IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KATHRYN S. NASSBERG, in her own Right and as Trustee of the Kathryn Cupp Nassberg Trust, Plaintiff	: DOCKET NO. 02-00508
vs.	:
JOHN C. SCHULTZ and PETER D. SCHULTZ, and JERSEY SHORE STEEL COMPANY, Defendants	:

OPINION OF THE COURT

Kathryn S. Nassberg in her own right, and as Trustee of the trust for her daughter, Kathryn Cupp Nassberg, brought an action against her brothers John C. Schultz and Peter D. Schultz and the Jersey Shore Steel Company. Jersey Shore Steel Company is in the business of rolling steel derived from railroad rails into steel angles (called angle iron) used in bed frames, vineyard stakes and other products. Its principle place of business is Avis, Pennsylvania and it employs approximately 300 full-time employees.

It’s a closely held corporation managed and controlled by Jack and Peter Schultz who are also the majority shareholders. Mrs. Nassberg and the trust she manages on behalf of her daughter are minority shareholders of 12% of the non-voting stock of the corporation. She alleges that her brothers and the closely held corporation which they control have acted illegally, oppressively or fraudulently toward her and the trust she manages. As to her claims of oppression Mrs. Nassberg alleges inter alia that:

1. Jack and Pete Schultz are compensated excessively by JSS; 2. Jack and Pete Schultz caused JSS to hire Jack's adult son and his son's colleague and JSS paid those individuals substantially beyond their worth; 3. Jack and Pete Schultz have caused JSS to forego corporate formalities such as shareholder meetings and distributing financial information; 4.

Jack and Pete Schultz caused JSS to engage in inappropriate accounting practices for the purpose of artificially causing JSS to be unprofitable in order to engage in a sham of denying Mrs. Nassberg dividends; 5. Jack and Pete Schultz caused JSS to offer Mrs. Nassberg the Hempstead Value, which is a severely depressed "fire sale" value.

In August of 2005 an eight day non-jury trial was conducted and at its conclusion the parties were directed to submit proposed findings of fact and conclusions of law upon the receipt of the trial transcript. It was agreed that a second closing argument would be held subsequent to said submission. On January 18, 2006, closing arguments were held and after careful review of an extensive record, the Court enters the following:

FINDINGS OF FACT

A. General Background and History

1. Jersey Shore Steel Company ("JSS") was founded in 1938 by John A. Schultz, Sr., the grandfather of defendants Jack and Pete Schultz and plaintiff Kathryn S. Nassberg ("Mrs. Nassberg"). John A. Schultz, Jr. ("John Jr.") and Charles Schultz took over the company in the 1940's when John Sr. died. John Jr. and Charles Schultz were brothers and the father and uncle, respectively, of Jack and Pete Schultz and Mrs. Nassberg. *Aug. 1 at 17; Aug. 3 at 30-32.*

2. JSS is a manufacturer of rail angle steel made from used railroad rail. JSS has two locations, a re-rolling mill in Jersey Shore, Pennsylvania and a fabricating facility in Montoursville, Pennsylvania. JSS presently has about 400 employees including 300 hourly union employees. *Aug. 1 at 17; EX-97; Aug. 3 at 27.*

3. In 1965, John Jr. and his brother Charles Schultz created "First Company" to benefit Jack, Pete and Mrs. Nassberg (children of John Jr.) and Charles Schultz's three children. JSS transferred ownership of the land on which its re-rolling mill was located to First Company and then it and First Company entered into a 30-year lease at a rent of $7,500 per month. The

monthly rental income was distributed to the six cousins (including Mrs. Nassberg and Jack and Pete Schultz) at $1,250 pr month per cousin. *Aug. 1 at 28, 29, 100-03; Aug. 3 at 34-36; Aug. 4 at 35-36.*

4. Defendant Jack Schultz is the chief executive officer of JSS, the son of John Jr. and the brother of defendant Pete Schultz and Mrs. Nassberg. Jack Schultz started his full-time employment at JSS in 1968 and has been employed continuously by JSS since then. *Aug. 3 at 26-27, 51-58*.

5. Defendant Pete Schultz is the executive vice president of JSS, the son of John Jr. and the brother of Jack Schultz and Mrs. Nassberg. Pete Schultz began his full-time employment with JSS in 1975 and has been employed continuously by JSS since then. *Aug. 4 at 4-5.*

6. In 1980, Charles Schultz, then a JSS owner and board member, died. At that time, Pete Schultz joined his brother Jack Schultz and his father John Jr. on the JSS board of directors. Later, in February 1982, at the specific suggestion of John Jr., who controlled JSS, the wives of Pete and Jack Schultz were also made JSS directors. *Aug. 3 at 43, 44, 46; Aug. 4 at 4-5; DX-108.*

7. Between 1984 and 1991, John Jr. gradually transferred all of his ownership and control of JSS to his two sons. Jack and Pete. By 1991, Jack owned 205 shares of Class A voting stock of JSS and Pete owned 204 Class A shares. That division of all of the voting stock of JSS has remained constant to this day (with the exception that Pete's shares are in a family partnership that he and his wife control) *Aug. 3 at 28, 45, 50, 58-59; Aug. 4 at 4-5, 27; DX-- 108; DX-I00.*

8. There is also outstanding Class B and Class C non-voting stock of JSS. During the 1980's, John Jr. made gifts of this JSS non-voting stock to family members, schools and charities. One such gift was 411 shares of Class C non-voting stock made to Kathryn C.

Nassberg. Mrs. Nassberg's daughter and John Jr.'s granddaughter. Those 411 shares were placed in a trust for the benefit of the granddaughter in 1991 and Mrs. Nassberg is the trustee. *Aug. 1 at 20; PX-13; Aug. 1 at 68; Aug. 3 at 31, 38, 60--61; Aug. 4 at 29; DX-100.*

9. After 1975 and until 1991 (when John Jr. died), JSS was managed principally by John Jr., Jack and Pete, all of whom worked full-time at JSS. After John Jr. died in August 1991, Jack and Pete Schultz continued to manage JSS without replacing their father with another executive. *Aug. I at 18; Aug. 4 at 4-5; DX-108.*

10. JSS is a closely-held, private Pennsylvania corporation. The Class A voting stock of JSS, since at least 1980, has been owned by the shareholders who work for and control JSS. Since 1980, a majority of the JSS board of directors has consisted of those controlling shareholders and the chief financial officer (Jay Dawson until 1998, Mark Scheffey thereafter). *DX-108.*

11. John Jr.'s will established a residuary life estate for his wife, Jane Schultz. That life estate, upon Jane's death was to be distributed 50% to Mrs. Nassberg and 25% each to Jack and Pete Schultz. *Aug. 1 at 73-74; PX-9, PX-10.*

12. By 1991, the health of Jane Schultz had deteriorated such that Mrs. Nassberg acquired a power-of-attorney over Jane Schultz's affairs. From that point forward until Jane Schultz's death in March 2000, Mrs. Nassberg managed the financial affairs of her mother, Jane Schultz. *Aug. 1 at 19, 75.*

13. As part of estate planning for her mother, beginning in 1992 Mrs. Nassberg caused cash distributions to be made from her mother's assets to Mrs. Nassberg, Jack and Pete, and members of their respective families. During the period 1992-99, Mrs. Nassberg distributed almost $600,000 to herself and her immediate family (as well as to Jack and Pete and their families). *Aug. 1 at 76-77; DX- 33-34.*

14. From at least the 1970's through 1999, JSS reported a profit each year from its operations. During those years, JSS also paid a dividend each year to all shareholders. Jack and Pete Schultz managed and controlled JSS during the period 1991-1999. *DX-117; DX-108.*

B. Mrs. Nassberg's Background and Her involvement With JSS

15. Mrs. Nassberg has never worked full-time at JSS. She worked at JSS for several summers while in college but after graduating, Mrs. Nassberg began a career in banking in Philadelphia. *Aug. 1 at 11-13, 16, 43-49, 52-53*.

16. While working as a bank executive in Philadelphia, Mrs. Nassberg (then known as Kathryn Lynn) met her future husband, Richard T. Nassberg. The Nassbergs married in 1981. Mr. Nassberg is an Ivy-League educated lawyer, and began his legal career on Wall Street. He then moved to a large law firm in Philadelphia, where he was working when he met Kathryn Lynn. *Aug. 1 at 45, 49*.

17. Despite her assertions to the contrary, and Trial Testimony that on several occasions strained credulity, Mrs. Nassberg is a sophisticated, intelligent businesswoman. Besides working as a bank executive, she has operated her own companies, including a credit analysis firm and several real estate ventures through which she currently does business. Mr. Nassberg, similarly, is a sophisticated businessman and lawyer with a background in transactional and corporate work. Mr. Nassberg is currently a county commissioner for Lycoming County, Pennsylvania. *Aug. 1 at 14-15, 17, 47-48, 49, 50-52, 97; DX-17.*

18. In 1983, the Nassbergs moved from Philadelphia to Houston, Texas. Mrs. Nassberg continued to work as a financial executive and Mr. Nassberg continued to practice corporate law. At that time, Mrs. Nassberg owned over 1,000 shares of JSS stock, which she received as gifts from her father. Her father decided in 1983 that it was not in the best interests of JSS to have JSS voting stock owned by an individual who did not work at JSS and who was

geographically remote from JSS. Accordingly, JSS purchased Mrs. Nassberg's stock in 1984 for $1,010,000, including interest on several installment payments. This transaction was negotiated by Mrs. Nassberg with JSS's chief financial officer. Between 1984 and 2002, Mrs. Nassberg did not own any JSS shares directly. *Aug. 1 at 14-15, 21-22, 47-50, 56-67; DX-109; Aug. 1 at 70; PX-13; Aug. 3 at 48-49; DX-108; Aug. 4 at 25-27.*

19. In 1993, the Nassbergs moved from Houston to the Bordeaux region of France. They continued to live there until 1997. While in France, neither Mr. Nassberg nor Mrs. Nassberg was employed or worked. *Aug. 1 at 15-16, 45.*

20. During the 1980's and 1990's, while living in Texas and France, Mrs. Nassberg had "no personal interest in the mill" except to ask for information about dividends on her daughter's stock. During that time period, through 1999, dividends were paid each year on JSS stock, including the stock that had been given to Mrs. Nassberg's daughter by John Jr. *Aug. 1 at 4; DX-17, 117-118.*

C. The Third Jersey Company and JSS's Rail Inventory

21. In 1992, on the advice of outside professionals, JSS created The Third Jersey Company as a subsidiary company to take advantage of Delaware tax laws. Third Jersey holds the cash and marketable securities of JSS. *Aug. 3 at 73; Aug. 5/8 at 21-22.*

22. Historically, JSS has kept relatively large amounts of liquid assets (cash and liquid investments) on hand for strategic use. One critical use of these liquid assets is to purchase railroad rail, the principal raw material used in JSS's rail angle steel manufacturing process. There is no organized marketplace for the purchase of used railroad rail. Purchases only become possible when an owner of abandoned rail, somewhere in the world, decides to sell that rail. These "spot markets" can arise at any time and, because of the nature of certain sellers. (foreign governments, foreign companies, unstable political climates, etc.), JSS

maintains liquid assets at a level to enable JSS to purchase rail when it becomes available and thereby maintain adequate rail inventories for production. *Aug. 3 at 94-95; Aug. 4 at 23, 95-99; Aug. 5 (a.m.) at 24, 27; Aug. 5/8 at 115; Aug. 9 at 13.*

23. The IRS has examined JSS's maintenance of large amounts of cash, or excess working capital. This examination occurred in 1997 for the 1994 tax year. The IRS was looking at about $26 million in alleged excess working capital. After dialogue with JSS and its auditors, the IRS found no additional tax due. *Aug. 5 (a.m.) at 90-100; DX-113-114.*

24. The rail inventory of JSS is maintained on the plant property in outdoor, exposed piles of rail. The rails are extremely heavy (made from carbon steel) and, when loosely piled in an outdoor setting, can be dangerous to human safety. *Aug. 5/8 at 90-91.*

25. Since at least 1970's, JSS has not performed a physical count of its rail inventory for year-end audit purposes. JSS believed that performing such a physical count is dangerous, expensive and unnecessary for its business. Instead, since at least the time that John, Jr. and his brother Charles owned and controlled JSS, the company has used a formula to account for its rail inventory. That formula, in general terms, assumes that there are certain mathematical relationships and correlations between the weight of finished product and the consumption of rail inventory (which is weighed when it is delivered to the plant) that is used to produce the finished product. *Aug. 5/8 at 90-94, 313-17.*

26. In 2002, JSS discovered that its rail inventory per its financial records differed substantially from what appeared to be its actual rail inventory sitting at the storage yard. The book rail inventory briefly went negative when the yard actually had a substantial amount of rail stored in it. JSS then realized that the formula it had been using for decades had resulted in a very gradual but unintentional overstating of the rail used in production and, therefore, an understatement of its rail inventory. *Id.*

27. JSS reported this rail inventory issue to the IRS in 2003. As a result, JSS filed for a change in accounting method with the IRS (which was granted). In that connection, JSS corrected its previous tax returns and financial records accordingly. *Id.*

D. South Avis Realty Company

28. In 1994, an opportunity arose for JSS to purchase the 86-acre "Conrail property" that adjoined the mill property as well as some abandoned rail on that property. Because of concerns about possible environmental exposure and resulting liability, and on the advice of counsel, Jack and Pete Schultz formed South Avis Realty Company to purchase the Conrail property (and rail on the property) for $281,000. South Avis borrowed funds from Jersey Shore State Bank in order to make the purchase. South Avis was owned by the children of Jack and Pete Schultz but controlled by Jack and Pete. *Aug. 3 at 81-87, 205, 208; Aug. 4 at 36-44, 120; DX-99.*

29. In April 1996, South Avis purchased 44 more acres adjoining the mill property from Gardner Warehouse Corporation and Perfection Fur Processing, Inc. for $274,000 and $175,000 respectively. These purchases were financed by South Avis through loans from Jersey Shore State Bank. *Id*.

