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LAWRENCE B. SEIDMAN AND ARTHUR WEIN,
Plaintiffs,
v.

SPENCER SAVINGS BANK, S.L.A., JOSE B. GUERRERO, PETER J. HAYES, NICHOLAS LORUSSO, BARRY MINKIN, AND ALBERT D. CHAMBERLIN,

Defendants.

SUPERIOR COURT OF NEW JERSEY
PASSAIC COUNTY
CHANCERY DIVISION
GENERAL EQUITY PART

DOCKET NO. PAS-C-25-19

CIVIL ACTION

OPINION OF THE COURT

Decided: July 31, 2020

Appearances:

Peter R. Bray, Esq., attorney for plaintiffs (Bray & Bray LLC, Parsippany, N.J.);

Sean Mack, Esq., Timothy P. Malone, Esq., Darcy Baboulis-Gyscek, Esq., attorneys for defendants (Pashman Stein Walder Hayden, P.C., Hackensack, N.J.);

Helen Davis Chaitman, Esq., attorney for defendants (Chaitman LLP, Frenchtown, N.J.).

FRANK COVELLO, J.S.C.

Plaintiffs, Lawrence B. Seidman and/or Arthur Wein seek to sit on the board of the defendant, Spencer Savings Bank, S.L.A. ("Spencer"). Defendant Spencer and its various and individually named directors, have pursued two avenues of response. The first is well-known to the parties: to alter its nomination threshold requirement for placement on the board of the directors—more than once deemed by this court, and often affirmed by the Appellate Division, as acts of entrenchment. This has been the normal course of addressing what can be referred to as the "Seidman problem." In short, they usually seek to side-step Seidman.

The second course of action, and the genesis and gist of this chapter of the "marathon"[1] revolves around a three-letter acronym: "QTL." This acronym, as will be addressed below, limits the amount of commercial lending Spencer can conduct. Plaintiffs accuse Spencer of seeking an end-around a previous holding in a previous litigation before this court by preparing an application to convert its corporate form and arise as a New Jersey Savings Bank because it eliminates voting from the members and will forever end the "Seidman problem." Defendants reply that in order to continue serve the community of Spencer, this conversion is a necessity and inevitability of SLAs. That member voting will cease post-conversion, defendants assert, is unfortunate but will be up to the members to choose—since they must approve the proposed conversion before its submission to the Department of Banking and Insurance ("DOBI").

Following a five-day bench trial conducted through the Zoom Virtual Courtroom platform, four things are now clear to the court. First, concerns about the QTL are sufficiently documented in Spencer's records and conversion would be a means to avoid hitting the QTL ceiling. A gradual shift to commercial banking operations over a course of many years for profit purposes is also apparent. Second, the "Seidman problem" played a significant, controlling factor in the decision of the board of directors in its approval of the conversion. Third, the preoccupation of Jose Guerrero with Seidman (and vice-versa) is the primary basis for the decision of the board to convert.[2] Fourth, the amended voting by-law, although it ostensibly complies with the statutory framework, the change was motivated by the desire to push through the conversion, which was improperly motivated.

[1] Seidman v. Spencer Sav. Bank, S.L.A., 2015 N.J. Super. Unpub. LEXIS 999 at *1 (Apr. 30, 2015) (*per curiam*).

[2] The conversion as proposed by the board would eliminate member voting, and eliminate any threat to the board by plaintiff Seidman.

Equity sees done that which ought to be done. From gun-to-tape, this case, and its legally different but factually similar predecessors embody the thought that the truth of a matter tends to lie somewhere in the middle of two opposing narratives. For the reasons set forth below, judgment will be entered in favor of PLAINTIFFS.

I.
Findings of Fact

The Parties

1. Plaintiff, Lawrence B. Seidman is an account holder at Spencer Savings, S.L.A., and seeks to use his status as a member to obtain a position on the board of directors.
2. Plaintiff, Arthur Wein is also an account holder at Spencer Savings, S.L.A., and seeks to use his status as a member to obtain a position on the board of directors.
3. Plaintiff Lawrence B. Seidman's history of litigation against the bank is well-documented and acutely positions him to a direct measure of harm when Spencer Savings, S.L.A. undertakes measures impacting corporate governance and membership on the board of directors.
4. Over a long career, Mr. Seidman has both succeeded and failed on multiple occasions to alter the behaviors of Savings and Loan Associations through means including, but not limited to: attempting to obtain a seat on the board of directors; build influence on the respective board of directors by assisting others in-line with his vision to obtain seats on the board; and sometimes proposing and at times achieving conversion of the entity into a stock-issuing institution.[3]

[3] Pursuant to N.J.R.E. 201, The court takes judicial notice of the following cases involving Mr. Seidman and, most

5. Seidman's attempted involvement in the governance of Spencer is not good for business, his efforts cost the thrift $3,000,000.00 in litigation.

6. Plaintiff, Mr. Arthur Wein took no real active role in the prosecution of this matter—appearing at deposition but not at trial, for instance. His deposition testimony was presented at trial.

7. Defendant, Spencer Savings, S.L.A., formed under a New Jersey Savings and Loan Association charter in a mutual form in 1939. Trial Trans. of May 18, 2020 ("Day 1"),[4] 25:1–5 (May 18, 2020).

8. Defendant, Spencer, operates through a Board of Directors.

9. Defendant, Jose B. Guerrero, is the President and CEO of Spencer, and acts as the Chairman of the Board of Directors.

10. Every litigation between Seidman and Spencer involved and implicates actions of Defendant Jose B. Guerrero.

11. Guerrero strongly dislikes Seidman.

12. That feeling is mutual between the two.

13. Previous litigations between the parties determined that Guerrero finds Seidman to be an undesired candidate to serve as a director of Spencer.

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relevantly, Savings and Loan Associations: Seidman v. Spencer Sav. Bank, No. A-3899-04 (App. Div. March 23, 2006) ("Seidman I"); Seidman v. Spencer Sav. Bank, Nos. A-0167-07, A-1036-07, A-1343-07 (App. Div. Nov. 9, 2009) ("Seidman II"); Seidman v. Spencer Sav. Bank, Nos. A-0167-07, A-1036-07, A-1343-07 (App. Div. July 27, 2010), certif. den'd, 204 N.J. 42 (2010) ("Seidman III"); Seidman v. Spencer Sav. Bank, No. A-3836-12 (App. Div. Apr. 30, 2015) ("Seidman IV"); Seidman v. Spencer Sav. Bank, Nos. A-2039-17, A-4739-17 (App. Div. Oct. 3, 2019), certif. den'd, 241 N.J. 144 (2020) ("Seidman V"); Seidman v. Clifton Sav. Bank S.L.A., 205 N.J. 150 (2011); In re Seidman, 37 F.3d 911 (3d Cir. 1994); Spencer Bank v. Seidman, 528 F. Supp. 2d 494 (D.N.J. 2008). See N.J.R.E. 201 (2020) (permitting New Jersey courts to take judicial notice of, *inter alia*, publicly available documents including court documents).

[4] The court will refer to trial transcripts based upon the dates of the trial. So: Day 1 is May 18, 2020; Day 2 is May 19, 2020; Day 3 is May 20, 2020; Day 4 is May 21, 2020; and Day Five is May 26, 2020.

14. Defendants Albert Chamberlin, Peter Hayes, Nicholas Lorusso, and Barry Minkin also served as directors in 2017 and 2019.

15. Non-parties John Sturges and Anthony Cicatiello served as members of the board of directors, too.

16. Previous actions by the Board of Directors related to nomination by-laws constituted acts of entrenchment aimed at preserving their positions on Spencer's board.

17. Previous to this litigation, the board of directors authorized more than $3,000,000.00 in expenditure of Spencer's funds to defend the actions brought by Plaintiff Seidman.

Background on Savings and Loan Associations

18. Savings and Loan Associations are commonly referred to as "Thrifts."

19. The nickname stems from the original primary purpose of such institutions: residential lending. Day 2, 97:6–14.

20. In 1987, seeking to galvanize personal homeownership and focus thrifts on this purpose, the United States Congress passed the Competitive Equality Banking Act of 1987, P.L. 100-86 § 104(c), mandating 60% of a thrift's portfolio of assets to consist of qualified thrift investments. These investments mostly involved residential mortgage loans.

