *v.* ***Spencer*** *Sav. Bank, S.L.A.*, No. A-1343-07T2. The three appeals have been consolidated for purposes of consideration and disposition of the issues before us.

II.

A.

Prior to addressing our appellate scope of review, it is appropriate to comment briefly upon the respective roles of the executive and judicial branches regarding the corporate governance of mutual savings and loan associations in New Jersey. Even before the country's economic dislocation commenced in 2008, the primary governmental branch tasked for the complex oversight of financial institutions in our state was the executive department through the DOBI, not the judiciary. *See N.J.S.A.* 17:1-25 to -28. Nationally, recently-enacted comprehensive financial sector legislation continues this division of responsibility. *See generally,* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111-203, 124 Stat. 1376 (2010).

We see neither a dilution of that hierarchy nor an erosion in the court's equitable jurisdiction by recognizing the primary role of the DOBI in the hands-on supervision of a mutual savings and loan association. *See Swan v. Boardwalk Regency Corp.,* 407 *N.J.Super.* 108, 116, 969 A.2d 1145 (App.Div.2009) (citing *Campione v. Adamar, Inc.,* 155 *N.J.* 245, 263, 714 A.2d 299 (1998)). Because the safety and soundness of a thrift is of utmost concern to its members and the public in general, the expertise of the regulatory agency-not the dispute resolution proficiency of the courts-is best applied by analyzing the interaction of a particular mutual savings and loan association's by-law amendment with the SLA.

***4** Conversely, the Chancery Division's open-door jurisdiction for resolution of disputes arising from claims of breach of fiduciary duties-even for actions found by the Commissioner to be not inconsistent with the SLA-remains fully intact. The stewardship role of the judiciary over such traditional causes of action, including resolving the effect of a given instance of corporate governance (such as the challenged amendment to By-Law 31), is not undermined by an indulgent review and expansive commentary by the DOBI, as is the case here.

B.

1.

Our review of the judgments of the Chancery Division employs a somewhat different mode of analysis than does our analysis of the findings and determinations of the DOBI. Although we do not act as a rubber stamp in either situation, it is imperative for an appellate court to give appropriate deference to a trial judge's findings of fact, especially on issues of credibility. *McElwee v. Borough of Fieldsboro,* 400 *N.J.Super.* 388, 397, 947 A.2d 681 (App.Div.2008) (noting that an appellate court must give "deference to the findings of the trial judge ... where ... the findings are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy.") (internal quotations omitted). However, findings by a trial judge must be supported "by adequate, substantial and credible evidence." *Triffin v. Automatic Data Processing, Inc.,* 411 *N.J.Super.* 292, 305, 986 A.2d 8 (App.Div.2010) (citing *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.,* 65 *N.J.* 474, 484, 323 A.2d 495 (1974)).

The appellate function is therefore limited, as " 'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so ... inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.' " *Rova Farms, supra,* 65 *N.J.* at 484, 323 A.2d 495 (quoting *Fagliarone v. Twp. of No. Bergen,* 78 *N.J.Super.* 154, 155, 188 A.2d 43 (App.Div.1963)).

We do not, however, owe deference to " '[a] trial court's interpretation of the law and the legal consequences that flow from established facts." *State v. Barrow,* 408 *N.J.Super.* 509, 516, 975 A.2d 539 (App.Div.), *certif. denied,* 200 *N.J.* 547, 985 A.2d 645 (2009) (quoting *Manalapan Realty v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378, 658 A.2d 1230 (1995)).

2.

Our approach to the administrative law issues in this appeal likewise contemplates a confined role in the review of the DOBI's determinations. Judicial review of agency decisions is limited in scope. *See Figueroa v. N.J. Dep't of Corr.,* --- *N.J.Super.* ---- (2010) (slip op. at 4); *In re Herrmann,* 192 *N.J.* 19, 27, 926 A.2d 350 (2007). "An administrative agency's final quasi-judicial decision will be sustained unless there is a

clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." *Id.* at 27-28, 926 A.2d 350.

