NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4033-07T2

LAWRENCE B. SEIDMAN and SEIDMAN AND ASSOCIATES, L.L.C.,

Plaintiffs-Appellants,

v.

CLIFTON SAVINGS BANK, S.L.A., JOHN A. CELENTANO, JR., RAYMOND L. SISCO, FRANK J. HAHOFER, THOMAS A. MILLER, JOHN H. PETO, JOSEPH C. SMITH, JOHN STOKES, and CLIFTON SAVINGS BANCORP., INC.,

Defendants-Respondents.

Argued May 5, 2009 - Decided August 19, 2009

Before Judges Fuentes, Gilroy and Chambers.

On appeal from Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-152-05.

Peter R. Bray argued the cause for appellant (Bray, Miller & Bray, attorneys; Mr. Bray, on the brief).

Richard A. Beran and Steven A. Beckelman argued the cause for respondents (McCarter & English, attorneys; Michael M. Horn, of counsel; Mr. Beran and Mr. Beckelman, on the brief).

PER CURIAM

Plaintiffs Lawrence Seidman and Seidman and Associates, L.L.C., brought a derivative stockholders action against

defendant Clifton Savings Bank, S.L.A. (Clifton) and its Board of Directors. Plaintiffs alleged that the Board breached its fiduciary duties and committed corporate waste by: (1) approving an excessive salary and compensation package for the Chairman of the Board, defendant John A. Celentano, Jr.; (2) approving excessive allocations under a shareholder approved Equity Incentive Plan; (3) approving a Retirement Plan that unjustly enriched the directors; and (4) approving consulting agreements with the former Chairman of the Board, defendant Frank J. Hahofer.

The trial court dismissed all of plaintiffs' claims, except a claim for corporate waste related to consulting agreements with Hahofer. The court ordered directors, Celentano, Hahofer, Raymond L. Sisco, Thomas A. Miller, John H. Peto, Joseph C. Smith and John Stokes, to reimburse Clifton for the compensation paid to Hahofer, and awarded counsel fees to plaintiffs.

Plaintiffs now appeal arguing that the court misinterpreted and misapplied the business judgment rule and the doctrine of waste. They also contend that the court improperly reduced the amount to be reimbursed to Clifton under the Hahofer consulting agreements, as well as plaintiffs' award of counsel fees.

After reviewing the record before us, and mindful of prevailing legal standards, we affirm the trial court's ruling dismissing plaintiffs' claims based on the business judgment

rule and doctrine of waste. Pursuant to Rule 1:7-4, we remand for further consideration and explanation of the court's award of damages relating to the consulting agreements with defendant Hahofer, and its award of counsel fees.

I

Clifton was originally formed as a state-chartered mutual Savings and Loan Association (Mutual). As such, it took deposits and made loans; its members were either depositors or borrowers. N.J.S.A. 17:12B-12, 74. In 1998, Seidman became a depositor at, and hence a member of, Mutual.

Hahofer served as a director of Mutual from 1941 until the bank converted to a stock entity on March 4, 2004. Hahofer thereafter served as a director of Clifton from the date of conversion until his retirement from the Board in February 2007. Hahofer served as Chairman of the Board until 2001, when he was replaced by Celentano, who had also been a director since 1962.

When Celentano replaced Hahofer as Chairman, the Board entered into a consulting contract with Hahofer to, among other things, inspect and evaluate real estate on which Clifton was considering making mortgage loans. The rationale behind this consulting agreement was to take advantage of Hahofer's knowledge and experience, thereby obviating the expense of refunding appraisal fees on loan applications that may ultimately been deemed unsuitable.

At first blush, Hahofer was not the ideal candidate for this position. Although he had been on the Board for nearly sixty years, he had only a seventh grade education and no formal experience in the appraisal of property. Despite the absence of formal education, Hahofer had performed these loan-suitability inspections for many years, at no cost to Clifton. The Board thus had a rational basis to believe that his services had sufficient value to warrant the continuation of Hahofer's involvement in this capacity. Indeed, there was evidence that during the period Hahofer reviewed collateral for mortgage loans, Clifton did not have any mortgage-related losses.

From 2001 to 2006, Hahofer entered into seven one-year consulting agreements with Clifton. He was almost ninety years old at the time he executed the first consulting agreement. The initial annual consulting fee was $12,060.00, ultimately increasing to $16,417.41. Hahofer did not negotiate the amount of compensation, and did not know how they were calculated. As a matter of simple arithmetic, however, the consulting payments amount to the difference between the annual compensation received by a director and that received by the Chairman of the Board.

By 2001, Sisco (a member of the Board and named defendant in this suit), came to the conclusion that, due to his age, Hahofer should step down as Chairman of the Board. Sisco

specifically testified, however, that the consulting agreement was not intended to induce Hahofer to give up his position as Chairman in favor of Celentano. Sisco believed that Clifton was entering into "a new era of banking." In his view, the Board was obligated to get someone new to serve as Chairman.

