

SPENCER SAVINGS BANK,
S.L.A.,

Plaintiff-Appellant,

v.

ARTHUR WEIN and LAWRENCE
B. SEIDMAN,

Defendant/Third Party
Plaintiffs-Respondents/Cross-
Appellants,

v.

JOSE GUERRERO, NICHOLAS
LORUSSO, THOMAS DUCH, ADA
MCGUINNESS, PETER HAYES
and BARRY MINKIN,

Third-Party Defendants-
Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-546-24

On Appeal From:

Superior Court of New Jersey,
Chancery Division
Docket No. BER-C-129-22

Sat Below:

Edward A. Jerejian, P.J.Ch.

Civil Action

**APPELLANTS' BRIEF
SUBMITTED ON FEBRUARY 25, 2025**

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Preliminary Statement

Multiple courts and all parties agree that the elimination of an outdated regulatory restriction on Plaintiff Spencer Saving's Bank, SLA's (Spencer) commercial lending abilities – the Qualified Thrift Lender (QTL) requirement – through a charter conversion is in Spencer's best interest. But Spencer's members (its depositors and borrowers) have been barred from considering whether to authorize that conversion to a mutual savings bank. The lower court's overreach and misapplication of the law concerning a board of directors' fiduciary duties has locked Spencer into being the only institution in this state that cannot abandon the outdated savings and loan association charter and pursue action that is indisputably in the best interest of the bank and its members.

Defendant Lawrence Seidman, a renowned bank raider, and Defendant Arthur Wein agree removing the QTL requirement is in Spencer's best interest but selfishly do not want Spencer to change charters because it would mean they can no longer seek nomination for seats on Spencer's board. That is because, under longstanding state law, mutual savings banks – of which there are many – are governed by self-perpetuating boards of managers, much like hospitals and other non-profit institutions, rather than elected by the bank's members.

Spencer's directors previously sought to convert its charter in 2019 but those efforts were stopped, despite this court and the then trial court

acknowledging that removing the QTL is a legitimate business concern, because the court disbelieved the directors' testimony that they did not discuss Seidman during their deliberations and therefore must have been solely motivated to entrench their board seats. Both courts made clear that because conversion could be pursued for a legitimate reason, Spencer could consider doing so in the future. Because the directors had not been advised at that time about decisive case law recognizing a board's right to repel corporate raiders if that action is in the corporation's best interest, that issue was not considered as it must be here.

In 2022, Spencer's Board – joined by two new directors – once again considered removing the QTL barrier. The Board received advice from staff and a consultant that the QTL restriction continued to place Spencer at a competitive disadvantage and must be eliminated to implement Spencer's strategic plan; counsel advised that the mutual savings bank charter was the only one available to eliminate the QTL while remaining in mutual form; and a retired Supreme Court Justice advised the directors concerning their fiduciary duties, including that it was appropriate to consider the elimination of the threat Seidman posed.

This action was brought to confirm the bank's right to present the conversion plan to its members and ensure its proxy materials were sufficient. After trial, the lower court again recognized the business need to change Spencer's charter. But it deemed it "premature" because Spencer had been

successful in 2022 despite undisputed testimony that Spencer's profits were adversely affected by the QTL restriction, drawing an arbitrary, undefined line as to how long Spencer must wait and how much Spencer must struggle before it can act to save its future, and declaring the directors had breached their fiduciary duties in taking an action that was indisputably in Spencer's best interests. That decision places Spencer and its Board in an untenable position, chilling the Board from taking action to plan for the future. And it deprives Spencer's members from having a say on the bank's path and deciding for themselves whether they value their voting rights over the bank's ability to grow.

The court also erred in failing to address the directors' advice of counsel defense. Directors are insulated from breach of fiduciary duty claims if they act in accordance with advice from competent counsel, even if that advice is wrong. Here, qualified counsel told the directors that a mutual savings bank conversion was a legitimate, right, and the only option, and that eliminating the Seidman threat was an added bonus. In acting upon that advice, even if the court disagrees with it, the directors cannot have breached their fiduciary duties.

This Court should thus reverse the judgment below, vacate the finding of breach of fiduciary duty, and remand for the lower court to consider the proxy materials, require any necessary revisions, and then allow Spencer's members to decide the bank's future.

Combined Procedural History and Statement of Facts¹

a) Spencer Savings Bank.

Spencer is a successful savings and loan association, headquartered in Bergen County.² Pa37. The bank is governed by a Board of Directors which, in accordance with state law, is elected by Spencer's members. N.J.S.A. 17:12B-62 to -63. In 2022, Defendants Jose Guerrero, who is also Chairman and CEO, Nicholas Lorusso, Peter Hayes, Barry Minkin, Thomas Duch, and Ada McGuinness were members of the Board, with Duch and McGuinness having joined in 2021. Pa112; 3T78-79; 3T123.

As a mutual, Spencer does not have shareholders, and thus Spencer can focus on long-term growth and ensuring the bank's viability for its customers and local communities rather than focusing on short-term returns for investors. 1T120. Spencer's Board is committed to remain in mutual form and its strategic plans consistently identify Spencer's mutuality as a key strength. 1T120.

b) History of litigation with Lawrence Seidman.

¹ The procedural and factual histories are closely intertwined and are thus combined for the court's convenience.

² "Pa" refers to Plaintiff's and Third-Party Defendants' appendix. "1T" refers to the September 13, 2023 transcript. "2T" refers to the September 14, 2023 transcript. "3T" refers to the September 19, 2023 transcript. "4T" refers to the September 20, 2023 transcript. "5T" refers to the January 12, 2024 transcript. "6T" refers to the June 7, 2024 transcript. "7T" refers to the October 11, 2024 transcript.

Seidman, a renowned bank raider, is opposed to the mutual form of governance, and has litigated against Spencer for two decades in furtherance of his attempts to gain a seat on Spencer's Board where he, Spencer believes, would push to convert the bank to a publicly-traded stock institution so he and his like-minded investors could profit on an initial stock offering. Because the lower court's decision made clear that the court was heavily influenced by that litigation history, we briefly summarize it below.

i. Nomination threshold lawsuits.

The first group of lawsuits concerned Seidman's efforts to reduce nomination thresholds that required a certain level of support from the bank's membership to stand for election to the Board as a member-nominated candidate. Seidman first sued Spencer in 2004, seeking to invalidate a bylaw Spencer had adopted increasing the required level of support from 10% to 20%. Seidman v. Spencer Savings Bank, Docket No. PAS-C-190-04; Pa129-130. Although recognizing that a board is entitled to take steps to defeat a threatened change in corporate control, the court found the board did not make a well-informed decision in large part because they did not understand the great impact the 20% threshold could have on every-day depositors' ability to run for the board. Pa136. This Court affirmed in large part, but found the court had erred in failing to make specific findings against individual directors. Pa145-151.

In accordance with the court's instructions that the Board consider the need to amend the threshold, the Board approved a nomination threshold requiring support of 15% of Spencer's membership. Seidman challenged that bylaw as well. Seidman v. Spencer Savings Bank, PAS-C-96-10, Pa386-387. The court found the number of nominations required to still be prohibitive to average members and invalidated it. Pa406-Pa408. However, the court expressly found the directors had not breached their fiduciary duties, emphasizing that the directors "sought out advice, reviewed memoranda that were prepared for them, and individually reached decisions based upon a plethora of reasons for the action they took." Pa415. The Appellate Division affirmed that finding. Pa431.

As part of its ruling, the court reinstated the 10% bylaw. Pa408. Seidman challenged that threshold too. Seidman v. Spencer Savings Bank, Docket No. PAS-C-53-15, Pa203. The trial court invalidated the 10% threshold, finding the directors had breached their fiduciary duties in not affirmatively acting to lower it following its judicial revival. Pa208-210. The court imposed on Spencer a threshold requiring a member to obtain signatures from the lesser of 1% of the bank's membership or 500 members to run for a seat on the Board.³ Pa212. The Appellate Division affirmed in large part, but found the court had usurped the

³ Even with that low threshold, no members other than Defendants have ever taken steps to run for a member-nominated seat on the Board.

authority of the Department of Banking and remanded for the Commissioner to review the bylaw. Pa251-255. The Commissioner approved the threshold.

ii. Other state court lawsuits.

In December 2020, Seidman filed a lawsuit to delay Spencer's 2021 annual meeting to give him more time to seek support for a nomination, and to enjoin Spencer from lobbying against a bill he caused to be introduced in the legislature and hold the directors liable for breach of fiduciary duty for lobbying against his bill. Pa437. The court dismissed the lawsuit, and this Court affirmed. Pa435. As to Seidman's lobbying claims, this Court explained:

The critical, indisputable fact is that the Directors had a right to oppose the Proposed Bill. No matter what their motives were, the Proposed Bill, as a proposed amendment to an existing statute, was subject to legitimate debate. The Directors' and the Bank's effort to lobby against the Proposed Bill becoming law was an exercise of their First Amendment rights to petition the government. Accordingly, those lobbying efforts cannot form the basis for civil liability.

[Pa442.]

In May 2021, Seidman sued a number of Spencer's current and former directors, seeking to hold them liable for any fees and costs incurred in connection with prior lawsuits. Seidman v. Spencer Savings Bank, Docket No. PAS-C-44-21. That lawsuit is ongoing, the court having denied Seidman's motion for summary judgment.

Seidman and Wein sought to run for the Board of Directors in connection with Spencer's January 2022 annual meeting. In September 2021, they sued to impose their preferred election procedures. Seidman v. Spencer Savings Bank, Docket No. PAS-C-91-21. Among other things, they sought to engage in direct solicitation of Spencer's members. The lower court granted that relief, but on Spencer's emergent application, the Supreme Court stayed it, apparently agreeing the order violated unambiguous state and federal banking privacy laws.

That stay remains in effect pending resolution of another case, Vasta v. Spencer Savings Bank, Docket No. PAS-C-108-21. The Vasta lawsuit was brought by ten former members whose accounts were among 1500 closed during a 2021 review for noncompliance with a requirement that depositors live or work in New Jersey and by Seidman (whose account remains open). The lawsuit claimed the reason for the closures was pretextual and was instead based on perceived support for Seidman. On Spencer's emergent application, the Supreme Court vacated a TRO requiring that Spencer offer to reopen all accounts. The court subsequently granted Spencer's motion to dismiss in-part.

iii. 2019 Conversion Lawsuit.

In 2019, Seidman and Wein sued to enjoin a special meeting called by Spencer at which Spencer's members would have voted on whether to convert Spencer from a savings and loan association to a mutual savings bank. Seidman

v. Spencer Savings Bank, Docket No. PAS-C-25-19. Pa451. As explained below, that charter change would relieve Spencer from restrictions on its commercial lending portfolio. But under New Jersey law, it would also change Spencer's governance such that the new Board of Managers would elect in own successors and thus make it harder for Seidman to gain a seat on the Board.

The court entered a TRO enjoining the meeting, after which Spencer withdrew its proxy materials and moved to dismiss the lawsuit as moot. Pa451. During argument on that motion, the court rejected Seidman's contention that a conversion should be permanently enjoined, observing that even if the directors had acted to entrench themselves in that instance, "does that mean that a future effort to change the bank is another effort to entrench? . . . What if these guys as part of this litigation look at it and say, you know that really was a good idea. . . . I know that wasn't our rationale the first time, but look at that, that would really make our bank better." Pa472.

In what it termed a "close call," Pa296, the court invalidated the 2019 conversion resolution, disbelieving the directors' testimony that Seidman had not been discussed when they voted on the resolution, and concluding the directors therefore must have acted to entrench themselves. Pa296, Pa300-301. Nonetheless, the judge discussed at length the legitimate business reasons for the conversion to allow greater entry into commercial markets, finding "[t]here

are indeed valid reasons to expand into commercial markets,” that “[f]aced 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,” and that “the court finds there is a legitimate business reason for such a conversion.” Pa280; Pa296; Pa301. The court refused to permanently enjoin Spencer from pursuing conversion based on “the interests of the members of Spencer, and the public policy of this State.” Pa301.

The Appellate Division deferred to Judge Covello’s credibility determinations and affirmed in an unpublished decision. Pa460. However, this Court held that “the ruling on the motive for the 2019 Conversion Resolution should not be forever binding” and “[a]ny future resolution to convert the Bank, if challenged, will need to be assessed based on the facts and circumstances at the time of the future vote.” Pa457. The litigation history was just one factor for consideration. Pa458.

c) Spencer’s commercial transformation.

Historically, New Jersey had a significant number of savings and loan associations, with 105 existing in 1987. 2T80. Spencer is the only remaining

savings and loan association. 2T81. Many converted to mutual savings banks.⁴ 2T81. Under longstanding state law, mutual savings banks are governed by a board of managers, who are required to be “elected by a plurality of the votes of the members of the board of managers at the time in office.” N.J.S.A. 17:9A-188(A) & -188(F); 1T121.

A key distinction between savings and loan associations and mutual savings banks and a principal reason for the change in charters is that savings and loan associations are subject to a federal regulatory requirement known as the QTL requirement, while mutual savings banks are not. 1T21; 2T103-104. The QTL requirement mandates that savings and loan associations hold at least 65% of their portfolio in qualified thrift assets, which largely consist of residential mortgages. 1T21. The requirement was enacted in 1987 to promote home ownership. 2T78. However, changes in the industry, including legislation, economic conditions, increased costs of regulatory compliance, the commoditization of mortgages, the entry of new competitors, and a shift in the manner of banking due to technology, have made it difficult for smaller community banks to compete. 2T81-83. Those smaller institutions thus shifted their focus away from residential mortgages. 2T85-86.

⁴ There are approximately 10 mutual savings banks in New Jersey. [REDACTED] [fdic.gov/resources/bankers/mutual-institutions/mutuals/2023.xlsx](https://www.fdic.gov/resources/bankers/mutual-institutions/mutuals/2023.xlsx) (last accessed February 19, 2025).

To ensure its long-term viability, Spencer made that strategic shift too, and over the last two decades, diversified its balance sheet and increased its focus on more profitable commercial lending. 1T27-28; 1T77-78; 2T85-86; 3T97. Spencer's operating budgets and strategic plans over the past 20 years document that shift. Pa596-599. Spencer's commercial real estate (CRE) balances grew from \$159 million in 2003 to \$1.8 billion in 2021, and its commercial & industrial (C&I) loan balance grew from \$0 in 2003 to \$404,070,000 in 2021. Pa599. Spencer also increased its staffing in its commercial lending departments and invested in technology to support its commercial lending. Pa596.

This growth in commercial lending caused Spencer to move closer to the 65% QTL limit. Spencer's QTL ratio decreased from 78.88% in December 2009 to 68.7% in December 2021. Pa598. Spencer has been required to actively manage its portfolio to avoid violating the QTL ratio and at times declined to pursue otherwise desirable commercial loans to maintain its QTL ratio in the high-60% to low 70% range to provide "some breathing room to operate" without risking a QTL violation, rather than focusing on whether certain loans are in the institution's best interest. 1T74-75.

One way in which Spencer has managed its QTL ratio is through multi-family lending. Multi-family residential loans are a QTL-qualifying asset but are more profitable than single-family residential lending. 1T31. However,

Spencer is now approaching a separate policy threshold limiting its concentration of multi-family assets within its CRE portfolio to a maximum of 500%. 1T41, Pa576. Spencer's CRE concentration rose to 494% by December 31, 2021, and it had to sell \$80 million of multi-family loans to maintain compliance. 1T41, Pa501. The combination of the CRE concentration limit and the QTL threshold now act as "double handcuffs" on Spencer's commercial transformation and ability to continue to grow its profits. 2T92-93.

d) Spencer's directors receive expert and legal advice.

Spencer's executive management frequently keeps the Board apprised of the QTL, presenting quarterly on the ratio and efforts to maintain it. 1T24. Consistent with that practice, Spencer's CFO, Steve Fusco, presented the Bank's QTL position to the Board at its May 26, 2022 meeting. Pa504. Spencer's ratio was at 70.8% as of March 31, 2022, reflecting a slight increase from Spencer's acquisition of Mariner's Bank. Ibid. But Spencer had only approximately \$300 million of commercial lending capacity or change in loan mix before it reached the QTL limit and was projected to breach the limit by early 2023 on its current trajectory. Pa522. Fusco explained that the QTL constraints placed Spencer "at a competitive disadvantage" as the bank could not pursue higher yielding commercial loans with corresponding core deposits (i.e. non-interest bearing deposit accounts), causing Spencer to lag behind other New Jersey banks with

more than \$2 billion in assets. Pa504. Spencer's net interest income – its “key” income margin “which is principally how a bank makes money, especially a community bank,” materially lagged at 2.67% compared to a peer average of 3.14%. 1T34; Pa504 Pa523. That equated to approximately \$18 million in unrealized annual revenues for Spencer in 2022. Pa504.

Similarly, Spencer's return on assets was only 0.69%, compared to an average of 1.25% among its competitors, a difference of \$22 million in lost annual net income and capital growth, meaning Spencer was “operating about half as profitable” compared to peers. 1T36; Pa504; Pa523-524. Fusco attributed that lag to Spencer's lack of growth in higher-yielding commercial loans and a weaker loan and deposit mix with fewer non-interest bearing deposits. Pa504.

