SUPERIOR COURT OF NEW JERSEY

MARGARET MARY MC VEIGH, P.J. CH

COURTHOUSE
PATERSON, NEW JERSEY 07505

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

December 19, 2012

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RE: Seidman vs. Spencer Savings Bank
Docket No.: C-96-10

Counsel:

In August of 2004, Lawrence Seidman filed a Complaint against Spencer Savings and Loan alleging breach of its fiduciary duty to its members. The focus of that litigation was the adoption of an amendment to Bylaw 31, which required an increase of the percentage necessary to nominate a member for a position on the Board of Directors. There were other allegations in that Complaint; however, for purposes of this Opinion, the Court needs only to comment on that allegation.

On April 13, 2007, after applications to the Appellate Division and a full trial, this Court rendered an Opinion and issued an Order that required that the Board of Directors and Bylaw Committee re-visit Bylaw 31 to "examine their need to amend the 10% requirement previously in place and set forth the reasons for changes recommended or past." (Opinion in this Court pg.9)

On or about September 2, 2010 Lawrence Seidman filed a Complaint in Passaic County against Spencer Bank, SLA, its Board of Trustees and By-Law Committee, Jose B. Guerrero, Peter J. Hayes, Nicholas Lorusso, Robert Motta, Barry C. Minkin, Albert D. Chamberlain and John S. Sturges alleging that, through the adoption of a revised Bylaw 31 and the enactment of Bylaw 46, Defendants breached their fiduciary duty to their members by creating an insurmountable barrier to members wishing to nominate individuals to serve on the Board of Directors. After months of discovery and motion practice, this matter came back to the Court for trial on the issues of Bylaw 31 and the new Bylaw 46 concerning the governance of Spencer Savings and Loan. This matter was tried before this Court over the course of eleven (11) days beginning on December 5, 2011 and concluding on June 5, 2012. The parties were given extensive time to prepare

and provide to the Court Proposed Findings of Fact and Conclusions of Law which were received by this Court in late August of 2012. This Court has reviewed its extensive trial notes and those Proposed Findings of Fact and Conclusions of Law, as well as documented evidence in excess of 100 documents.[1]

The Defendants' counterclaim in this matter alleges that Mr. Seidman is not an appropriate party to bring these issues to the Court, and that he had breached his fiduciary duties to fellow members by causing Spencer to incur the expense of this litigation.

Two themes were clearly present during trial and in the summation documents presented to the Court: 1.) the personal animosity between Mr. Seidman and Jose Guerrera and 2.) the specter of conversion of the bank. These two (2) issues severely overshadowed the issue of fairness or reasonableness of the percentage of members' signatures necessary to nominate a member to the Board of Directors.

The Defendants' entire case, including their defense to Mr. Seidman's application and their counterclaim, was focused on the battle against the professional investor and the evils of conversion. Despite the Court's daily request to focus on the Bylaws and the Board's action in July 2007, the evidence addressed the business practice of Mr. Seidman and his professional investor "wolf pack." The Court has had to determine if the revised Bylaw was an action to continue the entrenchment of the existing Board and its mind set, or a legitimate exercise of corporate governance.

This Court could very simply go back to its April 2007 opinion and the subsequent opinion issued by the Appellate Division in July 2010, and attach those two opinions to an Order to have a resolution in this current litigation. Such an action would not be helpful to the parties or to a reviewing authority or to the members of Spencer Savings and Loan. Therefore, this Court will attempt to go through, for the record, the salient facts that were presented to this Court during trial.

On or about July 19, 2007 the Spencer Board of Directors and Officers met with the Law Firm of McCarter & English and Graham Jones, corporation counsel, to discuss how they were going to address the issue of Bylaw 31. At two meetings that were held on July 26, 2007 they received professional input by a memo that had been drafted on July 23, 2007, and a conversation with these professionals that addressed Spencer's strategic plan, the issues involving the requirement of a percentage of members for nominations to the Board, and the articulated desire of the Board to hold off the professional investor. At that July 26, 2007 meeting the Board of Directors in fact enacted a revised Bylaw 31 which provides:

> No Director shall be eligible for election unless he shall have been nominated in writing by a majority of the Board or by members representing fifteen percent (15%) or more of the votes entitled to be cast by members, and the nominations are filed with the Secretary at

[1] The document number is an understatement as each party marked and introduced into evidence extensive documentation.

least thirty days before the annual meeting of members at which the nomination is to be voted upon, and a member shall not nominate a greater number of candidates than the number to be elected.

The Secretary shall, upon request, inform a member of the number of signatures of members necessary to nominate a director in accordance with the following: Commencing on the first business day after the preceding annual meeting, a member may request in writing that the Secretary provide to the member an estimate of the number of member signatures required to nominate a director at the next annual meeting. The Secretary shall respond to such requests within ten days following such requests with an estimated number based upon the number of holders eligible to vote as of the last business day of the month preceding the date of the request from such member. Commencing on the first day of November of any year, a member may request in writing that the Secretary provide to the member the actual number of signatures required to nominate a director as of the record date. The Secretary shall respond to such request within ten (10) days after the record date for the annual meeting or, if the request is made more than ten (1)) days after the record date, within three (3) days of the receipt of such written request.

The signatures of the members wishing to nominate a candidate for the Board shall be presented to the secretary in a manner than allows the association to reasonably verify whether such persons are members entitled to vote at the annual meeting and the signature is that of the member.

No person 75 years of age shall be eligible for election, reelection, appointment, or reappointment to the Board. No Director shall serve as such beyond the conclusion of the year in which he attains the age of 75. These age limitations do not apply to a Director serving on June 1, 2004. Any Director who has served as a Director for at least two full terms is entitled to annual retirement benefits in accordance with the Association's retirement policies in effect as of the date of the Director's retirement.

All Directors must be permanent resident of the State of new Jersey. The residency requirement does not apply to a Director serving on June 1, 2004.

and Bylaw 46 which provides:

In determining whether a candidate for the Board has been nominated by the necessary number of members, no signature of a

> member shall be counted if that member is acting in concert with any other member or members who individually or together constitute a company. In determining whether a candidate is eligible for nomination to the Board or for service as a director of the Board, no member shall be eligible if that member or any person nominating that member is acting in concert with any other member or members who individually or together constitute a company. A company shall mean any corporation, partnership, trust, joint stock company, or similar organization but does not include the Federal Deposit Insurance Corporation, any Federal Home Loan Bank, or any company the majority of shares which is owned by the United States or any State or instrumentality of the United States or any State. Action in concert shall have the same meaning as defined in Section 574.2(c) of the OTS Acquisition of Control of Savings Association Regulations 12 CFR Section 574.2(c) or such successor regulation.

The articulated reasons for enacting this amendment, which now sets a 15% requirement for the number of members who must sign a nominating petition, were: 1.) the desire to balance the average members' needs versus protection against the professional investor; 2.) provide a manageable mechanism to garner support for a candidate; 3.) provide a mechanism that was necessary due to the fact that there was low attendance at annual meetings; 4.) to protect Spencer against a disruption caused by a small minority of members attending those annual meetings; and 5.) to have a procedure that would only require one mailing to establish communications with all of those members, thus alleviating the Court's concern about expense.[2] The Board considered that in August of 2004 when the Bylaw was amended to require 20% of membership, they were concerned by the rise of professional investors and the impact that those investors could have on an average Spencer member who had no interest in converting the bank. The testimony would show the Board was advised that the threshold for nomination was clearly appropriate and attainable. Each of the Directors testified as to their concerns in a very similar fashion on every point including fear of the professional investor, the quality of a community bank versus a commercial bank, and the balancing of fairness in the process.