30. By the end of 1995, the 30-year lease between First Company (owned by the six Schultz cousins) and JSS was coming to an end. Jack and Pete Schultz decided that they, as the controlling shareholders of JSS, wanted to do for their children what their father and uncle, as the controlling shareholders of JSS, had done for their children 30 years earlier. Jack and Pete Schultz decided that they wanted to transfer ownership of the land on which the mill was located out of First Company and into South Avis Realty and use South Avis to benefit their children. In that connection, in 1995 a formal independent appraisal of the mill property owned by First Company was performed and the property was appraised at a little more than

$2 million. *Id.*

31. South Avis advised the four other Schultz cousins -- Mrs. Nassberg and the children of Charles Schultz -- of these plans. The three children of Charles Schultz agreed to the sale and also agreed (through a bank fiduciary) to sell their JSS shares back to JSS. Mrs. Nassberg also agreed to the sale. *Id.; Aug. 3 at 79-80.*

32. On July 1, 1996, all of the owners of First Company, including Mrs. Nassberg, agreed hi writing to sell the plant property to South Avis for $2,125 million (the appraised value). Mrs. Nassberg, with the knowledge and consent of her lawyer husband, signed the deed and agreement of sale that evidenced this transaction. Mrs. Nassberg individually received $350,000 as her share of the sale proceeds. South Avis borrowed the funds to close on this purchase from JSS. *Aug. 1 at 30, 104-09; Aug. 4 at 41.*

33. Before the 1996 sale, Mrs. Nassberg was receiving $1,250 (one-sixth of $7,500) a month from the rent paid to First Company by JSS, or $15,000 per year, all or much of which was subject to tax. After the sale, had Mrs. Nassberg invested her after-tax proceeds in tax-free investments bearing a 5% yield, she would have enjoyed an income of close to $15,000 per year, none of which was subject to tax. In other words, Mrs. Nassberg was no worse off (and probably better off) financially because of this sale. *Aug. 3 al 81-82.*

34. Neither Mr. Nassberg nor Mrs. Nassberg ever complained in writing about this July 1996 transaction. Nor did either of them seek to postpone or cancel the transaction at any time. Her claim of being "cornered" and "threatened" to persuade her to execute documents are not worthy of belief and are belied by their actions which ostensibly inured to their self-serving interests. *Aug. 1 at 104-108, 127-32; DX-21.*

35. Since 1996, JSS has paid rent to South Avis for the use of the mill property and the properties acquired in 1994 and 1996 (adding 130 acres). The monthly rent (about $27,000) is

roughly sufficient to cover the mortgage debt obligations and to pay certain other minor expenses. Jack and Pete Schultz have not received any money from South Avis since 1996 except $5,000 per year as salaries and distributions to cover tax obligations. *Aug. 3, at 81-87; Aug. 4 at 42-44.*

E. JSS's Repurchase of JSS Stock At Hempstead Value

36. At various times before he died in 1991, John Jr. caused JSS to make gifts of JSS non-voting stock to various family members, schools, churches and charities. *Aug. 3 at 60-62; DX-100; DX-122.*

37. Beginning at least as early as 1984, each year JSS offered to repurchase minority shareholders' JSS stock at the "Hempstead Value." The "Hempstead Value" is an annual value of JSS minority shareholder stock determined by an outside independent appraiser, Hempstead & Co., Inc. The Hempstead Value is prepared each year and is the result of a lengthy, detailed written appraisal prepared by Hempstead and presented to JSS. It is prepared by independent professional individuals who are educated, trained, experienced and qualified in business valuation and related areas. *Aug. 5/8 at 204-213; DX-97.*

38. The Hempstead written appraisal reports contain: an explanation of the company financial data collected and reviewed, as well as a detailed summary of that information going back five years, a description of the company and its history, facilities, employees, management, products, competition and an overview of the company's economic and industry outlook; an explanation of Hempstead's definition of use of "fair market value"; a discussion of adjustments to the company's financial statements for valuation analysis purposes; an explanation of the method by which Hempstead is placing a fair market value on minority-held JSS non-voting shares; a description of the manner in which comparable companies were selected for valuation purposes; a detailed discussion and analysis of those

comparable companies and economic ratios derived for those companies; a discussion of economic ratios selected for JSS and the application of ratios to derive values and weighted values per JSS share; a discussion of the company's non-operating assets; and a discussion of the discounts for illiquidity and non-voting. The Hempstead reports then set forth a fair market value per share for JSS Class A, Class B and Class C stock. *Id. Aug. 5/8 at 214-256.*

39. The Hempstead Value is the only value ever used by JSS to redeem minority-held stock of the company. *Aug. 4 at 109-11*.

40. JSS has offered the Hempstead value to minority shareholders that include family members, schools (including schools attended by Schultz family members) and religious organizations. Between 1995 and 2005, eight members of the Schultz extended family, five schools and three religious organizations sold their JSS stock at the Hempstead Value. During that period, JSS paid out almost $10,000,000 to redeem JSS stock at the Hempstead Value. *DX-122*.

41. Several JSS stock redemptions have been negotiated with fiduciaries for the minority stockholders, again using the Hempstead Value. In 1996, the children of Charles Schultz sold their JSS stock to JSS through a trust administered by a local bank serving as a fiduciary. The fiduciary bank was represented by counsel and they were furnished by JSS with current financial information, either directly through financial statements or through the Hempstead reports. After being given an opportunity to review this information, the bank and counsel permitted the transaction to occur. *Aug. 3 at 77-82; DX*-122.

42. In 1995, a Schultz family cousin, who was mentally retarded but represented by counsel, was furnished current financial information by JSS. After being given an opportunity to review this information, counsel permitted the transaction to occur. Id.

F. JSS Charitable Contributions

43. During the 1980's , while John Jr. controlled JSS, the company made annual charitable contributions to a variety of charities and causes, most of which had some connection to the Williamsport area.. Contributions were also made to schools that were attended at one time by John Jr.'s children, Jack Schultz, Pete Schultz and Mrs. Nassberg. *Aug. 1 at 43-44; Aug. 3 at 98-101; DX*-121.

44. While John Jr. was still alive, the annual charitable contributions ranged from a low of $69,000 to a high of $279,600. After John Jr. died in 1991, Jack and Pete Schultz continued his tradition of JSS's charitable contributions to the same or similar donees. From 1991 to 1999, under Jack and Pete's watch, JSS's annual charitable contributions ranged from a low of $139,350 in 1991 to a high of $341,950 in 1996. *DX-121*.

45. There is no evidence that the IRS has ever challenged in any way these charitable contributions that were taken as tax deductions by JSS.

46. In 2000, JSS experienced its first unprofitable year in decades. That year, JSS continued to make charitable contributions because some of those contributions were the result of prior commitments spread over several years going forward. However, the level of giving was reduced by almost one-third in 2000 compared to 1999, from $195,000 to $140,883. DX-121; Aug. 4 at 115.

47. JSS's charitable contributions remained relatively the same in 2001 ($140,833) as in 2000, again due in part to multi-year commitments made in prior years. Id.; Aug 3 at 105.

48. For the years 2002-2004, JSS's charitable contributions decreased substantially to $80,958 (2002), $34,002 (2003) and $1,275 (2004). Id

G. Mrs. Nassberg's Demand to Have Her JSS Stock Redeemed And The Initiation Of This Lawsuit.

49. John Jr. died in August 1991, leaving a residual life estate for his wife Jane Schultz. Following her death in 2000, the remainder was to be divided, 50% to Mrs. Nassberg and 25% each to Jack and Pete Schultz. *PX-9; PX-10.*

50. Because of Jane Schultz's deteriorating physical condition, in 1991 Mrs. Nassberg acquired a power-of-attorney over her mother's affairs. *Aug. 1 at 19.*

51. Jane Schultz died in March 2000. Mrs. Nassberg and Pete Schultz were co-executors of her will. Included in the remainder of the life estate established by John Jr. for his wife, were 1,120 JSS Class C non-voting shares. Accordingly, Mrs. Nassberg ultimately became a direct shareholder of JSS as a result of the distribution of 560 shares from the remainder interest, with Jack and Pete Schultz receiving 280 shares each. *Aug. 1 at 24, 33; PX-13; Aug. 4 at 61*.

52. In July 2000, Mrs. Nassberg, as the co-executor of her mother's estate, agreed to hire Hempstead to perform valuation work for the estate tax return, specifically to value the JSS stock that was to be distributed from the remainder of the life estate. *Aug. 1 at 33-34; PX-19, DX-27; Aug. 4 at 61-62.*

53. Later in the fall of 2000, a meeting that included Pete Schultz and the Nassbergs took place, in Mr. Nassberg's Lycoming County Commissioner's office at the courthouse in Williamsport. Either at this meeting, or earlier, the Nassbergs had demanded that JSS purchase the JSS stock held in trust for Mrs. Nassberg's daughter as well as the JSS stock Mrs. Nassberg stood to inherit (but did not own yet). In response to their sister's demand, Jack and Pete Schultz had offered the Hempstead Value to the Nassbergs but they declined. The meeting turned confrontational and included a suggestion by the Nassbergs that there could be

one JSS stock value for the government (the Hempstead Value) but a higher value for the Nassbergs. The meeting also included a statement by Mrs. Nassberg that it was "pay back time." Finally, the meeting also included a demand by the Nassbergs to review JSS financial information. When Pete would not agree to produce that information (because his father would not have permitted it), the Nassbergs threatened to sue the Schultz brothers, to which Pete Schultz angrily responded that there "could be another flood or fire." However, there was no flood or fire and despite Plaintiffs repeated assertions about such declaration by Pete, the Court finds such was a reactive rather than a reflective comment and there was no evidence of any destruction of documents. *Aug. 1 at 39, 119, 122-23; Aug. 3 at 126; Aug. 4 at 66-69; Aug, 5 (a.m.) at 5-6, 21-22.*

54. In September 2000, Hempstead completed its valuation of the JSS shares that were part of the remainder interest and a copy of this report was provided to Mrs. Nassberg through counsel. This report contained summaries of JSS balance sheets and income statements as of April 1, 2000 and for the fiscal years 1995-1999. *Aug. 1 at 37-38; PX-20. 21, 22; Aug. 1 at 120-21 Aug. 4 at 65.*

55. In October 2000, Mrs. Nassberg retained a valuation consultant, Analytics, Inc., to evaluate the Hempstead report and to evaluate the worth of the JSS shares that Mrs. Nassberg was inheriting as a result of her mother's death. In that regard, Mrs. Nassberg made a demand on JSS for substantial financial and operating information of JSS. That information was gathered by JSS following the completion of the fiscal year 2000 audit and albeit in a belated and begrudging manner ultimately supplied to Mrs. Nassberg (through counsel) in March 2001. *Aug. 1 at 37-38, 118; PX-20-22.*

56. In December 2000, Mrs. Nassberg resigned her fiduciary role as co-executor of her mother's estate. She resigned because she apparently did not want to become "boxed-in" by a

Hempstead valuation report. By this, Mrs. Nassberg acknowledged that by staying on as co-executor and relying upon the Hempstead report to value the JSS stock in her mother's estate, she would be endorsing that value and making it difficult for her to later attack the Hempstead Value in seeking to get a higher price for her JSS shares. *Aug. 1 at 40; PX-23; Aug. 1 at 113-16; DX-22, 23, 32.*

57. Mrs. Nassberg made a supplemental request for JSS information in May 2001 and JSS responded to that request in July 2001. *DX-104-105.*

58. Mrs. Nassberg never provided Jack and Pete Schultz, or JSS, with any valuation report prepared by Analytics, Inc.

59. Mrs. Nassberg's mother's estate was probated and eventually Mrs. Nassberg received the 560 shares of JSS Class C stock. Her JSS stock certificate was issued on March 15, 2002. *DX-4*.

60. Mrs. Nassberg filed this lawsuit against her brothers 11 days later on March 26, 2002. Among other things, Mrs. Nassberg's Complaint, which she personally verified, initially accused her brothers of stealing $6 million in JSS insurance funds; misappropriating nearly $17 million from JSS's cash and marketable securities; and receiving gifts and personal services from JSS for which they did not pay. All of these claims against her brothers were withdrawn before the hearing in this matter, without any explanation for why they were made in the first place. See Complaint.

H. Use Of The Hempstead Value

61. JSS and Schultz family members have sought and relied upon the periodic Hempstead Values for more than 20 Years. Those values have been used in connection with redeeming minority-held shares in JSS, to prepare and file gift and estate tax returns, to govern a "buy-sell" agreement among the principal JSS shareholders, and to calculate cash equivalents

for one donee when JSS stock was given to other donees. *Aug. 3 at 62; DX-122; Aug. 4 at 44.*

62. The original use of the Hempstead Value appears to have been in 1984 when Mrs. Nassberg's JSS shares were redeemed by the company. That use of the Hempstead Value was agreed to by Mrs. Nassberg and she received $1,010,000 in several installments in 1984. *Aug. 1 at 6167. 125; Aug. 3 at 48-50; DX-108.*

63. In the 1980s, John Jr. transferred control of JSS from himself to his sons Jack and Pete by gifting JSS stock to them. In connection with those gifts, federal gift tax returns were prepared and filed for John Jr. and they applied the then current yearly Hempstead Value to those gifted shares. *Aug. 3 at 50; Aug. 5 (a.m.) at 89-90.*

64. In 1992, JSS redeemed its shares then held by Jay Dawson, the long-time chief financial officer of JSS. JSS used, and Mr. Dawson accepted, the Hempstead Value in connection with this redemption. *Aug. 3 at 62-63; DX-108; DX-I22.*

65. In 1992, as part of a plan to reduce Jane Schultz's estate's tax burden upon her death, Mrs. Nassberg (who controlled Jane Schultz's financial affairs) gifted JSS stock to Pete and Jack Schultz and the cash equivalent to herself. Mrs. Nassberg caused her mother to gift 101 JSS shares each to Jack and Pete Schultz, while she received cash of $218,000. The $218,000 was derived by multiplying 101 shares times the then current Hempstead Value. *Aug. 1 at 23, 71-73, 76-77; 125; Aug. 3 at 70-71; Aug. 4 at 33-35; PX-16; DX-10, 11, 12.*

66. In connection with her mother's gifting of JSS stock, Mrs. Nassberg (as her mother's guardian) approved the filing of a federal gift tax return that applied the Hempstead Value. The tax return with the Hempstead report attached, was sent to Mrs. Nassberg and to the IRS. *Aug. 1 at 81-89; DX-106; Aug. 5/8 at 7-10, 39; DX-8.*

67. In 1992, JSS redeemed Class C shares from John Jr.'s estate, using the Hempstead

Value to calculate the purchase price. His father's estate also used the Hempstead Value in the estate tax return. *Aug. 3 at 67.*

68. In 1995, 1996, 1997, 1998, 1999, 2000, 2003, 2004 and 2005, JSS redeemed stock from Schultz extended family members, schools and religious organizations, each time applying the Hempstead Value to determine price. In several of those instances, the shareholders were represented by fiduciaries who, after making some investigation, accepted the Hempstead Value as the price. *Aug. 3 at 62-63, 77-80; DX-122.*

69. In 1999, the IRS examined a gift tax return of Pete Schultz for 1997. That return used the Hempstead Value to value JSS stock that was gifted by Pete. The result of that audit was "no change." *Aug. 5/8 at 3-5; DX-48.*

70. In 2002, the estate tax return for Jane Schultz's estate was prepared and filed. That tax return used the Hempstead Value to value the JSS stock included in her estate. *Aug. 4 at 61-64; DX-22-23*.

71. Jack and Pete Schultz are parties to a 1992 shareholder's "buy-sell" agreement. That agreement provides a mechanism for one brother to purchase the shares of the other upon the other's death in order to keep JSS ownership in the family. That agreement employs the Hempstead Value to determine the price to be paid by the surviving brother to the deceased brother's estate. *Aug. 3 at 180-81; Aug. 4 at 81; Aug. 5 (a.m.) at 6; Aug. 9 at 31.*

I. The Mill Expansion And Its Accounting Treatment

72. By 1998, JSS was selling more rail angle steel than it could manufacture at the mill. Indeed, in order to satisfy customer demand, JSS purchased some finished product from competitors and resold it to its customers at break-even or a loss. In addition, as of 1998, the process line at the mill was the original design from the late 1930's. That "cross-country" production line involved very hazardous movement of hot product by hand. Further, the

existing mill was limited in the size of rails it could process into product. For these reasons, in 1998 Jack and Pete Schultz began discussions about expanding and reconfiguring the mill. Estimates for the cost of doing so ranged from $13 million to $15 million. *Aug. 3 at 105-08, 183; Aug. 4 at 48-49, 77.*

73. Philadelphia National Bank initially and then Brown Brothers Harriman served as JSS's lenders and financial advisors. Don Roberts was JSS's principal contact, first at PNB and then at Brown Brothers. Roberts is very experienced in banking matters and has a lot of experience with Jack and Pete Schultz. Roberts regards Jack and Pete as men of personal character and business judgment. *Aug. 3 at 110; Aug. 5 (a.m.) at 30-38, 64; PX-60.*

74. In 1999, Jack and Pete Schultz, along with JSS's chief financial officer, had discussions with Don Roberts of Brown Brothers to formulate a plan to finance the cost of the mill expansion. Historically, JSS had not borrowed substantial amounts of money. After discussion, it was decided that the financing would come in two pieces: industrial revenue bonds (the interest on which is tax-free to the recipient and, therefore, the interest rate to the borrower is lower) and operating leases. *Aug. 3 at 110-11; Aug. 5 (a.m.) at 46-50; DX-64; Aug. 5/8 at 321-22; Aug. 9 at 34.*

75. In 2000, JSS issued $7 million of industrial revenue bonds and sold them to Brown Brothers. The bond sale was administered by a local agency, the Clinton County Redevelopment Development Authority. The interest on the bonds is tax-exempt under federal tax law. The proceeds of the sale of the bonds went to JSS, which used most of those proceeds to pay for a portion of the mill expansion. *Id. Aug. 2 at 14-21.*

