**CITATION:** Fisher v. NVA Queen West Management Inc., 2024 ONSC 6733
**COURT FILE NO.:** CV-24-715608-00CL
**DATE:** 20241216

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

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| **BETWEEN:** | ) | |
| PAULA FISHER<br>Applicant | ) | *Julia Wilkes* and *Sean Blakeley* for the Applicant |
| **– and –** | ) | |
| NVA QUEEN WEST MANAGEMENT INC. and NATIONAL VETERINARY ASSOCIATES CANADA INC.<br>Respondents | ) | *Doug McLeod* and *Brittany Town* for the Respondents |
| | ) | **HEARD:** December 2, 2024 |

**PENNY J.**

**Overview**

[1] In this application Dr. Paula Fisher asks for an order requiring NVA Queen West Management (QWM) and National Veterinary Associates Canada Inc. (NVA) to refer an earn-out calculation dispute to KPMG.

[2] The dispute arises in the context of a 2022 share purchase agreement (SPA) between Dr. Fisher and NVA. By virtue of this agreement, and a series of other agreements, Dr. Fisher and her former business partner, Dr. Mathison, sold their majority interest in Queen West Animal Hospital to QWM. Dr. Mathison has since left the Hospital.

[3] The SPA provides for the calculation of an annual earn-out statement for the first three years of the agreement. The first earn-out statement for the 2022/2023 year was delivered in August 2023. Dr. Fisher had 20 business days to review the earn out statement and to notify NVA if she had any objections. The parties had another 20 business days to meet to try to resolve the objections. Failing a resolution, any dispute over the earn out statement had to be submitted for determination by an independent firm of chartered professional

accountants within a further five days. If the parties were unable to agree on another firm, the dispute must be referred to KPMG.

[4] NVA has refused to refer Dr. Fisher's earn-out statement dispute to KPMG for two reasons. NVA submits:

(1) Dr. Fisher is out of time. The notice of objection she served within the time frame required by the SPA was non-compliant for lack of particularity. Notice of the particulars of her objections was ultimately delivered three months late; and

(2) the notice of objection does not raise any accounting issues subject to the expedited dispute resolution process. Rather, Dr. Fisher's complaint is about the alleged non-enforceability or unfairness of certain provisions of the agreements she entered into when she sold her interest in the Hospital to QWM. These are not issues subject to the expedited dispute resolution process under the SPA.

[5] NVA's two reasons for refusing to refer the dispute to KPMG frame the issues for determination in this application:

(a) was Dr. Fisher's notice of objection out of time? and, in any event,

(b) do Dr. Fisher's objections to the calculation of the earn-out statement fall outside the ambit of the expedited dispute resolution process in the SPA?

[6] For reasons I will explain below, I conclude that:

(a) Dr. Fisher's notice of objection was timely; any delay has been explained;

(b) the issues raised, properly interpreted in the context, fall within the ambit of the expedited dispute resolution process in the SPA.

## Background

[7] Dr. Fisher is a veterinarian. She began working at the Hospital in 2004. By 2012 she had become a half owner in the Hospital along with Dr. Mathison. In 2021, Drs. Fisher and Mathison (I will refer to both Drs. Fisher and Mathison collectively as the "co-owners" where appropriate in the context) engaged sophisticated and specialized financial, tax, accounting and legal advisors to consider a sale of their business.

[8] NVA is a national company which owns and operates multiple veterinary practices. It provides operational support and business services such as business operations, accounting, tax and human resource support.

[9] In the latter part of 2021, the co-owners began discussions with NVA about a possible transaction. In September 2021, they signed a nonbinding letter of intent with NVA to sell their shares in the Hospital.

[10] Between September 2021 and June 2022, NVA and the co-owners engaged in extensive negotiations regarding the terms of the sale. There was a great deal of evidence put forward by the parties about the content and characterization of these negotiations. I regard this evidence as essentially irrelevant to the issues in dispute. It is clear that both sides were sophisticated players who had the benefit of competent legal, financial and accounting advice.

[11] The final terms of the transaction were negotiated in June 2022 which resulted in the execution of five agreements:

(a) the Share Purchase Agreement (SPA);

(b) the Employment Agreements;

(c) the Unanimous Shareholders' Agreement;

(d) the Administrative Services Agreement (ASA); and

(e) the Lease.

[12] In the course of argument of this application, two basic terms from these agreements took on particular significance.