21. This requirement is known as the Qualified Thrift Lender ("QTL") and acts as a limit or test that Thrifts must comply with or face regulatory enforcement, fines, and reputational harm—among other repercussions.

22. This QTL limit fluctuates, but the current limitation rests at 65% of the thrift's portfolio. Day 4, 137:14–17.

23. As members of a board of directors of a thrift, the directors of Spencer testified to understanding what the QTL imposed and limited Spencer to assets-wise.

24. Federal and New Jersey SLAs are subject to this limit—even those with holding companies associated with them.

25. Since 2008, Spencer's QTL ratio has been shrinking due in no small part to a re-focused business model.

Spencer's Increased Commercial Lending

26. Following the 2008 economic recession, caused in no small part due to criminally subprime tranches of Mortgage-Backed Securities, and the 2010 Federal regulations implemented to curtail such financial misfeasance, residential mortgage lending shifted into a state of commoditization, and profitability of residential mortgage lending reduced. See Day 1, 106:4–12.

27. Many thrifts, Spencer included, shifted focus into commercial lending resultant this regulatory proliferation. Day 4, 147:3–8; 24, 148:1–6.

28. Evidence at trial revealed that commercial lending generally provides lending institutions higher interest rates on loans; shorter term commercial loans reduce interest rate risks; and these loans co-exist well with non-interest-bearing deposit accounts. Day 1, 109:15–110:1; 119:11–120:12; 121:11–15; 146:22–24; Day 2, 94:21–22; Day 3, 165:10–11; Day 4, 148:4–6.

29. These result in better profits for Spencer. Seidman and Wein agree on this point. Day 4, 33:15–22 (testimony of Lawrence B. Seidman); Deposition of Arthur Wein, Tr. at 14:7-10; 19:11–19 (April 22, 2020).

30. Spencer's desire to engage and expand commercial lending began in the early years of the 2000s, intriguingly, co-existent with the introduction of Plaintiff Seidman into the bank's affairs. See, e.g., Day 1, 65:21–66:19.

31. The purpose for this expansion was to diversify assets and improve the earnings engine of the bank, the net interest margin.

32. The Net Interest Margin is a formula used to determine the ratio of profit related to interest bearing instruments, where the calculation involves determining how much the bank pays out on interest contrasted to what it receives in interest payments. More interest received than paid results in a positive ratio—or a profitable net interest margin.

33. In 2003, Spencer hired its first employee in the Commercial and Industrial ("C&I") program and commenced offering C&I loans in 2004. Day 2, 166:11–17.

34. Defendants produced incredibly detailed documents outlining the shift to a focus on growth of C&I lending and generating and expanding Commercial Real Estate ("CRE") lending. See Defendants' Exhibits, 17–32 (hereinafter "D-"; e.g., "D-17").

35. This growth is reflected by year-end asset values. In 2004, Spencer projected $14,600,000.00 in C&I origination. By year-end 2016 this was $138,000,000.00 and $219,000,000.00 at year-end 2018. D-17; Defendants' Compilation Exhibits, at Ex. 2.

36. Between 2003 and 2018 the commercial lending division at Spencer grew in personnel from 8 in 2003 to 15 in 2018. Ibid.

37. Conversely, the residential mortgage division shrunk in size from 12 to 6 in that same period. Ibid.

38. Spencer invested in other support areas like Information Technology and Marketing to sustain and promote the increased commercial activity. D-17 – D-32.

39. By 2016, Spencer's increased commercial portfolio reflected well for the most part, with the net interest margin remaining a weakness. D-35.

40. The issue was, as identified in a strategic plan from July 2016, that 98% of the commercial portfolio being placed in CRE and of that 98%, 65% of that total rested in multi-family residential loans. Ibid.

41. Though listed as commercial lending, the multi-family residential mortgages qualified as thrift investments for QTL purposes. Day 3, 215:18–216:1.

42. These loans are the lowest amongst commercial lending Spencer possessed and constitute roughly 35% of Spencer's total loan portfolio. Day 3, 216:2–5.

43. Plaintiffs knew of this shift in focus, with Mr. Seidman electing to leverage this against the bank in previous litigation where he accused it of abandoning its community principles. Plaintiffs' Exhibits, at Ex. 44 (Transcript pages 42:14–44:3).

44. Much of the non-multi-family residential loans originated by Spencer go to local businesses within the community served by Spencer—which consists mostly of the North-Eastern segment of the State of New Jersey in and around its headquarters in Elmwood Park, New Jersey.

45. Members of the serviced community include persons of all socioeconomic status, but traditionally consisted of blue-collar workers.

46. Unlike public institutions or those who raise equity through stock issuance, mutual institutions like Spencer accumulate capital through internal sources, only. Day 2, 9:4–17.

A Tale of Two Conversions

The 2017 Conversion and WAWEL

47. The growth of Spencer's Commercial lending practice decreased the QTL ratio the thrift held. From 2010 to 2018, the ratio dropped from 80% to 70%. D-38 – D-48.

48. Director Minkin agreed with Plaintiff's counsel that the period of three years prior to 2017 saw a static QTL ratio at Spencer. However, the proofs do prove a three-point drop in the relevant period. D-42 – D-46.

49. In June 2017, Spencer projected it would violate the QTL limit in 2019. D-7. However, resultant this litigation and other issues, Spencer slowed down its commercial lending and the current forecast will be violation of the QTL in 2021. Day 3, 216:12–17; 18–22.

50. Discussions about the eventuality of a conversion to a different charter commenced a few years prior to 2017. Day 2, 155:21–156:14; 157:11–15.

51. In February 2017, Robert Peacock, then-Executive Vice President and Strategic Planning Officer & Treasurer, drafted a memorandum outlining the balance sheet of Spencer to some of its competitors where he concluded that Spencer's net interest margin and growth lagged; that a shuffling of the portfolio needed to occur and a shift to focusing on C&I and non-interest bearing deposit accounts needed to occur. D-2.

52. Jose Guerrero testified that this memo convinced him that the charter conversion needed to occur and he sought out legal advice from long-time regulatory counsel for the bank, Doug Faucette of Locke Lord, LLP. Day 1, 23:13–24:16;175:21–176:7.

53. Guerrero asked Faucette to draft a resolution for the board of directors which would authorize a charter conversion to a New Jersey Mutual Savings Bank; and he also asked

Faucette to author a memo that analyzed the benefits of forming s mutual holding company. Day 2, 27:14–28:9.

54. Guerrero also asked Faucette to research and discuss the inclusion of an integrity by-law for the newly converted bank's bylaws. D-3.

55. This request for information on an integrity by-law coincided with the 2017 litigation between these parties where Seidman sought to invalidate a nomination threshold by-law that Spencer adopted related to seeking placement on the board of directors.

56. Guerrero testified that he considered this by-law to be a gift to "Larry" in return for fifteen years of litigation. Day 1, 31:25–23:3.

57. Faucette's memo recommended non-inclusion of the by-law and advised against the formation of the holding company. These items were omitted from the memo Guerrero provided the other members of the board. Day 1, 56:8–20; 182:6–17; Day 2, 30:7–15; 33:21–34:8.

58. In connection with this charter change, Peacock authored a memorandum that discussed the strategic advantages of the New Jersey Savings Bank Charter. D-7.

59. Testimony revealed that the directors all recalled receiving the Faucette memo and the Peacock memo prior to the June 15, 2017 board meeting. All testified they had adequate time to review the materials.

60. Faucette and Peacock attended the June 2017 board meeting and presented their findings to the directors.

61. Faucette, as he testified, explicitly advised that his research into charter conversions provided no other alternative of conversion where Spencer could avoid the QTL limitation. Day 2, 38:8–15.

62. Though Faucette previously attended a deposition in litigation related to Spencer, he never occupied any role for the Bank other than regulatory counsel.

63. Significant discussion occurred amongst the directors during this meeting. Notably, Director Cicatiello asked, upon learning that the conversion to a mutual savings bank would eliminate member voting, whether the elimination of member voting could be avoided. D-8.

64. Faucette advised that New Jersey law controlled the appointment of managers of a mutual savings bank, not the members. Day 2, 40:4–41:6.

65. The directors all testified that Seidman was never a topic of discussion at this meeting, but the pendency of the nomination threshold litigation and the amount of money and effort spent combating Seidman's efforts suggest that mention of Seidman could not have been avoided. Especially where member election of directors would cease following the conversion.

