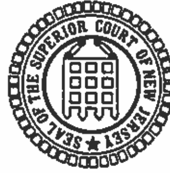
SUPERIOR COURT OF NEW JERSEY

Bruno Mongiardo
JUDGE, CIVIL DIVISION



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Lawrence Seidman v. Spencer Savings Bank, et al.
Docket No. PAS-C-53-15

OPINION OF THE COURT

This matter comes before the Court on Plaintiff's Complaint. The Complaint, as amended, articulates discrete claims against Spencer and its Directors. The First Count relates to Current By-Law 36 which requires that ten percent (10%) of the membership support a Member-initiated nomination of a candidate to the Board. Plaintiff asserts that this ten percent (10%) threshold is harming Spencer and its members since it prevents Members from having a legitimate opportunity to nominate candidates to oppose the incumbent Directors. The First Count seeks the invalidation of the threshold. The Second Count asserts that Spencer, as a mutual, is very similar to a Credit Union. The By-Laws for Federal Credit Unions provide that member-initiated nominations are valid as long as they are supported by the lesser of 1% (one percent) of the membership or 500 members. The Second Count seeks the replacement of the 10% threshold with the Federal Credit Union threshold. The Third Count alleges that Spencer improperly closed the accounts of Seidman, his entities and his relatives. The Plaintiff alleges that the proffered reason for the closures was pretextual. The reinstatement of the accounts and removal of the Directors is sought as relief. The Fourth Count asserts that the account closures were wrongful and breached a contract. Damages and counsel fees are sought.

The defense first argues that the 10% threshold has previously been held to be proper. Also, Defendants argue that Plaintiff has introduced no evidence that the 10% threshold is unattainable. The Defendants further argue that the Department of Banking and Insurance previously held that Spencer is entitled to impose a threshold and that it in fact upheld a 15% threshold. The Defendants argue that Spencer is required to protect its mutuality, and it has a right and obligation to protect itself against Seidman, an alleged notorious corporate raider. Finally, the Defendants argue that they acted properly and in accordance with the by-laws regarding the closure of the accounts.

This case was tried before the Court on May 1, 5, 22 & 24, 2017; June 27, 2017; July 5 & 27, 2017; and August 7, 2017. The Court then afforded both

counsel the opportunity to provide written summations to the Court. Both counsel did so. Finally, the Court entertained oral summations on September 22, 2017.

It is to be noted that this particular cause of action is the latest in a series of actions involving these parties over a number of years. The litigation history can best be described as contentious.

Pre-Complaint Litigation History

In 1995, upon the advice of its regulatory counsel, Spencer passed an amendment to its By-Laws to require that a member secure the written endorsement of at least 10% of all members in order to nominate a candidate for election to the Board of Directors. This was the first threshold in the history of Spencer. In 2004, this threshold was increased to 20%. At a first trial prosecuted by Plaintiff before the Honorable Margaret Mary McVeigh, PJCh. (now retired), she did strike down this 20% threshold. This Court has taken note of some of her specific findings as follows:

1. The amendment has a deleterious effect on the efforts of the common, everyday depositor whether it is 10% or 20%;
2. The Directors breached their fiduciary duty to their depositors by attempting to keep "outside investors" from gaining participation on the Board in order to maintain their own positions; and
3. The Board's attempt to erect an insurmountable barrier to those not part of the inner circle is shortsighted and improper.

Judge McVeigh issued her written decision on April 13, 2007.

The Appellate Division issued a written, unpublished decision affirming Judge McVeigh's decision on July 27, 2010. Most notably, the Appellate Division observed the following:

1. Any future goal for a conversion or merger that Seidman may have had was several events removed from the immediate focus of enhancing the franchise of Spencer's members; and
2. The finding that the By-Law has a deleterious effect on the nomination efforts of the common, everyday depositor is based upon substantial credible evidence.

