

CITATION: Tehama Group Inc. v. Pythian Services Inc, 2025 ONSC 4134
COURT FILE NO.: CV-23-711298-00CL
DATE: 20250711

ONTARIO

SUPERIOR COURT OF JUSTICE [Commercial List]

BETWEEN:)
)
TEHAMA GROUP INC.) *Michael Schafler, Chloe Snider and Ekin*
) *Cinar, for the Applicant*
Applicant)
)
– and –)
)
)
PYTHIAN SERVICES INC and PYTHIAN) *Alan Merskey and Kate Byers, for the*
SERVICES USA INC.) *Respondents*
)
Respondents)
)
)
) **HEARD:** April 25, 2025

JUSTICE JANA STEELE

REASONS FOR DECISION

(Application to set aside Arbitral Award)

Overview

[1] Tehama Group Inc. (“Tehama”) brings an application under Article 34 of the *Model Law on Commercial Arbitration* (the “Model Law”), set out in Sched. 2 to the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5.

[2] Pythian Services Inc. and Pythian Services USA Inc. (“Pythian”) had acquired Tehama’s services business. The parties agreed that if the acquired business in the year after closing achieved earnings of US\$11 million, Pythian would be required to pay Tehama a further payment of US\$10 million. Pythian determined that Adjusted EBITDA (earnings before interest, tax, depreciation and amortization) was US\$10.720 million, meaning that there was no purchase price adjustment payment owing to Tehama. Tehama disputed the calculation. Under the terms of the agreement, disputes related to the purchase price adjustment were to be resolved by an

Accounting Firm, whose determinations were to be “final and binding, absent fraud, bad faith or manifest error.”

[3] The underlying arbitration was conducted by PwC (the “Arbitrator”). The Arbitrator confirmed Pythian’s calculation of Adjusted EBITDA.

[4] Tehama seeks to set aside the Arbitrator’s award on the basis that the process followed by the Arbitrator was contrary to the parties’ agreement or violated the principles of natural justice.

[5] For the reasons set out below, I have determined that the process followed by the Arbitrator was consistent with the parties’ agreement, and that there was no violation of the principles of natural justice by the Arbitrator.

Background

[6] On September 6, 2019, Pythian acquired Tehama’s service business pursuant to an Asset Purchase Agreement (the “APA”).

[7] Section 1.08 of the APA provides that the purchase price was to be increased by US\$10 million if Adjusted EBITDA exceeded US\$11 million during the 2021 calendar year. Section 1.08 provides that Pythian will deliver a statement setting out its determination of Adjusted EBITDA for the Earnout Period, which becomes binding unless Tehama delivered a notice of disagreement, which it did. If the parties are unable to reach a resolution, section 1.08 provides:

Canadian Seller [Tehama] and Purchasers [Pythian] shall submit to the [Arbitrator] for resolution of any and all matters that were included by Canadian Seller in the Notice of Earnout Disagreement and that remain in dispute and the dispute resolution procedures set forth in clauses (c) through (h) of Section 1.07 shall apply to the dispute, *mutatis mutandis* [...]

[8] Section 1.07 sets out the dispute resolution procedures in clauses (c) through (h). Among other things, these provisions provide:

(c) [...], the Accounting Firm¹ (i) shall make its final determination on all matters within thirty (30) days of its appointment, (ii) shall not hold any hearings, (iii) shall not have any ex parte communications with Purchasers or any of the Seller Parties, (iii) shall not be entitled to take or order the taking of depositions or other testimony under oath and (iv) with respect to each matter submitted to it, shall not resolve such matter in a manner that is more favorable to Purchasers than the Statement or more favorable to any Seller Party than the Notice of Disagreement.

¹ “Accounting Firm” is defined to mean “the Toronto, Ontario office of PricewaterhouseCoopers LLP or such other internationally recognized independent public accounting firm mutually acceptable to Purchasers and Canadian Seller.”