The Earn Out Terms

[13] Section 2.3 of the SPA sets out the basis upon which the co-owners would receive additional compensation (earn out amount) if the Hospital's financial performance exceeded certain EBITDA (earnings before interest, taxes, depreciation and amortization) targets in any one of the three years following closing. Section 2.3 also sets out an expedited dispute resolution procedure in the event of disputes about whether the EBITDA targets were exceeded in any given year. The SPA stipulates tight, specific deadlines for calculation of, and objection to, the earn out amount.

[14] Section 2.3(a) provides that no later than 120 days following the end of each earn out period (in this case, the end of the first earn out period was June 30, 2023), NVA must prepare and deliver to the co-owners a statement, defined as the "earn out statement", showing (i) the Hospital's earnings before EBITDA in respect of each earn out period; and, (ii) the calculation of the amount by which the EBITDA amount is greater than the EBITDA growth target. This difference, if a positive number, is called the "excess EBITDA growth amount". The EBITDA growth target is a fixed amount defined for each of the first three years. The earn-out amount is defined to mean 15.96 multiplied by the excess EBITDA growth amount up to a maximum of $1,596,000. Each earn-out statement "shall be prepared in accordance with GAAP consistently applied."

[15] Section 2.3(b) provides that the co-owners shall have 20 business days following receipt to review the earn out statement and must notify NVA "if it has any objections to" the earn out statement "within such" 20 business day period. If a notice of objection is delivered,

the parties shall promptly meet to try to resolve the objections within a further 20 business days following receipt of the notice. Failing resolution of any objection, "only the amounts in dispute" will be submitted for determination to the independent firm of chartered professional accountants. Failing agreement to the contrary within a further five days, the independent firm of chartered professional accountants "will be" submitted to KPMG.

[16] The independent accountant "shall determine the procedures applicable to the resolution of the amounts in dispute with the primary purposes of minimizing expenses of the parties and expediting the accurate resolution of the dispute." The independent account is "deemed to be acting as" an expert and not as an arbitrator. The independent accountant's determination of the amount(s) in dispute and any corresponding changes flowing from the resolution of such amounts "will be final and binding upon the parties and will not be subject to appeal absent manifest error."

[17] Section 2.3(b) imposes certain parameters on the findings of the independent accountant. The result cannot be more favourable to NVA that what was reflected in NVA's earn out statement and cannot be more favourable to the co-owners than what was reflected in their notice of objection.

[18] Once under review by the independent accountant, both parties must each make available any individuals and any information, facilities, books, records and work papers as may be reasonably required by the independent accountant to fulfill his or her obligations.

[19] If an earn out amount is determined by the independent accountant to be payable, it must be paid within five business days.

[20] Section 2.3(c) ends with a *proviso*. NVA has "sole discretion" regarding all matters relating to the operation of the Hospital, although NVA may not, directly or indirectly, take any actions in bad faith that would have the purpose of avoiding or reducing any earn out amount. Notwithstanding the foregoing, however, NVA "has no obligation to operate" the business to achieve or maximize any earn out amount during any earn out period.

<u>The Management Fee Terms</u>

[21] Section 10.13 of the USA and Article 6 of the ASA provide that the Hospital shall be charged a monthly management fee equal to 3% of gross monthly revenue.

[22] Section 10.13 of the SPA contemplates the ASA, under which NVA, as manager, shall be entitled to receive from the Hospital a monthly management fee in an amount equal to 3% of the Hospital's monthly gross revenue. The management fee is for the provision of management services including, but not limited to, payroll, accounts payable, accounting, tax preparation, certain legal services, vendor contracting, human resources services, recruiting, certain information technology support, business intelligence and marketing and other back office support services as may be required by the Hospital from time to time.

[23] Article 6 of the ASA sets out in more detail the obligations of the manager and of the Hospital. It stipulates that the Hospital authorizes the manager to pay out to itself monthly

the sum of the following amounts: (i) 3% of the total revenue of the Hospital earned in the relevant month and (ii) reimbursement for all direct expenses paid by the manager on behalf of the Hospital. The Hospital specifically "acknowledges and agrees" that, in consideration of the substantial commitment made by the manager, the management fee "is fair and reasonable."

