PATRICIA WISNIEWSKI, Plaintiff-Respondent/Cross-Appellant, v. FRANCIS J. WALSH, JR., Defendant-Respondent/Cross-Appellant, and NORBERT J. WALSH, Defendant-Appellant/Cross-Respondent. NORBERT J. WALSH, Plaintiff-Appellant/Cross-Respondent, v. DONNA WALSH, Executrix of the Estate of Francis J. Walsh, Jr., PATRICIA WISNIEWSKI, NATIONAL RETAIL TRANSPORTATION, INC., a Pennsylvania Corporation, Defendants-Respondents/Cross-Appellants, and COHEN EXPRESS CORPORATION, a New Jersey Corporation, Defendant.

DOCKET NO. A-2650-13T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2015 N.J. Super. Unpub. LEXIS 3001

December 1, 2015, Argued
December 24, 2015, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Certification denied by Wisniewski v. Walsh, 2016 N.J. LEXIS 363 (N.J., Mar. 22, 2016)

PRIOR HISTORY: [*1] On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket Nos. C-171-95 and C-13-96.
Wisniewski v. Walsh, 2013 N.J. Super. Unpub. LEXIS 724 (App.Div., Apr. 2, 2013)

COUNSEL: **Jeffrey** J. **Greenbaum** and Eric I. Abraham argued the cause for appellant/cross-respondent (Hill Wallack LLP and Sills Cummis & Gross P.C., attorneys; Mr. Abraham and Mr. Greenbaum, of counsel; Mr. Abraham, Mr. Greenbaum and Christina L. Saveriano, on the brief).

Warren A. Usatine argued the cause for respondent/cross-appellant Patricia Wisniew-ski (Cole, Schotz, Meisel, Forman & Leonard, P.A., attorneys; Michael S. Meisel and Mr. Usatine, of counsel; Mr. Meisel, Mr. Usatine and Victoria J. Cioppettini, on the joint brief).

Eric D. McCullough argued the cause for respondents/cross-appellants Donna Walsh, Executrix of the Estate of Francis J. Walsh, Jr. and National Retail Transportation, Inc. (Waters McPherson McNeill, P.C., attorneys; Mr. McCullough and James P. Dugan, of counsel; Mr. McCullough, on the joint brief).

JUDGES: Before Judges Fisher, Espinosa and Currier.

OPINION

PER CURIAM

This twenty-year-old oppressed shareholder action returns to us for the third time. When last here, we remanded for the trial court's resolution of two narrow but related business valuation issues -- whether [*2] a marketability discount had already been embedded in the valuation the trial court previously adopted; if not, we mandated the application of a marketability discount. The trial judge found, following an extensive review of expert testimony, that a marketability discount had not yet been accounted for and that a twenty-five percent marketability discount was appropriate. Defendant Norbert J. Walsh appeals, arguing the judge erred in determining that a marketability discount was not previously embedded and in applying a twenty-five percent marketability discount. The other parties cross-appeal, arguing that a greater discount should have been imposed. We find no merit in their arguments and affirm.

I

We briefly recount some of the procedural events in this case.

On September 21, 1995, Patricia Wisniewski (Patricia) filed a complaint for injunctive relief against her brothers Norbert and Francis J. Walsh (Norbert and Frank) regarding the acquisition of certain property by a company shared by all three. Norbert filed a complaint on January 31, 1996, against his siblings, alleging they were attempting to remove him from the company; he demanded relief pursuant to the oppressed shareholder [*3] statute, *N.J.S.A.* 14A:12-7. Patricia filed a counterclaim for similar relief on May 2, 1997. The two cases were consolidated.

The proceedings were then bifurcated. The first phase was designed to determine whether oppression had occurred, to identify the oppressor, and to impose an appropriate remedy; the second was to appraise the business in the event of a resulting buyout. On January 24, 2000, after thirteen months of hearings, the original trial judge issued his Phase I opinion, concluding that Norbert was an oppressing shareholder and that his oppressive behavior had harmed the other two but, importantly, not the company itself. The judge entered an order on March 21, 2000, requiring that Norbert sell his one-third interest either to the company or to Frank and Patricia at a value to be set by the court.