Given Sisco's experience as Chairman of the Board of Jefferson National Bank for twenty-five years, other directors suggested that he should become Chairman; Sisco declined. Instead, Sisco recommended Celentano, whom he knew both as a fellow Board member at Clifton, and as a practicing attorney who represented Clifton, Jefferson National Bank, and other financial institutions in connection with loans secured by real estate mortgages. The Board accepted Sisco's recommendation.

Conversion from Mutual to Stock Entity

At first, Mutual did not hire Celentano as a full-time employee; thus in addition to his responsibilities at Mutual, Celentano remained engaged in the full-time practice of law. Sisco thought this arrangement did not leave Celentano with enough time to deal with the complexities associated with converting a Mutual Savings institution into a publicly traded bank. After Sisco conveyed his views to other directors, the Board hired Celentano as a full-time executive. In April of 2004, Celentano became a full-time employee of Mutual at an annual salary of approximately $350,000; his title was "Chairman

of the Board with executive powers." He was sixty-nine years old.

Walter Celuch was Mutual's and Clifton's president and CEO when Celentano became Chairman of the Board. He remained serving in this capacity even after Celentano was hired as a full-time employee; Celuch earned approximately $180,000 per annum. With the exception of Celentano, all of Clifton's employees reported to Celuch; his duties did not change after Celentano became a full-time employee of Clifton. The record shows, that the directors were satisfied with the way Celuch handled Clifton's day-to-day operations. Indeed, Celentano was hired to "take Clifton public," not to assume any of Celuch's operational duties.

Celentano's responsibilities were mostly limited to the conversion. They included: communicating and working with Clifton's accountants, attorneys, and appraisers; working with investment bankers on the initial public offering (IPO); and reviewing large volumes of related documents. He also spent considerable time locating new branch sites and negotiating for branch opportunities. Since his full-time employment, two new branches were opened and others were relocated or refurbished.

In 2003, the Board of Directors formally approved the conversion of Clifton from a mutual savings and loan to a stock entity. The approval established the Clifton Savings Bancorp,

Inc. (Bancorp), and an initial offering of shares in Bancorp to the public. The Board also formed a mutual holding company to hold 55% of the Bancorp shares, with the public holding the 45% balance. The public filings in connection with the conversions included disclosures concerning Celentano's salary and the consulting contract with Hahofer.

Seidman and Associates, L.L.C., and Seidman, became shareholders after the conversion of Clifton. Seidman acquired stock in Clifton in the IPO in 2004; he sold those shares prior to the commencement of this action. Seidman and Associates, L.L.C., acquired one thousand shares of stock in Clifton on July 22, 2004, and remains a shareholder.

After the conversion was completed, Celentano remained responsible for the general management and control of the business and affairs of Clifton and its affiliates. Celuch continued to handle the day-to-day responsibilities of the bank. The conversion increased the reporting and regulatory obligations for both Clifton and Bancorp.

Celentano was ultimately responsible for all regulatory and reporting compliance. Toward that end, Celuch, the chief financial officer, chief loan officer, and other department heads all reported to Celentano. Celentano was responsible to review Clifton's financial performance and to resolve any issues with state and federal regulators. He also remained active in

seeking additional branch locations; and explored other modes of expansion, including discussions of possible mergers with and/or acquisitions of other financial institutions.

Under Celentano's management, Clifton explored expansion and investment opportunities and eventually deployed capital, leveraging $75,000,000. Clifton investigated and implemented two programs to reduce taxes on its income: (1) the formation of a recognized investment company, Botany, Inc., which has saved $200,000 per year; and (2) invested in the adoption of the Bank Owned Life Insurance program (BOLI), with a projected savings of $360,000 per year.

Conversely, through the testimony of fellow shareholder Robert Freidman, plaintiff attempted to paint for the court a totally different picture of Clifton's financial performance. Freidman has a background in the analysis of securities. He testified that Clifton has been an "under-performer" since it went public, and was one of the least profitable banks in the area.

According to Freidman, one of the ways to measure an entity's performance in the banking industry is the return on average tangible equity (ROATE). Celentano admitted that Clifton's ROATE was lower than the median return of other New Jersey institutions. At the time of conversion, Clifton's return was 4.37%; the median number was a little over 10%. The

year after the conversion, Clifton's return had shrunk to 2.62%. During the same time period the median return was 8.12%.

Thomas Miller, a member of the Board of Directors and a codefendant, testified that Clifton's ROATE was around 2%, and therefore below the median return in the industry. This was the result of an inability to "effectively deploy capital." Celuch agreed. Notwithstanding Clifton's poor ROATE, its net income for the fiscal-year ending March 31, 2004 was $3,689,000, and $5,280,000 for the fiscal-year ending March 31, 2005. Clifton's return on average assets ("ROAA") improved from .57 to .67, and its Efficiency Ratio[1] improved from 57.33% to 53.35%.

