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

Part II: *Ferolito* and the Application of DLOM in New York Fair Value Cases

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The subject of New York statutory fair value law and the application of discounts for marketability on minority shareholder interests is, as one expert litigator and author in the field called it, “highly complex and technical.”[1] He went on to say that, “we will continue to see both theoretical and empirically based attacks on DLOM in fair value proceedings by New York lawyers and their appraisal experts.” Recently, a trial court judge called DLOMs “an area of heated debate” and pointed out that “more compelling appellate resolution of these issues would surely be welcomed by all.”[2]

In this article, Part II, we will not discuss the contrasting legal interpretations and history of New York fair value and DLOMs. This article will, instead, concentrate on understanding the law as it is and as the *Ferolito* court applied it and then attempt to show why, even under the judge’s set of assumptions, the court’s conclusion was wrong. Solely on the facts of the case, the court erred in placing a 25 percent discount for lack of marketability on Mr. Ferolito’s shares. A DLOM of zero percent, as has been awarded in several recent cases,[3] would have been the correct outcome. At most, an award in the area of 5 percent might have been conceivable.

Part I of this article discussed the tax-affecting of S-corporation earnings in New York fair value determinations and how an excessive pro forma tax rate in *Ferolito* understated the value of AriZona Beverages’ business (AriZona). Part II focuses on New York’s interpretation of its fair value statute as requiring the consideration of a discount for lack of marketability (DLOM) to be applied to dissenting shareholders’ interests. This now outdated and anomalous interpretation results in New York’s application of a marketability discount to dissenters’ shares in a substantial majority of its fair value cases.

FEROLITO: TWO MAJOR PROBLEMS

Both of the problems in the *Ferolito* decision (the S-corporation tax issue and the DLOM placed on dissenters’ shares) resulted in material benefits to Mr. Vultaggio, the continuing shareholder, at the expense of Mr. Ferolito, who was being bought out. The result of employing an erroneous pro forma S-corporation tax, as discussed in Part I of this article, was to reduce the valuation of AriZona by approximately 10 percent. This error was specific to the *Ferolito* case.

The second problem, the subject of this article, Part II, is the DLOM issue: the application of DLOMs to minority interests in fair value proceedings. This problem is graver than the S-corporation tax issue because it is not case-specific and, in fact, reflects the continuing confusion and controversy over New York’s interpretation of fair value and illiquidity discounts. The *Ferolito* case illustrates the reduced valuation awarded to dissenting shareholders, as well as the resulting windfall to the remaining shareholders, that flows from New York’s inclusion of a DLOM on minority interests in fair value cases.

NEW YORK FAIR VALUE, MINORITY DISCOUNTS, AND THE APPLICATION OF DLOMs

The case law on marketability discounts is complicated and lacking in coherent rationale, yet the permissibility – some would say the “requirement” – for the application of those discounts is firmly entrenched in New York fair value law. However, certain principles of New York fair value law and its position on minority discounts are clear. A concise enumeration of these principles and their legal sources was laid out by Fred D. Weinstein, an experienced litigator in the area, at the Business Valuation Conference of the New York Society of CPAs, May 2012. As presented in Chris Mercer’s blog of May 24, 2012,[4] they are:

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expert **TIP**

The *Ferolito* case illustrates the reduced valuation awarded to dissenting shareholders, as well as the resulting windfall to the remaining shareholders, that flows from New York’s application of a DLOM to minority interests in fair value cases, in contrast to general practice in other states.

1. Value the corporation as an operating business, not one in liquidation.[5]
2. Valuation is based on "the shareholder's proportionate interest in a going concern."[6]
3. Equal treatment of all shares of the same class of stock.[7]

As Mercer points out in his discussion, all of these principles relate to the valuation of enterprises and were enumerated in *Beway.*

New York law is clear on its position toward minority discounts: it forbids them. It does so because to impose a minority discount violates each of the three principles above. *Blake* held that minority discounts were prohibited in New York fair value proceedings by stating that:

> [A] minority interest in closely held corporate stock should not be discounted solely because it is a minority interest.[8]

When this holding was adopted by New York's highest court in *Beway, Blake's* position became precedent for New York's law on minority discounts.