Fusco advised that, unlike other banks, Spencer's ability to generate greater revenues through increased commercial loan production and core deposits is restricted by the QTL requirement. Pa504. To maintain compliance, Spencer had increased its concentration in multifamily loans to a level that exceeds 40% of its loan portfolio, contrary to what was called for in Spencer's strategic plan and making it one of the most heavily concentrated portfolios in the state. Pa505; Pa524. Fusco concluded that “adhering to QTL regulatory compliance has had an adverse impact on the Bank's business plan, earnings, profitability, capital growth and the exacerbation of loan concentration risk and

continues to put pressure on the Bank’s performance” relative to its peers. Pa527. Fusco anticipated that Spencer would not meet the goals of its commercial banking initiatives contained in its strategic plan for 2022-2024. Ibid.

John Duncan, Spencer’s longtime Chief Lending Officer and Executive Vice President, similarly explained during the Board’s May 2022 meeting that the QTL restriction was making it “increasingly challenging for [him] to manage the growth of the lending division” away from the thrift model, which “was really no longer viable if [Spencer] wanted to be competitive” going forward. 1T79; 1T93. Duncan expressed frustration with being unable to pursue greater commercial business because the QTL restricted its lending capacity. 1T93-94.

After hearing these presentations, the Board thoroughly discussed the issue, asking several questions of Fusco, Duncan, and Spencer’s President and COO. Pa505-506. Director Duch suggested the Board have a “dedicated day” to meet with outside experts so that the Board could make a more informed decision. Pa506. The other directors unanimously agreed. Ibid.

The Board next held a special meeting on June 9, 2022, at which the directors received presentations from Ron Riggins of R.P. Financial, LC, a well-regarded bank consulting firm; Douglas Faucette, Spencer’s longtime regulatory

counsel of Locke Lord LLP; and Gary Stein, a retired New Jersey Supreme Court justice and an attorney at Pashman Stein Walder Hayden, P.C. Pa509-513.

Riggins presented his evaluation of Spencer's implementation of its strategic plan, specifically whether certain key assumptions in it remained appropriate and the impact of the QTL on Spencer's ability to fully implement the plan. 2T89; Pa509-511; Pa530-559. Two core principles were Spencer's longtime commitment to mutuality and completing Spencer's commercial transformation, including the elimination of the QTL requirement. Pa509.

Riggins stressed that removal of the QTL through a charter conversion was "imperative" as the only option for Spencer to remain a mutual and stay the course with its strategic plan. 2T91; Pa509. The QTL requirement had become the tail "that wags the dog" because the bank had to continually modify strategic plan implementation to maintain compliance with the QTL. 2T116. Riggins also discussed the related regulatory issue of Spencer's CRE risk concentration policy limit and discussed that it restricted Spencer's ability to further seek multifamily assets with higher yields than traditional residential lending, further restricting Spencer's commercial transformation and profitability. Pa509-510.

Riggins advised that Spencer had reached a "strategic inflection point" accelerated by its recent acquisition of Mariner's Bank. Pa510. Spencer needed to either pursue a charter conversion to eliminate the QTL restriction, or to

change its strategic plan. Ibid. Riggins presented detailed charts projecting several opportunity costs absent a charter conversion and explained that Spencer would lose \$27.2 million in potential earnings between 2020 and 2024, and be approximately \$300 million smaller in asset size, absent increasing its commercial portfolio. Pa510; Pa547-Pa551. Those opportunity costs would increase over time. 2T100. Riggins discussed alternative options, but each posed a “dramatic” impact on Spencer’s operations and would adversely impact its profitability and growth. 2T100-102; Pa553-554. Riggins thus advised that charter conversion was “essential” to remove the artificial QTL barrier. 2T103.

Faucette, a regulatory attorney with extensive experience in the banking industry, including with mutual charter conversions, advised the Board concerning Spencer’s options to eliminate the QTL restriction. Pa511-512. If Spencer wished to remain a mutual institution, conversion to a mutual savings bank was the only option. Pa512. Faucette’s “exhaustive research” revealed “no alternatives practically available . . . aside from converting to a state-chartered savings bank . . . without sacrificing [Spencer’s] mutuality.” 1T120; 1T122.

Faucette discussed the governance of a mutual savings bank, explaining that a New Jersey savings bank is governed by a board of managers, which appoints its own successors similar to boards of charitable institutions like hospitals, non-profits, or universities. Pa512. Faucette explained the differences

between a mutual savings bank charter and that of stock institutions and presented empirical evidence that 72% of stock banks were sold or merged with larger banks just 3-7 years following a stock conversion. Ibid.

Justice Stein then advised the Board concerning its fiduciary duties. Pa512-Pa513. Stein has practiced law for decades, including as general counsel to major corporate and transactional clients in which roles he advised corporate boards and executives on matters related to governance, in addition to his seventeen-year tenure on the Supreme Court. 2T32-34.

Stein discussed Spencer's previous resolution to convert to a mutual savings bank in 2019, which Seidman and Wein had successfully blocked. Pa512. In that lawsuit, the court disbelieved that the then-directors had not considered Seidman in their deliberations, and thus concluded they were in fact motivated by Seidman and to entrench themselves. Ibid. Stein advised the Board should expressly consider the impact on Seidman of a conversion. Ibid.

Seidman is an investment professional in the business of trading bank stocks, who views the mutual form of governance as a "dinosaur for the modern era." 4T80; 2T86. His business includes opening accounts at mutuals, including Spencer, solely for the purpose of having an opportunity to profit if they later go through a public stock offering. 4T81; 4T83. Depositors at mutual institutions are afforded an advance opportunity to purchase stock before an initial public

offering at a price below the bank's tangible book value and can then sell those stocks at a higher value after the conversion is completed. 4T81.

Justice Stein presented the Board with a chart identifying 49 banks with which Seidman had been involved between 1984 and 2020. Seidman launched a proxy contest in 20 of those, and after he became involved, 39 of the 49 banks were sold or merged. 2T38-39; Pa369-371; Pa512. He stated that one "could very well draw the conclusion that if Mr. Seidman became a director of Spencer, it would be likely that an effort would be made to get Spencer to go public." 2T39. That goal has been acknowledged by Seidman for years, Spencer could face a sale or merger as a result, and "at least as of the date of the Board meeting [Seidman's goals] w[ere] inconsistent with the bank's long-term plan." 2T39.

Stein also advised the Board of his analysis that the ruling blocking the 2019 conversion resolution was wrong and had been appealed. Pa512. Stein explained that the law imposes a fiduciary duty on directors to act in the best interest of the company that they serve, and that based on the presentations from Riggins, Duncan, Fusco and Faucette, "[t]he decision to convert to a New Jersey chartered mutual savings bank is a legitimate and right decision" and "the economic necessity for conversion was overwhelmingly clear and constituted the primary reason for Spencer to convert to a mutual savings bank." Pa512. Stein also advised the Board that members were legally permitted to take actions

in the best interests of the company to thwart an unwelcome invader and “the fact that conversion would hamper Seidman’s profit motivated desire for Board membership was actually an added benefit and should not in any way influence the directors to vote against conversion which so obviously would serve the Bank’s best economic interests.” Pa513; 2T38.

Following these presentations, the Board unanimously approved a motion to act on the advice received and authorized the preparation of necessary documents to convert Spencer to a savings bank. Pa513. Given prior litigation with Seidman, the Board also voted to authorize counsel to prepare for any legal challenges to permit Spencer to move forward. Ibid.

e) The Board approves a resolution to present a plan of conversion to a mutual savings bank to Spencer’s membership.

At the Board’s July 6, 2022 meeting, Faucette reviewed the resolution of conversion to a mutual savings bank and proxy materials that would be sent to Spencer’s members which included the plan of conversion, the proposed articles of incorporation, and bylaws. Pa372. The proxy materials disclosed repeatedly, in bold font, that the members would be giving up their right to vote on the board of directors if they voted in favor of the plan of conversion. Pa327; Pa332; Pa335; Pa339. The materials also disclosed the litigation history between Spencer and Seidman, including the courts’ findings in each lawsuit. Pa343-344.

The Board unanimously approved the resolution after considerable discussion. Pa373-374. Duch explained that the Board could not allow the motivations of one individual – Seidman – to prevent them from carrying out their fiduciary responsibility to present the proposal to members to allow them to decide the bank’s future. Pa373. The other directors agreed, concluding that a change in Spencer’s charter was necessary to allow the bank to continue to be profitable and offer greater services to meet customer needs. Ibid.

f) Spencer files this declaratory judgment action seeking a ruling on Spencer’s right to present the plan of conversion to its members.

As well as approving the resolution to present a plan of conversion to the membership, the Board also authorized this action to obtain a declaratory ruling on the right to present the plan to the membership and on the sufficiency of the proxy materials. Pa374. Spencer filed the lawsuit because, based on Seidman’s history of challenging their actions, the Board wanted the court to affirm their ability to move forward with conversion before they took steps to implement what they believed was in the bank’s best interest. Pa36.

Defendants moved to dismiss the action, or in the alternative to transfer

venue⁵ or stay it, all of which were denied. Pa99-101. They then filed a third-party complaint against the directors, alleging that they were motivated by entrenchment in approving the resolution. Pa111-125. The case was ultimately tried over four days in September 2023. 1T-4T.

At trial, Spencer presented the testimony of Fusco, Duncan, Faucette, Stein, Riggins, and the Board members.⁶ 1T-3T. Fusco and Duncan testified concerning the advice they had given to the Board, and reiterated that Spencer was missing opportunities and not as profitable as it could be because it had to manage its assets to avoid violating the QTL rather than fully implement its long term strategic plan to increase commercial lending. 1T18-117. Fusco also addressed Seidman's argument that the QTL was not impacting Spencer's profitability as 2022 had been Spencer's most profitable year, explaining that 2022's results arose from Spencer having acquired Mariner's Bank and Spencer having built up a cash position during COVID that allowed it to keep interest rates the same during 2022, along with other balance restructures during 2022. 1T45-46. But Spencer's earnings had decreased 25 to 30 percent in 2023 due to

⁵ Consistent with R. 4:3-2, Spencer filed the action in Bergen County, where the bank is headquartered. Defendants sought to move the action to Passaic County, where they had filed prior lawsuits against Spencer.

⁶ Hayes passed away while the lawsuit was pending. Pa319.

compressed margins and rising interest rates. 1T46. Spencer's expenses were growing faster than its revenues due to its balance sheet mix. 1T46-47.

Faucette confirmed the legal advice he had given and that he still believed it to be accurate and complete. 1T119-124. Stein similarly testified concerning the legal advice he had provided concerning the directors' fiduciary duties, and that he "could not conceive of a director of Spencer at that time voting no on this resolution to convert because it was so clearly in the interest of not only the bank, but of the members." 2T35-42; 2T64:11-23.

Riggins testified concerning his presentation, and also provided expert testimony concerning strategic planning for financial institutions. 2T69-105. Consistent with his advice, Riggins opined that conversion of Spencer's charter was "essential" to remove the QTL barrier. 2T103.

Each director testified about their reasons for approving the resolution. 3T. Minkin, who cannot continue to serve on the Board if the bank converted to a mutual savings bank given his age, 3T32,⁷ testified that his main concern was shifting to a more balanced commercial lending portfolio, to generate more income and make Spencer more profitable after "a lot of years" of strategic planning to become more commercialized. 3T8-9. Minkin acknowledged that

⁷ Incredibly the trial court concluded that Minkin was primarily motivated by entrenchment – that is, to preserve his seat on the board – even though he would lose his seat if the bank converted.

Spencer was profitable and had a strong year in 2022 but believed that Spencer “was walking away from a lot of other opportunities that we shouldn’t have had to because of the QTL limitation.” 3T31.

Minkin relied on the advice of all experts he had heard from. 3T14-15; 3T28. He was “shocked” by the chart presented by Stein reflecting Seidman’s involvement with other banks. 3T24. To Minkin, that made it clear that Seidman “was not about preserving the right of a member to vote” but about Seidman’s “ability to get on the Board as an activist.” 3T24-26. Nonetheless, Seidman was not Minkin’s primary motivating factor, and the proposed conversion “was an objective of the bank as part of our strategic plan for growth.” 3T26-27.

Lorusso acknowledged the fact that the conversion would prevent Seidman from becoming a director would have “some [e]ffect” on his decision, because of the risk that Seidman could cause the bank to be taken over or merged with another bank if he gained a seat on the Board. 3T70-71. But the “main issue” was to see Spencer remain as a mutual, with continued viability and to be competitive with comparable institutions. 3T70. Lorusso understood the advice of counsel and experts presented to the Board and understood that members would be losing their voting rights in the proposed conversion, but factored into his decision that the members would vote on the conversion, and would thus decide whether they wanted to keep or give up their voting rights. 3T65-70.

Guerrero likewise relied on the advice of professionals received at the Board meetings, as well as his experience, having worked at Spencer for 40 years and witnessed how the bank “has changed dramatically over the years” from a predominantly consumer bank toward commercial growth. 3T97; 3T103-104. Guerrero understood based on Riggins’ presentation that Spencer needed to eliminate the QTL “going forward to continue to build commercial accounts.” 3T101-102. He relied on Faucette’s advice that the only way for Spencer to do that while remaining a mutual was to convert to a savings bank. 3T102.

McGuinness, a former bank regulator who joined the Board after the 2019 conversion effort and trial, voted in favor of conversion because “[t]he savings and loan charter, it has been restrictive to the bank, and in this competitive market we need to continue to grow and expand.” 3T80; 3T84. The presentations from Fusco and Duncan “really drove the fact home” that Spencer needed to eliminate restrictions that prevented Spencer from expanding and taking advantage of investment opportunities. 3T81-82. She also relied on Faucette’s advice that “made it clear that there was no other option” but to convert to a savings bank. 3T83-84. McGuinness testified that Seidman played no role in her decision because “it is really about what is best for the bank and the community at large.” 3T84-85. She was upset by the allegations of entrenchment, testifying

that “whatever we have done and continue to do and want to do is for the benefit of the community and to help just continue to grow and be successful.” 3T81.

Duch, a longtime Spencer customer who, like McGuinness, had joined the Board in January 2021, had witnessed firsthand in his capacity as a public officer⁸ over the years the benefits Spencer’s mutuality offers to its local communities. 3T123-129. He supported the resolution based on Fusco’s May 2022 presentation that the QTL “was a drag on the bank’s profitability,” which had prompted Duch’s request to hear additional presentations from experts concerning the bank’s options. 3T130-131. Duch “absolutely” relied on Faucette’s and Stein’s advice, particularly Faucette’s advice that the members would have the opportunity to weigh in on the proposed conversion. 3T135-37. Duch believed those members would benefit from Spencer’s increased profitability “by having additional surplus funds available,” which keeps the bank “sound and solid and avoids failures.” 3T140-141.

Seidman’s counsel questioned each of the directors concerning an expired bill, S2726 (2020), which had been introduced at Seidman’s behest. Pa376-377; 4T65. The bill purported to change the law governing newly-converted savings banks to provide depositor voting rights, but would not apply to existing mutual

⁸ Duch previously served as the mayor and manager of Garfield. 3T124-125.

savings banks and thus targeted solely Spencer as the only remaining savings association which could convert to a mutual savings bank. Pa380; Pa383. Spencer had lobbied against the targeted legislation, which Seidman challenged in a prior lawsuit. His claims there were rejected as a matter of law on constitutional grounds. Pa442. The bill never made it out of committee.

Defendants presented testimony from Spencer's corporate secretary, Marizel Collazo, and corporate counsel, Graham Jones, attempting to support a theory that the Board of Directors' meeting minutes were fabricated; from Seidman; from Harold Hennick, an associate of Seidman's; and from Gary Bronstein, an attorney presented as an expert in banking law.⁹ 4T.

Seidman admitted his desire to see Spencer converted to a public, stock-issuing institution. 4T83. He also testified that Spencer is currently "doing very good," and acknowledged that the QTL can be a valid reason to change charters and that it makes business sense for Spencer to be free of it. 4T87-88.

Hennick was presented to claim that Spencer's proxy materials seeking votes in favor of a mutual savings bank conversion were misleading. 4T20-22. But his mind was "made up a long time ago" that the Board wanted to entrench itself. 4T12-23. He held that opinion before reviewing the materials. 4T13.

⁹ Spencer had filed a motion in limine to preclude Bronstein's testimony as improper expert testimony in an area of domestic law. The lower court wrongly denied that motion. Pa325.

Bronstein’s purported legal expert testimony sought to argue there were alternative options to remove the QTL restriction while maintaining member voting. 4T18. He testified concerning a convoluted procedure that would require forming a federally-chartered mutual holding company, and simultaneously converting Spencer, as a subsidiary of that mutual holding company, to a mutual savings bank. Spencer, which has no branches in the state, would then need to incorporate a bank holding company in Pennsylvania. 4T18; 4T35. The sole example of such a transaction was that of a Pennsylvania bank, William Penn. 4T29. Unlike Pennsylvania, whose laws are silent on the issue, New Jersey law prohibits depositors of a mutual savings bank or savings bank holding company from electing managers or directors. 4T27; 4T29; 4T34. He could not guarantee the Commissioner would approve such a novel transaction. 4T36-37. But Bronstein had “absolutely no doubt” the simpler mutual savings bank conversion Spencer proposed would eliminate the QTL requirement. 4T36-37.

g) The court’s decision.

The court issued its written decision on August 30, 2024, nearly a year after the close of trial. Pa3. The court first discussed and rejected Defendants’ argument that the resolution of conversion and lawsuit were barred by res judicata, acknowledging its charge was to assess the Board’s July 2022 vote “based on the facts and circumstances existing at that time.” Pa18. The court

also rejected Defendants' arguments concerning spoliation of evidence in connection with the deletion of an MP3 recording of the Board of Directors meetings, finding that Spencer's secretary had acted in accordance with longstanding practice in deleting the recording after the meeting minutes were adopted. Pa28. The court expressly found:

Detailed written minutes were produced based on the recordings, **which Collazo and every other testifying witness who attended the June and July meetings credibly testified under oath accurately reflected what was discussed at those meetings.** (emphasis added).

