IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

STEVEN CHASE, and SHAWN PENNER,	)	
Plaintiffs,	)	No.: 4:17-cv-00094-DGK
v.	)	
FIRST FEDERAL BANK OF KANSAS CITY, et al.,	)	
Defendants.	)	

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF MOTION TO DISMISS

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The financial institution at the center of Plaintiffs' Amended Complaint, Inter-State Federal Savings and Loan Association of Kansas City ("Inter-State"), was organized as a mutual savings association, a form of financial institution subject to a legal regime very different from that applicable to stock financial institutions. Plaintiffs' causes of action in this case are predicated on a fundamental misunderstanding of that distinction. Plaintiffs claim that they and other depositors had ownership rights in Inter-State's capital that entitled them to compel a capital distribution at the time Inter-State was merged into another mutual savings association. That position is contrary to well-established law. For that reason, the Office of the Comptroller of the Currency ("OCC") files this brief in support of dismissal of the Amended Complaint.

INTEREST OF THE *AMICUS CURIAE*

The OCC is a bureau of the United States Department of the Treasury charged with, *inter alia*, the administration of the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461 *et seq.*

("HOLA"), and the system of Federal Savings Associations ("FSAs"), which previously had been supervised by the Office of Thrift Supervision ("OTS"). The OCC is the primary federal regulator for FSAs generally, and for the category of FSAs comprising mutual savings associations specifically. The OCC is authorized generally to represent itself in litigation by 12 U.S.C. § 93(d).

STATEMENT OF THE CASE

1. "FEDERAL SAVINGS ASSOCIATIONS " AND "MUTUAL SAVINGS ASSOCIATIONS"

Savings institutions, as distinct from other forms of financial institutions, evolved to provide a vehicle for family savings that were invested primarily, if not exclusively, in residential mortgages. J. Williams, "*Savings Institutions: Mergers, Acquisitions and Conversions"* (updated 2017) ("*Savings Institutions*.") § 1.01 at 1-1. Savings associations may be federally chartered or state-chartered, and in either case may be organized as a mutual savings association or stock savings association.[1] The earliest savings associations, in the early 19th Century, were organized as mutual institutions rather than stock institutions. *Mutual Savings Banks—A Primer*, American Bankers Association 2009 at 1. Beginning in the early 1980's, the predominant form of organization of savings associations began to shift from mutual to the stock form, in part through a choice of organization at the time of chartering and in part through

[1] The terminology of FSAs can be confusing, and varies among state and federal systems. There is no distinction between the terms "federal savings association," and "federal savings banks" as a matter of federal supervisory law; they are both "federal savings associations" under the HOLA. *See* 12 U.S.C. § 1462(2). "State savings associations" and "state savings banks" generally are not equivalent, however, and are typically governed by different sets of state statutes. Also, under the Federal Deposit Insurance Act, "state savings associations" are generally savings associations, and "state savings banks" are generally banks. *See* 12 U.S.C. §§ 1813(a)(2), 1813(b), and 1813(g).

"conversion" from mutual to stock. *Savings Institutions* § 1.01 at 1-4.[2] According to OCC information, 148 FSAs maintained the mutual form of organization as of December 31, 2016. *Federal Savings Association (FSA) Report of Condition (March 15, 2017*) at 5.

Mutual savings associations originally developed under state law, but legislation in 1933[3] made a federal mutual charter available under the supervision of a new federal agency, The Federal Home Loan Bank Board ("FHLBB"). *Savings Institutions* § 1.03[2] at 1-15; *see* HOLA § 5, chap. 64, 48 Stat. 128, 132. In 1989, legislation created the Office of Thrift Supervision ("OTS"), an independent bureau of the Treasury Department, to replace the FHLBB as the supervisor of federal savings associations and federal savings banks. *Savings Institutions* § 1.03[4] at 1-18. That system was changed again in 2010 by legislation[4] (effective in 2011) that merged OTS into, and transferred primary supervision over federal savings associations to, the OCC, in addition to the OCC's existing authority over national banks. *Savings Institutions* § 1.03[8] at 1-26.

The standard federal mutual charter[5] provides that all holders of the savings association's authorized accounts (*i.e.*, the depositors and in some cases, the borrowers) are "members" of the

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[2] Federal mutual banks were first statutorily authorized to convert to state stock charters in 1948, and to convert to federal stock charters in 1974. *See Savings Institutions* § 7.02.

[3] HOLA, 12 U.S.C. §§ 1461 *et seq.*

[4] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 124 Stat. 1388 (July 21, 2010) ("The Dodd-Frank Act").

[5] The OCC and previous supervisors of mutual federal savings associations (the OTS and the FHLBB) set forth standard charter provisions for these institutions in their regulations. *See, e.g.*, 12 C.F.R. § 5.21(e). FSAs are permitted to amend their charters, but, subject to limited exceptions, must either apply to the OCC for approval of the change or provide prior notice to the OCC of the amendment, depending on the substance of the amendment.

association, and it gives the members voting rights on "all questions requiring action by the members." Federal Mutual Charter, § 6, 12 C.F.R. § 5.21(e). In the event of a voluntary or involuntary dissolution, liquidation or winding up, all of the members are entitled to "equal distribution of assets, *pro rata*, to the value of their accounts." *See, e.g.*, Federal Mutual Charter § 8, 12 C.F.R. § 5.21(e).

As these charter provisions indicate, a mutual FSA differs fundamentally from a stock FSA in forms of governance and the nature of individual interests, most prominently, the absence in a mutual of specific individual equity interests. Dwight C. Smith & James H. Underwood, *"Mutual Savings Associations and Conversions to Stock Form"* (May 1997) at 4. The net worth of the mutual savings association belongs to the members as a whole; individual members are unable to exercise the rights of equity holders. *Id.* at 10. Another fundamental difference is that whereas stock associations can raise capital by issuing stock, mutual associations are limited in their ability to raise capital. "Savings associations organized as mutual institutions issue no capital stock and therefore have no stockholders. Mutual savings associations build capital almost exclusively through retained earnings." OTS Examination Handbook 110.1 (December 2003).

The standard charter form changed over the years. The FHLBB promulgated what is essentially the current form of charter in 1979. Previous charters were denoted by letters, most significantly (for mutual FSAs) Charter E, Charter K, Charter N, and Charter K (Revised). When the supervisor established a new form of standard charter, FSAs were not required to amend previous charters to conform to the new version, so that varying active charters may coexist among FSAs. Inter-State's charter, Charter K (Revised), was first issued in 1953. As discussed later in the Brief, *infra* at 10, the Supreme Court's decision in *Paulsen v. C.I.R.*, 469 U.S. 131 (1985), construes members' rights in connection with a mutual that was organized pursuant to Charter K (Rev.).

> As a mutual institution, the ability to raise capital is restricted to retained earnings. These are the earnings that stay with the bank after expenses, salaries, taxes and interest [are] paid on accounts. It can take a long time to grow retained earnings. Because retained earnings grow slowly, many mutuals are conservative in their capital deployment and maintain healthy capital levels to weather economic storms."

Mutual Savings Banks—A Primer, American Bankers Association (2009) at 2.

2. THE COMPLAINT IN THIS CASE

Plaintiffs Chase and Penner, and the class they seek to represent, were depositors in a mutual federal savings bank, Inter-State Federal Savings and Loan Association of Kansas City ("Inter-State"). Amended Complaint ("Compl.") ¶¶ 1, 8, 9 [Doc. 6]. In 2016, pursuant to a vote of Inter-State's board of directors, and OCC approval (OCC CRA Decision #173, March 2016), Inter-State was merged into another mutual FSA, First Federal Bank of Kansas City ("First Federal"), which is the successor entity. Compl., ¶¶ 4, 10. The Defendants are First Federal and individual members of the board of directors of First Federal who had also been members of the board of directors of Inter-State. Compl. ¶¶ 10-15.

The Amended Complaint asserts that Inter-State's Charter required that the defendants make a "mandatory" distribution of Inter-State's "excess earnings" to the depositors, and that no such distribution was made. Compl. ¶¶ 2, 3. The Amended Complaint asserts that Inter-State's Charter required a depositor vote to approve the merger, and that no such vote was taken. Compl. ¶ 5. The Amended Complaint asserts that, because at the time of the merger Inter-State had $25 million more in capital than First Federal, the Plaintiffs' ownership interest was "significantly diluted," without compensation. Compl. ¶ 5. The Amended Complaint asserts that the Inter-State board of directors failed to hire an experienced independent banking consultant to conduct a neutral evaluation of the merger. Compl. ¶ 6.

The Amended Complaint asserts causes of action against the individual directors for: breach of fiduciary duty (Compl.¶¶ 52-55), unjust enrichment (Compl. ¶¶ 56-59), and conversion (Compl. ¶¶ 60-63). The Amended Complaint seeks as relief an order certifying a class action, damages in excess of $5 million in an amount to be determined at trial, costs, attorneys' fees, prejudgment interest, disbursements, and all other such relief as the court deems just and proper. Compl. Prayer for Relief.

ARGUMENT

PLAINTIFFS MISSTATE THE LAW APPLICABLE TO FEDERAL MUTUAL SAVINGS BANKS

Plaintiffs' assertion of a right to a "mandatory distribution" of retained earnings misunderstands the nature of mutual savings association "ownership," and is contrary to judicial authority and agency interpretation and practice. Furthermore, any such mandatory distribution would contravene OCC supervisory policy that, as a matter of safety and soundness, strongly favors retention of capital as a cushion against losses, especially in the case of mutual FSAs. Plaintiffs' claim of an entitlement against "dilution" of their interests because of the different retained earnings each savings association brought to the merger presupposes an individualized equity interest that does not exist in a mutual savings association. Plaintiffs' claim that they were entitled to a vote as a precondition to the merger finds no support in the Inter-State Charter or applicable law, and is contradicted by an OCC regulation that provides that the OCC *may* require such a vote, strongly implying that a right to a vote is not inherent. For these reasons, the Amended Complaint should be dismissed.

1. Under Federal Judicial Authority And Agency Interpretation, Members of Mutual Savings Banks Have No Individualized Equity Interest in the Bank's Retained Earnings.

By claiming that depositors "own" the capital of Inter-State, the Plaintiffs demonstrate that they fundamentally misunderstand the nature of depositors' interests in a mutual FSA. While depositors of a mutual FSA do have the right to receive a *pro rata* distribution of capital of a mutual FSA in the unlikely event that a solvent institution dissolves,[6] they do not have the ability to compel distributions of capital in other contexts.

The U.S. Supreme Court, in addressing the nature of ownership in a mutual institution,[7] drew a bright line between stockholders' interests in stock banks and depositors' interests in mutual savings associations.

> The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility that hardly rises to the level of an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositors can readily transfer, any theoretical value reduces almost to the vanishing point.

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[6] *See* section 8 of the current version of the standard mutual FSA charter, and section 10 of Inter-State's charter. Regulators of mutual FSAs (currently the OCC and previously the OTS and FHLBB) have not allowed voluntary dissolutions of mutual FSAs unless the mutual FSA at issue reflected significant supervisory concerns and an alternative such as a standard conversion to stock form was not feasible. Among the supervisory reasons for disapproving a voluntary dissolution is the potential for insider abuse. *Savings Institutions* § 6.08.

[7] The mutual associations involved in *Bowers* were a state mutual savings association and a federal mutual savings association. The Supreme Court's analysis applied to both without distinction. "Nothing turns here on the difference in their origins." 349 U.S. at 144 n.3.

Society for Savings v. Bowers, 349 U.S. 143, 149-150 (1955). The Supreme Court repeated that conclusion in a later case: "The right to participate in the net proceeds of a solvent liquidation is also not a significant part of the value of the shares." *Paulsen v. C.I.R.*, 469 U.S. 131, 139 (1985). The Court in *Paulsen* also observed that, in mutuals: "The right to vote is also not very significant." *Id.* at 138.

Lower courts in several circuits have also emphasized that depositors in federal mutual savings associations generally do not have any entitlement to the retained earnings of those associations, a principle that cannot be reconciled with Plaintiffs' causes of action. In rejecting a challenge by depositors to a conversion from a mutual savings association to a stock association, the Seventh Circuit underscored the limited rights that inhere in membership in a mutual FSA:

> The mutual form of organization is an odd duck. Nominally the customers own the mutual, but it is ownership in name only. They cannot sell what they 'own,' and if they withdraw savings they receive only the nominal value of the account rather than a portion of the mutual's net worth, which is valuable to them only to the extent it permits the bank to pay higher interest.

Ordower v. Office of Thrift Supervision, 999 F. 2d 1183, 1185 (7th Cir. 1993). Similarly, the Fourth Circuit rejected a challenge to a conversion from mutual form to stock form predicated on loss of property rights, observing that:

> Although the depositors are the legal "owners" of a mutual savings and loan association their interest is essentially that of creditors of the association and only secondarily as equity owners. Depositors' rights are circumscribed by statute and regulation. They are not allowed to realize or share in the profits of the association, but are entitled only to an established rate of interest. The depositors do not share in the risk of loss since their deposits are federally insured, and their only opportunity to realize a gain of any kind would be in the event the savings and loan dissolved or liquidated.

York v. Federal Home Loan Bank Board, 624 F. 2d 495, 499-500 (4th Cir. 1980). The court further observed that "federal regulations prohibit savings and loans from dissolving without Bank Board

approval, and no solvent organization has ever secured approval for dissolution.[8] Thus, it is apparent that depositors will not be deprived of property rights by conversion to a federal stock organization." *Id.* *See also Reschini v. First Federal Sav. And Loan Ass'n of Indiana*, 46 F.3d 246, 248 (3d Cir. 1995) ("proprietary interest of a depositor-member in a mutual savings association is a chimera").

This judicial authority denying that members of a mutual savings association have a property interest or an individualized equity interest in the institution's retained earnings cannot be squared with the Plaintiffs' cause of action relying upon just such a property interest. Accordingly, Plaintiffs fail to state a right to a "mandatory distribution" or a right against non-dilution of their nonexistent ownership interest in the retained earnings.

Building upon judicial authority and agency experiences, the OTS, in 2002, issued a Letter from its Chief Counsel considering the question whether depositors in a federal savings association had a right to require a distribution of capital, and concluded that those rights are narrowly limited:

> In brief, we conclude that federal law does not give the members of federal mutual savings associations any right to dividends or other distributions of the capital of such savings associations, with two exceptions. Those exceptions are: (a) if the board of directors of the savings association has exercised its discretion to declare a dividend and complied with applicable OTS regulations; and (b) if there is an OTS authorized solvent liquidation of the institution.

Chief Counsel Letter P-2002-7 (June 21, 2002), at 1. Neither exception cited in the Chief Counsel Letter applies here – the board of directors have not declared a dividend, nor has the OTS (or the OCC) authorized the liquidation of the institution. The Chief Counsel Letter ultimately concluded that "owners of federal mutual savings associations have only very limited

[8] Since this statement in *York*, in 1980, a few such dissolutions have been authorized as a means of resolving mutual federal savings associations that presented regulatory concerns.

interests in those institutions and those interests do not include any rights as owners to demand a distribution of the institution's capital." Chief Counsel Letter at 5.[9]

Notwithstanding these general principles applicable to mutual FSAs, the Plaintiffs assert that a provision of the Inter-State Charter gave its depositors/members the right to distributions of income from Inter-State twice a year. The language of the charter states:

> As of June 30 and December 31 of each year, after payment or provision for payment of all expenses, credits to general reserves and such credits to surplus as the board of directors may determine, and the provision for bonus on savings accounts as authorized by regulations made by the Federal Home Loan Bank Board, the board of directors of the association shall cause the remainder of net earnings of the association for the 6 months' period to be distributed promptly on its savings accounts, ratably, as declared by the board of directors, to the withdrawal value thereof . . .

Inter-State Charter § 10. This provision, however, does not operate in the manner claimed by Plaintiffs, nor can Plaintiffs' interpretation be reconciled with the caselaw.

First, the charter does not support the Complaint's suggestion that any retained earnings in excess of minimum regulatory requirements should routinely be distributed to members/depositors. The charter does not speak to "minimum requirements," but instead expressly provides that any distributions to members would occur only after the board of directors exercised its discretion to make "such credits to general reserves and surplus as the board of directors may determine." *Id.* Because mutual FSAs routinely retain significant amounts of capital to support expansion, and for protection against losses, it is a legitimate business judgment for directors to conclude that it is appropriate to retain its earnings as a reserve, leaving no excess to distribute. In such cases, the OCC would not expect, and does not

[9] This Letter remains effective agency authority. A provision of the Dodd-Frank Act, which transferred OTS authority to the OCC, states that various forms of OTS authority, including interpretations and guidelines, would remain in effect. Dodd-Frank Act, § 316(b).

interpret the charter as requiring, specific declarations stating that the board has determined to add earnings to surplus.

Second, the result urged by Plaintiffs could not be reconciled with the conclusions of the courts in *Bowers* and *York* above, which were decided when *all* mutual charters contained a version of the quoted language from section 10 of the Inter-State Charter.[10] Indeed, the Supreme Court's *Paulsen* decision expressly states that the mutual in that case was organized pursuant to Charter K (Rev.), the charter used by Inter-State. *Paulsen*, 469 U.S. at 137. There is accordingly no basis in the applicable charter for distinguishing this dispositive authority.

In addition, Plaintiffs' urged interpretation would be contrary to strongly-held supervisory policy. The maintenance of adequate capital is a fundamental aspect of financial institution safety and soundness generally, and an abiding concern of financial supervisors. *See, e.g.*, *Guidance for Evaluating Capital Planning and Adequacy*. OCC Bulletin 2012-16. This principle applies to mutual institutions:

> Mutuals are subject to the same regulatory capital requirements as stock banks. The OCC has the same authority for setting individual minimum capital requirements for mutual as for stock banks. A difference, however, is that mutuals have very limited means to increase regulatory capital quickly. Therefore, capital planning is critical for mutuals.

Mutual Savings Associations, Characteristics and Supervisory Considerations, OCC Bulletin 2014-35 at 2. Bulletin 2014-35 addresses why, as a practical matter, there are no satisfactory alternatives to retained earnings as capital. *Id.*[11] Accordingly, a mutual FSA that seeks to

[10] The provision relied upon by Plaintiffs was contained in Charter K, Charter K Revised, and Charter N, and a similar provision was contained in Charter E.

[11] Bulletin 2014-35 explains the ways in which "pledged deposits" and mutual capital certificates would not effectively serve as capitalization. *Id.* at 2. A mutual may also convert to a stock form, but at the cost of transforming its organization. *Id.*

expand its operations must use retained earnings to support such expansion and retained earnings are a mutual FSA's sole source of capital to absorb losses. Mutual FSAs operate in a risk environment that includes economic fluctuations, credit and other types of risks without recourse to practical alternatives to retained capital to maintain a capital cushion. For these reasons, the OCC would have serious supervisory concerns weighing against a mutual FSA being permitted to make such distributions.

2. Contrary to Plaintiffs' Assertions, Depositors had No Entitlement to a Vote as a Condition of the Merger.

The Plaintiffs err in their argument that Inter-State's Charter granted the members of Inter-State the right to vote on the merger of Inter-State into First Federal Bank of Kansas City. Compl. ¶ 5. The Complaint does not cite to a provision of the charter in support of that assertion. To the contrary, an OCC regulation expressly authorizes the OCC to require a vote of the members in order for a merger to be effective. 12 C.F.R. § 5.33(o)(4). This provision demonstrates that a vote of the members is not otherwise required. This interpretation is confirmed by an OTS memorandum:[12] "In the case of a merger with another savings institution . . . approval of a mutual institution's members is not required unless the OTS specifically requires a vote in connection with its review of the merger transaction." *OTS Business Transactions Division Memorandum: Mutual Savings Associations and Conversion to Stock Form* (May 1997) at 13.[13]

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[12] As discussed above, this memorandum remains effective agency authority under the terms of section 316(b) of the Dodd-Frank Act.

[13] While Inter-State's charter requires a member vote for any "amendment, addition, alteration, change or repeal" of the charter, the OTS (and its predecessor, the FHLBB) never interpreted this charter provision as requiring a member vote for a merger of a mutual FSA with another mutual FSA.

CONCLUSION

For the reasons set forth above, the Amended Complaint [Doc. 6] should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Deputy United States Attorney hereby certifies that a true and correct copy of the foregoing **BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF MOTION TO DISMISS** was electronically filed with the Clerk of the Court using the CM/ECF system on this 1st day of May, 2017, which then send electronic notification to the following ECF participants:

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on this 1st day of May, 2017. The original of this **BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF MOTION TO DISMISS** will be maintained by the undersigned Deputy United States Attorney.

/s/ Jeffrey P. Ray
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