66. The near identical phraseology and syntactical outlay of the directors' testimony at trial in relation to the non-consideration of Seidman at the meeting suggested a pre-ordained method of addressing this concern.

67. However, the directors testified that they knew the QTL issue posed a legitimate business concern to the ambitions of Spencer, and each testified that they relied upon Faucette and Peacock in their vote to approve the resolution for conversion.

68. The directors unanimously approved the resolution on June 15, 2017. Despite the fact that this was likely the most important decision ever made by the directors (to convert) this vote was held at the same meeting the proposal was presented to them, and there are serious questions as to when they actually received the information they relied upon to

make their decision. There is evidence that documents submitted by Faucette (P-8 and P-11) were submitted to the directors two days before the meeting and the Peacock memo (P-9) was submitted at the meeting.

69. At the same board meeting, the directors approved a plan to engage in negotiations to purchase Wawel Bank ("Wawel").

70. Following back-and-forth between the two, the deal closed in March 2018.

71. In the interim between June 2017 and March 2018, due to a lot of concerns with the acquisition, regulatory approval, and more, the Wawel purchase occupied a lot of the time of management, probably too much time, and forced Spencer to place the conversion on the back burner because the projected violation of the QTL would not happen until sometime in 2019.

72. The resolution of June 2017 approving proposal for conversion became stale and on counsel's advice the board rescinded the resolution in February 2018.

73. Although the important resolution to convert was hurriedly approved in June, 2017, absolutely nothing was done thereafter to move forward with a conversion plan.

The Second Conversion Plan

74. Throughout the history of Spencer the Voting Bylaw had been the same, one member, one vote, irrespective of the amount on deposit. On July 19, 2018, the Voting Bylaw was changed to link the number of votes to account balances, giving move votes to members with larger account balances.

75. Although Mr. Guerrero testified that the Voting Bylaw change was not because it would be easier to obtain to votes for a conversion approval, the court finds this testimony to lack credibility.

76. By Fall of 2018, Spencer successfully integrated Wawel into the business and attention returned to the conversion. Guerrero instructed Vice President and Chief Operating Officer Jane Rey to author a memorandum outlining the strategic advantages of conversion to a savings bank charter. D-13.

77. Pursuant to the same, Faucette updated his legal memorandum and the proposed resolution for the directors to consider. D-14; D-16.

78. Similar to the Peacock memo from 2017, Rey's memo outlined that the conversion was necessary to remain competitive and re-iterated the need for a diversification and growth of commercial lending. The memo also spoke to the presence of the QTL and its limitation on Spencer's ability to achieve the proper commercial loan mix that management believed best served the business ends. D-13.

79. The Rey memo, like Peacock's, outlined that the conversion would grant Spencer more commercial investment and lending powers that other commercial banks have. Ibid.

80. The Rey memo concluded that it would be in the best interest of Spencer to convert to the New Jersey Savings Bank Charter at that time. Ibid.

81. Faucette's 2019 memorandum nearly mirrors his prior one, but includes a discussion about whether Spencer should consider conversion to a Federal Savings Association.

82. Faucette undertook this discussion based upon a provision included in Section 206 of the Economic Growth, regulatory Relief, and Consumer Protection Act ("The Flex Act")

which allowed Federal Savings Associations (the Federal analog to Spencer, a New Jersey thrift) existing as of December 31, 2017 to exemption from the QTL.

83. Spencer, which is not a Federal thrift, and was not as of December 31, 2017, could not avail itself of that exemption, as a result.

84. Faucette's memo also contemplates asking the Commissioner of DOBI to invoke her powers under New Jersey's Parity Act to exempt Spencer from the QTL but advised against that due to legal issues and procedural barriers. D-14.

85. Faucette's memo concluded, as its 2017 predecessor did, that conversion to a State Savings Bank would best serve the business ends that Spencer pursued. Ibid.

86. Faucette testified at trial that he knew of any other option that would relieve Spencer of its obligations under the QTL.

87. Though Faucette is not a licensed attorney in the State of New Jersey, he is renowned in the practice Banking Law.

88. Faucette's testimony also indicated that the passage of the Flex Act "ringfenced" Spencer to the extent that others that Spencer competed with who held federal charters no longer found themselves restricted by the QTL. Day 1, 168: 17–22.

89. Spencer's Board held a meeting on February 21, 2019 where Rey and Faucette presented their memoranda and entertained questions from the board.

90. Defendant presented testimony of Jane Rey, and in fact attempted to offer 16 years' worth of records to establish the Spencer, for many years, was moving toward commercial operation, and the conversion is simply the completion of that business plan. This court found Jane Rey's testimony to be credible.

91. The operating budgets testified to by Jane Rey did not indicate that Spencer was not profitable – actually quite the opposite was true. Spencer was very profitable.

92. Once again, as their nearly identical testimony indicated, the directors unanimously agreed upon the resolution and relied upon Rey's memorandum and Faucette's as well in making their decision.

93. Barry Minkin testified that the proposed conversion constituted a business decision and not "about Larry Seidman or any other member. It's about the bank expanding and continuing to grow to provide the same services we've been providing to our members all along. No dirty trick." Day 3, 106:15–19.

94. Yet, during this same period, the appeal on what is known as Seidman V was also ongoing—that decision from the Appellate decision arrived in October 2019.

95. The testimony at trial of the instant action by all the directors pointed to the decision being for business purposes. The testimony of the directors seemed well rehearsed with the directors using the same or similar language in their explanations of the purpose for the conversion and Spencer's business plan.

96. They nearly all testified that Seidman played no role in their consideration to approve the conversion. Such a position is utterly lacking in credibility. It too was a well-rehearsed line after having spent $3 million in fees to defend Seidman litigation over the years. To think that Seidman was not a consideration in all of this is nonsense.

97. The nearly mechanical rendition of their rationale is not fully convincing because the pendency of yet another issue with Seidman at this point fifteen years on from the original challenge brought by Seidman more than suggests that comments about Seidman made at this meeting.

98. The directors knew that they might lose the appeal in Seidman V. Previous cases with Seidman did not always conclude in their favor.

99. The directors knew that the conversion, if approved, would eliminate member voting. This detail was known to them since the first proposal of the conversion in 2017.

100. The directors were not given other options to the conversion that was supported by Mr. Guerrero. Peter Hayes, one of the directors who testified at trial, stated during the trial: "I would be concerned if the CEO was telling the outside consultant not to present something to the board." However, on cross examination by Spencer's attorney, Mr. Hayes testified that it *would not* concern him if the CEO told outside counsel not to present something to the board if it was a bad idea. Overall, Mr. Hayes' testimony was not credible as having provided many "canned" or rehearsed answers to support Spencer's position in the litigation.

101. The directors knew that the managerial make up of a New Jersey Savings Bank meant that Seidman would not be able to be voted on to the board of directors.

102. The legal memorandum of Doug Faucette outlined the process and procedure for the conversion and outlined the construct of a New Jersey Savings Bank. D-14.

103. The directors testified that they relied upon Faucette's advice and asked questions about the conversion.

104. There is no possibility that Seidman played no role in the approval of the conversion. No testimony or evidence, other than the assuredly self-serving denials of the directors, though, made clear exactly how much a factor Seidman played in their approval.

105. Spencer had a legitimate business reason to convert at the 2019 directors' meeting.

The Road to Seidman VI

Plaintiffs File Their Complaint

106. Following the approval of the resolution, Spencer undertook proxy solicitation by mailing out materials to the membership, utilizing the services of Tom Cronin to achieve the proxy solicitation.