In setting Celentano's initial salary as the full-time employee and Chairman of the Board, both members of Clifton's compensation committee and the Board as a whole reviewed information on compensation paid to senior executives by other institutions in New Jersey. One source of information consulted by these two groups was the result of surveys conducted by the New Jersey League of Community & Savings Bankers (NJL). The NJL compiles the survey results, broken down by the asset size of the institution, and the components of compensation, and sends

[1] Efficiency Ratio is defined as non-interest expense, including compensation expense divided by the sum of net interest income and net non-interest income. The lower the efficiency ratio, the more efficiently the institution is producing income.

these results to its members. The NJL prepares both a statewide and a Northern New Jersey compilation for institutions with assets of $500,000,000 to $1,500,000,000.

The 2001 survey indicates that the mean base salary and bonus paid to "position 1 = Highest Paid" was $359,331, with the median being $324,188 and the high being $767,000. The 2002 NJL Executive Salary Survey for Northern New Jersey[2] indicates that the base salary and bonus paid to "Position 1 = Highest Paid" the mean was $379,055, with the median being $318,500 and the high being $817,000. For 2003, the mean base salary and bonus was $440,457, with the median being $390,000 and the high being $867,000. As for 2004, the mean base salary and bonus was $474,458, with the median being $385,673 and the high being $915,000.

Among all public New Jersey-based thrifts, for the period ending 3/31/05[3] for Clifton and 12/31/04 for the comparables, Celentano's base compensation as a percentage of net income was 9.2%; the median was 8.9%. For the period ending 3/31/06 for Clifton and 12/31/05 for the comparables, Celentano's compensation as a percentage of net income was 12.3%; the median was 11.3%.

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[2] This includes Ocean, Monmouth, Mercer, and other counties to the north.

[3] Clifton's fiscal year ended on March 31.

When Celentano became Chair of Mutual on April 1, 2003, his base salary was set at $347,437.50 per annum. His salary was determined based on data regarding compensation from multiple sources. His salary remained unchanged from 2003 at $347,437.50, and he received no bonuses for 2003. In 2005, Celentano received a salary increase of $10,000, and a bonus of $10,423 based on Clifton's financial performance during the preceding fiscal year, stockholder return, peer group financial performance, and survey data. According to Celentano, his salary was not negotiated. He could not recall how it was initially set. Sisco recommended Celentano's initial salary and testified that it was based upon peer group studies.

Clifton's Compensation Committee operates pursuant to an official Charter adopted by the Board. The Charter mandates that the ommittee consider the following formulation in determining compensation recommendations: (1) the performance of Bancorp and Clifton; (2) shareholder return; (3) the compensation paid at comparable companies. Miller served as Chairman of the Compensation Committee for over a decade. He continued to serve in this capacity up to the time of trial.

Miller admitted that the Compensation Committee did not formally consider Clifton's or Celentano's performance when it dealt with Celentano's compensation. He also acknowledged that the Charter requirements established practices which had not

formally been followed. Indeed, Miller admitted that the Compensation Committee only started formally considering performance and the other criteria set forth in the Charter following the IPO and after receiving the advice of Clifton's counsel. He also testified that he did not know how Celentano's salary was set because it was not based upon a recommendation of the Compensation Committee.

The Equity Incentive Plan

Both the Board of Directors and the shareholders of Bancorp approved a 2005 Equity Incentive Plan (Equity Plan), that granted restricted awards of stock and stock options to the directors and certain other employees. Before adopting the Equity Plan, the Board reviewed the plan's contemplated terms and applicable considerations necessary for its adoption. The purpose of the 2005 Equity Plan was to provide:

> incentives and rewards to those employees and directors largely responsible for the success and growth of Clifton Savings Bancorp, Inc. and its Affiliates, and to assist all these entities in attracting and retaining directors, executives and other key employees with experience and ability.

Because the Equity Plan did not provide for specific distributions of awards, the shareholders were not informed how the awards would be allocated among the directors and other employees. The allocations were to be subsequently determined by the Board. Despite this lack of specificity, the documents

submitted to the shareholders generally represented that the awards would be granted based upon merit, and in accordance with the criteria established in the Compensation Committee Charter.

The Director of Compensation is also subject to regulatory oversight. The Office of Thrift Supervision (OTS) regulates Savings and Loan Associations and has established maximum amounts that may be granted to directors. Specifically, the Board of Directors may not receive more than thirty percent (30%) of the awards, and no director can receive more than five percent (5%) of the awards; a maximum of twenty five percent (25%) of the awards can be granted to the highest paid employee.

Here, the regulatory maximum (5%) was awarded to each of the six directors, and less than the maximum (25%) was awarded to Celentano, as the highest paid employee. Twenty-two other employees of Clifton and the directors not covered by the 5% award, were granted awards of stock options amounting to approximately 35% of the options awarded. Forty-two employees of Clifton, other than Celentano and the other directors, were granted awards of restricted stock, amounting to approximately 47.8% of the restricted shares awarded.[4]

[4] The Joint Compensation Committee reviewed four different scenarios for granting the stock awards, and consulted with counsel, various Certified Public Accountants, and a compensation consultant before awarding the stock and stock options under the Equity Plan.

