NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3836-12T2

LAWRENCE B. SEIDMAN,

Plaintiff-Respondent/
Cross-Appellant,

v.

SPENCER SAVINGS BANK, S.L.A.,
SPENCER SAVINGS BANK, S.L.A.
BOARD OF DIRECTORS, JOSE B.
GUERRERO, PETER J. HAYES,
NICHOLAS LORUSSO, ROBERT MOTTA,
BARRY C. MINKIN, ALBERT D.
CHAMBERLAIN, and JOHN S. STURGES,

Defendants-Appellants/
Cross-Respondents.

Argued January 12, 2015 - Decided April 30, 2015

Before Judges Sabatino, Simonelli, and Guadagno.

On appeal from the Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-96-10.

Helen Davis Chaitman argued the cause for appellants/cross-respondents (Becker & Poliakoff, L.L.P., attorneys; Ms. Chaitman and Vincenzo M. Mogavero, on the briefs).

Peter R. Bray argued the cause for respondent/cross-appellant (Bray & Bray, L.L.C., attorneys; Mr. Bray, on the briefs).

PER CURIAM

In this latest appellate chapter of marathon litigation involving a fight for control of Spencer Savings Bank, a New Jersey thrift institution, plaintiff and defendants each appeal from various decisions made by the Chancery Division after a ten-day bench trial. The court's principal ruling — as to which both plaintiff and defendants are dissatisfied for different reasons — invalidated the bank's revised by-law imposing a threshold of 15% of its "members" for nominating a candidate to the Board of Directors. The court replaced that 15% threshold with the 10% threshold contained in a former version of the by-law that had preceded the parties' litigation. The parties also appeal and cross-appeal a host of other discrete rulings by the trial court, including, among other things, the dismissal of claims and counterclaims of breach of fiduciary duty and the award of partial counsel fees to plaintiff.

For the reasons that follow, we affirm all of the trial court's decisions, except we remand for reconsideration of the quantum of counsel fees awarded.

I.

Background

The background of this ongoing dispute has been set forth at length in the three previous decisions of this court.[1] We summarize that background here, as well as the facts adduced at the ten-day 2011-12 trial.

Spencer Savings Bank ("Spencer") is a mutual savings and loan association chartered pursuant to the New Jersey Savings and Loan Act, N.J.S.A. 17:12B-1 to -319. Seidman 2, supra, slip op. at 3. The bank operates subject to the examination, inspection, and supervision of the New Jersey Department of Banking and Insurance ("the Department"), N.J.S.A. 17:12B-172. Seidman 3, supra, slip op. at 4 n.2.

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[1] See Seidman v. Spencer Sav. Bank, No. A-3899-04 (App. Div. March 23, 2006) ("Seidman 1") (remanding certain issues respectively to the trial court and to the Commissioner of Banking and Insurance); Seidman v. Spencer Sav. Bank, Nos. A-0167-07, A-1036-07, A-1343-07 (App. Div. Nov. 9, 2009) ("Seidman 2") (remanding certain issues to the Commissioner for amplification); Seidman v. Spencer Sav. Bank, Nos. A-0167-07, A-1036-07, A-1343-07 (App. Div. July 27, 2010) ("Seidman 3") (affirming certain rulings by the trial court and the Commissioner, but allowing plaintiff to file a new complaint), certif. denied, 204 N.J. 42 (2010).

It is also subject to federal oversight by the Office of the Comptroller of the Currency ("OCC")[2] and the Federal Deposit Insurance Corporation ("FDIC"). Id. at 27 n.11; Seidman 2, supra, slip op. at 4.

As a mutual association, Spencer has no shareholders. Seidman 2, supra, slip op. at 4. It is governed by a Board of Directors, consisting of up to nine individuals elected by the members to staggered three-year terms. Ibid. Members of the association are defined as "those in whose names accounts are established either as savings members or as borrowing members," N.J.S.A. 17:12B-74, and each member enjoys one vote regardless of the number of accounts owned, the amount on deposit, or the total indebtedness of the loan. Seidman 3, supra, slip op. at 4-5.

Plaintiff Lawrence B. Seidman is an attorney and money manager, who is in the business of buying and selling publicly-traded bank stocks. Seidman 2, supra, slip op. at 4. He opened

[2] At the time of the events giving rise to this litigation, Spencer was subject to the oversight of the Office of Thrift Supervision ("OTS") in the Department of the Treasury, which regulated federally-chartered mutual associations. Seidman 3, supra, slip op. at 27 n.11. On July 21, 2010, Congress's passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), transferred oversight responsibility to federal savings banks from OTS to OCC. In Re Checking Account Overdraft Litig., 880 F. Supp. 2d 1290, 1296 (S.D. Fla. 2012).

an account at Spencer in 1988, and has remained a member ever since. On several occasions, plaintiff discussed converting Spencer from a mutual association to a public stock corporation. Ibid. He had previously been involved in similar efforts to gain control of banking institutions and to broker their sale or merger. Ibid. At the time of trial, he was a major shareholder and director of Center Bancorp, the parent of Union Center National Bank, a competitor in the same geographic area as Spencer.

In 1995, Spencer's Board of Directors adopted By-Law 31, which required that a candidate for the Board be nominated "'in writing by a majority of the Board or by members representing ten percent (10%) or more of the votes entitled to be cast by members[.]'" Id. at 5 (alteration in original). Concerned about plaintiff potentially gaining control of the bank, the Board revised By-Law 31 in 2004, increasing the nomination threshold from 10% to 20%. Id. at 5-6.