107. In response, Plaintiffs, seeking an opportunity to challenge the board, filed suit. The complaint is outlined as follows.

   a. Count One: The proposed proxy materials were false and misleading and could not allow for an informed vote to occur. The proxy statements are vital to the proposal for conversion. The competitive advantage the conversion will allegedly provide is only to hide a pretext which is to eliminate the opportunity for members to have a say in who will serve on the board. Conversion will remove members right to nominate candidates or vote.

      i. Plaintiffs sought the following remedies under this count: Enjoin communication with the members about the meeting; enjoin the company from meeting to vote on a conversion; Invalidate the change in bylaws that eliminates one vote per member provision; Fees and other equitable reliefs.

   b. Count Two: If determined that a special meeting can occur, then safeguards should be placed. Proxy materials should be accurate, with the one vote per member rule reinstated and only one mailing, no phone communications.

      i. Plaintiffs sought the following remedies under this count: Enjoin defendants from submission of proxy materials that do not fully accurately disclose all required info; Enjoin any communication beyond one-time mailing and

compel Spencer to promptly mail any opposition materials to all members regarding a special meeting to convert.

c. Count Three: The proposed actions are unreasonable because meeting is scheduled for 04/23/19; this action is to entrench themselves as members of the board. Plaintiffs want a declaration that the conversion is a breach of fiduciary duties.

   i. Plaintiffs sought the following remedies: enjoin communications about the special meeting except to notify of its restraint; enjoin Spencer from holding a special meeting to vote upon a plan to convert; enjoin from submission of proxy material that do not fully disclose information; enjoin from further communications from beyond one-time mailing; and mail opposition materials to all members.

d. Count Four: Plaintiffs alleged that the directors should not be permitted to continue. They stated that if left in their positions, the directors will continue to mismanage. Want derivative relief under this count to have commissioner add six independent directors who can out-vote them or have them removed.

   i. They sought this specific remedy: An order removing directors or directing commissioner to appoint independent directors and an award of fees.

108. This court temporarily restrained the conversion meeting in April 2019. After Spencer requested the court to dismiss the case as moot following its withdrawal of the proxy materials.

109. Following denial of the motion to dismiss and a partial grant of a subsequent motion for reconsideration, only Counts One, Two, and Three remain in this case. This court

dismissed Count Four because the relief is only something that the Commissioner of DOBI could provide.

110. The main theory approaching trial posited by Plaintiffs involved the pretextual nature of the conversion and that alternatives could be employed that would prevent member voting elimination.

111. This court conducted the virtual trial on May 18, 2020; May 19, 2020; May 20, 2020; May 21, 2020; and on May 26, 2020. Because the trial was conducted virtually, with no one present with the testifying witnesses, it was difficult to determine what if anything they were relying on in providing their testimony. The fact that these witnesses in particular used similar phrases and talking points made their testimony particularly less credible.

112. Given the extent of the litigious relationship between the parties, this court questions the full credibility of the fact witnesses. The directors who testified seemed to provide rehearsed, "canned" answers to a variety of questions.

The Expert Witnesses

113. Plaintiffs proffered, and the court qualified, Richard Garabedian, Esq. as an expert in Banking Law.

114. Mr. Garabedian authored an expert's report addressing whether Spencer could convert to a mutual savings bank without impacting member voting rights. His report did not address the QTL.

115. Defendants proffered, and the court qualified, Ronald Riggins, as an expert in strategic planning and finance in the banking industry.

116. Riggins focused his expert report on the prudence of converting for financial institutions subjected to the QTL and what impact the QTL had on Spencer more broadly.

117. The testimony of Garabedian revealed that it was feasible to convert and retain the membership vote, but it involved creating a holding company that would be a stock issuing institution.

118. Garabedian's model consisted of the following set-up. Spencer would form a federal mutual holding company, convert Spencer into a stock institution held by the holding company, and then convert to a New Jersey Mutual Savings bank.

119. Mr. Garabedian acknowledged in his testimony that when the holding company formed, it would be a savings and loan holding company subject to the QTL.

120. Upon this conversion to the mutual savings bank of Spencer, under what is referred to as a 10(l) election,[5] the holding company would need to determine if it would remain a savings and loan holding company. Making this election would subject the company to the QTL.

121. Garabedian's testimony acknowledged that savings and loan holding companies are subject to Regulation MM[6] which conveys upon existing depositors and borrowers voting rights to vote for directors when the underlying institution forms the holding company. Yet, new depositors would not receive these rights.

122. Entities held by savings and loan holding companies are subject to QTL.

123. Garabedian's testimony revealed that a savings bank held by a mutual holding company that does not make a 10(l) election must register with the Federal Reserve Board as a bank holding company. Day 4, 80:25–81:3.

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[5] See 12 U.S.C. § 1467a.
[6] See 12 C.F.R. § 239.

124. Bank holding companies are not subject to Regulation MM. Day 4, 81:4–6.

125. At trial, and in contradiction to his prior testimony, Garabedian asserted that it would be possible to abandon the 10(l) election and for members to retain their voting rights because the Commissioner of DOBI, since bank holding companies are governed by state law, would permit the bank holding company to provide voting rights to members.

126. Mr. Garabedian acknowledged this is a novel concept, without precedent. Day 4, 77:9–16; see also Day 4, 49:4–11.

127. He did not assert this opinion at his deposition.

128. Mr. Garabedian acknowledged that no statute, state or federal, permits depositors in savings banks, or mutual savings banks held by mutual holding companies to vote for the board of directors.

129. Mr. Garabedian acknowledged that the charter of a bank holding company of a New Jersey savings bank providing voting rights to depositors of the savings bank would conflict with New Jersey law and the Commissioner of DOBI would not approve that proposal. Day 4, 93:12–19.

130. Based upon Mr. Garabedian's testimony, it is clear that the solution offered by Mr. Seidman to preserve member voting rights would not be successful.

131. Ronald Riggins testified at trial that he reviewed all the materials that Spencer employed in drafting the resolution to convert.

132. Riggins informed that thrift institutions like Spencer faced issues following a shift in the wake of the 2008 economic crisis.

133. Riggins testified that "there has been a significant move by savings and loan associations to become either savings banks, or to become commercial banks . . . in order to increase

their competitive profile to offer broader products, and services to be able to increase profitability." Day 4, 147:3–8.

134. Based upon his review of the Spencer documents, Riggins testified that it was prudent for Spencer to pursue the mutual savings bank charter in New Jersey because it would eliminate the limitations of the QTL. Day 4, 145:8–13.

135. Riggins testified that Spencer would need to convert to prevent violation of the QTL and to increase the commercial lending it wished to do.

136. Riggins knew of no other alternatives that would allow Spencer to eliminate the QTL and remain a mutual institution—allowing for members to retain voting rights. Day 4, 156:3–6.

137. Faced with a clear limitation on their commercial lending abilities without conversion, and without a clearly viable option that would avoid the QTL limitation and retain member voting, Spencer faced no other practical option than to convert to a Mutual Savings Bank.

138. The expert testimony highlights that the decision made by Spencer was not done without proper research and vetting of alternatives.

139. The novel alternative proffered by Mr. Garabedian is questionable at best and would likely not work – thus defeating the entire purpose of creating the elaborate holding company structure, but not avoiding the QTL and not maintaining member voting.

140. The voted-upon resolution by the Board of the directors, while not the ideal outcome, it not without foundation and business necessity. However, taking into account the history of Spencer and the relationship between Spencer and the plaintiffs, this court is satisfied

that Spencer was motivated to change its banking charter to eliminate voting and thus eliminate the Seidman threat.

Spencer's Voting By-Law Amendment

141. In 2018, Spencer amended the allocation of votes permitting one vote per $100.00 on deposit at the bank with a limit of 1,000 votes per member.

142. Under N.J.S.A. 17:12B-12, New Jersey Savings and Loan Associations may allow either: one vote per member; or, one vote per $100.00 on deposit, with a maximum of 1,000 votes per member.

143. Spencer's board of directors testified that they felt it would be more equitable to provide more votes for those with more monetary interest in the thrift.

144. The change did not remove voting rights but could impact those with less than $100.00 on deposit, potentially.

145. Although it was alleged that the change did not arise for proxy solicitation purposes, it is clear from the evidence that it made proxy solicitation easier. Day 2, 146:12. And again, would help streamline the path to removal of voting rights through the conversion scheme.

146. The change pre-dates the original 2019 conversion vote.

147. Spencer provided notice of this change in their postings for the 2019 annual meeting and in the proxy materials first submitted for the 2019 meeting on the conversion.

148. Spencer's determination to modify the voting bylaw was motivated out of desire to entrench the members of the board, and eliminate the threat of Seidman.

II.