76. Federal tax regulations limited JSS, during a six-year period (beginning three years before and ending three years after the bond transaction), to a maximum of $10 million in capital expenditures. Any breach of this "cap" would result in the loss of the tax-exempt

nature of the interest on the bonds. Accordingly, JSS needed another means by which to pay for the mill expansion without breaching the cap. That means was two operating leases entered into by Brown Brothers and JSS, which would not count against the $10 million cap if they were true operating leases. *Id.; Aug. 5/8 at 133-39.*

77. In 2000, Brown Brothers and JSS executed two seven-year leases relating to various machinery and equipment installed in the mill as part of the expansion. Brown Brothers purchased the machinery and equipment and leased it to JSS at pre-determined lease rates. Those leases enabled JSS to finance about $8.4 million in expense related to the mill expansion. *Id; Aug. 9 at 8-11.*

78. In order to currently expense these lease expenses under GAAP (and in order to avoid breaching, the $10 million six-year cap), the leases had to be classified as "operating leases" and not "capital leases." In other words, Brown Brothers had to be considered the true owner of the equipment and JSS had to be considered the true lessee. Under GAAP, in order to be an "operating lease," a four part test is applied and failure of any one part renders the leases capital in nature. Both JSS, the lessee, and BBH, the lessor, understood this and understood the significant consequences of failing any one of these parts. JSS's auditors also understood these requirements. *Id.; Aug. 5 (a.m.) at 68; PX-27, DX-64: Aug. 9 at 35-38.*

79. Even plaintiff acknowledges that the JSS operating leases did not fail any of the first three parts. As to the fourth part, it involves a calculation to test whether the lessee effectively is purchasing the leased equipment by comparing the discounted present value of the lease payments to the fair market value of the equipment at the inception of the lease. If the discounted present value is 90% or more of the fair market value, the test is not met and the lease is classified as a capital lease. If the ratio is less than 90%, then the test was not failed. *Id; Aug. 2 at 75-79; Aug. 5 (a.m.) at 68; PX-27, DX-81, DX-125, DX-129.*

80. An important element of the 90% calculation is the discount interest rate to be applied. Under GAAP, the lessee (here, JSS) was required to use its own "incremental borrowing rate" unless it is "practicable" for the lessee to know the implicit interest rate used by the lessor in the lease and that rate is less than the lessee's incremental borrowing rate. *Id.*

81. JSS and its auditors performed this 90% calculation in June 2000, using JSS's incremental borrowing rate and the result was a ratio of less than 90%. Neither JSS nor its auditors knew Brown Brothers' implicit rate nor did (or would) Brown Brothers disclose that rate to JSS. *Aug. 5 (a m.) at 53-57, 81-83; DX-65; Aug. 5/8 at 133-39, 188-191; Aug. 9 at 35-41, 98.*

82. Brown Brothers engaged outside counsel and an outside independent lease specialist who confirmed to Brown Brothers that the leases qualified as operating leases under GAAP. *Aug. 5 (a. m.) at 57, 69-70.*

83. The JSS mill is a large, complicated, noisy re-rolling mill that is dense with heavy moving machinery. There are a lot of very substantial physical forces being exerted in moving, breaking, heating, slitting, cutting, rolling and packaging carbon steel railroad rails. As a result, there is a substantial need for constant attention to the repair and maintenance of this machinery and the mill in general. *Aug. 3 at 113-14; Aug. 4 at 52-53.*

84. For many years, JSS has retained Lundy Construction to provide repair and maintenance services at the mill on a full-time basis. There are 2-8 Lundy individuals at the plant full time. Before 2000, when the mill was expanded, Lundy on average was paid about $500-650,000 per year for this normal repair and maintenance service. *Aug. 3 at 115: Aug. 5/8 at 148; Aug. 9 at 16.*

85. Jack and Pete Schultz, and JSS's chief financial officer Mark Scheffey, followed a policy of deducting expenses currently whenever possible but not to do so if it was illegal or

otherwise inappropriate. Arguably, many, if not most, closely-held companies such as JSS follow this policy so as to reduce profits and, therefore, taxes. There is nothing inappropriate about this form of "aggressive" accounting and despite Plaintiff's assertions to the contrary such "aggressive" expensing or accounting practices are not pejorative terms that should be equated with illegal or unethical. *Aug. 3 at 112-17, 176-179; Aug. 4 at 50-52, 57-58. 74-75, 123; Aug. 5 (a.m.) at 43-45, 80; Aug. 5/8 at 21, 109; Aug. 9 at 7-8; Aug. 9 at 14-20.*

86. In the years 2000-2002, JSS followed the policy of expensing, when it legitimately could, millions of dollars related to repair and maintenance of the mill and its machinery. JSS, in consultation with its outside auditor, made considered judgments about which costs to currently expense and which to capitalize. *Aug. 3 at 112-13; Aug. 4 at 50-53, 55-56. 74-75, 126; Aug. 5/8 at 121, 132, 144-151, 162, 164, 193, 319; Aug. 9 at 14-20, 103-04.*

87. Pete Schultz improperly stated that he wanted JSS to be unprofitable because of a "situation" with his sister, but said assertion was an isolated and reactive rather than reflective assertion, that was unrelated to JSS alleged acts of omission or commission.

J. The Financial Performance of JSS

88. Jack and Pete Schultz assumed complete management responsibility for JSS when John Jr. died in August 1991. Although for at least a decade the father and two sons had managed JSS together, after John Jr. died he was not replaced, as Jack and Pete Schultz absorbed John Jr.'s duties. *Aug. 3 al 57-58; DX-108; Aug. 4 at 7.*

89. During the years 1992-99, JSS was prosperous and profitable. Gross sales grew from about $45 million to a high of about $65 million. Profits ranged from just under $1 million to almost $4 million. Dividends were declared and distributed to all shareholders and ranged from $75/share to $165/share, with the average dividend being about $120/share. *DX-117-118.*

90. JSS operates a re-rolling steel mill. JSS manufactures rail angle steel from used railroad rail. The individual rails are broken into pieces, cleaned of certain dirt and residue, heated white-hot (2300 degrees) in a furnace and then slit and formed by massive rollers into right angle steel pieces. Those pieces can be used by customers for bed frames, casket frames, fence posts, shelving, scaffolding, stakes and other uses. *DX-97.*

91. JSS has a relatively small number of customers and little customer turnover. An even smaller number of customers, however, account for a substantial amount of JSS's sales. One customer in particular, Leggett and Platt, historically has accounted for 35-45% of JSS's sales. *PX-42; DX-97*.

92. Railroad rail is the principal raw material in JSS's operation. JSS uses brokers to locate rail put up for sale by railroads in North America, Europe and Asia. Prices fluctuate with demand and have varied widely over time. *Aug. 4 at 9-12, 17-19.*

93. Historically, JSS has maintained relatively high levels of cash and near-cash in order to be able to respond to rail purchasing opportunities. Depending upon levels of inventory and other factors, JSS's cash and near-cash on hand has ranged from about $4 million to about $20 million. The cash and investment securities of JSS are held by a wholly-owned Delaware subsidiary. Third Jersey Company, and those assets are managed by Brown Brothers. *Aug. 3 at 73, 94-95; PX-29; see proposed finding 22*.

94. JSS competes primarily on quality, price, service and delivery. It functions as a warehouse operation for its customers because it requires little lead time on orders. Most orders are shipped a few days after production. JSS has about five or six direct competitors that also re-roll rail into rail steel. All of them are privately owned except that SMI Steel is part of CMC, a public company. *DX-97; Aug. 3 at 188; Aug. 9 at 169-72.*

95. The mill expansion occurred between the fall of 1999 and the end of spring 2000. In

fact, the mill was actually shut down for 7-8 weeks in February and March 2000 for installation of new machinery and equipment; the new process line was then started up and the plant returned to full production by May-June 2000. *Aug. 3 at 108: Aug. 4 at 53.*

96. In addition to the expense of the mill expansion, JSS faced a number of other circumstances that contributed to a financial downturn. JSS's existing labor contract with its steelworkers' union was too expensive for JSS. When that contract ended in 2001, JSS and the union continued to operate under the terms of that contract while they attempted to negotiate a new contract. JSS's labor force is mature in that union employees tend to stay at JSS for many years and, therefore, tend to be at the high end of the pay scale. JSS was not able to negotiate a concessionary contract with its union until 2005. In connection with those negotiations and the request that the union make wage concessions, JSS supplied its audited financial statements to representatives of the international steelworkers union. After reviewing these financials, the union agreed to discuss wage concessions. *Aug. 3 at 116-17, 126-28; Aug. 4 at 58-60, 116; Aug. 5 (a.m.) at 11-42; PX-60.*

97. In the late 1990s and continuing into 2000 and thereafter, the price of railroad rail fluctuated dramatically, mostly upward. JSS was unable to pass all of these raw material cost increases on to its customers in the form of corresponding price increases. *Aug. 3 at 108, 126-27; Aug. 4 at 17-25, 60.*

98. The economy in this country, generally, softened dramatically in 2000. JSS's customers had less demand for their products and, in turn, had less demand for JSS's products. *PX-27.*

99. JSS lost substantial business from a key customer in 2000. JSS also had to reduce its prices in the years 1999-20003. *Aug. 4 at 58; DX-97; Aug. 5 (a.m.) at 59-60; DX-68; Aug. 9 at 23.*

100. For all of these reasons, JSS operated unprofitably in fiscal year 2000 (October 1999-September 2000) and has continued to operate unprofitably since then. In 2000, JSS lost about $4.3 million; in the years 2001-2004, JSS has incurred yearly losses averaging about $1.65 million. *Aug. 9 at 13; DX-117.*

101. JSS's outside independent auditors since at least 1990 has been the Horsham, Pennsylvania certified public accounting firm of Hege, Kramer, Connell, Murphy & Goldkamp, P.C. ("Hege Kramer"). Harry Kramer (of Hege Kramer) has been involved with audits of JSS since long before 1990, serving as the audit partner; Harry Murphy (of Hege Kramer) has also been involved with JSS audits since long before 1990, serving as the tax partner; Rich Snyder (of Hege Kramer) has been involved with JSS audits since 1991, serving as the audit manager. *Aug. 3 at 73-76; Aug. 5 (am.) at 86-89.*

102. Hege Kramer has also provided services to individual Schultz family members, such as preparing tax returns. Indeed, Hege Kramer prepared the Nassbergs' income tax returns for many years until the present litigation. The Nassbergs were neither asked nor required to pay for these services and they did not pay them. *Aug. 1 at 82-83; Aug. 5/8 at 56.*

103. Historically, Hege Kramer has not provided to JSS a so-called "unqualified" opinion as to its financial statements. Despite the adverse interest Plaintiffs want the court to conclude from such, the only reason for Hege Kramer's declination over the years to provide such an opinion on JSS's financial statements is JSS's decision not to make a physical count of its rail inventory. Auditing principles require that a physical count of inventory be performed in order to express a clean opinion. JSS, for decades, under the management of John Jr. and Charles Schultz, then John Jr., and then Jack and Pete Schultz, determined it was too expensive and too dangerous to make a physical count of rail lying in the plant's yard in piles. The resulting absence of an auditor's "clean opinion" was not troublesome to JSS because it is

a private, closely-held company that had no obligation to report its finances publicly. Further, JSS seldom borrowed money and when it did, it turned to Brown Brothers, which understood the reason for the absence of an auditor's opinion but, similarly, was not troubled by this absence. *Aug. 3 at 203-04; Aug. 5 (a. m.) at 40, 77-78; Aug. 5/8 at 308-12; DX-75.*

104. The absence of Hege Kramer's opinion does not mean that JSS's books and records were not audited by Hege Kramer -- they were and, with the exception of the inventory figure, Hege Kramer was satisfied with all other aspects of JSS's accounting practices. In particular, Hege Kramer understood the reasons for JSS's wish to expense currently as much cost as possible, and was not only satisfied with this policy but was satisfied with JSS's application of this policy. *Aug. 3 at 203; Aug. 9 at 69.*

105. Based upon the audited financial statements for JSS's fiscal years 2000-2004, Hege Kramer advised JSS each year that it should not declare any dividends for JSS shareholders. In each of those years, the audited financial statements reflect losses, ranging from a low of $1.1 million in 2004 to a high of $4.3 million in 2000. The non-payment of dividends has nothing to do with Mrs. Nassberg. *Aug. 3 at 93, 96-97, 139; DX-117; Aug. 4 at 45-46, 113; Aug. 5/8 at 16-17, 66; Aug. 9 at 22.*

106. Jack and Pete Schultz own 100% of the Class A voting stock of JSS and about 70% of all classes of outstanding stock of JSS. Mrs. Nassberg and her daughter's trust own about 12% of all JSS outstanding stock. The remaining 18% is owned by various Schultz extended family members, schools and religious organizations. The inability of JSS to declare a dividend has a profoundly more dramatic financial impact on Jack and Pete Schultz than it does on Mrs. Nassberg and her daughter's trust. *DX-100.*

K. Jack and Pete Schultz's Compensation

107. Jack Schultz began working full time at JSS in 1968, and has continued to work full

time at. JSS to the present -- a total of 37 years. He was a JSS board member as of 1980 and has continued to serve on the JSS board since then. In the 1980's Jack Schultz was vice-president of JSS, then executive vice-president, and finally president. When John Jr. died in 1991, he was chairman of JSS and managed the company along with his two sons, Jack and Pete. After John Jr.'s death, his duties and activities were absorbed by Jack and Pete Schultz. *Aug. 3 at 26-27, 51-58.*

108. Pete Schultz began working full time at JSS in 1975 and has continued at JSS until the present time -- a total of 30 years. He became a JSS board member in 1980 and has continued on the JSS board since then. In the 1980's Pete Schultz was secretary of the corporation and then he became executive vice-president, a position that he holds today.

109. Jack and Pete Schultz, from at least 1991 forward, were the sole owners of JSS voting stock, owned 70% of all JSS stock and controlled the company. Since 1992, their income from JSS (apart from dividends) has consisted of a salary and a bonus. This combined income for each of them has been substantially the same each year. *DX-118; Aug. 3 at 92.*

110. The aggregate total compensation for Jack and Pete Schultz in 1992 was $480,000, or slightly over 1% of gross company sales. That aggregate figure increased to $1,230,000 by 1995 (or slightly under 2% of gross company sales) and to $1,6000,000 by 1999 (or about 2.5% of gross company sales). *Aug. 3 at 88-90; DX-118.*

111. In 2000, the first year that JSS reported a loss. the Schultz brothers' combined compensation was decreased by $65,000. No other officer or manager at JSS experienced any decrease in compensation that year. The following year, 2001 (another loss year), the Schultz brothers aggregate compensation was decreased by $400,000 because their bonus was not paid. In 2002 (another loss year), the Schultz brothers' compensation increased by $315,000 (because their 2001 bonus was paid in 2002), but to a level below that of 2000. In 2003 (a loss

year), the Schultz brothers' aggregate compensation was decreased by $50,000 and in 2004 (a loss year but with record sales), the Schultz brothers' compensation was decreased by another $87,500. *Aug. 3 at 202; DX-118.*

112. Despite modest losses in the years 2000-2004, Jack and Pete Schultz have managed to preserve . JSS has one of the few viable steel mills in Pennsylvania, employing about 400 workers and supporting about 400 families. They have done this in the face of a soft economy, dramatically rising raw material costs, a "generous" labor contract and the loss of key business.

