At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 14th day of February 2022.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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In the Matter of the Application of
LMEG Wireless LLC,

Petitioner,

-against-

Menachem Farro,

Respondent.

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Index No. 501508/2021
Cal. No. 12 MS 4

DECISION AND ORDER

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
MS 4	Docs. 93-182

Upon the foregoing papers, Petitioner's motion for a protective order, pursuant to Limited Liability Company Law §1002 (f) and CPLR 3103, is decided as follows:

In this postmerger action for valuation, commenced pursuant to Business Corporation Law § 623 and Limited Liability Company Law §1002, petitioner moved for a protective order to preclude respondent Menachem Farro from obtaining party or non-party disclosure of events, transactions, or financial matters post-dating the statutory valuation date of November 16, 2016, including concerning Bohm Technologies, LLC. Respondent opposed.

CPLR 3101 (a) provides that there shall be full disclosure of all evidence "**material** and **necessary**" in the prosecution or defense of an action, regardless of the burden of proof [emphasis added]. "The phrase 'material and necessary' is 'to be interpreted liberally to

require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Yoshida v Hsueh-Chih Chin*, 111AD3d 704, 705 [2d Dept 2013], citing *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). The test is one of usefulness and reason and may be curtailed when it becomes an unreasonable annoyance and tends to harass and overburden the other party (*Yoshida*, 111AD3d at 705; *Harrison v Bayley Seton Hosp. Inc.*, 219 AD2d 584 [2d Dept 1995]).

Petitioner contended respondent's subpoenas and requests for documents should be quashed to the extent they seek information beyond the "valuation date" for LMEG Wireless LLC, and to the extent disclosure is sought regarding the subsequent corporation Bohm Technologies, LLC, which was created after the merger date. Respondent contended Business Corporation Law § 623 (h) (4), the statute under which the instant action was commenced, permits certain post-merger factors to be considered. Petitioner contended that Limited Liability Company Law §1002 (f) restricts relevancy to the valuation date of November 16, 2016.

Business Corporation Law § 623 provides as follows:

> h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:
> (4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date. In fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors. The court shall determine the fair value

> of the shares without a jury and without referral to an appraiser or referee. **Upon application by the corporation or by any shareholder who is a party to the proceeding, the court may, in its discretion, permit pretrial disclosure, including, but not limited to, disclosure of any expert's reports relating to the fair value of the shares whether or not intended for use at the trial in the proceeding and notwithstanding subdivision (d) of section 3101 of the civil practice law and rules** [emphasis added].

Limited Liability Company Law § 1002 (f) provides as follows:

> f) Upon the effectiveness of the merger or consolidation, the dissenting member (referred to in subdivision (e) of this section) of any domestic limited liability company shall not become or continue to be a member of or hold an interest in the surviving or resulting limited liability company or other business entity but shall be entitled to receive in cash from the surviving or resulting domestic limited liability company or other business entity the fair value of his or her membership interest in the domestic limited liability company as of the close of business of the day prior to the effective date of the merger or consolidation in accordance with section five hundred nine of this chapter but without taking account of the effect of the merger or consolidation.

Although no Second Department cases were found directly on point, in a relevant First Department case reviewing Business Corporation Law § 623, the court denied petitioner's motion to compel production of respondent's subchapter S election documents. In doing so, the court stated, "Contrary to petitioner's contention, the statute's requirement that the court consider 'all other relevant factors' in fixing value does not modify its time frame for fixing value 'as of the close of business on the day prior to the shareholders' authorization date' " (*Matter of Estate of Mandelbaum v Five Ivy Corp.*, 72 AD3d 574 [1st Dept 2010]).

The Court of Appeals, however, more pointedly addressed the applicable approach in *Matter of Cawley v SCM Corp.*, 72 NY2d 465 (1988). There, in a stock appraisal proceeding arising from a corporate merger, under Business Corporation Law § 623 (h) (4), the Court held that courts are authorized to consider and accord weight to relevant postmerger factors, including the tax benefits of a given transaction, which must be distributed equally to all shareholders. The

Court detailed the history surrounding the statute, indicating prior to 1982, the statute "prevented courts from considering postmerger factors in assessing 'fair value' by expressly excluding from the calculus 'appreciation or depreciation directly or indirectly induced by [the] corporate action or its proposal' [citations omitted], and case law held that fair value was determined by considering, as of the date of the merger, net asset value, investment value and market value, and according weight to each as the facts and circumstances of a particular case dictated (*Matter of Cawley*, 72 NY2d at 471 [citations omitted]). The court expressed that the statute was amended in 1982 to provide a more flexible case by case approach to the evaluation of shares, noting:

> In fixing fair value under the statute as amended, courts must examine "the nature of the transaction giving rise to the shareholder's right to receive payment for shares and *its effects on the corporation* and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and *all other relevant factors*" (Business Corporation Law § 623 [h] [4] [emphasis added]). By including the phrase "all other relevant factors" and deleting the phrase "excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal", the Legislature evinced its intent that postmerger factors enter valuation computations (*see* Bill Jacket, L 1982, ch 202, at 20; *cf.*, Business Corporation Law § 1118 [fair value of interest in a close corporation excludes any element of value arising from the filing of the judicial dissolution petition under Business Corporation Law § 1104-a]). However, in amending section 623 (h) (4), the Legislature was not encouraging the abandonment of the three basic methods of valuation delineated in *Endicott*. Rather, it intended courts to supplement these approaches by also considering "[e]lements of future value arising from the accomplishment or expectation of the merger which are known or susceptible of proof as of the date of the merger and not the product of speculation" (*Alpert v 28 Williams St. Corp.*, 63 NY2d at 571, *supra*; *see Weinberger v UOP, Inc.*, 457 A2d 701, 713 [Del]).

Accordingly, the Court in *Matter of Cawley* mandates a flexible approach in considering some postmerger factors regarding the value of shares as a result of a merger or expectation thereof, although providing that the date preceding the merger is controlling of the final valuation at trial (*see Matter of Cawley*, 72 NY2d 465). Further, to the extent the nature of

discovery is at issue, Business Corporation Law § 623 (h) (4) is explicitly clear that the court, in its discretion, has the authority to permit any and all discovery which might lend to disclosure of information regarding the value of the shares - whether or not the information obtained is admissible at trial, and notwithstanding CPLR 3101. This court has reviewed Respondent's First Notice for Discovery and Inspection and finds the requests material and relevant, and the subpoenas appropriate. Therefore, petitioner's motion for a protective order and to squash the subpoenas is denied in entirety.

ENTER,

Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.