In contrast, New York's law that mandates adjudicators to consider the application of marketability discounts on minority shares is opaque in origin and obscure in reasoning. We cannot delve its depths in this article. Mr. Weinstein pointed out that from 1991 on, New York's highest courts have accepted a principle that allowed a marketability discount to be placed not on the enterprise, but on the minority shares alone. He cited *Seagroatt:*

> [W]hatever the method of valuing an interest in such an enterprise, it should include consideration of any risk associated with illiquidity of the shares.[9]

Similarly, in the *Beway* decision, the Court of Appeals insisted that because minority shares are limited in their salability by virtue of being minority holdings, their value should be subject to a DLOM. The *Beway* court agreed with *Blake's* approval of minority marketability discounts:

> A discount for lack of marketability is properly factored into the equation because the shares of a closely held corporation cannot be readily sold on a public market. Such a discount bears no relation to the fact that the petitioner's shares in the corporation represent a minority interest.[10]

New York is now the only state that applies a DLOM in a substantial majority of fair value proceedings. As the *Ferolit*o court pointed out, "Nearly all courts in New York that have considered the question whether to apply a DLOM have answered in the affirmative."[11] They do so because they adhere to *Beway's* precedent.

The New York fair value principles are explicit that all shareholders have to be treated the same in fair value proceedings: all have to receive a pro rata share of the on-going business. However, New York's application of a marketability discount on minority interests is seen by many as the equivalent in impact to the application of a minority discount to minority interests. The theoretical criticism is that a DLOM is viewed as equivalent to a minority discount in violating all three of the fair value precepts listed above. Criticism of *Beway's* theoretical foundations was made soon after the *Beway* decision and continues to resonate increasingly today, as can be seen in the recent *Zelouf* case discussed below.

How could *Beway* and *Blake* interpret fair value and marketability discounts to end up with results opposed to New York's own fair value principles? They did so by accepting the reasoning in *Blake,* holding that a DLOM bears no relation to the fact that the petitioner's shares represent a minority interest. They believed that the marketability discount on minority interests was *a different kind of discount* from the minority discounts they had forbidden. In fact, they emphatically stated that a DLOM, although imposed only on minority shareholders, was not the imposition of a type of minority discount at all.

Arguments that the effect of placing a liquidity discount on one group of shareholders alone was tantamount to treating that group unequally were rejected. *Beway* thus ensured that minority shareholders would not receive a pro rata share of going-concern value. Instead, they would receive a reduced share value. *Beway's* insistence that the DLOM application to minority interest was different in character from other forms of minority discounts justified its exclusion from the prohibition on minority interests.

The *Beway/Blake* view is all the more surprising when we understand that the two courts recognized that they were valuing the minority interests in the context of involuntary dispositions – oppression, appraisal, or entire fairness proceedings – not in voluntary fair market sales. These proceedings arise only when the dissenter has been forced out or is alleging oppressive treatment. In these situations, the dissenter is statutorily granted the right to have a fair value judicial determination designed to award him the fair value of the interests he has involuntarily lost. This right to a fair value adjudication only becomes available after the majority (or controller) has declined to dissolve the corporation or failed to offer what the dissenter deems to be a fair price. If the controller or majority had agreed to dissolve the corporation, the market price received would be divided pro rata by all shareholders with each holder receiving the same, or equal value, per share owned.

As stated in the principles above, the fundamental equity purpose of fair value determinations is that minority interests must receive an equal pro rata share of the value of the going-concern value of the corporation as a whole. Nevertheless, *Beway* established that in New York it was acceptable, moreover "correct," for dissenters to receive the reduced/unequal share that would result after application of a DLOM, and, further, that that result would not contradict New York's fair value statute.

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The *Ferolito* court followed this understanding of New York law when it applied a material DLOM to Mr. Ferolito's interest. The consequent and foreseeable result was that Mr. Ferolito, the dissenter, received materially less than his pro rata share of the going-concern value of the corporation.