113. There was no evidence that Jack and Pete Schultz's compensation was excessive. There was no expert testimony to that effect. In fact, the only expert testimony on Jack and Pete Schultz's compensation was from defendants' expert, William Lazor. Lazor testified that he compared Jack and Pete Schultz's compensation to a database of executive compensation in the same industry and that the Schultz's compensation was at about the 85th percentile. *Aug. 10 at 53-55.*

114. For each year in question, the Schultz brothers' compensation was reviewed by JSS's outside independent auditor, Hege Kramer, for propriety in light of IRS regulation of compensation. Each year, Hege Kramer approved the level of executive compensation and the IRS has never challenged it as unreasonable or excessive. Indeed, the IRS specifically reviewed JSS executive compensation for 1994 and made no adjustments. Further, Hege Kramer compared Jack and Pete Schultz's compensation to a database known as the Robert Morris Associates studies, and concluded that the compensation was reasonable. *Aug. 3 at 88-91, 133-34; Aug. 4 at 47; Aug. 5 (a.m.) at 6; Aug. 5/8 at 17-18, 42-43.*

115. In 1992, George Beyer, the president of Valley Forge Financial Group, a financial planning consultant, advised Jack and Pete Schultz to establish "salary continuation

agreements" with JSS to help fund Jack and Pete's retirement income. These agreements are common as tools to fund the retirement benefits of key executives and owners. *Aug. 3 at 69; Aug. 4 at 31; Beyer Dep. at 17-18.*

116. Jack and Pete Schultz and JSS entered into "Salary Continuation Agreements" in 1992. *PX-72; PX-73.* They were signed and put away without any thought of concealing or hiding them. *Aug. 3 at 69; Aug. 4 at 31-32; Aug. 9 at 47-51.*

117. Jack and Pete Schultz have not yet retired and have not received anything to date from the 1992 Salary Continuation Agreements. *Aug. 3 at 68; Aug. 9 at 52*.

118. Ultimately, any payments by JSS to Jack or Pete Schultz under the Salary Continuation Agreements (at least those for payments for death) will be funded by life insurance policies on the lives of Jack and Pete Schultz, the premiums for which are paid by JSS and the beneficiary of which is JSS. Hence, JSS is reimbursed for the premium payments. *Aug. 3 at 201-02; Aug. 9 at 52-53.*

119. In addition, JSS, in 1995, established a deferred compensation plan for Jack and Pete Schultz, specifically on the advice of Hege Kramer. Because they have not yet retired, Jack and Pete Schultz have received nothing in the way of deferred compensation. *Aug. 5/8 at 14-15.*

120. Beginning in 1984, Jack and Pete Schultz's father caused JSS to begin purchasing life insurance policies on Jack and Pete's lives, paid for by JSS. JSS owns and pays for a number of these policies which are intended to fund any obligations under the salary continuation agreements and buy/sell agreement. *Aug. 3 at 59-60; Aug 9 at 28-31, 105-106*.

L. JSS Corporate Formalities

121. There is no dispute that the JSS Class C shares given to Mrs. Nassberg's daughter, held in trust for the daughter, are non-voting shares. The same is true for the JSS shares

inherited by Mrs. Nassberg in 2002 -- they are non-voting shares. *Aug. 1 at 24; PX-14.*

122. The JSS bylaws provide that notice of shareholder meetings shall be given only to JSS shareholders entitled to vote. Non-voting shareholders such as Mrs. Nassberg and her daughter's trust are not entitled to notice under the bylaws. Arguably by implication, non-voting shareholders are not entitled to attend shareholder meetings. *PX-2; DX-124; Aug. 1 at 93-94.*

123. The Pennsylvania Business Corporation Law in effect in 2001, similarly, required only that notice of shareholders' meetings be given to shareholders entitled to vote at such meetings. Pa. C.S.A. Sec. 1704.

124. While she was a Class A shareholder entitled to vote before January 1984, Mrs. Nassberg never requested or demanded that a JSS shareholders' meeting be held. While she was a trustee of her daughter's trust that owned JSS non-voting shares (1991 to the present), Mrs. Nassberg never requested or demanded that a JSS shareholders' meeting be held. Since 2002, when she received her JSS Class C non-voting shares, Mrs. Nassberg has never requested or demanded that a shareholders' meeting be held. Indeed, at no time has Mrs. Nassberg requested or demanded that a JSS shareholders' meeting be held. *Aug. 4 at 30-32.*

125. After 1984, the JSS Class A shareholders entitled to vote included John Jr., Jack Schultz, Pete Schultz and Jay Dawson. By 1991, all of the voting shares of John Jr. had been gifted to his sons, Jack and Pete, and in 1992, Jay Dawson's shares were redeemed by the company at the Hempstead Value. Since 1992, only Jack and Pete Schultz have owned voting stock of *JSS. DX-108.*

126. JSS Shareholders' meetings of those entitled to vote, as such, were not formally convened in the 1980's and 1990's. The voting shareholders in question, instead, acted informally and prepared minutes of an annual shareholders' meeting and ratified the actions

purported to be taken as reflected by the minutes. *Aug. 3 at 39-44, 152-53; Aug. 4 at 13-14; DX-108.*

127. The directors of JSS since 1984 have included only John Jr., Jack and Pete Schultz, the wives of Jack and Pete Schultz and the company's chief financial officer (Jay Dawson until 1999 and Mark Scheffey since then). Directors meetings were not formally convened, as such, in the 1980's and 1990's. Instead, the directors acted informally and minutes of annual directors' meetings were prepared and those minutes reflect ratification of the board's actions described in those minutes. *Aug. 3 at 152-53, 204; Aug. 4 at 13-14.*

128. The minutes of the JSS annual shareholders' and directors' meetings accurately reflect action taken by a majority of those shareholders and directors. *Aug. 3 at 152-53; Aug. 4 at 13-14.*

129. John Jr., while he controlled JSS, never distributed financial information of the company to minority shareholders. After John Jr. died in 1991, Jack and Pete Schultz continued this practice. *Aug. 1 at 25*. While the practice is not de jure, unethical or improper, the Court believes such, (despite Mrs. Nassberg's own Acts of Omission in that regard) must be modified to allow Plaintiffs to make more informed decisions in the future beyond the costly and contentious litigation that has ensued.

130. Before September 2000, with one exception, Mrs. Nassberg never requested JSS financial information. That one exception was in 1991, when Mrs. Nassberg asked her brother Jack Schultz for JSS financial information at a gathering that included her father. Jack Schultz declined, relying upon his father's previous practices. Mrs. Nassberg said "okay" and did not press the issue then, or at any other time before September 2000. *Aug. 1 at 25, 94-95, 126; Aug. 3 at 76, 156.*

131. There is no evidence that before September 2000, Mrs. Nassberg ever exercised any

rights under the Pennsylvania Business Corporation Law to compel JSS to provide her with JSS financial information.

132. In September 2000, Mrs. Nassberg was provided a copy of the most recent Hempstead report, which contained summaries of JSS' s balance sheets and income statements going back five years. *See proposed finding 54.*

133. In September 2000, through counsel, Mrs. Nassberg made a demand for JSS financial information far beyond just a balance sheet and income statement. JSS supplied Mrs. Nassberg with some JSS Financial information immediately, and eventually supplemented this information in March and July 2001. Since then, JSS has provided the annual audited financial statements to Mrs. Nassberg. *Aug. 3 at 158-59.*

134. No other JSS minority shareholder has requested JSS financial information. In fact, all other minority shareholders informed JSS that they did not desire to have JSS financial information provided to them. *Aug. 3 at 158-61; Aug. 9 at 46-47, 66.*

135. Until her recent litigation the record reflects Mrs. Nassberg had no expectations of attending shareholder meetings or receiving financial information about JSS. *Aug. 1 at 125-27.*

M. JSS Hiring of Geoffrey Schultz and Michael Taylor

136. As of the Spring of 2001, JSS had experienced its first unprofitable year in recent memory. The general economy was soft, rail prices were escalating, JSS's best customers were seeking lower prices on JSS's products, and JSS had lost significant business. *See proposed findings 93-97; DX--117.*

137. Geoff Schultz is Jack Schultz's youngest son. In the Spring of 2001 he was 27 years old and a graduate of Stanford University with a degree in engineering and a master's degree in business administration. Jack Schultz invited his son Geoff to visit the plant to meet an

outside engineering consultant. Shortly thereafter, JSS retained Geoff Schultz and his colleague Michael Taylor to finish a stalled marketing study. *Aug. 3 at 25, 118-19; Aug. 4 at 70*.

138. Michael Taylor is a graduate of Harvard University and had several years' experience working at a large sophisticated financial consulting organization in New York City as a business consultant. *Taylor Dep. At 6-14*.

139. Geoff Schultz and Michael Taylor were originally retained by JSS to complete a marketing study that had been started by a different consultant. This study was completed by Schultz/Taylor in the summer of 2001. At that time, Geoff Schultz and Michael Taylor were retained by JSS to provide general business consulting services to a company that was experiencing sluggish performance. In addition, Jack and Pete Schultz were both in their 50's and contemplating the next generation of JSS business and leadership. *Aug. 3 at 118-22; Aug. 4 at 70-71*.

140. Geoff Schultz (who became a JSS employee) and Michael Taylor provided services to JSS until October 2003, when they were terminated by Jack Schultz. During that time period, Schultz and Taylor made various contributions to JSS with advice on management structure, marketing, family leadership, product diversity, financial modeling, compensation and benefits. *Aug. 3 at 122-25; Aug. 4 at 70-71, 86-87.*

141. While the Court finds there is a basis for a difference of opinion about the "value" of their services, there is no substantial evidence that the compensation paid to Geoff Schultz and Michael Taylor was unreasonable or excessive. Indeed, no witness testified to that effect. In fact, Michael Taylor provided information to Jack Schultz in response to Jack Schultz' questioning that arguably substantiated the level of compensation paid to them. The only evidence of unreasonable compensation to these two consultants was an e-mail from Linda

Schultz, Pete Schultz' wife and Pete's own less explicit concerns about same. While understandable, there may have been some family tension that developed over the continuing use by JSS of Schultz/Taylor, who spent some of their time working on JSS matters in New York City, both Jack and Pete Schultz had been the targets of some criticism by Schultz/Taylor as part of their assignment to identify problems at JSS and suggest solutions. *PX-7; PX-77: Aug. 3 at 171; Taylor Dep. at 202-204.*

142. In any event, Mrs. Nassberg presented no evidence as to what portion, if any, of the compensation paid to Geoff Schultz or Michael Taylor was excessive or unreasonable. Mrs. Nassberg presented no evidence, expert or otherwise, to demonstrate what portion, if any, of the work performed by Geoff Schultz and Michael Taylor was of no value to JSS.

CONCLUSIONS OF LAW

A. Minority Oppression Under Pennsylvania Law.

Pennsylvania law provides that

> "Upon application of any shareholder, the court may appoint one or more persons to be custodians of and for any business corporation when it is made to appear that ...in the case of a closely held corporation, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5% or more of the outstanding shares of any class of the corporation in their capacities as shareholders, directors, officers or employees."

15 Pa C.S.A. Sec. 1767 (emphasis supplied). According to the notes, "oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices, or by substantially diminishing his power or compensation." *See 15 Pa. C.S.A. Sec. 1767* (1995 historical note). Since Nassberg has abandoned her most sensational claims[1] of

[1] Plaintiff's Pretrial Memorandum also states that Mrs. Nassberg is asserting oppression because of the 1996 First Company-South Avis transaction. That claim is not viable because she expressly withdrew it shortly before trial in response to defendants' motion in limine.

illegal or fraudulent conduct,[2] this case turns on whether she has carried her burden of proving that she was oppressed by her brothers.

In order to constitute "oppression" within the meaning of the minority shareholder oppression statute, the conduct at issue must specifically target the minority shareholder. Where (as here) the claims in question involve conduct that affects all shareholders equally, the injury (if any) is to the corporation, and the remedy is a shareholder derivative suit. *See 12 Summm. Pa. Jur.2d Business Relationships Sec. 7:90; see also Tyler v. O'Neill, 994 F. Supp. 603, 609-10 (E.D. Pa. 1998), aff'd, - 189 F.3d 465 (3d Cir. 1999) (table), cert. denied, 528 US. 1137 (2000).* As discussed below, Mrs. Nassberg has steadfastly refused to assert any derivative claims on behalf of the corporation. Because there are no applicable exceptions to the requirement that a derivative claim be made, all of Mrs. Nassberg's claims will be dismissed summarily except one. That lone exception is Nassberg's claim that the offer to purchase her stock at the Hempstead Value was oppressive. While this claim is particular to Mrs. Nassberg and no other shareholder, it falls on its face because there was and is no requirement at all under Pennsylvania law to have made any offer to Mrs. Nassberg in the first place. Minority shareholders have no right to "put" their stock to the company and they certainly cannot be heard to complain if the company volunteers to redeem the stock but at a price considered too low.

Recently, the Superior Court opined on what constitutes "oppressive conduct" within the meaning of the minority shareholder oppression statute. In *Ford v. Ford, 878 A.2d 894*

[2] At closing argument the Court indicated that absent such, no receiver or custodian would be appointed.

(Pa.. Super. Ct. 2005), the Superior Court held that "oppressive actions refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Ford, 878 A. 2d at 899.* Leaving aside the fact that Nassberg never committed her own capital to JSS, and was instead given JSS shares by her father (a fact the *Ford* court found to be relevant although not dispositive to whether the minority shareholder's expectations were reasonable, see *Ford, 878 A. 2d at 904*), Nassberg has not alleged any conduct that defeated any "reasonable" expectations she may have had.

The Ford court explicitly found that "an expectation of lifetime employment was unreasonable." See *Ford, 878 A.2d at 903-904.* Nassberg, however, has not alleged that she ever expected to work at JSS. To the contrary, she has testified that her father and benefactor did not want her to work at the mill. Similarly, Nassberg never had any reasonable expectations to be otherwise involved in the affairs or governance of JSS. Indeed, during the relevant time period, when Nassberg and her husband lived in Philadelphia and then in Houston and then in France, Nassberg displayed absolutely no interest in JSS affairs independent of her financial remunerations.

As a result, Nassberg's only expectation was that her daughter's trust would receive dividends from JSS.[3] While such an expectation might be reasonable if JSS was profitable, see *Ford, 878 A.2d at 904* such an expectation is not reasonable if JSS was not profitable. Since the evidence shows that JSS paid dividends in the years in which it made a profit, and only stopped paying dividends when it became unprofitable in 2000 -- an act fully protected under the business judgment rule -- Nassberg's reasonable expectations have not been

[3]Nassberg sold the shares that she owned directly in 1984 for over 1,000,000 (Hempstead value). She never directly owned JSS shares again until 2002, when JSS had already stopped declaring dividends because of no earnings.

frustrated.

B. Mrs. Nassberg Has Not Demonstrated Oppression Because of Excessive Compensation To Jack and Pete Schultz

Mrs. Nassberg claims that she has been oppressed because Jack and Pete Schultz have excessively compensated themselves through large salaries and bonuses, salary continuation agreements, life insurance policies and payments to family members. Not only has Nassberg not proven excess, in some instances she has not even proven compensation. Moreover, this claim is a derivative claim belonging to the corporation and Nassberg has not asserted a derivative claim.

Jack Schultz began his full-time employment at JSS in 1968 and Pete Schultz did so in 1975. By 1980, they were both executives and board members. Between 1980 and 1991, Jack and Pete partnered with their father to grow the company, provide employment to hundreds of families and provide dividends to all shareholders, including Mrs. Nassberg's daughter.

In 1991, Jack and Pete's father died. He was not replaced with another executive but, instead, Jack and Pete absorbed his duties. Between 1991 and 1999, Jack and Pete Schultz grew the company by another 30%, set sales records for the company and distributed dividends to all shareholders averaging $120 per share. By 1991, Jack and Pete Schultz together owned 100% of JSS voting stock and nearly 70% of the total stock. Their father had employed a "salary light-bonus heavy" executive compensation strategy but Pete and Jack, on the advice of JSS's auditors, Hege Kramer, revised that strategy to a "salary heavy-bonus light" approach. Between 1991 and 1999, Jack and Pete Schultz's compensation changed in two ways. First, their salaries relative to their bonuses increased and vice-versa. Second, their total cash compensation increased.

The total cash compensation for Jack and Pete Schultz combined in 1992 was

$480,000, or slightly over 1% of gross company sales. That figure increased to $1,230,000 by 1995 (or slightly under 2% of gross company sales) and to $1,600,000 by 1999 (or about 2.5% of gross company sales)[4]. In 2000, the first year that JSS reported a loss, the Schultz brothers' combined compensation was decreased by $65,000. No other officer or manager at JSS experienced any decrease in compensation that year. The following year, 2001 (another loss year), the Schultz brothers' aggregate compensation was decreased by $400,000 because their bonus was not paid. In 2002 (another loss year), the Schultz brothers' compensation increased by $315,000 (because their 2001 bonus was paid in 2002), but to a level below that of 2000. In 2003 (a loss year), the Schultz brothers' aggregate compensation was decreased by $50,000 and in 2004 (a loss year but with record sales), the Schultz brothers' compensation was decreased by another $87,500.