(d) The scope of the disputes to be resolved by the Accounting Firm shall be limited to (i) whether the Statement and the calculations thereon were prepared in accordance with Section 1.07(a) and the related definitions set forth herein with respect to matters submitted to the Accounting Firm for resolution, (ii) whether there were mathematical errors in the Statement and (iii) the fees and expenses allocation pursuant to Section 1.07(f). [...].

(e) The final determination by the Accounting Firm of the matters submitted to it pursuant to Section 1.07(b) shall: (i) be in writing; (ii) include the Accounting Firm's calculation of the Adjustment Amount; (iii) include the Accounting Firm's determination of each matter submitted to it pursuant to Section 1.07(b); (iv) include the fees and expenses allocation pursuant to Section 1.07(f); and (v) include a brief summary of the Accounting Firm's reasons for its determination of each issue.

(f) The determinations of the Accounting Firm shall be final and binding, absent fraud, bad faith or manifest error. [...]

[9] Sections 1.07 and 1.08 of the APA are reproduced in their entirety in Appendix A.

[10] The formula to calculate Adjusted EBITDA was set out in an agreement between Pythian and its lenders (the "Credit Agreement"). It is a specifically defined contractual term.

[11] On June 2, 2022, Pythian delivered its Earnout Statement, which provided that Adjusted EBITDA for the relevant period was US\$10,720,157.

[12] On July 15, 2022, Tehama delivered its Notice of Earnout Disagreement. Tehama's position was that Adjusted EBITDA was in excess of US\$14 million.

[13] The Arbitrator was engaged by the parties on or about November 1, 2022. The Arbitrator's engagement letter (the "Engagement Letter") set out the scope of the Arbitrator's services, which included:

- The Arbitrator's role is to make a **final and binding determination as to the appropriate accounting treatment** for each of the Disputed Items under the terms of the APA.
- The Arbitrator may ask further questions or seek further clarification of the parties to the APA with respect to the determination of the Disputed Items, subject to s. 1.07(c) of the APA. [Emphasis added.]

[14] The Engagement Letter further states that "PwC will provide its determinations strictly from a financial accounting perspective. It does not purport to offer legal guidance or opinion, including as to the legal interpretation of any contract."

[15] Appendix A to the Engagement Letter sets out the timelines for submissions.

[16] There were preliminary disputes before the Arbitrator regarding access to certain documents. The Arbitrator ruled that Pythian was required to disclose certain information. Pythian produced two quality of earnings reports prepared by Deloitte LLP: a due diligence report dated December 24, 2021, and an addendum report dated January 20, 2023 (the “QofE Reports”)². These reports were prepared in connection with Pythian’s consideration of a proposed sale and covered the Earnout Period. The QofE Reports disclosed adjusted EBITDA in the range of US\$12.867 to US\$13.335 million. Tehama relied on these reports to argue that certain items were unusual or non-recurring.

[17] On June 13, 2023, the parties filed their initial submissions with the Arbitrator.

[18] On July 14, 2023, the parties filed their reply submissions.

[19] As required by the APA, the arbitration was conducted in writing.

[20] In its reply submissions, Pythian filed a declaration from Mr. Cascagnette (the “Cascagnette Declaration”).

[21] By letter dated July 21, 2023 (the “July 21, 2023 Letter”), Tehama objected to the Cascagnette Declaration. Tehama’s position was that it was contrary to section 1.07(c)(iii) of the APA, and it included new information to which Tehama had no opportunity to respond. Tehama asked that the Arbitrator either strike the Cascagnette Declaration or afford it no weight.

[22] Pythian sent a letter to the Arbitrator on or about July 25, 2023 (the “July 25, 2023 Letter”) responding to the July 21, 2023 Letter.

[23] On August 4, 2023, the Arbitrator requested additional information from the parties, including a copy of the June 30, 2019 interim financial statements, and a description of the roles and responsibilities of certain persons.