II

Acting on plaintiff's application, the trial court admitted Certified Public Accountant Peter Goldman as an expert witness in the field of banking performance. Goldman analyzed data comparing Clifton with peer entities for the years 2004, 2005, and 2006. According to Goldman, the data showed that Clifton was "dead last" in ROATE. He recognized, however, that a newly converted institution was likely to experience some negative effect on ROATE for some time after conversion as the additional capital is deployed.

Robert Clark, an employee and partner at Seidman, prepared the data reviewed by Goldman. Clark admitted that SNL Financial, the leading source of industry data, includes the ROAA and Efficiency Ratio. Neither measure, however, was included in the data he prepared for Goldman. The court found that Clark intentionally excluded this data at the direction of Seidman, who admitted that he chose virtually all of the data included in, or excluded from, Goldman's analysis.

Plaintiffs also presented the testimony of James Reda, who was qualified as an expert in corporate compensation. He opined that Celentano was "substantially over-compensated" by a total of $804,000 for 2004, 2005 and 2006. He based his conclusion on two factors: (1) the Compensation Committee failed to consider Clifton's performance when setting his salary in excess of the

median for 2004 and 2005, making him the highest paid employee in the industry in 2006; and (2) Celuch was the person who actually ran the company and performed all CEO functions. Aggregating these factors, Reda opined that such an excess was a waste of corporate assets, and should be repaid to the corporation.

According to Reda, every public company since 2000 considers performance of the company and the executive before setting compensation. Clifton was in the seventh percentile for profitability. Reda claimed to have never seen a situation like the one involved here: a CEO successfully running a company and another individual, with no frontline banking experience and at the retirement age of 69, brought in as Chairman, at double the salary of the CEO. He admitted, however, that he had never been asked to give compensation advice to institutions or savings and loans that were converting to publicly held companies.

Reda further acknowledged that commercial banks and thrifts are materially different. Against this admission, Reda did not know whether the institutions in his peer group data were commercial banks or thrifts. Further questioning revealed that all of the other institutions in his data group were commercial banks. The asset sizes of the other institutions in the peer group were smaller than Clifton's. Finally, Reda did not study

the effect, if any, the location of the institution had on reasonable executive compensation.

The record shows that Reda based his overpayment calculation on the difference between the "market level" of compensation for salary and bonus for Celentano's peer group in 2004, 2005, and 2006, and the combined salary and bonus of Celuch and Celentano for those three years. This data did not disclose, however, that some of the listed institutions had a paid Chairman and a paid CEO or president; it only included salary and bonus of the CEO.

Finally, with regard to Clifton's performance and Celentano's compensation, Reda admitted that he was not an expert on the relative performance of Clifton or other financial institutions, and relied exclusively on Goldman's analysis and his data on that subject. Ironically, Goldman also lacked this expertise. Reda testified that he did not know whether Clifton had a net profit every year since the conversion; whether Clifton paid dividends since the Conversion; or whether Clifton's stock price was higher than the IPO price.

Regarding the allocation under the Equity Plan, Reda opined that the awards granted to Celentano and the other directors were an unjustified giveaway because the Compensation Committee failed to: (1) engage an outside consultant to provide reasoned recommendations; (2) consider the ages of the directors and

Celentano; (3) base the awards upon a reasoned analysis of the relevant factors, including Clifton's consistently poor performance; and (4) retain a sufficient pool of awards for new directors and employees. He thus concluded that the awards given to Celentano and the other directors were unjustifiable and excessive.

In reaching this conclusion, Reda did not examine the allocation practices of newly converted savings and loans as to the percentage of the total available under a plan given out at any one time; and he did not know how many savings and loans had awarded the OTS maximum percentage to their directors. He also admitted that he did not know whether the Compensation Committee had information on allocations by other savings and loans. Plaintiffs did not present literature documenting industry standards, nor did they cite to an administrative ruling, statute, or regulation that permits or supports reducing compensation awards based on the age of directors or officers.

The court admitted Susan O'Donnell as a defense expert witness in the area of executive compensation. O'Donnell, who focused her practice on executive compensation in the community bank field, testified that asset size is the primary parameter for banking compensation surveys and analysis. She noted that base salary for top executives is generally not performance-based. In her view, NASDAQ requires listed companies to have a

Compensation Committee staffed by non-employee directors; it is the responsibility of these Compensation Committees to exercise independent judgments and make reasonable compensation decisions.

O'Donnell found Celentano's total cash compensation package (base salary and bonuses) below the median in all years considered. She found his total cash compensation reasonable when compared to both his peer group and the regular practices of financial institutions of similar size. When she made these findings, however, O'Donnell was unfamiliar with Celentano's day-to-day duties, and was under the impression that Celentano was Clifton's CEO. Stated differently, she did not know that Celuch served as Clifton's CEO.

In contrast to Reda, O'Donnell had experience with stock allocations in the context of recently converted savings and loans. She referred to a study of public information that showed that almost all Mutual Holding Company (MHC) conversions were followed by the enactment of Equity Plans. In her view, allocations by recently converted institutions must be looked at as distinct from Equity Plans enacted by companies that have been public for a while because, prior to the conversion, the directors and officers of a Mutual have no equity; there is also a legitimate need to provide them with an equity stake in order to align their interests with those of the other shareholders.