Despite modest losses in the years 2000-2004, Jack and Pete Schultz have managed to preserve JSS as one of the few viable steel mills in Pennsylvania, employing about 400 families. They have done this in the face of a soft economy, dramatically rising raw material costs, a "generous" labor contract and the loss of key business.

Mrs. Nassberg presented no evidence that Jack and Pete Schultz's compensation was excessive. There was no fact testimony on that point and neither of her experts opined as to whether the Schultz brothers' compensation was excessive. *Aug. 2 at 207*. In fact, the only expert testimony on Jack and Pete Schultz's compensation was from defendants' expert, William Lazor. Lazor testified that he compared Jack and Pete Schultz's compensation to a

[4] Jack and Pete's income would be the same for each year, except that $15,000 of what otherwise would be Jack's salary is paid to his wife, Carol Schultz, as an IRA, an adjustment made in the early 1990's on the suggestion of an outside advisor. *Aug. 3 at 92.*

database of executive compensation in the same industry and that the Schultz's compensation was at about the 85th percentile. *Aug. 10 at 53-55; DX-129.*

Further, for each year in question, the Schultz brothers, compensation was reviewed by JSS's outside independent auditor, Hege Kramer, for propriety in light of IRS regulation of executive compensation.[5] Each year, Hege Kramer approved the level of executive compensation and the IRS has never challenged this compensation. Indeed, the IRS specifically reviewed JSS executive compensation for 1994 and made no adjustments. Further, Hege Kramer compared Jack and Pete Schultz's compensation to a database known as the Robert Morris Associates studies, and concluded that the compensation was reasonable.

In 1992, George Beyer, the president of Valley Forge Financial Group, a financial planning consultant, advised Jack and Pete Schultz to establish "salary continuation agreements" with JSS to help fund Jack and Pete's retirement income. These agreements are common as tools to fund the retirement benefits of key executives and owners. Accordingly, Jack and Pete Schultz and JSS entered into "Salary Continuation Agreements" in 1992. Jack and Pete Schultz have not yet retired and have not received anything to date pursuant to the 1992 Salary Continuation Agreements. Nor has JSS paid out anything pursuant to these agreements. Ultimately, any payments by JSS to Jack or Pete Schultz under the Salary Continuation Agreements will be funded by life insurance policies on the lives of Jack and Pete Schultz, the premiums for which are paid by JSS and the beneficiary of which is JSS. Hence, JSS will be made whole in the end.

In addition, JSS in 1995, established a deferred compensation plan for Jack and Pete Schultz, specifically on the advice of Hege Kramer. This, too, is a common device to fund

[5] The IRS has an interest in this issue because excessive executive/owner compensation is reclassified by the IRS as a constructive dividend, which is then subject to taxation at two levels (corporate and individual) instead of one (individual).

retirement benefits for key executives and owners. Because they have not yet retired, Jack and Pete Schultz have received nothing in the way of deferred compensation.

Nassberg also points to a number of life insurance policies on the lives of Jack and Pete, paid for by JSS. Jack and Pete Schultz are parties to agreements that require that each purchase the other's JSS stock upon the death of the other. This is a common agreement among family members/shareholders in closely-held Pennsylvania corporations. The purpose is to insure that control of the corporation stays within the family and those active in the corporation. The life insurance policies are purchased and paid for by the corporation and are intended to assist the surviving brother to purchase the deceased brother's JSS stock. Moreover, if and when a death occurs and insurance proceeds are paid, the policies are "split dollar policies" and JSS is reimbursed fully for the cost of the premiums on the policies. Again, Nassberg can point to no precedent that would justify a holding that these kinds of policies, which are quite common, constitute minority shareholder oppression.

Nassberg maintains that Jack and Pete Schultz have caused JSS to contribute to charities and non-profit schools that benefit only Jack and Pete, not JSS. For instance, she points to contributions made by JSS to St. Lawrence University (Jack and Pete's alma mater). She fails to mention, however, that contributions by JSS to St. Lawrence were started by her own father and benefactor. Jack and Pete have simply continued the practice. She also fails to mention that JSS for years made contributions to two of her alma maters as well. Nassberg totally ignores the substantially diverse and chartable mix of entities -- almost entirely local to Williamsport -- that have received JSS contributions over the years. Jack and Pete Schultz have continued their father's longstanding tradition of donating several hundred thousand dollars a year to several dozen Williamsport charities such as the Boy Scouts, the YMCA, hospitals, Little League Baseball and charities in which JSS employees participate. In addition to increasing JSS's goodwill and reflecting good corporate citizen conduct, these contributions are generally tax deductible and therefore provide a benefit to JSS. Further, these contributions have never even remotely approached the limit on such contributions established by the IRS. Again, Nassberg can cite to no precedent that would justify a holding that these charitable contributions constitute a form of minority shareholder oppression. Indeed, it is surprising that Nassberg and her county commissioner husband would object to this form of modest philanthropy within their own county.

Mrs. Nassberg's excessive compensation claim is rejected for legal reasons as well. The commentators agree that "obvious cases of derivative actions are actions claiming excessive compensation to officers or directors, or actions claiming breach of fiduciary duty by an officer or director." *19 Fletcher Cyclopedia of Private Corporations Sec. 5:06. See also Roger J. Magnuson, Shareholder Litigation Sec. 9:4* ("obvious examples" of claims that must be brought derivatively include claims of "excessive compensation, bonuses and other perquisites of management"). The commentators conclude that an excessive compensation claim is derivative because "paying excessive salaries from corporate fund[s] does not create an individual claim." *Shareholder Derivative Actions Law & Practice Sec. 2:4 (2004)*. As a result, Nassberg's allegations that Jack and Pete Schultz have been over compensated cannot form the basis of a shareholder oppression claim, since such overcompensation (if any existed) harmed all shareholders, and not just Nassberg.[6]

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[6]Jack and Pete Schultz acknowledge that, in *Warden v. McLelland, 288 F 3d 105, 111-12 (3d Cir. 2002)*, the Third Circuit left open the question of whether the Pennsylvania Supreme Court would give Pennsylvania Courts the ability to allow what should be derivative claims to be brought as individual claims by the shareholders of closely held corporations. Since the Third Circuit explicitly left this question unresolved, see *Warden, 288 F.3d at 111*, and since the ability to allow derivative claims to be brought individually by shareholders of closely held corporations (if indeed any such ability exists) would be discretionary, see *Warden, 288 F3d at 112*, this Court declines to allow Nassberg to do so. Nassberg has not asked this Court to allow her to bring derivative claims in her individual capacity. instead, she has insisted that she is bringing only claims that belong solely to her. Since Nassberg will not share any recovery in this lawsuit with Jersey Shore Steel's other minority shareholders, it would be improper to allow her to recover for alleged wrongs to the

Finally, Nassberg complains about JSS's employment (or engagement) of Geoff Schultz, Jack's grown son, and his colleague Michael Taylor as business consultants to JSS during the years 2001-2003. Nassberg claims that Jack was lining his own son's pocket without any benefit to JSS. If these expenditures constitute some form of corporate waste by Jack, the injury is not to Nassberg but is to the corporation and therefore the claim is derivative. Since Nassberg has asserted no derivative claim, the claim is rejected summarily.

Further, both Geoff Schultz and Michael Taylor were trained and educated consultants. This was a critical time in JSS's history as it had experienced its first unprofitable year in decades and was headed for a second. Competition was increasing in the markets for JSS products. JSS's fortunes, in many respects, were very dependent upon the demand of one very large customer, which constituted almost half of JSS's sales. Jack and Pete were in their 50s and contemplating the next generation of JSS business and leadership. Indeed, Jack and Pete were mindful of their father's wishes that the grandsons join the business some day.

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corporation. Additionally, if this Court were to allow Nassberg to bring derivative claims in her individual capacity, it would open the door to duplicative claims from other minority shareholders, including other family members and any charities who received gifts of stock.

Under the circumstances, hiring consultants and selecting these two individuals was arguably reasonable and justified. The compensation paid to Geoff Schultz and Michael Taylor by JSS was not substantially unreasonable. At a minimum, it was an exercise of business judgment -- both the decision to hire and the decision regarding compensation -- that cannot be challenged here. Geoff Schultz is Jack Schultz's oldest son. In the Spring of 2001 he was 27 years old and a graduate of Stanford University with a degree in engineering and a master's degree in business administration. Michael Taylor is a graduate of Harvard University and had several years' experience working at a large sophisticated financial consulting organization in New York City as a business consultant.

Geoff Schultz and Michael Taylor were originally retained by JSS to complete a marketing study that had been started by a different consultant. This study was completed by Schultz/Taylor in the summer of 2001. At that time, Geoff Schultz and Michael Taylor were retained by JSS to provide general business consulting services to a company that was experiencing sluggish performance. Geoff Schultz (who became a JSS employee) and Michael Taylor provided services to JSS until October 2003, when they were terminated by Jack Schultz. During that time period, Schultz and Taylor made contributions to JSS with advice on management structure, marketing, family leadership, product diversity, financial modeling, compensation and benefits. Admittedly many of the contributions were never adopted.

There is no evidence that the compensation paid to Geoff Schultz and Michael Taylor was substantially unreasonable or excessive. Indeed, no witness testified to that effect. The only evidence of unreasonable compensation to these two consultants was an e-mail from Linda Schultz, Pete Schultz' wife and Pete's less explicit reservations about the work product and practices of the consultants. Understandably, there may have been some family tension that developed over the continuing use by JSS of Schultz/Taylor, who spent some of their time working on JSS matters in New York City. To some extent, both Jack and Pete Schultz had been the targets of some criticism by Schultz/Taylor as part of their assignment to identify problems at JSS and suggest solutions.

Mrs. Nassberg presented no evidence as to what portion, if any, of the compensation paid to Geoff Schultz or Michael Taylor was excessive or unreasonable. Mrs. Nassberg presented no evidence, expert or otherwise, to demonstrate what portion, if any, of the work performed by Geoff Schultz and Michael Taylor were of no value to JSS. On the other hand, the Schultz defendants' accounting and financial expert, Lazor, testified that the decision to hire these two individuals was not unsound or unusual.

After Geoff Schultz and Michael Taylor had finished their work, it was noteworthy that it was Jack who terminated the consulting relationship. There is no basis to conclude that any of this constituted minority shareholder oppression towards Nassberg.

C. Mrs. Nassberg Has Not Demonstrated Oppression Because of The 1996 First Company-South Avis Transaction

The Court's treatment of this oppression claim by Mrs. Nassberg is undisputed because it has been withdrawn. Originally, Nassberg claimed oppression because Jack and Pete Schultz allegedly engaged in self dealing and usurped corporate opportunities in connection with (1) the transfer of mill property ownership from First Company (owned by Nassberg, Pete, Jack and three cousins) to South Avis (owned by Pete, Jack and their families), and (2) the 1994 and 1996 purchases by South Avis of the Conrail and Gardner/Perfection properties. Mrs. Nassberg and her husband appeared at the closing on the First Company transfer to South Avis in July 1996. She signed the deed, she signed the agreement of sale and she left with $350,000. There is no credible evidence that she did so under duress or against her will.

South Avis was created in 1994, on the advice of counsel, for an important reason. The Conrail property may have had environmental issues and Jack and Pete were advised to have a separate entity own the property. Later, Jack and Pete Schultz decided to use South Avis as their father and uncle had used First Company -- as a means to provide income for their children.

Mrs. Nassberg waited almost six years, until March 2002 when she filed this action, to complain about this transaction. Accordingly, the Schultz defendants moved in limine to preclude evidence on this claim based upon the expired statute of limitations. Mrs. Nassberg's response was that she 'has not advanced an individual claim pertaining to this realty transaction" but that she should be permitted to present evidence of it as "illustrative" of the Schultz's oppressive conduct. See Plantiff's Consolidated Response to Defendants John C. Schultz and Pete D. Schultz's Motions In Limine ...." at 3. This claim is time-barred, Mrs. Nassberg admits as much, and she has presented no authority for the novel proposition that evidence of a barred claim can be admitted as "illustrative" to prove another claim. Indeed, such evidence is barred by the "prior bad acts" rule of evidence in Pennsylvania. *See Pa. R. Evid. 404(b).*

Finally, Nassberg's claim that she agreed to sell the mill property -- for which she received fair value of $350,000 -- as the result of "duress" is absurd. There is no evidence of any duress other than the Nassbergs' recently-contrived undocumented recollection of such. The Nassbergs claim that they arrived at the closing on the sale to discover that the purchaser was not the mill but was an entity controlled by Jack and Pete. The Nassbergs then claim that they signed the agreement and deed "under duress" instead of simply refusing to close, as was their, right. Given their sophisticated business background, particularly that of corporate lawyer Dick Nassberg, this claim is not worthy of belief. It is worth noting that the three children of Uncle Charles, who were the other three cousin-owners, received the same treatment as Mrs. Nassberg and have never complained.

D. Mrs. Nassberg Has not Demonstrated Oppression Because She Was Denied Corporate Financial Information And Attendance At Shareholder Meetings

There is no dispute that the JSS Class C shares given to Mrs. Nassberg's daughter, held in trust for the daughter, are non-voting shares. The same is true for the JSS shares inherited by Mrs. Nassberg in 2002 -- they are non-voting shares.

The Pennsylvania Business Corporation Law provides that notice of shareholder meetings shall be given only to each shareholder entitled to vote at the meeting. *15 Pa. C.S.A. Sec. 1704*. Similarly, the JSS bylaws provide that notice of shareholder meetings shall be given only to JSS shareholders entitled to vote. *PX- 2 ; DX-124.* Non-voting shareholders such as Mrs. Nassberg and her daughter's trust are not entitled to notice of shareholder meetings under the bylaws. By necessary implication, therefore, non-voting shareholders are not entitled to attend shareholder meetings, which make sense, as there would be nothing for them to vote upon. Indeed, the statutory provision relied upon by Mrs. Nassberg, *15 Pa. C.S.A. Sec. 1755*, does not require an annual shareholders meeting -- it merely requires at least one annual meeting for the election of directors. JSS held those meetings each year (*see DX-108*), but since Mrs. Nassberg could not vote for directors, she was not given notice nor otherwise invited.

Indeed, while she was a Class A shareholder entitled to vote before January 1984, Mrs. Nassberg never requested nor demanded that a JSS shareholders' meeting be held. While she was a trustee of her daughter's trust that owned JSS non-voting shares (1991 to the present), Mrs. Nassberg never requested nor demanded that a JSS shareholders' meeting be held. Since 2002, when she received her JSS Class C non-voting shares, Mrs. Nassberg has never requested nor demanded that a shareholders' meeting be held. To this day, Mrs. Nassberg has never requested nor demanded that a JSS shareholders' meeting be held.

After 1984, all of the JSS Class A shareholders entitled to vote were John Jr., Jack Schultz, Pete Schultz and Jay Dawson. By 1991, all of the voting shares of John Jr. had been gifted to his sons, Jack and Pete, and in 1992, Jay Dawson's shares were redeemed by the company at the Hempstead Value. Since 1992, only Jack and Pete Schultz have owned voting stock of JSS. JSS shareholders' meetings of those entitled to vote, as such, were not formally convened in the 1980's and 1990's. Instead, the voting shareholders -- all of whom worked at JSS within feet of one another and who met constantly with one another -- prepared minutes of an annual shareholders' meeting and ratified the actions taken as reflected by the minutes.

The directors of JSS since 1984 have included only John Jr., Jack and Pete Schultz, the wives of Jack and Pete Schultz and the company's chief financial officer (Jay Dawson until 1999 and Mark Scheffey since then). Directors' meetings were not formally convened, as such, in the 1980's and 1990's. As with the voting shareholders, a majority of the directors (all those except the two wives) worked at JSS within feet of one another and met with one another constantly. Minutes of annual directors' meetings were prepared and those minutes reflect ratification of the board's actions described in those minutes. The minutes of the JSS annual shareholders' and directors' meetings accurately reflect action taken by a majority of those shareholders and directors.