The judge then requested that the parties submit expert reports addressing the company's fair value. Despite conflicting reports, the judge ruled without conducting an evidentiary hearing. He issued his Phase II opinion on November 7, 2001, setting the value of Norbert's interest in the company at approximately $12.4 million. A final amended judgment to that effect was entered on April 25, 2002. [*4] Norbert appealed, the others cross-appealed, and we reversed and remanded for a valuation trial. *Wisniewski v. Walsh*, No. A-3477-01 (App. Div. Mar. 23, 2004) (*Wisniewski I*) ([slip op.] at 12).

In the interim, the original trial judge retired. On remand, another judge heard expert testimony over the course of twelve days between October 17, 2006, and February 28, 2007, and issued a pair of oral decisions adopting a discounted-cash-flow approach to valuation and fixing the value of Norbert's interest at approximately $32.2 million. These determinations were memorialized in an order entered on September 18, 2008. Following further proceedings to ascertain the company's financial health and determine appropriate payment terms, the judge entered an amended final judgment on October 16, 2010.

Frank died before the proceedings concluded, but his widow Donna Walsh (Donna), as executrix of his estate, and Patricia and Norbert each appealed, challenging the valuation on a variety of grounds. We affirmed in nearly every respect, but concluded that a marketability discount should have been applied to the extent no such discount was already embedded in the discounted-cash-flow valuation the court adopted. *Wisniewski* [*5] *v. Walsh*, Nos. A-0825-10 & A-0826-10, 2013 N.J. Super. Unpub. LEXIS 724 (App. Div. Apr. 2, 2013) (*Wisniewski II*) ([slip op.] at 31-34, 56). The Supreme Court denied certification. *Wisniewski v. Walsh*, 215 N.J. 485, 73 A.3d 511 (2013).

By this time, the second trial judge had retired. On remand, Judge Hector R. Velazquez briefly contemplated that the record might need to be supplemented with expert testimony pertaining to the narrow issues presented, but ultimately decided against it; none of the parties quarrel with that approach now. Left to resolve the matter on the record developed after the first remand, Judge Velazquez heard oral argument and issued an opinion on October 16, 2013, concluding that a discount for marketability was not embedded in the prior valuation and that a discount of twenty-five percent should be applied. He entered a second amended final judgment to that effect on January 7, 2014.

Norbert appeals, and the other parties cross-appeal.

II

We also briefly summarize the facts necessary to an understanding of the issues in this appeal and cross-appeal.[1]

1 More extensive discussions of the facts are contained in the first trial judge's Phase I opinion and our unpublished opinion in *Wisniewski II, supra*, 2013 N.J. Super. Unpub. LEXIS 724, [slip op.] at 11-16. We only briefly summarize those facts to the extent pertinent to disposition of this appeal.

Frank, [*6] Norbert, and Patricia owned equal shares of the trucking company their father founded in 1952. Begun with a single truck in New York City's garment district, the company thereafter grew considerably, albeit not without setbacks, and now provides trucking and transportation services, including private fleets, to a nationwide customer base largely concentrated in the retail industry. Frank, the oldest of the siblings, assumed the company's leadership by 1973, and Norbert, as well as Raymond Wisniewski, Patricia's husband, were directors and officers by the time this litigation began in 1995.

In the years that followed, the company afforded the three siblings generous shareholder distributions and loans totaling in the tens of millions of dollars. Notwithstanding its ability to make such expenditures, the company filed for bankruptcy in the 1980s and suffered another temporary setback in 1992 when Frank was sentenced to a prison term -- an event that put Norbert in control of the company. The parties do not dispute Frank's key role in fostering the company's otherwise considerable success.

This litigation found its genesis in Norbert's management of the company while Frank was unavailable. [*7] While in charge, Norbert discontinued payment of certain bills the company ordinarily handled on Patricia and Raymond's behalf, and ordered a transfer of all line-haul billings and receipts from an entity owned by all three siblings to one in which Patricia held no interest, without compensating or consulting Patricia. Even after Frank's return, Norbert tried to exclude Patricia from a real estate deal the company was pursuing and, when Frank objected, he excluded both Patricia and Frank by purchasing the property through a limited liability company owned by his own immediate family. This litigation soon ensued, and the trial court found from these circumstances that Norbert was an oppressing shareholder. None of the parties has ever contested that finding or the court's consequent conclusion that Norbert should be bought out.