[Pa27.]

The court also expressly stated that it "respects the Third-Party Defendant Directors' passion for the Bank and concern regarding the QTL threshold" and recognized "that eliminating the QTL is a legitimate business concern." Pa29-30. But the court bewilderingly then leapt to find, with scant reasoning, that the directors had breached their fiduciary duties and that Seidman, and not the QTL, was the primary motive for the conversion resolution. Pa29.

The sole reasons presented for that conclusion was 2022 being "the most profitable year ever" for Spencer, and that the QTL ratio had only decreased slightly in 2022 (because, as Fusco and Duncan testified, Spencer was actively managing the ratio to avoid violating it, including by selling loans and declining to pursue others). Pa29; 1T35-38; 1T42-43; 1T94; 1T105; Pa501. Thus, the court

concluded “the 2022 Conversion Resolution was premature” because it was made only “thirteen months” after the court’s decision invalidating the 2019 conversion attempt (ignoring that 3 years had passed between the board actions). Pa28-29.

Based on that conclusion, the court found that Spencer’s request for the court to review the proxy materials was moot. Pa30. It denied Defendants’ requests for damages and attorneys’ fees. Ibid.

Spencer filed a motion for partial reconsideration, arguing the court should have declined to address the claims in the third party complaint as moot once it invalidated the resolution of conversion, and that the directors should not have been found to breach their fiduciary duties because they had merely sought a ruling from the court that they could seek member approval of the conversion to a mutual savings bank, and had not taken any other affirmative steps towards conversion. The court denied that motion in an October 11, 2024 oral decision, which made clear that the court had been prejudiced by “twenty years of history” in adjudicating the dispute before it. 7T15.

Argument

Point I

The trial court erred in concluding Spencer’s 2022 profitability meant pursuing a charter change was premature and a breach of fiduciary duty. (Pa28-30)

Appellate courts defer to trial court fact-findings unless “they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence.” In re Trust Created by Agreement Dated December 20, 1961, ex rel Johnson, 194 N.J. 276, 284 (2008) (internal quotation marks and citation omitted). Appellate courts likewise defer to the trial court’s credibility determinations. Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). But “[a] trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (alteration in original).

In this matter, the only credibility finding made by the lower court was that Spencer’s witnesses, including its directors, were credible in their testimony concerning what occurred at the meetings at which the directors heard advice concerning the QTL, the bank’s strategic plan, the potential of a charter change, the impact of Seidman on the directors’ consideration of options, and at which the directors approved a resolution to present the potential conversion to Spencer’s members. Pa27; Pa372-375; Pa504-513. However, without any other credibility determinations, and apparently based solely on the lower court’s finding that Spencer was profitable in 2022 and therefore a charter change was

“premature,” the lower court concluded that the directors were primarily motivated to make more difficult Seidman’s quest for Board membership. Pa29.

The lower court thus erred as a matter of fact and law in precluding Spencer from seeking member approval of conversion to a mutual savings bank because 2022 was a successful year. The law imposes no requirement that a savings association cannot plan for the future and seek to strengthen its financial standing at a time the institution is profitable. Unacknowledged by the lower court, the testimony addressed that very issue, with Spencer’s CFO explaining the specific reasons why 2022¹⁰ had been so successful – including a completed acquisition and cash reserves from COVID that helped Spencer keep interest rates steady on deposit accounts – and that earnings were down significantly in 2023 due in no small part to the QTL restriction. 1T45-47. The lower court erred in focusing only on 2022 and superimposing a precondition that Spencer be unprofitable and that it wait an undefined period of years before it can pursue its statutory right to seek to change its charter.

¹⁰ The court’s focus on year-end 2022 profits in its decision was in itself improper and completely contrary to its express recognition that the only relevant facts and circumstances were those existing as of July 2022, Pa18, as the directors would not have known the amount of those profits in reaching their decision, which was based on Spencer’s first quarter performance and projections. See Paramount Comm’ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994) (“a court should not second-guess [a board’s] choice even though it might have decided otherwise or subsequent events may have cast doubt on the board’s determination”).

New Jersey law provides that “[a]ny mutual association may apply to the commissioner to convert itself to a mutual savings bank” on the satisfaction of certain procedural requirements – being unprofitable is not one of the requirements. N.J.S.A. 17:16M-2. The statute provides that if a Board determines conversion is in the best interests of its members it can adopt a resolution and present that resolution to its members for approval. N.J.S.A. 17:16M-2(a); N.J.S.A. 17:16M-2(b) & (c). Upon approval of two-thirds of the voting members, the bank can then apply to the Commissioner for approval. N.J.S.A. 17:16M-4.

Hence, the law does not require that a mutual association must be struggling or unprofitable at the time it makes such an application. Nor did this Court impose such a requirement, or a specific timing requirement, in its ruling affirming the invalidation of Spencer’s 2019 conversion resolution. Rather, the Court merely held “[a]ny future resolution . . . will need to be assessed based on the facts and circumstances at the time of the future vote.” Pa457. The facts and circumstances here were that, while profitable in 2022, the bank was limited by the QTL, was not as profitable as it could be, and was at an “inflection point,”¹¹ Pa510, as the directors were advised by a well-qualified

¹¹ The lower court appeared to fault Riggins for being unaware of Spencer’s 2022 profits. Pa29. However, Riggins gave his presentation to the Board in mid-

bank consultant. The directors were advised by staff, experts, and legal counsel that conversion to a mutual savings bank was necessary for the bank to allow it to continue to implement its strategic plan of growing its commercial lending and realize its full profit potential. In addition, the Board was told that Spencer's revenues as reflected in its net interest income ratio for the preceding fiscal quarter were approximately \$18 million less than they could have been without the QTL. Pa504. To the extent this Court did intend to impose a minimum timing requirement, the Board notably did not have the benefit of this Court's decision concerning the 2019 conversion resolution at the time it acted. Instead, the Board had only the trial court's ruling which expressly permitted future conversion efforts because it recognized the mutual savings bank conversion was in the member's best interest. Pa301.

Moreover, it makes no sense to judicially impose a requirement that Spencer wait until it is unprofitable before it can pursue charter conversions or other restructurings, as that would chill directors from planning for future success and put them at risk for being found liable for breaching their fiduciary duty for acting too late. That is particularly so in light of testimony from Spencer's CFO that 2022 had been an unusual year, in that Spencer had

2022 and would have had no way of knowing Spencer's end-of-year results at that time. 2T115.

increased cash reserves during the COVID pandemic that allowed it to avoid raising deposit account interest rates, and that Spencer had acquired Mariner's Bank that year. 1T45-47. The lower court erred in using Spencer's profitability during 2022 as the sole basis on which to conclude that Spencer's conversion was "premature" and to thus be misled by the past litigation history and infer that the directors had been primarily motivated to keep Seidman off the board – not to free the bank from the QTL -- in approving the conversion resolution.

The court's ruling here thus places the directors of Spencer in an impossible position. The lower court's statement that its decision "should not prevent future efforts at conversion, if with the passage of time, those efforts are motivated by appropriate circumstances," Pa30, is of small comfort, as directors will be left to guess at whether they are on the right side of an arbitrary and undefined line drawn by the court as to how long they must wait and whether Spencer is struggling enough for the "circumstances" to be "appropriate." If they choose wrong, they risk a finding that they breached their fiduciary duties, with all attendant consequences including the potential need to reimburse any legal fees advanced in their defense. See N.J.S.A. 17:12B-73.

Thus, the court erred in placing undue weight on Spencer's 2022 profits, and in concluding on that sole basis that the directors were primarily motivated to keep Seidman off the board in approving the resolution of conversion. That

finding, and the resulting invalidation of the resolution and holding that the directors breached their fiduciary duties in voting to seek member approval of conversion to a mutual savings bank is legally unsustainable and must be reversed. This Court should remand and instruct the lower court to review the adequacy of Spencer's proposed proxy materials accordingly.

Point II

A dual motivation to eliminate the QTL and eliminate the threat of Seidman does not constitute a breach of fiduciary duty. (Pa21-22)

The trial court erred as a matter of law by failing to apply the correct legal analysis required where the court has found dual motivations, one legitimate and one entrenching. Here, the court found that it respected the directors' legitimate concern about the impact the QTL had on the bank but also found that the directors were motivated to prevent Seidman from gaining a seat on the board. Pa29. However, in concluding the motivation to entrench alone was sufficient, the court utterly failed to apply the required dual motivation analysis to determine whether there is entrenchment.

To prove entrenchment, which derives from the fiduciary duty of loyalty, the plaintiff must show that the directors' actions were motivated primary or solely for the purpose of protecting their tenure. Scheidt v. DRS Technologies, Inc., 424 N.J. Super. 188, 202 (App. Div. 2012).

However, “[t]he law requires more than just a 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). As this Court explained, the “retention by directors of their positions on a board 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, 424 N.J. Super. at 202; Krim v. ProNet, Inc., 744 A.2d 523, 528 n.16 (Del. Ch. 1999) (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.) Therefore, a “plaintiff charging a primary purpose of entrenchment bears a heavy burden of proof at trial.” Benihana, 891 A.2d at 186.

Here, the trial court found entrenchment solely based on its conclusion that the board was motivated to keep Seidman from obtaining one seat on the board.¹² Pa29. Not only is that motivation alone insufficient to find entrenchment under Scheidt and Benihana, the trial court failed to conduct the required legal analysis after it found a second non-entrenching motivation.

A. The critical issue in dual motivation cases is whether the Board’s vote is in the corporation’s best interests.

¹² The trial court never explained how Barry Minkin could have been motivated to preserve his board seat when it was undisputed that if the conversion happened, he would lose his seat because of his age. A finding of entrenchment as to Mr. Minkin is therefore wrong as against the clear evidence and the law and must be reversed irrespective of what else this court does.

Importantly, in dual motivation cases, even when one purpose of a board's action is to obstruct a challenger's effort to attain a board seat, that does not result in entrenchment where the challenged action also is in the best interest of the company. For example, in McPhail v. L.S. Starrett Company, 257 F.2d 388 (1st Cir. 1958), the court found that to obstruct the plaintiff's efforts to attain a board seat, the board proposed adoption of a stock purchase plan allowing employees to buy stock. Despite that entrenching motivation, the court rejected the entrenchment claim because keeping the plaintiff off the board was in the best interest of the company. The plaintiff's

purpose was to insinuate himself into the Company's management so that he could manipulate its affairs to his personal profit. The master found that [plaintiff] wished to be elected a director in order to be in a position to reduce the Company's dividend rate, not because of insufficient earnings, but to cause dissatisfied stockholders to sell their stock and so to depress its market value so he could buy it up more cheaply

[Id. at 395.]

It was thus not a breach of fiduciary duty for the directors to entrench themselves in the face of "the legitimate, indeed the laudable purpose of frustrating a raid by [plaintiff] on the investment of other stockholders." Id. at 395-96.

Similarly, in Shoen v. Shoen, 804 P.2d 787 (Ariz. Ct. App. 1990), the Arizona Court of Appeals rejected an entrenchment claim despite making the

factual finding that the board authorized the issuance of additional stock, which only it could vote by proxy, in an effort to prevent a dissident stockholders' group from gaining control of and liquidating the company. In its legal analysis, the court explained:

The fact that the directors had a personal interest in the transaction simply triggers the inquiry as to whether their actions were fair and in the best interests of the corporation and its shareholders. As to entrenching themselves, that was the potential collateral result of the board's actions in every case upon which we rely. **The important point is that even if the action entrenches the board, it is permissible if it also serves a proper corporate purpose.**

[Id. at 795 (emphasis added).]

See Nw. Indus. v. B.F. Goodrich Co., 301 F. Supp. 706, 712-13 (N.D. Ill. 1969) (“[T]he fact that consummation of [the] transaction may have some effect on the control of the corporation is immaterial and the agreement will stand or fall depending on whether it is fair to the corporation” (internal quotation marks and citation omitted)); see also Heit v. Baird, 567 F.2d 1157, 1161-62 (1st Cir. 1977) (dismissing derivative complaint based on multiple directors being issued large blocks of shares to perpetuate their control of the company, and holding the transaction, which “has the collateral effect of enhancing the power of incumbent management” was not invalid because it “may have served any of a number of entirely proper corporate purposes” and as such, “while perhaps

vulnerable to criticism, is of a character which could be thought to serve the interests of the company.” (quoting McPhail, 257 F.2d at 265))

Case law from Delaware, which New Jersey courts regularly follow, is in accord. Among the leading Delaware cases is Benihana in which a board decision to finance the renovation of restaurants owned by Benihana, Inc. (Benihana) was challenged as entrenching by Benihana of Tokyo (BOT), the owner of over 50% of Benihana’s stock. The proposed financing took the form of a \$20 million issuance of convertible preferred stock, which was purchased by a company owned and controlled by two of Benihana’s directors. 891 A.2 at 154-155. BOT sought rescission of the board’s action, alleging that Benihana’s directors had breached their fiduciary duties and did so to dilute BOT’s interest in Benihana and entrench the directors. Ibid.

The Chancery Court rejected plaintiff BOT’s contentions and focused on whether the proposed financing was in Benihana’s best interests:

An entrenchment effect alone, even assuming such an effect exists in this cause, is not enough to demonstrate a primary or sole purpose to entrench.

Therefore, Plaintiff has failed to meet their burden as to the claim of improper purpose. I find that the primary purpose of the BFC Transaction was to provide what the directors subjectively believed to be the best financing vehicle available for securing the necessary funds to pursue the agreed upon Construction and Renovation Plan for the Benihana restaurants.

[Id. at 190.]

Similarly, in Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 951 (Del.1985), the court evaluated a tender offer by Unocal for its own shares that excluded from participation Mesa Petroleum Co., a Unocal shareholder that had made a hostile tender offer funded in part with “junk bonds” for Unocal’s stock. Unocal’s board, after conferring at length with counsel and financial advisors who advised the board that Mesa’s tender offer price was less than the value of Unocal’s shares, authorized Unocal to respond with its own tender offer for its own stock. Id. at 950-51. However, any shares owned by Mesa would be excluded from Unocal’s tender offer. Id. at 951. Mesa filed suit, challenging among other things Mesa’s exclusion from Unocal’s tender offer.

The Delaware Supreme Court upheld the exclusion of Mesa despite its claim that the exclusion was “entrenching.” The Court found that the offer by the Unocal board “was reasonable and consistent with the director’s duty to ensure that that the minority stockholders receive equal value for their shares,” and “reasonable in relation to the threat posed by Mesa’s inadequate and coercive two-tier tender offer.” Id. at 957-58.

Even where Delaware courts have found directors took action directly motivated to interfere with or impede the effectiveness of a stockholder vote in a contested election of directors, the finding of that simple motivation alone is

not enough. If such motivation is found, Delaware courts then require the board to demonstrate that it needed to respond to an “important corporate interest or to the achievement of a significant corporate benefit” and that the response was reasonable and did not preclude shareholder voting. Coster v. UIP Companies, Inc., 300 A.3d 656, 672-73 (Del. 2023) (internal quotation marks and citation omitted); see also MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1129-32 (Del. 2003) (explaining board action will be affirmed where it is “proportionate and reasonable in relation to the threat posed”); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 662-63 (Del. Ch. 1988) (rejecting per se rule invalidating board action taken for the primary purpose of thwarting shareholder vote and requiring board to provide a compelling justification for such action).

Accordingly, Delaware courts are fundamentally concerned – even if directors may be motivated to diminish the effectiveness of stockholder voting – with whether the Board’s action is justified because it clearly serves the corporation’s best interests.¹³

¹³ In the earlier Seidman v. Spencer litigations in which Spencer’s board adopted various nomination thresholds to try to stop Seidman from getting on the board, as the courts explained, there was nothing inherently wrong with adopting the thresholds to make it more difficult for Seidman to get on the board; the breach of fiduciary duty occurred because the means chosen to do so did not otherwise serve the best interests of the company and were unreasonable reactions to the perceived threat. Pa136.

Here, the court and all parties, including Defendants, agreed that eliminating the QTL was in the bank's best interests. Specifically, it is indisputably in the bank's best interest to eliminate the QTL and allow it to continue to grow its commercial lending portfolio. Pa30. Such loans are more profitable, come with corresponding no-interest deposit accounts from those borrowers, and are necessary to continue to strengthen Spencer. All courts that have considered the issue have agreed. Pa30; Pa301; Pa461. Seidman did not claim otherwise but simply and selfishly wished to preserve his ability to campaign for a seat on the Board. 4T87-88. And the lower court here expressly underscored and believed the Board's concern about the QTL as well as the director's passion for the Bank. Pa29. That finding in a dual motivation case that removing the QTL was in the bank's best interest should have ended the analysis in favor of the Board's decision.

Instead, based on no more than its arbitrary view of timing and prior litigation history, the court concluded the directors were primarily motivated by making it more difficult for Seidman to achieve Board membership. But the Board's consideration of the impact on Seidman and desire that such a bank raider not join the Board, does not make the directors' actions a breach of fiduciary duty. This court's prior opinion concerning Spencer's 2019 conversion resolution does not hold otherwise. Pa461-462. Here, unlike in 2019

where the court rejected the directors' testimony that they did not discuss Seidman at all in considering conversion, the directors expressly discussed and received detailed legal advice on Seidman's history of engagement with other banks, usually resulting in their sale or merger, and that eliminating that threat was an added benefit to changing the bank's charter, and were candid about that advice and its impact on their decision. Acting to prevent that threat was consistent with, not a breach of, the directors' fiduciary duties, as recognized by the Delaware Supreme Court. See Unocal Corp., 493 A.2d at 956-958.