After the first trial, Spencer set the threshold at 15%. Seidman challenged this threshold in a second trial. In fact, Seidman sought the abrogation of any threshold at all. After a lengthy second trial, Judge McVeigh issued a written decision on December 19, 2012. She wrote that she did not find a threshold "per se objectionable" but found the Board's process in setting the 15% threshold to be objectionable. Judge McVeigh acknowledged that the Appellate Division in its previous *Seidman* decision indicated that Seidman needed to present "quantification of the impact of the By-Law threshold. Specifically, the Appellate Division indicated there needed to be empirical evidence". She

recognized that Seidman "failed to demonstrate quantifiable data" as to why there should be no By-Law threshold. Judge McVeigh nonetheless invalidated the 15% threshold and entered judgment reinstating the 10% threshold Spencer set in 1995.

Certain notable observations of Judge McVeigh are as follows:

1. The focus is on the By-Law and not a battle against the professional investor or the evils of conversion;
2. The Board's focus was never on the size of membership (40,000); rather, the focus was on preventing Seidman from having any ability to address bank governance and banking policies; and
3. The amendment has a deleterious effect on the effort of the common day depositor. The proofs establish that 15% was the same as 20% when one considered the actual members of Spencer. The proofs established that obtaining a seat by the average member is almost impossible;

The Appellate Division again, by a written unpublished opinion dated April 30, 2015 affirmed, pertinently finding:

1. The nexus between the ability to nominate candidates for the Board and actual conversion of the mutual is attenuated; and
2. Any perceived threat by Seidman was neither imminent nor irresistible.

The Appellate Division soundly rejected Seidman's argument that no percentage threshold can be justifiably imposed. "That is the law of the case and we will not disavow it here". This litigation then ensued prior to Judge McVeigh's retirement.

Procedural History of This Case

After Seidman filed the instant Complaint, Spencer filed a motion to dismiss pursuant to Rule 4:6-2(e) for failure to state a claim on the basis of res judicata, collateral estoppel, judicial estoppel, the entire controversy doctrine, the law-of-the-case doctrine, and laches. On September 22, 2015, Seidman filed his First Amended Complaint, which added a now dismissed count for breach of fiduciary duty, and he also filed a motion for summary judgment on the first two counts of the Amended Complaint. On December 9, 2015, Judge McVeigh denied Spencer's motion to dismiss and adjourned Seidman's motion for summary judgment. In denying the Motion to Dismiss, Judge McVeigh made critical observations and held:

1. The nomination procedures have to provide reasonable availability to the members;
2. A dislike of Seidman does not give Defendant the ability to disenfranchise everyone else; and
3. Accessibility is the issue. Not Seidman.

On December 24, 2015, Spencer filed a motion for reconsideration of Judge McVeigh's denial of its motion to dismiss. On March 4, 2016, Judge McVeigh heard oral argument on Spencer's reconsideration motion and on Seidman's motion for summary judgment. During oral argument, but without written opinion, the Court denied Spencer's motion to dismiss and Seidman's motion for summary judgment.

As to the motion to dismiss, Judge McVeigh made it quite clear what she believed the critical issues to be. On December 4, 2015, she stated:

"I think that it has been made very clear that accessibility is the issue here. Not Larry Seidman. So I think that we are going to have to address this again. We are going to have to address whether or not 10 percent is reasonable."

At oral argument on March 4, 2016, she stated:

"I think that the fact exists that 6000 as a number of signatures is unreasonable. I find that as a matter of fact (emphasis added). I have found that previously".

She also stated on March 4, 2016,

"I found it unreasonable in the past for someone to try to come up with 6000 signatures on a petition to get nominated, let alone even win".

"So, 6000 is a bad number".

This Court has found these findings by Judge McVeigh to be the law of the case. See Lanzet v. Greenberg, 126 NJ 168 (1991).

Judge McVeigh also made it quite clear that the impact of the 10% threshold has not been previously litigated:

"I have never considered, it has never been presented to me, the impact of the 10% on the ability of the members of the Savings & Loan to be able to proffer candidates".