The First Lawsuit

Plaintiff filed a verified complaint in the Chancery Division in October 2004, seeking declaratory and injunctive relief from revised By-Law 31, which increased the threshold requirement to 20%. Seidman 1, supra, slip op. at 3-4. The trial court denied the request for injunctive relief, referred

certain issues to the Commissioner of Banking and Insurance (the "Commissioner"), and retained jurisdiction regarding any election issues pending the Commissioner's decision. Id. at 4-5. This court then granted defendants leave to appeal, and held that the Chancery Division was the proper forum to adjudicate whether the Board breached its fiduciary duty by adopting By-Law 31's revised 20% threshold requirement. Id. at 7-9.

The trial court conducted a two-day trial in the first lawsuit. On April 13, 2007, it issued a written opinion, finding that in revising By-Law 31 to increase the nomination threshold to 20%, the Board had breached its fiduciary duty by disenfranchising Spencer's members. The court ordered the Board to revisit By-Law 31 and set forth reasons for any changes recommended or passed.

Following several meetings devoted to the matter and consultation with legal and financial experts, on July 26, 2007, the Board unanimously approved another amendment to By-Law 31 that reduced the nomination threshold requirement from 20% to 15%. This revised version stated as follows:

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

> nomination is to be voted upon, and a member shall not nominate a greater number of candidates than the number to be elected.
>
> The Secretary shall, upon request, inform a member of the number of signatures of members necessary to nominate a director in accordance with the following: Commencing on the first business day after the preceding annual meeting, a member may request in writing that the Secretary provide to the member an estimate of the number of member signatures required to nominate a director at the next annual meeting. The Secretary shall respond to such requests within 10 days following such requests with an estimated number based upon the number of holders eligible to vote as of last business day of the month preceding the date of the request from such member. Commencing on the first day of November of any year, a member may request in writing that the Secretary provide to the member the actual number of signatures required to nominate a director as of the record date. The Secretary shall respond to such request within ten (10) days after the record date for the annual meeting or, if the request is made more than ten (10) days after the record date, within three (3) days of the receipt of such written request. . . .
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> [(Emphasis added).]

Also on July 26, 2007, the Board adopted By-Law 46, which provides:

> In determining whether a candidate for the Board has been nominated by the necessary number of members, no signature of a member shall be counted if that member is acting in concert with any other member or members who individually or together constitute a company. In determining whether a candidate is eligible for nomination to the Board or

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

The Commissioner approved amended By-Law 31 on September 11, 2007.

After further proceedings, in October 2007, the trial court found that the Board had conducted a thorough investigation in connection with its revision of By-Law 31 and that any further review of that by-law was exclusively within the province of the Commissioner. The court also denied plaintiff's request for relief in aid of litigant's rights.

Three separate appeals were then brought by Seidman from the decisions of the trial court and the Commissioner, which were consolidated and addressed in Seidman 2. Finding that the Commissioner's September 2007 approval decision was "too conclusory and cryptic," we temporarily remanded the matter in Seidman 2 to the Commissioner for the issuance of a more

detailed statement of reasons underlying his decision to approve By-Law 31's 15% nomination threshold. Seidman 2, supra, slip op. at 28-29. On February 1, 2010, the Acting Commissioner issued an eighteen-page written decision on remand, again approving the by-law revisions.

The dispute returned to us in Seidman 3, in which we affirmed the decisions of the trial court and the Commissioner in all respects. Seidman 3, supra, slip op. at 23, 29. In so doing, we observed that the trial court had not addressed whether the 15% threshold was the result of a new or continued breach of fiduciary duty. Id. at 9. We found that the trial court had correctly refrained from adjudicating that particular issue because plaintiff had raised it improvidently through a motion in aid of litigant's rights, rather than as a newly-filed derivative claim. Id. at 31.

After our decision in Seidman 3 was issued in July 2010, plaintiff's attorney wrote to Spencer, demanding that By-Laws 31 and 46 both be rescinded. In August 2010, plaintiff's attorney again wrote to Spencer requesting that those by-laws be rescinded immediately, stating that plaintiff anticipated nominating candidates for the next Board election, and asking the Board to consent to an expedited litigation schedule. In September 2010, defendants' attorney informed plaintiff in a

letter that the Board would not rescind By-Law 31[3] and would not agree to an expedited schedule for litigation.

The Present Lawsuit

In September 2010, plaintiff filed a verified complaint in the Chancery Division, seeking the invalidation of revised By-Law 31 with the 15% threshold as well as damages arising from the Board's alleged breach of fiduciary duty. Plaintiff amended his complaint to add a count seeking the invalidation of By-Law 46. Defendants asserted a counterclaim against plaintiff, arguing that he was not a proper person to bring a derivative action, and alleging his breach of fiduciary duty.

In November 2010, plaintiff wrote to the Board's Secretary, stating that he intended to nominate two individuals for election to the Board and inquiring as to the actual number of signatures required to do so. In December 2010, the Secretary responded to plaintiff, requesting certain additional information and informing him that 47,411 votes were entitled to be cast as of November 28, 2010, which meant that the number of member signatures required to nominate a candidate was 7,111.65, i.e., 15% of 47,411. Plaintiff then provided her with additional information as well as the proposed communication that he wanted to send to all members. The Secretary again

[3] The letter does not discuss By-Law 46.

wrote to plaintiff, pointing out the last-minute nature of plaintiff's request, commenting on plaintiff's proposed communication with members, setting forth the costs of various mailing options, and reminding plaintiff that the nominations must be filed with her no later than December 28, 2010. On December 21, 2010, plaintiff sent the Secretary the resumes of his two nominees.