Based on the foregoing case law, any consideration of which is notably absent from the court's analysis, that ruling was legally wrong and should be reversed because i) eliminating the QTL restriction through a charter conversion is indisputably in Spencer's legitimate business interests; and ii) the side effect of that conversion, that Seidman could no longer mount challenges to obtain a seat on the Board was also in Spencer's best interest, as it would eliminate the threat of an outsider who the directors were advised and reasonably believed was a threat to Spencer remaining a mutual institution.

Additionally, it is important to underscore how the directors proceeded here. Given the prior court's ruling that they could consider converting again in the future with the proper motivations, the directors sought and received the advice of competent counsel and advisors before making a decision, and upon

making their determination did not unilaterally move forward to implement it. Pa504-513. They voluntarily came into court seeking confirmation from the court that they were right and could move forward. Pa34. Under the circumstances of the litigation history here, and the clearly legitimate need to get out from under the QTL, how could it possibly be a breach of fiduciary duty to simply ask a court to declare that the bank can finally convert?

Accordingly, the lower court erred by failing to consider what was in the best interest of the bank. This court should reverse, and remand with instructions for the lower court to review Spencer's proposed proxy materials, and to then allow the members to decide on Spencer's future.

Point III

The lower court erred in failing to find that advice of counsel insulated the directors from a breach of fiduciary duty claim. (Pa19)

The lower court committed reversible error in finding the directors breached their fiduciary duty in light of the evidence, credited by the court, that the directors received and relied upon advice of counsel and experts in voting upon the resolution of conversion.

To establish an advice of counsel defense, its proponent must prove "that they relied upon counsel's advice accurately and in good faith; that said advice was as to a matter of law and given by competent counsel." McGlynn v. Schultz,

90 N.J. Super. 505, 519-20 (Ch. Div. 1966), aff'd, 95 N.J. Super. 412 (App.Div.1967), disapproved on other grounds by Francis v. United Jersey Bank, 87 N.J. 15 (1981). Where those criteria are established, the reliance on advice of counsel negates the existence of bad faith or negligence and offers complete protection to the directors against a claim of breach of fiduciary duty, even if the advice given was ultimately wrong. Ibid.; see also Scheidt, 424 N.J. Super. at 203-04 (holding that shareholder “failed to offer facts to support a claim that the directors breached their duty of loyalty by failing to act in good faith” where the board retained legal counsel and several financial advisors to provide advice regarding a merger transaction).

A decision by the New York Appellate Division, Second Department is instructive. See Gilbert v. Burnside, 13 A.D.2d 982 (1961), aff'd, 11 N.Y.2d 960 (1962). In that case, the directors of a Pennsylvania corporation received a legal opinion that a plan of reorganization was legally proper. Once the plan had been carried out, however, the Supreme Court of Pennsylvania found the transaction constituted a de facto merger, and because dissenting shareholders had not been offered appraisal rights, the plan was held invalid. Id. at 983. Armed with that decision, the shareholders then sued Glen Alden’s directors in New York for corporate waste in carrying out the unlawful reorganization. The trial court rejected the proffered reliance on advice of counsel defense on the grounds that

the directors knew or should have known that the transaction was a merger and not an acquisition and that, consequently, they could not justifiably have relied upon counsel's erroneous advice. Gilbert v. Burnside, 197 N.Y.S. 2d 623, 634 (Sup. Ct. 1959). The appellate court reversed, with the majority stating emphatically that reliance on advice of counsel offered complete protection to the directors, despite the fact that the underlying advice was wrong:

The judgment below determines, in effect, that these financiers (the Glen Alden directors) knew, or should have known, more Pennsylvania law than eminent Pennsylvania counsel. There is no evidence to support the Special Term's findings that the Glen Alden directors knew that the plan was illegal, or that they did not justifiably and in good faith rely on the advice of counsel to the effect that the plan was legal even though it did not accord the right of appraisal to dissenting stockholders. In our opinion, the evidence supports findings to the contrary. Reliance upon advice of counsel is a good defense.

[Gilbert, 13 A.D.2d at 983.]

Other courts have found the same. See, e.g., Spirt v. Bechtel, 232 F.2d 241, 247 (2d Cir. 1956) (reliance on incorrect legal advice concerning tax deduction did not bar defense and insulated director from claim of breach of fiduciary duty); Pool v. Pool, 22 So.2d. 131, 133 (La. Ct. App. 1945) (the directors "had a right to rely on the advice and suggestion of the public accountant and the attorney whom they had employed to look after these legal and technical matters" and could not reasonably expected to interpret "very

complicated and involved” issues concerning tax law deadlines and payment of dividends).

Similarly, although not expressly deeming it an advice of counsel defense, in litigation concerning Spencer’s 15% nomination threshold, this Court affirmed the trial court’s finding that the directors had not breached their fiduciary duties in adopting that bylaw, even though the court invalidated it, because the directors had “consulted with ‘the best and brightest attorneys’ and advisors,” and were “‘seriously dedicated to the best interests’ of Spencer” but “‘simply chose a flawed by-law to carry out that intention.” Seidman v. Spencer Savings Bank, S.L.A., A-3836-12T2, 2015 WL 1931965, *12, *15 (App Div. Apr. 30, 2015); Pa429-431. Accord Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) (in reversing the trial court’s determination that directors breached the duty of loyalty in approving a transaction made on the advice of financial and legal advisors, observing that “there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties”).

The same result was called for here and precluded a finding that the directors breached their fiduciary duties in following the advice of two highly qualified attorneys – Justice Stein and Faucette – as well as Spencer’s CFO, chief lending officer, and a bank consultant. Pa504-505, Pa509-513. As

reflected in the meeting minutes and confirmed in Stein’s trial testimony, Stein advised the Board that “[t]he decision to convert to a New Jersey chartered mutual savings bank is a legitimate and right decision” and that “the economic necessity for conversion was overwhelmingly clear and constituted the primary reason for Spencer to convert to a mutual savings bank.” Pa512; 2T40. Stein also advised the Board that “the fact that conversion would hamper Seidman’s profit motivated desire for Board membership was actually an added benefit and should not in any way influence the directors to vote against conversion which so obviously would serve the Bank’s best economic interests.” Pa513; 2T38. That was based on Stein’s analysis of and presentation to the Board of a chart reflecting Seidman’s involvement in nearly 50 banks, the majority of which had been sold or undergone a merger after Seidman’s involvement. 2T38-39. Faucette advised the Board that the only option for the bank if it were to remain a mutual institution was to convert to a mutual savings bank. Pa512.

Again, the lower court expressly found that each witness including the directors testified credibly about what occurred at the Board meetings.¹⁴ Pa27. And the directors acted consistent with and relied upon the advice they had

¹⁴ Thus, this is unlike the prior conversion litigation, where the trial court disbelieved the then-directors’ testimony that Seidman had not been discussed.

received. The lower court did not find otherwise, and did not address the advice of counsel defense in its legal conclusions.

It does not matter, as a matter of law, whether the lower court or this court disagrees with the substance of the advice given. Rather, receiving and acting upon legal advice provided by competent, qualified attorneys insulated the directors from a finding that they breached their fiduciary duties in following that advice. The lower court erred in failing to address the advice of counsel defense, and in determining that the directors had breached their fiduciary duties in approving the resolution of conversion notwithstanding that they acted upon advice of counsel.

Thus, this Court should conclude that the advice of counsel defense insulated the directors from Defendants' breach of fiduciary claim and the trial court's ruling should be reversed.

Conclusion

For all the foregoing reasons, Spencer respectfully submits that the judgment below should be reversed, and the matter remanded with instructions for the lower court to review Spencer's proposed proxy materials.

PASHMAN STEIN WALDER HAYDEN, P.C.
Attorneys for Plaintiff and Third-Party
Defendants

By: s/ Sean Mack
Sean Mack

Dated: February 25, 2025

SUPERIOR COURT of NEW JERSEY

Appellate Division

Docket No. A-546-24

<p>SPENCER SAVINGS BANK, S.L.A., Plaintiff-Appellant, v. ARTHUR WEIN and LAWRENCE B. SEIDMAN, Defendant/Third Party Plaintiffs- Respondents/Cross-Appellants, v. JOSE GUERRERO, NICHOLAS LORUSSO, THOMAS DUCH, ADA MCGUINNESS, PETER HAYES and BARRY MINKIN, Third-Party Defendants-Appellants.</p>	<p style="text-align: center;"><u>Civil Action</u></p> <p>On Appeal From Orders Of The Superior Court of New Jersey, Chancery Division, Passaic County</p> <p>Docket No. BER-C-129-22</p> <p>Sat Below: Edward A. Jerejian, P.J.Ch.</p>
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RESPONDENTS'/CROSS-APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

This case is yet another episode in the long running series that deals with the search by the Third-Party Defendants (“The Directors”) of Plaintiff, Spencer Savings Bank, S.L.A. (“Spencer”), for the solution to “The Seidman Problem.” [The Seidman Problem is the perceived threat that Defendant/Third-Party Plaintiff, Lawrence B. Seidman (“Seidman”) represents to the Board’s unchallenged control of Spencer.]

This series started back in 2007, when it was decided the best way to solve The Seidman Problem was to make it impossible for him, or anyone else not anointed by the Chairman of the Board, to even be nominated for election. This was accomplished by imposing unachievable requirements for nomination. Over a period of years, the Chancery Courts, with the concurrence of and affirmances by the Appellate Division, invalidated these barriers in three (3) separate cases. In so doing, it was repeatedly concluded that the Board was acting out of self-interest to entrench themselves; and, in so doing they repeatedly violated their fiduciary duties.

Finally, an achievable nomination mechanism was imposed by the Court. Undaunted, The Directors seized upon the total elimination of member voting for directors as an alternate way to solve The Seidman Problem. This could be achieved by changing Spencer’s Charter to convert from a Saving & Loan Association to a Savings Bank, since the Board of a Savings Bank appoints replacement directors,

and the members do not have the right to elect directors. This scheme, however, presented a problem – to wit: A business justification was needed in order to disguise the true goal of a Charter change was the elimination of The Seidman Problem and permanent entrenchment of the Board. The Directors, with the aid and guidance of their special counsel, Douglas Faucette, Esq. (“Faucette”), who touted himself as being able to solve The Seidman Problem, decided to claim Spencer’s future profitability was dependent upon the elimination of a lending restriction (“QTL”), which was not applicable to Savings Banks. [QTL essentially required that a designated percentage of loans be residential.] Thus, The Directors adopted a Plan to Convert Spencer to a Savings Bank (“The 2019 Plan”).

Seidman and Defendant/Third-Party Plaintiff, Arthur Wein (“Wein”), commenced a suit in the Chancery Division (Passaic County) to invalidate The 2019 Plan. After a plenary trial, the Chancery Judge found The Directors’ business justification for the adoption of The 2019 Plan to not be credible and concluded the actual goal was again to entrench themselves by eliminating voting. In so holding, the Judge noted that The Directors’ claim they innocently relied upon the advice of Faucette to be no more than “putting lipstick on a pig.” The Appellate Division affirmed noting that the determination would not necessarily bar a future conversion adopted for legitimate reasons, since “the passage of time and a change in circumstances may make a conversion appropriate.” In addition, the Appellate Panel

held that The Directors' prior actions to entrench were relevant and properly considered.

The Final Judgment invalidating The 2019 Plan was entered on June 21, 2021. **Less than one (1) month later**, The Directors remained undaunted by the Court's condemnation of their actions and adopted a Strategic Plan (Da55), which determined Spencer would again take steps to convert. It took approximately one (1) year for The Directors to adopt a new plan to convert Spencer ("The 2022 Plan"). The Directors again claimed QTL was stifling profits and was jeopardizing Spencer's stability. This time, The Directors decided to start suit to validate their action so they could change the forum to Bergen County – even though three (3) different Judges found against them in the Passaic County Actions.

Judge Jerejian issued his decision after a plenary trial. Succinctly, he concluded there was no change in circumstances, the claimed threat to profitability is a façade, The 2022 Plan is again primarily motivated by a desire to prevent Seidman from gaining a Board Seat and The Directors, by so doing, acted to entrench and in breach of their fiduciary duties.

Judge Jerejian rejected Seidman and Wein's claim for legal fees based upon the "American Rule," despite the fact that they were sued and prevailed on derivative claims that benefited Spencer and all Members; and, he failed to address the claim that The Directors were not entitled to indemnity.

PROCEDURAL HISTORY

Spencer filed the Complaint on July 11, 2022 (Pa34) Seidman and Wein's Answer and Counterclaim was filed on September 6, 2022 (Pa102) Seidman and Wein filed a Third-Party Complaint against the Plaintiff's Directors on October 3, 2022. (Pa111)

The Trial was convened and conducted over four (4) days in September 2023. Judge Jerejian issued his Order and Opinion on August 30, 2024. (Pa1 and Pa3)

Plaintiff and Third-Party Defendants filed a Motion for Reconsideration which was denied on October 15, 2024 (Pa32)

REPLY TO THE DIRECTORS' STATEMENT OF FACTS

The Directors assert – without citation to the record – that Seidman is opposed to the mutual form of governance. (Pb5) In fact, Seidman testified he has no problem with the mutual form of governance. (4T86-10)

The Directors also assert it was recognized Spencer was entitled to take steps to defeat a threatened change in control. (Pb5) This is not so. First, this idea that Conversion was a way to meet, or avoid, a change in control was newly-minted in this case – by counsel and as an afterthought. The Directors did not testify this was their goal; rather, they asserted the goal was to eliminate QTL. [Significantly, the July 2021 Resolution, which adopted The 2022 Plan does not state its purpose was – in whole or in part – to solve The Seidman Problem.] Further, as stated above, the decision to again try to convert was made a year earlier when The Strategic Plan (Da55) was adopted, which was one month after Judge Covello entered the Judgment invalidating The 2019 Plan and adopted when the loan mix had only changed .02% - as Judge Jerejian specifically noted. (Pa29)

The Directors mention their Lobbying against The Bill and the fact this activity was determined to be protected by the First Amendment; and, they attempt to portray their actions as having been condoned. (Pb7) The subject Bill was proposed as a way to convert to a Savings Bank and preserve member voting rights – something that was proposed and supported by Seidman. (4T87-12 to 15) (Da1)

The fact the lobbying was not an actionable tort does not mean it was proper and does not mean it was not strong evidence that The Directors' primary goal was the elimination of The Seidman Problem by eliminating voting.

The opposition to The Bill is of key significance in view of The Directors' steadfast denial that The 2022 Plan was approved in pursuance of the primary goal of eliminating voting. It is significant that Seidman took the position – at trial and in correspondence – that he would not oppose a conversion under The Bill. (Da1); (4T87-12 to 15) Rather than support The Bill, The Directors undertook affirmative steps to kill it in Committee by:

(a) Hiring a Lobbyist to oppose its adoption. (3T110-2 to 13)

(b) Having Spencer's President (Jane Rey) provide testimony to oppose it.

(Da2) (3T111-14 to 25)

(c) By having Faucette provide testimony to oppose it. (Da2) (3T110-14 to 20)

[Here, Faucette's role as a neutral legal advisor was demonstrated to be a façade. Faucette claimed he provided opposition for a Savings & Loan Group he represented and not Spencer. (1T141-1 to 142-14; 1T143-20 to 21) But, a document Faucette distributed touted the fact he testified for Spencer. (Da2) Further, Faucette informed Banks, including Spencer, that he was able to provide advice that would effectively establish a defense to Seidman. (3T134-20 to 135-16)]

The Directors seize upon Judge Covello's aside that his invalidation of The 2019 Plan was a "close call." (Pb9) This ignores the fact that he concluded The Directors' claimed business justification was not credible, their motives were impure and they breached their fiduciary duties. (Pa300-Pa301)

The Directors then launch into an extended discussion about what Faucette, Justice Stein and a Banking Consultant (Riggins) said at the Meetings where The 2022 Plan was discussed and adopted. (Pb13 to Pb19) However, The Directors, not surprisingly, leave out key information:

- (i) The similarities between The 2019 Plan and The 2022 Plan are patent:
 - (a) While it is asserted the QTL was stifling profits, the profits actually increased each year. (3T48-7; 3T91-19; 3T108-18 to 109-2; 3T114-13) (Da5) (3T48-22; 3T108-18 to 109-2)
 - (b) There was no material change in the QTL percentages. In 2019, it was 71% and in 2022 it was 70.8%. (Pa29) (1T49-15 to 18)
- (ii) Faucette gave the same advice to The Directors both times. (1T132-24 to 133-14) [Advice Judge Covello concluded was not relied upon and constituted "lipstick on a pig." (Da19)]
- (iii) The Minutes to the June and July 2022 Meetings were obviously scripted and orchestrated as evidenced by the following:

- (a) Justice Stein was invited to attend on two (2) days notice. (Da21)
(2T44-7 to 15)
- (b) Justice Stein's presentation was set forth in his notes created prior to the June Meeting. (2T45-1 to 11)
- (c) Justice Stein endorsed the plan to convert **prior** to hearing the presentations by Management and the Consultant (Riggins) (Da23)
- (d) Justice Stein was added to the cast due to his **gravitas** even though he was part of the litigation team.
- (e) Justice Stein did not limit himself to legal advice, he also advised conversion was completely appropriate and in the best interests of Spencer. (Da23) (2T56-1)
- (f) Justice Stein delivered his advice without having any information on The Directors' actual motives. (2T50-7 to 10)
- (g) Justice Stein volunteered his view that Judge Covello was wrong and he was confident the Appellate Division would reverse¹ and presented factually incorrect comments about Seidman. (Da23; Pa512) (2T60-4 to 6)

¹ This prophesy was proven to be invalid. The Appellate Division affirmed Judge Covello.