SUMMARY OF THE *FEROLITO* FACTS

The *Ferolito* facts are presented here again to provide background. 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 owned 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. Mr. Ferolito wished either to sell his 50 percent interest to a third party or, alternatively, to sell the entire company. After years of shareholder disputes and after Mr. Vultaggio prevented sale of the company or of Mr. Ferolito's shares, Mr. Ferolito sought dissolution pursuant to BCL § 1104-a, which required Mr. Vultaggio either to dissolve the company or to purchase his interest at fair value. Mr. Vultaggio then exercised his right under BCL § 1118 to purchase Mr. Ferolito's shares. Because the parties disputed the value of AriZona and of Mr. Ferolito's shares, the parties petitioned the trial court to determine the fair value of AriZona and of Mr. Ferolito's shares.

After the court imposed a DLOM of 25 percent ($0.5 billion) on Mr. Ferolito's 50 percent interest,[12] he was awarded a diminished 37.5 percent of Arizona's going-concern value. Thus, 12.5 percent of AriZona's value was shifted to Mr. Vultaggio. Mr. Vultaggio's half-interest was effectively valued at 62.5 percent of AriZona's value, 67 percent more than was awarded to Mr. Ferolito for his half-interest. Mr. Ferolito's reduced award defeated the purpose of the fair value adjudication, which is to give all shareholders in the same class their proportionate share in the business's value.

THE *FEROLITO* COURT EMPLOYED NEW YORK'S COMMON 25 PERCENT SHAREHOLDER DLOM

Because New York requires a consideration of a discount for lack of marketability in fair value assessments, the *Ferolito* court undertook the determination of that discount. There was a major difference between the two parties on the appropriate discount for lack of marketability to be applied to Mr. Ferolito's shares. Mr. Ferolito's expert argued for a zero DLOM and Mr. Vultaggio's for 35 percent. The court applied a 25 percent DLOM, describing it as "the DLOM typically applied" in New York fair value cases:

> The Court concludes that a 25% DLOM is appropriate, which even one commentator opposed to application of a DLOM in most if not all cases admits 'hover[s] in the range' of the DLOM typically applied.[13]

There was no discussion of any facts specific to AriZona that supported the amount of the DLOM selected by the court. Thus, it appears that the court selected the 25 percent DLOM because 25 percent was consistent with the percentage commonly used in other New York cases.

The *Ferolito* court was following in the tradition of numerous New York decisions. New York courts have often applied a 25 percent DLOM at the shareholder level, usually without explanation but citing *Beway* and/or *Blake* and/or other subsequent appellate decisions.[14] In contrast, some courts have weighed the specific facts in their cases and have applied DLOMs at lower rates, such as 15 percent[15] or 10 percent.[16] In fact, a small number of New York cases have determined, again on the basis of the facts in the specific case, that a zero DLOM was appropriate.

FEROLITO PROVIDED FOUR UNPERSUASIVE REASONS FOR APPLYING A DLOM

The *Ferolito* court gave four reasons to justify its application of a DLOM:

> (a) the fact that AriZona did not have audited financial statements for many years prior to the valuation date, (b) the extensive litigation between the shareholders, (c) the uncertainly about the company's S-Corporation status, and (d) the transfer restrictions in the Owners' Agreement.[17]

None of these reasons justify a DLOM in this case.

First, although the Deloitte audit partner working with AriZona had testified that it had "become increasingly difficult to finalize the audit process due to the S-Corporation issues and the dissension among the parties,"[18] he also testified that "Arizona's financial statements can be readily audited, particularly when the shareholders are no longer battling with each other."[19]

The second reason put forward, the "extensive litigation between the shareholders," is irrelevant and has no impact on the determination of value of AriZona or any other economic entity for purposes of disposition (either through dissolution, sale, or any other means) under the New York or any other fair value statute. New York case law spells out that the value of the corporation is to be determined as a whole, that is, "what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business."[20] To buyers, the quarrels of past or present shareholders may be the cause of their buying opportunity but they are not relevant to the buyers' estimates of value to themselves, since the quarreling shareholders cease to be shareholders after the transaction.

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Fair value cases proceed as a result of dissenters being forced out or wanting out because of perceived oppression or management differences, and controllers or majority shareholders choosing to keep the enterprise going and not dissolve it. Mr. Vultaggio made the election to buy out Mr. Ferolito, thereby terminating the litigation and at the same time, avoiding dissolution. Basing a DLOM on prior litigation between the parties unfairly penalizes the petitioner, Mr. Ferolito, for asserting his rights. Indeed, if the dissenter is pleading oppression at the hands of the controller, it is a miscarriage of equity to punish the dissenter for attempting to exit.