On December 23, 2010, plaintiff requested a hearing before the Commissioner pursuant to N.J.S.A. 17:12B-121 and -122, arguing that Spencer had refused to mail out his letter and enclosures. In a written decision[4] issued on January 25, 2011, the Commissioner noted that a member of a mutual association has a fundamental right to communicate with fellow members, but found that Spencer never denied plaintiff that right. Rather, the Commissioner found that the December 17, 2010 letter acknowledged plaintiff's right to have his communication mailed, and that plaintiff was free to adopt or decline any of Spencer's comments and suggestions. Finally, the Commissioner observed that because plaintiff never paid any of the costs of the mailing, Spencer's duty to issue the communication had not yet commenced.

Following the issuance of the Commissioner's January 2011

[4] Plaintiff has not appealed this administrative agency decision.

decision, plaintiff made no further efforts to nominate candidates to the Board. At the subsequent trial, he explained that he sent the letters to the Secretary to prove a point, and that pursuing the nominations would have been an act of futility that would have cost him close to $200,000.

The Trial and Defendants' Multiple Subpoenas

The parties appeared in October 2011 before the trial court to argue various discovery motions and to discuss the upcoming trial schedule. Shortly thereafter, defendants served approximately forty subpoenas on individuals they suspected of being associates of plaintiff and professional members[5] in the bank. The court convened an N.J.R.E. 104 evidentiary hearing on the first scheduled day of trial to determine whether to grant plaintiff's motion to quash defendants' subpoenas. The hearing continued to a later date, at which time plaintiff moved to discontinue the proceeding and start the trial. The court allowed the witnesses already present at the courthouse to testify, explaining that the court would preserve all of the testimony given at the hearing so that none of the witnesses would need to come back. The court noted that defendants would

[5] As the directors would later explain at trial, a "professional member," or "professional investor," is a member who invests solely for monetary gain. This type of member maintains a deposit so that in the event the association goes public, he or she will be able to buy shares in the initial offering.

have the right to produce witnesses at trial who would bolster their position with regard to the reason the by-laws were passed.

On July 16, 2012, the trial court issued a written opinion granting in part, and denying in part, defendants' application to move certain documents and testimony into the record. The court specifically found that many of the proffered documents had no relevance to the issue before the court.

The Evidence At Trial

At trial, plaintiff called to the stand six of the seven directors who voted on the 2007 by-law revisions: Albert D. Chamberlain, Barry C. Minkin, Nicholas Lorusso, Jose B. Guerrero (the bank's Chief Executive Officer and Board Chairman), John S. Sturges, and Peter J. Hayes.[6] Their testimony was generally consistent.

Chamberlain, Minkin, Lorusso, Sturges, and Hayes joined the Board after being nominated by Guerrero. All of them agreed that their primary motivation in adopting the 15% nomination threshold was to preserve the mutuality of Spencer. They were also concerned that the bank's low quorum requirement and the usually poor turnout at annual meetings created the potential for special interest groups to nominate and elect candidates who

[6] The seventh director, Mildred Damiano, died prior to trial.

did not enjoy broad support among the membership. In addition, some directors believed that if any one member could nominate a candidate, the annual meeting could descend into "bedlam" and "confusion."

The Board solicited advice and reports from experts concerning the threshold requirement, and the directors took the information that they received into account when deciding how to vote. The directors stated they considered all of the options in order to determine what would be in the best interests of the average member. Deliberations were hampered by the fact that no member in the history of the association, with the exception of plaintiff, had ever sought to nominate a candidate for a seat on the Board, and hence there was no track record to review in order to see how their procedures worked.

The directors concluded that a 15% threshold was reasonable and would not have an adverse effect on members' abilities to nominate a candidate. In fact, they felt that the 15% threshold struck a balance between the average member and the professional member, who has access to greater financial resources to pursue a seat on the Board. Further, the second paragraph of By-Law 31 allows a member an entire year to gather signatures for a nomination.

The directors testified that Spencer is a well-managed

institution with a long history of commitment to the community and to its employees. According to the directors, the average member benefits from mutuality because it allows the association to offer competitive rates on deposits and loans, and make contributions to the community in times of disaster or economic crisis. Once mutuality is lost, they asserted, the commitment to community no longer exists because a stock corporation is committed only to its shareholders, as owners of the institution. This points to an alleged fundamental difference between a bank formed as a stock company and a mutual association: average members in a mutual bear no financial risk because their accounts are insured by the FDIC and hence they have little incentive to become involved in the mutual's governance; shareholders in a corporation, on the other hand, are the owners of the corporation and have a direct financial stake in the company's success or failure.

To varying degrees, the record suggests that all of the directors understood the procedural and regulatory steps that would be required for a mutual association to convert to a public stock corporation. None of the directors was aware of a situation where a mutual had been involuntarily converted by a member or group of members.

As to By-Law 46, the testimony reflects that the directors

voted for that provision because they found it an appropriate means of preventing professional members from grouping together to take control of the Board. They explained that their vote was based on information the Board received from its attorneys, who warned about investors acting together to force the association to convert to a stock corporation.

The directors were unsure of the conditions that would trigger a violation of By-Law 46. The directors said they would leave the determination of whether a group of members were acting as a "company" for purposes of By-Law 46 to the Board's attorneys.