The actions of administrative agencies are entitled to a presumption of reasonableness. *E. Orange Bd. of Educ. v. N.J. Schools Constr. Corp.*, 405 *N.J.Super.* 132, 143, 963 A.2d 865 (App.Div.), *certif. denied*, 199 *N.J.* 540, 973 A.2d 944 (2009) (citing *City of Newark v. Natural Res. Council*, 82 *N.J.* 530, 539, 414 A.2d 1304 (1980)). We will only decide whether the findings and determinations of the agency could reasonably have been reached upon the credible evidence in the record, considering the proofs as a whole. *Tlumac v. High Bridge Stone*, 187 *N.J.* 567, 573, 902 A.2d 222 (2006). Our version of wisdom will not be substituted for that of the agency, even if we were to disagree with the content or ultimate determinations of its delegated decision-making.

C.

*5 With these principles firmly embedded in our mode of review, we turn to **Spencer's** appeal of the Chancery Division's determinations (1) permitting the matter to proceed as a derivative action; (2) finding a breach of fiduciary duties; and (3) reallocating counsel fees and expenses to plaintiff. From our analysis of the totality of the record, we fail to discern a basis upon which to disturb these ultimate determinations of the trial court, even though we harbor reservations about some of its conclusions on various subsidiary points. We may nevertheless affirm for other reasons because, in the end, we review judgments and orders, not opinions. *See Do-Wop Corp. v. City of Rahway*, 168 *N.J.* 191, 199, 773 A.2d 706 (2001); *Gazzillo v. Grieb*, 398 *N.J.Super.* 259, 265, 941 A.2d 641 (App.Div.), *certif. denied*, 195 *N.J.* 524, 950 A.2d 910 (2008).

1.

Defendants contend that the trial judge erred in determining that plaintiff had set forth an appropriate derivative claim pursuant to *Rule* 4:32-3. The judge determined that breach of fiduciary duty by "depositor disenfranchisement" was a proper derivative claim, because it was a wrong against all individuals with a common interest in the institution. Defendants argue that plaintiff could not appropriately represent the interest of **Spencer's** members, because plaintiff's "entire goal and motivation was to destroy the mutual character of **Spencer** for his own investment gain." Plaintiff responds that he was pursuing associational claims, not personal claims, and that he succeeded in invalidating the 2004 amendment to By-Law 31, which accrued a benefit to all of **Spencer's** members and to the institution as a whole as well.

A derivative action is an action brought by a shareholder to assert the rights of a corporation, or in the case of a mutual association, it is an action brought by a member on behalf of the association.[7] *See In re PSE & G Shareholder Litig.*, 173 *N.J.* 258, 277-78, 801 A.2d 295 (2002) (explaining that a shareholder derivative action is a suit brought by shareholders on behalf of a corporation). Thus, an association's member may bring a derivative action "to enforce a secondary right" of one or more association members. *R.* 4:32-3. However, "[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the ... members similarly situated in enforcing the right of the ... association." *Ibid.*

7 The irony is not lost on us that *Rule* 4:32-3 speaks in terms of a derivative action by "shareholders," but **Spencer's** members are not shareholders. However, the very efforts that **Spencer** seeks to resist-**Seidman's** attempt to convert the thrift from a mutual association to a capital stock association-would, if successful, create shareholder status and thereby satisfy the literal language of the *Rule*. In any event, we do not read the text of *Rule* 4:32-3 so narrowly as to confine it to traditional shareholder actions and not extend it to functionally-comparable actions brought on behalf of members of a mutual savings and loan association.

In *Strasenburgh v. Straubmuller*, 146 *N.J.* 527, 683 A.2d 818 (1966), the Court explained that a derivative action is deemed to belong to the corporation but allows the individual shareholder to protect the associational interest from its directors' misfeasance and malfeasance. *Id.* at 550, 683 A.2d 818. An individual action, in contrast, involves a "special injury" that does not affect all shareholders. *Id.* at 551, 683 A.2d 818. A claim of the directors' breach of fiduciary duty "is generally regarded as derivative unless the injury to shares is distinct." *Id.* at 551-52, 683 A.2d 818. A claim of entrenchment by directors can be either direct or derivative, "depending on whether the entrenchment affects shareholders unequally." *Id.* at 552, 683 A.2d 818.

*6 The resulting harm as found by the trial judge in this case affected all members of **Spencer** equally. There

is no allegation of any special injury to plaintiff or any particularized group of members. As plaintiff contends, his claim was clearly derivative, not personal.