[24] There is evidence, particularly from NVA, to the effect that Dr. Fisher became unhappy with the ways things worked out after closing. She and Dr. Mathison had a falling out. Dr. Mathison ultimately resigned and left the Hospital. Among other things, Dr. Fisher complained about the Hospital's administration costs (i.e., the management fee) now being based on a percentage of revenue, not actual or historical costs. Increased monthly revenues served to increase the monthly amount the Hospital had to pay to NVA by way of management fees. NVA took the firm position that it would not renegotiate fundamental terms of the agreements.



The Earn Out Statement and Notice of Objection

[25] NVA prepared the year one earn out statement after the first anniversary date and delivered it to Dr. Fisher on August 3, 2023. It is not in dispute that this was within 120 day window required under the SPA. The earn out statement is effectively three lines: Total EBITDA of 535,556; EBITDA Goal of 546,857; and Amount needed to reach minimum goal -- 11,301 (EO is not met). This result was consistent with the parties' suspicions that the Hospital would likely fail to meet or exceed the year one EDITDA growth target. That target was $546,857. The year one earn out statement calculated the EDITDA to be $535,556; this was $11,301 short of the minimum target for a payout.

[26] Dr. Fisher's complaints about the Hospital's operations and her frustration with some of the terms of the agreements continued after NVA delivered the earn out statement on August 3, 2023. Dr. Fisher's counsel, in a letter of August 4, 2023, stated:

> Without assistance from NVA and only minimal involvement of Dr. Mathison, Dr. Fisher worked tirelessly to operate the clinic and to significantly grow revenues throughout the First Earnout Period ending on June 30, 2023. For that work, she received nothing, except her compensation for providing veterinary services set out in her employment agreement.
> …
> Currently, Dr. Fisher has no incentive to remain at QWAH. Left without adequate support or any contribution from the majority shareholder, Dr. Fisher is unlikely to hit the Earnout numbers required to receive adequate compensation for the sale of her interest in the clinic.
> …
> This will hinder QWAH's revenues and render it impossible for Dr. Fisher to meet the Earnout numbers for a second

year.

[27] NVA maintained its position that, while it was willing to work with Dr. Fisher to improve performance, it would not renegotiate fundamental terms of the agreements.

[28] It was not until the 19th business day following receipt of the earn out statement that Dr. Fisher expressed any concern about the *accounting* reflected in the earn out statement. On August 30, 2023 Dr. Fisher submitted, through her counsel, a notice of objection under section 2.3 of the SPA. The notice of objection simply states:

> NOTICE OF OBJECTION
> Paula Fisher is providing notice that she objects to the Earn-Out Statement delivered August 3, 2023. Specifically, Dr. Fisher contests the calculation of the EBITDA in the First Earn-Out Period.

[29] Following delivery of the notice of objection, there ensued protracted correspondence between counsel for Dr. Fisher and counsel for NVA about the production of additional financial information alleged to be necessary for Dr. Fisher to understand the earn out statement and to formulate specific objections to the numbers reflected in the statement. For example, on September 6, counsel for Dr. Fisher requested "a calculation of the EBITDA reconciling to the final internal statements for the First Earn-Out Period. We also require copies of the final monthly profit and loss statements for the First Earn-Out Period."

[30] Counsel for NVA responded by stating:

> The calculations were previously reviewed with your client, and your client had access to periodic reporting. Please refer to that.
> The notice of objection provided on August 30, 2023 is deficient, and includes no substance or particularity. If you would like to object within timelines, please provide a proper notice of objection based on the materials already provided to your client within applicable time periods pursuant to the purchase agreement.

[31] Although NVA did ultimately provide additional financial information in support of the earn out statement it did so expressly under protest and without prejudice, stating that it was not providing Dr. Fisher with any relevant financial information that she had not always had access to.

[32] In one email chain, litigation counsel to NVA reiterated that Dr. Fisher had failed to deliver a compliant notice of objection and that she had, and continued to have, access to the necessary financial information to do so. Nevertheless, he indicated that on October 25, 2023, and again on November 15, 2023, NVA provided additional information requested by Dr. Fisher. By doing so, he said, NVA "continued to discharge its obligations under the SPA". In this November 15, 2023 email, however, NVA's counsel indicated that NVA was not prepared to provide any more information, stating: "we do not see the utility of further discussions on this and both parties can proceed as they see fit under the SPA."