- (h) Justice Stein *sua sponte* considered the objective of eliminating Seidman was viable and blocking the adoption of The Bill was proper because it would not eliminate Seidman. (2T58-18 to 59-3)
- (iv) Faucette conceded he conducted a Q&A segment with Riggins to create a record. (2T-22 to 19-5)
- (v) Riggins' presentation in 2019 and 2022 were virtually identical. (3T106-20 to 107-3; 115-15 to 116-6)
- (vi) Faucette actually created the record by virtue of the fact that the Corporate Secretary submitted drafts of Minutes to Faucette to revise and all of his changes were adopted. (4T46-13 to 47-9)

Thus, it was beyond any doubt that The 2022 Plan is simply – and solely – an identical replay of the invalidated 2019 Plan with some frills added to make it appear to be different.

The Directors challenge the Opinion – unopposed at trial – presented by Seidman's Banking Expert (Gary Bronstein, Esq.) by referring to him as a "purported expert." (Pb28) This is completely unfair and improper, since counsel for The Directors did not object to Mr. Bronstein being qualified as an expert in banking governance and regulatory matters. (4TT16-17 to 17-3) Mr. Bronstein presented his opinion that there was a way – a precedented way – to convert to a Savings Bank and retain member voting rights. (4T17-23 to 25-13)

The Directors assert Judge Jerejian “bewilderingly then leapt to find, with scant reasoning, that The Directors had breached their fiduciary duties and that Seidman, and not the QTL, was the primary motive for the conversion resolution.” (Pb29) This is not a “fact.” It is an argument and an unfair one at that. The record amply supports Judge Jerejians’s findings – specifically:

- (a) The prior history of over-reaching with the single-minded goal of eliminating The Seidman Problem was considered. (Pa13)
- (b) The Directors’ claim that Spencer faced exceptional challenges to its profitability and the charter change was required to preserve profitability. (Pa7)
- (c) The Directors did not prove the QTL was the claimed detriment to profitability. Indeed, profits actually increased since Judge Covello’s trial on the validity of The 2019 Plan while the QTL percentages remained essentially the same. (71% vs. 70.8%) (Pa28-Pa29)
- (d) The profit improvement was substantial, the Consultant’s projections in 2022 were similar to those he provided in 2019. (Id.)
- (e) Spencer is not simply surviving, it is prospering. Thus, the claim that there is an imminent threat to profitability due to the QTL is a “façade and

premature”² and again primarily motivated to prevent Seidman from gaining a Board Seat. (Pa29)

² Façade – meaning sham. Premature – meaning no change in circumstances validating the presented justification.

ARGUMENT

POINT I: THE DIRECTORS' CLAIM THAT THE COURT ERRONEOUSLY CONCLUDED SPENCER'S 2022 PROFITABILITY MEANT THE CHARTER CHANGE WAS IMPROPER IS ITSELF ERRONEOUS. (Pa28-Pa30)

The Directors establish, and then belittle, the false premise that Judge Jerejian based his decision exclusively on the fact that Spencer was profitable in 2022. (Pb30 to Pb36) As an adjunct to this position, The Directors challenge the reference to the 2022 profitability, citing Paramount Comm'ns Inc. v. QVC Network Inc., 637 A2d 34, 45 (Del. 1994) (Pb32 fn 10)

Before addressing The Directors' argument, it warrants noting that an appeal is from a judgment and not from the reasons set forth in a decision. Thomas v. Toys R Us, 282 N.J. Super. 569, 581 (App. Div. 1995) Thus, a Trial Court judgment that reaches the proper conclusion must be affirmed even if based upon faulty reasoning. Hayes v. Delamonte, 231 N.J. 373, 381 (2018); Heffner v. Jacobson, 100 N.J. 550, 553 (1985). This standard is mentioned not because Judge Jerejian's reasoning was flawed, it is mentioned to note that support for the judgment can also be found by canvassing the record.

Here, Judge Jerejian found that the claim of issues with profitability was a pretext to hide the fact the primary motivation was to eliminate voting and with it The Seidman Problem. Judge Jerejian's Decision so states and the record shows: (i) The Directors adopted the Resolution to approve The 2022 Plan stating it was

designed to solve the QTL's suppression of profits. (ii) The Directors testified this was their sole motive. (iii) The results of operations – for the period from 2017 through 2022 and not just for 2022 – demonstrated a steady increase in profits. Here, the finding of prematurity was also amply supported by the record, which demonstrated there was no change in circumstances since the trial on, and invalidation of, The 2019 Plan. Specifically, the QTL percentage remained unchanged, the projections by the Consultant (Riggins) remained unchanged and the presentation by Faucette were virtually identical.

In addition, while not expressly stated to be a reason for his ultimate conclusion, Judge Jerejian's decision did spend time discussing The Directors Lobbying against The Bill, which supplied compelling evidence that The Directors' primary goal was to eliminate voting and with it The Seidman Problem. All doubt about this motive was removed by Justice Stein's candid admission that The Directors opposed conversion under The Bill because it would not eliminate voting and The Directors needed to block Seidman. (2T58-18 to 59-3)

Given The Directors' position that threats to the profitability was the factor demonstrating that QTL was the primary issue for the charter change, it was clearly appropriate to analyze whether the imminent threat to profits, which had been predicted since 2017, was legitimate. Thus, it warrants mention that it was proper to consider the profitability for all of 2022 even though The 2022 Plan was adopted in

July 2022. In Lawson Mardon Wheaton v. Smith, 160 N.J. 383, 405-07 (1999), the Supreme Court approved of the introduction of financial information that post-dated a statutory valuation date by several years. There, there was a merger, which gave shareholders the right to dissent and secure fair value for their shares. A value was fixed based upon a claim the Company's financial health was deteriorating. Years later, while appeals were being considered and while the finances reportedly continued to suffer, there was another merger at a much higher price. The Trial Court, on a remand, refused to consider post-valuation (hindsight) data. The Supreme Court reversed saying it was appropriate to consider the later valuation in order to test the accuracy of the claimed trend of deteriorating finances and the impact on the valuation.³

Here, there was a claim that QTL presented a real and imminent threat to Spencer by suppressing its profitability. Here, it was claimed – in substance – The Directors had to act to save Spencer from its inevitable doom. In this context, it was proper to test the sincerity and validity of these statements by reviewing profits through the entire year of 2022 – particularly since a good first-half can be an anomaly and eliminated by the performance for the rest of the year.

³ Ironically, The Directors also presented evidence at Trial concerning events, and profitability, after July 2022. Specifically, The Directors' Banking Consultant's Report deals with matters occurring after July 2022. (Da170; Da178 fn 28; Da179 fn 31; Da181 fn 34, 35 & 36; Da194)

The Directors disingenuously argue the Conversion Statute does not require that the Savings & Loan Association be unprofitable. (Pb33) Of course not, The Directors – not the Court or Seidman – “hitched their wagon” to the story that profitability was the motivation/justification for the conversion and the elimination of voting was simply unavoidable collateral damage.

The Directors also assert there was no need to wait. (Pb34) This misses the point. They needed to have a legitimate reason based upon a change in circumstances – if they were to again try to rely upon the impact of QTL.

The Directors close by asserting they are left in an “impossible position.” (Pb35) Nothing could be further from the truth. The Directors’ bad faith conduct is what scuttled their plan. If they legitimately wanted to eliminate QTL, The Bill was available to do so efficiently, inexpensively and without litigation.

POINT II: THE CLAIM THAT DUAL MOTIVES CAN JUSTIFY THE 2022 PLAN IS INVALID. (Pa21-Pa22)

The Directors assert that they could properly, and lawfully, have dual motives for adopting The 2022 Plan: One legitimate (QTL) and one entrenching (Eliminate Seidman). (Pb36) It is contended that the Court had to, but failed to, apply a dual motivation analysis. (Id.)

The flaws in this position are: First, the issue was already litigated before Judge Covello and affirmed by the Appellate Division that a primary motive to

entrench will result in the nullification of an approved action. Thus, principles of *res judicata* bar re-litigation of this issue. Walker v. Choudhary, 425 N.J. Super. 135, 150 (App. Div. 2012) cert. den. 211 N.J. 274 (2012); Velasquez v. Franz, 123 N.J. 498, 505 (1991) Second, The Directors did not justify, or support, The 2022 Plan as being designed and adopted to eliminate The Seidman Problem. Neither the adopting Resolution, nor The Directors' testimony, established this dual motivation; rather, it is solely Justice Stein's construct. Third, Judge Jerejian concluded that the primary motivation was to eliminate Seidman.

A review of the Trial testimony, by each Director who testified, unequivocally demonstrates there was no dual purpose supporting the adoption of The 2022 Plan – specifically:

(a) **Minkin** specifically testified the adoption of The 2022 Plan was not about Seidman. (3T7-4 to 7) The motive was not to keep Seidman off the Board. (3T26-23 to 27-2)

(b) **LoRusso** testified he voted for The 2022 Plan because he wanted Spencer to remain competitive. (3T70-15 to 22) The objective was not to keep Seidman off the Board; rather, the objective was to be competitive. (3T73-3 to 7)

(c) **McGuinness** testified she voted for The 2022 Plan because of the QTL Restrictions. (3T84-2 to 12) Seidman did not play any role in her vote to convert. (3T84-25 to 85-4)

(d) **Guerrero** testified he voted for The 2022 Plan because it had to be done. It was an economic issue that affected profits and competitiveness. (3T105-16 to 20)

(e) **Duch** testified he voted for The 2022 Plan due to the impact of QTL. (3T129-15 to 131-9)

The Directors then cite a number of cases; however, they all stand for the proposition that – as was the case here – when a primary motive/purpose is to retain tenure, it constitutes entrenchment. (Pb36 to Pb37)

The Directors switch gears and assert the inquiry should be whether the action was in Spencer’s best interest. (Pb37 to Pb42) The simple answer is that entrenchment is not in the best interests of any corporation. Similarly, the elimination of all voting cannot possibly be considered to be promotive of Spencer’s best interests.

The Directors conclude they received detailed legal advice which should insulate them from a claim of breach of fiduciary duty. (Pb44) As is addressed *infra* at Point III, the so-called advice was a scripted show that was put on long after The Directors decided to again convert when they adopted the Strategic Plan in 2021 (Da55). Thus, the element of reliance upon advice is absent.

POINT III: THE ADVICE OF COUNSEL DEFENSE WAS PROPERLY REJECTED. (Pa19)

The Directors claim that Judge Jerejian improperly failed to consider their advice of counsel defense to the breach of fiduciary duty claim. (Pb45) It is also argued that Judge Jerejian ignored the Advice of Counsel Defense. While not expressly discussed, Judge Jerejian obviously rejected this defense due to the fact that the decision to convert was made a year before the Directors' Meeting when the so-called advice was given. Further, The Directors' actions were purposefully wrongful and it is nonsensical to think that taking such purposeful actions was consistent with advice provided by counsel.

The key is the requirement that reliance upon the advice must be proven. McGlynn v. Schultz, 90 N.J. Super. 505, 519-20 (Ch. 1966) aff'd 95 N.J. Super. 412 (App. Div. 1967) In LoBiondo v. Schwartz, 199 N.J. 62 (2007), the Supreme Court held reliance upon the advice of counsel can be a defense if it is demonstrated the client dealt with counsel in good faith and fully disclosed all material information. (199 N.J. at 82) The Court also noted that collusion with counsel is antithetical to good faith. (Id.)

Here, reliance was once again not proven. [Here, self-serving testimony that there was reliance, when the decision to act was made over a year earlier, cannot

legitimately be deemed to constitute viable proof.]⁴ Further, and as stated earlier, no advice was given – nor could it be properly given – that The Directors have the right to adopt an action for the primary purpose of entrenching themselves. In addition, it is notable that Judge Stein endorsed the Plan without asking The Directors to identify their primary goal and they clearly did not volunteer it.

⁴ The Directors made the same claim in the earlier case and Judge Covello summarily rejected it as “lipstick on a pig.”

CROSS-APPEAL

Seidman and Wein have Cross-Appealed to challenge:

(1) Paragraph 5 of the Final Judgment which denies the claim for an award of fees and costs.

(2) The failure to address, and rule upon, the claims in the Fourth Count of the Third-Party Complaint. (Pa124) This Count sought a determination and declaration that The Directors were not entitled to indemnity and are accordingly obligated to reimburse Spencer for the fees and expenses it advanced.

POINT I: THE CLAIM FOR AN AWARD OF FEES WAS ERRONEOUSLY REJECTED. (Pa30)

Seidman and Wein did not “pick this fight.” Rather, The Directors caused Spencer to sue them, as representatives of all members, to secure a judicial approval of The 2022 Plan. In turn, Seidman and Wein joined, and asserted third-party claims against, The Directors. Seidman and Wein successfully secured relief that benefitted Spencer and all Members. The 2022 Plan was invalidated, the members’ voting rights were preserved and The Directors were again found to have violated their fiduciary duties.⁵

⁵ This had an impact upon The Directors’ obligation to reimburse Spencer for its payment of their defense fees [N.J.S.A. 17:12B-67] – a claim not addressed. (See Point II, *infra*.)

Judge Jerejian simply applied the “American Rule” and rejected the claim for an award of fees. In so doing, he did not consider the fact that fees are awarded in derivative actions. Sarner v. Sarner, 38 N.J. 463 (1962) So long as a benefit is conferred upon the corporation or its shareholders, fees are awarded. Trimarco v. Trimarco, 396 N.J. Super. 207, 215-17 (App. Div. 2007); R. 4:42-9(a)(2)

In Strasenburgh v. Straubmuller, 148 N.J. 527 (1996), the Supreme Court addressed the identification of derivative claims. There, it is noted the determination is based upon the pleadings to identify the nature of the wrongs alleged with both breach of fiduciary duty and entrenchment claims both being derivative. (148 N.J. at 551-52) Here, review of the Complaint and Third-Party Complaint assert claims that are clearly derivative, and the relief beneficial to all. Here, therefore, fees and expenses should have been awarded.

This issue has previously been addressed, and decided in favor of an award of fees, in prior litigations between these parties. Specifically, it was held by Judge McVeigh, and affirmed by the Appellate Division, that challenges to voting rights and successful claims of fiduciary duty breaches are derivative and entitled to fee awards. (Pa134-Pa135; Pa142-Pa143)

POINT II: IT WAS ERROR TO NOT ADDRESS COUNT FOUR OF THE THIRD-PARTY COMPLAINT AND THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION AND GRANT THE SUBJECT RELIEF. (Not addressed by Trial Court)

Here, Judge Jerejian failed to address the Fourth Count of the Third-Party Complaint, which sought a determination that The Directors are not entitled to indemnity and must reimburse Spencer for the fees advanced for their defense.

The Directors of a Savings & Loan Association must take an oath of office pursuant to N.J.S.A. 17:12B-67. Savings and Loan Association diligently and honestly administer the affairs of their Association, while not violating The Savings and Loan Act (1963) or the Association's Bylaw's.

Spencer's Bylaw 25 imposes liability upon Directors for acts, or omissions, that are a breach of the duty of loyalty to Spencer and its members, or are not in good faith or are a knowing violation of the law.

Spencer's Bylaw 47 requires that a Director's actions must be in good faith and in promotion of the interests of Spencer in order for indemnity to be available – subject to compliance with the law.

Thus, the statutorily proscribed duties of a Director of a Mutual Savings and Loan Association are: (i) Honest and diligent administration of the Association's affairs; (ii) Compliance with the Association's Bylaws, which in the case of Spencer

requires not breaching the duty of loyalty, not acting in bad faith and acting in a manner that promotes the interests of Spencer and its members.

N.J.S.A. 17:12B-73(B) provides:

Any person shall be indemnified or reimbursed by the association for reasonable expenses, including, but not limited to, attorney fees, actually incurred by him in connection with any action, suit or proceeding, instituted or threatened, judicial or administrative, civil or criminal, to which he is made a party by reason of his being or having been a director, officer or employee of an association; provided, however, that no person shall be so indemnified or reimbursed, nor shall he retain any advancement or allowance for indemnification which may have been made by the association in advance of final disposition in relation to such action, suit or proceeding in which, and to the extent that, he finally shall be adjudicated to have been guilty of a breach of good faith, to have been negligent in the performance of his duties or to have committed an action or failed to perform a duty for which there is a common law or statutory liability; and, provided further, that a person may, with the approval of the commissioner, be so indemnified or reimbursed for:

- (1) Amounts paid in compromise or settlement of any action, suit or proceeding, including reasonable expenses incurred in connection therewith; or
- (2) Reasonable expenses, including fines and penalties, incurred in connection with a criminal or civil action, suit or proceeding in which such person has been adjudicated guilty, negligent or liable, if it shall be determined by the board of directors and by the commissioner that such person was acting in good faith and in what he believed to be the best interests of the association and without knowledge that the action was illegal, and if such indemnification or reimbursement is approved at an annual or special meeting of the members or stockholders by a majority of the votes eligible to be cast. Amounts paid to the association, whether pursuant to judgment or settlement, by any person

within the meaning of this section shall not be indemnified or reimbursed in any case.