Before this Court was able to hear from the Directors, or even hear from Plaintiff with regard to the substance of his allegations, the Court conducted a 104 Hearing with regard to approximately 40 subpoenas that had been issued by defense counsel just days before the trial was scheduled to begin. It should be noted for the record that as the Court approached the trial date in this matter, trial counsel was substituted for the defendant Spencer Savings and Loan. Becker & Poliakoff, LLP was substituted for McCarter and English, and Helen Davis Chaitman, Esq. became designated trial counsel in place of Mr. Beron and his associates.

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[2] The Statute requires that an applicant be responsible for the cost of mailing.

This Court was assured that there would be no delay in moving to trial as a result of this substitution and there would be no request for additional discovery. Unfortunately, the additional discovery that was not needed pre-trial, was sought by way of trial-subpoenaed testimony. The majority of the individuals subpoenaed never had been named as witnesses prior to the subpoenas having been issued. Many of the individuals were business associates of Mr. Seidman, members of Spencer who had not previously been identified, and included Peter Bray, Esq., counsel for Mr. Seidman.

In order to determine whether or not the subpoenas would be quashed or honored during the course of the trial, the Court conducted the 104 Hearing and took testimony from a limited number of those individuals identified by Ms. Chaitman. All of the fifteen subpoenaed witnesses, including Mr. Bray, Mr. Baumkirchner (who has been identified as a potential Seidman candidate for the Board), and Raymond Vanaria, among others, had accounts at Spencer. They were either a client or a business associate of Mr. Seidman or had met Mr. Seidman at some point in their lives. One witness (Robert Dennis), spent eighteen months in prison for wrongful conduct with regard to the conversion of another bank. None of the individuals confirmed any specific obligation to Mr. Seidman and this Court's notes indicate many, if not all, of them indicated that becoming a member of the Savings and Loan was always a good idea because it provided an opportunity for investment in the future.

After almost two full days of testimony from these individuals this Court ended the 104 Hearing. It was clear to this Court at the end of that testimony that Spencer Savings and Loan does have members: 1.) who may be improper members pursuant to their own Bylaws; or 2.) who may have wished to benefit from a conversion at some point in time; and 3.) who know Mr. Seidman. Those factors alone did not give rise to this Court believing that their testimony or the testimony of the other 25 individuals would be relevant to the determination of the appropriateness of the Bylaw or the Defendants' counterclaim. However, the Court did preserve that testimony in the event that the proofs revealed a pattern of depositor as a sustainable issue and reason for the Court to consider the viability of Bylaw 31.

What was very clear from their testimony was that while Spencer has Bylaw provisions prohibiting out of state depositors and very specific rules with regard to who may be a depositor or borrower, Spencer does not necessarily police its own accounts on a regular basis. In fact, Spencer had not policed their accounts up until shortly before the trial in this matter.

The Court then heard from various Board members during Plaintiff's presentation of his case. First to testify was Albert Chamberlain. Mr. Chamberlain has been on the Board since 2006. He was asked by Mr. Guerrero to serve, was nominated by the Board to stand for election, and was on the Board in 2007 when Bylaw 31 was revisited. He firmly believed that the 20% did not have an adverse effect on the average depositor and felt that it was perfectly legitimate to stand in place. However, because of the Court Order and his own past experiences with conversion and banking institutions, he felt that the 15% requirement achieved all the results that were presented by the professional

experts hired by the Board to advise them.. His vote for the 15% was simply out of deference to the Court having ruled against the 20%. Mr. Chamberlain did not even consider what the cost to the members would be in order to comply with the Bylaw modification nor was he aware of the numbers of members of the bank at the time either Bylaw revision had been struck or at the time they voted on the new provision. Mr. Chamberlain had no recollection that the Court found the 6,000-member signature requirement to be prohibitive. He simply thought that the Court was objecting to the number of 20%. Neither Bylaw requires that the individual who is submitting their name commit to mutuality; both, however, were necessary to prevent groups of professional investors from taking control of Spencer. Despite his reasons, he was not aware of any mutual, either in New Jersey or across the country, that had been involuntarily converted by a group of members. He had a vague understanding of the steps that were necessary for a mutual to be converted.

Mr. Chamberlain had been an employee of the bank for several years, and so he was asked about annual meetings and the bank's procedures. Mr. Chamberlain informed the Court that the Board does not mail notices of the annual meetings to its members because of the cost. After all, there are over 40,000 members! The notices of meetings are published in the Legal Notices section, but he had never been concerned or asked whether or not the members had seen those notices published in the paper nor whether they had any particular view about how the bank was operating.

Just as Mr. Chamberlain had been suggested to the Board by Mr. Guerrero, Mr. Chamberlain had indicated that Mr. Sturges, who is a current Board member, had also been suggested to the Board by Mr. Guerrero. Mr. Sturges had indicated an interest and had asked to be considered when a position was available. Mr. Guerrero submitted his name and the Board subsequently nominated him to join them. Mr. Chamberlain testified to the Court that the Board had never disagreed with any of the recommendations that Mr. Guerrero had ever made to be on the Board.

Mr. Chamberlain was fully familiar with the minutes of the Board and was familiar with D129 (Evidence) which is the memo from Corporation Counsel. He balanced all of the information that was provided by the experts and his own experience regarding conversion from mutual to stock organization and reached a decision that the Bylaw amendments were precedent and necessary. He said that after a conversion, the focus of a Board and employees goes from the community to value per share. It was his desire to keep the focus on the community and not on the value per share. Further, his experience told him that employees would be fired and the community ignored by a "value per share bank."

Mr. Chamberlain relied very strongly on the opinions of the expert that 20% was achievable, so, clearly, the 15% was achievable as well. Also, he accepted the general opinion that there was an increasing number of professional investors. It was clear to him that the average Spencer member was happy with the way the bank was proceeding because they did not come to meetings or file any complaint. Other than Mr. Seidman, no one has ever nominated anyone for the Board. His belief was that, in order to offer

low competitive rates of interest on lending and competitive rates of interest on savings as well as an ability to serve the community, it was necessary to maintain the concept of mutuality as well in its identity for this bank. He believes the members are only concerned that their deposits are safe and that their bank has a face in the community, makes charitable contributions, works with individuals who fall behind and face foreclosure and is protected against those professional investors who only seek to enhance their personal well being.

Mr. Chamberlain indicated however, that he had only learned before his testimony that there were maybe a dozen or more professional investors. In July 2007 he had no idea how many professional investors were depositors and members at Spencer. Mr. Chamberlain was aware of the fact that Spencer held 603 running proxies that they could exercise at the annual meeting. While he was an advocate of having the member who wishes to run for the Board use social media and the internet, he also felt that those activist members were aided by that technology to group and re-group and reach out to as many people as possible.

Barry Minkin[3] testified that the amendment to the Bylaw 31, requiring 15% of the members to nominate, was to strike a balance between the average member and a professional investor. Mr. Minkin felt there needed to be a requirement about nominations because one could not deal with the bedlam that would ensue at an annual meeting if members could nominate from the floor or only require a single nomination and vote. He has been a member of the Board since 2005. He is also an associate of Mr. Guerrero whom he had known for a period of time. He had worked with the Board in developing their benefits plan and, after that project was completed, he was asked if he would be interested in serving on the Board. Mr. Minkin had never been a director with any institution before, although he did know that Directors were paid a salary. As previously noted, his primary concern was the low turn-out at annual meetings and the one-member quorum requirement at those meetings. While he was aware of that problem, he never brought up at the meeting in 2007 the possibility of increasing the quorum in order to address the very same concerns that be believes have been addressed by Bylaw 31.