In his own testimony, plaintiff maintained that By-Law 31 represents an improper entrenchment of management and a violation of sound corporate governance. He contended that the nomination threshold is unnecessary because if he sought to install more than three directors on the Board, and hence effect a change in control, he would need to first obtain approval from the OCC or FDIC. He stated that he had been involved in such change of control applications on three occasions in the past and that they entailed "voluminous" documentation and thorough investigation by the regulators.

As to By-Law 46, plaintiff contended that it was adopted by defendants to circumvent a court ruling in previous litigation.

Spencer had brought an action against him in federal court, accusing him of violating the Savings and Loan Holding Company Act by controlling a group of investors.[7] The federal court dismissed that complaint on summary judgment, finding that the bank did not have a private cause of action under the statute. Plaintiff claimed that By-Law 46 was designed to allow the Board to act where the federal law did not. Moreover, if he complied with By-Law 31 and obtained the signatures of six thousand people to support his nomination, he would automatically be violating By-Law 46's prohibition against "concerted" action.

Plaintiff claimed to control only five Spencer member votes. He complained that defendants had subpoenaed people who signed his 2004 petition whom he did not even know, and that such a practice had a chilling effect on anyone attempting to gather signatures on a nomination petition. He observed that it

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[7] Specifically, Spencer had accused plaintiff of violating 12 U.S.C.A. § 1467a(h)(1), which makes it unlawful for a savings and loan holding company or its subsidiary or any "person owning, controlling, or holding with power to vote, or holding proxies representing, more than 25 percent of the voting shares, of such holding company or subsidiary, to hold, solicit, or exercise any proxies in respect of any voting rights in a savings association which is a mutual association[.]" The federal district court dismissed Spencer's complaint, finding that the statute did not contain an implied private right of action. Spencer Bank, S.L.A. v. Seidman, 528 F. Supp. 2d 494, 504 (D.N.J. 2008). The Third Circuit Court of Appeals affirmed for the same reason. Spencer Bank v. Seidman, 309 Fed. Appx. 546, 550-51 (3d Cir. 2009).

was not a surprise that people had opened accounts at Spencer hoping to make money on a conversion because financial experts had been advising investors for years to open accounts at savings and loans for that purpose.

Plaintiff presented expert testimony from Richard Grubagh, who testified about the mechanics of proxy solicitation. Grubagh testified that the approximate cost for a single mailing to 40,000 members would be $60,000 to $70,000. Grubagh believed that it was highly improbable that an individual member could solicit the required number of signatures for a nomination in the time frame allocated by the by-laws. Based on statistics published by a major mailing house for brokerage firms, Grubagh noted that only about 15.4% of all accounts actually vote at public companies, despite the fact that these accounts have received mail and phone calls soliciting their participation and that they can vote their shares by mail, telephone and internet.

According to Grubagh, another factor hindering a Spencer member seeking signatures is that the solicitation must take place over the holiday period, when mail deliveries are slower than average. Grubagh stated that it would be "pointless" for a member to request a member count or mailing before the record date, which falls between November 3 and December 2, because such a count would include names of individuals who are no

longer members and would omit names of individuals opening accounts between the mailing and record date.

Defendants presented testimony from several of its officers. The officers generally testified concerning Spencer's commitment to the community and the advantages that a mutual association offers.

The officers also indicated that Spencer has a very stable membership. According to one officer, the bank's membership fluctuated less than 2% between February 1 and December 1, 2011. The stability in membership has been consistent for a long time. Another officer testified that Spencer is a very attractive target for a professional investor.

Defendants called Thomas Cronin, a proxy specialist, to testify as an expert in proxy solicitations and mutual votes. Cronin explained that a shareholder of a public corporation is generally more knowledgeable than a mutual depositor, who usually does not understand the implications of a conversion to a stock corporation.

Cronin testified that a 15% nomination threshold was obtainable. In situations involving mutual votes, he has seen first-mailing proxy return rates of 25% to 30%. Cronin opined that one mailing would be sufficient to satisfy the 15% threshold, and estimated the cost of that mailing to be between

$50,000 and $80,000. However, a member could use other means of communication besides mailing to get his or her message across, such as newspaper articles, websites, blogs, and social media. Without actually doing a mailing to Spencer members, Cronin testified, it was impossible to know what the response would be, but he estimated that it would be greater than 30%. He could not say whether a 15% threshold was achievable by an average member because he had never seen an average member seek a seat on the board of a mutual association.

Ronald Janis, an attorney retained to advise defendants concerning the revision of By-Law 31, testified about the deliberations surrounding the 2007 by-law amendments. He reviewed the trial court's April 2007 opinion, met with other attorneys advising the Board, discussed the matter with Cronin, prepared a report outlining the results of his research, met with the Board to discuss how to proceed, and presented his findings at the Board's morning meeting on July 27, 2007.

Janis, who has known plaintiff since 1986, described to the Board his perceptions of plaintiff's general mode of operation. According to Janis, plaintiff works with a "wolf pack" of investors who actively and aggressively pursue a bank target until it either gives up or falters financially. Plaintiff then takes over the target and merges it out of existence. Janis did

not identify any specific group of people who might be operating with plaintiff at Spencer; however, nor did he hear any discussion of that topic at the meeting.