Judge Jerejian ruled that The Directors breached their fiduciary duties. This ruling renders The Directors ineligible for indemnity and liable for repayment of the advanced fees and expenses.

The Appellate Division can, and should, exercise original jurisdiction as necessary for the complete review of a matter. R. 2:10-5. To do so here will avoid further litigation without further fact-finding. Price v. Himeji LLC, 214 N.J. 263 (2013) Here, the issue dispositive finding was made – to wit: The Directors breached their fiduciary duties. As a matter of law, under N.J.S.A. 17:12B-73, this ruling requires the repayment of the advanced fees and expenses; because, this Statute imposes strict liability for breaches of good faith and common law duties.

As a result, this Court should grant the relief requested and find The Directors liable for the repayment of advanced expenses and fees.

CONCLUSION

For all the foregoing reasons, Defendants/Third-Party Plaintiffs respectfully submit that the judgment should be affirmed; except, the Defendants/Third-Party Plaintiffs should be awarded legal fees and granted relief under Count Four of the Third-Party Complaint.

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By: /s/ Peter R. Bray
PETER R. BRAY

Dated: March 27, 2025

SPENCER SAVINGS BANK,
S.L.A.,

Plaintiff-Appellant,

v.

ARTHUR WEIN and LAWRENCE
B. SEIDMAN,

Defendant/Third Party
Plaintiffs-Respondents/Cross-
Appellants,

v.

JOSE GUERRERO, NICHOLAS
LORUSSO, THOMAS DUCH, ADA
MCGUINNESS, PETER HAYES
and BARRY MINKIN,

Third-Party Defendants-
Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-546-24

On Appeal From:

Superior Court of New Jersey,
Chancery Division
Docket No. BER-C-129-22

Sat Below:
Edward A. Jerejian, P.J.Ch.

Civil Action

**APPELLANTS' REPLY AND CROSS-APPEAL RESPONSE BRIEF
SUBMITTED ON APRIL 28, 2025**

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Preliminary Statement

Defendants Lawrence Seidman and Arthur Wein cannot dispute that the law governing fiduciary duties permits a board's action to repel and isolate a hostile investor, especially when the board was motivated by the corporation's clear business interests. They do not even try. Instead, Defendants seek to distract the court by distorting the record below and the positions advanced by Spencer Savings Bank, S.L.A. (Spencer), and its directors, and by replacing the trial court's absence of factual findings with their own.

Contrary to Defendants' assertions, Spencer does not argue that it is at the brink of collapse. Rather, the undisputed evidence established that Spencer was profitable, although less profitable than its peer institutions, and that the reason for this lower performance was Spencer's inability to expand its commercial lending due to the constraints of the Qualified Thrift Lender (QTL) requirement. Spencer's expert explained that the bank would continue to lose profit opportunities absent a charter change. Spencer's management testified that Spencer was actively managing the QTL ratio and selling otherwise profitable loans to avoid violating the threshold while also complying with restrictions on the bank's loan concentration. Removing the artificial QTL restraint would eliminate the need to take those actions, allow Spencer to be more competitive with its peers, and is indisputably in the bank's best interests. Defendants'

position, and the effect of the lower court's ruling, penalizes Spencer for doing as well as it has under these constraints, and chills planning for future success. That cannot be the law nor in any sense equitable.

Defendants next argue that the lower court need not have analyzed dual motives, because the court found the directors were solely motivated to entrench themselves. But the court expressly stated it appreciated the directors' concern about the QTL and their eminently reasonable desire to avoid the QTL's adverse impact on profits. To the extent it believed the directors also were motivated to thwart Seidman's attempt to control the bank, it erred in failing to determine whether the board's pursuit of the mutual savings bank conversion was so overwhelmingly in the bank's best interest that it outweighed any incidental impact on Seidman's ambitions to serve on the board.

Defendants also handwave away the lower court's failure to address the directors' advice of counsel defense by claiming the advice was scripted and a sham. The court made no such finding. Rather, the court found all witnesses to have testified credibly concerning what occurred at the board's meetings, including the advice given. The directors testified that they relied upon that advice, and the court did not find otherwise. The defense thus insulated the directors from a breach of fiduciary duty claim. And although legally irrelevant to the defense's applicability, counsel's advice was correct. It is not a breach of

fiduciary duty for a board to take action that is in the bank's best business interest, especially if that action will also protect it from a corporate raider.

Spencer should likewise not, as Defendants argue, have been required to support a bill Seidman proposed to single Spencer out as the only mutual savings bank subject to his attacks. The legislature decided over a century ago that a self-perpetuating board is a suitable governance structure for a mutual savings bank. Numerous other institutions, like hospitals and universities, use the same structure. Spencer is permitted to support and rely upon existing law to advance its business needs.

Defendants' cross-appeal provides no grounds for relief. It will be rendered moot if this court rules in Spencer's favor. Further, Defendants' opposition to a mutual savings bank conversion is solely to advance their self-interests – underscored by their offer to support conversion so long as members still can elect the board – and they are thus direct, not derivative parties concerning their third-party complaint and therefore unentitled to attorneys' fees. Their claim to bar indemnification of the directors fares no better. This court already ruled that that claim must await exhaustion of the directors' appeals. Even if unsuccessful, the statute permits Spencer to seek approval to indemnify the directors and any declaration on indemnification rights is thus premature.

Counterstatement of Facts and Procedural History¹

We briefly refocus the court on the key facts established below, given Defendants' mischaracterization of the record and the lower court's findings.

a) Spencer's QTL and profit concerns are real.

Spencer does not claim, contrary to Defendants' characterizations, that it has been unprofitable or is on the brink of collapse. To the contrary, Spencer is proud that, under the oversight of its board, the bank has been successful and has grown over the years.

However, the QTL requirement has indeed imposed a constraint on Spencer's continued growth. The record below – undisputed by Defendants – reflected that Spencer was less profitable than institutions of comparable size. Community banks like Spencer principally make money from net interest. 1T34. In his May 2022 presentation to the board, Spencer's CFO, Steve Fusco, reported that Spencer's net interest income margin materially lagged at 2.67%, compared to a peer average of 3.67%. Pa504; Pa523.² That amounted to

¹ The procedural and factual histories are closely intertwined and are thus combined for the court's convenience.

² "Pa" refers to Spencer's appendix. "Da" refers to Defendants' appendix. "PRa" refers to Spencer's reply appendix. 1T" refers to the September 13, 2023 transcript. "2T" refers to the September 14, 2023 transcript. "3T" refers to the September 19, 2023 transcript. "4T" refers to the September 20, 2023 transcript. "5T" refers to the January 12, 2024 transcript. "6T" refers to the June 7, 2024 transcript. "7T" refers to the October 11, 2024 transcript.

approximately \$18 million in unrealized annual revenues for Spencer. Pa504. Spencer's return on assets was similarly below that of its peers – a return of .069% compared to 1.25%, or a difference of \$22 million. 1T36; Pa504; Pa523-524.

Thus, while profitable, Spencer's profits lag below what they should be, and what its peers are achieving. Both Fusco and Ron Riggins, Spencer's strategic planning consultant, advised the Board that the QTL was the chief reason for this shortfall. (Pa504; Pa509-510) The QTL requirement prevents Spencer from growing its commercial lending, and corresponding non-interest bearing accounts, to increase its profit margins. (Pa505).

Defendants attempt to claim the QTL concern is illusory because the ratio has stayed relatively stable in recent years. But the undisputed testimony at trial explained the reason for that – Spencer has been actively managing the QTL ratio to keep it around 70% so as to provide a buffer and avoid crossing the 65% threshold. (1T73-74). Spencer's lending department has been unable to focus on whether certain loans are in Spencer's best financial interest, but instead must focus on what the impact of those loans will be on the QTL ratio. Spencer's chief lending officer, John Duncan, confirmed that he has directed staff not to pursue certain loans solely because of their impact on the QTL. (1T105). Absent that

active tracking and careful management of Spencer's lending mix, Spencer would already have violated the QTL threshold.

Additionally, as Riggins advised the Board, Spencer is at a "strategic inflection point." (Pa510). In recent years, Spencer has been able to grow, to a degree, its commercial lending by also pursuing QTL-compliant but less profitable multi-family loans to offset the effect of that increased commercial lending. (Pa505). Those loans, however, are subject to a separate concentration policy threshold of 500 percent. (Pa509). Spencer is bumping up against that threshold, and in 2022 had to sell \$80 million of otherwise profitable multi-family loans to maintain compliance. (1T41; Pa501). These two thresholds are now acting as "double handcuffs" on Spencer's lending abilities. (2T92-93).

Compliance with the QTL is thus substantially suppressing Spencer's profitability. Riggins projected that \$3.8 million in lost net income due to the QTL in 2020 would increase to \$7.7 million in 2024, with a cumulative projected net income loss of \$27.2 million. (Pa551). Spencer also was projected to be \$302.2 million smaller in asset size than it otherwise could be, absent the QTL restraint. (Pa551). Confronted with this overwhelming evidence of the QTL rule's adverse impact on Spencer's profitability, it would have been a breach of fiduciary duty for the board not to authorize conversion in order to remove the QTL's restraints.

b) Spencer’s board deliberated carefully and acted upon the advice of experts and counsel.

Defendants also suggest the Board acted hastily to pursue a mutual savings bank conversion after Judge Covello’s ruling in earlier litigation. But the actual chronology reflects otherwise.

Spencer’s prior conversion resolution was passed in February 2019. (Pa450). It was challenged by Seidman and Wein, and subject to a temporary restraining order throughout that lawsuit. (Pa451). The trial was conducted in May 2020, and Judge Covello issued his post-trial decision on July 31, 2020. (Pa452-453). Thus, as of July 2020, Spencer and its directors were aware that i) the resolution of conversion would be invalidated; but, and importantly, ii) that the court had found the QTL requirement posed a serious impediment for Spencer; iii) that there were legitimate reasons for Spencer to seek to relieve itself of the QTL requirement and expand into commercial markets; iv) that the mutual savings bank charter was the only viable option; and v) that the court would not restrain Spencer from pursuing mutual savings bank conversion again because it was in the best interests of Spencer and its membership. (Pa279; Pa280; Pa301). Judge Covello did not place any time limitations on Spencer’s right to act.

The court then took nearly a year to address a narrow motion for reconsideration – which did not challenge any of those core findings – and to

then enter final judgment in June 2021. (Pa454). The QTL continued to pose an issue for Spencer throughout that time. In a routine update of its strategic plan in July 2021, Spencer thus discussed the ongoing QTL problem and its impact on its commercial growth, including that the commercial “portfolio transformation would have been greater were it not necessary for multifamily residential loans to be originated to ensure QTL compliance when a charter change had been fully expected.” (Da71). The plan discussed the QTL limit in some detail, including analysis that Judge Covello had endorsed in his decision, and that conversion to a mutual savings bank was a possible solution. (Da77-78). The strategic plan acknowledged that Spencer’s prior effort to convert to a mutual savings bank had been enjoined. (Da78). As a result, Spencer continued to face adverse consequences from the QTL. (Da79).

Another year later, and with executive management advising the then-directors that the QTL requirement continued to place Spencer at a competitive advantage, the Board acted to address it. The Board did so after hearing advice from management, their outside strategic planning consultant, and counsel over several meetings, detailed at length in Spencer’s opening brief. See Pb13-20.

Defendants repeatedly characterize that advice as “scripted.” But the lower court did not so find.³ To the contrary, the court expressly found each meeting attendee to have testified credibly about what took place. (Pa27). Indeed, Defendants’ counsel expressly asked witnesses, including regulatory attorney Douglas Faucette who advised the board concerning its options, if the meeting “was all pre-scripted.” Faucette firmly rejected that assertion. (2T18). In finding Faucette and others credible, the lower court did too.

Argument

Point I

The lower court erred in concluding that the mutual savings bank conversion resolution was premature due to Spencer’s profitability.

The lower court improperly based its decision on the fact – and only the fact – that Spencer was performing well at the time the resolution of conversion was approved. (Pa29). Defendants simply wish the court had found other facts,

³ With nothing to point to in the record to support their assertion, Defendants repeatedly quote a harsh statement by Judge Covello in the earlier case. Spencer notes that Judge Covello later disqualified himself from hearing matters involving Spencer’s counsel due to perceived impermissible bias against counsel and his clients – a claim that was not made lightly. In any event, Judge Jerejian correctly rejected Defendants’ res judicata arguments and considered the testimony concerning meetings held after Judge Covello’s decision. (Pa18). In doing so, he found the directors’ and other participants’ testimony to be credible. (Pa27).

and attempt to present their version of events as if it were endorsed by the lower court.

The relevant findings by the court preceding its decision were, after recounting Spencer's economic performance over the preceding years, that:

While the Court respects the Third-Party Defendant Directors' passion for the Bank and concern regarding the QTL threshold, it is clear that the Bank is more than simply surviving, it is in fact prospering. Thus, the urgent threat to the Bank's profitability is merely a façade.

In the end, the 2022 Conversion Resolution was premature and again primarily motivated to prevent Seidman and his associates from gaining a position on the Board. In doing so the Board was acting to entrench itself, thereby breaching its fiduciary duty. (Pa29).

As discussed in detail in Spencer's brief, that reliance on Spencer's performance to bar Spencer from planning for additional future success was in error. New Jersey law imposes no bar to conversion by profitable banks. N.J.S.A. 17:16M-2. It further makes eminent sense that a board, when presented with information and advice indicating that the bank is underperforming its competitors, and at an inflection point because the QTL restriction and concentration policy limits prevented it from pursuing certain strategies to further grow its commercial lending, would act to address those concerns.

The court's discussion likewise made clear it was heavily influenced by Spencer's performance for the entire year of 2022, noting that it was Spencer's

“most profitable year ever” and that Guerrero had received a bonus in recognition of that performance. (Pa29). But the directors and their advisors did not have that information when they voted mid-year concerning charter conversion, which was initiated based on an analysis of the first quarter of 2022 (Pa504) nor does that alter the fact that Spencer’s profitability trailed its competitors and, but for the QTL, would have been significantly higher.

Defendants’ reliance on Lawson Mardon Wheaton v. Smith, 160 N.J. 383 (1999) to support the court’s reliance on post-vote year-end earnings information is misplaced. Lawson Marden Wheaton concerned the appropriate date for valuing shares of a corporation in a forced buyout. It is inapposite to whether a court can consider events that had yet to occur in assessing a director’s motivation at the time he or she acted. Directly on-point case law confirms that is not appropriate. See Paramount Comm’ns Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1994) (“[A] court should not second-guess [a board’s] choice even though it might have decided otherwise or subsequent events may have cast doubt on the board’s determination.”). The information before the directors reflected that Spencer’s net interest margin was lagging that of its competitors, that it could earn millions more if Spencer were able to grow its commercial lending, and that Spencer’s ability to implement its strategic plan and be competitive with its peers would be impeded absent relieving itself of the QTL

requirement. (Pa504-Pa506; Pa509-Pa511). Defendants have not questioned the accuracy of that information, and instead disingenuously claim Spencer's profitability does not matter because Spencer is a mutual institution.

What is more, the testimony reflected that 2022 was an atypical year, due to Spencer's completed acquisition of another bank and the aftermath of the pandemic. (1T45-46). Performance in 2023 was down. (1T46). Thus, even if the Board had been presented with projections showing 2022 to be a banner year, that does not mean the directors could not or should not have acted to address the QTL problem impeding Spencer's profitability and to ensure success into the future.

Therein lies the crux of the problem with the lower court's decision. It creates an undefined line on how long Spencer must wait, or how far the directors must let Spencer fall behind its competitors, before the directors can act to present a plan to remove an impediment on Spencer's growth and future stability to members. Removal of the artificial and outdated QTL barrier is indisputably in Spencer's best interests. It should never be premature, and certainly not a breach of fiduciary duty, to take actions in a bank's best interests to plan for future success. And at the time the directors acted, they had been told by the chancery court that there were legitimate business reasons for Spencer to

pursue conversion to a mutual savings bank, and that the bank would not be permanently enjoined from doing so. (Pa301).

Despite Defendants' suggestions, Judge Covello placed no timing restrictions on the directors taking action to address the QTL. Although this court ultimately suggested a change in circumstances component in its review of Judge Covello's decision (Pa458), this court had not yet ruled at the time the directors acted. See Paramount Comm'ns, 637 A.2d at 45. And even if changed circumstances were required, that standard was readily met. As the testimony established, Spencer was no longer able to pursue multi-family loans to offset increased commercial lending. Instead, Spencer had been forced to sell \$80 million in otherwise profitable multi-family loans in late 2021 to maintain compliance with the separate concentration limit on those loans, and was facing "double handcuffs." 1T43; 2T93. That circumstance did not exist at the time of Spencer's 2019 vote or the 2020 trial.

Accordingly, the lower court erred in finding that Spencer's profitability meant the directors' action to plan for the future was "premature," and in invalidating the resolution to present a plan of conversion to Spencer's membership on that basis. This court should correct that error and remand to the lower court for it to review the adequacy of Spencer's proposed proxy materials seeking approval of the mutual savings bank conversion.

Point II

The lower court erred in failing to analyze whether the directors' actions were in Spencer's best interests.

Defendants do not dispute that, as explained in Spencer's opening brief, an action that may enhance the security of a board of directors is not impermissible when it is also in the best interest of the company. They likewise do not contest that the lower court failed to analyze this case law. Instead, they claim the court did not need to because, they misleadingly claim, the court found the directors to be solely motivated to retain their positions.