On April 11, 2016, Defendants filed a motion for leave to file an interlocutory appeal of Judge McVeigh's denial of Defendants' Motion to Dismiss. On May 4, 2016, the Appellate Division denied the motion. Judge Sabatino agreed with Judge McVeigh that the "validity of the current 10% signature requirement has not been previously adjudicated by this Court in its prior opinions in this matter".

Plaintiff Seidman also did file a motion to compel the reinstatement of the accounts in question. During oral argument on the motion, Judge McVeigh stated:

"Ms. Chaitman, in 24 years on the bench, I have never been so distressed at a tactic by an attorney in the pursuit of vengeance as I have with the actions to close these accounts...

We come into an Equity Court with clean hands. This was not a good faith, clean hands action. It goes nowhere."

Judge McVeigh made reference to Ms. Chaitman, trial counsel for Defendants. The testimony is that she advised Spenser to close the accounts.

Judge McVeigh was reluctant to compel Defendant Spencer to reopen the accounts because of her uncertainty as to whether she had the authority to do so. Judge McVeigh did seek an advisory opinion from the Commissioner of the Department of Banking and Insurance (DOBI) whether a regulation exists which establishes criteria for when a Depository Savings and Loan Association should, or must, close a savings account and whether the DOBI has exclusive jurisdiction over disputes between a depositor and a Depository Savings and Loan Association concerning the unilateral closure of savings accounts. On August 3, 2016, a response from the Attorney General's Office on behalf of the Commissioner of DOBI was received. That communication addressed to this Court (Judge McVeigh retired June 30, 2016) states, "After carefully reviewing the court's request, the Department respectfully declines to comment on this private litigation".

On June 7, 2016, Judge McVeigh entered an Order granting Plaintiff leave to file a Second Amended Complaint asserting claims relating to the closure of the said savings accounts, holding that Plaintiff continued to have standing to prosecute the claims in this action. Also, on June 10, 2016, Judge McVeigh issued an oral decision dismissing Defendants' Counterclaim (RICO) with prejudice.

The 10% Threshold

The Law-of-the-Case is that a By-Law that requires approximately 6000 members to validate a member-initiated nomination is unreasonable and invalid. Marzena Czachor, a Spencer Branch Manager testified that the typical Spencer member is "blue collar".

John Sturges, a Board member, testified that one seeking to achieve the nomination threshold must incur the cost of mailing to all members. Plaintiff testified that the cost of the mailing would be approximately $85,000.00. Anthony Cicatiello, a Board member re-elected in 2017 testified that the requisite mailing cost would be in excess of $50,000.00. Nicholas Lo Russo, a Board member since 1984 agrees that the cost would be over $50,000.00.

Jane Rey, Spencer's Chief Operating Officer testified that Spencer's roots are in Bergen County with many members being in the low to moderate income group. Many are immigrants. Spencer also did acquire another savings and loan institution in Elizabeth comprised of many low income members. The

evidence clearly establishes that many members of Spencer are non-English speaking people. In short, the witnesses have created the impression that the majority of members are blue collar, perhaps immigrants, who can ill-afford the cost of a requisite mailing which would be in excess of $50,000.00 and perhaps as high as $85,000.00. It is undisputed that since a threshold has been in place since 1995 not one single member has sought to be nominated to the Board.

Because of the required anonymity of the membership, an initial mailing to all members is required. The cost of this mailing places nomination beyond the reach of the average member.

Given the fact that this case is the third trial questioning the validity of a fixed percentage threshold, it is clear to this Court that the use of a static percentage requirement is unworkable. The membership of Spencer fluctuates and cannot be determined with any degree of exactitude.

The evidence in the record reveals that on May 14, 2015, and after the 10% threshold was imposed to replace the 15% threshold, Ms. Chaitman issued a letter stating that the current membership of Spencer was <u>estimated</u> to be 58,659 members (P-4). Michael Irslinger, a Vice President of Spencer, sent an email to Jane Rey indicating the potential total number of members to be 58,068. He indicated that this represents the "best estimate". (P-6) When first called to testify, Mr. Irslinger did testify that this estimate could be inaccurate. He also testified that Spencer's software does not permit the establishment of an accurate determination of the number of voting members.