At the valuation trial, Norbert presented testimony from Gary R. Trugman, president of Trugman Valuation Associates, who appraised the company using a discounted-cash-flow approach, estimating its worth from the present value of the income stream it would be expected to generate for its owner. Patricia and Donna relied on Roger J. Grabowski, partner and managing [*8] director of Duff & Phelps, who instead used a market approach, extrapolating the company's value from data derived from the sale of comparable entities.

It appears the trial judge at the time was not particularly persuaded by either expert. He made clear his "relative displeasure" with them, believing both experts exaggerated to suit their clients "without any concept of what the facts in this case involve." Nonetheless, he resolved the disputes by "accept[ing] various parts" of each expert's opinion. In that connection, he found the discounted-cash-flow approach favored by Trugman generally more reliable and legally sound under the circumstances.

In that regard, Trugman estimated the company's anticipated revenues over a period of years, normalized its expenses, discounted the resulting income stream to its present value at a rate appropriate for the particular company at issue, and then added any residual value of the company at the end of that period, likewise discounted to present value. In the first respect, Trugman analyzed data as to the company's past revenue and the growth of its key clients, determined that the company was mature and steadily growing, and estimated a long-term growth [*9] rate of about five percent, a figure the trial judge deemed appropriate. The judge rejected Trugman's analysis of the company's expenses, however, and instead adopted Grabowski's approach to normalizing the company's income.

To discount the resulting income stream to its present value, Trugman applied a discount rate formulated through the "build-up" method -- that is, he added a series of components reflecting the risk to the holder of receiving that income stream. He used the long-term treasury bond yield to account for the basic risk of holding any asset and added an equity risk premium of seven percent to adjust for the further risk associated with holding a share of stock in a company.

Trugman then applied a premium of nearly three-and-one-half percent to reflect the additional risk of investing in a relatively small company, and another four percent to account for certain company-specific risk factors, among them the company's closely-held nature, dependence on Frank as a key manager, relative undercapitalization, and concentration of its customer base in the retail industry. With some further adjustment, he arrived at a twelve-percent discount rate, which the second trial judge [*10] approved.

Of interest to the issues at hand, Trugman did not apply any independent marketability discount to the resulting valuation, such as may be meant to account for the relative illiquidity of an interest in a closely-held company. *Lawson Mardon Wheaton, Inc. v. Smith*, 160 N.J. 383, 398-99, 734 A.2d 738 (1999). He believed none was warranted, and he explained that this successful company, with its solid growth and earnings, would likely take no longer to sell than other closely-held companies of similar size and type, ordinarily about six to nine months, so long as "the right business intermediary" were engaged to sell it. Nor, he believed, would shareholders stand in danger of losing liquidity while trying to sell, because during the marketing period they would still have the benefit of a generous cash flow from the business, which had distributed tens of millions of dollars to shareholders in the years surrounding the evaluation date.

Trugman explained that marketability discounts were more appropriately applied, for example, to the valuation of a minority share of restricted stock in a publicly-traded company, on the notion that owners cannot readily dispose of their interest when the fluctuating market declines and the interest so suffers from that lack [*11] of liquidity. He explained that closely-held businesses such as these are "very different animal[s]" and naturally "not nearly as volatile in value," so their valuation would not require the same adjustment. Trugman noted, as well, that he had considered certain risk factors, such as the company's customer concentration in the retail industry, when building up his discount rate -- the "right place" to count them -- and he did not want to count the risk factors again by applying an independent discount for illiquidity.

Grabowski, on the other hand, applied a marketability discount to his evaluation. In so doing, he considered numerous risk factors pertaining to liquidity, including the company's size and closely-held nature, its profitability, high customer concentration in the retail industry, anticipated holding period, and heavy dependence on Frank. In his estimation, this particular closely-held corporation's relative lack of marketability, consistent with guidance from applicable studies and legal precedent, merited application of a thirty-five percent discount.

