STATE OF NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE

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IN THE MATTER OF THE APPLICATION BY LAWRENCE B. SEIDMAN FOR A HEARING PURSUANT TO N.J.S.A. 17:12B-122 TO GAIN PERMISSION TO COMMUNICATE WITH THE MEMBERS OF SPENCER SAVINGS BANK, SLA

FINAL DECISION AND ORDER

This matter comes before the Commissioner of the New Jersey Department of Banking and Insurance ("Commissioner") upon the application of Lawrence B. Seidman ("Seidman"), pursuant to the New Jersey Savings and Loan Act, N. J.S.A. 17:12B-1 to -319 for a hearing to permit Seidman and Arthur Wein ("Wein") to communicate with members of Spencer Savings Bank, SLA ("Spencer Bank") and directing Spencer Bank to prepare and mail Seidman's proposed communication to its members.

FACTS AND PROCEDURAL HISTORY

The parties were previously before me at a hearing on November 17, 2020. At that time, the parties disagreed on whether Seidman could send the solicitation of proxy votes simultaneously with votes for nomination; whether Spencer Bank's Core Processor should send out the materials; and how member responses should be collected. After that hearing, I issued Final Decision and Order No. A20-06, dated December 15, 2020 ("Order"). I held that soliciting member votes by proxy was premature because Seidman and Wein were not yet nominated to run for election to the Board of Directors. Order at 6. I also recommended changes to Seidman's proposed cover letter and voter proxy card. <u>Id.</u> at 6-8. I also held that N.J.S.A. 17:12B-123 gives no authority to the

Commissioner to decide how communications are to be sent and responses collected. <u>Id.</u> at 8. Lastly, I ordered Spencer Bank to provide Seidman with an estimate of the cost of the preparation and mailing of the revised communication within three days of receipt of the Order. Seidman was then ordered to pay the costs within three days of receipt of the estimate. Spencer Bank was ordered to mail out the revised communication within five days of receipt of payment and notify Seidman and Wein immediately after one or both of them reached the necessary number of member endorsements for the director nomination. <u>Ibid.</u> These timelines were necessary to allow Seidman and Wein enough time to then request Spencer Bank to distribute and collect their vote proxies before the applicable deadlines set forth in Spencer Bank's by-laws. <u>Id.</u> at 8-9.

Seidman has been a member of Spencer Bank since 1990¹. Spencer Bank will hold its next annual meeting in January 2022, at which there will be an election to Spencer Bank's Board of Directors ("Board"). Seidman and Wein both want to run for the two open Board positions.

On May 11, 2021, Seidman and Wein sent a letter request to Spencer Bank to mail to its members: (1) a letter of solicitation from Seidman and Wein seeking members' votes by proxy, and (2) an enclosed Revocable Proxy Card, which members could use to cast votes for Seidman and Wein. (May 11, 2021 letter, Ex. P-2). Notably, Seidman indicated to Spencer Bank that he already secured the necessary number of member nominations to run for election to Spencer's

¹ Seidman and Spencer Bank have been involved in past litigations, which are relevant to the extent of providing additional background and history of the parties leading to the current matter. <u>See Seidman v. Spencer Savings Bank, et. al.</u> 2006 N.J. Super. Unpub. LEXIS 97 (App. Div. Mar. 23, 2006); <u>Spencer Bank v. Seidman</u>, 528 F. Supp. 2d 494, 496 (D.N.J. 2008), <u>aff'd Spencer Bank, S.L.A. v. Seidman</u>, 309 F. Appx 546, 547 (3d Cir. February 9, 2009); <u>Seidman v. Spencer Sav. Bank</u>, 2009 N.J. Super. Unpub. LEXIS 2802 (App. Div. Nov. 9, 2009); <u>Seidman v. Spencer Sav. Bank</u>, S.L.A., 2010 N.J. Super. Unpub. LEXIS 1783 (App. Div. July 27, 2010); <u>Seidman v. Spencer Sav. Bank</u>, 2015 N.J. Super. Unpub. LEXIS 999 (App. Div. Apr. 30, 2015); <u>Seidman v. Spencer Sav. Bank</u>, 2019 N.J. Super. Unpub. LEXIS 2038 (App. Div. Oct. 3, 2019), <u>certif. denied</u>, 241 N.J. 144 (2020), <u>cert. denied</u>, <u>U.S.</u>, 141 S. Ct. 554 (2020).