Defendants argue, however, that plaintiff cannot fairly represent members' interests because of his ulterior motives. However, "to determine whether a complaint states a derivative or an individual cause of action, courts examine the nature of the wrongs alleged in the body of the complaint, not the plaintiff's designation or stated intention." *Id.* at 551, 683 A.2d 818. Moreover, defendants fail to specify exactly why plaintiff's ultimate goal or motivation prevents him from fairly representing **Spencer's** members regarding their voting rights.

Defendants cite *Nolen v. Shaw-Walker Co.*, 449 *F.*2d 506, 507 (6th Cir.1971), in which a shareholder asserted a derivative claim against the defendant's directors for damages resulting from the company's excessive accumulation of earnings, for which the IRS imposed heavy penalties. The court held that the plaintiff shareholder did not fairly or adequately represent the rest of the shareholders' interests because the litigation was controlled by a third party whose purpose was to force the defendant to merge with another company of which he was a director. *Id.* at 509. The court concluded that the plaintiff's "primary objective is not the enforcement of the corporation's claim." *Id.* at 510.

Here, unlike *Nolen*, no third party controlled plaintiff's action. There is no evidence that plaintiff or either of his proposed director nominees were affiliated with any other financial institution with which plaintiff sought to merge **Spencer**. In addition, the plaintiff in *Nolen* sought damages, which if awarded would have weakened the defendant-company and likely forced a merger. In this case, plaintiff did not seek damages; he sought merely to invalidate the amendment to By-Law 31 and thereby obtain a more realistic method of nominating directors. Any future goal for a conversion or merger that plaintiff may have had was several events removed from the immediate focus of enhancing the franchise of **Spencer's** members. Members' use of their voting rights, once the percentage burden associated with the nomination of directors was removed, would be left to their individual consciences.

We are thoroughly satisfied that the trial judge properly treated plaintiff as qualified to prosecute a derivative action on behalf of **Spencer** and its absent members.

2.

Defendants contend that the Chancery Division judge erroneously concluded that defendant board members breached their fiduciary duty. Located in a footnote in their appellate brief, defendants raised for the first time that board members who voted against the amendment to By-Law 31 cannot be liable for a breach of their fiduciary duty in enacting it. The record does not clearly reveal which individual defendants voted against the amendment, and the trial court failed to distinguish among the conduct of individual defendants.

*7 Notwithstanding the foregoing, an appellate court does not ordinarily consider an issue raised for the first time on appeal, unless it goes to jurisdiction or involves a matter of substantial public interest. *Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234, 300 A.2d 142 (1973). The liability of individual directors who voted against the amendment is neither of significance to the public nor does it pertain to jurisdiction. In addition, it is improper to raise a legal issue in a footnote. *Almog v. Israel Travel Advisory Serv., Inc.*, 298 *N.J.Super.* 145, 155, 689 A.2d 158 (App.Div.1997), *appeal dismissed*, 152 *N.J.* 361, 704 A.2d 1297 (1998), *cert. denied*, 525 *U.S.* 817, 119 *S.Ct.* 55, 142 *L. Ed.*2d 42 (1998).

Nevertheless, we are puzzled by the trial court's declaration in its written opinion that "the Board (sic) has breached their fiduciary duty to their depositors in their paternalistic attempt to keep 'outside investors' from gaining participation on the Board of Directors in order to maintain their own positions." Our uncertainty is compounded by the contemporaneous memorialization of that conclusion in the court's April 13, 2007 order, which adjudged, "[t]he plaintiff's request for a finding of breach of [f]iduciary [d]uty by [d]efendant Board of Directors on the basis of member disenfranchisement is [granted]." We have scoured the pleadings and cannot find where the board-as an entity separate from **Spencer**-was ever named as a defendant. Rather, the only defendants that we can readily identify are **Spencer** and nine of its individual directors. We appreciate that for purposes of making a declaration of rights only, and not for the admeasurement of damages, the distinction between "defendant Board of Directors" and individual board members may not be that important. However, when the trial court ultimately reallocated counsel fees and expenses in the amount of $63,008.84, the obligors in the August 29, 2007 order were identified as "the [d]efendants, jointly, severally or in the

alternative." We are unsure whether, and how-if indeed there was a breach of fiduciary duties by individual directors-the court obligated **Spencer**, arguably an innocent bystander to the perceived machinations of its board members, to pay those counsel fees and expenses instead of requiring the offending directors to bear the reallocation charges individually.[8] *Cf. Sarner v. Sarner*, 38 *N.J.* 463, 185 A.2d 851 (1962) (granting an allowance for legal services to be paid by corporations that should have commenced an action against the majority stockholder and which received tangible benefits from the litigation).