Third, the uncertainty about AriZona's S-corp status would have no impact whatever on the value of AriZona to a third-party buyer. The uncertainty would be irrelevant to the prospective willing buyers of a $2 billion company because a corporation cannot be a shareholder of an S corporation and, therefore, any acquiror would almost certainly be ineligible to be an S-corp shareholder. In fact, as discussed in Part I of this article, the court utilized a tax rate higher than the C-corp tax rate in its valuation of AriZona, evidencing that it effectively concluded that S-corp status did not add to AriZona's value.

Fourth, a DLOM should not have been applied based on the transfer restrictions in the Owners' Agreement. Two Court of Appeals cases, *Beway* and *Pace Photographers*, have ruled that covenants that restrict transferability are inapplicable to fair value determination. *Beway* explained:

> [A] statutory acquisition of minority shares by a corporation pursuant to the Business Corporation Law is not a voluntary sale of corporate shares as contemplated by a restrictive stockholder agreement and, therefore, 'the express covenant is literally inapplicable.'[21]

THE *FEROLITO* COURT ERRED IN ITS REJECTION OF ZERO DLOM AWARD CASES

The court explained how it distinguished *AriZona* from several New York cases in which a zero DLOM had been applied. We discuss three of them here: *In re Walt's Submarine Sandwiches, Inc. (Walt's)*,[22] *Academe Paving*[23] and *Zelouf.*

As to the first, the *Ferolito* court stated that the saleability of Walt's Submarine Sandwiches was highly evidenced in contrast to AriZona's. He stated that *Walt's* differed because, in *Walt's:*

> A DLOM was not appropriate where there was testimony of increased profits, expansion and '120 responses to a "for sale" advertisement in the Wall Street Journal.' *[Walt's]* at 981. There are a geometrically smaller number of expressions of interest for AriZona in the present case, even assuming that those expressions of interest here had as much depth and breadth as those in *Walt's Submarine.*[24]

In fact, AriZona, as made clear in the facts presented at trial, was (and is) an attractive acquisition candidate. It is a large, highly successful company in a niche market. Indeed, the decision discussed three large potential purchasers that had submitted informal offers to acquire AriZona: Coca Cola,[25] Nestlé Waters N.A. (Nestlé) (a subsidiary of Nestlé S.A.),[26] and Tata Tea (the parent of Tetley Tea).[27] The stature of the potential acquirors who had discussions with AriZona, as well as the fact that at least two investment banks had made pitches to represent AriZona in a transaction,[28] appear to indicate that AriZona would have been quite marketable if both shareholders had wished to sell.

The court discredited Nestlé's interest, stating:

> According to ... Nestle's then-CEO, that company was very interested in a deal with AriZona because it had high growth and a great distribution system. [He] testified credibly that Nestle had a hard time getting 'good financial data' from AriZona, and that the information Nestle did receive was 'woefully inadequate for a proper due diligence.' He further testified credibly that Nestle required, prior to making a binding offer, a 'path to control' of AriZona upon which both Ferolito and Vultaggio agreed. Nestle's discussions with Ferolito and Vultaggio never reached that point *because Vultaggio ceased returning Jeffrey's phone calls* [emphasis added].[29]

Looking at the facts set forth by the court, it appears that it was Mr. Vultaggio's lack of cooperation that barred a deal with Nestlé. Mr. Vultaggio was in management control of the company and the lack of "good financial data" and other deficiencies for sale were under Mr. Vultaggio's control. The court concentrated on the potential problems in selling AriZona rather than on the fact that the impediments to marketability were caused by the continuing/controlling shareholder's volitions and actions. When controllers do not wish to further a sale, they can easily thwart any interest or offers. Controllers who, in fact, wish to continue their corporations and freeze out minority interests or dissenters, would be given an incentive for doing so, if, in the fair value determination, they knew they could be enriched by the court's imposition of a discount for lack of marketability on the forced-out shares. The *Ferolito* court failed to appreciate that the goal of a fair value adjudication is to remedy the loss of interests by the dissenters, not to enrich the majority who remain in the on-going corporation.