Board. Accordingly, his letter of solicitation was not seeking nomination votes, but was only seeking actual member votes by proxy. Additionally, in his May 11, 2021 letter, Seidman requested that Spencer Bank use First Coast Results, Inc. as a tabulator, and use Toppan Merrill for mailing.

Seidman's letter of solicitation to members asserted that the current Board directors were found by "the Courts" to have violated their fiduciary duties to the Bank and members. The letter asked members to vote for Seidman and Wein instead. The letter also contained a link to this website – <u>www.spencerbankvote.com</u> – which includes Seidman's and Wein's biographies and all the court decisions regarding Seidman's challenges to Spencer Bank's by-laws.

Spencer Bank did not respond to Seidman's May 11, 2021 letter within 10 days, as required by N.J.S.A 17:12B-121.

On May 27, 2021, Seidman sent a letter to the Commissioner requesting a hearing, as authorized by N.J.S.A. 17:12B-121(1). (May 27, 2021 letter to Commissioner, Ex. P-1).

On June 7, 2021, Spencer Bank sent a letter to the Commissioner arguing that the hearing should not be scheduled because Seidman failed to provide a statutory basis for his hearing request. (June 7, 2021 letter to Commissioner, P-6, EX SSB - 001). Spencer Bank argues that it has exchanged letters with Seidman to reach an agreement about the details of the communication to its members. Specifically, Spencer Bank presented Seidman with an estimate of \$40,000 for the mailing, which Seidman refused to pay. Over the series of multiple letters, Seidman insisted that he should only be required to pay approximately \$25,000 because that was the estimate he received from Toppan Merrill in October 2020. Spencer Bank also argued that Seidman had not provided proof of member nominations to Spencer Bank, as required by its by-laws, and that Seidman had yet to provide the definitive specifications for his proposed communication.

On June 8, 2021, Seidman replied to Spencer Bank's letter and agreed that the letter of solicitation with the Revocable Proxy Card could not be sent before Spencer Bank validates Seidman's and Wein's nominations to run for the election, which, under Spencer Bank's by-laws 34 and 36, can only happen not earlier than 60 days before the elections. Also, Seidman argued that his quote from Toppan Merrill had the precise specifications, and there was no justification for Spencer Bank to use its own mailing firm which charged more. Finally, Seidman reiterated that he was ready to pay for his own tabulator. (June 8, 2021 letter to Commissioner, Ex. P-7).

On June 24, 2021, the Commissioner granted the request for a hearing and scheduled a Zoom videoconference hearing for July 19, 2021.

On July 6, 2021, both parties submitted to the Commissioner pre-marked documents to be considered by the Commissioner in rendering the decision. Seidman's counsel submitted documents pre-marked "P-1" through "P-14." Spencer Bank's counsel submitted documents Bates Stamped "EX SSB – 001" through "EX SSB – 033." These pre-marked documents constitute the entire record of this matter.

The Commissioner held the hearing on July 19, 2021 via Zoom Videoconference. Participating at the hearing were: Douglas P. Faucette, appearing pro hac vice, who represented Spencer Bank, and Peter R. Bray, who represented Seidman.

DISCUSSION

Seidman requested a hearing pursuant to N.J.S.A. 17:12B-121 for an order requiring Spencer Bank to disseminate Seidman's communication to its members. Pursuant to N.J.S.A. 17:12B-122, the Commissioner had 30 days to designate a time and place for a hearing and give the parties a 10 days' written notice. Under N.J.S.A. 17:12B-123, at the hearing, the Commissioner "shall examine into the merits of the application and if [she] determines that the application is made in good faith and to grant the application would not be detrimental to the best interests of the State association and its members; then the Commissioner shall . . . order the State association to prepare and mail the communication or communications, in whole or in part, on the condition that the applicant shall first pay to the State association all of the costs and expenses of such preparation and mailing."

Under N.J.S.A. 17:12B-117, there is a confidential relationship between a savings and loan association and each of its members. Because of that relationship, "no association or any of its directors, officers or employees shall disclose or be required to disclose a list of the members of the association, in whole or in part to any person[.]" N.J.S.A. 17:12B-117.