Mr. Irslinger later in the trial was called by the defense to testify as to the size of Spencer's membership as of June 16, 2017. The number was not determined by Mr. Irslinger or an employee of Spencer but rather by a third party using unknown software and undescribed techniques. It is not part of the business practice to check the number of voting members. This Court, therefore, is satisfied that Spencer's membership is in constant flux and cannot be ascertained with any degree of reasonable certainty so as to make a fixed percentage threshold workable.

<u>Entrenchment of the Board</u>

This Court has considered the testimony of the following Board members: Jose Guerrero (Chairman), Peter Hayes, Barry Minkin, Anthony Cicatiello, Nicholas Lo Russo, Albert Chamberlain and John Sturgess. A number of findings can be made from this collective testimony.

First, Spencer's Board is a self-perpetuating body of seven members who share common goals. Virtually all members have been invited to join the Board by Jose Guerrero, Director and Chairman. None of them had to ever deal with a nomination threshold. They, in turn, consistently reappoint Guerrero and approve his very lucrative compensation package. Guerrero receives over two

million dollars per annum as his compensation package while the Directors receive approximately $70,000.00 plus other valuable fringe benefits.

Second, the motivating factor of establishing and maintaining this threshold is fear of Plaintiff. Board Member Hayes testified that when the threshold was doubled in 2004, the only reason for doing so was the concern about Plaintiff. Board Member Lo Russo testified that Plaintiff was considered a threat which then necessitated the doubling of the threshold. Board Member Chamberlain stated that a threshold is necessary because he is fearful of Plaintiff's motives. These are improper reasons to maintain this threshold because the case is not about Seidman but rather it is about accessibility of the average member to the election process. As noted above, the ten percent (10%) threshold establishes an insurmountable barrier to member-initiated nominations. The requisite mailing costs in all likelihood could not be met by the so-called "blue collar immigrants" who arguably are the "average members" of Spencer. While the Board may dislike Plaintiff (which is understandable since he comes across as brash, arrogant and pompous) and feel threatened that he may "rock the boat", this is no legitimate reason to disenfranchise the average member.

Third, it is clear that the Board seeks to maintain total control of the governance of the Bank without challenge. As Board Member Minkin testified, without a threshold anyone can show up and seek a nomination. Board Member Hayes echoed this sentiment when he testified that the threshold only applies to "outsiders". Also, the signing of running proxies (6700) virtually assures the control of management. This fact is confirmed by the testimony of Board Member Lo Russo when referencing the running proxies and confirming that anyone not nominated by the Directors would need at least 6701 votes "to have a chance". That number is, of course, greater than 10% of the present membership.

Fourth, the argument that the present threshold ensures stability and prevents chaos in the management of the Bank is simply not supported by the evidence. It is clearly established that Spencer never had any problem when it operated without any threshold prior to 1995. According to Board Member Lo Russo, there was "no chaos" in Board elections prior to 1995. While this Court accepts that the Law-of-the-Case is that a threshold is proper and valid and should not be totally abolished, the threshold must be workable.

Fifth, the argument that the threshold preserves mutuality is not acceptable to the Court. The goal of preserving mutuality is too attenuated to be relevant. There is no evidence to conclude that conversion is necessarily a bad thing except for some self-serving declarations, without substantiation, of Board members and Spencer employees. Also, the Board members have never polled membership and are accordingly unaware of goals shared by the majority of members including their views regarding mutuality and conversion.

The maintenance of a nomination barrier is entrenching. Spencer's attorneys so opined when the Directors were considering the establishment of a

new Nomination By-Law to replace the 20% threshold. See P-26 at page 4, last paragraph.