Mr. Minkin was aware of the process necessary for conversion and knew Larry Seidman and his business partners. He was not aware of any situation in which Mr. Seidman or anyone else had forced a mutual to convert. He was not aware that no other mutual had a minimum percentage requirement for nomination by members other than nominations by the Board.

Mr. Minkin said that the whole idea of a minimum requirement for nomination was to address those institutional professional investors who are more than likely to be the ones nominating members not approved or suggested by the Board. A typical member was not really his concern because he did not believe that it was likely that an individual member could achieve that type of percentage for nomination. He also felt that 25% was a viable and valid number, but,in order to show good faith to the Court, was

[3] Member of the Board

willing to reduce that amount to 15%. He disagreed with the Court's rulings but understood the necessity to comply.

Through Mr. Minkin's testimony with regard to Bylaw 46, it is clear that the Bylaw is directed at the professional investor, those out-of-state people who come in to deposit simply because they have personal interest in financial gain. Spencer's policy requirement of New Jersey residence is not in writing, nor was Mr. Minkin sure that they make depositors aware of that when they open accounts.

Mr. Minkin did not see Bylaw 46 as prohibiting individuals from talking about nominations among themselves. His understanding was that the Bylaw was directed at groups or companies that would join together in order to effect a takeover. Mr. Minkin additionally was not aware that Bylaw 31 continued to require the 6,000-member number that the Court found prohibitive. He focused primarily on his concerns about chaos and bedlam at annual meetings if there were not a large percentage nomination requirement. Despite all of his concerns about chaos and bedlam, Mr. Minkin could not provide this Court with an indication that there had in fact been chaos historically at Spencer. The 10% requirement that was in effect before all of this litigation commenced in 2004 was only enacted in 1995. Mr. Minkin was very clear that if it were not for Mr. Guerrero this Board would not have many candidates for the Board of Trustees because very few people have ever expressed an interest. He indicated that if Mr. Guerrero had not asked him, or told him that he would support him, he would not have pursued membership on the Board.

Mr. Nicholas Lorusso[4] testified that, to his knowledge, there has been no one other than Larry Seidman who has sought nomination to the Board outside of those candidates the Board itself has endorsed. Mr. Lorusso has been affiliated or associated with Spencer since 1964. He has moved from one section of the Bank to another and has been on the Board since 1984. In 1994 the Board was faced with the realization that so many other mutuals had moved to stock corporations by way of conversion. The Board at the time wanted to prevent that type of a situation for Spencer, so the Bylaw was put in place requiring 10% of members for a nomination. Mr. Lorusso also felt that the initial jump to 20% and then to the 15% was designed to maintain mutuality and make it difficult for someone like Mr. Seidman to get a seat on the Board. While he acknowledges that every member has a right to a position on the Board, no one other than Seidman ever was interested. The Bylaw was never intended to hurt the average depositor, but was meant to deter the professional investor.

Mr. LaRusso provided this Court with the information that the members had never been told that the threshold for nomination was going up to 10% and that they had not been advised about the move to the 20% or 15% threshold either. He was very pleased with the professional advice he was given and the way the new Bylaw was worded so that a member could begin the day after the annual meeting to obtain information about membership and what was needed to get elected.

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[4] Member of the Board.

The Court then heard from Mr. Jose Guerrero, who appears to be the key to Spencer's pursuit of its current position. He has been Chairman on the Board since 1999 and serves as Chairman of the Board and CEO. He has been a strong proponent of the threshold percentage for nominating so "as to prevent the disenfranchisement of the average depositor." He also echoed the concern about chaos at the meetings. He is aware of the steps an institution must take in order to move for conversion, i.e., the approval by the Board, and the bank regulators, including the requirement that the majority of the Board and two thirds of the members are necessary for approval. He is also a very strong advocate of Bylaw 46.

In talking about annual meetings and the Bylaw threshold, Mr. Guerrero said the last annual meeting was in January 2011. If one counts the employees as well as the members that were present at that meeting, there were approximately thirty people present. He confirmed Mr. Chamberlain's position that there is no mailing of the notice of the annual meeting. A threshold is critical, he believes, based upon his experience at this bank and banking in general, as well as the advice that the Board received at the July 2007 meeting. At that meeting, there was considerable discussion about the professional investors as well as the cost that was required to obtain a 15% threshold. Mr. Guerrero was not sure as to how many professional investors Spencer has as members now or had in 2007. He did know that Mr. Seidman was a professional and advised that Spencer was reviewing their membership list to determine how many others there might be.

Mr. Guerrero said Mr. Seidman has a very clear public record of his work. He is an investor in bank stocks and other business entities. Mr. Guerrero considers the professional investors to be the minority of the membership at Spencer and, because of their expertise, it was necessary to adopt a threshold such as Bylaw 31 to protect the majority of average members. The Bylaws were not enacted to keep Spencer as a mutual forever but rather to prevent chaos and, as he articulated earlier, to keep the minority from disenfranchising the majority of average members.

Mr. Guerrero said his reading of the Court's opinion did not indicate that the number of signatures that were necessary was the issue. He believed the Court objected to the process itself. His testimony may have been "the judge took down the process not the numbers."

Mr. Guerrero saw Bylaw 46 as an additional measure to eliminate the vote of the professional companies who act in concert to disenfranchise the average investment. He was aware that there are several statutes that keep corporations from acting in concert, but this bylaw specifically addresses that the vote would be disqualified. He could not explain Bylaw 46 any more than that because he advised the Court that this is a legal question and the lawyers would have to figure all of that out. He saw no incongruity or conflict in the two Bylaws.

Mr. Guerrero was asked directly about the reasonableness of all this work and litigation to simply stop Mr. Seidman. He responded that no one member should have the right to influence the right of the average member or the majority of the members.

Mr. Guerrero again asserted his belief in the viability of the 20% but that it was important to show good faith and respect for the Court. Accordingly the 20% was reduced to the 15%.

The Court then heard from John Sturges. Mr. Sturges was one of the most interesting witnesses that this Court had in the entire litigation. Mr. Sturges is a member of the Board of Directors. When he became interested in serving on the Board, he approached Jose Guerrero and asked him if he could be considered when there was an opening. Very soon thereafter, he was the Board's nominee for a seat on the Board. He does not possess any special skill or talent for bank management nor was his memory shown to be exceptional. He first told this Court that conversion was not a concern for the Board when they reviewed Bylaw 31. Unfortunately, during his deposition he indicated that in fact it was a concern. He was only aware of one professional depositor at Spencer: Mr. Seidman. He was not certain as to whether or not the By-Law was enacted as a reaction to professional investors nor did he know how it could be used to unseat Directors who were not properly performing. He told the Court that the threshold was intended to provide a logical process to unseat a member of the Board. It was reasonable they had to get 6,000 other members to support a nominee. He does not agree this threshold is a barrier nor that it made it more difficult for members to participate. He never considered the impact of the cost of the mailing on an average member because he never believed the average member would be interested in seeking nomination by mail. He, as with his colleagues on the Board, was not aware that the Court felt that the 6,000-member threshold was prohibitive. He understood the Court's decision that the original process to amend in 2004 was not rational when they voted on the 20%.

With regard to Bylaw 46, Mr. Sturges simply saw it as a mechanism to ensure that Federal Law had not been violated. He was not concerned about how it would be put into place because it was not for the Board but for legal counsel to determine.

Peter Hayes was the last Board member to testify. He advised this Court that every member has a right to nominate someone for the Board of Directors and that the Board walks a fine line between understanding the core value of the Bank and what the depositor expects from them. Bylaw 31 was enacted to stop activists from coming in and taking over, and Bylaw 46 addresses that design even better.