In addition, the comparison of the marketing process with *Walt's* is inapt. Large private companies like AriZona are not sold the same way as sandwich shops. The sale process for large companies is not effected through public advertising, but is com-

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monly carried out by having an investment bank discreetly contact a limited number of industry and financial buyers.

For the second case, *Academe Paving,* the *Ferolito* court also rejected the zero DLOM that court had awarded. It distinguished *AriZona* from *Academe Paving* by saying that "the trial court appears to have applied an impermissible minority discount, rather than a DLOM."[30] The judge in *Ferolito* appears to have misread *Academe Paving.* The *Academe* court applied no discounts, rejecting a minority discount,[31] a DLOM at the enterprise level,[32] and the 30-35 percent DLOM at the shareholder level proposed by respondents' expert.[33]

ZELOUF

The third case that the *Ferolito* court distinguished and rejected, *Zelouf,* came down only eight days before *Ferolito*. In *Zelouf,* the court considered not only the facts in the case but also the fundamental purposes advanced to justify shareholder-level DLOMs in New York. After doing so, the court awarded a zero DLOM.

Zelouf International Corp. is a family-owned company whose shareholders are all members of the founder's family. In appraising the 25 percent interest owned by Nahal Zelouf, the widow of a shareholder, the court decided that the facts of the case merited a DLOM of zero percent. The judge observed that "it seems unlikely that the company would or could ever actually be sold" because of the controllers' intent to keep the company within its family due to its remunerative family benefits; the court therefore concluded that "the rationale for a applying a DLOM breaks down when one considers that any liquidity risk ... is more theoretical than real."[34]

The denial of a DLOM in *Zelouf* was based on the court's conclusion that the company would not be sold, that the company was under the controller's control and could not be sold without his desire, and that the controller had no desire to sell. The *Ferolito* court had come to the same conclusion and stated, "Vultaggio admittedly does not want to sell and instead wants to stay in the business and keep the company for his children."[35] If the *Zelouf* reasoning discussed above had been applied in *Ferolito,* the court would have applied a zero DLOM to Mr. Ferolito's 50 percent interest.

After reargument in which the respondents claimed that New York required a DLOM, the court stated in *Zelouf II* that "no New York appellate court has ever held that a DLOM must be applied to a fair value appraisal of a closely held company."[36] The court reiterated its rejection of a DLOM in the case, concluding that "application of a DLOM here would be *tantamount to the imposition of a minority discount.*"[37] [emphasis added] She explained:

> In effect, applying a DLOM here would be the economic equivalent of imposing a minority discount — that is, Nahal realizing less for her shares because she is being forced to sell while Danny gets to realize their full value by staying in control. It is well settled that minority discounts are not permitted under New York law. Indeed, it is the tension between the application of a DLOM, which is done in most cases *but is not legally required*, and the practical effect of a DLOM here serving as a minority discount, repugnant to New York courts and never allowed, that drives the court's ruling.[38] [emphasis added]

Zelouf II acknowledged that it would be inconsistent with New York precedent to decide that a DLOM was legally inappropriate.[39] However, the court commented:

> This court's understanding of the applicable precedent is that, while many corporate valuation principles ought to guide this court's analysis, this court's role is not to blithely apply formalistic and buzzwordy principles so the resulting valuation is cloaked with an air of financial professionalism.[40]

The *Ferolito* court distinguished *Zelouf* but failed to see the similarities. *Ferolito* distinguished the facts by emphasizing one aspect of *Zelouf:* the fact that the company involved in *Zelouf* was highly unlikely to ever be sold. The *Ferolito* court wrote:

> *[Zelouf]* concluded [that because of controller's intent to retain the company and keep it private] 'any liquidity risk associated with [Zelouf International] is more theoretical than real.' By contrast, as readily demonstrated by the stalled Nestle negotiations, the very reasons for a DLOM here have resulted in — or are at least strongly correlated with — the failure of Ferolito to sell his shares prior to this proceeding.[41]

This quote reveals that the *Ferolito* court failed to see that not only were important facts in the two cases similar, but the context in which the facts existed were similar: Danny Zelouf wished to retain the company and had no desire to dissolve or sell, and Mr. Vultaggio was in the same position. Mr. Vultaggio, like Mr. Zelouf, wished to retain the company. Mr. Vultaggio did not wish to allow a dissolution in which all the dissolving shareholders would share equally, nor did he wish to sell – as evidenced by his lack of willingness to prepare and present his company for sale.