[24] The parties responded to the Arbitrator’s request on August 28, 2023 (the “Pythian August 28, 2023 Letter” and the “Tehama August 28, 2023 Letter”, and together the “August 28, 2023 Letters”).

[25] Tehama sent a further letter to the Arbitrator on August 30, 2023 (the “August 30 Letter”) attempting to respond to Pythian’s August 28, 2023 response.

[26] On September 5, 2023, the Arbitrator requested no further communication on the matter, stating:

² Tehama states that a quality of earnings report provides an assessment of “normalized” or “adjusted” EBITDA upon which a business can be valued, by showing what revenues or expenses may be unusual or non-recurring.

Our request appears to have generated some ongoing discussion between the parties and their respective counsel. However, under Appendix A to our engagement letter, dealing with the Engagement Process and Timeline, Phase 2, item 5, paragraph iii states that, (iii) any response by a Party to [the Arbitrator] will be limited to the specific questions asked and/or additional information requested by [the Arbitrator] and provide no other answers or information. Therefore, we respectfully request that no further communication be circulated on this matter.

[27] The Arbitrator issued the Award in favour of Pythian on September 19, 2023 (the “Arbitration Award”).

[28] There are three primary disputed items (the “Disputed Items”). The Disputed Items, and the difference between the parties’ positions on each item, are as follows:

- a. **Disputed Item 1** – Interest Add Back (US\$362,014)³;
- b. **Disputed Item 2** – Rent Expense Adjustments (US\$517,751)⁴; and
- c. **Disputed Item 5** – Unusual, One Time or Non-Recurring Charges, Integration Costs, severance, Relocation Costs, Recruiting Costs (US\$1,194,748)⁵.

³ Disputed Item 1 relates to an adjustment under Section B(i) of the definition of Consolidated Adjusted EBITDA, used to determine the Adjusted EBITDA. Pythian’s position was that Consolidated Adjusted EBITDA be increased in the amount of \$5,228,232. Tehama’s position was that Consolidated Adjusted EBITDA be increased by \$5,590,246. The Arbitration Award notes, at para. 40, that both parties “agree that the \$362,014 disputed amount relates to a fair value adjustment to contingent liabilities that reduces the amount presented as net finance expense on the financial statements, thereby increasing Adjusted EBITDA over the Earnout Period.” KSV (Tehama’s expert) had submitted that the fair value adjustment related to the contingent notes was accretion income, which was rejected by the Arbitrator at para. 50. The Arbitrator accepted Pythian’s position that the fair value adjustment related to the contingent notes was a non-cash gain increasing Consolidated Net Income in the Earnout Period.

⁴ Pythian took the position that an adjustment reducing Consolidated Adjusted EBITDA by \$517,751 should be made. Tehama was of the view that no adjustment with regard to the rent expense should be made. For this item, the Arbitrator determined the appropriate accounting treatment having regard to the terms of the APA. The Arbitrator noted, at para. 60 of the Arbitration Award, that s. 1.07(d) of the APA refers to section 1.07(a) of the APA and the definitions in the APA. Applying the APA definitions, the Arbitrator determined that the appropriate accounting treatment was that used for the December 31, 2018 financial statements. The Arbitrator noted, at para. 63 of the Arbitration Award, that for the December 31, 2018 financial statements, IAS 17 was applied in the calculation of amortization/rent expense.

⁵ Disputed Item 5 related, in part, to whether certain charges had been unusual and non-recurring. Tehama relied on Pythian’s QofE Reports, which had treated certain items as unusual and non-recurring (contract costs related to TravelClick, founders and executive costs of acquired businesses for transition period, certain compensation/salaries). The Arbitrator determined that none of these items was unusual or non-recurring. Pythian’s position was that an adjustment increasing Consolidated Adjusted EBITDA in the amount of \$428,442 should be made for Disputed Item 5. Tehama’s position was that the adjustment should be \$1,623,190.