John Jr., while he controlled JSS, never distributed financial information of the company to minority shareholders. After John Jr. died in 1991, Jack and Pete Schultz continued this practice. Before September 2000, with one exception, Mrs. Nassberg never requested JSS financial information. That one exception was in 1991, when Mrs. Nassberg asked her brother Jack Schultz for JSS financial information at a gathering that included her father. Jack Schultz declined, relying upon his father's previous practices. Mrs. Nassberg said "okay" and did not press the issue then, or at any other time before September 2000.

Before September 2000, Mrs. Nassberg never exercised any rights under the Pennsylvania Business Corporation Law to compel JSS to provide her with JSS financial information. That law gave Mrs. Nassberg the right to make a request in writing for JSS financial information and, if not received within five days, the right to apply to a court for access to such information. *15 Pa. C.S.A. Sec. 1508.* Mrs. Nassberg never exercised that right.

In September 2000, Mrs. Nassberg was provided a copy of the most recent Hempstead report, which contained summaries of JSS's balance sheets and income statements going back for five years. At or about the same time, through counsel, Mrs. Nassberg made a demand for JSS financial information arguably far beyond just the balance sheet and income statement required to be produced annually under the Business Corporation Law. JSS ultimately supplied Mrs. Nassberg with JSS financial information and supplemented this information in March and July 2001. Since then, JSS has provided the annual audited financial statements to Mrs. Nassberg.

No other JSS minority shareholder has requested JSS financial information. In fact, all other minority shareholders informed JSS that they did not desire to have JSS financial information provided to them.

Finally, there is a two-year statute of limitations on any claims Mrs. Nassberg may have regarding the failure to provide her with financial statements and invite her to shareholder meetings. Since Nassberg filed her lawsuit on March 26, 2002, all of her claims about these lack of corporate formalities based on conduct before March 26, 2000 are time-barred, including any claim based on her 1991 request for financial information.

E. Mrs. Nassberg Has Not Demonstrated Oppression Because Of The Elimination Of Dividends

It is an elementary principle of corporation law that the declaration of dividends out of net profits rests in the discretion of the board of directors." *Knapp v Bankers Securities Corp., 230 F. 717, 720 (3d Cir. 1956)* (applying Pennsylvania law). More than sixty years ago, the Pennsylvania Supreme Court held:

> "It is true that courts may interfere with the declaration or non-declaration of dividends if the directors act fraudulently or unreasonably and are guilty of an obvious abuse of their discretionary power, but the mere fact that a corporation has a large surplus does not entitle stockholders to the payment of dividends. To what extent the net earnings should be distributed among the shareholders depends largely upon the company's need for accumulated reserves to strengthen its credit, increase its working capital, carry out contemplated projects of expansion, or provide contingencies against future hazards."

Jones v. Costlow, 349 Pa. 136, 141-142, 36 , A.2d 460, 463-64 (1944)

Not only has Nassberg failed to proffer any evidence that Jack or Pete Schultz acted "fraudulently or unreasonably and are guilty of an obvious abuse of their discretionary power," she failed to proffer any evidence that JSS had any earnings available for payment of dividends during the time dividends were not paid. *Cf. Knapp, 230 F.2d at 720* (holding that shareholders can only maintain an action for the failure to pay dividends "if directors have acted fraudulently or arbitrarily in refusing to declare a dividend when the corporation has a surplus which it can divide among the shareholders without detriment to the business") (emphasis supplied). On the contrary, the credible evidence demonstrates that, as a result of an expensive mill expansion project, substantially increased rail steel inventory prices, competitive pressure and a worsening economy, JSS lost money in the years it did not pay a dividend (2000 to the present).

According to the Pennsylvania Supreme Court, "the business judgment rule" insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interest of the corporation. *Cuker v. Mikalauskas, 547 Pa. 600, 606, 692 A.2d 1042, 1045 (1997)*. "The business judgment rule reflects a policy of judicial noninterference with business decisions of corporate managers, presuming that they pursue the best interest of their corporations, insulating such managers from second-guessing or liability for their business decisions in the absence of fraud or self-dealing or other misconduct or malfeasance." *Cuker, 547 Pa. at 608-09, 692 A.2d at 1046.* Pennsylvania courts have followed this policy since 1872. See *Cuker, 547 Pa. at 609, 692 A. 2d at 1046*. They have done so because 'The doctrine prevents courts from becoming enmeshed in complex corporate decision-making, a task they are ill-equipped to perform" *Cuker, 547 Pa. At 607. 692 A. 2d at 1046.*

The Pennsylvania Supreme Court has further held that the decision not to pay a dividend is subject to the business judgment rule. *See, e.g., Green v. Philadelphia Inquirer Co., 329 Pa. 169, 174, 196 A. 32, 34 (1938); Pardee v. Harwood Electric Co., 262 Pa. 68, 72, 105 A. 48, 49-50 (1918). See also 18 C.J.S. Corporations Sec. 298.*[7] As it has been set forth above, "the mere fact that a corporation has a large surplus does not entitle stockholders to the payment of dividends." *Jones, 34 Pa. at 141-42, 36 A.2d at 463-64*. Not only can directors decide to retain surplus to make repairs or improvements to the corporation's physical plant, see *Jones, 349 Pa. at 141-42, 36 A.2d at 463-64; 18 C.J.S. Corporations Sec. 298*, directors

[7]Nassberg cannot claim that the fact that Jack and Pete Schultz would also receive dividends makes their decision to forgo a dividend "self-interested," and therefore outside the business judgment rule. Not only was Jack and Pete Schultz's decision to forgo a dividend against their self-interest (since they would be the largest beneficiaries of any dividend), corporate directors are almost always shareholders. A claim that a decision on dividends is self-interested would therefore swallow the business judgment rule. In any event, a decision to forgo a dividend treated all Jersey Shore Steel shareholders in exactly the same way, and therefore did not fall within the "self-interest" exception to the business judgment rule.

can decide to apply corporate funds "to the redemption of the corporation's own stock-instead of paying them out as dividends. *See 18 C.J.S. Corporations Sec. 298*.

In addition to holding that the decision not to pay a dividend is subject to the business judgment rule, the Pennsylvania Supreme Court has also held that the decision to treat a particular expenditure as an "operating expense" is subject to the business judgment rule. *See Pardee, 262 Pa. at 72, 105 A. at 49.* As a result, Nassberg cannot attempt to "second guess" the board's determination that certain expenditures should be classified as "expenses," rather than "capital improvements."

Despite this prohibition on second-guessing a director's decision to treat costs as "expenses" and not to declare dividends, Mrs. Nassberg retained a "forensic" accountant (who had never managed an audit in his career) who concluded that JSS and its auditors "cooked the books" by "aggressively." expensing certain costs associated with the mill expansion. Mrs. Nassberg then argues that when these "accounting tricks" are corrected by her expert, the adjusted financial statements reflect profits from which dividends should have been paid. However, this position is based upon the seriously flawed "corrections" to the audited financial statements made by Nassberg's forensic accounting witness -- corrections that are contrary to the reasonable judgments made by JSS's management, JSS's auditors, and JSS's lender and its professionals.[8] Mrs. Nassberg presented Raymond F. Dovell ("Dovell") as her expert accounting witness. Dovell is a "forensic" accountant arguably meaning that much of his work is related to litigation. *Aug. 1 at 176-77,* 179. Dovell never visited the JSS mill and

[8]Given that Jersey Shore Steel's accountants passed on all of the items Nassberg now wishes to challenge, it is easy to see why her claims have no merit. See, e.g., Shareholder Derivative Actions Law & Practice Sec. 2:4 (2004) ("if the complaint alleges that the corporations' directors breached fiduciary duties owed to the minority stockholders through self-dealing transactions and through attempts artificially to deflate the market price of the company's common stock, the action must be maintained on a derivative basis because the duties owed to the stockholders are not distinct from those owed to the corporation, and the injuries affect the corporation in the first instance.") (emphasis supplied).

could not provide basic information about the layout or contents of the mill. *Id. At 178.* Nevertheless, Dovell proceeded to rearrange JSS's audited financials for the years 1998-2004. His work and opinions in this case can be broken down into several components. First, Dovell identified nearly $6,000,000 in JSS costs recorded as current expenses in the fiscal years 2000-2002 that he associates with the mill expansion and which he believes should have been recorded as assets and capitalized over 10 years. *PX-27. PX-35, PX-37.* Second, he analyzed the two leases entered into by JSS and Brown Brothers in 2000 that were recorded , is "operating leases" and concluded that they were actually "capital leases" and, as a result, he reversed $8.4 million from current expense to capitalized cost in JSS's audited financials for 2000- 2003. *PX-27, DX-125.* Third, to assist Mrs. Nassberg's valuation expert O'Neill, Dovell made certain "normalizing" adjustments to JSS's audited financials for 2000-2002, essentially eliminating over $10 million in expense that he regarded as abnormal, non-recurring or discretionary. *PX-37.*

1. Dovell's $6,000,000 Adjustment From Expensing to Capitalizing

Dovell took $5,959,443 ($5,225,628 plus $733,815) recorded as current repair/ manufacturing expense by JSS in the fiscal years 2000-2002 and re-categorized it as capital expense to be depreciated over 10 years. *PX-35, PX-37.* By doing so, he reduced JSS's expenses in the years 2000-2002 so as to make the company look profitable, which, of course, fits into Mrs. Nassberg's theory that JSS was actually profitable but her brothers engaged in accounting tricks to make the company appear unprofitable so as to deny her dividends.[9]

[9] This claim would not have been presented in the absence of Michael Taylor's report of the August 2002 family retreat wherein Taylor attributes to Pete Schultz the statement that JSS wants to be unprofitable because of the "situation" with Nassberg. *PX-4*. That remark, which Pete Schultz denies making, but which this Court believes was uttered by Pete, in an angry/reactive, as compared to reflective utterance. However, while Pete "talked the talk," there is no evidence he walked the walk (i.e. engaged in any acts of omission or commission that negatively impacted profitability). Additionally. Taylor stated that while he was at JSS for two years he saw no evidence "that Jack and Pete took any intentional steps to make the company not profitable because of the situation with Tab." *Taylor Dep. at 189*.

The linchpin to Dovell's conclusion is his assertion that all of this expense is part of the "mill expansion" as opposed to ordinary mill expense. Dovell reached his nearly $6,000,000 figure by reviewing vendor invoices and making his own subjective determination whether the costs reflected in the invoices were related to the mill expansion, and therefore should be capitalized, or not so related and therefore may be currently expensed. *Aug. 1 at 816; Aug. 2 at 42.* However, Dovell brought none of the invoices to the hearing and none were made exhibits; he obviously did not interview JSS or the vendors about the nature of these invoices and what they covered and Nassberg's counsel did not interrogate JSS or the vendors as to the same; and, as noted above, he never visited the mill and knew very little of its configuration and process line.

Aug. 1 at 178, 183-86, 190. Aug. 2 at 42.

Dovell's original expert report, *PX-27*, was supplied in January 2005. It contained no breakdown of the $6,000,000 ($5,935.443) except a breakdown by year and cost category. *PX-37*. Dovell admits that the original report made it impossible to tell what specific costs were in this $6,000,000 adjustment. *Aug. 2 at 39.*

Dovell estimated that the mill expansion cost $21.4 million. This is inconsistent with the 1998-99 projections JSS made of $13-15 million and the amount JSS financed for the mill expansion, which was $15.4 million. *Aug. 2 at 5-6; Aug. 3 at 110-111; Aug. 9 at 5-6; PX-28.* The difference, of course, is this $6,000,000 which Dovell insists relates to mill expansion and should have been capitalized. However, Dovell did not know exactly when the mill expansion took place. *Aug. 2 at 8*. Indeed, his $6,000.000 includes over $2.8 million from the years 2001 and 2002, but it is beyond dispute that the mill was rebuilt in February-March 2000 and was back to full production by the summer or fall of that same year. *Aug. 2 at 8;*

Aug. 3 at 109. It appears that Dovell simply included invoices for work that was not related to the mill expansion but related to normal mill repair and maintenance or other cost categories that may legitimately be expensed in the current period, such as spare parts, training services and invoices under $5,000.

Indeed, -- *PX-35* -- results in more questions than answers. Almost $2.5 million of the $6 million in question is in a category of "other vendors" with absolutely no detail as to which vendors performed what work. *PX-35; Aug. 2 at 40.* The largest single item on Dovell's chart is the $1.835 million for Lundy Construction. *PX-35.* However, Dovell did not know that Lundy was at the plant on a full-time basis with multiple employees performing routine repair and maintenance unrelated to the mill expansion. *Aug. 2 at 41; Aug. 3 at 114-115*. Further, Dovell apparently believed, in connection with his analysis, that $41,000 was immaterial as he referred to his $5,959,443 analysis as $6,000,000 repeatedly in his written report. *PX-27.* On his chart, there are at least nine items that are insignificant ($41,000 or less) and, therefore, eligible to be expensed and not capitalized as immaterial. Further, since Dovell did not identify the specific invoices and how many of them combine to produce the figures on his chart, many if not all of them may be sufficiently small to be immaterial and may be expensed in the current year.

There was a fair amount of skirmishing at the hearing about "aggressive" accounting practices and what that might mean in the context of expensing certain costs in the current period or "capitalizing" those costs by recording them as assets and depreciating them over a number of years. The choice affects the financial statements because expensing in the current period tends to depress earnings and reduce taxes while capitalizing and depreciating over time has the opposite effect. The issue was provoked by several comments in the Hege Kramer work papers. One comment, from an August 1999 memorandum, in connection with the mill expansion, states that “the Company will be aggressive in expensing certain items that could be considered capital items in an IRS audit." *PX-29.* Another comment, from that same memo, states that "we will not challenge their position that such amounts can be justified as expense in the year incurred."[10] Dovell conceded that these comments were not proof of any impropriety but served as "flags" to him to look carefully at the expensing that JSS did relative to the mill expansion. *Aug. 1 at 152- 55; Aug. 2 at 26-27.* More importantly, Dovell conceded that he does not equate "aggressive" to "illegal" or in violation of the tax laws. *Aug. 2 at 26.* He agrees that most privately-held companies like JSS are "aggressive" in their tax returns in order to minimize their taxable income and reduce taxes. Id. Dovell agreed that it is not uncommon for closely-held corporations to be aggressive about expensing for tax reasons. Id. Dovell agreed that there was some "grayness" under GAAP in the area of expensing or capitalizing -- that it's not an area of bright lines. *Id. at 27.* He conceded that there could be legitimate expensing of certain costs related to the mill expansion and the choice to expense or capitalize depends upon the circumstances. *Id.*

Jack and Pete Schultz and JSS exercised their discretion to be "aggressive" in this area of expensing certain mill expansion costs. *PX-28; PX-30.* They both testified that while they did not recall using the word "aggressive" they did advocate the policy of taking expenses in the current period where at all possible, but not to cross the line into impropriety. *Aug. 3 at*

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[10]Mr. Kramer of Hege Kramer, the author of this memo and this statement, testified that the sentence should have read "We will not challenge their position since such amounts can be justified as expense in the year incurred." Kramer dep. at 75-76. Mr. Kramer further testified that Mr. Murphy, the Hege Kramer tax partner, confirmed this point to him -- that the current expensing by JSS in question would stand up before the IRS. Id.