Janis advised the directors that a very important distinction between a corporation and a mutual association involves the quorum requirement. A corporation typically has a 50% quorum requirement, thus requiring a majority of the stockholders to be present before a meeting is considered open. A mutual association like Spencer, on the other hand, has a one-person quorum requirement and a vote can be taken on an important issue with very few members in attendance. For that reason, Janis was concerned that chaos would ensue at an annual meeting in the absence of a nomination threshold requirement. In that regard, he was persuaded by the New York court's reasoning in Stuberfield v. Long Island City Savings and Loan Association, 235 N.Y.S.2d 908 (Sup. Ct. 1962), where a five percent nomination threshold imposed by a mutual association was upheld based on similar concerns.[8]

Janis presented various threshold percentage options to the directors, but took no specific position on which percentage was

[8] In Seidman 3, we declined to adopt the New York court's reasoning in Stuberfield, noting that the case involved "factually dissimilar" circumstances. Seidman 3, supra, slip op. at 27 n.10.

best. After hearing that in a corporate setting a 50% quorum was necessary and hence 25% of the shareholders could act as a majority, one director suggested that 15% was a good level. Eventually the Board members came to the view that a threshold of 15% struck an appropriate balance between avoiding constant proxy fights and ensuring that members had a say in nominations.

The directors were concerned about the expense imposed by a mailing, but reasoned that it could not be avoided because the Savings and Loan Act prohibited the Board from disclosing names of association members. Further, they reasoned that even if there were not a threshold requirement, at least one mailing would be necessary so that a candidate's qualifications could be communicated to the members. In order to reduce costs, the directors decided to rewrite the by-law in such a way as to avoid the need for two mailings. They did this by providing in the second paragraph of By-Law 31 a means to send out a mailing as early as February so that a member seeking nomination could distribute telephone numbers or social media contact information and thus eliminate the need for a later mailing.

Graham Jones, Spencer's general counsel, also testified concerning the July 2007 meetings. The directors discussed the fact that plaintiff operated with a group of investors who were members at Spencer. To Jones's knowledge, no one actually

counted the number of plaintiff's "confederates" and compared that number to the six hundred or so running proxies held by the Board.

Finally, defendants presented testimony from director Minkin concerning the reasons By-Law 31 and By-Law 46 were adopted. He stated that the directors were aware that professional investor groups had accounts at Spencer, and with that in mind, By-Law 31's 15% threshold was established as a means to protect the interests of the average members. Similarly, By-Law 46 was adopted to create a level playing field between the average members and the professional investors. By-Law 46 was also adopted, in part, to insure that nominees would be suitable for service on the Board. On cross-examination, Minkin admitted that in July 2007 no one had yet attempted to determine how many of Spencer's members were professional investors.

The Trial Court's December 2012 Opinion and April 2013 Counsel Fee Award

On December 19, 2012, the trial judge issued a written opinion invalidating the 15% nomination threshold as too onerous and setting the threshold at 10% (the threshold originally placed in By-Law 31 in 1995 before it was amended in 2004), invalidating By-Law 46, initially denying plaintiff's request for attorneys' fees and costs, dismissing defendants'

counterclaim for breach of fiduciary duty, and dismissing defendants' allegations of spoliation of evidence.

In her written post-trial opinion, the trial judge expressed doubt as to the relationship of By-Law 31 to sound corporate governance. She found that although each director testified that the Board had attempted to balance the interests of the average member against those of the professional investor, the Board had no idea how many professional investors had accounts at Spencer. The judge further found that

> Mr. Seidman's proofs establish that Spencer's Board of Directors did not comprehend that 15% was the same as 20% when one considered the actual number of members of Spencer Savings [and] Loan. Mr. Seidman's proofs establish that unless one was known to and or liked by Jose Guerrero she had no possibility of having her name submitted to the members as a potential member of the Board of Directors. . . . <u>Mr. Seidman's proofs demonstrate by clear and convincing evidence that obtaining a seat on the Board by the average Spencer member is almost impossible</u>.
>
> [(Emphasis added).]

The judge observed that defendants had "hired the best and the brightest attorneys to provide advice on fashioning of [By-Law 31]," but concluded that they had still failed to do the "basic leg work that is necessary to determine the extent of the risk and impact to its members." In that regard, she had been supplied with "no proof that the professional investors would be

able to create 'chaos' at an annual meeting." The judge also observed that, instead of researching the threshold percentage that would protect members' interests without disenfranchising them, the Board simply enhanced what the judge termed its "anti-Seidman position" by educating itself about his business practices.

For these reasons, the judge found that By-Law 31, as written with a 15% threshold, was void. She directed defendants to reinstate the 10% threshold, but retain the language in the second paragraph of that by-law facilitating a nominating member's one-mailing process.

Both parties moved for reconsideration. In a written decision issued on March 4, 2013, the trial judge denied the motions in all respects, with the exception of plaintiff's request for attorneys' fees. Finding that the trial days spent on the N.J.R.E. 104 hearing provoked by defense counsel were unreasonable, the judge directed plaintiff's counsel to submit a certification of services for those days.

Plaintiff's counsel submitted a certification of services to the court, requesting a fee award of $58,422.63. On April 11, 2013, the court entered an amended judgment awarding plaintiff that entire amount.

The Appeal and Cross-Appeal

Defendants appealed various aspects of the trial court's rulings, and plaintiff cross-appealed. Both sides are principally dissatisfied with the trial court's reinstatement of the former 10% nomination threshold in By-Law 31. Defendants advocate that the 15% threshold be upheld, while plaintiff argues that a percentage threshold be eliminated altogether. Defendants also object to the invalidation of By-Law 46, the dismissal of their counterclaims against Seidman, and the counsel fee award.