[29] Tehama’s position is that the Arbitrator took steps that were contrary to the parties’ agreement or breaches of natural justice in respect of each of the Disputed Items.

[30] If any of the Disputed Items had been decided in Tehama’s favour, the purchase price adjustment would have been payable by Pythian to Tehama.

Analysis

Jurisdiction

[31] Tehama brings the application asking the court to set aside an arbitral award under Article 34 of the Model Law.

[32] I considered whether the matter was, indeed, an arbitration. Among other things, the APA does not state that PwC would be acting as an arbitrator (although it does refer to the Arbitrator’s decision as being final and binding), and it was not clear to me that the Arbitrator understood that it was acting as an arbitrator, as opposed to an expert. The APA defines the decision maker as the “Accounting Firm,” not as the “Arbitrator.”

[33] I asked the parties to provide written submissions on this issue. Both parties agreed that the dispute over the calculation of the Earnout Payment arising under the APA was an accounting arbitration, as opposed to an expert opinion on that aspect of the APA, having regard to the test set out by the Supreme Court of Canada in *Sport Maska Inc. v. Zittner*, [1988] 1 S.C.R. 564.

[34] This was an international arbitration seated in Toronto. The Ontario Superior Court of Justice has jurisdiction to deal with the set aside application: *Tehama Group Inc. v. Pythian Services Inc.*, 2024 ONSC 1819, at paras. 29-33 (“Tehama 1”). In Tehama 1, Pythian had brought a motion to stay Tehama’s application on the basis that the parties agreed to the jurisdiction of New York for any disputes arising under the APA. Penny J. dismissed Pythian’s motion. He determined, at para. 46, that the parties chose Toronto as the place of arbitration of disputes arising out of purchase price adjustments and contingent payments. He found that these disputes had been excepted from the general choice of forum provisions in the APA.

The Law

[35] Article 34(2)(a) of the Model Law provides:

An arbitral award may be set aside by the court specified in article 6 only if:

(a) The party making the application furnishes proof that:

[...]

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

[...]

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; [...]

[36] Tehama also relies on Article 18 of the Model Law, which provides: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

[37] The Court in *Vento Motorcycles, Inc. v. United Mexican States*, 2023 ONSC 5964, at para. 61, recently confirmed the standard of review to be applied under Article 34 of the Model Law:

To justify setting aside an award under that provision for reasons of fairness or natural justice, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice. Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the arbitral tribunal’s conduct is so serious that it cannot be condoned under Ontario law. [Emphasis added.]

[38] In regard to the standard to be applied where a party seeks to set aside an arbitral award, the Court of Appeal in *All Communications Network of Canada v. Planet Energy Corp.*, 2023 ONCA 319, at para. 42, noted: “[t]he onus on a party seeking to set aside an arbitral award on the basis of a failure of due process, is high.” In *Planet Energy* the application judge upheld the arbitral award. Among other things, the applicant had argued that the arbitrator denied Planet the opportunity to present its case pursuant to article 34(2)(a)(ii) of the Model Law. The Court of Appeal dismissed the appeal of the application judge’s decision. The Court of Appeal stated, at para. 49, that “[i]t was incumbent on Planet [the applicant] to demonstrate that it was unable to present its case.”

[39] Where a breach has been found, the Court has the discretion as to whether to set aside the arbitral award. From the case law, it is clear that the court must undertake a balancing exercise considering the nature and seriousness of the breach as well as the impact. As noted by Pythian, even where there has been a “significant” procedural breach, the court may still exercise its discretion not to set aside the award: *Popack v. Lipszyc*, 2015 ONSC 3460, paras. 63 and 73, aff’d 2016 ONCA 135, 129 O.R. (3d) 321.