Mr. Hayes has absolutely no problem with 15% as the proper threshold because, after three to four meetings with four different lawyers, it was believed that even 25% was an achievable number for someone seeking a Board seat. He pointed out to the Court that public companies have a 30% requirement for nomination. Mr. Hayes is also of the opinion that with the low number turn-out at annual meetings and the low quorum requirement, without a threshold for nomination there would not be a barrier to people like Larry Seidman. He believes that the Board had a tremendous amount of professional advice about how to protect the bank's interest. The 15% threshold was a good number, and this would show good faith to the Court.

Mr. Seidman then presented his position to this Court. Mr. Seidman believes that the requirement to obtain 6,000 signatures is a plan to protect the Board and advance the entrenchment of that management. It is a provision that is unheard of at any other company; further, Mr. Seidman believes that conversion is an excuse for the advocacy of that entrenchment. Mr. Seidman strenuously indicated to the Court that regulatory policy and provisions, as well as the law, provide an oversight that Bylaw 31 could never even address.

This current Bylaw is no different than the 20% that the Court struck down in 2007, a decision that the Appellate Division affirmed. This new number, based upon the current number of members, requires closer to 7,000 than the 6,000 that was previously required and is now even more onerous. He strenuously testified that it is an affront to the Court.

Mr. Seidman saw Bylaw 46 as simply a back door way to achieve the same thing that bank attempted in filing the federal litigation against him. *See Spencer Bank v. Seidman*, 528 F. Supp. 2d 494 (D.N.J. 2008). In that action, the court found that the bank had no standing to pursue the cause of action because it was a federally-granted right, not a right given to the bank. He believes that if one complies with Bylaw 31 one violates Bylaw 46. In the federal litigation, and now in this litigation, Mr. Seidman is accused of having a "wolf pack." He has never seen nor is he aware of any mutual that was forced to convert outside of its own interest and concerns.

Mr. Seidman told this Court that Spencer argues to the Court that he has control over some of the individuals, i.e., his "wolf pack", and yet they failed to acknowledge the impact of their running proxies. This proxy is signed when an individual opens an account and gives the bank the right to vote on any issue that arises without notice to the member. P4 indicates in 2004 Spencer had 603 running proxies. It indicates that the Board starts any election process with 603 votes. P11 was Spencer's responsive correspondence to Mr. Seidman when he requested information concerning his intent to nominate individuals in 2007.

The level of animosity and hostility that existed between the parties in this case was quite challenging for the Court. During one day of testimony, the Court returned from the break and Ms. Chaitman began her cross examination of Mr. Seidman by questioning him about his behavior during the break. While the parties and witnesses were present in the waiting room, he yelled at her using a derogatory term. The Court continued to be very troubled throughout the trial that the parties and counsel were unable to separate their individual hostilities from the overriding issues before this Court. There are an excess of forty-four thousand members at Spencer whose interests shall be determined by this Court's decision. There was never a sincere focus on those forty-four thousand individuals. Instead, the focus was on the Board's attempt to prevent Larry Seidman from having any ability to address bank governance and banking policies in the context of the Board of Directors. No less troubling is Mr. Seidman's personal animosity toward Mr. Guerrero and the Board.

On cross examination, Mr. Seidman indicated that while he had discussed the possible conversion of Spencer he had never pursued conversion because he considered it a regulatory impossibility. His discussions took place with Mr. Guererro and Mr. Bedrin prior to the 2004 litigation at a time when he was advised by Mr. Guererro that they (the Board) intended to take the company public within twelve to eighteen months. Mr. Seidman has not actively taken any action to either re-nominate or comply with the requests of Spencer in their 2007 correspondence responding to the request that the package be mailed to members.

Mr. Seidman indicated he has spoken with various analysts, lawyers who specialize in this field as well aswith people who have deposits at Spencer Savings Bank. When challenged by Ms. Chaitman on this issue and whether or not he knew people with accounts at Spencer, Mr. Seidman indicated that he had no idea who had accounts at Spencer until Ms. Chaitman subpoenaed them. Having learned that they were subpoenaed, he had conversations with them.

Following this exchange and a ruling by this Court on the issue of Mr. Seidman's breach of fiduciary duty, Ms. Chaitman walked Mr. Seidman through various documents reflecting his economic and financial holdings and companies in which he owns an interest. For example, D39, for identification, is part of a schedule attached to a 13D for Southern Connecticut Bank Corp. filed in March of 2009. Mr. Axelrod was one of the individuals subpoenaed by Ms. Chaitman who has an account at Spencer and a business contact of Mr. Seidman whose name appears on that 13D.[5] Mr. Seidman identified D44 for identification as well. D45 which was an agreement with Broad Park and Michael Mandelbaum. D46 references Center Bank Corp. Inc. in which Mr. Seidman nominated Peter Bray, Esq., to be on the Board of Center Bank Corp. Mr. Seidman evasively indicated that he has been involved in over 45 proxy contests and was not 100% sure in what his role was in any particular one. Mr. Seidman was questioned about his relationship with Clark Estates, a Michael Hamer, Jack Zakim, Center Bank Corp. and Bench Mark & Associates. He was questioned as to whether or not he had sought regulator permission for some of his activity, although his response was that the OTS was still in control of the processing and, as long as he did not seek greater than one third of the Board, there was no approval necessary. It is his position that the OTS and the Federal Reserve have a much stricter view of collusion and, even if one wanted to nominate more than one individual, they consider that to be a change in control and therefore subject to regulation.

With regard to the 35 or 45 proxy contests Mr. Seidman has been involved with in his life, he indicated that: 1.) he usually brings in an expert to assist him; 2.) he has actually only won 10% of those contests; and 3.) they were all public company contests. Pressed again as to why he did not comply with making a request for a mailing by Spencer Savings and Loan, Mr. Seidman's position was that it would be an act of futility

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[5]. Mr. Seidman and Mr. Axelrod have a long relationship. Mr. Seidman indicates that Mr. Axelrod is not an employee but in fact does accounting work for him. Mr. Seidman and Mr. Axelrod also have business dealings with the Israeli Sports Exchange. Mr. Seidman is the President of the Israeli Sports Exchange which additionally has an account at Spencers.

to go forward. It was clear to him that they passed the two Bylaws to effectively prohibit him from having any role with Spencer. Mr. Seidman said the cost required for each of the 35 proxy contests he was involved with was around $40,000.00 to $50,000.00 total. He felt that the cost to challenge the actions of Spencer would have been close to $200,000.00 and would have been an absurd action on his part.

He is fully aware that provision of the Savings and Loan Act establishes the cost of mailings on the member,[6] but there is nothing in that requirement that says that the Board has to establish the threshold of signatures to nominate a person for the Board. He sent the letter asking for information about nominating members because he was considering nominations to the Board. It was sent to prove a point and, if he had done otherwise, he would have been in violation of Bylaw 46. Mr. Seidman believed that any letter he would have issued or petition he had the Bank mail for him would have subjected him to the filing of a suit against him by Spencer.

Unlike his own actions Mr. Seidman feels that the Board continues to operate in a frivolous fashion. Particularly with regard to this litigation, he is being challenged as having control of large members of professional investor votes when actually "there really are only five votes that I control and those would be me and family members' votes." The people that signed petitions for him in the first attempt he made to nominate individuals to the Board are some of the people that the Defendants subpoenaed to the Court in this case. This has a chilling effect on people who are willing to sign petitions, in which their willingness to do so results in them being dragged into Court.