O'Donnell conducted a study on newly converted thrifts to determine the percentage of stock they awarded directors and employees. From that group, O'Donnell determined that the 21.7% of combined options and restricted stock awarded to Celentano was slightly above the midpoint. Five of the twelve converted thrifts reviewed were higher. Based on her review of a peer group of converted MHCs, Bancorp's plan, like those of most other MHCs, based the total shares available on the OTS guidelines governing the percentage of stock that could be reserved for Equity Plans.

Based on this evidence, O'Donnell concluded that the allocations under the Equity Plan "were consistent and comparable to what other mutual holding company converted banks did." She rejected the proposition that that the stock awarded by Clifton was a giveaway, because it had the recognized purpose of alignment of interests.

III

The trial court entered judgment in favor of defendants dismissing all claims in the complaint, except for the claim of waste related to the compensation paid to Hahofer under the consulting agreements. The court found that plaintiffs had failed to rebut the presumption under the business judgment rule that the Board's decisions were informed, and in good faith.

Plaintiffs argue that they presented sufficient evidence to rebut the presumption justifying the Board's actions under the business judgment rule with respect to the following three specific incidents: (1) the amount of Celentano's compensation; (2) the allocations under the Equity Plan as to Celentano and the directors; and (3) the retirement plan, as applied to the Board of Directors. In their view, they presented sufficient evidence to shift the burden to defendants to establish that the transactions in question were intrinsically fair. Plaintiffs also contend that the trial court erroneously applied the business judgment rule to the Board's actions, because the challenged decisions involved self-interested directors who breached their duty of care, and otherwise engaged in unconscionable business practices.

Before we address the merits of plaintiffs' arguments, we will first set out our standard of review. On appeal from a judgment entered in a non-jury case, the trial court's findings will not be disturbed unless "'they are so wholly insupportable as to result in a denial of justice.'" Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (quoting Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div. 1960), aff'd o.b. 33 N.J. 78 (1960)); Jacobs v. Walt Disney World, 309 N.J. Super. 443, 452 (App. Div. 1998). An appellate court will not disturb "the factual findings and legal

conclusions of the trial judge unless . . . they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice. . . ." Rova Farms, supra, 65 N.J. at 484 (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)).

With these principles in mind, we reject defendant's arguments attacking the merits of defendants' actions. In the interest of clarity, we will address each argument separately.

New Jersey courts presume that a board of directors' decisions are proper and in the best interest of the corporation, unless the challenging shareholder(s) can show a breach of the board's fiduciary duties of care, loyalty, or good faith. See e.g., In re PSE&G S'holder Litig., 173 N.J. 258, 276-77 (2002); Maul v. Kirkman, 270 N.J. Super. 596, 614 (App. Div. 1994). See also In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. Super. 2006) ("Our law presumes that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company.") (internal quotation and citation omitted).[5]

[5] Our courts generally follow Delaware's pronouncements on corporate law, and therefore "an appropriate source of reference is the case law of Delaware." Pogostin v. Leighton, 216 N.J. (continued)

Under the business judgment rule, there is a rebuttable presumption that good faith decisions based on reasonable business knowledge by a board of directors are not actionable by those who have an interest in the business entity. PSE&G, supra, 173 N.J. at 276-77; Maul, supra, 270 N.J. Super. at 614. The rule "'protects a board of directors from being questioned or second-guessed on conduct of corporate affairs, except in instances of fraud, self-dealing, or unconscionable conduct.'" PSE&G, supra, 173 N.J. at 276-77 (2002) (quoting Maul, supra, 270 N.J. Super. at 614); it "exists to promote and protect the full and free exercise of the power of management given to the directors." Maul, supra, 270 N.J. Super. at 614 (citing 3A William M. Fletcher, Fletcher Cyclopedia of Law of Private Corporations § 1039 at 45 (perm. ed. rev. vol. 1986)). Stated differently, "bad judgment, without bad faith, does not ordinarily make officers individually liable." Ibid.

The rule places the initial burden on the person challenging a corporate decision to demonstrate self-dealing on the part of the decision-maker(s), or any "other disabling factor." Ibid. If the challenger sustains that initial burden, then the "presumption of the rule is [] rebutted, and the burden

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Super. 363, 373 (App. Div.), certif. denied, 108 N.J. 583, cert. denied, 484 U.S. 964, 108 S. Ct. 454, 98 L. Ed. 2d 394 (1987).

of proof shifts to the defendant or defendants to show that the transaction was, in fact, fair to the corporation." Stuart L. Pachman, Title 14A-Corporations at 228 (2000) (citing Maul, supra, 270 N.J. Super. at 614). See also Walt Disney, supra, 906 A.2d at 52 (If the business judgment rule is rebutted, "the burden then shifts to the director defendants to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders.")

With these legal principles as our guide, we now turn to plaintiffs' argument attacking Celentano's compensation. "[D]irectors have the power, authority and wide discretion to make decisions on executive compensation." Brehm v. Eisner, 746 A.2d 244, 262 (Del. Super. 2000). The business judgment rule's presumption of good faith and regularity carries particular force when the challenged decision concerns employee compensation. Eliasberg v. Standard Oil Co., 23 N.J. Super. 431, 440 (Ch. Div. 1952), aff'd, 12 N.J. 467 (1953).