Legal Standard

Rules of corporate governance apply to this case.[7] A director of a company may not compromise his or her loyalty and fiduciary duty to his or her company. See Casey v. Brennan, 344 N.J. Super. 83, 108 (App. Div. 2001) ("[i]n light of their status as fiduciaries, our law demands of directors utmost fidelity in dealing with [the company and its stakeholders]"). In an action for a breach of a fiduciary duty, a plaintiff must establish a breach of duty by a director or directors and that performance of the duty would have avoided the company's loss. Francis v. Utd. Jersey Bank, 87 N.J. 15, 36 (1981). Generally, claims by stakeholders take two forms either direct or derivative. A derivative action is an action brought by a shareholder to assert the rights of a corporation, or in the case of a mutual association, it is an action brought by a member on behalf of the association. See In re PSE&G Shareholder Litig.,173 N.J. 258, 277–78 (2002) (explaining that a shareholder derivative action is a suit brought by shareholders on behalf of a corporation). Thus, an association's member may bring a derivative action "to enforce a secondary right" of one or more association members. R. 4:32-3. However, "[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the . . . members similarly situated in enforcing the right of the . . .association." Ibid.

In Strasenburgh v. Straubmuller, 146 N.J. 527, (1996), the New Jersey Supreme Court explained that a derivative action is deemed to belong to the corporation but allows the individual shareholder to protect the associational interest from its directors' misfeasance and malfeasance. 146 N.J. 527, 550 (1996). An individual action, in contrast, involves a "special injury" that does not affect all shareholders. Id. at 551. A claim of the directors' breach of fiduciary duty "is generally

[7] See, e.g., Seidman V, 2019 N.J. Super. Unpub. LEXIS 2038 at *32.

regarded as derivative unless the injury to shares is distinct." Id. at 551–52.

Reviewing a claim for entrenchment requires determining whether the claim is direct or derivative. Id. at 552. "Claims of entrenchment by directors often fall into the same category of stating either a direct or derivative claim, depending on whether the entrenchment affects shareholders unequally." Ibid (citing Spillyards v. Abboud, 662 N.E.2d 1358 (Ill. Ct. App. 1996)). Here, the injuries alleged by Messrs. Seidman and Wein qualify as direct actions—their injuries are unique in contrast to the full membership of Spencer because they are seeking places on the board of directors. This endeavor is not something that the totality of the membership of Spencer seeks to do. Additionally, and discussed, *infra*, there are still two more steps to occur in this conversion application: (1) 2/3 of the membership must approve the transaction; and (2) the Commissioner of DOBI must approve the action.[8] The interests of the Spencer body public arise when the proposal goes to a vote and, if approved, when the Commissioner of DOBI reviews the proposal. Thus, a derivative action could then be implicated. Yet, as it stands, the alleged harm here is direct to both Seidman and Wein.

In this instance, the plaintiffs seem to frame their challenges as derivative and on behalf of the "blue collar" individuals that make up the membership of Spencer's community. However, the singular purpose of this challenge, as it has been since Lawrence Seidman began his quixotic crusade in 2004 is to obtain a seat on the board of the board of directors. Arthur Wein's deposition testimony reveals his own singular purpose in this litigation: to obtain a seat on the board. The motive and resources of the plaintiffs here could not more greatly differentiate these plaintiffs from

[8] It would be at this point that a derivative action would exist, if one could indeed be found. At that stage, the transaction or decision by the directors would be fully consummated. This case is best viewed as a direct action because the point at which the direct harm to Seidman and Wein exists is before the proposed conversion goes to the membership for a vote. After the vote, the review of the conversion is no longer what the purpose of the proposal was but rather its prudence. Or, whether it is good for the company—a derivative cause of action.

the remainder of the membership of Spencer. At bottom, the allegations of the plaintiffs allege an impingement upon their rights as shareholders—namely the right to vote their "shares" in Spencer to find a way onto the board of directors. This is a direct claim. Carmody v. Toll Bros., 723 A.2d 1180, 1188–89 (Del. Ch. 1998) (holding an entrenchment claim to be direct where the complaint alleged that the shareholder's direct right to vote was impacted by a governance decision).[9]

Entrenchment stems from a director's duty of loyalty to the company—one of the two main fiduciary duties owed by a director. In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). Though previous editions of the Seidman saga applied a modified business judgment rule, the court cannot apply the rule here because the prior cases implicated the duty of care, to which the business judgment rule applies. The business judgment rule applies in a case where a challenge to a corporate action states anything but allegations of fraud; self-dealing; or, unconscionable conduct. Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 135 (App. Div. 2018). "[T]o invoke the rule's protection[,]directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties." Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984), overruled on other grounds, Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (emphasis added).

[9] Carmody also held that even if the claims of the plaintiffs were to be considered derivative, the demand requirement would be obviated through futility where shareholder voter rights are implicated. 723 A.2d at 1189. It is unclear whether the mandatory demand rule of the Business Corporations Act, N.J.S.A. 14A:3-6.5(3), would apply in this case. The Appellate Division panel in Seidman V, 2019 N.J. Super. Unpub. LEXIS 2038 at *32, alluded to the fact that only specific corporate governance principles apply to thrifts, so demand and futility may not apply. The earlier Seidman cases dealt with adopted by-laws that impacted the threshold of nomination to the board of directors, thus implicating the duty of care and, as such, the business judgment rule. This case pertains to the right of Seidman, Wein, and if approved by the 2/3 majority of Spencer members—the shareholder analog for thrifts—to vote for their board of directors, not just nominate them. Realistically, the difference between direct and derivative is unimportant beyond the fact that the plaintiffs here place their self-interest before their fellow members of Spencer—thus also providing grounds for a direct cause of action.

The business judgment rule's protections "can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment. From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." Ibid (internal citations omitted) (emphasis added). Distilled down, the business judgment rule deals with instances where a challenger alleges that a decision made by fiduciaries of a company amounts to a grossly negligent exercise of obligations to the company and its stakeholders—not to instances where self-interest appears to be the genesis of an alleged harm. Compare Singh v. Attenborough, 137 A.3d 151 (Del. 2016) ("[a]bsent a stockholder vote and absent an exculpatory charter provision, the damages liability standard for an independent director or other disinterested fiduciary for breach of the duty of care is gross negligence") with In re Caremark, supra, 698 A.2d at 967 (holding entrenchment claims to be those sounding in the duty of loyalty). Finally, and without any irony lost on the court, the New Jersey Supreme Court holds that "when corporate actions either have been approved or ratified by the stockholders, the propriety of those actions is to be gauged by the business judgment rule." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 177 (2011). As is evidently clear by this case, the action that Messrs. Seidman and Wein challenge is not one that the members of Spencer approved or ratified because only the resolution to propose conversion to the members is completed. So, in sum, the challenge here neither: (1) implicates the duty of care; nor (2) attacks an action approved or ratified by the members of Spencer; thus, the business judgment rule cannot be the legal standard employed.[10]

[10] The *sine qua non* of the business judgment rule is disinterest. The second self-interest is implicated, the duty of loyalty carries the day. Messrs. Seidman and Wein are correct that, given the extensive history between these parties, it is difficult to think that any action the board takes potentially impacts the the board of directors is one that sounds

The duty of loyalty is helpfully described by the Delaware Supreme Court in In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 751 (Del. 2005):

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests . . . . A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest[.]

907 A.2d 693, 751 (Del. 2005) (quoting Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)). The duty of loyalty, "in essence, 'mandates that the best interest of the corporation and its shareholders take[] precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally'." Ibid (internal citation omitted) (alteration in original). Directors must be reasonably informed and act in good faith in order to adhere to the duty of loyalty. Stone ex rel. AmSouth Bancorp. v. Ritter, 911 A.2d 362, 369–70 (Del. 2006); accord In re Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 32 (Del. Ch. 2014).

A successful showing of a case of entrenchment requires the challenger to show the

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in full disinterest. Defense counsel argued that discussion about self-dealing and entrenchment in cases past is impermissible character evidence under N.J.R.E. 404(b). Not so much. To the contrary, it appears most likely that this is admissible habit evidence—that is, an action that a party routinely takes in response to a singular stimulus. Rightly or wrongly, the board of directors of Spencer habitually undertake some form of action to counteract the encroachments of Lawrence Seidman—who occupies, though likely in his mind the job of a Socratic gadfly, the role of the stimulus here.

“defendant directors engaged in action which had the effect of protecting their tenure and that the action was motivated primarily or solely for the purpose of achieving that effect.” Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 202 (App. Div. 2012). Said another way, the successful plaintiff shows: (1) the action taken protects, in some form, the tenure of the directors; and (2) the directors took that action solely or primarily to preserve their tenure. See Ibid. Directorial actions taken to entrench cannot be permitted to remain. Snell v. Chris Craft, 285 A.2d 439 (Del. 1971).