The focus then shifted back as to why Mr. Seidman had not attempted to follow through on his plan to nominate individuals to the Board of Directors. After all, there are other methods besides mailing that he can use to garner support and signatures. It was pointed out to Mr. Seidman that he uses a computer, a Blackberry and emails. He also knows how to use a company to help him with proxy statements. He was asked about starting a blog or other internet social media forms of communication. Counsel asked Mr. Seidman why he could not have just as well started a public awareness group to advertise his desire to run himself or a candidate for the Board. Mr. Seidman's response was that was not what he wanted to do. It was pointed out to him that he does have a web site and could have set up a site for members since he had another operational website. Again, Mr. Seidman was questioned about conversations about merging Spencer, converting Spencer, his understanding of the nature of the depositors at Spencer and their interests in the banks future.

Mr. Seidman has been associated with various individuals including Mark Risto, who is under investigation by the Federal Government, and he is also associated with many other individuals who have opened accounts at Spencer Savings since Mr. Seidman got involved. His response to all these allegations was that in 1970 Peter Lynch wrote an article telling people that if you opened accounts in mutuals when they went to convert and go public, that individuals had the opportunity to make a profit on an investment. In response to a challenge that members may not be able to afford a stock purchase, he

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[6] N.J. Stat. § 17:12B-120

flippantly proposed that he would give away stock to member depositors for free. When challenged that he had put a rather large investment in this litigation Mr. Seidman responded with the fact that he had no interest at this time in Spencer converting; he is concerned about the way this bank is governed and stated "I abhor the corporate governance of this bank."

Richard Grabaugh was presented by Mr. Seidman as an expert with regard to the cost of mailing and the procedures for the nomination under the Bylaws. Mr. Grabaugh's opinion was that an individual member would not be able to comply with the procedures set forth by Spencer's Bylaw 31. It was highly improbable that a single member would be able to solicit the numbers necessary to gain a nomination. Based upon his experience in returns by shareholders in public offerings done by mailing, the type of return sought here was almost an impossibility. Mr. Grabaugh had never been involved in the solicitation to mutual members, nor was he aware of a contest to convert mutuals. His data on consumer shareholders comes from a company called Broad Ridge, which conducts most of the public company contests. Broad Ridge is recognized and relied upon in the industry. It is Broad Ridge who tracks voting results through public companies and it was his position that, based upon the statistics, only about 15.4% of all shareholders vote. In those contests the individual can vote by mail, phone or internet and can be contacted openly. None of those options is available under Bylaw 31.

Additionally, he was concerned about the time of year that the mailings would have to go out for a nomination to Spencer because of their January meetings. All of the mailing would be done during the holiday period, which he claims is a slower period for mail delivery. The process of gaining signed returns is even more difficult, because they are seeking nominations and not even a voting opportunity. It just does not have the appeal an actual vote does. Mr. Grabaugh has participated in approximately a dozen proxy solicitations with Mr. Seidman over the years. He has no recollection of those institutions with which he was involved. Mr. Grabaugh's memory with regard to numbers and particular information was not very clear and, although he does have some convincing computer expertise, his inability to provide anything clearly as an avenue for Mr. Seidman to use was not helpful.

Cross examination of this witness really challenged the fact that without an actual attempt to test the probabilities in this case, this Court does not have probative information to determine whether or not the threshold as enacted is reasonable. Mr. Grabaugh obviously is a very bright man with tremendous experience, but he does not have at his fingertips factual or empirical data that explains the apathy in this type of election. His ideas and his philosophy are excellent, but there does not seem to be a connection to the situation and the facts at hand.

Out of turn, this Court permitted Defendant to present Jane Ray. Ms. Ray is a Vice President with Spencer Savings. Her experience at Spencer Savings is extensive. She was aware of OTS involvement with the Spencer Board seeking a change in the composition of the Board. Ms. Ray identified D18 through 139 and D125, all of which address the road map for the bank and its strategic plan. She described Spencer as

community-driven, not fee-driven, and the lending activity is kept and managed by the bank in the local community. They do not lose contact with the customers with whom they are engaged. Ms. Ray, like many of the witnesses that followed her for Spencer Savings & Loan, focused on the commitment to being involved in the community. Officers are encouraged to join and belong to various local groups, to get on community boards, to develop grants and to obtain donations for various organizations. She recited the standard of "time, talent and treasure" recognition in social giving.

Ms. Ray has been involved with Spencer for the last eighteen years. She is not personally in favor of conversion. While she would personally profit she does not see conversion as a good option for the community. Ms. Ray has become aware of the growing involvement in Spencer of professional investors. Those are individuals who opened accounts in violation of the bank's policy for the simple purpose of future financial gain. They misrepresent their residency, use others to contrive and even have participated fraudulently. It is her position that there are a group of people from out of state working with in-state people to open accounts and defraud the bank. She identified various schemes utilized to frustrate the bank.[7] It was Ms. Ray who identified the Complaint filed against Mark Risto in September 2007 and the two pieces of correspondence indicating a connection between Mr. Risto and Mr. Seidman.

Interestingly, this policy of having to be a New Jersey citizen is reduced to writing somewhere, but is not necessarily given to all new depositors. The information about this problem of out-of-state depositors only came to the attention of the bank last year. At the same time, she also became aware of the criminal information about Mr. Risto. Some of the information that has caused her to be concerned may have been known during the 2004 litigation and some of it actually became known within the time that the trial in this matter commenced.

Ms. Ray assured the Court that they did not just start hunting for these accounts as a result of this litigation, but it appears that there was no prior scrutiny applied to the bank accounts before this case became active. Just in the last month she indicated they began to close accounts and send money back to depositors who do not comply with Spencer Savings' rules.

Ms. Ray was an extremely credible witness. She struggled with the fact that many of the irregularities should have been discovered by the bank many years ago, but demonstrated genuine interest and concern about the future of Spencer Savings Bank. While she had expressed concern about the danger that conversion presents to community involvement, it was a bit disingenuous to indicate that commercial banks do not engage in community activities or encourage community volunteerism.

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[7] Two individuals opened an account and remove the name of the New Jersey resident allowing the out of state person who now has a post office box to continue to be the depositor. Marked for identification was D112 which shows documents opening an account for an Alan Greene who was a resident of Plainfield for five trust accounts in 2006. The beneficiaries were all Wisconsin residents and within months of opening those accounts Alan Greene was removed and the trust with the out of state individuals continued to be deposited.

Defendants' expert was Thomas Cronin, who is a partner with Phoenix Advising Group, a proxy consulting firm. He has been involved in evaluating proxy contests and working on proxy contests for approximately thirty years. His focus has been primarily on banks and he has seen approximately 150 mutuals that were converted. He did work with Larry Seidman some twenty to twenty-five years ago. Mr. Cronin described that an average shareholder in a public company is much more knowledgeable about what goes on in that particular company than the member of a mutual, such as Spencer, who really is not interested in governance. These members do not become involved in any of the governance events, and most of whom will not buy stock if the mutual does in fact convert. It is his experience, in a conversion, that most of the stock is purchased by the professional invest depositor.

These investor/depositors are identified as people from all over the country who open the accounts in banks they believe have the potential for conversion and future profit. Mr. Cronin did review P12, which was the complaint that was filed by Spencer against Mr. Seidman in the Federal District Court. He reviewed Spencer's Bylaws and is familiar with the New Jersey Savings & Loan Act. It is his obligation in a proxy contest to understand all the documents necessary to the process. He also reviewed the postal reports for the area to evaluate timing and cost.