The *Zelouf* court drew a completely opposite conclusion from similar facts as to equity and fairness. *Zelouf* concluded that the dissenting shareholder should not suffer the burden of a discount on her shares because of the controller's volitions and actions. In stark contrast, the *Ferolito* court felt comfortable imposing the financial burden of "illiquidity" onto the exiting shareholder, despite the fact that the illiquidity resulted from Mr. Vultaggio's unwillingness to allow the business to be fairly priced in an authentic marketing process or to permit Mr. Ferolito to sell his 50 percent to a third party. Mr. Ferolito's dif-

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ficulty in selling his shares, emphasized by the court, resulted to a significant degree from Mr. Vultaggio's failure to cooperate and unwillingness to sell. As a New York decision commented in 2009, "The creators of the cause of the non-marketability should not gain from their handiwork."[42] Unfortunately, that is the result that occurred in *Ferolito,* and a material gain for Mr. Vultaggio ensued from the DLOM on Mr. Ferolito's shares.

CONCLUSION

There is broad consensus that marketability discounts should seldom, if ever, be permitted in appraisals. With respect to DLOMs, New York continues to be out of line with the Model Business Corporation Act[43] and the American Law Institute,[44] as well as the widely accepted view in other states and in legal literature. New York's approach is based on outdated valuation approaches that were utilized three or more decades ago:

> Determination of "fair value" under [N.Y.] BCL [§] 1118 has become the subject of increased litigation, and grows more complicated with the increasing sophistication of the appraisal industry, effectively in its infancy in the 1980s, when defining case law pertaining to same evolved. Despite proliferation of new studies and greater understanding of financial theory within the appraisal community, a court's ability to accept and recognize these changes is limited at best, if principal reliance is upon cases determined in the 1980s.[45]

Authoritative legal and valuation writers have long recommended that the Court of Appeals reconsider New York's view of DLOMs.[46] A change in New York's obsolete and misguided position on DLOMs in fair value cases is long overdue, but until that occurs, cases such as *Ferolito* that result in inequity call for examination at least on their facts alone. In the end, Mr. Ferolito was awarded 75 percent of his proportionate share of the value of AriZona, leaving Mr. Vultaggio with 125 percent for his portion. Mr. Vultaggio was given a windfall and unjustly enriched, an outcome diametrically opposed to the fair value the dissenting shareholder is supposed to receive when the controller acquires his shares.

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1 Peter Mahler, "The Marketability Discount in Fair Value Proceedings: An Emperor Without Clothes?" July 11, 2011, available at http://www.nybusinessdivorce.com/2011/07/articles/valuation-discounts/the-marketability-discount-in-fair-value-proceedings-an-emperor-without-clothes/ (Mahler, "Emperor Without Clothes?").

2 *Zelouf Intl. Corp. v. Zelouf,* 999 N.Y.S.2d 731, 735 (N.Y. Sup. 2014) (*Zelouf II*).

3 For example, *Zelouf Intl. Corp. v. Zelouf,* 2014 N.Y. Misc. LEXIS 4341 (N.Y. Sup., Oct. 6, 2014) (*Zelouf*) (discussed below and in Robert J. Grossman, "Discounts for Lack of Marketability and Fair Value, *Financial Valuation and Litigation Expert,* April/May 2015, pp. 12-14); *Application of Zulkofske,* 2012 N.Y. Misc. LEXIS 3088 (N.Y. Supr., June 28, 2012) at *7, *11 (50 percent shareholder awarded an undiscounted half of the value of the corporation); *Man Choi Chiu v. Chiu,* 125 A.D.3d 824 (N.Y. App. 2015) at *3, *4 (Appellate Division did not overturn trial court's ruling that the DLOM should be zero).

4 Z. Christopher Mercer, "New York Statutory Fair Value: To 'Marketability Discount' or Not," May 24, 2012, available at http://mercercapital.com/assets/Mercer-Capital-Statutory-Fair-Value.pdf, p. 54.

5 *Matter of Blake v. Blake Agency,* 107 A.D.2d 139 (N.Y. App. 1985).