Pending appeal, defendants have posted a supersedeas bond for the full amount of the monetary judgment. We subsequently granted defendants' motion to stay the relief directed by the trial court.

II.

In reviewing the trial court's various decisions challenged by one or both sides here, we adhere to several well-established guiding principles. We must bear in mind the special role that a Chancery Division judge performs as a court of equity, particularly where, as here, the judge has presided over a lengthy bench trial after handling years of litigation with the same parties and same general issues.

As the Supreme Court noted in Seidman v. Clifton Savings Bank, S.L.A., 205 N.J. 150 (2011), a Chancery Division case that coincidentally involved an attempt by Seidman to gain control of a different bank:

> Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: "'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008) (quoting [Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)] (internal quotation and editing marks omitted)).
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> [Id. at 169.]

The Court amplified in Seidman v. Clifton some of the sound reasons for such deference:

> Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility. Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses. Therefore, an appellate court should not disturb the factual findings and legal conclusions of the trial judge unless it is convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice. The appellate court should

> exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter.
>
> [Ibid. (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).]

See also Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (similarly applying such deference in affirming a Chancery judge's decision issued after a full-blown trial).

Moreover, "[i]n 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 N.J. Super. 269, 275 (App. Div. 2010) (citing Salorio v. Glaser, 93 N.J. 447, 469, cert. denied, 464 U.S. 993, 104 S. Ct. 486, 78 L. Ed. 2d 682 (1983); Mitchell v. Oksienik, 380 N.J. Super. 119, 130-31 (App. Div. 2005)).

That said, "'[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference[,]' and is subject to de novo review." State v. Barrow, 408 N.J. Super. 509, 516-17 (App. Div.) (alterations in original) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)), certif. denied, 200 N.J. 547 (2009).

The primary focus of both sides on appeal is the trial

court's invalidation of revised By-Law 31's 15% nomination threshold and the court's restoration of the 10% threshold contained within By-Law 31 before the Board amended it in 2004. Like the trial judge, we do not approach this subject on a blank slate.

We have already discussed at length in Seidman 3 the competing principles of business governance. Seidman 3, supra, slip op. at 4, 10-11, 29-35. We are well aware of the concerns about 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 to convert a mutual association to a stock corporation. The trial judge exhibited great sensitivity to these competing interests in her post-trial dispositive rulings, including her re-calibration of the nomination threshold back to its original 10% level.

Despite the prior rulings of this court and the Department, plaintiff persists in arguing, in essence, that no percentage threshold can be justifiably imposed, and that any such threshold is, by its nature, unduly burdensome on member rights. Our opinion in Seidman 3 clearly upheld the Commissioner's determination that a numerical threshold may be properly imposed under the Savings and Loan Act. Id., slip op. at 26-27. That

is the law of this case, and we will not disavow it here. Lombardi v. Masso, 207 N.J. 517, 539 (2011); Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 179 (App. Div. 1993).

Reciprocally, we 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. See Seidman 1, supra, slip op. at 8; Seidman 3, supra, slip op. at 26-27. In fact, the Commissioner, at various times, successively 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.

In addition, we made clear in Seidman 3 that the trial court's prior approval of the 15% provision on a truncated record, after a motion in aid of litigant's rights, did not foreclose re-examination of that percentage if plaintiff filed a

plenary derivative action in which the pertinent evidence and issues could be more fully developed. Seidman 3, supra, slip op. at 29-33. As anticipated, plaintiff filed such a derivative action, and the detailed proofs heard by the trial judge at the lengthy 2011-12 trial ensued.

The burdens of proof governing this second lawsuit imposed certain obligations on both sides. Under the "modified business judgment rule" endorsed by our Supreme Court in In re PSE&G Shareholder Litigation, 173 N.J. 258 (2002), and which we cited in Seidman 3, the law

> imposes an initial burden on a corporation to demonstrate that in deciding to reject or terminate a shareholder's suit the members of the board (1) were independent and disinterested, (2) acted in good faith and with due care in their investigation of the shareholder's allegations, and that (3) the board's decision was reasonable.
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> [PSE&G, supra, 173 N.J. at 286.]

A challenger may still overcome this showing by persuasive counterproof, including proofs obtained in discovery concerning "the reasonableness of the [board's] decision." Ibid. (quoting In re PSE&G S'holder Litig., 315 N.J. Super. 323, 337 (Ch. Div. 1998)).

In attempting to salvage revised By-Law 31's 15% nomination threshold, defendants stress the trial judge's specific finding that the Board consulted with "the best and the brightest

attorneys" and advisors before adopting the revision, and that the judge made no determination that the Board member acted without good faith. However, good faith is only one of the considerations set forth in PSE&G. Process alone cannot save an infirm by-law if its substance is unreasonable. PSE&G authorizes a by-law to be judicially stricken, even if it procedurally was adopted in good faith by disinterested Board members, if it fails the test of reasonableness. Ibid.[9]

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[9] Plaintiff argues that we should apply an even more stringent test requiring defendants to prove a "compelling justification" for a by-law that squelches shareholder or member participation in company governance, citing the Delaware Chancery Court's use of that standard in Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988). Plaintiff notes that the Third Circuit Court of Appeals predicted in IBS Financial Corporation v. Seidman & Associates, L.L.C., 136 F.3d 940, 949-50 (3d Cir. 1998) — a case in which he was involved — that the New Jersey Supreme Court would ultimately adopt the Blasius standard of "compelling justification." However, the Court has yet to either adopt or reject Blasius.