From the evidence it is quite clear that the Directors are all beholden and defer without exception to Jose Guerrero. His control is so complete that he was able to secure an amendment to By-Law 9 requiring that the size of the Board of Directors be expanded and that he be appointed to a seat in the unlikely event that the members do not re-elect him. In fact, Board Member Lo Russo who voted for this amendment to By-Law 9 now claims he has no recall of whose idea this was to approve this change. (See P-1) This is not credible.

In short, there are no legitimate reasons to keep the present threshold which would justify the negative impact it has on the average member.

Proposed Alternative Threshold

Robert Fenner was called by Plaintiff and qualified as an expert in Federal Credit Unions. Credit Unions are cooperatively owned financial institutions that operate like banks. The sizes of federally-chartered credit unions vary with the largest having $80 billion in assets with up to six million members. Spencer is a $3 billion Savings and Loan Association. There are 61 Credit Unions of similar size. It is Mr. Fenner's opinion that credit unions and mutual savings and loan associations are comparable.

Mr. Fenner testified that credit unions are member owned financial institutions. The members are called shareholders but do not own stock. The Board of Directors are elected by members. They do have by-laws which have provisions on how Board candidates are nominated.

Mr. Fenner was directly involved in the promulgation of, and consideration of changes to, the Uniform By-Laws for Federal Credit Unions. These By-Laws are applicable to all Federal Credit Unions regardless of their size. Nominations for election to the Boards of Federal Credit Unions are by petition, and a nominee must secure the signatures of one percent (1%) of the members, but no more than 500 members.

The Federal Agency regulating Federal Credit Unions (the NCUA) considered increasing the number of petitioners required to validate a nomination and solicited industry comments. The decision was made to not increase the numbers because this would make it too difficult for a member to seek to participate in management by running for a Board. The 500 Members Cap makes nominations possible for average members.

Fenner testified that there are 5,275 federally insured credit unions. Two-thirds are federally chartered (approximately 3500). These 3500 have the 500 Member Cap. This Cap has been in effect since at least 2006.

Robert Fenner's testimony is arguably unrefuted. He presents a reasonable and workable alternative threshold which would provide accessibility to the average investor.

The defense called Thomas Cronin as an expert on proxy solicitation. He opined that the ten percent (10%) threshold is achievable. His reasoning, however, in the opinion of the Court is flawed. His opinion is based upon the fact that if the 15% threshold is achievable as he previously determined, then the 10% threshold ipso facto must be achievable. He seems to ignore the actual size of Spencer's membership. He also bases his opinion upon what someone with Plaintiff's evident resources can do despite the prior rulings that the nomination barrier must be measured by that which is achievable for the person of average means.

As noted above and as held by Judge McVeigh, this case is about accessibility, not Seidman. Yet, Mr. Cronin has made it about Seidman. He explained that the threshold's purpose is to protect against upheaval from a corporate raider like Seidman. He testified that Seidman's interest in a bank like Spencer is to gain a seat on the Board and effectuate a conversion. He further explained that Seidman's tactics involve evading securities regulations to achieve a hostile takeover. However, he never refutes or challenges the testimony of Fenner on the issue of accessibility. He made it all about Seidman.

This Court will give no weight to the opinions presented by Cronin. He has no experience with the response rate associated with seeking votes to nominate a candidate at a mutual. While his analysis was focused upon what someone like Seidman could achieve, he did not analyze whether an average member could secure the requisite level of support. Finally, while Cronin conceded that the size of membership matters, he admitted on cross-examination that he did not consider Spencer's membership size in his analysis.

Additionally, this Court finds Cronin to be biased against Plaintiff. He did admit that he told the Board about Plaintiff's tactics in taking over banking institutions. He opined that the downside of lowering the threshold is that it makes it easy for people to vote and "get anybody nominated". He believes conversion is bad for Spencer's members.

On the other hand, the Federal Credit Union nomination standard has proven to be workable of all sizes of institutions. This is a fact that is not disputed. Importantly, this standard permits that a nomination be achieved by securing petitions at branches which eliminates the enormous expense associated with a mailing.