[33] Finally, on November 22, 2023, following receipt of the additional information on November 15 and in light of NVA's position that Dr. Fisher's EDITDA calculation was required, Dr. Fisher's accountant, Mr. Toner, provided his opinion concerning the earn out calculation. Mr. Toner opined that the EBITDA calculation for the First Earnout Period was $754,179, which would entitle the co-owners to the maximum earnout payment of $1,596,000. The statement from Mr. Toner sets out ten adjustments to the NVA EDITDA calculation which result in an adjusted difference of 218,622 above the EDITDA target, producing the EDITDA calculation of 754,179. The largest of these adjustments, 139,995, is for the "Management Fee". The note states:

> This is not a business expense for the calculation of EDITA as it is not consistent. A truer example of the actual expenses in in the following line.

The following line adds back 25,000 with the note:

> Market Rate Accounting and HR Support consistent with prior years' expenses.

Thus, the adjustment recommended by Mr. Toner for management fees, based on prior years' expenses, results a net increase to EDITDA of 114,995.

[34] On December 13, 2023, new litigation counsel for NVA advised, in a lengthy letter, that NVA refused to submit the earn out calculation issue to an independent accounting firm. In essence, NVA took the position that Dr. Fisher failed to comply with the procedural requirements for making an objection to NVA's earn out statement and, in any event, that her objections were manifestly not related to a *bona fide* EDITDA dispute but, rather, reflected her dissatisfaction with (and desire to re-negotiate) fundamental terms of the agreements, specifically section 2.3 of the SPA (the earn out provision) and section 10.13 of the USA and Article 6 of the ASA (the management fee provisions).

[35] This correspondence prompted Dr. Fisher's application to this court seeking an order requiring the earn out dispute raised by the competing EBITDA calculations to be submitted to KPMG.

## Analysis

### *1. The Timing and Sufficiency of the Notice*

[36] There are several questions raised by the parties' competing views of the timing and content of the earn out statement and the notice of objection. These include:

i) the timeline/milestones
ii) the content of the earn out statement and the notice of objection, and

iii) the information, and access to the information, on which the earn out statement and the notice of objection are based.

The SPA addresses the first question expressly, the second partially by inference, and the third not at all.

[37] It is clear from the provisions of the agreements set out above that the drafters of section 2.3 of the SPA intended there to be a simple, short and narrowly focused dispute resolution process for the determine of EBITDA – earn out statement delivered 120 days after the first anniversary of closing; notice of objection within 20 days business days; 20 days for attempts at resolution; and, if no resolution, five days for referral to the expert.

[38] The SPA does not set out the form of the earn out statement, other than to say it must conform to GAPP consistently applied. The August 3, 2023 earn out statement itself gives no hint of what it is based on, although the covering memo to Dr. Fisher states: "I know you have the monthly EBITDA figures already, which were contained in the monthly Statements of Operations (SOO) previously provided."

[39] I agree with NVA's submission that Dr. Fisher used most of her 20 days seeking to re-negotiate fundamental terms of the agreements. She was, in particular, unhappy about the basis upon which the management fee was calculated – the more the revenues increased, the more the management fee increased. It was NVA's consistent refusal to engage in those attempted re-negotiations that finally prompted Dr. Fisher to deliver a notice of objection on August 30, 2023. The notice of objection merely stated that Dr. Fisher "contests the calculation of the EBITDA".

[40] The SPA does not stipulate the precise content required for a notice of objection under section 2.3. I agree with NVA, however, that, read as a whole, the provisions of the SPA make it clear that a notice of objection is supposed to identify a specific amount or amounts which form the basis of Dr. Fisher's dispute.

[41] There are 20 business days for the parties to meet to try to resolve the objections. Failing resolution "only *the amounts* in dispute [emphasis added]" may be submitted to the expert. The role of the expert is to determine the "*amount* in dispute [emphasis added]". Section 2.3(b) provides that the expert's determination of the "*amount* in dispute [emphasis added]" cannot be more favourable to Dr. Fisher than what is "*shown* in the proposed changes [emphasis added]" to the earn out statement delivered "under [her] notice of objection".

[42] Dr. Fisher argues that she is not required in her notice of objection to identify a specific amount or amounts in issue. She contrasts the generality of the language used in section 2.3 with the language of section 2.5, dealing with post-closing adjustments to the purchase price. Section 2.5(c) provides that any notice of objection to the purchase price adjustment calculation prepared by NVA "must contain a statement of the basis of each of the objections and each amount in dispute." Dr. Fisher argues that because section 2.3 does not use the same language, similar particularity under section 2.3 is not required.