Mr. Cronin does believe that the 15% threshold for nominations is obtainable; however, he did say that it was not easily done. He opined one could see as much as a 25% to a 30% response after a first mailing, but that is impacted by what the solicitation has to offer. For example, depending on whether or not it contains an opportunity to buy stock, or if a nomination was someone of importance, then one could expect a higher response. Because of Mr. Seidman's comment about "giving away shares of stock" through an offering, Mr. Cronin opined that depositors that would probably become more involved with that type of an offer and one mailing would be more than sufficient.

Mr. Cronin described many of the less expensive ways of cultivating support for a nominee in today's current environment. He pointed out that the initial letter could contain an email address, one could use newspaper articles, or put a telephone number in that original mailing. He is a proponent of Facebook and other electronic social media. When Counsel asked about using blogs and websites to reach people, Mr. Cronin indicated that those would also be appropriate ways. One of the biggest proxy sites that he recalls was with Bank of America, which put all of their information on the internet.

Interestingly Mr. Cronin, who was aware of Mr. Seidman and his history, indicated that Mr. Seidman's main use of communication is through direct telephone calls and mailing. He has not seen him use any web-based programs. Mr. Cronin felt that during the holidays, mail is usually much quicker to be delivered and that the Bylaws' indication that one can begin mailing in February adds to its ease of use.

Mr. Cronin was involved with Mr. Seidman in the 1980's. He indicated that at the time his boss did not particularly like working with Mr. Seidman because Mr. Seidman was very proactive in the process. Mr. Cronin himself has not ever been

involved in a conversion of a mutual. He has been a professional investor in numerous thrifts that went through conversions, however. Mr. Cronin talked about his experience with Mr. Seidman.

He has not known Mr. Seidman to be involved in not-for-profit organizations or investments that did not involve financial gain. While he does attempt to engage in direct conversation activity, he and his associates normally work behind the scenes. They use one bank to buy another bank or push for sale for conversion. Mr. Cronin indicated that Mr. Seidman has a number of associates; they are his investors and the individuals he recommends to buy stock in certain institutions. Mr. Cronin's opinion is that Bylaw 31 treats every group fairly, professional depositors as well as the average depositor and family members. It is his opinion that professionals will certainly be the first to sign a petition or vote in any type of contest. In his career, he has never seen a non-professional investor nominate an individual for a mutual Board seat. Mr. Cronin was also familiar with the names of various Seidman associates. He was aware that many of these are individuals who are a part of what he classified as the 13D Group, those that appear on many of those documents. It was his professional opinion that the professional investor in this setting would dilute the impact of any average depositor because those depositors are small depositors not concentrating on what occurs and the professionals are focused on the investment itself.

On cross examination Mr. Cronin admitted that the cost to achieve the 15% threshold would be anywhere between $50,000.00 and $80,000.00. He has never been involved in a proxy for a nomination. Most of his work is in the conversion area. He has never seen a conversion forced by a professional investor. He has seen credit unions and insurance companies use quorum requirements to control as a quality remedy as opposed to a threshold for nomination.

When looking at Spencer, Mr. Cronin had not actually looked at Spencer's website and did not know that they had a commercial real estate portfolio. He did believe that there was a possibility that those average members might be more sophisticated than what was previously expected or discussed.

The Court then heard from John Fitzpatrick, Sr., Vice President of Retail Banking at Spencer. He reports directly to Jane Ray and has been at Spencer for 12 years. Before that, he worked in commercial banks for 21 years. Mr. Fitzpatrick is not a fan of commercial banks. He told the Court that in commercial banking it was all about meeting quotas, hitting goals for the quarter, and at Spencer they have no quotas or goals. They simply have the opportunity to sit and listen to customers and to find a service or a product that meets their individual needs. He loves working at this type of a bank. He is focused on it being a community bank. They provide services not because they are mandated by the bottom line but, in fact, because they enjoy what they are doing.

He said that Spencer is a very unique bank because it is an old bank. He refers to them as "senior boomers." They banked at Spencer with their parents depositing their weekly allowance, and Spencer focuses on the people that have worked in the area for

years. These individuals are marked by having equity in their homes and passbook savings accounts. There is no pressure to generate fees or incomes, unlike the commercial banks that rely on the fees charged on overdrafts, for example.

The Court then heard from a number of Spencer employees, all of whom described Spencer community involvement, the goodness of Mr. Guererro, and the negative implications of converting the bank. Employees Robert Peacock, Allison Dancheck, and William Callahan all testified. Mr. Callahan in fact had worked at Crest Mount Savings when control of the company changed to Mr. Seidman. It was his testimony that branches were closed and the bank declined. He indicated that the difference between the mutual and commercial banks was that commercial banks were all about cutting costs and making money rather than the customers. Mr. Callihan had to admit on cross examination that Mr. Seidman's control at Crest Mount occurred after Crest Mount was converted.

The Court also then heard from Marzena Czachor and Edward Kurbansade as to their experiences with the numbers-driven bank as opposed to Spencer where their efforts are spent establishing loyalty between the customers and the bank.

Finally, the Court heard from Ronald Janis. Mr. Janis is a lawyer at Day Pitney LLP in New York. He specializes in banking law, regulatory work, institutions and corporate law. He has known Larry Seidman since 1986 when he was "going after Hudson United." Since then, Mr. Janis has followed Mr. Seidman on a regular basis by reading his 13D filing to see what he is doing.

Mr. Janis was retained by Spencer to work on Bylaw 31. He worked with the Directors on reviewing the Court's Opinion, Bylaw 31, and goals that they needed to set. It is primarily Mr. Janis who describes Mr. Seidman and his "wolf pack" to the Board. He explained how Mr. Seidman does business and the kind of people associated with him. While Mr. Janis disagrees with this Court's 2007 opinion, stating that the Court relied to heavily on corporate law, he did have to admit that the original action to amend Bylaw 31 had not been given sufficient due diligence.

Mr. Janis is another individual who feels this threshold is necessary to ensure there is no chaos at the annual meeting and commented that " Greek democracy" did not always work. While individuals engaged in this process had thought about a larger quorum as being helpful on an actual voting date, it was determined that a larger quorum would not be a logical response.

The Board was clear that they wanted a threshold for nominations. They were not going to go with a "no threshold" under any circumstances. There was a goal to make the mailing less expensive. The idea of giving permission to begin this effort in February was a way to avoid two mailings and reduce those costs.

D31 is actually a memo from Michael Horn in the McCarter litigation group describing the prior litigation and the Directors. The inferences here are that Mr.

Seidman's true goal in this litigation directed at Spencer was to move the bank toward conversion. The Board's concerns were consistent with Janis' experience and he supported their desire to avoid that unrest. At the meeting that he attended he walked the Board through all of the issues and Court's Opinion. He wanted to make it clear to them that they needed to consider and understand the reasons for what they were doing and that there was no hard and fast line established in the law. He told the Board the decision the Court had made invalidating the 20% threshold was focused on the lack of factors and reasons to support that change. Mr. Janis was quite clear that once one makes the determinations there has to be a threshold he has created an obstacle to the average members' ability to nominate. Therefore, the reasons for that percentage needed to be established.

On cross examination Mr. Janis articulated the fact that the minutes were not comprehensive. "They are limited in form and omit certain things that were discussed." For example, there is no discussion in the minutes on the topic of the chaos at the Annual Meeting. Nor was the concern about chaos articulated in any of the memos that were provided to the Board. Mr. Janis indicated that most of the discussions really took place at the morning meeting where they walked through the Court's opinion, case law, and memoranda supplied to the Board of Directors by the attorneys that had been retained. They also talked about Mr. Seidman's pattern, his history and the Board of Directors' concern about stopping him.