As the Appellate Division made clear in its Opinion of April 30, 2015 affirming Judge McVeigh's striking of the 15% threshold, and reinstating the 10% threshold, a court cannot simply pick a remedy "out of thin air" and impose its personal choice upon the parties. Instead, the court's decision must have a "sound basis". In this instance, this Court has compared the testimony

of Fenner and Cronin. It has carefully considered the appropriateness and workability of the present threshold. It has considered the fairness or reasonableness of the 10% threshold. This Court is also well aware about the concerns of management entrenchment and oppression which are pitted against the need for stability in mutual associations and the risks of potential upheaval that may be caused by raiders seeking a conversion of a mutual association to a stock corporation. Here, there is clear evidence of entrenchment which leads to disenfranchisement. There is no evidence of chaos or instability that would result from a lowering of the threshold. There is also no evidence that lowering of the threshold would lead to a Seidman takeover.

For all these reasons, the Court will vacate the 10% threshold and replace it with the Federal Credit Union Threshold. This Court chooses not to leave the Directors to their own devices.

The members' right to vote is the ideological underpinning for the democratic process; and, the right to nominate is of equal importance since "the right to vote is meaningless without the right to participate in selecting the candidates". *Durkin v. National Bank of Olyphant*, 772 F 2d. 55, 59 (3d Cir. 1985). All nominees for election to a mutual savings and loan Board of Directors must be treated equally. *Application of Veloso*, 93 NJ Super 186, 194 (App. Div. 1966), cert. den. 48 NJ 580 (1967).

The Account Closures

Defendant Spencer closed accounts maintained by Seidman, his entities and his relatives on or about April 20, 2016. All of the accounts were savings accounts or certificates of deposit (P-13). Plaintiff Seidman had his accounts since 1988; his wife Sonia had her accounts since 2002; his adult daughter Erica Fishman had her account since 2005; his son-in-law Michael Hammer had his account since 2005; and his corporation, Veteri Place, had its accounts since 2004.

The stated reason for the closures was the existence of the Civil RICO Counterclaim filed by Spencer. (That Counterclaim has been dismissed with prejudice by Judge McVeigh). It was counsel, Ms. Chaitman, who recommended the closures stating in letters dated April 20, 2016:

"Given the allegations of the claim, the Bank has no alternative but to close the accounts in your name and in the name of your family members". (P-12)

Spencer claims that it has the authority as per its by-laws to permit the closure of accounts without cause. However, Jane Rey testified that this authority did not come about until 2012, after the second trial. Notice was only given to new members.

In order to modify a contract, the proposed modification must be communicated to, and accepted by, the other party. *County of Morris v. Fauver*, 153 NJ 80. The party who does not propose the change must have knowledge of it and assent to it. *Bonnco Petrol, Inc., v. Epstein*, 115 NJ 599 (1989).

As will be shown below, the proffered reason for the closures was pretextual. The real reason was to eliminate Seidman's membership, disenfranchise him and deprive him of standing. Judge McVeigh has already found this to be a bad faith act.

Ms. Rey and Mr. Guerrero made the decision to close the accounts based upon the recommendation of counsel Chaitman. She admitted that the purpose of the account closures was to stop this litigation. Guerrero admitted that the goal of the closure was to terminate Seidman's membership. The accounts of Seidman's relatives were closed solely because they were his relatives. With respect to the account closures, Lo Russo testified that "enough was enough". One of the goals was to stop the litigation. Chamberlain testified that Ms. Rey informed the Directors that the accounts were closed because of the time and money spent on the litigation. The goal, he stated, was to remove Seidman so he cannot nominate anyone. Sturges testified that the goal of closures was a termination of disreputable conduct. He further indicated that the attendance of litigation counsel at a Board Meeting, in this instance Ms. Chaitman, was unprecedented. Cicatiello testified that the closure was done to eliminate Seidman as a voting member.