[40] In *Popack*, the arbitral panel met *ex parte* with a prior arbitrator that one of the parties suggested the arbitral panel should meet. However, the panel did not provide notice that the meeting was going to be held, nor was there any record of the meeting. Mr. Popack brought an

application to set aside the award. The application judge had determined that there was a breach of the agreed upon procedure by the arbitral panel. However, the application judge determined that in the exercise of her discretion she would not set aside the award. Mr. Popack appealed to the Court of Appeal, which dismissed his appeal. The Court of Appeal referred to the balancing exercise that the application judge undertook. At para. 30, the Court of Appeal stated that there was no “bright line” rule regarding the nature of the discretion in article 34(2) and stated: “It is clear from the case law that the scope of the discretion under art. 34(2) is significantly affected by the ground upon which the award could be set aside.” The Court of Appeal noted, at para. 31, that the court will consider “the extent that the breach undermines the fairness or the appearance of the fairness of the arbitration and the effect of the breach on the award itself.” The Court of Appeal in the subsequent *Vento* case, at para. 41, classified the fair hearing breach in *Popack* as “relatively minor” and one that “clearly did not affect the outcome of the arbitration.”

[41] In *Vento* the application judge had found that certain conduct during the arbitration had given rise to a reasonable apprehension of bias; however, in her discretion she did not set aside the award. The Court of Appeal in *Vento* determined that the application judge had erred in failing to set aside the arbitral award. The Court of Appeal noted, at para. 28, that a finding of reasonable apprehension of bias “undermines the integrity and legitimacy of the adjudicative process” and “is necessarily a major violation of procedural fairness.” At para. 33, the Court of Appeal stated that “[a] finding of reasonable apprehension of bias is necessarily serious and must be made in the knowledge of the result that follows: the adjudicator is disqualified and the substantive decision is void.”

[42] In *United Mexican States v. Feldman Karpa*, 74 O.R. (3d) 180 (C.A.), the Ontario Court of Appeal noted at para. 34 that courts should use their “authority to interfere with international commercial arbitration awards sparingly.” At para. 37, the Court of Appeal further indicated that where the parties select a specialized arbitral tribunal, Canadian law requires a “high degree of deference.”

[43] Tehama also relies on the recent decision, *Mattamy (Downsview) Limited v. KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013. In that case, Mattamy sought to set aside an arbitration award under s. 46 of the *Arbitration Act*. The applicant argued that the arbitrator had exceeded his jurisdiction by raising and deciding a new issue, and on grounds of unfairness because he refused to allow Mattamy to present certain evidence it considered relevant to the new issue. Kimmel J. found that the arbitrator had the jurisdiction to raise the new issue. However, acknowledging that the court does not lightly interfere with arbitral awards, Kimmel J. found that the arbitrator’s refusal to admit certain evidence that Mattamy sought to tender in respect of the new issue (with the consent of the respondents) was procedurally unfair to Mattamy and led to a failure of natural justice in the arbitration process. The award was set aside, and a new arbitration was ordered before a new arbitrator.

[44] I will address each of the issues raised by Tehama to determine first if there was a breach of the APA or natural justice, and if so, whether the court should exercise its discretion to set aside the award.

[45] I first note that the nature of the alleged breaches relates to whether there was a procedurally fair hearing, not apprehension of bias, as was the case in *Vento*. In *Vento*, the Court of Appeal explained, at paras. 23 and 25:

[23] The requirements of procedural fairness flow from the pillars of natural justice. The first pillar, *audi alteram partem*, requires decisionmakers to hear both sides before deciding a dispute. In essence, it requires that a fair hearing be provided before a decision is made. At its most basic level, a fair hearing requires notice of the decisions that is to be made and an opportunity to make submissions to the decisionmaker. The second pillar, *nemo iudex in sua causa*, precludes a person from being judge in their own cause. In essence, it requires that a decisionmaker be impartial or unbiased – someone without an interest in or connection to the dispute, who will fairly consider the parties’ positions before deciding.

[...]