The second meeting was where they actually voted. Mr. Janis then testified that during all of the discussions there never was a comment made or an inference raised that they wanted a threshold to protect their individual jobs. They needed to rely on the bank regulators to take whatever action was necessary to remove incompetent directors. In this setting, Mr. Janis felt it was important to be concerned about those members who never voice any concerns or take any actions on their own. He again pointed out that no one before Mr. Seidman has ever attempted to nominate someone to get on the Board.

The Court then heard from Graham Jones, who has been general counsel for Spencer Savings for the last forty years. Mr. Jones was personally involved in all of the litigation. He was aware of the complaint that was filed in March 2007 in the Federal District Court and is fully aware of Mr. Seidman and how he engages in business practices. Mr. Jones was present when the Board adopted Bylaw 31 and participated in discussions, as previously testified to by other parties.

On cross-examination however, it was clear at the time the Bylaw was enacted the Board had not actually identified any number of "confederates" of Mr. Seidman. The Board was concerned that there were a number of Mr. Seidman's confederates on the Board, but there was no calculation as to whether or not the number of professional investors/confederates of Mr. Seidman outnumbered the number of running proxies that the Board held. He did note that there were over 630 running proxies at the time the Bylaw was enacted.

The Defendants actually called Mr. Seidman on their case and proceeded again to go through some of his history and his business practices. There was an attempt to begin again to talk about the 2004 litigation and the attempt by Mr. Seidman to nominate individuals to the Board. The Court terminated that testimony because that matter had been thoroughly litigated and the prior actions of Mr. Seidman in his attempt to gain access to the Board were not the subject of this particular litigation. This litigation is focused specifically on the latest modification to Bylaw 31 and the creation of Bylaw 46.

Mr. Seidman was shown various documents including D152 through D156. He was then shown D150 (which is actually P11), which reflects the beginning of the attempt to nominate people in 2010. Mr. Seidman testified it was his view that whatever he did, he was sure that Spencer was going to sue him. While he had individuals he wanted to nominate to the Board, he seriously believed he would be sued if he responded to their correspondence about the form of his nomination petition. He had forwarded the resumes of the individuals he wanted to nominate because they were left out of the initial mailing. Mr. Seidman became very agitated when asked if the true reason he did not follow through on his attempt to nominate individuals was that he was afraid of being sued by the Federal Agencies as opposed to the bank. His demeanor was extraordinarily hostile at that point, and he proceeded to scream his answer at counsel. It was clear through the remainder of his testimony that he believed that various individuals associated with Spencer and Spencer's litigation have personal animus towards him. Specifically, he had an issue with Mr. Fawcett whom he described as having threatened to ruin him and put him out of business.

It is undisputed that Mr. Seidman did not maintain any of the documents that had been on his personal computer from the 2004 litigation or anything in the interim period between that litigation and the commencement of this litigation that may have been relevant. He also took no steps to preserve any documents. However, Defendants never made it clear to this Court how any of those records or documents could assist in the findings of facts in this litigation.

Mr. Seidman made it very clear that he filed this lawsuit because he believes that the Spencer Bylaw is illegal and he is challenging its illegality. He is also concerned because, originally, Mr. Bedrin had come to his office and told him about all of the expensive trips and the salaries that were being paid to the Board. When he made inquiries to Jose Guerrero about these expenses, it was Mr. Seidman's sense that Mr. Guererro felt that this was his bank and he could do whatever he wanted to do. This litigation, Mr. Seidman said, is not about conversion. He does not really care if the bank goes public; his concern is the way this particular Board and Jose Guerrero are acting towards bank governance. He feels that "everyone should be answerable to someone."

Barry Minkin was called as a defense witness and simply repeated the concerns of the bank about the actions of professional investors and professional investment groups.

After reviewing all of the testimony and evidentiary documentation, this Court now has to once again look at this Bylaw in light of the Appellate Division's decision

affirming this Court's 2007 decision. When this Court rendered its decision in 2007 the Court was significantly disturbed by the lack of understanding by the Board members of the purpose and the effect of the Bylaw. However, the Court was more concerned about the entrenchment of the incumbent Board of Directors. This Court found "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 unwelcome wealthy outsiders, this amendment has a deleterious effect on the efforts of the common day depositor to gain a seat for themselves on the Board of Directors if they are unknown to the current nominating committee."

I started this opinion some five years after that decision rendered in 2007 and, twelve days of testimony later, this Court is still not sure that this Bylaw has any more concrete relationship to corporate governance. Each and every Director testified to the fact that the Board attempted to balance the rights and the needs of the average Spencer member against those of the professional investor. The testimony and the documentation clearly establishes that this Board had no idea how many professional investors, as they were defined, had accounts at Spencer Savings and Loan. The only professional investor that this Board was aware of specifically was Lawrence Seidman. In the meetings with their corporate counsel and special outside counsel, they were made aware of all of the various individuals that showed up on 13D filings by Mr. Seidman and his various companies. But those filings and those documents were all public record that anyone could obtain at any particular point in time. While it was clear from the testimony that during trial preparation the bank began to review its member lists and those individuals who had accounts, this was not done in preparation for the meeting to approve the Bylaw.

Mr. Seidman's proofs establish that Spencer's Board of Directors did not comprehend that 15% was the same as 20% when one considered the actual number of members of Spencer Savings Loan. Mr. Seidman's proofs establish that unless one was known to and or liked by Jose Guererro she had no possibility of having her name submitted to the members as a potential member of the Board of Directors. Of the last two Board of Directors members elected, one individual was clearly approached and recommended by Jose Guerrero to the Board as a potential nominee, and the other- Mr. Sturges- expressed direct desire to be a member of the Board of Directors to Jose Guerrero. Mr. Seidman's proofs demonstrate by clear and convincing evidence that obtaining a seat on the Board by the average Spencer member is almost impossible. This Court acknowledges that the New Jersey Statutes require that the cost of communication be imposed upon the nominee.

As stated in N.J. Stat. § 17:12B-120:

> If the application is to enable the member to communicate with other members of the State association, and if the State association grants the application, the State association shall prepare and mail copies of the communication or communication, submitted with such application, to all of its members as soon as the applicant

> has paid to the State association all of the costs and expenses involved in such preparation and mailing. *Id.*

It is also true from the facts produced at trial that the Board hired the best and the brightest attorneys to provide advice on fashioning of the Bylaw. Even taking that action, this Board continues to fail to do the basic leg work that is necessary to determine the extent of the risk and impact to its members. The entire focus of the legal presentation to this Board was Mr. Seidman's 13D associates. There was no proof to make a correlation as to whether or not those people were a part of the Spencer membership in sufficient number to impact voting. There was no evaluation as to whether or not there were sufficient numbers of the "wolf pack" to overcome the number of running proxies that the Board had for the annual meeting. There was no proof that the professional investors would be able to create "chaos" at an annual meeting.

One inquiry New Jersey courts undertake in applying the business judgment rule focuses on whether a corporation's board "acted in good faith and with due care in investigating the merits" of litigation. *In re PSE & G Shareholder Litigation*, 173 N.J. 258, 291 (N.J. 2002). As the Court in *In re PSE&G* noted:

> [T]he Court's inquiry is not into the substantive decision of the board, but rather is into the procedures employed by the board in making its determination." In that regard, there is "no prescribed procedure that the board must follow." Nonetheless, the process should be such that a reviewing court can look to it and conclude confidently that it reflects a corporation's earnest attempt to investigate a shareholder's complaint. Stated differently, the inquiry is whether the "investigation has been so restricted in scope, so shallow in execution, or otherwise pro forma or half-hearted as to constitute a pretext or sham. *Id.* at 291-292.