8 We do not pretend to render the last word on this issue because, among other things, we do not know if there are any indemnification or insurance opportunities available to ultimately pay the reallocated counsel fees and expenses.

For our purposes, and notwithstanding the ambiguities noted, we treat all defendants as collectively pursuing the issue on appeal relating to the breach of fiduciary duties. They argue that plaintiff was a threat to **Spencer's** "mutual character and independence," and that reacting to that threat was properly motivated. Defendants assert that if they were "acting in their own self interest, they would have welcomed a conversion," because a conversion would financially enrich them personally.

***8** Plaintiff counters that "By-Law 31 prevented members from being able to nominate persons for election to **Spencer's** Board of Directors." He argues that defendants did not establish that plaintiff could have feasibly obtained the required twenty percent of eligible members' signatures and objects to the further cost of a proxy mailing to members.

Plaintiff additionally argues that conversion would not benefit the individual defendants, because it would result in "intensified scrutiny due to Stock Exchange and SEC requirements," as well as interjecting significant voting rights in the election of **Spencer's** directors, which would jeopardize defendants' ability to maintain control of the association.

Plaintiff further contends that consternation over conversion is a diversionary ploy because the amendment to By-Law 31 was not limited to conversion activities. Additionally, plaintiff denies that he could readily obtain the approval of a majority of directors, a majority of members, as well as that of the Commissioner, all of which are required by *N.J.S.A.* 17:12B-261 in order for the conversion of a mutual association to a capital stock association to take place.

The trial judge found that "there was not a single member of the Board who was 100% clear as to the reason or the necessity for the increase in this percentage of signatures." It was "[m]ost troubling" to the judge that none of the directors knew how many votes would actually be needed to comprise the required twenty percent.

The judge found that the amendment to By-Law 31 had no rational relationship "to any of the issues involving bank governance or operation," and that it had "a deleterious effect on the efforts of the common, every day depositor to gain a seat for themselves on the Board of Directors if they are unknown to the current nominating committee." The judge concluded that the directors

> breached their fiduciary duty to their depositors in their paternalistic attempt to keep 'outside investors' from gaining participation on the Board in order to maintain their own positions. Whether one approves or disapproves of Mr. **Seidman** and his investment strategies the Board's attempt to shut down discourse by erecting an insurmountable barrier to those not part of the inner circle, is short sighted and improper.

After our own independent review, we are satisfied that the trial judge's findings of fact are supported by adequate, substantial, and credible evidence. We recognize that there appear to be two prongs to the court's ultimate remedy to have **Spencer's** Board engage in a do-over: 1) the utter lack of understanding by many board members of the purpose and effect of amended By-Law 31 and (2) the entrenchment of its incumbent directors. Even though a finding of the lack of board members' understanding could be sufficient on its own to undo this amendment to By-Law 31, we entertain grave doubts that such a determination standing alone would give rise to the bold conclusion that there was a tortious breach of fiduciary duties. Nevertheless, in tandem, the judge's findings are entirely supportable on this trial record.

***9** Notwithstanding our decision to affirm the judgment under review, we believe that individual defendants should be afforded a limited opportunity to clarify their liability by applying to the Chancery Division for relief pursuant to *Rule* 4:50-1(f) no later than October 1, 2010. This is not an open-ended invitation to revisit the judgment. Rather it is intended to allow individual directors who claimed to have had no substantive involvement in the adoption of the 2004 by-law

amendment to seek relief from the judgment if they desire to do so. We do not signal that such relief must necessarily be granted if sought; rather, we simply leave the door ajar for a limited period to facilitate re-examination of personal liability if requested by any individual defendant.

3.

