No. 20-144

In The

SUPREME COURT OF THE UNITED STATES

SPENCER SAVINGS BANK, SLA, JOSE B. GUERRERO, PETER HAYES, NICHOLAS LORUSSO, BARRY MINKIN, JOHN STURGES, ANTHONY S. CICATIELLO, AND ALBERT D. CHAMBERLAIN,

Petitioners,

v.

LAWRENCE B. SEIDMAN,

Respondent.

On Petition For a Writ of Certiorari to The
Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is there a legitimate question – much less of question of importance – implicated as Petitioners suggest?

The question is: Can a bank, which has been found and determined to have closed savings deposit accounts in bad faith and for pretextual reasons, have its misconduct validated on the theory that statutes and regulations requiring the filing of Suspicious Activity Reports ("SARs") permit unjustified and bad faith closures of deposit accounts?

If Petitioners' position that the state court's mandate requiring the wrongfully closed accounts to be re-opened actually implicated important federal questions, then why was this position not raised before the trial or appellate courts and only raised as an afterthought in the rejected Petition for Certification submitted to the New Jersey Supreme Court?

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REPLY STATEMENT OF CASE

A. Factual Background and Decision Below

Petitioners assert that Spencer's depositor account agreements **always** gave it the right to close accounts for any reason or no reason. (Petition at page 7) This is not so. The trial court specifically found that this discretion regarding closures was not adopted until 2012 – long after the subject accounts were opened. (App. 62 to 63) [1]

Spencer claims that it was its view that Respondent violated the N.J. RICO (civil) statute. (Petition at page 7). This is also untrue. The trial court concluded that the RICO claim was not legitimate and was solely presented to provide a pretextual justification for closing the savings deposit accounts, which included accounts maintained by Respondent's relatives, who were not even charged with these concocted claims. (App. 63)

Spencer claims that the trial court reversed itself after the trial, and re-instated the accounts notwithstanding "binding authority to the contrary." Ambruster v. National Bank of Westfield, 116 N.J.L. 122 (E. & A. 1936). (Petition at page 8). Three corrections are warranted: (i) The trial court simply, and solely, refused to re-open the accounts pending trial; but, held that the closures did not deprive Respondent of standing to continue prosecuting the case; (ii) Ambruster was not even cited by Petitioners in their filings, including their post-trial brief and their appellate brief (this case was first cited in the Petition for Certification filed with the New Jersey Supreme Court); and (iii) actually, Ambruster recognized that

[1] Citations to the Appendix submitted on behalf of Petitioners shall be "App."

a bank could be liable for the malicious (an intentional undertaken act without just cause or excuse) closing of a checking account.

The New Jersey Appellate Division affirmed the trial court's fact findings and legal conclusions. (App. 37 to 38).

Petitioners include arguments in this section – not background facts – that the subject decision places an unjustified burden on a bank that wants to comply with the law and eliminate customers engaged in proscribed suspicious activities; and, the failure to close the savings deposit accounts would have exposed Spencer to liability for complicity in Respondent's misconduct. (Petition at page 9). Borrowing from a television commercial: "Where's the Beef?", how is it a burden to operate in good faith? Obviously, it is a burden for Petitioners; but, certainly not an unjustified one. As to the complicity, this is truly fanciful, since there was no misconduct by Respondent, the RICO counterclaim was dismissed on motion to dismiss and was determined to have been concocted to provide a seemingly legitimate basis for its bad faith closing of the deposit accounts.

Petitioners conclude this section with the complaint that the New Jersey Supreme Court denied certification without addressing the argument that the closure decision "contravenes federal banking policy." (Petition at page 9). This statement fails to mention the fact that this so-called question of federal banking policy was not even mentioned at the trial or appellate levels and only added as an afterthought in the last two pages of the 20 page Petition for Certification filed with the New Jersey Supreme Court.

SUMMARY OF ARGUMENT

This case involved a challenge by Respondent Lawrence B. Seidman to the corporate governance of Petitioner Spencer Savings Bank SLA ("Spencer").

Spencer is a New Jersey state chartered mutual savings and loan association and Respondent, as a depositor, is a member of Spencer with voting rights. Spencer, with the approval of the individual Petitioners (the "Directors"), closed the savings deposit accounts maintained by Respondent and his family. Their alleged justification for these closures was that something needed to be done because Spencer was filing a New Jersey RICO (civil) counterclaim, which was promptly dismissed on motion for failure to state a claim. After trial, it was determined by the trial court that the proffered justification for the savings deposit account closures was pretextual and the real reason was to deprive Respondent of standing to challenge the Directors' actions and entrenchment. The trial court concluded that the account relationship between a depositor and a bank is contractual and, as a result, a bank can only unilaterally close the account if it acts fairly and in good faith.[2] It was expressly determined that the closures were done in bad faith and Spencer was accordingly required to reinstate the savings deposit accounts.