If the presumption of the rule is not rebutted, the burden is "on the objecting stockholders to convince the court that no person of ordinary, sound business judgment would be expected to entertain the view that the consideration was a fair exchange for the value given." Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962); Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (Del. Ch. 1952). The conduct complained of must be egregious,

constituting recklessness, gross neglect of duty, or manifest disloyalty to the company. PSE&G, supra, 173 N.J. at 296.

Celentano's cash compensation was set by the Board of Directors. The trial court determined that that decision was protected by the business judgment rule. We are satisfied that the court properly found that plaintiffs did not rebut the presumption of validity. Plaintiffs failed to establish that the setting of Celentano's cash compensation involved self-interest or self-dealing on the part of the directors.

"[T]he issue of director 'interest' . . . is largely a question of fact to be determined from all the relevant facts and circumstances of a particular case." Borden v. Sinskey, 530 F.2d 478, 495 (3d Cir. 1976) (citing Puma v. Marriot, 283 A.2d 693 (Del. Ch. 1971)). A director becomes "interested" in a decision when the director's loyalty is split or where the director will receive a "personal financial gain from the [decision] not equally shared by the shareholders." PSE&G, supra, 173 N.J. at 290.

Conversely, a director is "independent" when that "director's decision is based on the corporate merits of the subject before the board rather than extraneous consideration or influences." Ibid. Moreover, "[a] director is not to be viewed as being 'interested' merely because he or she may have approved the challenged transaction or because a shareholder alleges that

the director would be reluctant to sue a fellow corporate decision-maker." Ibid. "While a showing of financial interest is certainly relevant to, and often dispositive of, [the issue of director 'interest,'] it is only one factor to be considered by the finder of fact." Borden, supra, 530 F.2d at 495.

Here, plaintiffs failed to present any evidence that any of the directors on the Compensation Committee received any financial gain in setting Celentano's cash compensation. Rather, according to plaintiffs, "[t]he compensation to Celentano involved self-interest because this was an adjunct to removal of Hahofer." Plaintiffs failed to establish any relationship between Hahofer stepping down as Chair in 2001, and Celentano's cash compensation in 2003, and beyond. The record shows that Celentano's cash compensation was approved by a majority of independent, disinterested directors.

Plaintiffs also failed to demonstrate that the directors breached their duty of care. "[D]irectors must discharge their duties in good faith and act as ordinarily prudent persons would under similar circumstances in like positions." Francis v. United Jersey Bank, 87 N.J. 15, 30-31 (1981). To discharge its duty of care, the Board and the directors are required to obtain all material information reasonably available to them when making the decision, and act with the requisite care in the discharge of their duties. See id. at 30-33. See also Cede &

Co. v. Technicolor, 634 A.2d 345, 367 (Del. 1993), modified on other grounds, 636 A.2d 956 (Del. 1994).

To rebut the business judgment rule based on a breach of the duty of care, the challengers must establish gross negligence on the part of the board. PSE&G, supra, 173 N.J. at 296. See also Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), overruled in part on other grounds by Brehm, supra, 473 A.2d at 254 (holding appropriate standard is gross negligence). Here, the board members had the assistance of outside advisors; they reviewed substantial data regarding the compensation paid to senior executives by other New Jersey institutions in setting Celentano's cash compensation. There is simply no evidence that the directors were grossly negligent in setting Celentano's cash compensation.

Thus, a fortiori, plaintiffs have also failed to demonstrate that Celentano's cash compensation was unconscionable. Plaintiffs attempt to meet their burden by lumping Celentano's cash compensation with the award of stock and options, and the retirement plan, is facially unavailing. The directors reviewed substantial data regarding the compensation packages of other executives of similarly sized financial institutions and sought the assistance of outside advisors prior to setting Celentano's cash compensation. There is also no evidence of fraud or self-dealing by the Board. We

reach a similar conclusion with respect to the awards of stock and stock options to Celentano.

We next address the Board's Equity Incentive Plan. The court found that the awards under the shareholder approved Equity Incentive Plan were consistent with other incentive plans of financial institutions of similar size. The Board reached this decision after the directors obtained the advice of outside counsel and advisors. The court found that the decision was thus protected by the business judgment rule. We agree.

"[W]here board members vote themselves stock options and do not obtain stockholder ratification," they are deemed to be "interested" in the transaction and are not entitled to the presumption of the business judgment rule; "they themselves have assumed the burden of clearly proving their utmost good faith and the most scrupulous inherent fairness of the bargain." Gottlieb, supra, 91 A.2d at 58. "Where there is stockholder ratification, however, the burden of proof is shifted to the objector." Ibid.

In cases of shareholder ratification, "the court will look into the transaction only far enough to see whether the terms are so unequal as to amount to waste, or whether, on the other hand, the question is such a close one as to call for the exercise of what is commonly called 'business judgment.'" Ibid. Indeed, "[i]t is axiomatic in such cases that the courts will

not substitute their own 'business judgment' for that exercised in good faith by the stockholders." Ibid.