[43] I do not find this argument persuasive. Among other things, section 2.5 deals with a much broader range of inputs and possible adjustments than section 2.3, which only deals with one thing. In any event, the entire point of the process laid out in section 2.3 is to join issue over any "amount" in dispute in the calculation of EBITDA. In order for there to be a "dispute" over an "amount" calculated by NVA, there must be an alternative "amount" being sought by Dr. Fisher. How can the parties seek to resolve the dispute without knowing what the competing "amounts" are? How can there be a submission for determination to KPMG without competing "amounts"? And how can KPMG determine the dispute without the presentation of competing "amounts"? The language of section 2.3(b) simply makes common sense – Dr. Fisher's notice of objection to NVA's EBITDA calculation is assumed to "show" the "proposed changes" to NVA's calculation being sought by Dr. Fisher in her objection.

[44] Dr. Fisher's contrary interpretation is also inconsistent with the 45-day timeframe for submission to the expert set out in section 2.3. Under section 2.3, the notice of objection is meant to join issue on the disputed amount at the outset; it is not merely a first step to some other, undisclosed and unspecified process of discovery/document production and further particulars.

[45] However, this determination of the intent of the drafters does not fully resolve the issue. This is because of the third question, which deals with access to the information on which both the earn out statement and any notice of objection, are, or would be, based. In this case, Dr. Fisher takes the position that she was unable to provide her own specific calculation of what she says is the correct EBITDA number without first obtaining the additional information requested from NVA.

[46] The ASA is clear that following NVA's purchase of the Hospital's veterinary practice, NVA's management company became responsible for the provision of all financial and accounting services. This included financial planning, the preparation of budgets, the preparation of annual and periodic financial statements and the provision of all accounting and clerical services generally, such as accounts receivable, accounts payable and bookkeeping services.

[47] Mr. Harju is the VP, Operations for NVA. In his affidavit, he deposes that Dr. Fisher had access to EBITDA results and other monthly financial reporting each month, without restriction, through an intranet dashboard site referred to as "7123 Snapshot Dashboard". Through the Dashboard, Dr. Fisher was able to access NVA's monthly financial reports and to view details including all monthly earnings and expense line items. The Dashboard, Mr. Harju says, was designed to present large volumes of financial information in a concise and digestible way, and to allow users to quickly drill down on underlying source data.

[48] The with prejudice communications from NVA's counsel sent at the time made this point repeatedly. Dr. Fisher, they say, had ready access to all the information upon which the earn out statement was based.

[49] These assertions are contradicted by the evidence of Dr. Fisher, who says, in her own words and through her counsel, that she (as well as her accountant) was not able to make specific objection to an "amount" until she had the additional information requested. This information included: a calculation of the EBITDA reconciling to the final internal statements for the first earn out period; the final monthly profit and loss statements for the financial statements; adjusting entries showing adjustments to convert the aggregate of the monthly cash basis numbers to the financial statements; and a balance sheet as at the end of the first earn out period.

[50] There is a dispute about whether Dr. Fisher had, needed or was entitled to the additional information sought before providing a detailed notice of objection. It is not clear from the record precisely what information was ultimately provided, although it is clear that at least some of it, including the balance sheet, was. There was at least one meeting between the parties and, finally, on November 15, 2023, a "final" response to a series of ten follow up questions posed to NVA by Mr. Toner. It was after the receipt of these answers that Mr. Toner provided, on behalf of Dr. Fisher, his opinion on the year one earn out period EBITDA.

[51] Part of the problem with the record on this critical issue is that none of the people who performed the actual calculations (that is, the responsible individual at NVA[1] and Mr. Toner for Dr. Fisher) gave evidence on the issue.

[52] Now, with the benefit of hindsight, and through new litigation counsel, NVA takes the position that its production of additional information was all without prejudice to its essential position that Dr. Fisher missed her opportunity by failing to deliver a compliant notice of objection on a timely basis. I find this position difficult to reconcile with a number of statements of NVA's counsel along the way. For example, on September 6, 2023, Mr. Kirvan, who is in house counsel at NVA stated:

> The notice of objection provided on August 30, 2023 is deficient, and includes no substance or particularity. If you would like to object within timelines, please provide a proper notice of objection based on the materials already provided to your client within applicable time periods pursuant to the purchase agreement.