Proving entrenchment demands more than a simple motivation to entrench. Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 186 (Del. Ch. 2005), aff’d, 906 A.2d 114 (Del. 2006). A plaintiff alleging a primary purpose of entrenchment carries a strong burden at trial. Id. at 186. “An entrenchment effect alone, even assuming such an effect exists, is not enough to demonstrate a primary or sole purpose to entrench.” Id. at 190. Retention of their positions by directors does not, without more, provide evidence of a disqualifying interest that could support a claim of the directors’ breach of their duty of loyalty. Scheidt, supra, 424 N.J. at 202–03. Maintenance of directorial positions when a company merges or alters corporate form, moreover, cannot equate to a breach of the duty of loyalty through entrenchment. Krim v. ProNet, Inc., 744 A.2d 523, 528, n.16 (Del. Ch. 1999).

Lastly, Plaintiffs challenge the amended voting by-law that Spencer’s board approved in 2018. The Appellate Division clearly delineated in Seidman III where the Chancery Court’s equitable review powers wax and wane regarding decisions by the board that directly implicate the Savings and Loan Act and are intended for the sole review of the Commissioner of DOBI. The panel in Seidman III explained:

> [I]t is appropriate to comment briefly upon the

> respective roles of the executive and judicial branches regarding the corporate governance of mutual savings and loan associations in New Jersey. Even before the country's economic dislocation commenced in 2008, the primary governmental branch tasked for the complex oversight of financial institutions in our state was the executive department through the DOBI, not the judiciary. See N.J.S.A. 17:1-25 to -28. Nationally, recently-enacted comprehensive financial sector legislation continues this division of responsibility. See generally, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
>
> We see neither a dilution of that hierarchy nor an erosion in the court's equitable jurisdiction by recognizing the primary role of the DOBI in the hands-on supervision of a mutual savings and loan association. See Swan v. Boardwalk Regency Corp., 407 N.J. Super. 108, 116, 969 A.2d 1145 (App. Div. 2009) (citing Campione v. Adamar, Inc., 155 N.J. 245, 263, 714 A.2d 299 (1998)). Because the safety and soundness of a thrift is of utmost concern to its members and the public in general, the expertise of the regulatory agency--not the dispute resolution proficiency of the courts--is best applied by analyzing the interaction of a particular mutual savings and loan association's by-law amendment with the SLA.
>
> Conversely, the Chancery Division's open-door jurisdiction for resolution of disputes arising from claims of breach of fiduciary duties--even for actions found by the Commissioner to be not inconsistent with the SLA--remains fully intact. The stewardship role of the judiciary over such traditional causes of action, including resolving the effect of a given instance of corporate governance [] is not undermined by an indulgent review and expansive commentary by the DOBI."

Seidman v. Spencer Sav. Bank, S.L.A., 2010 N.J. Super. Unpub. LEXIS 1783 at *11 ("Seidman III") (App. Div. July 27, 2010) (emphasis added). The relevant statutory framework provides that every thrift governed under the Act must set forth in its by-laws the voting rights of its members.

The voting rights by-law must follow one of two authorized methods: (1) one vote per member; or (2) one vote per $100.00 on deposit, limited to 1,000 votes per member. See N.J.S.A. 17:12B-126. A mutual savings and loan association may adopt such by-laws "as it may deem necessary or desirable for the regulation of its business and affairs and for the attainment of its purposes, consistent with the provisions of [the SLA] . . . and may change the same from time to time." N.J.S.A. 17:12B-38. In order to become effective, a by-law must be submitted in writing to the Commissioner for approval. N.J.S.A. 17:12B-39. "Approval shall not be withheld by the [C]ommissioner unless a proposed by-law or any change in the by-laws is in conflict with the provisions of [the SLA]." Ibid. The court cannot alter by-laws that either require action by DOBI or are directly compliant with the SLA—as either action bypasses the statutory scheme under the SLA. Cf. Seidman V, supra, 2019 N.J. Super. Unpub. LEXIS 2038 at *35 (holding that the chancery court's attempt to fashion a remedy for a nomination threshold prior to action by the Commissioner of DOBI constituted error as it was premature).[11]

III.

Plaintiffs' Arguments

Turning now to the contentions of the parties, the theory of the case by Plaintiffs is as follows. In seeking an end-around the 2017 chancery court decision which invalidated the 10% nomination threshold, the devious directors led by their ruthless ringleader Jose Guerrero undertook to concoct a way to eliminate the "Seidman problem" forever. Plaintiffs indicate that the Defendants in this case must be adjudged under the modified business judgment rule and must

[11] The record in this case is absent any form of evidence that the by-law was denied approval by the Commissioner of DOBI. Even still, the Appellate Division, not the Chancery Division is the appropriate avenue for review of this by-law if one needs to occur. See In re Application Pursuant to N.J.S.A. 17:12B-38, et seq., 2009 N.J. Super. Unpub. LEXIS 2802 (App. Div. Nov. 9, 2009).

show that they held a legitimate reason that was non-pretextual and that they were disinterested. Under Plaintiffs' theory, the directors cannot do this. Since they have been previously adjudged to be entrenched, they cannot show independence. Additionally, they argue that Guerrero masterminded the conversion proposals and that the remaining directors, profligate in their desire to remain in their lucrative positions, blindly followed Guerrero's plan to rid Spencer of Lawrence Seidman *ad infinitum*.

Plaintiffs state that the reliance upon Doug Faucette, an individual not licensed in the State of New Jersey, constitutes wrongful action and violative of public policy in this State. Specifically, Plaintiffs write: "it would offend public policy for this Court to cloak the advice allegedly given by Faucette with the same effect that would be accorded to the advice of a licensed New Jersey Attorney." Plaintiffs' Br. in Summation, at 11 (Jun. 16, 2020). The argument is that Faucette's "advice" could not be properly given or relied upon because he is not licensed in the State of New Jersey. Plaintiffs allege that any reliance upon Faucette's advice was wrongful and a showing of the pretext and mismanagement of Spencer that this conversion proposal represents.

Plaintiffs' arguments, stated succinctly, is the following: "Spencer would have this Court believe that this elimination of Member voting was coincidentally established when Guerrero and The Directors were in the midst of a trial that would end their unchallenged control of Spencer; but was unrelated to those matters. The Proofs—particularly the documents—show this is yet another fictitious scenario constructed to hide the fact that the conversion is a bad faith action designed to permanently entrench Guerrero and The Directors in their sinecures." Pls. Br., at 2–3.

Defendants Arguments

Defendants riposte focuses mainly on the legitimate business reasons behind the need for conversion but, specifically, the QTL. They begin their argument by indicating that "Plaintiffs . . .

admit [that their challenge] to [the vote on the resolution] is not based on any disagreement with Spencer's strategic plans or a claim that the bank should not be focused on improving profitability; it is borne out of self-interest as a vehicle to place themselves on Spencer's Board of Directors. Plaintiffs' selfish desires are no basis on which to prevent Spencer from implementing its longstanding business plan." Defendants Br. in Summation, at 1 (Jun. 16, 2020).

Under Defendants theory of the case, the following emerges. Since the early 2000s Spencer's business focus has been to expand its commercial lending practice and to increase profitability. Following the 2008 economic crisis and the change in regulatory frameworks and the shift to a commodity of residential mortgages, many thrifts sought to alter their focus and to convert their charter forms to survive. Spencer's commercial lending increased consistently over a period leading up to 2017. With a projected violation of the QTL set to occur in 2019, the chairman, CEO and President of Spencer, Jose Guerrero took it upon himself to seek out counsel to look into conversion. Doug Faucette and Robert Peacock both researched and prepared presentations and by June 15, 2017, the directors, well-informed of the need for a change, voted unanimously to convert.

However, based upon the difficulties related to the Wawel acquisition, the conversion needed to be placed on hold. By February 2018, the stale conversion resolution was removed. Thereafter, Jose Guerrero re-enlisted Faucette and sought Jane Rey to re-do the research and update necessary details to present to the other directors again. Then, the well-informed and unbiased directors, following discussions and questions about the impact of the conversion's removal of board of director voting, unanimously voted in favor of the proposal.