We are also mindful that some courts in Delaware and elsewhere have questioned the Blasius standard. The Delaware Supreme Court has noted that the Blasius test is so "onerous" that it is rarely used. Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996). More recently, the Chancery Court has offered a more refined version of the test, which eliminates the need for a board to establish a "compelling justification." Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 788, 810-11 (Del. Ch. 2007). Under that test, a board has the initial burden of identifying "a legitimate corporate objective served by its decision" and that its "motivations were proper and not selfish." If the board meets that burden, it then must show that the actions taken "were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a

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The trial judge recognized near the outset of her opinion that the "fairness or reasonableness of the percentage of members' signatures necessary to nominate a member to the Board" was significant. The court's opinion does not include an explicit finding that the 15% threshold in By-Law 31 was "unreasonable." Even so, a logical reading of the opinion is that the court implicitly found the 15% threshold to be unreasonable, despite the Board's consultative process in formulating it.

Despite the Board's review, no director who testified at trial could identify an instance where a mutual association was involuntarily converted. Further, as all the testifying directors recognized, there are a number of procedural and regulatory hurdles that would need to be overcome before a conversion could proceed. Even if plaintiff's true objective

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(continued)
particular way." Id. at 810-11. Some state courts have declined to adopt the Blasius test. See, e.g., First Union Corp. v. Suntrust Banks, Inc., 2001 N.C.B.C. 9A, ¶¶61-86, ¶163 (N.C. Super. Ct. 2001)(declining to adopt Delaware's case law on the subject, including the Blasius test); Shoen v. Shoen, 804 P.2d 787, 795 (Ariz. Ct. App. 1990)(declining to adopt the Blasius test in a case challenging a board's various measures to prevent a dissident shareholder group from taking control of the company).

Given this history, we decline to address the Blasius standard because the lesser test of reasonableness under the modified business judgment rule suffices here to support the trial court's invalidation of the 15% threshold.

was to place individuals on the Board who would effect a change in control, he would first have to obtain approval of federal regulators to do so. Thus, the alleged nexus between plaintiff's ability to nominate candidates for the Board and the actual conversion of the mutual association is attenuated.

Moreover, as the trial judge aptly recognized, defendants failed to establish that the directors could not have taken other less drastic steps to protect Spencer from conversion. For example, they could have expended association funds to inform members of the benefits of mutuality and encourage them to vote for their candidates for the Board. They could have more effectively communicated the time and place of the annual meetings to members to increase attendance and participation. To alleviate the concern that the lack of a nomination threshold would result in chaos at the annual meeting, the directors could have increased the quorum requirement.

Essentially, the main evidence defendants presented as to why they were compelled to take action and alter the nomination threshold was testimony and documentation concerning plaintiff's own business tactics. Janis, who had known plaintiff for more than twenty-five years, described plaintiff's predatory practices to the Board and warned the directors that once plaintiff got leverage he would pursue a target until it gave up

or faltered. Plaintiff would then merge the target out of existence and profit from the sale of stock. For his part, plaintiff openly admitted that he was in the business of buying and selling bank stocks.

Although Janis believed that plaintiff often worked with a group of like-minded investors to accomplish his goals, at the time of the 2007 meetings, he did not know of any specific depositors who were associated with plaintiff. Janis did not hear any discussion of specific individuals associated with plaintiff at the meeting, and the directors openly admitted that they were not aware at the time of any professional investor, other than plaintiff, who had an account at Spencer. While the existence of an alleged "wolf pack" of professional investors scheming with plaintiff to assume control of the association's governance was not conclusively established, it can be reasonably said that plaintiff presented a threat to the association, but that such a perceived threat was neither imminent nor irresistible.

In sum, while the record substantiates that defendants' concern over the loss of mutuality was genuine and reasonable, they failed to present a sufficient reasonable justification for the adoption of the 15% barrier. As the trial judge recognized, the costs of a mailing, which are dictated by statute under

N.J.S.A. 17:12B-120, would be about $50,000. She reasonably regarded that cost to be too onerous a burden to place upon members who might wish to contest the thrift's management. The judge lived with this litigation for over five years, and her well-informed ultimate assessment of the parties, witnesses, and issues ought not be lightly cast aside.

The remedy the Chancery judge selected here was well within her equitable authority and has a sound basis. Upon nullifying the 15% requirement, the judge reinstated the 10% threshold that had preceded it before litigation began in 2004. The judge did not pick a percentage out of thin air and impose her personal choice upon the parties. Instead, she simply reinstated the percentage that the Board itself had previously adopted, and which the Commissioner had previously approved, before this matter was litigated and twice tried. The remedy was appropriate under the circumstances. The evidence at trial focused on the extant 15% threshold challenged by plaintiff, and did not focus on the 10% level that had preceded it.[10] As the

[10] We decline to consider evidence proferred by plaintiff on the eve of the appellate oral argument that the bank recently acquired thousands of additional customers through a transaction with an insurance company, thereby increasing the absolute number of signatures needed to nominate a member. This new evidence was not before the trial court, and we find it inconsequential in reviewing the record developed in this case. See R. 2:5-4.

judge correctly stated, "[t]he issue with regard to the 10% threshold was never fully explored before [the trial] court."

The trial court also did not err in retaining the second paragraph of revised By-Law 31, which includes the "one-mailing" procedure. The one-mailing provision was not challenged in plaintiff's complaint or amended complaint in this case. The Board presumably regarded the one-mailing provision as reasonable because it approved the provision, as the Commissioner presumably did also as part of the Department's overall ratification of the bank's by-laws. Although there is no explicit "savings clause" in the by-laws, we are satisfied that the trial judge fairly exercised her equitable authority in preserving the one-mailing provision while striking down the 15% threshold in the first paragraph.