113; Aug. 4 at 50-51. As noted above, JSS, its auditors and its bank, Brown Brothers, all believed the mill expansion would cost about $15 million. That is why JSS borrowed $7 million (through Brown Brothers) in the form of the industrial revenue bonds and leased the rest of the equipment, worth $8.4 million, from Brown Brothers in the form of operating leases. The proceeds from the bonds ($7 million) were spent on machinery and equipment for the mill expansion and those costs were capitalized. The leases were structured as operating leases principally to avoid the $10,000,000/ six year IRS-imposed cap and if these were operating leases they could be treated as current expenses regardless of what the leases served to procure for JSS (which was $8.4 million worth of machinery and equipment). Dovell concedes this point. *Aug 2 at 18.*

Both Rich Snyder, the Hege Kramer audit partner for JSS, and Mark Scheffey, JSS's chief accounting and financial officer, testified that JSS wanted to expense as much as it could in the current period but that it wanted to follow GAAP and proper methods of accounting. *Aug. 5/8 at 109, 120. 125. 127-28; Aug. 9 at 7-8.* Both Snyder and Scheffey agreed with Dovell that the expensing versus capitalizing area is a "gray" area in which the individual circumstances must be examined and judgments made. *Aug. 2 at 27, 102-103; Aug. 5/8 at 126; 184; Aug. 9 at 7.* Both Snyder and Scheffey confirmed that all invoices under $5,000 for work associated with the mill expansion were expensed as immaterial and that all invoices over $5,000 for work associated with the mill expansion were individually reviewed and judgments made regarding expensing or capitalizing. *Aug. 5/8 at 121; 126, 150-151, 165-67, 193; Aug. 9 at 14-15, 19-20.* As Dovell conceded, and Snyder and Scheffey confirmed, the test is not whether the cost is merely associated with a capital improvement such as the mill expansion, but whether the cost is legitimately eligible to be expensed currently, such as immaterial costs, spare parts, training services and the like. *Aug. 5/8 at 32,* *148-149, 151; Aug. 9 at 103-04.*

Both Snyder and Scheffey reviewed Dovell's chart on his $6,000,000 reclassification, *PX35*. Both of them pointed out that $2.4 million of the $6 million is in a line marked "other vendors" and that it is impossible to tell which vendors doing what work is the subject of that amount; indeed, both agree it very well could be the substantial number of invoices under $5,000. Both Scheffey and Snyder regarded the $1.8 million assigned by Dovell to Lundy Construction as three years' worth of the normal yearly expense of Lundy providing full time repair and maintenance to the mill. Both Scheffey and Snyder reviewed invoices related to the next two biggest items on Dovell's *PX-35*, Danieli and Bricmont, and concluded that these costs were spare parts and training services properly expensed. *Aug. 5/8 at 132; 145-51: Aug. 9 at 14-20.*

In addition, the Schultz defendants presented the expert accounting testimony of William R. Lazor of Kingston, Pennsylvania. Mr. Lazor is a CPA who actually engages in audits, unlike Mr. Dovell. Mr. Lazor was the president of the Pennsylvania Institute of Certified Public Accountants in 2003-2004. *Aug. 10 at 25-29; DX-I29.* Lazor examined the accounting policies of JSS as they relate to expensing and also examined whether these policies were applied. He concluded that the policies and their application were consistent with GAAP. *Aug. 10 at 31-38; DX-129.* Lazor also confirmed the GAAP principle that not all costs associated with a capital project, such as a mill expansion, need be capitalized but certain costs may be expensed and that this is a "gray" area in which the company is permitted to exercise its judgment. *Id*.

2. The Operating Leases

With the advice and assistance of its bank and financial advisor, Brown Brothers, JSS decided to finance a little more than half the cost of expanding the mill ($8.4 million) through operating leases. This decision was driven in large part by IRS regulation of the industrial revenue bonds and limits on JSS's capital expenditures within a six-year period. Even though operating leases are used to finance the acquisition of capital equipment, they will not "count" towards the cap if, in fact, the leases are the operating leases.

The only issue before the Court is whether Mrs. Nassberg, through Dovell, proved that JSS failed the last of the fourth-part GAAP test used to determine if a lease is a capital lease or operating lease. *PX-81; PX-128.*

It was very important to both JSS and Brown Brothers that the leases be structured as true operating leases. For Brown Brothers, if the leases were actually capital leases, then the IRS imposed $10 million limit on JSS's six-year spending related to capital equipment would be breached and the income on the industrial revenue bonds purchased by Brown Brothers would become taxable, not tax-free, income. For JSS, if the leases were actually capital leases, the cost of borrowing under the bonds would increase because Brown Brothers would pass through its unexpected tax consequences to JSS. Further, the leases would not be treated as current expense (helping to reduce income and taxes) but as capital assets to be depreciated over tune. Indeed, this issue was sufficiently important to Brown Brothers that it engaged independent counsel and a lease specialist to opine that these were true operating leases. Both of these professionals concluded that these leases were true operating leases and so informed Brown Brothers. It was only with these opinions in hand that Brown Brothers moved forward with the JSS leases.

JSS's chief financial and accounting officer, Mark Scheffey, and a Hege Kramer partner who was, the JSS audit partner, also analyzed the leases under the fourth GAAP test. They did this in the summer of 2000 before the leases were finalized.

The fourth test under GAAP for operating leases involves a present value calculation expressed as a ratio of the present value of the minimum lease payments to the fair market value of leased equipment. *PX-81: DX-I25.* If the calculation results in 90% or greater, the test is failed and the lease is a capital lease. As with all present value calculations involving a stream of payments, an interest rate must be used. The GAAP rule provides that the lessee (here, JSS) must use its own "incremental borrowing rate" as the interest rate unless the lessee knows or it is practicable for the lessee to know, the lessor's ('Brown Brothers') implicit rate and that rate is lower than the lessee's incremental rate.

Neither JSS nor Hege Kramer knew Brown Brothers' implicit rate. Further, had Brown Brothers been asked to provide that rate, it would not have done so. Therefore, JSS and Hege Kramer used JSS's incremental borrowing rate as the interest rate in the calculation and it resulted in a percentage under 90%. Accordingly, JSS moved forward with the Brown Brothers' leases.

Mr. Dovell's January 2005 report stated that he also performed the fourth GAAP calculation and it resulted in a ratio of more than 90%. Therefore, he concluded these two leases were really capital leases and he made adjustments accordingly to JSS's financial statements. Dovell also wrote that JSS failed to perform the calculation at all because he could not find the calculation in Hege Kramer's work papers. *PX-27.* Dovell did not attach the calculation to his report nor describe it nor give any detail as to what he relied upon.

Dovell first supplied his written calculation the week before trial. *Aug. 2 at 80; DX-125.* Although his written calculation clearly states that he used the "lessee's incremental borrowing rate" of 3.28287%, he testified that he actually used the lessor's implicit interest rate found in a Brown Brothers' document. *DX-125; Aug. 2 at 87.* Dovell's written calculation is materially inaccurate where it states that the lessee's incremental borrowing rate is 8.28287%. Dovell admitted this when he testified that he did another calculation using the different, higher lessee's rate and that calculation resulted in a percentage under 90%.

Dovell did not bring with him to the hearing the Brown Brothers' document in which he found these various interest rates. *Aug. 2 at 88.* Instead, those documents were identified by Mrs. Nassberg's counsel several days later in the trial. The document in question is actually *DX-65.* That document, on the first page, identifies a present value calculation using the implicit rate of 8.28287% and a percentage of 90.4609% (failing the test). The third page reflects another calculation, however, using the incremental borrowing rate of 9.2%. resulting in a percentage of 87.8726% (passing the test).

Interestingly, next to this calculation on the third page are the handwritten words "JSS thinks/knows this rate." In fact, Brown Brothers only gave JSS this higher incremental borrowing rate but never gave JSS the implicit rate. *Aug. 5 (a.m.) at 56-57.*

Mr. Dovell, although he urged that JSS failed this fourth GAAP test, in fact, he ended up proving that JSS had passed it.

Finally, Mr. Dovell made an issue of his inability to find any calculation done by or for JSS in Hege Kramer's "work papers." *PX-27; Aug. 1 at 167.* This is a reference to Hege Kramer's audit work papers. Hege Kramer performs its audit in the fall and winter each year because JSS's fiscal year ends the last Saturday closest to September 30. The calculation that JSS/Hege Kramer did in 2000 in connection with the Brown Brothers' leases was done in June. There was no audit being conducted at that time and there were no work papers. The calculation was performed and the documentation discarded. *Aug. 5/8 at 138.*

3 Non-Recurring, Abnormal and Discretionary Expenses

Dovell next attempted to identify alleged non-recurring, abnormal and discretionary expenses of JSS during the fiscal years 1998-2004. He did this to "normalize" JSS's financial statements in order to assist Mrs. Nassberg's valuation expert, O'Neill, in performing a discounted cash flow valuation. The theory is that an interested investor in JSS would want to strip away certain expenses that are out of the ordinary or that can be avoided in order to reach a realistic evaluation of the company. Dovell eliminated almost $10 million of expense in this exercise. Along the way, however, he made some major mistakes.

First, he admits that his elimination of $823,630 in welding expense in 2002 was a mistake. *Aug. 2 at 60-61, PX-37.*

Second, Dovell eliminated over $2 million in "Temporary and Outside Services" in the years 2002-2004. He was not aware, however, that these expenses were not new, one-time or otherwise extraordinary but, in fact, were expenses historically captured in another account but broken out as a separate expense for the first time in 2002. He also was not aware that JSS had been using 10-30 workers from a temporary employment service for many years. Hence, Dovell should not have eliminated this large expense item.

Third, he eliminated $822,385 in charitable contributions by JSS because they were "discretionary." *PX-37.* Dovell conceded that charitable contributions provide benefits to a company as tax deductions, even in unprofitable years. *Aug. 2 at 64.* Dovell certainly infers that an interested investor would conclude that a company such as JSS -- one of the largest employers in its area -- could operate without making any charitable contributions. This is not a realistic inference and this adjustment by Dovell also is highly suspect.

Fourth, even though he made adjustments for non-recurring expenses, Dovell did not level the field by making corresponding adjustments for non-recurring income. Aug 2 at 70-71. He admits that he missed this. *Id.*

Finally, after he reclassified $14.4 million in JSS expense as capital costs (the $6 million in mill expansion expense and the $8.4 million in the leases), he had to determine appropriate useful lives for depreciation purposes. Despite the fact that JSS used seven years for depreciating machinery and equipment and that the IRS uses a seven-year guideline for steel mills, Dovell chose 10 years. By spreading the expense out an additional three years, he reduces the expenses for 2000, 2001 and 2002. this, in turn, helps to inflate Mr. O'Neill's cash flow number, which is the linchpin for his valuation of JSS stock.

F. Mrs. Nassberg Has Not Demonstrated Oppression Because She Was Offered The Hempstead Value

As a general matter,

> "Majority shareholders have no obligation to purchase the shares of minority shareholders when minority shareholders wish to dispose of their interest in the corporation in the absence of an agreement among shareholders or between the corporation and the shareholder, or a provision in the corporation's articles of organization or bylaws."

12B Fletcher Cyclopedia of Private Corporations Sec. 5911. As a result, neither a corporation nor a majority shareholder has any obligation to purchase a minority shareholder's stock at any particular price. See *12B Fletcher Cyclopedia of Private Corporations Sec. 5811* ("In the absence of fraud, however, there is ordinarily no duty on the part of other shareholders to revise or update an agreed-upon redemption price.") *See also Gee v. Blue Stone Heights Hunting Club, Inc., 145 Pa. Commw. 658, 665-66, 604 A.2d 1141, 1144-45 (1992)* (holding that a member of a non-profit corporation is not oppressed when the corporation refuses to buy out that member's interest at a price demanded by the member). Nassberg cannot, therefore, claim to be oppressed by Jack and Pete Schultz's decision to offer to buy her shares only at the Hempstead Value. Indeed, since Nassberg has previously sold her own shares at the Hempstead Value, previously distributed her mother's assets to herself using the Hempstead Value, and she approved her mother's estate valuing shares at the Hempstead Value, her only "reasonable expectation" was that JSS would offer to buy her shares at the Hempstead Value.

Minority shareholder oppression requires proof that a majority shareholder "targeted" the minority shareholder with some intent to act illegally, fraudulently or oppressively towards that shareholder. Mrs. Nassberg, unwilling to weather the financial downturn of JSS and the elimination of dividends, demanded to be bought out by JSS. In response, Jack and Pete Schultz offered her the one and only value that JSS ever used to redeem minority-held stock -- the Hempstead Value. This Value was not some arbitrary low-ball, "fire sale" value, but was a value derived by an independent qualified appraiser; a value used by Schultz family members, the former JSS chief financial officer, fiduciaries and schools to sell their stock back to JSS; a value that was used in federal and state tax returns and never rejected; and a value that Mrs. Nassberg had used a number of times in her own affairs.

Mrs. Nassberg, for her own reasons, obviously did not welcome the offer to purchase her shares at the Hempstead Value. But she was hardly oppressed by that offer.

G. Pennsylvania Courts Have Found Minority Oppression Only In Much More Severe Cases.

The committee notes to Pennsylvania's minority shareholder oppression statute state that

> "In the case of a closely held corporation, oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation."

15 Pa. C.S.A. Sec. 1767 (1995 committee note).

In light of these comments, it is not surprising that common to every reported case in Pennsylvania finding that a minority shareholder had been oppressed is either a decision to fire, or severely reduce the salary and authority of, minority shareholder who was working for the corporation. *See Ford, 878 A.2d at 899-904* (a minority shareholder is oppressed when she is fired and when "the evidence at trial was the Plaintiffs receive no benefit from their interest in the corporation" even though the corporation was profitable);[11] *Viener v. Jacobs, 834 A.2d 546, 556 (Pa. Super. Ct. 2003*), *appeal denied, 579 Pa. 704, 857 A.2d 680 (2003), cert. denied, 125 S.Ct. 1300 (2005)* (a minority shareholder is oppressed when, as a result of his complaints that others were authorizing improper cash payments to subcontractors, he was demoted from president to vice-president, and then fired as vice-president, when locks were changed, and when he was excluded from decision making through the establishment of "committees" that included all shareholders but him); *Leech v. Leech, 762 A.2d 718, 720 (Pa. Super. Ct. 2000)*(a minority shareholder is oppressed when he is stripped of his power as corporate secretary and treasurer); *ARC Manufacturing Co. v. Konrad, 321 Pa. Super. 72, 80-82, 467 A.2d 1133. 1137-38 (1983)* (affirming the appointment of a receiver with limited powers when a minority shareholder was locked out of the corporate premises, and then stripped of his position as president, voted out as a director, and fired from the corporation while at the same time the majority shareholders increased their own salaries and refused to pay any dividends); *see also Orchard v. Covelli, 590 F. Supp. 1548, 1551-52 (WD. Pa. 1984), aff'd, 802 F. 2d 448 (3d Cir. 1986)* (table) (ordering a corporation to buy out a minority shareholder at fair value when the majority shareholder had fired the minority shareholder, who had previously been the vice-president in charge of the day-to-day operations of the corporation).

Although they do not involve findings that minority shareholder oppression has occurred, the common thread running through reported opinions denying preliminary objections or motions to dismiss minority shareholder oppression claims is also an allegation that the minority shareholder was fired, or that the minority shareholder's power or authority

[11]The Ford Court noted that a minority shareholder had no reasonable expectation of receiving benefits if the corporation was not profitable. See Ford, 878 A.2d at 904.

was severely diminished. *See Liss v. Liss 2002 WL 576510 at *2 and *6 (Phila. C.P. March 22, 2002)* (denying preliminary objection when a minority shareholder pled that, although he was the Treasurer and Chief financial Officer, the majority shareholder froze him out of management, cut his salary, forced him to retire, and then terminated his compensation and benefits); *see also Tyler, 994 F. Supp. At 607* (refusing to dismiss plaintiff's claims of fraud and breach of fiduciary duty when he alleged that he had been fired when he questioned the reduction in shareholders' equity); *Simms v. Exeter Architectural Products, Inc., 868 F. Supp. 668, 673 (MD. Pa. 1994)* ("The Plaintiff's allegations of wrongful termination, of Defendants' failure to disclose corporation information and Defendants' intentional disregarding of the Shareholder Buy-Sell Agreement certainly raise the issue of oppression, but we cannot, at this juncture, make such a determination without further development of the record").
Nassberg has not alleged that Jack or Pete Schultz fired her. She cannot do so because she never worked at JSS. Similarly, Nassberg has not alleged that Jack or Pete Schultz restricted her authority as an officer or director of JSS. She cannot do so because she was never anything other than a passive minority shareholder which, of course, is what her father and benefactor wanted and, indeed, what she wanted.