Judge Velazquez concluded, based on that record, that although Trugman and Grabowski had considered several of the same factors in [*12] formulating their discount rate and marketability discount, respectively, that Trugman had made no adjustment for marketability in building up his discount rate -- in short, the judge concluded that no marketability discount was embedded in his evaluation. The judge rejected both expert opinions, moreover, in selecting an appropriate discount, and fixed the rate at twenty-five percent.

III

Norbert contests the finding that a marketability discount was not already embedded in Trugman's valuation, arguing that Grabowski considered precisely the same factors in arriving at his marketability discount as Trugman had in building up his discount rate, and that applying a separate discount based on those same factors would consequently double-count the same risks.

Evaluation of a closely-held company is a fact-sensitive endeavor, *Steneken v. Steneken*, 183 N.J. 290, 297-98, 873 A.2d 501 (2005), with the objective of achieving the asset's "fair value" to its holder, whether or not any ready market for it exists, *Brown v. Brown*, 348 N.J. Super. 466, 487, 792 A.2d 463 (App. Div.), *certif. denied*, 174 N.J. 193, 803 A.2d 1164 (2002). Where appropriate, that process may entail application of a marketability discount, which reduces the value of the asset on the premise that the pool of potential buyers for a relatively illiquid interest in a closely-held company [*13] would be limited. *Lawson Mardon Wheaton, supra*, 160 N.J. at 398-99. Whether the discount should apply in a given matter depends on the equities of the case, *Balsamides v. Protameen Chems.*, 160 N.J. 352, 381-83, 734 A.2d 721 (1999), although, in one case, we recognized that such a discount is not usually warranted in an oppressed-shareholder action absent extraordinary circumstances, *Brown, supra*, 348 N.J. Super. at 483.

A trial court's determination of fair value is generally reviewable only for an abuse of discretion. *Balsamides,* *supra*, 160 N.J. at 368. Such a decision will not be disturbed on appeal so long as the factual findings underlying its decision find the support of sufficient credible evidence in the record, the determination logically could have been reached on those factual predicates, and the court adhered to all applicable legal principles. *Clark v. Clark*, 429 N.J. Super. 61, 72, 57 A.3d 1 (App. Div. 2012). The court's conclusions on matters of law are entitled to no special deference on appeal and are subject to de novo review. *Balsamides, supra*, 160 N.J. at 372. That includes the threshold determination of whether a marketability discount should apply to a particular valuation, *Lawson Mardon Wheaton, supra*, 160 N.J. at 398, but would not ordinarily include, as here, a factual finding as to whether such a discount might already be embedded in a valuation or, if not, a fact-sensitive, discretionary decision as to the discount's size.

The deference usually accorded to a trial court's conclusions in [*14] those last two regards, however, is largely premised on the trial judge's superior vantage point for making credibility evaluations, given its opportunity to observe witness testimony first-hand. *Balsamides, supra*, 160 N.J. at 367-68. The same level of deference is unwarranted where, as here, a judge reaches a decision on review of only a static record developed before a different judge in a prior proceeding. *See, e.g., Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 587-88, 538 A.2d 794 (1988); *State v. Reevey*, 417 N.J. Super. 134, 146-47, 8 A.3d 831 (App. Div. 2010), *certif. denied*, 206 N.J. 64, 17 A.3d 1245 (2011); *Jock v. Zoning Bd. of Adjustment of Wall*, 371 N.J. Super. 547, 554, 854 A.2d 928 (App. Div. 2004), *rev'd on other grounds*, 184 N.J. 562, 878 A.2d 785 (2005). That said, a reviewing court must still defer to any credibility evaluations the first judge made, *Close v. Kordulak Bros.*, 44 N.J. 589, 599, 210 A.2d 753 (1965), and to the second judge's sound exercise of discretion, *cf. Clowes*, *supra*, 109 N.J. at 588-89, in considering the third judge's application of additional factors.

The second trial judge rejected application of a marketability discount following our first remand. He considered Frank's criminal conviction, a factor Grabowski suggested would reduce the company's value, but noted that while the company endured a lull during Frank's absence, it resumed its growth on his return with no apparent hindrance attributable to his criminal history. Neither that nor any other circumstance, the trial judge at the time reasoned, justified application of the discount.