[53] There is a good deal of ambiguity in this statement because, on NVA's strict reading of the timelines, by September 6, 2023, Dr. Fisher was already out of time, having failed to file a "proper" notice of objection within 20 business days of receiving the earn out statement. Thus, on NVA's reading of the SPA, Dr. Fisher no longer had the ability to provide any notice of objection "within the applicable time periods", since they had expired.

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[1] Mr. Harju is not an accountant and did not perform the earn out statement calculations. He is the director of operations for NVA, responsible for operations over 130 animal hospitals, 3,000 employees nationwide and NVA's national growth in Canada.

[54] To similar effect is the communication of NVA's earlier litigation counsel on November 15, 2023. In this email, NVA's counsel indicated that:

> Despite its disagreement over the manner in which your client proceeded, *NVA continued to discharge its obligations under the SPA by providing you with further information and meeting with your client and her advisors in good faith* on October 16, 2023. After some initial misapprehensions over what was and was not previously disclosed to your client, Greg fairly agreed that the only outstanding information to be provided was a balance sheet, which was then provided to you on October 25, 2023. Given that your client already had weeks (if not longer with the other information that had been provided), we reasonably expected any follow up inquiries from Greg to be based on the balance sheet. We also emphasized that it would not be well received for your client to turn this into a fishing expedition and that any further limited requests should be narrowly tailored to resolving any outstanding questions after the balance sheet had been provided. Your side appeared to agree to this on the call. In these circumstances, we were disappointed to see that the November 9 memo is not at all tailored to the balance sheet and appears to be moving in the wrong direction. In short, NVA is confident in its position on the numbers and is not prepared to continue to engage with moving targets. *With that said, in a final effort to put this matter to rest, I have set out below my client's responses to the items that Greg requested* [emphasis added].

[55] It is of course true that concessions made in an effort to buy peace are not admissions of fault or wrongdoing and do not constitute a waiver of positions previously taken. Apart from anything else, it would be a mistake to conclude that just because NVA agreed to provide additional information, it was conceding that Dr. Fisher was "entitled" to this information or that she "required" it before her accountant could finalize a specific response to the August 3, 2023 earn out statement. I make reference to these statements only in connection with the point that this record does not permit me to make a dispositive finding on whether the additional information was, or was not, already known to Dr. Fisher or whether the provision of this information was, or was not, a necessary precondition to the formulation of Dr. Fisher's disputed "amount" in the calculation of EBITDA.

[56] These communications also reinforce a more fundamental point. Leaving aside the particular facts of this case, it seems to me as a general principle within the duty of good faith performance of contract that, faced with a provision like section 2.3, it is a requirement, and assumed, that the counterparties will have access to the information necessary to make informed, reasoned and logical judgments about the accuracy of the earn out statement and the basis for any notice of objection. Acceptance of this fundamental principle is clearly implicit in all the parties' dealings with one another. The disagreement in this case is over whether Dr. Fisher already had all the necessary information (or access to that information) that enabled her to meet the 20 day deadline for providing a notice of objection.

[57] The evidence in the record of the communications between the parties shows that it was Mr. Toner who requested the additional information because he felt he needed it to conduct his own independent analysis of year one EBITDA. NVA provided the information. At that point, Mr. Toner prepared and delivered his calculation of year one EDITDA within several days.

[58] I would add one further point. There is evidence that certain expenses (such as prepaid expenses) were sometimes later reversed, based subsequent adjustments to those costs. This apparently arose from timing differences between anticipated and actual expenses. The record does not make clear whether all such reverse entries were cleared for purposes of year one earnings before NVA delivered the year one earnout statement. Dr. Fisher makes the point that the swing on such expenses, if even some of them were later reversed, could exceed the $11,301 shortfall on the "growth target" earnings shown in NVA's earn out statement.

[59] It must also be remembered that this was the first earn out statement and objection process under the SPA. The parties had not been through this before. Implementation and interpretation issues were bound to arise. It is no one's "fault" that the process did not unfold seamlessly the first time around.

[60] Given the uncertainty arising from the evidentiary record, the fact that Mr. Toner, at least, felt he needed the information to perform his task, and the absence of any evidence of prejudice to NVA, I am not prepared to dispose of Dr. Fisher's rights on the technical basis that the 20 day deadline for the delivery of a "proper" or detailed notice of objection was not met. I find that Dr. Fisher's November 22, 2023 calculations, while they ought to have been submitted with the notice of objection, in the unique circumstances outlined above provide qualifying particulars of an "amount" in dispute under her notice of objection.