Spencer's Petition presents no issue warranting certiorari. Spencer does not contest the determination it acted in bad faith and that the proffered justifications were a pretextual cover-up of its improper motives. The proffered reliance upon the statute and regulations requiring the filing of SARs is frivolous for one simple

[2] New Jersey law provides that every contract includes an implied covenant of good faith and fair dealing. Sons of Thunder v. Borden, 148 N.J. 396 (1997).

reason - to wit: a SAR must be filed in good faith and based upon a reasonable belief there has been illegal activity with respect to the account. 12 C.F.R. §163.180(b) and (d).

This Court should accordingly deny certiorari.

REASONS FOR DENYING THE PETITION

1. THE DECISIONS BELOW DO NOT CONTRAVENE FEDERAL LAW

Petitioners urge that this case is of "immense importance", because it implicates the issuance of early warnings about terrorist activities, money laundering and other financial crimes. This is allegedly so because a bank can (or, per Petitioners, must) terminate an account after filing of a SAR without disclosure of the fact that a SAR was filed. This argument is without any legitimacy, because:

(a) There was no misconduct here to report – no terrorist activities, no money laundering and no financial crimes. Rather, Petitioners, acting in bad faith, closed the savings deposit accounts and manufactured a false narrative to validate this wrongful action.

(b) The statute, 31 U.S.C. § 5318(g)(1), provides for the reporting of suspicious transactions relevant to a possible violation of law or regulation. The regulation, 12 C.F.R. § 21.11(a), requires the filing of a SAR when a known or suspected violation of federal law or a suspicious transaction related to money laundering or a violation of the Bank Secrecy Act is detected. Finally, 12 C.F.R. § 163.180(b) prohibits the filing of false or misleading statements with federal bank regulators by savings associations and subparagraph (d) lists a SAR as a required statement. Hence, Spencer could not have filed a baseless SAR to report actions it knew to be unfounded.[3]

[3] It is not without irony that Petitioners recognize the existence of the good faith obligation imposed under the federal scheme by quoting from the Bank Secrecy Act/Anti-Money Laundering

(c) Even if a SAR is filed, the bank is not precluded from disclosing the underlying misconduct as the reason for closing the subject account. Example: a customer is "kiting checks." Clearly, this is reportable conduct and the fact that the account was closed for "kiting checks" is disclosable, since the statute solely precludes disclosure of the filing the SAR. 12 C.F.R. § 21.11(k); 12 C.F.R. § 163.180(i).

Petitioners conclude their argument by asserting: "the filing of a SAR will almost always be coupled with termination of the customer's account." (Petition at page 14) This statement could arguably be correct; provided the SAR was filed based upon the detection of what the bank has in good faith and reasonably concluded is unlawful recurring misconduct. This would *a fortiori* make the closure of the account the by-product of a good faith decision. Obviously, however, the converse is not true – *i.e.*, a bank cannot make an unjustified and bad faith decision to close a deposit account and then file a baseless SAR to provide a fictitious justification for the closure.

Comptroller's Handbook 2000 that there must be: "facts which lead to a reasonable presumption that money held on deposit derives from criminal activity or that transactions entered into are themselves criminal in purpose". (Petition at page 13).

2. THE SO-CALLED SAFE HARBOR PROVISION DOES NOT VALIDATE BAD FAITH CLOSURES OF DEPOSIT ACCOUNTS.

Petitioners assert that the Safe Harbor Provision of the Bank Secrecy Act, which immunizes banks from liability for the filing of a SAR, should likewise give banks freedom to close accounts in bad faith without being challenged. (Petition at pages 14-17). The mere statement of this proposition supplies its refutation.

In actuality, the filing of a SAR is unrelated to the decision to close an account. Clearly, if a bank – particularly a state chartered savings and loan association – takes the mean spirited step of unjustifiably closing a member's[4] savings deposit account in bad faith, it is subject to having a court require that it reinstate the accounts.

3. THE STATE COURT DECISIONS DO NOT VIOLATE THE PREEMPTION DOCTRINE

Petitioners claim that the imposition of the requirement that a savings deposit account at a state chartered savings and loan association can only be unilaterally closed in good faith interferes with the accomplishment of the Bank Secrecy Act's "obvious purposes" and is preempted. (Petition at page 18) In order for the claim to even be worthy of discussion, it would first have to be established that the Bank Secrecy Act is intended to promote over-reaching misconduct that is designed to wrongfully entrench the directors of a bank and insulate them from

[4] The depositors are members for whom the association exists. N.J.S.A. 17:12B-74. They have liquidation rights (N.J.S.A. 17:12B-229) and the right to elect the directors who are responsible for supervising the operations of the association. N.J.S.A. 17:12B-115.

challenges for their seats. Obviously, this is not a purpose of the Bank Secrecy Act and there is, therefore, no preemption issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: September 11, 2020

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