But that is not what the court found. Rather, the court expressly found that the directors were rightly concerned about the QTL. (Pa29). The court also found the directors were passionate about Spencer. (Pa29). Thus, even though the court also found the directors were acting to prevent Seidman from gaining a position on the board, the court was required to consider the paramount consideration – whether the board's action was in Spencer's best interests. See, e.g., Coster v. UIP Companies, Inc., 300 A.3d 656, 672-73 (Del. 2023) (an action that secures the board's tenure is permitted if it is needed to respond to an "important corporate interest or to the achievement of a significant corporate benefit"); Blasius Indust., Inc. v. Atlas Corp., 564 A.2d 651, 662-63 (Del. Ch. 1988) (explaining board action will be affirmed where it is "proportionate and

reasonable in relation to the threat posed.”); and further discussion at Ab37-42. See McPhail v. L.S. Starrett Co., 257 F.2d 388 (1st Cir. 1958); Shoen v. Shoen, 804 P.2d 787 (Ariz. Ct. App. 1990); Nw. Indus. v. B.F. Goodrich Co., 301 F. Supp. 706, 712-13 (N.D. Ill. 1969); Heit v. Baird, 567 F.2d 1157, 1161-62 (1st Cir. 1977); Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 190 (Del.Ch. 2005), aff’d, 906 A.2d 114 (Del. 2006) MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1129-32 (Del. 2003); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 951 (Del.1985). The lower court did not do so.

Had the court performed that analysis, it would have concluded that presenting the conversion to Spencer’s members was in the best interest of Spencer and its members, and that the directors had not breached their fiduciary duty of loyalty in pursuing what is indisputably in the bank’s best interests – eliminating the QTL. The lower court did not doubt that the QTL remained an issue for Spencer. (Pa30). Tellingly, Defendants have no objection to Spencer relieving itself of the QTL threshold; they simply object to the fact that state law governing the only available charter to eliminate the QTL while remaining in mutual form would also eliminate their ability to launch proxy contests to gain seats on Spencer’s board.⁴

⁴ The court did not credit the convoluted alternative presented by Defendant’s legal expert, which would have required Spencer to adopt a Pennsylvania charter. Contrary to Defendants’ assertion, Db9, Spencer did object to the presentation of

That the mutual savings bank conversion would make it more difficult for Defendants to join the board, and that the directors considered that fact in their decisions, does not convert an otherwise permissible action in Spencer's best interests to a breach of fiduciary duty. Rather, it is consistent with Spencer's best interests. As the board was advised, Seidman's interests are inimical to those of Spencer, and particularly Spencer's commitment to mutuality and its community. (Pa512-513). Seidman's involvement with other institutions has, in a majority of instances, preceded their sale or merger. (Pa369). Thus, becoming a mutual savings bank would not only serve Spencer's economic interests; it would remove a threat to Spencer's mutuality and community focus. The lower court never even acknowledged or addressed the substantial case law that permits board action that incidentally enhances a board's tenure but is motivated in part by a desire to impede a hostile takeover of the corporation. That was the decisive error committed by the court below.

Seidman's claims concerning the proposed bill he introduced is a red herring. This court already ruled that Spencer's lobbying against that bill could not, as a matter of constitutional law, be a breach of fiduciary duty. Seidman v.

Bronstein's testimony, and sought to bar the testimony as improper expert legal testimony. See, e.g., Ptazynski v. Atl. Health Systems, Inc., 440 N.J. Super. 24, 37 (App. Div. 2015) ("expert opinion on matters of domestic law is not admissible"). The lower court denied that motion. (PRa2).

Spencer Savings Bank, S.L.A., Docket No. A-2649-20 (App. Div. May 11, 2022) (Pa434; Pa442). It follows that same lobbying cannot form a basis for a breach of fiduciary duty in this matter.

Moreover, there is nothing impermissible about Spencer opposing a bill that would single it out for special treatment. The legislature determined over a century ago that a self-perpetuating board of managers is an appropriate form of governance for a mutual savings bank. See Warren v. Pim, 66 N.J. Eq. 353, 418 (E. & A. 1904) (noting that “our act relating to savings banks (Gen St. p. 3000) provides for the management of these important financial institutions by a self-perpetuating board of managers, whose only interest is that of trustees.”).⁵ And that makes sense. A mutual savings bank is a highly regulated institution, with oversight by both federal and state regulators. See, e.g., N.J.S.A. 17:9A-260 (requiring that savings banks be subject to examination by the Commissioner); 17:9A-267 (providing authority for the Commissioner to take action related to a savings bank’s violation of its certificate of incorporation, violation of law, or unsafe practices); 12 C.F.R. § 362.1 et seq. (federal regulations concerning activities of state banks). Most members – the bank’s depositors and borrowers

⁵ This is not unique to mutual savings banks. The legislature has also provided that trustees of nonprofits are to be elected by members of the board. N.J.S.A. 15A:6-5.

– take no interest in bank governance and care only about the services offered by the bank and the safety of their money. (Da174; 3T17). Spencer is the only remaining mutual savings association that could convert to a mutual savings bank, and thus Seidman’s bill would single Spencer out as the sole savings bank subject to attacks by him or similar corporate raiders.⁶ 4T89. Spencer determined that existing law, rather than a targeted legislation proposed by a longtime adversary, better suits its needs. That is not inconsistent with its directors’ fiduciary duties.

Additionally, and importantly, the decision to convert to a mutual savings bank and eliminate member voting rights rests with the members themselves, not Spencer’s directors alone. Absent two-thirds approval from members, Spencer cannot pursue regulatory approval of the charter change. N.J.S.A. 17:16M-2(c). Several directors emphasized that this was important to their decision; that the members would decide whether they valued their voting rights such that they wished to retain them under Spencer’s current charter, or that they

⁶ Defendants also claim that retired Supreme Court Justice Gary Stein made an admission about Spencer’s motives in lobbying against the Bill. Not so. Justice Stein was not asked about and did not address the directors’ motives. He simply testified, consistent with his advice to the Board, that converting under current law was in Spencer’s “best interest” because in addition to addressing the QTL problem it would make it more difficult for Seidman to gain a seat on the Board. And that the board’s consideration of Seidman’s hostile motivation was an appropriate and lawful reason for the board’s decision to convert to a mutual savings bank. 2T58-59.

wanted to allow Spencer to convert. 3T70; 3T104-105; 3T137-139. This action was filed to confirm Spencer's right to ask the members to approve conversion, and to confirm that the proxy materials seeking their approval were sufficient and not misleading. Those materials fully disclosed and underscored, repeatedly, that members would give up their voting rights if they approved conversion to a mutual savings bank. (Pa56; Pa61; Pa64; Pa68). They would have included any other disclosures the court deemed appropriate. The lower court's decision deprived the members of the opportunity to decide for themselves what future they wanted for Spencer – for Spencer to be permitted to adjust to the times, continue to grow, and convert to a saving bank, or for them to retain their ability to vote for directors.

It is in Spencer's and its members' best interests to allow that vote to occur. Case law concerning fiduciary duties permits that vote, and the directors' actions in seeking it, even if motivated in part by preventing future proxy contests initiated by Seidman. The lower court thus erred in enjoining Spencer from calling a special meeting, and in finding the directors violated their fiduciary duties in seeking to call one.

Point III

The lower court erred in failing to consider the directors' advice of counsel defense, which insulated them from a breach of fiduciary duty claim.

As explained in detail in Spencer's opening brief, reliance upon the advice of counsel provides an absolute defense to liability on a breach of fiduciary duty claim. See, e.g., McGlynn v. Schultz, 90 N.J. Super. 505, 519-20 (Ch. Div. 1966), aff'd, 95 N.J. Super. 412 (App. Div. 1967), disapproved on other grounds by Francis v. United Jersey Bank, 87 N.J. 15 (1981). Defendants cannot dispute that essential point.

Instead, Defendants claim the lower court properly rejected the defense. But the court did not address the defense at all beyond reciting that it had been asserted (Pa25), or make any findings that would support its rejection.⁷ Defendants argue that reliance on advice of counsel was not proven, but Judge Jerejian did not so conclude, and instead found that the witnesses testified credibly about the advice given. (Pa27). He did not find collusion or lack of

⁷ Defendants also point to Judge Covello's rejection of the defense in earlier litigation. But Judge Jerejian expressly held that res judicata did not apply, and that he had to adjudge the facts and legal issues before him concerning the 2022 resolution. Moreover, Judge Covello addressed advice given to the directors in 2019, not advice given by Mr. Faucette and Justice Stein in 2022 to the directors then on Spencer's Board, including two new directors.

good faith in dealings between counsel and client, as Defendants suggest. The court instead made no findings at all.

Again, the directors received substantial legal advice prior to their vote. Mr. Faucette advised that his thorough research had confirmed that the mutual savings bank charter was the only charter available that would enable Spencer to remain in mutual form while relieving itself of the QTL requirement. (Pa512; 1T120). Justice Stein advised the directors concerning the potential threat that Seidman posed to Spencer's continuation as a mutual institution, and advised that "the mere fact that you took into account the law governing savings banks, and that that law would make it more difficult for Mr. Seidman to get on the Board, is not wrong." 2T38.⁸ "If in your judgment it is consistent with the best interests of Spencer to convert and for it to be more difficult for Mr. Seidman to get on the Board, that is a perfectly appropriate judgment for members of this Board to make." 2T38. Justice Stein "had no doubt in the world that the decision to convert was prudent and in the bank's best interest and to the extent that that decision because of operation of State law made more difficult Mr. Seidman's

⁸ Defendants take issue with Justice Stein preparing an outline reflecting that conversion was in Spencer's economic interest before hearing the presentation from Riggins. However, Justice Stein testified that he reviewed Judge Covello's earlier opinion prior to preparing his remarks. 2T43; 2T47. Judge Covello found that pursuing commercial lending, and a potential conversion to a mutual savings bank, was in Spencer's best interest. (Pa301).

quest to become a director, that was not a reason to vote against [conversion].”
2T49-58. He was “sure [he] said to the Board that it was prudent and in the best
interest of Spencer for the members of the Board to vote in favor of conversion.”
2T50.

As acknowledged by the trial court, the directors testified they relied upon
advice given by Justice Stein and Mr. Faucette as well as other experts. See
Pa21-22; 3T14-15; 3T24; 3T35-37; 3T65-70; 3T81-82; 3T102. And the only
credibility finding made by the court was to find the directors credible, and to
expressly appreciate their concern about the QTL and their passion for the bank.
Pa27; Pa29. Based on this testimony and the court’s credibility finding, it was
legal error for the court to not address the advice of counsel defense, and to fail
to conclude that it insulated the directors from a finding that they breached their
fiduciary duties.

In its review of the record and the findings the lower court did make, this
court should find that the advice of counsel defense does apply, and reverse the
lower court’s ruling that the directors breached their fiduciary duties.

Point IV

Defendants' cross-appeal provides no grounds for relief from this Court.

A. The lower court acted within its discretion in applying the American Rule.

Trial courts are “invest[ed] . . . with wide latitude in resolving attorneys’ fees applications.” Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 25 (2004). The Appellate Division “will disturb a trial court’s determination of counsel fees only on the rarest occasion and then only because of a clear abuse of discretion.” Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (internal quotation marks and citations omitted). The lower court acted within its discretion in applying the American Rule in this matter and determining that Defendants were not entitled to an award of fees in this matter. The court’s denial of fees should be affirmed.

“Under the American rule, ‘which is the law of this State, a prevailing party may not be granted attorney’s fees unless authorized by the parties’ contract, court rule, or statute.’” Litton Indust. Inc. v. IMO Indust. Inc., 200 N.J. 372, 404 (2009) (quoting Rock Work, Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 350-51 (App. Div. 2007)); see also R. 4:42-9(a) (“No fee for legal services shall be allowed in the tax costs or otherwise” except in the exceptions set forth in the Rules).

Success on a breach of fiduciary duty claim does not, by itself, provide an entitlement to counsel fees. See, e.g., In re Estate of Lash, 169 N.J. 20, 34 (2001) (“the fact that a person owes another a fiduciary duty, in and of itself, does not justify an award of fees unless the wrongful conduct arose out of an attorney-client relationship”); In re Estate of Vayda, 184 N.J. 115, 123-124 (2005) (affirming “New Jersey’s strong public policy against the shifting of counsel fees” and declining to award counsel fees in case where executor breached fiduciary duty). Rather, with respect to fiduciary duties owed to shareholders, courts have permitted attorney’s fees only through derivative claims, relying on the payment of fees “out of a fund in court” provided for in Rule 4:49-2(a)(2).

That exception provides:

The court in its discretion may make an allowance out of such fund, but no allowance shall be made as to issues triable of right by a jury. A fiduciary may make payments on account of fees for legal services rendered out of a fund entrusted to the fiduciary for administration, subject to approval and allowance or to disallowance by the court upon settlement of the account.

As the Supreme Court has explained, “[t]he term ‘fund in court’ is one of art. It is applied where plaintiff’s actions have created, preserved or increased property to the benefit of a class of which he is a member.” Sarner v. Sarner, 38 N.J. 463, 467 (1962) (emphasis added); see also Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 168 (1960) (“In general, allowances are payable from a ‘fund’ when

it would be unfair to saddle the full cost upon the litigant for the reason that the litigant is doing more than merely advancing his own interests.”).

“Thus, the Rule’s exception allows for attorney fee awards when a shareholder’s derivative action results in the conferral of benefits, whether of a pecuniary or non-pecuniary nature, upon the defendant, that the defendant may, in the exercise of the court’s equitable discretion, be required to yield in the form of an award of attorney’s fees.” Trimarco v. Trimarco, 396 N.J. Super. 207, 216 (App. Div. 2007). The Rule does not permit the award of fees in direct actions. See ibid. (affirming award of counsel fees that reflected “an articulated division of the time allocated to individual and derivative claims”); Sarner, 38 N.J. at 470-71 (remanding to trial court to parse out which fees were incurred on plaintiffs’ derivative rather than personal causes of action).

In claiming they are derivative plaintiffs entitled to a fee award, Defendants recount several prior litigations in which they were awarded fees. But they ignore the most relevant lawsuit, the earlier conversion lawsuit before Judge Covello. There, unlike in lawsuits concerning nomination thresholds, the court ruled that Seidman and Wein’s claims were direct, not derivative. “Their injuries [were] unique in contrast to the full membership because they are seeking places on the board of directors. This endeavor is not something that the totality of Spencer’s membership seeks to do.” (Pa283).

That stood in contrast to the earlier Seidman lawsuits: “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” whereas “[t]his 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.” (Pa284 n.9). Seidman and Wein’s allegations concerned “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” which the trial court found is a direct claim. Ibid. (citing 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). This Court affirmed that analysis, and Judge Covello’s denial of fees. (Pa467)

So too here. Although not explicitly analyzed by Judge Jerejian, the allegations asserted by Defendants in their third-party complaint are on four corners with those raised as the plaintiffs in the earlier lawsuit. Any injury to Defendants is to their self-interested desire to gain seats on Spencer’s board, and the relief they seek is to prevent the general membership from voting on the

charter change to a mutual savings bank unless Spencer first supports a legislative change that would facilitate Defendants' continued proxy contests.

Moreover, even if the claims in the third-party complaint could qualify as derivative, that does not mean Defendants are automatically entitled to an award of attorneys' fees. Rather, whether to award fees is subject to the "court's equitable discretion." Trimarco, 396 N.J. Super. at 216. Especially given the court's finding that there had been no damages to Spencer or its members, the lower court thus acted within its discretion in declining to award fees to Defendants. (Pa30).

Accordingly, the Court should affirm the denial of Defendants' request for an award of attorneys' fees.

B. The lower court correctly dismissed Defendants' claim seeking to bar indemnification of the directors.

The trial court likewise did not err in dismissing Defendants' claim that sought to bar Spencer from indemnifying its directors, as well as damages for any fees they incurred in the lawsuit. At the outset, insurance has and is covering the directors' legal defense fees in this matter, and thus the claim was and remains moot. (PRa4). And even if that were not the case, the Savings and Loan Act (SLA), N.J.S.A. 17:12B-73(B) entitles the directors to advancement or reimbursement by Spencer of their legal fees until final adjudication of this matter, including through an appeal and, if necessary, petition for certification.

In the event of a final adverse adjudication, the statute permits the Commissioner of the Department of Banking and Insurance, the board of directors, and the saving association's members to determine that the directors were acting in good faith and should be entitled to reimbursement of reasonable expenses. Ibid. Thus, any claim to bar Spencer from indemnifying its directors is premature and unripe, and was correctly dismissed.

Specifically, N.J.S.A. 17:12B-73 mandates that directors of a savings and loan association “shall be indemnified or reimbursed by the association for reasonable expenses, including, but not limited to, attorney fees, actually incurred by him in connection with any action, suit or proceeding, instituted or threatened, judicial or administrative, civil or criminal, to which he is made a party by reason of his being or having been a director, officer or employee of an association[.]” Only when a director has “finally [been] adjudicated to have been guilty of a breach of good faith, to have been negligent in the performance of his duties or to have committed an action or failed to perform a duty for which there is a common law or statutory liability” does the right of indemnification go away and the savings association have an obligation to seek reimbursement of fees advanced. Ibid. (emphasis added).

Additionally, the statute provides that a director may be indemnified or reimbursed for

[r]easonable expenses, including fines and penalties, incurred in connection with a criminal or civil action, suit or proceeding in which such person has been adjudicated guilty, negligent or liable, if it shall be determined by the board of directors and by the commissioner that such person was acting in good faith and in what he believed to be the best interests of the association and without knowledge that the action was illegal, and if such indemnification or reimbursement is approved at an annual or special meeting of the members or stockholders by a majority of the votes eligible to be cast.