[25] Depending on the nature of the proceedings and the decision to be made, and taking into account the procedural choices of the decisionmaker, a fair hearing may require relatively minimal procedural protection. But it also may require something much more substantial, approximating the protections accorded in a judicial proceeding using disclosure, a right to counsel, an oral hearing and, ultimately, a decision with reasons. [...]

[46] The Court of Appeal further stated, at para. 28, that reasonable apprehension of bias “is no minor procedural defect.”

[47] Tehama raises issues regarding the conduct of the hearing by the Arbitrator, none of which I have found, in the circumstances of this case, to be a “significant” procedural breach. Certainly, there was no breach of fairness or natural justice that was “sufficiently serious to offend our most basic notions of morality and justice.” The Arbitrator, an accountant, conducted the procedure in accordance with the APA, in all material respects, and treated the parties fairly. As set out below, even if I had found that any of the alleged breaches were breaches of natural justice, I would have exercised my discretion and not set aside the Judgments.

Has Tehama established that there was a breach of the APA or natural justice in the filing of the Cascagnette Declaration?

[48] Tehama submits that, with regard to Disputed item 1, the Arbitrator received the sworn testimony of Mr. Cascagnette, which it says is contrary to section 1.07(c) of the APA. Tehama complained to the Arbitrator asserting that the declaration contravened section 1.07(c)(iii) and that it contained “new information that could have, and should have, been included in Pythian’s Initial Submissions.”

[49] The Arbitrator, having received Tehama’s letter, indicated that it would “consider those comments in arriving at [its] determination.”

[50] Section 1.07(c)(iii) of the APA provides that the Arbitrator “shall not be entitled to take or order the taking of depositions or other testimony under oath.” The Cascagnette Declaration was included with Pythian’s reply materials.

[51] I disagree with Tehama that the Cascagnette Declaration was contrary to section 1.07(c)(iii) of the APA. The wording of section 1.07(c)(iii) refers to taking or ordering the taking of depositions or other testimony under oath. Pythian submits that this provision precludes the Arbitrator from hearing *viva voce* evidence and does not preclude a party filing a declaration. I agree. The expedient process contemplated by the parties in the APA and the appendix to the Engagement Letter would be inconsistent with any *viva voce* evidence. However, filing a declaration, or an affidavit, would be in keeping with the expedient process agreed to by the parties. As noted by Pythian, Tehama filed two expert reports by KSV Soriano Inc., an experienced testifying expert. I agree with Pythian that the two KSV reports were filed with the same degree of seriousness and reliability as Mr. Cascagnette’s declaration.

[52] Pythian delivered the Cascagnette Declaration to counter the allegations made by Tehama in its initial submissions. (In its initial submissions, Tehama had cautioned the Arbitrator from relying on Pythian’s accounting team, which was formerly Tehama’s own team). The Cascagnette Declaration was reply, in that it was delivered to address the allegations Tehama made against Pythian’s accounting team. The procedure agreed upon by the parties contemplated shotgun initial submissions and shotgun replies. The Arbitrator followed the procedure.

[53] Tehama’s other complaint about the Cascagnette Declaration in Pythian’s reply was that Tehama was not given the opportunity to respond. In the declaration, at para. 11, Mr. Cascagnette stated that he and certain other members of his team would have been entitled to a relatively significant payout if Pythian had met the Earnout Target. Tehama could not reply because there was no sur-reply (neither party was permitted sur-reply). Tehama was also unable to cross examine Mr. Cascagnette because the agreed upon procedure did not contemplate cross examinations. Tehama’s theory is that Mr. Cascagnette’s equity participation rights incentivize him to not want the threshold to be hit and the payment to be made to Pythian. This is speculative. As noted by Pythian, Mr. Cascagnette indicated he would have preferred a “bird in the hand.”

[54] I am not satisfied that there was a breach of the APA, nor a denial of natural justice in the filing of the Cascagnette declaration.

Was Tehama denied natural justice because it was not given the opportunity to respond on Disputed Items 1, 2 and 5?