The Defendants never provided any proof to this Court that the Board took a look at the prior 10% threshold to determine whether or not it was logical, or rationally sufficient to remain as the threshold. The record is full of testimony by individuals including Directors, Officers and Counsel that no one other than Mr. Seidman has ever sought to nominate a candidate for the Board other than a candidate designated by the Board. The 10% threshold itself arose out of fear created in the 1990s when many mutuals were being sought after for conversion and profit-taking. But nowhere in the testimony did this Court hear that the Board, in going through their numbers and membership list, and in light of the information about Mr. Seidman's associates, determined that more than a 10% threshold was necessary. While Spencer argues that Mr. Seidman has not provided "empirical numbers" with regard to the difficulty and the expense to an individual member, both sides' experts agree that a minimum cost to mail petitions for nominations is in excess of $50,000.00.

What was present in almost every Board member's testimony was the fact that they recognized their need to placate the trial judge. As the Appellate Division said in reviewing this Court's 2007 opinion:

> Bylaws 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. *Seidman v. Spencer Sav. Bank, S.L.A.*, 2010 N.J. Super. Unpub. LEXIS 1783 (App.Div. July 27, 2010)

This Board's investigation into the appropriateness of this Bylaw was so thorough that they were not even aware that the current status of the membership put their 15% at almost the same number that their 20% was in 2007 when this Court found both the procedure and the number to be prohibitive. Director after Director testified that they did not even look at the number. Director after Director also indicated that they have never rejected a suggested nominee to the Board from Mr. Guererro. Mr. Sturges, who indicated that he wanted to get on the Board, did not attempt to gain nomination as a simple member, but went to Mr. Guerrero directly to indicate his wishes to be on the Board. Mr. Seidman has been telling this Board that this amendment, and its unreasonable barrier to member participation, is improper. This Board was directed in this Court's prior ruling to revisit the need for a change in the 10% threshold.

The only clearly defined and identified professional investor in 2007 when this Bylaw was revisited is Seidman. Instead of researching what the proper number is to protect the individual members and approach a nominating threshold or process that protects that interest as well as protecting the majority from disenfranchisement by the minority, the Board simply enhanced its anti-Seidman position by educating itself about Mr. Seidman's business practices and his associates. Instead of identifying parties of interest and deposing individuals during the course of discovery, Spencer attempted to boot strap a defense for the Bylaw by subpoenaing in excess of 40 individuals at the time of trial in order to gain their discovery at the expense of the Court's time. They, in essence, tore down all the laws to reach the devil and stop him.[8] Bylaw 31, as currently written with a 15% threshold, is void. Spencer Savings is directed to reinstate their 10% threshold, retaining the language facilitating a one mailing process.

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[8] Spencer waited until sometime in 2011 and early 2012 to go through their membership and determine whether or not their members were complying with the institutional roles. The defense of their By Law was based in the evil spector of forced conversion even while they could provide no factual basis for that ever having occurred. With apologies to Robert Bolt's "A Man for All Season."

Spencer Savings and Loan's counterclaim against Larry Seidman for breach of fiduciary duty in filing this litigation is Dismissed with Prejudice. Despite Mr. Seidman's business interest, he has again pointed out to the Court during the trial a lack of serious investigation as to the best way to protect the interest of the individual members of Spencer Savings and the further entrenchment of the Board that is hand picked by Jose Guerrero. Discussion of bank governance has been effectively stifled by the slogan "we are the community" without having anyone vested with the ability to look specifically at the actions of the Board.

The Defendant Spencer Savings' last minute allegations of spoliation of evidence by Mr. Seidman are likewise Dismissed with Prejudice.

Mr. Seidman's demeanor throughout this trial towards defense counsel was clearly uncivil. It is alleged that outside the Court's presence he was hostile and crude. Many times during the trial this Court observed him being dismissive, dilatory and rude towards defense counsel. However, defense counsel also demonstrated a pattern of leading and passive/aggressive demeanor that is unnecessary, particularly out of the presence of a jury. Both sides were warned throughout the trial that the Court would consider sanctions if the environment in the courtroom did not change.

As before, this Court is not ruling or deciding upon which business approach is preferable.

The Court is also going to grant Mr. Seidman's request to declare void Bylaw 46. Spencer Savings has attempted to cloak itself with the authority that is reserved for the Federal Government and Regulators in addressing the behavior of those individuals associated in business practices. Whether it became a Bylaw that simply repeated the federal statutory provisions or not, would not create a better cause of action for Spencer than they had in 2007 when they filed the Federal District Court action against Mr. Seidman. *Spencer Bank v. Seidman*, 528 F. Supp. 2d 494 (declining to infer a federal right of action); *see also Cal. v. Sierra Club*, 451 U.S. 287, 293-294 (U.S. 1981) (statutes [that] focus on the person regulated rather than the individuals protected [they] create 'no implication of an intent to confer rights on a particular class of persons.').[9] In fact, the

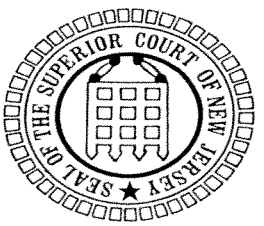
[9] In *Spencer Bank v. Seidman* filed in 2007, Spencer alleged that Seidman and a group of mutually interested and associated individuals known as his "confederates," had targeted and acquired interests in several institutions employing menacing tactics, initiated lawsuits, and induced tender offers to influence the boards of directors of the savings institutions in which they held interests into seeking to merge with or to be acquired by another institution. However, the court concluded that Spencer was not one of the class for whose especial benefit § 1467a(h)(1) was enacted and did not create a federal right in favor of Spencer. The court found the focus of § 1467a(h)(1) was upon savings and loan holding *companies*, not savings associations which were mutual associations. 528 F. Supp. 2d 494.

evidence showed that in conjunction with Bylaw 31 Bylaw 46 inherently causes a conflict and a violation of both Bylaws. This Court has considered all issues raised by the parties and is satisfied the above decision reflects the evidence presented.

Very truly yours,

Margaret Mary McVeigh, P.J.Ch.

MMM:rlg



PREPARED BY THE COURT:

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION
GENERAL EQUITY PART
DOCKET NO: C-96-10

SEIDMAN

Plaintiff,

v.

Civil Action

SPENCER SAVINGS BANK

ORDER

Defendant

This matter having come before this Court for trial on December 5, 2011 and concluding on June 5, 2012 and the Court having heard the matter, considered the evidentiary proofs, for good cause appearing, and for the reasons set forth in the attached opinion of this date,

IT IS on this 19th day of December, 2012,

ORDERED, that Plaintiff Lawrence Seidman's request to invalidate New Bylaw 31 is GRANTED in part; Defendant is ordered to reinstate the 10% threshold as it existed in 2004, along with all the new provisions enacted in July 2007.

ORDERED that Plaintiff's requests to recover the costs of suit, compensatory damages, and counsel fees derivatively on behalf of Spencer Savings and against the Director Defendants jointly, severally, or in the alternative are DENIED.

ORDERED, that Plaintiff Lawrence Seidman's request to declare void Bylaw 46 is GRANTED;

IT IS FURTHER ORDERED that Defendant Spencer Saving Bank's counterclaim against Plaintiff for breach of fiduciary duty in filing this litigation is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendant Spencer Savings Bank's allegations of spoliation of evidence by Plaintiff Lawrence Seidman are DISMISSED with prejudice;

The Court is not ruling or deciding upon which business approach is preferable.

Margaret Mary McVeigh, B.J. Ch.