Although that reasoning was sound for [*15] the most part, we reversed because the judge at the time failed to consider that Norbert's oppressive conduct had harmed his fellow shareholders and necessitated the forced buyout. *Wisniewski II, supra*, 2013 N.J. Super. Unpub. LEXIS 724 at *34-35. The Supreme Court had observed under similar circumstances in *Balsamides*, *supra*, 160 N.J. at 378-79, 382-83, that, absent application of a discount, the oppressing shareholder would receive a windfall, leaving the innocent party to shoulder the entire burden of the asset's illiquidity in any future sale. Equity demanded application of the discount, or else the statute would create an incentive for oppressive behavior. *Id.* at 382-83; *see also Brown*, *supra*, 348 N.J. Super. at 484 (requiring oppressed shareholder to buy out an oppressor constituted extraordinary circumstance warranting application of the discount). We concluded that the same result should occur here, though we cautioned that a marketability discount could apply only to the extent that no adjustment for liquidity was already embedded in the discounted-cash-flow valuation the court had adopted. *Wisniewski II, supra*, 2013 N.J. Super. Unpub. LEXIS 724 at *34-35.

On remand, Judge Velazquez determined on the existing record that a marketability discount was not already embedded in the valuation. He recounted that the discount rate Trugman built up included a size premium and an adjustment for a series [*16] of company-specific factors including the company's reliance on Frank, its customer concentration in the retail industry, and high debt. Although Grabowski had considered similar factors in formulating his marketability discount, the judge concluded that Trugman had certainly "utilized them in a different way" than to adjust for any lack of illiquidity.

Judge Velazquez found this to be plainly evident from Trugman's testimony. Trugman had rejected the notion that any discount for liquidity should apply, and it followed that he could not have incorporated one into his valuation. Trugman believed this highly successful, closely-held business would generate no more difficult a sale than others of its size and type, and that shareholders stood in no danger of losing liquidity during such a sale. He had insisted, moreover, that a marketability discount was more appropriate in adjusting for the risk associated with the sale of an entirely different sort of asset -- a minority share of restricted stock in a publicly-traded company, whose value would naturally be more volatile and illiquid than that of the interest in question here.

The judge also explained that, even though Trugman had considered [*17] certain marketability-related factors in his build-up analysis, he considered "positive" factors such as longevity of the company's customers, its history of growth, and significant cash flow. Yet Trugman could not specify on cross-examination the weight he assigned to each factor in his analysis, allowing only that the choice of an appropriate specific-company risk premium was a matter of "subjective judgment."

Grabowski analyzed a handful of the same factors, among many others, in formulating his marketability discount, but, in contrast, focused on the inherent illiquidity of closely-held companies and the anticipated holding period for a rational investor in this company. There was no clear indication in the record, then, that Trugman and Grabowski had accounted for the same risks relative to marketability, such that application of a separate marketability discount would cause double counting.

Norbert disputes that conclusion in prosecuting his appeal, arguing that Trugman considered all applicable marketability factors when building up his discount rate, and that applying a separate discount based on the same factors would unfairly "devalue" Norbert's share of the company twice on [*18] account of the same risks. Those factors included all of the small company factors that Grabowski had considered in setting his marketability discount -- that the company was privately held and had a capitalization structure typical of small businesses, relied on a small number of key managers, and had a core customer base dealing in retail goods. According to Norbert, Trugman had already incorporated the risks associated with the first of those factors into his analysis by adding a size premium of nearly three-and-one-half percent and then added another four percent to account for the latter two factors, leaving no need to account for them again with a separate discount for marketability. Even Trugman, Norbert asserts, worried about double-counting and declined to apply any additional discount for that reason.

Norbert surmises Judge Velazquez disagreed only because he misunderstood his task on remand and believed that, so long as no marketability discount itself was featured as an element in Trugman's build-up analysis, there could be no risk of double counting. He argues it was enough here that Trugman and Grabowski had considered the same handful of factors to establish a discount [*19] rate and marketability discount, respectively, and that both experts, contrary to the court's reasoning, had used them precisely the same way -- to reduce the company's value. Norbert also interprets the decision in *Balsamides, supra*, 160 N.J. at 379, as recognizing the analysis of those factors in both contexts to be *inherently* the same undertaking.