Under Defendants theory, the directors are not liable for any fiduciary duty breaches because they acted with the best interests of Spencer in mind.

IV.

The process of converting a mutual association to a mutual savings bank is controlled by N.J.S.A. 17:16M-2. It states:

> Any mutual association may apply to the commissioner to convert itself to a mutual savings bank by organizing and transferring its assets and liabilities to a newly-chartered mutual savings bank, and any capital stock association may apply to the commissioner to convert itself to a capital stock savings bank by organizing and transferring its assets and liabilities to a newly-chartered capital stock savings bank, and the proceedings to effect either application for conversion shall be as follows:
> a. When in the judgment of the board of such State association it shall be deemed advisable and in the best interests of its members or stockholders that the same shall be converted into a savings bank of this State, the board of directors shall adopt a resolution to that effect.
>
> b. After the adoption of such resolution, a meeting of the members or stockholders, as the case may be, of the State association shall be held upon not less than 10 days' written notice to the members or stockholders by mail, postage prepaid, directed to their addresses appearing on the books of the State association, which notice shall contain a statement of the time, place and purpose for which such meeting is called.
>
> c. At such meeting, the members or stockholders may by the affirmative vote of ⅔ of the members present, or shares eligible to be voted which are represented at the meeting, either in person or by proxy, declare by resolution the determination to convert the State association into a savings bank of this State.
>
> d. If the authority for the proposed conversion has been approved by the board of directors and by the members or stockholders as required by this section, the board of directors of the State association may apply to the commissioner to convert to a savings bank.

N.J.S.A. 17:16M-2 (emphasis added). After preliminary approval from within the association, the Commissioner of DOBI is then empowered to review the application, per N.J.S.A. 17:16M-4. The

Commissioner cannot approve a conversion unless the application is completed. See N.J.S.A. 17:16M-4 (2019) ("The commissioner shall not approve an application . . . unless the commissioner finds . . . that the following requirements have been met: . . . (a) the application is complete"). Notably, too, the same provision provides that the commissioner cannot approve the conversion unless "[t]he interest of the State association's depositors and creditors, and the public generally, will not be jeopardized by the proposed conversion." N.J.S.A. 17:16M-4(g) (2019). Upon the rendering of a final determination by an administrative entity, the Appellate Division is exclusively vested with jurisdiction to review the decision. See R. 2:2-3(a)(2) (2019); In re Failure by the Dep't of Banking & Ins. to Transmit a Proposed Dental Fee Schedule to OAL, 336 N.J. Super. 253, 261 (App. Div. 2001) (holding that the exclusive review of an action or inaction by the commissioner of DOBI lies with the Appellate Division).

Courts first must consider the plain language of any statute it analyzes. See e.g., Macysyn v. Hensler, 329 N.J. Super. 476, 485 (App. Div. 2000). "Each word in the statute must be given its plain meaning; no word should be rendered inoperative or superfluous." Ibid. "[Courts] ascribe to the statutory words their ordinary meaning and significance . . . and read them in context with related provisions so as to give sense to the legislation as a whole[.]" DiProspero v. Penn, 183 N.J. 477, 492 (2005). If the plain language leads to a clear and unambiguous result, the interpretive process ceases. See Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007).

The operative portion of legislation is N.J.S.A. 17:16M-2(a) to (d):

> a. When in the judgment of the board of such State association it shall be deemed advisable and in the best interests of its members or stockholders that the same shall be converted into a savings bank of this State, the board of directors shall adopt a resolution to that effect.

> b. After the adoption of such resolution, a meeting of the members or stockholders, as the case may be, of the State association shall be held upon not less than 10 days' written notice to the members or stockholders by mail, postage prepaid, directed to their addresses appearing on the books of the State association, which notice shall contain a statement of the time, place and purpose for which such meeting is called.
>
> c. At such meeting, the members or stockholders may by the affirmative vote of ⅔ of the members present, or shares eligible to be voted which are represented at the meeting, either in person or by proxy, declare by resolution the determination to convert the State association into a savings bank of this State.
>
> d. If the authority for the proposed conversion has been approved by the board of directors and by the members or stockholders as required by this section, the board of directors of the State association may apply to the commissioner to convert to a savings bank.

N.J.S.A. 17:16M-2(a)–(d). After applying the plain meaning to these provisions, the requirements for submission of an application to the following four-step process: (1) the board of directors, upon determining that a conversion is in the interest of the association, adopts a resolution; (2) the directors not sooner than 10 days prior to a vote provide written notice to the members or stockholders—with containing a statement of the time, place and purpose for which such meeting is called; (3) at the convened meeting, two-thirds of votes present, or votes eligible that are represented at the meeting adopt a resolution; and (4) if approved by both the directors and members, then the association "may" apply to the commissioner for conversion.

The process does not end there. For an application to be submitted, N.J.S.A. 17:16M-3 requires: (1) duplicate copies of the minutes of the proceedings verified by affidavit; (2) a certified copy of the resolution of the board of directors; (3) a certificate of incorporation meeting the requirements of N.J.S.A. 17:9A-7 or 17:9A-8.2; (4) copies of all applications and approvals required from federal regulations incident to the conversion; and (5) such other information or

materials as the commissioner may require by regulation. See N.J.S.A. 17:16M-3(a)–(e). These requirements dovetail into the procedure by which the commissioner finally reviews the application for conversion.

N.J.S.A. 17:16M-4 provides:

> The commissioner shall not approve an application of a State association to convert to a savings bank unless the commissioner finds, after appropriate investigation, and a public hearing if deemed by the commissioner to be necessary, that the following requirements have been met:
>
> a. The application is complete;
>
> b. The converting State association was insured by the Federal Deposit Insurance Corporation, and the resulting savings bank will also be insured by that agency;
>
> c. The converting State association satisfies all capital maintenance requirements for State associations set forth by the Federal Deposit Insurance Corporation, any other federal regulator and the department;
>
> d. The converting State association is not subject to any outstanding supervisory order, agreement or memorandum of understanding of the Federal Deposit Insurance Corporation, any other federal regulator or the department;
>
> e. The proposed conversion will result in a savings bank that will satisfy all capital maintenance requirements for savings banks set forth by the Federal Deposit Insurance Corporation, any other federal regulator and the department.
>
> f. Directors or managers designated in the certificate of incorporation possess the qualifications, experience and character required for the duties and responsibilities with which they will be charged; and
>
> g. The interests of the State association's depositors and creditors, and the public generally, will not be jeopardized by the proposed conversion.

N.J.S.A. 17:16M-4(a)–(g).

V.

Following review of the record and submissions by the party, the court finds in favor of the Plaintiff. This case is a close call. There was a valid business purpose to seek to change the bank's charter. However, in and of itself, that is not enough. This court finds that this board has engaged in a long history of conduct that has been designed to entrench its membership. So while entrenchment may not have been the sole purpose of the proposal to convert, this court is convinced that it was a primary factor in reaching its decision to take the action at this point in time, after more than 14 years of allegedly intending to do it. The best interests of Spencer and its depositors were not the primary motivating factor. Additionally, while the plaintiffs would like this court to believe that an attempt to increase Spencer's profitability is somehow nefarious, it is not.

A great deal of this court's reasoning lies with the credibility of witnesses, particularly Jose Guerrero and the board members. The court will not be led to believe that Lawrence Seidman and Arthur Wein never crossed the minds of any of the directors in the build up to either of the two conversion resolution votes. Following sixteen years of acrimonious litigation over the board of directors and membership thereon, it is utterly implausible to believe that a desire to keep their positions and to stop Seidman once and for all did not at all motivate the actions of this board of directors. This court finds that Guerrero and the board members were primarily motivated by stopping the plaintiffs in taking the action to convert. The testimony of these witnesses were well rehearsed and canned answers were abound during their testimony.

The process of seeking a conversion to a New Jersey state savings bank is a statutorily permitted process, so the question that this case posed was: did the directors pretextually seek this

process to entrench themselves? Entrenchment stems from a director's duty of loyalty to the company. In re Caremark, supra, 698 A.2d at 967. The duty of loyalty demands unselfish fidelity to a company and demands that there be no conflict between duty and self-interest. In re Walt Disney, supra, 907 A2d. at 751 This means, "in essence, '[]that the best interest of the corporation and its shareholders take[] precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally'." Ibid (internal citation omitted) (alteration in original). Good faith, moreover, is a fundament of the duty of loyalty. Ritter, supra, 911 A.2d at 369–70.