Defendants additionally object to the reallocation of counsel fees and expenses, which the trial judge initially denied, but then later granted on plaintiff's motion for reconsideration. Defendants argue that there was no basis for reconsideration, because the judge's reasoning in originally denying the award was correct and plaintiff "simply asked for a 'do over.' " Plaintiff counters that his motion for reconsideration was properly based on applicable legal authority that the judge had overlooked, which allows the reallocation of counsel fees to a successful plaintiff in a derivative action, despite the lack of other monetary damages.

"[R]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." *Cummings v. Bahr,* 295 *N.J.Super.* 374, 384, 685 A.2d 60 (App.Div.1996) (quoting *D'Atria v. D'Atria,* 242 *N.J.Super.* 392, 401, 576 A.2d 957 (Ch.Div.1990)). We find no abuse of discretion in the trial judge's reconsideration of her earlier denial of an allowance for counsel fees and expenses. Moreover, based upon *Rule* 4:42-9(a)(2), which gives the court the discretion to make a counsel fee allowance out of a fund in court, plaintiffs' success in invalidating the 2004 amendment to By-Law 31 affected and benefited all of **Spencer's** members and conferred an intangible benefit upon the institution itself. There was sufficient factual support for the trial court's conclusion, as well as ample legal precedent to justify the counsel fee reallocation. *Trimarco v. Trimarco,* 396 *N.J.Super.* 207, 215-17, 933 A.2d 621 (App.Div.2007) (holding that *Rule* 4:42-9(a)(2) is applicable "when a shareholder's derivative action results in the conferral of benefits, whether of a pecuniary or non-pecuniary nature, upon the [corporation]").

We therefore affirm the April 13, June 28, and August 29, 2007 orders entered by the Chancery Division.

D.

We next turn to **Seidman's** appeal of the DOBI's validation of **Spencer's** amended minimum fifteen percent requirement for directorate nominations. Plaintiff's contention is that the approval of the 2007 amendment to By-Law 31 was arbitrary, capricious, and unreasonable because an evidential hearing was never conducted and the agency further failed to provide a proper substantive analysis of the effect of that amendment on the nomination process. Plaintiff also argues that greater deference to the Chancery Division's findings of entrenchment should have been given. Defendants respond that the DOBI had exclusive jurisdiction to approve the by-law, that a hearing was unnecessary because there were no material facts in dispute, and that the court should defer to the agency's expertise. The DOBI itself contends that because its decision was not arbitrary or unreasonable, we should defer to its "expertise to ensure banking statutes are construed for the protection of the public."

***10** Pursuant to *N.J.S.A.* 17:12B-39, the Commissioner of the DOBI shall approve a change in a by-law unless it is "in conflict with the provisions of this act." The only conflict between the 2007 amendment to By-Law 31 and the SLA that plaintiff cites is the provision in *N.J.S.A.* 17:12B-63 that states that the members of a mutual association shall elect its directors. Plaintiff asserts that the validation of the amendment constitutes a de facto repeal of this mandate in the SLA. We consider plaintiff's position in this regard to be an exaggeration of the amendment's consequence, without proper regard for the DOBI's superintendence of financial institutions such as **Spencer**. Furthermore, we deem plaintiff's stance against any percentage requirement as a prerequisite to a directorship nomination as without provenance in New Jersey law. [9] Out of state authorities bear little resemblance to the special needs and concerns of our home-grown mutual savings and loan associations. [10]

9 We view *Valle v. N. Jersey Auto. Club,* 125 *N.J.Super.* 302, 310 A.2d 518 (Ch.Div.1973), *aff'd and modified on other grounds,* 141 *N.J.Super.* 568, 359 A.2d 504 (App.Div.1976), *aff'd and modified,* 74 *N.J.* 109, 376 A.2d 1192 (1977) as inapposite because it did not conclude that a per se prohibition against a minimum percentage of support for the candidacy of a director was appropriate. It also did not involve a state mutual savings and loan association.

10 We deem *Stuberfield v. Long Island City Sav. & Loan Ass'n,* 37 Misc.2d 811, 235 *N.Y.S.2d* 908 (N.Y.Sup.Ct.1962) factually dissimilar to the instant case

so as to discount the persuasiveness of its validation of a five percent threshold for the nomination of directors.