The trial judge also had a sound basis to invalidate the "acting in concert" provision in By-Law 46. As the judge found:

> The [c]ourt is also going to grant Mr. Seidman's request to declare void Bylaw 46. Spencer Savings has attempted to cloak itself with the authority that is reserved for the Federal Government and Regulators in addressing the behavior of those individuals associated in business practices. Whether it became a Bylaw that simply repeated the federal statutory provisions or not, would not create a better cause of action for Spencer than they had in 2007 when they filed the Federal District Court action against Mr. Seidman. Spencer Bank v. Seidman, 528 F. Supp. 2d 494 (declining to

> infer a federal right of action); see also Cal. v. Sierra Club, 451 U.S. 287, 293-294, [101 S. Ct. 1775, 1779, 68 L. Ed. 2d 101, 107] (1981) (statutes [that] focus on the person regulated rather than the individuals protected [they] create 'no implication of an intent to confer rights on a particular class of persons.'). In fact, the evidence showed that in conjunction with Bylaw 31 Bylaw 46 inherently causes a conflict and a violation of both Bylaws.
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> [(Alteration within the Sierra Club explanatory phrase in original) (footnote omitted).]

The directors demonstrated in their trial testimony a poor understanding of By-Law 46. None could define the term "company" as contemplated by the provision, and none knew exactly how it would be enforced. They merely explained that the by-law was adopted upon the advice of their attorneys, and that they would defer to the attorneys when questions arose about its enforcement. In fact, Guerrero acknowledged that the applicability of the by-law might ultimately need to be resolved in court.

Other than believing that By-Law 46 would somehow hinder plaintiff's efforts to nominate candidates for the Board, the directors had no clear idea of why they were adopting it. In short, they offered no real substantive justification for their action. Moreover, because By-Law 46 merely incorporates the federal statute set forth at 12 U.S.C.A. § 1467a(h)(1), it is at

best superfluous, and at worst illegal, in essentially providing a private remedy where none exists. Second, By-Law 46 is inherently in conflict with By-Law 31, because collecting signatures or forming a nominating committee in an effort to comply with By-Law 31's threshold requirement could be deemed a violation of By-law 46's proscription against concerted action. The judge sensibly recognized this inherent conflict, and set aside By-Law 46.

We likewise sustain the trial judge insofar as she was not persuaded to find either defendants or plaintiff to have breached their respective fiduciary duties. As to defendants, although she struck down the 15% threshold, the judge was satisfied that the Board members believed that a threshold was required "to ensure that member-initiated nomination produce[d] individuals who [were] seriously dedicated to the best interests of [the bank] and not their own financial gain." The Directors simply chose a flawed by-law to carry out that intention.

Reciprocally, the trial court did not err in declining to find that plaintiff himself breached any fiduciary duties in bringing the derivative action. His standing to bring such a case was already established by this court in Seidman 3. Seidman 3, supra, slip op. at 18. We specifically rejected defendants' argument that plaintiff could not fairly represent

members' interest because of his alleged ulterior motives, noting that "'to determine whether a complaint states a derivative or an individual cause of action, courts examine the nature of the wrongs alleged in the body of the complaint, not the plaintiff's designation or stated intention.'" Id. at 17 (quoting Strasenburgh v. Straubmuller, 146 N.J. 527, 551 (1996)). Moreover, plaintiff achieved some partial success in vindicating the members' interests by persuading the court to nullify the 15% threshold in By-Law 31 as well as the concerted activity proscription in By-Law 46.

We lastly turn to the court's award of $58,422.63 in counsel fees for the two-day N.J.R.E. 104 hearing. The judge was authorized under Rule 4:42-9(a)(2) to award fees in her discretion out of a fund in court, see Trimarco v. Trimarco, 396 N.J. Super. 207, 215-17 (App. Div. 2007) (applying the "fund in court" fee-shifting principles to derivative actions). See Seidman 3, supra, slip op. at 24-25. The judge also had the discretion to confine the fee-shifting to defendants' wasteful and time-consuming use of trial subpoenas that provoked the N.J.R.E. 104 hearing, which the judge reasonably characterized as "dilatory" and "an attempt to conduct discovery [that defendants] represented [they] did not need before trial."

However, the judge's actual calculation of fees does not

comport with her stated purpose. Instead of awarding fees for solely the time spent by plaintiff's counsel in connection with the two-day N.J.R.E. 104 hearing, the judge seems to have awarded plaintiff fees for all or most of the entire trial. At oral argument on appeal, plaintiff's counsel conceded that point, although he asserts that his client is justifiably entitled to fee reimbursement for the entire case. Given the limited success that plaintiff achieved, we are satisfied that the trial judge's stated intention to limit the fee-shifting to only the attorney time spent respecting the N.J.R.E. 104 proceedings was sensible, and a fair exercise of her discretion. However, the actual calculation needs to be reexamined by the court on remand.

The balance of the issues raised on the appeal and cross-appeal, including defendants' allegation of plaintiff's spoliation of evidence, lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).[11]

[11] The motion filed by Seidman in 2013 (M-7770-12) to strike and suppress defendants' brief is denied as moot.

Affirmed in all respects, except as to the counsel fee determination, which is remanded for reconsideration and recalculation. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION