How the Court Undervalued the Plaintiffs' Equity in *Ferolito v. AriZona Beverages* –

Part I: Tax-Affecting S Corporation Earnings

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Domenick Vultaggio and John Ferolito co-founded AriZona Beverages in 1992; it has grown to become the largest privately owned beverage company in the United States. The Ferolito and Vultaggio families each own 50 percent of the parent company, Beverage Marketing USA, Inc. (BMU), an S corporation whose subsidiaries manufacture and distribute AriZona Tea and several other proprietary products (collectively, "AriZona"). By mutual agreement, Mr. Vultaggio was the manager of the business. After years of shareholder disputes, Mr. Ferolito sought dissolution under New York Business Corporation Law (BCL) §1104-a in order to require Mr. Vultaggio either to dissolve the company or to purchase his interest. Mr. Vultaggio then exercised his right under BCL §1118 to purchase Mr. Ferolito's shares of BMU at their fair value. Fair value is the standard courts use to measure the value of dissenting or oppressed shareholders. The goal of this standard is to equitably remunerate the petitioner for that which he has lost. Because the parties disputed the value of AriZona, the trial court[1] determined the fair value of AriZona and of Mr. Ferolito's shares in *Ferolito v. AriZona Beverages USA LLC.*[2]

In my opinion, the *Ferolito* decision contains two substantial problems, both of which result in material benefits to Mr. Vultaggio, the continuing shareholder, at the expense of Mr. Ferolito, who is being bought out. The first is that the Court applied an excessively high tax rate of 43.5 percent to normalize AriZona's pretax income. The second is that the Court applied a material discount for lack of marketability (DLOM) to Mr. Ferolito's interest in this situation where any DLOM was neither reasonable nor equitable. The result of applying an erroneous tax rate and 25 percent DLOM is that Mr. Ferolito will receive only about 34 percent of the value of AriZona and Mr. Vultaggio will retain 66 percent.[3] This windfall to Mr. Vultaggio is all the more unfortunate because Mr. Ferolito's right to have his shares purchased (NY BCL § 1118) was predicated on his receiving fair value.

This article, Part I, discusses the challenges in determining the appropriate tax rate for courts to use when tax-affecting S-corporation earnings and the substantial impact of applying an inappropriate rate. Part II, which will appear in the next issue, discusses the application of DLOMs in New York fair value cases.

THE COURT'S VALUATION OF ARIZONA

AriZona's revenues for the 12 months ended September 30, 2010, were about $1 billion and its EBITDA was $173 million. The trial court concluded that "AriZona's value approached $2 billion on October 5, 2010, and was a few percent less than that on January 31, 2011."[4] In arriving at its valuation, the Court tax-affected AriZona's earnings using an erroneous 43.5 percent rate.

Several experts testified in the case. Valuation testimony was provided by Z. Christopher Mercer (Mercer Capital) and Christopher Stradling (Lincoln Intl.) for Mr. Ferolito and by Professor Richard Ruback (Harvard Business School) for the defendants. Supporting testimony was given by Michael Bellas (Beverage Marketing Corp.), Basil Imburgia (FTI Consulting), and David Tabak (NERA) for Mr. Ferolito and by Dr. Shannon Pratt for the defendants.

Mr. Mercer testified that the appropriate rate for tax-affecting AriZona's earnings was 38 percent, which is a blended C-corporation rate reflecting federal and state corporate income taxes. Mr. Vultaggio argued that AriZona's earnings should be tax-affected using a 43.5 percent rate. The Court, in accepting the 43.5 percent rate, wrote that Mr. Ferolito's expert had not provided sufficient rationale or support for application of the 38 percent rate. The Judge justified his selection by stating, "[T]he tax rate of 43.5 percent urged by Vultaggio reflects the actual pass-through tax rate paid by both Vultaggio and Ferolito over the years."[5] The Judge's language in his discussion of the tax rate reveals that the depth and clarity of analysis necessary for an informed decision on the appropriate tax rate for an S corporation was either absent or had failed to enlighten him.

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***expert* TIP**

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> [T]he Court notes that Mercer never testified to any rationale for a tax rate of 38%. His reports and the demonstrative exhibits used throughout his testimony also do not offer any support for using that tax rate. There is no basis for the Court to impute a rationale for such a rate, much less to assume that a willing buyer would necessarily pay the *lower* C-Corporation tax rate of 38% percent.[6] [Emphasis added]

The Court recognized the obvious fact that the shareholders of AriZona benefitted from its tax structure:

> [C]entral to AriZona's financial success is its status as an S-Corporation. Simplified greatly, this means that Arizona's profits are passed on directly to its shareholders and taxed at the individual level, rather than the potentially higher corporate level.[7]

Nonetheless, the Court applied a *higher* tax rate to AriZona as an S corporation than would have been applicable if it were a C corporation. A large profitable company structured as an S corporation *cannot be worth less* than it would be had it been a C corporation. Although the various studies of relative values of S corporations and C corporations in acquisitions differ as to whether or not S corporations command a premium over C corporations, no study has ever concluded that S corporations sell at a discount (see EMPIRICAL STUDIES later in this article).

THE COURT SHOULD HAVE TAX-AFFECTED ARIZONA AT A C-CORPORATION TAX RATE

The Court erred in applying the individual owner's tax rate to AriZona. The Court recognized that

> [t]he tax rate component of the DCF analysis requires the Court to determine the tax rate that would be paid on AriZona's future income. A greater tax rate necessarily reduces the potential cash flow and the resulting valuation, while a lesser tax rate necessarily increases the potential cash flow and the resulting valuation.[8]

However, the Court failed to recognize an important distinction between C-corporation tax rates and the taxes paid by individual shareholders. Investors set up S corporations to *avoid* double taxation and to *reduce* the effective tax rate on income. By reducing the aggregate tax burden, S-corporation shareholders have more cash available for reinvestment – indeed, this is why AriZona's S-corporation status was important for its growth.

C corporations must pay corporate tax prior to making distributions and shareholders must then pay additional tax on any dividends. Moreover, C corporations cannot circumvent this double taxation by paying high salaries or bonuses to its control shareholders because the payments in excess of "reasonable compensation" are subject to substantial additional tax and/or penalties.[9]

The taxes paid by S-corporation shareholders constitute the entire taxes on the earnings of the business – there are no "dividends." Thus the dividend tax is avoided: the shareholder pays only once.[10] If the S-corporation structure were not tax-efficient (for example, if personal income tax rates become materially higher than corporate rates), S-corporation shareholders would likely convert to a more tax-friendly corporate structure. In contrast, a C-corporation shareholder bears not only the burden of taxes at the corporate level but also an additional individual income tax when those earnings are distributed as dividends. Shannon Pratt's classic book, *Valuing a Business,* elucidates:

> It is important to recognize that both C corps and S corps pay taxes on corporate income. Whether that tax is actually paid by the corporation or the individual is absolutely irrelevant. What is relevant is the difference between the value of a company valued as a C corporation . . . and [as] an S corporation. It is for this reason that most S corporation models begin by valuing the company 'as if' a C corporation . . . and then go on to recognize the *benefits* of the Subchapter S election. Many analysts have confused the S corporation tax issue by focusing on the deductibility of corporate taxes. However, this is not the tax that an investor avoids, and is not the tax that is forgone when a corporation elects subchapter S. . . . [W]hen [an investor] receives [a] dividend from the publicly traded [C corporation] stock, the investor will have to pay a dividend tax on it. In the case of an S corporation, this tax is avoided; and . . . *the benefit of the avoided dividend tax must be taken into consideration.*[11] [Emphasis added]

What Dr. Pratt is recommending is that the valuator should value the company using a C-corporation tax rate (as Mr. Mercer did), and, if appropriate, *increase* that valuation to reflect the *benefits* of the S-corporation structure. In this case, the Court acknowledged that the tax rate applicable to a C corp is lower than the aggregate taxes paid by S-corp shareholders. However, the Court instead *reduced* the valuation by using personal tax rates with no adjustment for the benefits of being an S corporation.

FAIR VALUE UNDER THE NEW YORK DISSOLUTION STATUTE

Under the New York dissolution statute, the standard of value is "fair value." In the *Beway*[12] case, the New York Court of Appeals defined "fair value" as the amount that would be paid by an arm's-length buyer:

> [I]n fixing fair value, courts should determine the minority shareholder's proportionate interest in the going concern value of the *corporation* as a whole, that is, 'what a willing purchaser, in an arm's length transaction, would offer the

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> corporation as an operating business.'[13] [Emphasis in original]

The Court quoted *Beway* and added that it

> value[d] AriZona using the 'financial control' measurement, that is, 'the value of a company exposed to a representative group of buyers who are not expecting synergies, who are looking at the value of the business on a standalone basis.'[14]

Under New York fair value, the Court should have considered the nature of the potential "willing" and "representative" buyers of a large company like AriZona. An S corporation is limited to 100 shareholders. Corporations, partnerships, and non-resident aliens may not be shareholders. Because of these limitations, it is highly likely that any potential acquiror would be either a C corporation or a foreign corporation. An acquiror would be unable to continue AriZona's S-corp status and thus would be unable to benefit from its S-corp tax advantages. Any acquiror would consider the corporate tax rate applicable to the earning power being acquired, i.e., the C-corporation tax rate. Assessing fair value from the viewpoint of a buyer, it is appropriate to value AriZona, an S corporation, at the C-corporation tax rate, as Mr. Mercer did.

EMPIRICAL STUDIES OF PREMIUMS IN S-CORP ACQUISITIONS

Empirical studies have been conducted to address the question of whether S corporations really are valued more highly than C corporations. These studies have attempted to determine whether, in practice, premiums have been paid for control of S corporations. The results are mixed.

Some studies have concluded there is an S-corp premium. The premiums they have found are far lower than posited by the *Gross* decision and, on average, marginally lower than the premium in *Delaware MRI,* which is discussed later in this article. One academic study of acquisitions of S corporations for stock concluded that the "average tax benefits in S corporation acquisitions are equal to approximately 12–17 percent of deal value."[15] Another study of S-corporation transactions from 2000 to 2006 stated:

> Results of the regression show that the magnitude of the 'S corporation premium' indeed depends on the level of these variables. In particular, the findings are (1) the premium depends positively on net sales; (2) the premium is higher for the cases in which the transaction is done through Asset sales rather than Stock sales; and (3) the premium is higher for the cases in which firms are bought by private buyers rather than public buyers.[16]

In contrast, other empirical studies have found that there is no premium for stock sales of S corporations. A study of transactions from 1991 to early 2002 found "no significant empirical evidence to support the existence of an 'S' premium for the stock sales of S corporations."[17] A 2004 article determined that "the S-Corp premium is not meaningfully statistically significant in any test that we conducted."[18] A study of 2001–2010 transactions found "no significant transaction price premium for closely-held S corporations over closely-held C corporations."[19]

Although there is conflicting evidence as to whether or not S corporations do or do not sell at *premiums,* there is no evidence at all to support the *Ferolito* court's conclusion that AriZona, as an S corporation, is worth *less* than a comparable C corporation.

HOW SHOULD VALUATION PROFESSIONALS TAX-AFFECT S-CORPORATION EARNINGS?

There are three alternatives that have been used by courts and the valuation community to tax-affect the earnings of Subchapter S corporations: (1) do not tax-affect, (2) tax-affect as if the S corporation were a C corporation, or (3) tax-affect in a manner that gives effect to the tax benefits of an S-corporation structure.

The concept of not tax-affecting S-corporation earnings is generally rejected by the valuation experts but, since the *Gross*[20] decision in 1999, some courts, primarily the U.S. Tax Court using a fair-market value standard, have valued S corporations without tax-affecting their earnings.[21] This position values an S corporation at more than 1½ times the value of an otherwise identical C corporation. The Tax Court's position, which has been adopted by the IRS, fails to recognize the essential fact that earnings of S corporations are not tax-free. Although S corporations do not pay corporate income tax, their earnings are *not* tax-free– they are taxed as personal income to shareholders *whether or not any distributions are made.* Any investor would take into account the potential taxes payable on a business's earnings, regardless of whether the company or its shareholders pay the taxes.

Pointedly, one of the appellate judges in *Gross* dissented with respect to tax-affecting an S corporation, writing:

> [T]he court's decision to tax affect the stock by 0% did not accurately reflect the fair market value of G&J stock as determined under the willing buyer/willing seller standard. Instead of relying upon real-world evidence, the court reverted to its own perception of the proper approach to tax affecting, thereby deviating from the time-sensitive willing buyer/willing seller standard. I therefore would hold that to the extent it was based upon the use of a 0% tax affect the court's ultimate valuation . . . was clearly erroneous.[22]

Indeed, prior to the 1999 *Gross* decision, the *IRS Valuation Guide,* which is used by IRS appeals officers, stated:

> If you are comparing a Subchapter S Corporation to the stock of similar firms that are publicly traded, the net income of the former *must be adjusted for income taxes using the*

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> *corporate tax rates* applicable for each year in question, and certain other items, such as salaries.[23] [Emphasis added].

The *Gross* court quoted this sentence, but it ruled that the IRS was "not estopped from disregarding a fictitious corporate tax when valuing an S corporation."[24] This ruling ignores the essential fact that the earnings stream being valued is, in fact, taxed, albeit at the shareholder level. Had the *Ferolito* decision used the *Gross* approach, AriZona would have been materially overvalued.

The *Gross* decision has been widely criticized. Professor Keith Sellers and Nancy Fannon commented:

> In [the *Gross*] case, the Tax Court first examined and then rejected the concept of 'tax affecting' the earnings of a Subchapter S corporation when using the income approach to estimate the fair market value of a firm. . . . This is a conclusion that has been rejected outright by the majority of private equity analysts.[25]

They explained:

> [In] sharp conflict with both the Tax Court and the IRS, the valuation profession has developed a number of widely accepted models which attempt to quantify any true 'premium' that should be attached to the fair market value of a pass-through entity vis-à-vis a similar Subchapter C corporation. These models, which are widely used throughout the valuation profession, incorporate current and anticipated *shareholder-level* taxes in the determination of fair market value. [The] results of a stream of fruitful academic research suggest that ... the IRS and the Tax Court [are] incorrect in their valuation of pass-through entities.[26] [Emphasis added]

There have been numerous other explicit criticisms of the *Gross* conclusion in valuation and legal literature.[27] Reflecting the accepted view of valuation experts, Shannon Pratt concluded, "There is consensus in the business valuation community that the [tax court] decisions generally do not comport to good economic theory."[28] James Hitchner commented, "It was alarming how the so-called Gross method appeared to be adopted by the IRS, various courts, and even some in the appraisal community."[29]

Some valuation experts favor the second approach of tax-affecting earnings of S corporations at the rate applicable to C corporations. Mercer wrote in 2004:

> S corporations are worth the same as *otherwise identical* C corporations *at the enterprise level.* Operating cash flows are identical, and there is no rationale that suggests that their enterprise values should be anything but identical.[30] [Emphasis added]

Clearly, the value of a large S corporation to a generic acquiror is neither increased nor decreased (as in *Ferolito*) by its tax status. A buyer who cannot benefit from an S-corporation's ability to avoid double taxation would not pay a premium for the seller's S-corporation status. New York does not permit an S-corp premium to be applied in an appraisal because "a rational purchaser of 100% of a company would not pay a premium based on a company's status as an S-corporation."[31]

The third approach is to value an S corporation by taking into account the financial benefits of the difference between taxes payable on S-corp earnings and the aggregate C-corp taxes payable at the corporate and personal levels. Several alternative methods for tax-adjusting S corporations have been proposed by valuation experts.[32] For a review of these alternative methods, see Hitchner's *Financial Valuation Applications and Models,* pp. 594-624.

DELAWARE MRI

Then-Vice Chancellor Leo Strine, Jr. (now Chief Justice of the Delaware Supreme Court) utilized this approach in a 2006 appraisal case, *Delaware MRI,*[33] and, in my opinion, his method is worthy of consideration and adoption. He calculated the effective pro forma S-corporation tax rate at the corporate level that would give shareholders the same after-tax earnings that C-corporation shareholders would receive after both corporate taxes and taxes on corporate dividends. Using a 40 percent corporate tax rate, a 40 percent personal tax rate, and a 15 percent tax on S-corporation dividends, he determined that a 29.4 percent rate should be used to tax-affect the S-corporation's earnings (see chart below).[34]

In addition, the Massachusetts Supreme Court subsequently accepted this method in *Bernier v. Bernier,*[35] a divorce case, which described Strine's method:

> [T]he judge asked: if the S corporation at issue were a C corporation, at what hypothetical tax rate could it be taxed and still leave to shareholders the same amount in their pockets as they would have if they held shares in an S corporation? In other words, the judge asked what the effective corporate tax rate would be for the S corporation shareholder, although the entity itself paid no corporate tax.[36]

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	C Corp	S Corp	S Corp Valuation
Income Before Tax	$100	$100	$100
Corporate Tax Rate	40%	–	29.4%
Available Earnings	$60	$100	$70.60
Dividend or Personal Income Tax Rate	15%	40%	15%
Available After Dividends	$51	$60	$60

IMPACT OF TAX STRUCTURE

Going-concern value is impacted by the tax structure – if less taxes are payable, shareholders benefit and the value of the company is higher. A valuation of a company as it is being run should take this into account by tax-affecting earnings to reflect the tax benefits to S-corp shareholders.

Both New York and Delaware define fair value as the shareholder's pro rata interest in the value of the corporation, but the definition in New York, as discussed above, differs in one substantive respect from Delaware. New York defines going-concern value as "what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business."[37] Delaware, in contrast, defines going-concern value as the value of the company as the business is being run, not as value to a purchaser.[38] The Delaware statute states "the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation."[39] The Delaware Supreme Court "defined 'fair value' as the value to a stockholder of the firm as a going concern, *as opposed to the firm's value in the context of an acquisition or other transaction.*"[40] [Emphasis added]

When the definition of fair value looks at the value of the company as it is being run (as in Delaware) rather than value to a willing purchaser (as in New York), the methodology applied to tax-affect S-corp earnings in *Delaware MRI* is a reasonable and court-approved approach. When fair value is defined as value to a willing purchaser, as it was in *Ferolito,* the appropriate tax rate would be the rate applicable to a C corporation (as Mercer testified), unless the potential buyer would be able to benefit from S-corp status. ꟿ

The application of DLOMs in New York cases will be discussed in Part II of this article, which will appear in the next issue.

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1 The Supreme Court in New York is the trial court. The intermediate appellate level is the Appellate Division and the highest is the Court of Appeals.

2 2014 N.Y. Misc. LEXIS 4709 (N.Y. Supr., Oct. 14, 2014) *(Ferolito).*

3 As discussed below, the Court valued AriZona at about $2.0 billion. The number would have been approximately $2.2 billion if it had applied an appropriate tax rate. With a 25 percent DLOM, the Court valued Mr. Ferolito's shares at $750 million, which is 34 percent of $2.2 billion.

4 *Ferolito* at *58. Oct. 5, 2010, was the valuation date for Mr. Ferolito's personal interest and Jan. 31, 2011, was the valuation date for other family interests.

5 *Ferolito* at *42. It appears that the court did not question that 38 percent was an appropriate C-corporation tax rate, but instead concluded that the record did not support using a C-corp tax rate rather than the personal tax rate.

6 *Ferolito* at *41-*42.

7 *Ferolito* at *15.

8 *Ferolito* at *41.

9 See, e.g., *Wechsler & Co., Inc. v. Commissioner,* T.C. Memo 2006-173.

10 As in a partnership, S-corp shareholders are taxed on all profits, whether or not they are distributed. In practice, when S corps are retaining earnings for growth, they normally pay out at least the amount the shareholders will owe in taxes.

11 Shannon P. Pratt, *Valuing a Business,* 5th ed. (McGraw Hill, 2008), p. 618-19.

12 *Friedman v. Beway Realty Corp.,* 87 N.Y.2d 161 (N.Y. 1995).

13 *Beway at 168,* quoting *Matter of Blake v. Blake Agency,* 107 A.D.2d 139,146 (N.Y. App. 1985).

14 *Ferolito* at *19-*20, quoting Mercer's trial testimony.

15 Merle M. Erickson and Shiing-wu Wang, "Tax Benefits as a Source of Merger Premiums in Acquisitions of Private Corporations," *82 Acctg. Rev. 359 (2007).*

16 James A. DiGabriele, "The Moderating Effects of Acquisition Premiums in Private Corporations: An Empirical Investigation of Relative S Corporation and C Corporation Valuations," *22 Acctg. Horizons 415 (2008).* The mean premium (before adjustment for size) was 13.5 percent.

17 Michael Mattson, Kevin Shannon and David Upton, "Empirical research concludes S corporation values same as C corporations," *Business Valuation Update*, Nov. & Dec. 2002.

18 John Phillips, "S-Corp or C-Corp? M&A Deal Prices Look Alike," *Business Valuation Update*, March 2004.

19 Charles J. Russo, Lasse Mertins and Charles L. Martin, Jr., "Business Valuation Acquisition Premiums and Tax-Affecting Earnings of Pass-through Entities" (2011), available at *http://russophdcpa.com/uploads/3/1/2/9/3129429/valuation_premiums_paper_12_14_2011.pdf.*

20 *Gross v. Commissioner,* T.C. Memo 1999-254; *aff'd.* 272 F.3d 333 (6th Cir. 2001).