Norbert further argues, relying on *Brown, supra*, 348 N.J. Super. at 488, that no marketability discount should apply here at all, because none of the parties planned to sell to a third party. That circumstance counseled against applicability of the discount in *Brown*, but was clearly outweighed in *Balsamides, supra*, 160 N.J. at 382-83, and here, by the circumstance that the oppressed shareholder was to buy out the oppressor. No sale to a third-party was contemplated there either, but the Court concluded that, consistent with the demands of equity, the oppressed shareholder should not be forced to hand the oppressing shareholder the windfall of an undiscounted price, leaving the oppressed shareholder to shoulder the entire burden of the company's relative illiquidity. *Id.* at 378-79, 382-83. Moreover, we already concluded that the same result must obtain here, except to the extent the valuation already accounted for any illiquidity, *Wisniewski II, supra*, 2013 N.J. Super. Unpub. LEXIS 724, [slip op.] at 33-34. In short, that issue was previously [*20] decided.

Insofar as Norbert contends that mere consideration of the same factors when building up a discount rate in a discounted-cash-flow valuation and application of a separate marketability discount based on the same considerations *inherently* double counts the same risks, he is mistaken. The crux of that misunderstanding is that the same collection of factors -- the company's size and closely-held nature, undercapitalization, dependence on key managerial personnel, and concentration of customers in one industry -- influences the value of the company in two distinct ways. First, they diminish the certainty of receiving the expected income stream from the asset. Shannon P. Pratt et al., *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 161-62 (4th ed. 2000). Second, they affect the asset's liquidity by limiting the pool of potential buyers in the event of a sale. *Lawson Mardon Wheaton, supra*, 160 N.J. at 398-99.

The first of these two effects must be accounted for in the discount rate in a discounted-cash-flow valuation, which calculates the value of an asset according to the present value of receiving a particular income stream from it. Pratt, *supra*, at 153, 161-62. The less certainty of receiving that income stream, the more of a premium [*21] a buyer will demand to compensate for the added risk. *Id.* at 159, 161. And the higher the discount rate, the lower the value of the company. None of the parties dispute that Trugman considered these factors when building up his discount rate and chose a value accordingly.

But the same risk factors also impact the asset's marketability, and an adjustment in price may be demanded on that account, as well. *Id.* at 392. An evaluator using a discounted-cash-flow approach may adjust for marketability in building up the discount rate or may not. *Id.* at 161. The question here is whether Trugman did. Several factors he considered in building up his discount rate were related to liquidity but, as already explained, not exclusively so. His insistence that the company never had any illiquidity to account for strongly suggests that he set the applicable premiums in his discount rate to values meant to adjust for uncertainty in receiving the expected income stream, but not for any lack of marketability. Judge Velazquez's finding to that effect was therefore sound.

Trugman, as Norbert points out, did mention a concern with double-counting. But the balance of his testimony -- that he believed the company could be easily sold, that shareholders [*22] would suffer no loss during the marketing period, and that adjustments for marketability were generally more appropriate for other sorts of businesses entirely -- suggests that he never deliberately counted any marketability-related effect of the specific company factors in his discount rate that could be counted again through application of a separate discount.

For these reasons, we conclude that Judge Velazquez soundly determined that no marketability discount was already embedded in the valuation.

IV

Both sides challenge the twenty-five percent discount rate applied by Judge Velasquez. Norbert argues it should have been set at zero, again asserting, incorrectly, that Trugman's discount rate already accounted for all the factors affecting liquidity that Grabowski had considered, that the judge never identified any other factors justifying application of an additional discount, and that, in any event, there was no basis in the record for the precise figure the judge chose. Patricia and Donna argue the judge should have set the value at the thirty-five percent figure that Grabowski favored.

The Court noted in *Balsamides*, *supra*, 160 N.J. at 377, 379, that marketability discounts for closely-held companies frequently ranged from [*23] thirty to forty percent, though the Court explained that selection of an appropriate rate, and the applicability of a rate in the first place, must always be responsive to the equities of a given matter.