### *2. Does the Notice Fall Within the Ambit of Section 2.3?*

[61] This brings me to NVA's second objection: that Dr. Fisher's complaint is not about any accounting issues with the calculation of year one EDITDA but is, in substance, a complaint about the terms of the contract she agreed into when she sold her shares in the Hospital. NVA says this is clear from Mr. Toner's deletion of $139,995 in administration costs (resulting from the contractual management fee applicable in year one) and its replacement with $25,000 (purportedly based on market rate accounting and HR support costs consistent with prior years). NVA's point is that, while the 3% management fee may produce an administrative cost that is higher than prior years, this is because Dr. Fisher entered into an agreement to pay these costs in 2022, not because NVA has caused a deviation from GAAP.

[62] There is something to be said for NVA's argument. Section 2.3 contains an expedited dispute resolution procedure for disputes about whether the EBITDA targets were exceeded in any given year. As noted earlier, section 2.3(b) was intended to set up a simple, short and narrowly focused dispute resolution process for the determine of EBITDA. The independent accountant is acting an as expert, not an arbitrator. The accountant must

determine the procedures applicable to the resolution of the amounts in dispute with the primary purposes of minimizing expenses of the parties and expediting the accurate resolution of the dispute. Much of the intended benefit of section 2.3(b) has already been eroded by the course events have taken in this case.

[63] In addition, as a matter of substance, I agree with NVA that the independent accountant's role is not to assess the validity of the management fee under section 10.13 of the SPA and Article 6 of the ASA. If Dr. Fisher wanted to challenge the applicability or enforceability of those provisions, she had to commence an action in the Superior Court of Justice for that relief. The Hospital's obligation to pay a 3% management fee to NVA in year one post-transaction is not a GAAP issue; it is a contractual issue between these parties. The 3% management fee does not show up in prior years because there was no contract with NVA requiring the Hospital to pay that fee in prior years. NVA's earn out statement calculations, in this respect at least, are not a deviation from, but consistent with, GAAP.

[64] That said, this is only one of nine overall adjustments proposed by Mr. Toner. And, apart from the change in circumstance resulting from Dr. Fisher's agreement for the Hospital to pay the management fee commencing in 2022, there may be other strictly accounting/GAAP issues relating to how or when this change should be accounted for – that will be for the expert accountant to decide.

[65] NVA argues that it ought not to have to take the risk of the accountant potentially doing something prejudicial under the expedited dispute resolution process, in part because the expert's determination is "final and binding upon the parties and will not be subject to appeal". However, there is an important qualification to that standard; the strict standard of review only applies "absent manifest error." In my view, reversing the management fee for the year one EDITDA calculation under section 2.3 merely because it was not paid in prior years would reveal "manifest error" and I am confident no expert accountant (in this case KPMG) would yield to such a suggestion.

[66] For these reasons, I find that the substance of the notice of objection, properly interpreted, falls within the parameters of the section 2.3(b) dispute resolution process.

[67] The NVA's earn out statement and Dr. Fisher's notice of objection, with the November 22 particulars, shall, therefore, be submitted to KPMG within five business days. That submission shall include a copy of these reasons. The agreements make no provision for additional information or submissions from the parties unless, and only to the extent, requested by KPMG.

**Conclusion**

[68] For all these reasons the application is allowed. The dispute over year one EBITDA shall be submitted to KPMG within five business days.

**Costs**

[69] Although Dr. Fisher was successful in her application, this application would almost certainly not have been necessary if she had more faithfully sought to follow the strictures of the SPA. She was largely the author of her own misfortune and was, in effect, seeking an indulgence from the court. For this reason, I make no order as to costs.

Penny J.

**Released:** December 16, 2024

**CITATION:** Fisher v. NVA Queen West Management Inc., 2024 ONSC 6733
**COURT FILE NO.:** CV-24-715608-00CL
**DATE:** 20241216



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

**BETWEEN:**

PAULA FISHER

Applicant

**– and –**

NVA QUEEN WEST MANAGEMENT INC. and NATIONAL VETERINARY ASSOCIATES CANADA INC.

Respondents

**REASONS FOR JUDGMENT**

Penny J.

**Released:** December 16, 2024