21 See, e.g., *Wall v. Commissioner*, T.C. Memo 2001-75; *Dallas v. Commissioner,* T.C. Memo 2006-212; *Vicario v. Vicario,* 901 A.2d 603 (R.I. 2006); *Hamelink v. Hamelink,* 2013 Minn. App. Unpub. LEXIS (December 30, 2013).

22 *Gross,* 272 F.3d 333 at 351.

23 *Gross,* T.C. Memo 1999-254 at 26.

24 *Id.* at 27.

25 Keith F. Sellers and Nancy J. Fannon, "Valuation of Pass-Through Entities: Looking at the Bigger Picture," 2012 American Taxation Association Midyear Meeting: JLTR Conference, Dec. 2011, p. 1 (available at SSRN: *http://ssrn.com/abstract=2003901*).

26 Sellers and Fannon, p. 2.

27 E.g., in George B. Hawkins and Michael A. Paschall, "A Gross Result in the *Gross* Case: All Your Prior S Corporation Valuations Are Invalid," 23 *Bus. Val. Rev.* 10 (2002); R. James Alerding, Travis Chamberlain and Yassir Karam, "S corporation premiums revisited: the Erickson-Wang myth," *Bus. Val. Update* (Jan. 2003); John Phillips, "S-Corp or C-Corp? M&A Deal Prices Look Alike," *Bus. Val. Update* (Mar. 2004); Mercer, "Are S Corporations Worth More than C Corporations?" 23 *Bus. Val. Rev.* 117 (2004); Franklin M. Fisher, Christopher F. Noe and Evan Sue Schouten, "The Sale of the Washington Redskins: Discounted Cash Flow Valuation of S-Corporations, Treatment of Personal Taxes, and Implications for Litigation," 10 *Stan. J. L. Bus. & Fin.* 18 (2005); Courtney Sparks White, "S Corporations: A Taxing Analysis of Proper Valuation," 37 *Cap. U. L. Rev.* 1117 (2009); Daniel R. Van Vleet, "Warning! The Service Believes S Corporations Are Undervalued," *SRR Journal* (Fall 2010).

28 Pratt, *Valuing a Business,* 5th ed., p. 614.

29 James R. Hitchner, *Financial Valuation Applications and Models*, 3rd ed. (Wiley, 2011), p. 577.

30 Z. Christopher Mercer, *23 Bus. Val. Rev. 117*. Mercer adds, "Interests in S corporations may be worth more or less than identical interests in otherwise identical C corporations" because "[t]he effective cash flows to shareholders may be different." *Id.*

31 *Zelouf Intl. Corp. v. Zelouf,* 2014 N.Y. Misc. LEXIS 4341 (N.Y. Sup. Ct., Oct. 6, 2014) at *19-*20.

32 See, e.g., Fannon, "Subchapter S Corporation Valuation – A Simplified View," 26 *Bus. Val. Rev.* 8 (2007); Roger J. Grabowski, "S Corporation Valuations in the post-Gross World–Updated," 23 *Bus. Val. Rev.* 139 (2004); Chris D. Treharne, "Valuation of Minority Interests in Pass-Through-Tax Entities," 23 *Bus. Val. Rev.* 105 (2004); Van Vleet, "The S Corporation Economic Adjustment Model," 23 *Bus. Val. Rev.* 167 (2004).

33 *Delaware Open MRI Radiology Associates v. Kessler,* 898 A.2d 290 (Del. Ch. 2006) *(Delaware MRI).* In a Delaware appraisal, a company is valued as it is being run by its current management, not as it might be run by a financial buyer.

34 *Delaware MRI* at 330. Based on the difference between a 29.4 percent tax rate and a 40 percent tax rate, the S-corp premium was 17.7 percent.

35 873 N.E.2d 216 (Mass. 2007).

36 *Id.* at 230.

37 *Beway* at 168, quoting *Blake* at 146.

38 Lawrence A. Hamermesh and Michael L. Wachter, "Rationalizing Appraisal Standards in Compulsory Buyouts," 50 B.C. L. Rev. 1021 (2009).

39 8 DEL. CODE ANN. § 262(h).

40 *Golden Telecom, Inc. v. Global GT LP,* 11 A.3d 214, 217 (Del. 2010).