6 *Friedman v. Beway Realty Corp.,* 661 N.E.2d 972 (N.Y. 1995) *(Beway)*.

7 *Cawley v. SCM Corp.,* 530 N.E.2d 1264 (N.Y. 1988).

8 *Blake* at 149.

9 *Matter of Seagroatt Floral Company, Inc.,* 583 N.E.2d 287, 290 (N.Y. 1991) (cited in *Beway* at 974).

10 *Blake* at 149.

11 *Ferolito* at *46.

12 In most fair value cases, the parties seeking the fair value determination are dissenting minority shareholders and the parties continuing in ownership are majority and controlling shareholders.

13 *Ferolito* at *50-*51, quoting Mahler, "Emperor Without Clothes?"

14 *E.g., Matter of Vetco, Inc.,* 292 A.D. 391, 392 (N.Y. App. 2002), which rejected a 40 percent DLOM and said, "The appropriate percentage for the illiquidity discount is 25%."

15 *E.g., Quill v. Cathedral Corp.,* 215 A.D.2d 960, 963 (N.Y. App. 1995) (15 percent DLOM for business retained, zero for business sold before trial); *Murphy v. U.S. Dredging Corp.*, 74 A.D.3d 815, 818 (N.Y. App. 2010).

16 *E.g., Matter of Joy Wholesale Sundries,* 125 A.D.2d 310, 311 (N.Y. App. 1986); *Matter of Raskin v. Walter Karl Inc.,* 129 A.D.2d 642, 644 (N.Y. App. 1987); *Matter of Carolina Gardens, Inc.,* 238 A.D.2d 189, 190 (N.Y. App. 1997); *Cortes v. 3A N. Park Ave. Rest. Corp.,* 2014 N.Y. Misc. LEXIS 4693 (N.Y. Sup., Oct. 28, 2014) at *64.

17 *Ferolito* at *49.

18 *Ferolito* at *16.

19 *Ferolito* at *49.

20 *Matter of Pace Photographers, Ltd.,* 525 N.E.2d 713, 718 (N.Y. 1988), quoting *Blake.*

21 *Beway* at 977, quoting *Pace Photographers* at 719.

22 173 A.D.2d 980 (N.Y. App. 1991).

23 *O'Brien v. Academe Paving, Inc.,* No. 99-2594 (Sup. Ct. Broome Co., N.Y., Sept. 25, 2000).

24 *Ferolito* at *47.

25 *Ferolito* at *13.

26 *Ferolito* at *9-*11.

27 *Ferolito* at *8-*9.

28 *Ferolito* at *12-*13.

29 *Ferolito* at *9-*10.

30 *Ferolito* at *47.

31 *Academe Paving,* slip op., p. 12.

32 *Academe Paving,* slip op., p. 15.

33 *Academe Paving,* slip op., pp. 12-14.

34 *Zelouf* at *22.

35 *Ferolito* at *31.

36 *Zelouf II* at 735. The court commented, "[E]ven if this court were required to apply a DLOM, the evidence submitted at trial does not justify a DLOM of 25% or higher. If it had applied a DLOM, the court would have applied a 10% DLOM." (*Zelouf II* at 737, fn. 5)

37 *Zelouf II* at 737.

38 *Zelouf II* at 735.

39 *Zelouf II* at 738.

40 *Zelouf II* at 738.

41 *Ferolito* at *48.

42 *Murphy v. United States Dredging Corp.,* 2008 N.Y. Misc. LEXIS 9900 (N.Y. Sup., May 19, 2008) at *15; *rev'd on other grounds,* 74 A.D.3d 815, 818 (N.Y. App. 2010).

43 MBCA § 13.01(4)(iii) (1999).

44 ALI, *Principles of Corporate Governance: Analysis and Recommendations* § 7.22(a) (1994).

45 Kenneth J. Weinstein and Joel Rakower, "Marketability Discount and Dissenting Minority Ownership," N.Y.L.J., July 8, 2011, pp. 7-9, at p. 9.

46 *See, e.g.,* Barry M. Wertheimer, "The Shareholders' Appraisal Remedy and How Courts Determine Fair Value," 47 *Duke L. J.* 613, 641 (1998) at fn. 136.