N.J.S.A. 17:12B-118 sets forth the procedure for a member to communicate with other members. The member may file with the association an application to do so in writing, which states: his full name and address; the amount of the participation value of his accounts in the State association at the time such application is made; a statement specifying in detail the information he wants to communicate with the other members of the State association. If the application is to enable the member to communicate with other members, it must be accompanied by a complete copy of the proposed communication or communications, and the reasons for and the purposes of his requests. N.J.S.A. 17:12B-118(1)(a) to (d).

At the time of the hearing, there were three main areas of disagreement between the parties. The first area of disagreement is whether Seidman must pay the Spencer Bank's estimated cost of preparation and mailing of Seidman's communication of \$40,000 when Seidman independently obtained a lower quote for \$25,000 from Toppan Merrill.

The next area of disagreement is whether Spencer Bank must e-mail Seidman's communication to those members who have an e-mail address.

Lastly, the parties disagree on whether Spencer Bank must disclose the name and address of its tabulator to Seidman and whether Spencer Bank must use Seidman's tabulator.

These issues are discussed below.

Payment for the Estimated Cost of Preparation and Mailing

Seidman argues that Spencer Bank should send the communication using the printing and mailing services of Toppan Merrill, who provided an estimate of approximately \$25,000 to send out Seidman's communication. (Toppan Merrill proposal dated May 7, 2021, Ex. P-5). Spencer Bank indicated that the estimate from its printing and mailing firm is approximately \$40,000. (December 16, 2020 letter, EX SSB – 031). I note that the estimate that Seidman received from Toppan Merrill made certain assumptions, such as that some members would be able to vote online and would not have to mail back their votes. Spencer Bank also noted concerns of cyber security and the protection of its members privacy. (June 7, 2021 letter to Commissioner, P-6, EX SSB – 001).

The statute provides that a State association shall mail a communication "as soon as the applicant has paid to the State association all of the costs and expenses involved in such preparation and mailing." N.J.S.A. 17:12B-120. The statute implies that a State association calculate the costs of mailing and present it to the member for payment. There is no provision in the statute that requires a State association to match an estimate obtained by the member, or that the member may choose the company that performs the work.

Therefore, there is no authority granted to the Commissioner to order Spencer Bank to use a particular mailing company, or to match Seidman's estimate.

However, members of savings and loans have the right to communicate with their fellow members and the savings and loans should not make that process more difficult or expensive in order to impede that right. Thus, I encourage Spencer Bank to choose a cost-efficient and confidentiality-preserving distribution method to perform the printing and mailing of the communication.

E-mailing of Communications

Seidman argues that Spencer Bank should send out the communication via e-mail to members who do not wish to receive paper communications from Spencer Bank. (December 16, 2020 letter, EX SSB – 027). Spencer Bank argues that it has not enabled e-mail for communications with members for solicitations and responses. (December 17, 2020 letter, EX SSB – 024).

Regarding the e-mail distribution, as I previously held in the December 15, 2020 Order, "the statute is silent on the technicalities of the preparation and mailing, including how [a communication] is to be mailed out and how responses are to be collected. There is no authority granted to the Commissioner in N.J.S.A. 17:12B-123 to order how the preparation of the communications and mailing occurs. These issues are to be decided without the involvement of the Commissioner. The only power vested in the Commissioner is to order a savings association to prepare and mail a communication, in whole or in part." Order at 8.

Therefore, there is no authority granted to the Commissioner to order Spencer Bank to use its e-mail functionalities to distribute Seidman's communication. However, I encourage Spencer Bank to explore all cost-saving options, including distribution by e-mail, and implement them if feasible.

Disclosure and Use of Tabulator

Seidman maintains that he would like to hire and use his own tabulator, First Coast Results, Inc., to tally the member votes. (Agreement with First Coast Results, Inc., Ex. P-4; Letter to Spencer Bank dated May 11, 2021, Ex. P-1). Alternatively, he argues that Spencer Bank should disclose the name and address of its vote tabulator. (December 16, 2020 letter, SSB – 027). Spencer Bank raised concerns regarding privacy of members if member information were collected by a third party. (June 7, 2021 letter to Commissioner at P-6, EX SSB - 001).

Regarding the use of a tabulator chosen by Seidman, the statute is silent as to how a State association receives and counts election votes.

Additionally, Spencer Bank raised valid concerns about having member information and responses shared with a third-party tabulator of Seidman's choice. Pursuant to N.J.S.A. 17:12B-117, there is a confidential relationship between a savings and loan association and each of its members. Because of that relationship, "no association or any of its directors, officers or employees shall disclose or be required to disclose a list of the members of the association, in whole or in part to any person[.]" N.J.S.A. 17:12B-117. If Seidman's tabulator were to receive member responses, then member confidentiality could be at risk.