We also view the DOBI's analysis of the pertinent decisions of the Office of Thrift Supervision (OTS)[11] unexceptionable and within the orbit of the Commissioner's delegated authority. In *Columbia Bank* (Order No.2008-34, September 26, 2008) and *Clifton MHC* (Order No.2008-47, December 5, 2008) the OTS rejected by-law adjustments that imposed severe conditions upon the nomination of directorial candidates. **Seidman** argues that these decisions by the federal financial regulatory agency compels comity-like application by the DOBI pursuant to the parity provisions of *N.J.S.A.* 17:1-25(c). We disagree, based upon the thorough analysis of the substantive differences between **Spencer's** threshold requirement for directorate nominations and the outright perpetual disqualification of being nominated for a director's position in the two OTS cases. We do not view our Legislature's policy of "facilitat[ing] a uniform approach to regulatory oversight of all financial institutions and promot[ing] consistency in efficient and effective regulatory enforcement," *N.J.S.A.* 17:1-25(c), as an administrative straightjacket.

11 Congress created the OTS as an agency in the Department of the Treasury to regulate federally-chartered mutual associations. The OTS has supervisory oversight that subjects **Spencer** to its scrutiny, but the DOBI maintains regulatory primacy relating to the mutual's by-laws.

It is true that the Commissioner's Decision on Remand speaks in pragmatic terms about the fifteen percent requirement for a directorate nomination as being "achievable and not unduly burdensome." This observation is a conclusion that arguably goes beyond the statutory mandate to determine whether a conflict exists with the SLA. Plaintiff is correct that it is the court's function, not the DOBI's, to determine the legal effect of an amendment and whether that amendment's adoption was a breach of fiduciary duty because it placed the self-interest of directors in conflict with the interests of the association's members.

Even if the DOBI overstepped its bounds by an unduly expansive declaration regarding the supposed effect of the 2007 amendment, the agency nevertheless cannot fairly be criticized for its analysis of the amendment's fidelity to the SLA. Whether a by-law conflicts with the SLA is a question of statutory and regulatory law, not fact. Not only has plaintiff failed to explain how he was prejudiced by the denial of a hearing, he has not persuaded us that the Decision on Remand was either an incorrect analysis of the legal and regulatory questions presented or was otherwise capricious. The DOBI's statutory authority was restricted to a determination of whether the by-law conflicted with any provision of the SLA, *N.J.S .A.* 17:12B-39, and the Commissioner properly and reasonably determined that it did not. Surplusage that goes beyond this calculus detracts from the proper implementation of DOBI's primary jurisdiction over the safety and soundness implications of **Spencer's** by-law amendment activities.

***11** We affirm the approval of the 2007 amendment to By-Law 31 by the DOBI.

E.

Our attention is last directed to the most difficult part of this appeal, plaintiff's grievance with the Chancery Division's denial of his application in aid of litigant's rights. Our main source of concern stems from the court's previous finding that a twenty percent threshold was contaminated by the self-interest of board members, but that a fifteen percent requirement did not share the same taint. We are likewise troubled by the trial court's reference to the business judgment rule as support for rejecting plaintiff's attack on the re-done 2007 amendment to By-Law 31.

Our unease, however, is alleviated by a careful review of the judge's opinion. The court cited *Green Party v. Hartz Mountain Industries, Incorporated,* 164 *N.J.* 127, 752 A.2d 315 (2000), in support of its refusal to substitute judicial judgment "for that of a legally constituted Board when it addresses its own governance." At first blush, this may appear as though the judge deployed the business judgment rule as an all-encompassing shield that protects the board from "second guessing by courts." However, the opinion further detailed the scope the court's review as "simply to determine whether **Spencer** Savings Bank had complied with the Court's previous [o]rders." With this appropriately focused mission, any reference to the business judgment rule was inoffensive.