[55] Tehama submits that there was a denial of natural justice because it was not given the opportunity to respond on Disputed Items 1, 2 and 5.

[56] As noted by the Court of Appeal in *Planet Energy*, at para. 52:

Natural justice requires that an arbitrator act with procedural fairness, the requirements of which depend on the subject-matter of the dispute, the circumstances of each case, the nature of the inquiry, and the rules under which the parties have agreed to arbitrate their dispute. [...]

[57] Appendix A to the Engagement Letter with the Arbitrator sets out the process and timeline for the dispute resolution with the Arbitrator. The parties had agreed on a shotgun process with the Arbitrator. Both parties were to provide their Initial Submission to the Arbitrator on the same day. The Arbitrator was to provide each party's initial submissions to the other party. Twenty days later, each party was required to deliver to the Arbitrator a written reply submission with respect to the Disputed Items. The Arbitrator was given a further opportunity to ask questions, which it did, before delivering its decision.

[58] The Arbitrator followed the process and delivered its decision in accordance with the process. It seems in retrospect that Tehama may have preferred a different process that permitted sur-reply. However, that is not what Tehama and Pythian agreed upon. As noted above, neither party was permitted sur-reply. After the Arbitrator asked questions and the parties replied, the parties wrote to the Arbitrator seeking to respond to the information provided in response to the Arbitrator's questions. The Arbitrator wrote to the parties referencing their agreed upon procedure that precluded them from filing any response to information requests that went beyond the Arbitrator's specific requests.

[59] Similar to the *Mattamy* case, Tehama argued that it was not given the opportunity to respond. However, *Mattamy* is distinguishable. In the instant case, Tehama had bargained for a process that did not include sur-reply. *Mattamy*'s inability to lead evidence on the new issue was unrelated to the process the parties had bargained for—instead, it resulted from unfairness on the part of the arbitrator in raising and deciding a new issue but refusing evidence on the issue. Here, Tehama had bargained for the process, which was followed by the Arbitrator.

[60] The parties were treated equally and in accordance with the process agreed upon by them.

Was there a failure to give reasons by the Arbitrator amounting to a breach of natural justice?

[61] Tehama submits that the Arbitrator failed to give reasons as to why he allowed Mr. Cascagnette's Declaration (objected to in the July 21, 2023 Letter), or why he did not permit Tehama to respond to new information provided by Pythian in its August 28, 2023 letter. Tehama states that the Arbitrator did not adjudicate Tehama's procedural objections.

[62] As pointed out by Pythian, the parties selected an accountant to arbitrate disputes between them related to the purchase price adjustment determination under the APA. They did not select a lawyer.

[63] The Supreme Court of British Columbia, in *Sound Contracting Ltd. v. Campbell River*, 2024 BCSC 933, at para. 52, stated the following regarding the extent of reasons required:

[N]atural justice does require that enough is set out so that the parties, especially the losing party, and a court on appeal can understand why the result was as it was. The standard is contextual in the sense that a higher degree of explicitness will be required for issues that were central to the argument between the parties. An exception is if a party raised an obviously invalid issue, in which case conclusory reasoning will not violate the rules of natural justice. But a serious

argument on a central issue must be responded to in the sense that its *premises* must be addressed. It is not enough for the arbitrator to disagree with the argument's *conclusion*.

[64] The parties specified certain terms for the Arbitrator, including that the Arbitrator was to provide “a brief summary of the Accounting Firm’s reasons for its determination of each issue.” The description of what was required in terms of reasons is certainly short of something akin to judicial reasons. The Arbitrator delivered a lengthy set of reasons (56 pages) that was more than “brief” addressing the issues as required in the APA and the Engagement Letter.