Therefore, I recommend that the parties use Spencer Bank's tabulator to tally the members' proxy votes.

Regarding the disclosure of the name of Spencer Bank's tabulator to Seidman, Spencer Bank did not identify any harm or concern with the sharing this information. Therefore, I recommend that Spencer Bank disclose to Seidman the name and address of its proposed tabulator to be used in connection with the 2022 Board election.

Text of Seidman's Proposed Letter and Proxy Card

N.J.S.A. 17:12B-123 provides that if Commissioner determines that the communication is made in good faith and is not detrimental to the best interests of the State association and its

members, "then the Commissioner shall order the State association to prepare and mail the communication or communications, in whole or in part[.]" N.J.S.A. 17:12B-123(b).

The Commissioner has the authority to recommend changes to proposed communications to members. N.J.S.A. 17:12B-123(b) permits the Commissioner to order savings and loan associations to prepare and mail communications "in whole or in part," thus granting the Commissioner authority to strike certain wording within communications. The Appellate Division of the New Jersey Superior Court has endorsed the Commissioner's power to suggest changes to proposed communications in <u>In re Veloso</u>, 93 N.J. Super. 186, 195 (App. Div. 1966). In <u>Veloso</u>, the then-Commissioner "noted a few changes that should be made in the wording" of the proposed letter at issue in that case. <u>Id.</u> at 192. The Appellate Division remanded the case back to the Commissioner directing that he "grant the application subject to the changes in wording heretofore suggested by him." <u>Id.</u> at 195.

I FIND that the mailing of Seidman's cover letter and Revocable Proxy Card to members "would not be detrimental to the best interests of the State association and its members." N.J.S.A. 17:12B-123. However, I recommend that certain changes be made to the proposed Revocable Proxy Card.

I FIND Seidman's proposed communication at issue in this hearing no longer contains the deficiencies I noted in the December 15, 2020 Order.

First, the proposed cover letter has the notation that it is not endorsed or sponsored by Spencer Bank. (Proposed Letter and Proxy Card, Ex. P-3). Second, assuming Seidman and Wein have secured the necessary number of nominations, there is no longer a concern with the Proxy Card. (May 11, 2021 letter, Ex. P-2). The parties agree that the letter and Revocable Proxy Card can only be sent out after Spencer Bank validates Seidman's and Wein's nominations, which under

the by-laws must occur 60 days before the annual meeting, i.e. in November 2021. (June 8, 2021 letter to Commissioner, Ex. P-7). Third, the website <u>www.spencerbankvote.com</u> referenced in Seidman's cover letter no longer contains a link to the Vote Proxy card. Fourth, the Revocable Proxy Card no longer needs to be changed to the "Nomination Endorsement" card because Seidman and Wein have allegedly already secured the necessary number of member nominations. Finally, the letter and the Revocable Proxy Card no longer provide that the member responses should be returned to Seidman.

However, I recommend the following changes to the Revocable Proxy Card.

First, because I recommended above that Spencer Bank use its own tabulator, the two boxes at the bottom of the proposed Revocable Proxy Card that members can cast their votes with Seidman's tabulator by Internet and by telephone should be stricken. The box that members can sign and return their votes by mail should stay. I recommend that the return envelopes for member responses reflect Spencer Bank's tabulator's name and address.

Second, all language in the proposed Revocable Proxy Card referencing voting by Internet or telephone should be stricken for the same reasons above.

With these changes, I hereby ORDER Spencer Bank to mail Seidman's proposed communication.

Regarding the timing of the mailing of the communication, I concur with the parties that it can only be sent after Spencer Bank formally validates and approves Seidman's and Wein's nominations to the Board. Mailing this communication before Seidman and Wein are duly nominated to run for the 2022 election may cause confusion with the members. However, Spencer Bank must expeditiously review Seidman's and Wein's nominations, as early as permitted under its by-laws, and then immediately inform Seidman and Wein if they were duly nominated to run for the election. If Seidman and Wein are duly nominated, Spencer Bank must mail the communication within three days of receiving Seidman's payment for the preparation and mailing of the communication.

It is so ORDERED on this <u>4</u> day of <u>August</u> 2021.

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Jd Seidman FO 2/ Final Orders/ Banking