Here, because the directors awarded themselves stock and stock options, they were clearly "interested" in the transaction. Because the awards were made pursuant to a shareholder approved plan, however, the burden shifted to the plaintiffs. Ibid. They failed to meet this burden. There is no evidence showing self-dealing on the part the directors, or any "other disabling factor," necessary to rebut the business judgment rule. Maul, supra, 270 N.J. Super. at 614. For the reasons explained herein, plaintiffs failed to demonstrate that the directors breached their duty of care, or were otherwise unconscionable. Our conclusion in this respect also applies to the retirement plan.

IV

We now address plaintiffs' argument with respect to corporate waste. Specifically, plaintiffs claimed the following constituted waste: (1) paying Hahofer as a consultant; (2) paying Celentano an excessive salary and benefits package; (3) allocating the maximum benefits under the Equity Incentive Plan; and (4) approving and continuing a retirement plan for the Board.

The trial court determined that plaintiffs failed to establish waste as to Celentano's salary and benefits package,

the awards under the Equity Incentive Plan, and the approval and continuation of the retirement plan. The court determined, however, that retaining and compensating Hahofer as a consultant constituted waste.

Plaintiffs argue that the court incorrectly applied the doctrine of waste. We disagree. We are satisfied that the court properly articulated the corporate waste doctrine and applied it to plaintiffs' claims of waste as to Celentano's compensation, the allocations under the Equity Incentive Plan, and the retirement plan.

Corporate waste is an "extreme test, very rarely satisfied by a shareholder plaintiff." Zupnick v. Goizueta, 698 A.2d 384, 387 (Del. Ch. 1997). The judicial standard for determination of corporate waste, however, is well developed:

> [W]aste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift. If, however, there is any substantial consideration received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude ex post that the transaction was unreasonably risky. Any other rule would deter corporate boards from the optimal rational acceptance of risk, for

> reasons explained elsewhere. Courts are ill-fitted to attempt to weigh the "adequacy" of consideration under the waste standard or, ex post, to judge appropriate degrees of business risk.
>
> [Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997) (citations and emphasis omitted) (cited with approval in Brehm, supra, 746 A.2d at 263).]

Thus, "[d]irectors are guilty of corporate waste, only when they authorize an exchange that is so one-sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. 1993). "[A] board's decision on executive compensation is entitled to great deference." Brehm, supra, 746 A.2d at 263. See also Haber v. Bell, 465 A.2d 353, 359 (Del. Ch. 1983). Indeed, "[i]t is the essence of business judgment for a board to determine if a particular individual warrant[s] large amounts of money, whether in the form of current salary or severance provisions." Brehm, supra, 746 A.2d at 263 (internal quotation marks and citations omitted).

Under the totality of the circumstances, we agree with the trial court that "the directors acted in good faith and that the corporation received a benefit from Celentano's services." Celentano was deeply involved in the conversion process, requiring his full attention. He was constantly involved and in

communication with attorneys, accountants, corporate appraisers, and investment bankers. Also, prior to the effective date of the conversion, Celentano spent considerable time locating branch sites and negotiating other branch opportunities.

Although plaintiffs argue that Celentano's duties were duplicative of Celuch's duties, and that his compensation was excessive, they failed to establish that Celentano's cash compensation constituted corporate waste. There was substantial evidence distinguishing Celentano's role as CEO and Celuch's role as president of Clifton. Defendants presented evidence that other similar financial institutions employed both a full-time Chairman of the Board and a full-time president; Celentano's cash compensation as Chairman of the Board was reasonable for an institution of Clifton's size. There was a good faith basis for the Board to select Celentano as a person well-suited to take the bank through the conversion process.

We reject plaintiffs' arguments attacking the Equity Incentive Plan based on the doctrine of waste for the reasons previously discussed herein. By way of summary, the record shows that the directors' actions were not tainted by self-interest, and the plan was properly ratified by the shareholders. In short, plaintiffs have failed to meet the burden of showing "that no person of ordinary business judgment could be expected to entertain the view that the consideration

furnished was a fair exchange for the options conferred." Eliasberg, supra, 23 N.J. Super. at 449.

The same reasoning applies to the retirement plan. The terms of the plan were released in a prospectus to all of the shareholders. It was also approved by the DBI. Plaintiffs were completely aware of the retirement plan when they purchased Clifton stock. Defendants provided expert testimony which established that between 17% to 19% of similarly situated financial institutions had director retirement plans. Plaintiffs have not presented any evidence that defendants acted intentionally to injure the bank or its shareholders, or that the retirement plan damaged or jeopardized the financial well-being of Clifton.

V

Plaintiffs prevailed, however, with respect to their claim for waste relating to the payments to Hahofer under the consulting agreements. The trial court held that "[t]hose sums [paid to Hahofer] shall be returned to [Clifton], paid equally by each director, including Mr. Hahofer." Without explanation, the court entered a supplemental order setting $49,252.32 as the amount to be repaid to Clifton. Although Hahofer received $91,941.00, it appears that only $49,252.32 was paid after the conversion.