This guarded approach by the court is entirely understandable because of the nature of the proceeding at the time it was presented to the Chancery Division. The court was neither engaged to litigate a new dispute concerning the breach of fiduciary duties by **Spencer's** board members, nor did plaintiff present the judge with empirical data vis-à-vis the fifteen percent requirement that might potentially

demonstrate self-dealing or entrenchment by members of **Spencer's** board. Rather, the judge was simply asked to enforce litigant's rights, for which there was no extant violation of an order. We have scoured the record in vain to find either a retention of jurisdiction by the Chancery Division over the continuing operations of **Spencer** or a requirement issued by the court that **Spencer** adopt a particularized amendment to By-Law 31. **Spencer** had been ordered only to "revisit By-Law 31, examine the need to amend the [ten percent] requirement previously in place and set forth reasons for any changes recommended or passed." That was the scope of the court's judgment, which framed any enforcement activities pursuant to *Rule* 1:10-3. Moreover, that is exactly what **Spencer** accomplished.

If plaintiff truly sought to either (1) mount a public policy-based challenge to **Spencer's** adjusted (fifteen percent) directorate nomination requirement or (2) derivatively obtain a declaration of rights regarding a breach of fiduciary duties, he was obliged to file new pleadings. Although such action would necessarily entail delays and increased expenses, it would have properly framed the issues and permitted the parties to fairly engage in the necessary discovery processes to focus the key factual question that plaintiff raises in this appeal: what is the tangible effect of the fifteen percent requirement on the nomination of directors to **Spencer's** Board? If plaintiff had pursued that approach in a new action commenced in the Chancery Division, it not only would have resulted in the proper identification of the parties' respective burdens of proof, but additionally would have given the Chancery Division a reasonable opportunity to address the full spectrum of issues implicated by defendants' 2007 conduct. In such a context, the court would have had the occasion to explicitly compare its conclusions regarding the twenty percent threshold against the more recently-adopted fifteen percent requirement. The use of the expedient of *Rule* 1:10-3 short-circuited the ordinary fulsome adjudicative processes that best served the resolution of this transfigured dispute.

***12** From our vantage point, we cannot deduce any legal error on the part of the Chancery Division in its refusal to grant further relief to plaintiff in the context of his application pursuant to *Rule* 1:10-3. Although even partial reliance upon the business judgment rule in that circumstance may have been mistaken, we are satisfied that the refusal to grant what plaintiff requested was proper when we consider the totality of the circumstances.

Given these important procedural nuances, we need not consider substantively whether there is any material difference between a twenty percent nomination requirement and a fifteen percent requirement, or whether the invalidation of the former can be substantively reconciled with the validation of the latter. We are mindful that the DOBI concluded that the twenty percent and the fifteen percent requirements are essentially similar, and that they both pass muster under the SLA. Nevertheless, that conclusion was unaffected by the procedural differences in how the two by-law amendments were successively presented to the Chancery judge, nor the deficiencies in the process of the board's adoption of the first by-law amendment. Consequently, the Chancery judge's ultimate determinations can be reconciled in light of those procedural factors, irrespective of whether different treatment of the two by-laws can be harmonized substantively.

We affirm the October 16, 2007 order entered by the Chancery Division.

F.

The by-laws of a mutual savings and loan association, no less than any other corporate entity, are made to reflect the identity and goals of the association. For a financial institution in this State, it also means that the stamp of approval of the DOBI must accompany the creation of that institutional persona to ensure compliance with all applicable statutory and regulatory provisos.

By-laws are also made to establish and protect the rights and specify the duties of the organization's members and its management. We fully understand that once fashioned, an association cannot be so immune from change to cement management for its own sake. Members are entitled to facilitate a change to the entity's board of directors through the selection of new contestants for directorate elections. By-laws that make it unreasonably difficult to obtain candidates other than board-sponsored nominees can be scrutinized for that effect by our courts. What we are loathe to do, however, is to second-guess the legislatively-designated overseer and regulator, the DOBI, and substitute our notion of appropriate democratic processes for the considered view of the agency that supervises similarly-situated associations on a day-to-day basis. From our vantage point we lack a regulator's comprehensive and expert sense of the local, regional, national, or global picture of the financial services industry.

Because our Legislature has placed its trust in the DOBI, we must accord that faith the measure it is due. Thus, we remain committed to encouraging the DOBI to perform its statutorily authorized functions, while giving validation to a court's jurisdiction to explicate the contours of the effect of entity governance and the resolution of disputes related thereto.

***13** Accordingly, for the reasons we have outlined, we affirm the entirety of the orders, judgment, and Decision on Remand in these consolidated appeals.

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