Judge Velazquez properly rejected from the outset Norbert's suggestion that the marketability discount be set at zero percent. Indeed, we had already decided that a marketability discount was required and Judge Velazquez was bound by our mandate.

After carefully canvassing the record, Judge Velazquez came to the conclusion that selecting a thirty to forty percent rate as described in *Balsamides* would excessively punish Norbert, the oppressing shareholder, beyond what the equities of this case required and, in light of the company's past financial success and anticipated continued future growth, stood to "give the remaining shareholders a significant windfall."

In choosing an appropriate marketability discount after rejecting portions of both expert opinions on the issue, Judge Velazquez acknowledged our Supreme Court's advice in *Balsamides* that such discounts frequently ranged from thirty to forty percent, but noted that other studies supported a broader range, reaching as low as twenty [*24] percent. He alluded to authorities from other jurisdictions approving the application of a wide range of discounts, sensitive to the equities of each individual case, and to our decision in *Cap City Products Co. v. Louriero*, 332 N.J. Super. 499, 501, 505-07, 753 A.2d 1205 (App. Div. 2000), allowing application of a twenty-five percent discount.

The judge also considered the United States Tax Court's guidance in *Mandelbaum v. Commissioner of Internal Revenue*, 69 *T.C.M.* (C.C.H.) 2852, an authority on which Grabowski had likewise relied. There, the Tax Court explained that appropriate factors to weigh in setting a marketability discount were those which reflected an "appreciation of the fundamental elements of value that are used by an investor in making his or her investment decision." *Ibid.* Among them were

> (1) The value of the subject corporation's privately traded securities vis-a-vis its publicly traded securities (or, if the subject corporation does not have stock that is traded both publicly and privately, the cost of a similar corporation's public and private stock); (2) an analysis of the subject corporation's financial statements; (3) the corporation's dividend-paying capa-city, its history of paying dividends, and the amount of its prior dividends; (4) the nature of the corporation, [*25] its history, its position in the industry, and its economic outlook; (5) the corporation's management; (6) the degree of control transferred with the block of stock to be valued; (7) any restriction on the transferability of the corporation's stock; (8) the period of time for which an investor must hold the subject stock to realize a sufficient profit; (9) the corporation's redemption policy; and (10) the cost of effectuating a public offering of the stock to be valued, e.g., legal, accounting, and underwriting fees.
>
> [*Ibid.*]

Although Grabowski had focused largely on the holding period risk, concluding that the anticipated holding period for a rational investor in property of this sort would likely be lengthy, Judge Velazquez found no evidence of such an anticipated holding period on this record. He agreed instead with Trugman that the company's historical financial performance and growth would ensure that shareholders would receive sufficient earnings while they attempted to sell, and that, in light of the company's strong earnings and projected future growth, it would not likely take long to sell the company. The judge allowed that Grabowski had considered other relevant factors listed [*26] in *Mandelbaum*, but found that Grabowski simply failed to adequately weigh these other "strong indicators of liquidity." Accordingly, the judge concluded that the equities in this case favored application of a marketability discount on the "low end of normal."

Norbert maintains that the marketability discount should have been set at zero, because the company had no issues with liquidity. By way of their cross-appeal, Patricia and Donna likewise fault Judge Velazquez for departing from expert opinion to select his own percentage, and maintain that he should have adopted Grabowski's opinion instead. They dispute the judge's minimizing of Grabowski's methodology as inadequately explained, asserting that Grabowski had clearly identified all of the factors he had considered in reaching his figure, which, they note, was consistent with the one tentatively approved in *Balsamides, supra*, 160 N.J. at 379.

Despite their earnest contentions, Judge Velazquez was not bound to accept either expert opinion at face value or for all purposes; he was entitled to find a figure that no expert in the case had specifically favored so long as it was plausible, based on evidence in the record, and -- in the final analysis -- fair and equitable. [*27] *See City of Long Branch v. Liu*, 203 N.J. 464, 491-92, 4 A.3d 542 (2010).

Neither side has presented any principled ground upon which we might second-guess the judge's thoughtful and well-reasoned determination in this most difficult case.

Affirmed.