Plaintiffs appeal from that ruling arguing that the court erroneously reduced the amount required to be repaid to Clifton pursuant to the Hahofer consulting agreements. According to plaintiffs, Clifton is entitled to reimbursement of all of the consulting payments to Hahofer totaling $91,941.00, which would include money paid before the conversion.

We reject this argument. Plaintiffs lack standing to challenge the transactions of Mutual. Because plaintiffs were not members of Mutual, plaintiffs cannot recover any payments made to Hahofer prior to the conversion. They can only recover payments made after Clifton's conversion to a publicly traded corporation.

Despite correctly rejecting plaintiffs' claims in this respect, the trial court made no findings of fact as to the amounts paid to Hahofer under the consulting agreements, or how much was paid after the conversion. Accordingly, we are compelled to remand this matter for the trial court to determine the appropriate amount to be repaid to Clifton as a result of the Hahofer consulting agreements. R. 1:7-4. Recovery would be limited to payments made to Hahofer after plaintiff Seidman and Associates, L.L.C. obtained the stock which conferred the requisite standing to bring this action.

In New Jersey, "the contemporaneous ownership rule governs the issue of standing to bring a derivative suite." Pogostin,

supra, 216 N.J. Super. at 371. Under the contemporaneous ownership rule, a stockholder lacks standing to challenge a transaction unless he or she was a stockholder of the corporation at the time of the challenged transaction. Conrad v. Blank, 940 A.2d 28, 41 (Del. Ch. 2007). Indeed, N.J.S.A. 14A:3-6(1) of the New Jersey Business Corporation Act deals with actions by shareholders and expressly provides that:

> No action shall be brought in this State by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares . . . at the time of the transaction of which he complains, or his shares . . . devolved upon him by operation of law from a person who was a holder at such time.
>
> [(Emphasis added).]

See also R. 4:32-3 (which states that in a derivative action, "the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction complained of, or that the share thereafter devolved by operation of law.").

Plaintiffs argue that Seidman has standing to challenge the payments made to Hahofer prior to the conversion because Seidman was a depositor at, and therefore, a member of Mutual. We disagree. As the trial court recognized in its October 10, 2006 opinion, Seidman ceased being a shareholder of Clifton in November 2004, prior to commencement of this action, when he sold his stock. Seidman had no derivative standing to sue

Clifton. To cure this problem, the court granted plaintiff's "request to substitute Seidman and Associates L.L.C. as a plaintiff."[6]

Because Seidman and Associates, L.L.C. was not a depositor of Mutual, it has no standing to assert a claim that related to a transaction prior to conversion. It only has standing to challenge transactions that occurred subsequent to its acquisition of its stock. N.J.S.A. 14A:3-6(1); R. 4:32-3. See also Conrad, supra, 940 A.2d at 41.

Plaintiffs also argue that Clifton, as a stock association, assumed the liabilities of Mutual. In support of this proposition, plaintiffs cite N.J.S.A. 17:12B-261, which provides:

> Upon the conversion of the mutual association, the legal existence of the association shall not terminate but the capital stock association shall be a continuation of the entity of the mutual association and all property of the mutual association . . . . The capital stock association shall have, hold and enjoy the same in its own right as fully and to the same extent as the same was possessed, held and enjoyed by the mutual association. The capital stock association as of the time and the taking effect of the conversion shall continue to have and succeed to all the rights, obligations and relations of the mutual association.

[6] Seidman and Associates, L.L.C., acquired one thousand shares of stock in Clifton on July 22, 2004.

[(Emphasis added).]

We agree that Clifton, as the stock association, shall continue to have and succeed to all the obligations of the mutual association. This does not confer plaintiffs with derivative standing to challenge the Hahofer consulting agreements prior to conversion. Plaintiffs only obtained derivative standing when Seidman and Associates, L.L.C., acquired a shares of stock in Clifton Savings on July 22, 2004.

VI

As a prevailing party concerning the fees paid to Hahofer under the consulting contract, plaintiffs moved for an award of legal fees. The court concluded that plaintiffs were entitled to attorney fees proportionate to their success in the derivative action. Plaintiffs submitted a certification of professional services, requesting total fees and costs in the amount of $146,329.84. Without explanation, the court entered an order awarding counsel fees in the amount of $16,377.75.

Defendants do not dispute that plaintiffs are entitled to a partial award of counsel fees. Plaintiffs argue that the court erred by improperly reducing the award of counsel fees.

Because the trial court did not explained how it determined the amount of fees and costs awarded, we are compelled to remand this issue for further consideration. On remand, the court

shall apply the standards articulated by the Court in Rendine v. Pantzer, 141 N.J. 292 (1995), and determine, with particularity, the amount of fees and costs plaintiffs are entitled to recover, limited to the part of the legal action upon which they prevailed: the fees paid to Hahofer after Clifton's conversion.

Affirmed in part, and remanded for further consideration consistent with this opinion. We do not retain jurisdiction.