This Count finds none of the reasons given by Ms. Rey to support the closure of the accounts to be credible. Also, the RICO Counterclaim was not prepared until April 2016 which was approximately ten months after the commencement of this case.

The inescapable conclusion is that the accounts were closed in bad faith. This Court also finds Seidman has standing to challenge all the closures because all of the subject accounts were closed because of a connection to him.

It also must be noted that there was no proof presented by the defense to suggest that Seidman did anything wrong or illegal. The defense called fourteen witnesses in an attempt to discredit Seidman. None of the witnesses had any agreement with Seidman to do anything with respect to Spencer. Several of the witnesses did not even know Seidman or only came to know him long after they had opened accounts at Spencer. Many of the witnesses had voluntarily closed their accounts in the ordinary course of events undermining and destroying any theory that they were engaged in some clandestine conspiracy with Seidman.

This Court will Order the reinstatement of all subject accounts that were improperly closed.

Interest at the rates paid to depositors during the period from April 2016 should be paid on each account.

The Court's Authority

The defense objects to the Court's authority to fashion the above remedies. The Court disagrees. The Appellate Division decision of April 30, 2015 is very instructive in this regard. The Appellate Division stated:

"[W]e reject Defendants' entreaties that we uphold the 15% threshold because the trial court and the Commissioner had previously approved it in 2010 before the instant ten-day trial in 2011-12. As we made clear in our prior decisions, the Commissioner's regulatory approval under the Savings and Loan Act does not mandate approval of a by-law under legal and equitable principles of corporate governance. (omit citation) In fact, the Commissioner, at various times, successfully approved the 10% threshold in Spencer's By-Law 31, then the 20% provision, then the 15% provision. This pattern signifies that the Commissioner and the Department have been relatively flexible about the actual nomination percentage adopted by the bank, leaving it to the judiciary to evaluate the propriety of the percentage under more general principles of governance". Appellate Division, A 3836-12T2, p. 30 (April 30, 2015).

Furthermore, the Appellate Division in its earlier decision of July 27, 2010, addressed the respective roles of the executive and judicial branches regarding the corporate governance of mutual savings and loan associations in New Jersey. The Court stated:

"[t]he 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 courses 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..." Appellate Division, A0167-07T2; A1036-07T2; A1343-07T2; p. 11 (July 27, 2010).

The instant case alleges breach of fiduciary duties on the part of the Board.

In fashioning relief, a Chancery judge has broad discretionary power to adapt equitable remedies to the particular circumstances of a given case. *Marioni v. Roxy Garments Delivery Co., Inc.*, 417 NJ Super 269 (App. Div. 2010). The Chancery Division has the inherent power to impose equitable remedies to redress directorial abuses. *Roach v. Margalies*, 42 NJ Super 243 (App. Div. 1956). The Chancery Court will act even though directors have the power to act when there is self-dealing or other unconscionable conduct. *Penn-Texas Corp. v. Niles-Bemest-Pond Company*, 34 NJ Super 373 (Ch. Div. 1955).

Legal Fees

Legal fees are awarded in a derivative action. *Sarner v. Sarner*, 38 NJ 463 (1962). They are awarded if a benefit is conferred upon the corporation or its shareholders/members. *Trimarco v. Trimarco*, 396 NJ Super 207 (App. Div. 2007); Rule 4:42-9(a)(2). In this instance, the prosecution of the claims asserted with respect to the 10% threshold unquestionably benefits Spencer and its members. These claims are derivative. However, the Court does not reach the same conclusion as to the claims concerning the closure of the accounts. Those claims are not derivative.

Any application for fees must be restricted to the derivative claims.

Removal of Directors

This is the third trial involving these parties. There have been several appellate reviews. Thus far, there has been no basis to remove the Directors. This Court will not now take such a severe, draconian step.

Accordingly, Plaintiff shall submit an Order consistent with the Court's decision.

Dated: 10/19/17

HON. BRUNO MONGIARDO, J.S.C.