Nassberg's only involvement with JSS has been receiving money from JSS for her gifted stock and cashing dividend checks. The dividends stopped when the profits stopped. The profits stopped as a result of outside economic factors and Jack and Pete Schultz's decision to spend substantial money modernizing JSS's plant. The decision to invest a corporation's cash in a plant modernization, rather than pay the cash out as dividends, is the quintessential management decision subject to the business judgment rule. *See In re: Reading Co. 711 F.2d 509, 520 (3d Cir. 1983); Knapp, 230 F.2d at 720.* Indeed, in light of JSS's losses, and its deteriorating balance sheet, JSS's accountants advised Jack and Pete Schultz not to pay dividends.

The cases upon which Nassberg relies are distinguishable from the case at bar. For example, *Orchard v. Covelli, 590 F Supp. 1548 (W.D. Pa. 1984), aff'd, 802 F.2d 448 (3d Cir. 1986)* (table) involved the firing of the minority shareholder who had previously been the Vice-President in charge of day-to-day operations of the corporation. *See Orchard, 590 Supp. at 1551-52. Adler v. Tauherg, 881 A.2d 1267 (Pa. Super. Ct. 2005)* involved a situation in which the holders of half of the shares in a medical corporation reduced the powers (and compensation) of the president of the corporation, and issued new shares to an ally, thereby tipping the balance of power. *See Adler, 881 A.2d at 1268.* The Court's decision to appoint a receiver stemmed from its finding that the defendant shareholder- directors had violated several stock transfer agreements when they attempted to issue new shares of stock. *See Adler, 881 A.261 at 1270.* Both of these cases are distinguishable because Nassberg never worked for JSS, and cannot allege that she had an expectation (reasonable or otherwise) of receiving a salary. Similarly, she cannot allege that Jack or Pete Schultz violated any stock voting or stock transfer agreements.

Ferber v. American Lamp Corporation 503 Pa. 489, 469 A.2d 1046 (1983) stands for nothing more than the undisputed proposition that a majority shareholder of a closely-held corporation cannot oppress the minority. *See Ferber, 503 Pa. at 496 A.2d at 1050.* While the Ferber court believed that the majority shareholders may have "disregarded their father's wish that their sister be provided for in some significant way from the profits of the family business," *Ferber, 503 Pa. at 496, 469 A. 2d at 1049-50,* it held that the lower court had erred in holding that the salaries of the majority shareholders (who were actually running the business after their father's death) could not be deducted from the "profits" of the business. *See Ferber, 503 Pa. at 494-95, 469 A.2d at 1049.* As a result, not only does Ferber stand for the proposition that shareholders such as Jack and Pete Schultz who run a business that their father wanted them to run are entitled to draw salaries, it is distinguishable both because Jack and Pete Schultz did not violate any provisions of their father's will, and because JSS paid Nassberg substantial dividends in the years when Jersey Shore Steel had profits.

Harper v. Superior Tool and Die Co., 1987 WL 18414 (E. D. Pa October 7, 1987) is the sole case cited in which any Pennsylvania court found that a minority shareholder who had never worked for a corporation had been "squeezed out." *Harper,* however, involved a situation in which the corporation had never paid any dividends. *See Harper, 1987 WL 18414 at 2*. Since the corporation had never paid a dividend, the *Harper* court held that the minority shareholder's stock was essentially worthless, especially since the majority shareholders had diverted all valuable opportunities away from the corporation. *See Harper, 1987 WL 18414 at 2. Harper* is therefore distinguishable for four reasons. First it is an eighteen year old unpublished decision from a federal trial court, and is therefore not binding on the Court. Second, unlike the plaintiff in Harper, Nassberg received substantial dividends from JSS in the years when JSS was profitable. Third, there is no evidence that Jack and Pete Schultz diverted corporate opportunities from JSS.[12] Finally, Nassberg's stock is not worthless because JSS offered to purchase the stock for almost $1.5 million -- the Hempstead Value.

DISCUSSION

[12]While Nassberg insinuates that the formation of South Avis Realty constituted a diversion of a corporate opportunity, Nassberg made no such claim at the time she (literally) signed off on that transaction, and pocketed $350,000. The reasons why the South Avis Realty transaction is irrelevant to this case, and cannot give rise to claims have been set forth more fully above. In any event, these "opportunities" were not diverted from JSS as it enjoys the use of all three parcels of land to this day.

Mrs. Nassberg's case at trial proceeded as if "oppression" was presumed and the only real issue was "valuation."

Nassberg is a minority shareholder in a closely-held company that is not currently paying dividends. This is because the company is not currently making profits and the majority shareholders – the Schultz defendants -- are not being paid dividends either. Nassberg may not like being denied dividends, but that simple fact does not equate to "oppression." Indeed, Pennsylvania's "business judgment rule" insulates the Schultz defendants and JSS from liability for exercising their discretion as directors not to declare dividends -- even if there were profits (which there were not) and even if there are available funds to pay those dividends. In fact, the business judgment rule cloaks the Schultzes with immunity for redeeming JSS stock during the years dividends were not paid.

Although she had no right to be bought out by JSS, Mrs. Nassberg made that demand to her brothers immediately after the dividends dried up in 2000. Unhappy that JSS offered to purchase her stock at the "Hempstead Value," Nassberg presented an oppression case from claims that are either abandoned, waived, time-barred, unsupported by necessary expert testimony or based upon isolated "sound bites" that have been refuted. There is no reported decision, in Pennsylvania or elsewhere, that would support a finding of "oppression" on the credible facts of this case. Nassberg's "reasonable expectations" as a minority shareholder simply have not been frustrated. The critical facts found in those cases where oppression has been determined -- firing the minority shareholder or severely diminishing the minority shareholder's authority — are totally absent here.

Nassberg never worked at JSS and although not dispositive she never invested any money in it. She and her daughter own JSS stock only because her father gifted it to them. Nassberg, by her own confession, had "no personal interest in the mill" and chose to spend most of the 1980's and 1990's living in Houston and the Bordeaux region of France. She never demanded any corporate formalities (such as shareholders meetings or JSS financial information) and was content to receive JSS dividends through 1999 while the company was profitable. During that time period she received over $2 million derived from the JSS profits made possible by the hard work of Jack and Pete Schultz and their father. The majority of that money flowed from her own personal use of the "Hempstead Value" of JSS stock, a value she now rejects as a "fire sale" value.

In 2000, JSS lost money for the first time in anyone's memory for palpable external economic and competitive reasons (rising rail cost, unexpected competition, loss of customers, an expensive labor union contract and an expensive mill expansion). That same year, the Schultz siblings' mother died and Nassberg stood to inherit JSS stock (in addition to the stock she held in trust for her daughter). In fact, she stood to inherit twice as much following her mother's death as did either of her brothers, a result intended by her father.

At a critical point in time when JSS was suffering difficulties and her mother's estate was in need of her attention as co-executor. Nassberg committed two acts of arguable poor judgment and cupidity. Rather than see JSS and her brothers through a period of financial downturn, Nassberg demanded to be bought out by JSS at a special value higher than any other minority shareholder had ever received. She presented this demand by threatening her brothers with litigation and attempting to intimidate them by arguably using the office of her county commissioner husband as a venue for this demand. And despite her own personal use of the "Hempstead Value" on at least three occasions before, Nassberg tried to convince her brothers that there could be one value for the government (Hempstead) and one for her (much higher). When her brothers were not intimidated but continued to offer their sister the same treatment afforded all other JSS minority shareholders (an offer not even required by

Pennsylvania law), Nassberg strategically abandoned her mother's estate as a co-executor. She did so because she feared that she would be "boxed in" by her further use of the Hempstead Value, a value she had already agreed to use for her mother's estate's tax return.

Nassberg then, albeit begrudgingly, received JSS financial information that she was due under Pennsylvania law. This information was delivered by JSS to a valuation consultant retained by Nassberg who never surfaced in this litigation with any report. Then, just eleven days after she received her stock certificate for the JSS shares that she inherited, Nassberg sued her brothers for "oppression."

Nassberg's March 2002 publicly filed Complaint contained a number of sensational charges. Her initial assertions were an elevation of sound bite utterances over substance, whose purpose seemed to acquire oppressive exactions rather than present a credible cause of action. The three principal charges alleged that Jack and Pete Schultz stole and misappropriated millions in JSS funds and received lavish gifts and "perks" from JSS. However, these ultimately unsupported claims were later abandoned by Nassberg with no explanation for why the claims were made in the first place. The rest of Nassberg's "oppression" claims were tried to this Court and, as discussed below, are either waived, time-barred, unsupported by necessary expert testimony or based upon "sound bites" that have been refuted. The principal remedy that she seeks – redemption of her stock – relies upon a valuation of JSS stock that is unsupported with substantial credible evidence. Nassberg has presented this Court with a valuation that is riddled with major mistakes and flawed assumptions arguably designed to drive this Court to an artificially high "split the baby" figure. That value is six times greater than the value that has been accepted by other family members, schools, fiduciaries, the IRS and Mrs. Nassberg herself on at least three prior occasions.

Mrs. Nassberg's reasonable expectations as minority shareholder have not been frustrated. She is unhappy that JSS is not paying dividends and she is unhappy that her brothers did not concede to her demands to give her special treatment. Jack and Pete Schultz have seen a Pennsylvania steel mill through a difficult four years that has resulted in very marginal losses. In the process, the Schultz brothers have arguably saved 400 Pennsylvania jobs. They have operated JSS ever mindful of the legacy of their father, who is Mrs. Nassberg's benefactor. In no way have they oppressed Nassberg.

Mrs. Nassberg, with all due respect, is entitled to nothing because she has failed to shoulder her burden of proving minority shareholder oppression. The Court does not have to discuss in any substantive manner the valuation issues because of this failure. Further, there is nothing unfair or inequitable about denying Nassberg any financial recovery. She is far from being in dire straits and her continued ownership of JSS stock has palpable benefits. Nassberg is a sophisticated businesswoman involved in a viable real estate market and is married to a former Wall Street lawyer who is a county commissioner. Nassberg's JSS stock has great value that, presumably, can be put to JSS at any time for the Hempstead Value. If JSS is ever old or liquidated, Nassberg will share in the net proceeds as a 12% shareholder. Arguably, if she had faith in her exaggerated valuation offered to this Court (almost $9 million), she can find a purchaser for a bargain price of, say, $6 million. Arguably, a "savvy investor" will recognize the value that she and her valuation expert apparently recognize. In any event, there is no harm to Mrs. Nassberg in holding onto her JSS stock -- in fact, there is substantial value.

CONCLUDING OBSERVATION

In conclusion, despite all Mrs. Nassberg's protestations during her testimony about her lack of interest or knowledge about the financial affairs of JSS, such was belied by the record as reflected in our findings of facts. We suspect the Nassbergs were aware of the large amount of cash and assets that JSS held in reserve to purchase rolling stock in the spot market. However, when the company fell on difficult times for the reasons previously enunciated (such being contemporaneous to its need to engage in a major capital campaign of expansion/renovation to remain competitive) and Mrs. Nassberg suffered the loss of her dividend income (which loss occurred subsequent to an extended period of apparent financial inactivity by Mrs. Nassberg and her husband while in France), she went on the offensive. She assumed the dual role (with the perceived assistance of her husband) of oppressor and oppressed; all to no avail.

As to the brothers, such initially involved resentment, anger, reactive rather than reflective comments, and a refusal to render up more dollars or information than provided in the Hempstead report. The "gauntlet" was then thrown down by both and an extensive and we suspect expensive period of litigation ensued. Subsequent to the initial sensational and unsupported assertions (which if justified would have merited the appointment of a limited receiver) able counsel prevailed and reasonable issues and subsequent (albeit delayed) response to discovery occurred and the cases moved forward to trial.

Initially, (during the trial) this court (who had never handled a closely held corporation case involving the type of assertions set forth herein) struggled to fully comprehend the "issues" as presented by the "experts" regarding valuation of a corporation that is not public and questions involving accounting practices (GAAP).[13]

[13] We remain uncertain about some of the accounting standards utilized and opinions expressed by the experts for both sides. However, as to the valuation of Mrs. Nassberg and her daughter's stock, the evidence presented by Plaintiffs can best be described as being speculative and evidentially in "equipoise". While we concur that the accounting "practices" utilized by JSS were "aggressive", such as we alluded to during our questioning is not itself a pejorative word and certainly cannot be equated with any fraud or misrepresentation. Rather, such appeared to be an "aggressive" effort to minimize taxes. It appeared to the court that "neutrality" in accounting has a greater significance for those who set the accounting (GAAP) standards than for those who have to apply those standards in preparing financial reports. The suggestion that JSS and the Schultz brothers "cooked the books" to deny the Plaintiffs their "just" compensation is in our view absurd. In fact, rather than support such a contention as to defendants, it appeared that Plaintiffs experts

However, we ultimately concurred with able counsel for the brothers who submitted a very credible and persuasive and supported (as reflected by our careful review of the record) set of findings and conclusions. Unfortunately for the Nassbergs' their able counsel was unable to overcome his client's lack of credibility as to Mrs. Nassberg's self-serving and ultimately unsupported assertion of oppression. Notwithstanding Nassberg's reliance on some inflammatory, reactive and perhaps understandable (given the prevailing circumstances such as occurred in the commissioners meeting room or office) albeit inappropriate and unjustified comments by Pete, and the questionable value received for the services rendered by Jack's son and his "protégée" (a matter on which Peter's wife also opined) we found in effect that Mrs. Nassberg's "reasonable expectations" were nothing more than unreasonable posturing protestations and unsupported legal proclamations that do not sustain her cause of action.

We therefore enter the following:

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charge to determine whether fraud and/or misrepresentation occurred by acts of omission or commission by JSS (i.e. the alleged "predetermined purpose" as set forth in Plaintiffs pleadings) should not implicate a "predetermined result" — yet we had the impression that Plaintiffs results were outcome or result, rather than factually determinative. Plaintiff's expert testimony on valuation was the least persuasive. Notwithstanding all of the above, ultimately, as indicated in the body of our opinion, the seminal issue, or lack thereof, as to oppression, was dispositive.

DECREE NISI

In consideration of the foregoing it is DETERMINED, ORDERED and DIRECTED that:

1. Plaintiff has not sustained her burden of persuasion on her oppression claim of excessive compensation.

2. Plaintiff has not sustained her burden of persuasion on her oppression claim relating to the 1996 South Avis-First Company transaction.

3. Plaintiff has not sustained her burden of persuasion on her oppression claim relating to dividends and accounting improprieties; in addition, the decisions of the JSS directors to "aggressively" expense certain costs and to forego dividends in years when the audited financials showed losses are decisions protected by the Pennsylvania business judgment rule.

4. Plaintiff has not sustained her burden of persuasion on her oppression claim relating to the 200 Hempstead offer made to her by JSS.

5. Plaintiff has not sustained her burden of persuasion on her oppression claims relating to shareholder meetings and financial information; all such claims relating to events before March 26, 2000 are time-barred by the applicable statute of limitations; neither Pennsylvania law nor the JSS bylaws required JSS to hold an annual shareholders meeting to include Plaintiff; and JSS has substantially complied since September 2000 with any obligation to provide financial information to shareholders. However, since Plaintiff's claims of oppressive conduct and/or breach of fiduciary duty is founded in Equity it is ordered and Directed that John S. Schultz and Peter D. Schultz and Jersey Shore Steel Company shall annually provide Kathryn S. Nassberg in her own right and as Trustee of Kathryn Cupp, with Jersey Shore Steel Company's complete yearly audited financial statements as well as their

Personal Income Tax Statements. Said statements shall be provided within ten (10) days of receipt or filing of such. Said financial records (along with the complete records and inspection rights set forth in *15 Pa. C.S.A. Sec. 1507* - which this Court would be inclined to construe liberally in favor of Nassberg), should (given the controversy between the parties about the "value" of this closely corporation) hopefully provide ongoing information as to the fair value of the shares in question, in lieu of further litigation and the costs appurtenant thereto.

BY THE COURT,

Barry F. Feudale, Sr. J.
Specially Presiding

Date: June 2, 2006