[N.J.S.A. 17:12B-73(B)(2)]

A declaration by the trial court, or this court, that the directors are not entitled to indemnification would thus be inappropriate, as it would cut the directors off from pursuing that statutorily-authorized procedure. “A declaratory judgment claim is not ripe for adjudication if the facts illustrate that the rights or status of the parties are ‘future, contingent, and uncertain.’” Garden State Equal. v. Dow, 434 N.J. Super. 163, 189 (Law Div. 2013) (quoting Indep. Realty Co. v. Twp. of N. Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005)).

That is the case here, since whether indemnification is permissible must await the final conclusion of this matter, including through all appeals. Indeed, this court already found as much in denying Defendants’ pre-briefing motion that sought to disqualify counsel and obtain summary adjudication of their indemnification claim in an effort to deter the directors from exercising their appellate rights. See PRA4 (explaining, among other reasons for denying the

motion, that “the various issues of reimbursement and indemnification can be addressed upon the eventual final disposition of this matter”). Even after exhaustion of appellate rights, Spencer must be permitted to determine whether to seek approval from its members and regulators to indemnify the directors. Thus, a declaration concerning Spencer’s right to indemnify its directors is unripe for adjudication under the declaratory judgment act.

Even if the lower court could have adjudicated the claim, the court would have been required to find that indemnification is required and reject Defendants’ claim for damages based on the findings it made against the directors. Ignored by Defendants, N.J.S.A. 17:12B-73 must be read in conjunction with a more recently enacted provision of the SLA, which provides that a savings association may amend its bylaws to provide that directors shall not be personally liable for damages for any breach of duty:

except that the provision shall not relieve a director or officer from liability for an act or omission: a. in breach of that person’s duty of loyalty to the association or its members; b. not in good faith or involving a knowing violation of law; or c. resulting in receipt by that person of an improper personal benefit. As used in this section, an act or omission in breach of a person’s duty of loyalty means an act or omission which that person knows or believes to be contrary to the best interest of the association or its members in connection with a matter in which he has a material conflict of interest.

[N.J.S.A 17:12B-38.1]

A version of this provision was first inserted into the SLA as part of a 1987 bill that largely addressed business corporations. The legislative history reflects that the bill's proponents:

consider[ed] the statutory changes to be essential in order to enable New Jersey corporations to continue to attract and retain capable management. The escalating cost and shrinking availability of directors' and officers' liability insurance, combined with management's increased exposure to liability in a time of hostile takeovers, 'greenmail', 'poison pills' and the like, have created a reluctance on the part of many to serve on boards of directors. Moreover, this has led to what many believe to be an overly risk-averse approach to decision-making which is injuring both shareholders and the goal of economic efficiency.

[Assembly Insurance Committee, Statement to Senate Substitute for Senate Committee Substitute for Senate, No. 2510, January 12, 1987 (PRa6-7)].

The Governor's news release upon signing the bill similarly stated that the legislation was "considered necessary because many corporations are having difficulty attracting and retaining board members due to the threat of law suits and the lack of sufficient insurance coverage." (PRa8).

The provision was amended again in 1989 to provide the definition for a breach of the duty of loyalty and make clear that only a "knowing" breach of the duty would mandate personal liability. See L. 1989, c. 17, § 9, eff. Feb. 4, 1989. Thus, N.J.S.A. 17:12B-38.1 permits a savings association to relieve a director of personal liability unless there was a knowing breach of the duty of loyalty; if

the director acted not in good faith or engaged in a knowing violation of law; or engaged in conduct resulting in the receipt of an improper personal benefit. N.J.S.A. 17:12B-38.1 is thus broader than N.J.S.A. 17:12B-73, and permits a savings association to adopt a bylaw relieving a director of personal liability for, for example, a negligent breach of the duty of care or duty of loyalty.

“When there are two contradictory provisions in a statute, the primary object is to ascertain the legislative design with reasonable certainty.” Brewer v. Porch, 53 N.J. 167, 174 (1969). “The Legislature is presumed to be familiar with its existing enactments and is presumed to intend that newer enactments be harmonized with existing ones, in light of the Legislature’s purpose.” Correa v. Grossi, 458 N.J. Super. 571, 580 (App. Div. 2019). But “[a] new law altering fundamental assumptions relied upon by the old law will work to supersede earlier inconsistent statutes.” N.J. State Policemen’s Benevolent Assoc. of N.J. v. Town of Morristown, 65 N.J. 160, 165 (1974). See also Kemp by Wright v. State of N.J., 147 N.J. 294, 307 (“When a subsequent enactment covering a field of operation coexistent with a prior statute cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts, the latest legislative enactment prevails, and the prior law yields to the extent of the conflict.”)

Thus, because the Legislature added N.J.S.A. 17:12B-38.1 without removing N.J.S.A. 17:12B-73, the court must first try to read them together and harmonize them, rather than presuming N.J.S.A. 17:12B-73 is no longer valid law. But to the extent they are inconsistent and cannot be reconciled, N.J.S.A. 17:12B-38.1 must control as the more recent legislative enactment.

Given that the express purpose of N.J.S.A. 17:12B-38.1 was to reduce, not increase, personal exposure of directors, the provision should be read to authorize a savings association to address limiting personal liability in its bylaws. Hence, to the extent N.J.S.A. 17:12B-73 would bar indemnification of legal fees, but a bylaw consistent with N.J.S.A. 17:12B-38.1 would permit it, that is an irreconcilable conflict and the more recent statute must control. Accordingly, a savings and loan association may adopt a bylaw allowing it to absolve a director of a breach of the duty of care or an unknowing breach of the duty of loyalty notwithstanding the general ban against indemnification for breach of fiduciary duties in N.J.S.A. 17:12B-73.

Spencer has indeed adopted such a bylaw in Article 25 of its bylaws, which provides that no director shall be personally liable unless they have breached their duty of loyalty, acted not in good faith or involving a knowing violation of law, or acted in such a way that resulted in receipt of an improper

personal benefit.⁹ (PRa10-11).¹⁰ Article 47 of Spencer’s bylaws further requires Spencer to indemnify its directors, officers, and employees for all expenses, including attorney’s fees, “provided such person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Bank[.]” (PRa13). Article 47(D) also authorizes Spencer to maintain insurance, at its expense, to protect itself and its directors. (PRa13-14). The Commissioner of the Department of Banking and Insurance approved these bylaws pursuant to N.J.S.A. 17:12B-39. The indemnity provisions of Article 47 are consistent with indemnification powers for federal savings association. See 12 C.F.R. § 145.121. The Commissioner’s approval of such bylaw is consistent with her powers to provide parity with federal institutions so as to maintain the competitiveness of the state charter. See N.J.S.A. 17:12B-48(21); N.J.A.C. 3:26-4.1.

The SLA and Spencer’s bylaws thus require Spencer to indemnify its directors, including for legal fees expended in defending lawsuits, unless there was a finding of knowing breach of the duty of loyalty, if the directors acted in

⁹ As noted above, N.J.S.A. 17:12B-38.1, which authorized this bylaw, defines a breach of the duty of loyalty to included only a “knowing” violation of the duty.

¹⁰ Defendants misleadingly summarize Spencer’s bylaws without citation. So that the Court can consider the actual language in the bylaws, and not Defendants’ mischaracterization, they are included in Spencer’s reply appendix.

bad faith or in knowing violation of law, or if they acted in such a way that resulted in receipt of an improper personal benefit. Here, although finding generally that the directors breached their fiduciary duties, the court here made no such predicate determination that this breach was a knowing breach or in bad faith.¹¹ Rather, the court found the directors were concerned about the QTL and respected their passion for Spencer, but had simply acted prematurely.

Thus, based on the court's findings and governing law, Spencer was and is required to indemnify the directors to the extent any of their defense costs are not covered by the D&O insurance policy that has covered those costs thus far. Accordingly, there are no grounds to reverse the lower court's dismissal of this claim.

¹¹ Even if there were such findings, Spencer is entitled following the procedures of Article 47 to determine that its directors did act in good faith and in a manner he or she believed to be in the best interests of Spencer, and are entitled to indemnification. Thus, for the same reasons as above, adjudication of Defendants' indemnification claim remains premature.

Conclusion

For all the foregoing reasons and for those in Spencer's opening brief, Spencer respectfully requests that the court reverse the lower court's judgment, remand for the lower court to rule upon the adequacy of Spencer's proxy materials, and dismiss Defendants' cross-appeal.

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Dated: April 28, 2025

By: s/ Sean Mack
Sean Mack

SUPERIOR COURT of NEW JERSEY

Appellate Division

Docket No. A-546-24

<p>SPENCER SAVINGS BANK, S.L.A., Plaintiff-Appellant, v. ARTHUR WEIN and LAWRENCE B. SEIDMAN, Defendant/Third Party Plaintiffs- Respondents/Cross-Appellants, v. JOSE GUERRERO, NICHOLAS LORUSSO, THOMAS DUCH, ADA MCGUINNESS, PETER HAYES and BARRY MINKIN, Third-Party Defendants-Appellants.</p>	<p style="text-align: center;"><u>Civil Action</u></p> <p>On Appeal From Orders Of The Superior Court of New Jersey, Chancery Division, Passaic County</p> <p>Docket No. BER-C-129-22</p> <p>Sat Below: Edward A. Jerejian, P.J.Ch.</p>
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RESPONDENTS'/CROSS-APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

This Brief exclusively addresses the Appellants' Opposition to Respondents' Cross-Appeal.

It is important to not ignore the fundamental nature of the claims asserted here, because this determines whether a matter is deemed to be a derivative action for which the prevailing members are entitled to an award of fees.

Appellant, Spencer Savings Bank, S.L.A. ("Spencer") filed its Complaint against Defendants/Responses (collectively "Seidman") asserting a Declaratory Judgment to secure approval of the Conversion Plan of 2022. (Pa034)

Seidman Answered and Counterclaimed to invalidate the Conversion Plan of 2022 and secure an award of fees. (Pa102) Seidman also filed a Third-Party Complaint to invalidate the Conversion Plan of 2022, to determine the Directors violated their duties in adopting this Plan and to secure a determination the Directors are not entitled to be indemnified. (Pa111)

Seidman prevailed on all claims. Spencer and The Directors have confirmed that the key issue is what is in the best interests of Spencer. (PRb at Point III) These rulings that Seidman secured benefit all members equally –The Directors have again been prevented from implementing an action whose primary goal is to entrench themselves.

ARGUMENT

POINT I: THE AMERICAN RULE IS INAPPLICABLE. (Prb23)

Judge Jerejian applied the “American Rule,” which leaves all litigants responsible for the payment of their own fees. The problem (defect) with this ruling is that the American Rule is applicable except when it is not. This case is such an exception; since it is unquestionably a derivative action where the shareholder/member has prevailed with benefits being conferred upon Spencer and all of its Members. Sarner v. Sarner, 38 N.J. 463 (1962); Trimarco v. Trimarco, 396 N.J. Super. 207, 215-17 (App. Div. 2007)

In Strassenburgh v. Straubmuller, 146 N.J. 527 (1996), the Supreme Court instructs that the determination of whether a litigation involves derivative, or individual, causes of action is made by examining the nature of the wrongs alleged in the complaint. (146 N.J. at 551) Here, a review of the Complaint, Counterclaim and Third-Party Complaint confirms the claims asserted all provide benefits to Spencer and all of its members. Hence, these are derivative claims and an award of fees is accordingly appropriate, since Seidman prevailed.

POINT II: A RULING ON INDEMNITY IS NOT PREMATURE AND A DETERMINATION THE DIRECTORS ARE NOT ELIGIBLE FOR INDEMNITY IS APPROPRIATE. (PRb27)

The Directors make three (3) arguments in support of their position that the rejection of the indemnity claim was appropriate:

- (i) Insurance – not Spencer – is paying. (Prb27)
- (ii) The claim is premature. (Prb29)
- (iii) N.J.S.A. 17:12B-38.1 is applicable and exonerates them. (Prb31)

The position taken about the existence of insurance is based upon an Order, which expressly directs that the “issues of reimbursement and indemnification can be addressed upon the final disposition of the matter.” (Pra4) Given the mandate of the Entire Controversy Rule, it is clear this Order requires the issue be decided by the Trial Court once it was decided whether the conduct was eligible for receipt of indemnity, which it was not in this Case. Furthermore, it is not established what the deductibles were, or whether coverage covered all fees and expenses.

The above also addresses The Directors’ position on the propriety of deciding the issue of the right to indemnity. [In essence, it is urged that a decision disqualifying The Directors from indemnity would interfere with their statutory rights and right to appeal.] This makes no sense, since there are no statutory rights to petition the Commissioner or appeal without a Final Judgment being entered.

Stated otherwise, without a final determination, there would be nothing for the Appellate Court to reverse and nothing for the Commissioner to pardon.¹

The notion that N.J.S.A. 17:12B-38.1 is applicable and would grant relief is a “bridge too far.” The Directors assert that the language in N.J.S.A. 17:12B-73(B) must be read in conjunction with N.J.S.A. 17:12B-38.1, which they contend creates a contradiction that requires an unstated modification to N.J.S.A. 17:12B-73(B) to make a director eligible for payment of defense costs unless he/she commits a “knowing” breach of duty or “knowingly” acts not in good faith.

As codified, and as it has existed since 1963, N.J.S.A. 17:12B-73(B) provides that a director shall not be indemnified if adjudicated: (1) to be guilty of a breach of good faith; (2) to have been negligent; or (3) to have committed an action or failed to perform a duty for which there is a common law or statutory liability. Thus, The Directors argue a requirement of knowing conduct should be inferred in two (2) places: (i) the breach of duty of good faith; (ii) the act or failure to act in conformance with common law or statutory duties.² The gist of this argument is that N.J.S.A. 17:12B-38.1 was adopted, in 1989, when the New Jersey Business Corporation Act

¹ It is virtually unthinkable that the Commissioner would give relief to Board Members, who have repeatedly been found to have violated their fiduciary duties, to have acted in bad faith and acted to promote their own self-interests.

² Obviously, by definition, negligence cannot be an intentional act.

provision on the indemnification of directors was liberalized to make indemnity more available. This was twenty-six (26) years after N.J.S.A. 17:12B-73(B) was adopted. The argument is that the Legislature forgot, or overlooked, the fact that N.J.S.A. 17:12B-73(B) existed, and would have engrafted the “knowing” requirement unto N.J.S.A. 17:12B-73(b) had they not overlooked the existence of this statute covering Savings & Loan Associations and the Legislature has continued to overlook this error for the ensuing thirty-four (34) years. This argument, however, ignores the settled principle of statutory construction that it is assumed the Legislature is thoroughly conversant with its own legislation. Matawan Borough v. Monmouth County, 51 N.J. 291 (1968)

Aside from the lack of logic, and lack of legal support, for this claim that The Legislature was, and has continued to be, so ignorant – in this highly regulated area overseen by the Department of Banking and Insurance – the argument ignores the following vital points:

(i) N.J.S.A. 14A:3-5 of the New Jersey Business Corporation Act, which The Directors contend provided the impetus for the adoption of N.J.S.A. 17:12B-38.1, provides different terms for, and expressly established a distinction between indemnity for defense expenses and indemnity for liability.

(a) N.J.S.A. 14A:3-5(2) authorizes a Business Corporation to provide indemnity for both expenses and liabilities under stated circumstances.

(b) N.J.S.A. 14A:3-5(3) authorizes a Business Corporation to provide indemnity for expenses only under stated circumstances.

(c) N.J.S.A. 14A:3-5(4) requires that a Business Corporation provide indemnity for expenses under stated circumstances.

(ii) N.J.S.A. 17:12B-73(B) establishes the requirement that a Savings & Loan Association indemnify a director, or be reimbursed by a director for advanced defense expenses. It is stipulated a director is not entitled to this indemnity for expenses, and must repay any advances, if the director is finally adjudicated:

(a) To have been guilty of a breach of good faith.

(b) To have been negligent in the performance of his duties.

(c) To have committed an action or failed to perform a duty to which there is a common law or statutory liability³.

(iii) N.J.S.A. 17:12B-38.1 permits a Savings & Loan Association to **adopt a Bylaw** to exonerate a director from liability **for damages** to the Association or its

³ This section also empowers the Commissioner to permit indemnity for liability.

members for breach of any duty owed; except, the director shall not be relieved from liability for an act or omission that is:

- (a) A breach of the duty of loyalty to the association or its members.⁴
- (b) Not in good faith or in a knowing violation of the law.
- (c) Result in receipt of an improper personal benefit.

Thus, the comparison of N.J.S.A. 17:12B-73(B) and N.J.S.A. 17:12B-38.1 is akin to comparing apples to oranges. One deals with indemnity for expenses defending third-party claims. The other deals with adopting a bylaw to address indemnity for liability for damages to the Association or its members. N.J.S.A. 17:12B-38.1 obviously does not modify N.J.S.A. 17:12B-73(B) *sub silentio* or otherwise.

Hence, it is patent The Directors should have been determined to be ineligible for indemnity and to be obligated to repay any fees and expenses that Spencer advanced.

⁴ This is defined as an act or omission the director knows or believes to be contrary to the best interests of the association or its members in connection with a matter in which he has material conflict of interests.

CONCLUSION

For all the foregoing reasons, Seidman respectfully submits that the judgment should be affirmed; except, Seidman should be awarded legal fees and granted relief under Count Four of the Third-Party Complaint.

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By: /s/ Peter R. Bray
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Dated: May 6, 2025