Entrenchment claims require a showing that: (1) the action taken protects, in some form, the tenure of the directors; and (2) the directors took that action solely or primarily to preserve their tenure. Scheidt, supra, 424 N.J. Super. at 202. Directorial actions taken to entrench cannot be permitted to remain. Snell, supra, 285 A.2d at 439. Proving entrenchment demands more than a simple motivation to entrench. Benihana of Tokyo, Inc., supra, 891 A.2d at 186. "An entrenchment effect alone, even assuming such an effect exists, is not enough to demonstrate a primary or sole purpose to entrench." Id. at 190. Here, defendants have a long history of attempting to thwart efforts by Seidman to gain a foothold on the board of directors.

Defendants point to the reliance upon advice of regulatory counsel to bolster their decision. A plaintiff challenging the good faith reliance must proffer facts that show the reliance upon advice was unreasonable and not in the company's best interest. Scheidt, supra, 424 N.J. Super. at 203–04; Benihana of Tokyo, Inc., supra, 891 A.2d at 188. Absent such a showing by a plaintiff, this consideration will weigh in favor of the directors and in support of good faith and reasonable decision making. Ibid. In the instance of relying upon regulatory counsel, New Jersey case law

does not require that counsel to be licensed in the State of New Jersey. Scheidt, supra, 424 N.J. Super. at 194; but see N.J.S.A. 17:12B-64 (outlining that the board can "retain or employ one or more attorneys-at-law or firm of attorneys-at-law of this State for a term not longer than 1 year. The board may employ, or authorize any officer to employ, any persons necessary for the conduct of the business of the State association).[12] Here, plaintiffs have met their burden on this point.

Turning to the merits of the plaintiffs' claims, the record at trial reveals that the primary purpose was to entrench in drafting a resolution, approving it, and proposing conversion to its members. Although the facts of this case support an effort on the part of Spencer to increase its commercial lending space, Spencer was profitable. It cannot be disputed that Spencer's assets show a decrease in its QTL ratio and that at some point, based on projections, Spencer may reach the QTL ceiling. But it is clear that the board members were not presented with all available options to allow for an elimination of QTL and preservation of the right to vote. The solution offered by Seidman is questionable at best, and most likely would be unsuccessful at accomplishing Spencer's purported goals. But the record shows that because Guerrero was not in favor of such a plan, it was never presented as an option to the board members.

In 2017, the case that eventually led to the Appellate Division's October 2019 decision in Seidman V remained ongoing at the trial level. Judge Mongiardo issued his opinion about the nomination threshold by-law in July 2017. The request by Jose Guerrero for memoranda from Robert Peacock and Doug Faucette, the completion of the resolution, the provision of the materials

[12] Plaintiffs place much stock in the fact that Doug Faucette is not licensed in this state. However, their reliance upon the statutory provision that permits the thrift to retain a New Jersey licensed attorney for a period of one year seems to misplace literalness to that provision. This portion seems to speak more to a General Counsel-type role as opposed to counsel hired to provide regulatory advice. Even apart from Doug Faucette's advice, both Robert Peacock and Jane Rey provided business strategy-driven memoranda that support Spencer's need to convert. Legal feasibility of the conversion does not turn on Faucette's advice—the thrift could elect to propose this conversion regardless pursuant to N.J.S.A. 17:16M-2(a) to (d). That they consulted regulatory counsel at all bespeaks good faith, if anything.

to the board, and the vote all concluded by June 15, 2017. All the directors testified that none of them even so much as considered Seidman in the decision—even though a successful conversion provides them the opportunity to name their successors as managers of the newly-chartered savings bank. Further, Jose Guerrero first asked Doug Faucette to research an integrity by-law. Though this means that Guerrero must have had Seidman on his mind during the vote, this integrity by-law did not make it into the finalized version of the materials provided to the board prior to the vote in 2017. It is dubious, moreover, that not a single director mentioned Seidman at the meeting where they voted on the by-law. The history of these two parties shows that the other directors entirely follow the direction of Guerrero, who has an acrimonious relationship with Seidman. The 2017 vote was rushed, without sufficient time for the board members to fully review the documents. While it was unclear from the recollection of the witnesses, how much time they actually had to review the reports, it is clear from the evidence that they had less time to review these documents than any others on the agenda for the same day. And this vote was arguably the most important vote the board would ever make. Moreover, following the vote, while other issues were in litigation with Seidman, Spencer took no action whatsoever to move forward with conversion. This speaks volumes on the motivation of the board members in adopting the resolution. This court finds that this was simply another tool in the shed to be used on Seidman when it was necessary.

Turning next to the 2019 conversion proposal, the conclusion is much the same as the 2017 conversion. The Appellate Division received submissions and held argument in Seidman V contemporaneous to the 2019 re-vote to convert. As the record at trial reveals, at the same meeting in 2017 as the vote to convert, Spencer's directors voted to approve efforts to approach, negotiate with, and acquire Wawel bank. The conclusion of the purchase occurred between February and

March 2019. Following the removal of the stale resolution for conversion in February 2018, the record reveals that the directors needed to re-vote. So, the process went forward once again.

By the time they voted, given the ever-presence of Seidman in the periphery of Spencer's vision, the directors considered the effect the conversion would have on the Seidman "problem." Once again, though, the directors testified to the fact that the directors relied upon the memoranda of Jane Rey and Doug Faucette[13] in their 2019 decision. This time, for better or worse, Jose Guerrero did not include a gift for Mr. Seidman for the years of litigation in his requests to Faucette. Additionally, the testimony reveals that the other directors recalled the necessity of the QTL from 2017 and realized from Jane Rey's memorandum that Spencer would breach the QTL by 2020 or 2021.

Taking these facts and placing them with the law, the court holds that the primary purpose behind this proposal to convert was pretextual and was primarily aimed at entrenching the board of directors and ending the Seidman problem. See Scheidt, supra, 424 N.J. Super. at 202–04. The reliance upon the proposals of Faucette and Rey in the 2019 vote might otherwise constitute a good faith effort on the part of all directors, but it has been clear in this case and in prior cases between these parties, that the board members are entirely controlled by Jose Guerrero. There is no possibility that the malice Mr. Guerrero holds towards Seidman allowed him to operate in good faith. While there may have been a reasonable business purpose to convert, as shown in the testimony of Riggins and the failure of Garabedian's model, the basis for the conversion was a mere pretext to prevent Seidman from exercising any control over the board.

[13] This court notes for the record that the testimony of Jane Rey and Douglas Faucette was extremely credible. In fact, the most credible of all Spencer witnesses.

Based on the record and the law, the board of directors of Spencer pretextually or with a primary purpose of entrenchment, approved a resolution that would propose to convert Spencer from a New Jersey SLA to a New Jersey Mutual Savings Bank. Therefore, a violation of the duty of loyalty occurred and judgment must be entered in favor of the plaintiffs barring the request for conversion at this time. However, the interests of the members of Spencer, and the public policy of this State demand that this cannot be a permanent resolution. There are indeed valid business reasons to expand into commercial markets. It was troubling to this court from the outset that the voting solicitation by Spencer to its members (which was the action that brought about this lawsuit) failed to fully disclose to the members that a vote in favor of conversion would prevent them from ever voting for members of the board. This was just further evidence of the improper motivation of Mr. Guerrero and the board in seeking conversion from the outset.

V.

Finally, as to remedies, this court hereby invalidates the Conversion Resolution and Voting Bylaw Amendment. This court finds that Jose Guerrero and the members of the board have violated their fiduciary duties by acting in a manner that was motivated by entrenchment and as to the board members, were entirely controlled by Jose Guerrero. The findings may be reported to the Commissioner of the Department of Banking and Insurance, but no recommendation shall be made to remove or reconstitute the board. That is not the place for this court. This court cannot enjoin any future efforts at conversion, because this court finds that there is a legitimate business reason for such a conversion. However, as requested by plaintiffs, in order to move forward with a plan of conversion, following a vote of the board of directors, application shall be made to the court for the appointment of independent regulatory counsel to review the proposal and to safeguard the voting rights of members. The court will award legal fees to the plaintiffs as the

prevailing parties. Plaintiff's counsel shall submit an Affidavit of Services to support their application for fees.