[65] The fact that the Arbitrator did not specifically set out his reasons as to why he allowed the Cascagnette Declaration, or why he did not permit Tehama to respond to new information provided by Pythian in its August 28, 2023 Letter, does not amount to a breach of natural justice. The Arbitrator was following the process set out by the parties. Further, the fact that the Arbitrator did not set out the specifics in its decision does not mean that the Arbitrator did not consider these issues. The Arbitrator, an accounting firm, was retained to apply its accounting expertise to determine certain disputed items between the parties, which it did. It provided its reasons on those disputed items. Tehama may disagree with the reasons, but the Arbitrator fulfilled its obligation to provide them. Para. 13 of the Arbitration Award states:

We have assessed the appropriate accounting treatment for each of the Disputed Items under the terms of the APA, by considering the guidance provided in:

- a. Section 1.08 of the APA, the definition of Adjusted EBITDA provided in Exhibit A of the APA;
- b. The definition of Consolidated Adjusted EBITDA provided in section 1.1 of the Debt Financing Agreement; and
- c. The submissions and supporting documentations provided by the Parties to the APA, and other information, as listed in Section 2, above.⁶

[66] The Arbitrator referenced the fact that it considered the July 21, 2023 Letter and the August 28, 2023 Letters. The extent to which, if any, the Arbitrator relied on these letters is not specified. The parties bargained for an accounting expert, not a judge or lawyer. They wanted the accountant’s expertise. As noted by the Delaware Superior Court in reviewing a similar process in *AM Buyer, LLC vs Argosy Investment Partners IV, L.P. et al.*, 2024 Del. Super. LEXIS 621, C.A. No. N23C-11-167 PRW CCLD:

⁶ Section 2 lists all the documents and information reviewed and relied upon by the Arbitrator, including all the submissions, as well as the July 21, 2023 Letter, the July 25, 2023 Letter, the Tehama August 28, 2023 Letter, and the Pythian August 28, 2023 Letter.

...the Independent Accountant had the authority to determine, based on the parties' submissions and its own [contractual] interpretations, the parties' disputed items. [The] Buyer's disquiet about just how the Independent Accountant weighted those items doesn't empower the Court to simply substitute its own judgment or analysis for this subject-matter expert's.

[67] I further note that the terms of the Arbitrator's engagement agreement require the Arbitrator to make a "**final and binding determination as to the appropriate accounting treatment** for each of the Disputed Items under the terms of the APA." The Arbitrator did just that.

[68] I am not satisfied that there was a breach of natural justice.

Did the Arbitrator rely on a new theory resulting in a breach of natural justice?

[69] As noted by Penny J. in *Nelson v. The Government of the United Mexican States*, 2022 ONSC 1193, at para. 39: "The principle that a tribunal cannot decide a case on a basis that was not pleaded or argued is well established and not in doubt."

[70] Tehama says that in respect of Disputed Item 2, the Arbitrator based its decision on new theories relying on provisions on which Pythian had not relied. Tehama submits that the Arbitrator relied on section B(iv) (amortization expenses), even though in Tehama's view amortization was not in dispute, and the Arbitrator relied on section 1.07(a) of the APA, on which Tehama states neither party relied. Tehama states that it was not afforded an opportunity to address these theories. The accounting issues were:

- a. **Reliance on B(iv) amortization expenses:** The Arbitrator indicated that the determination of Adjusted EBITDA required the use of IAS 17. At para. 63 of the Arbitration Award, the Arbitrator confirmed that after having reviewed the December 31, 2018 financial statements (additional information the Arbitrator had requested having determined that the accounting treatment in respect of that year was applicable), they determined that IAS 17 was applied in the calculation of amortization/rent expense. The Arbitrator applied the APA definitions to make the determination. The Arbitrator determined that the required accounting treatment resulted in an amortization of that expense, not a deduction as Tehama had argued. Among other things, Tehama had argued that the formula to determine Adjusted EBITDA used the language "plus" at the end of (a) such that items under (B) could only be added, not subtracted. Both Pythian and Tehama made their submissions, reply submissions, and submissions in response to the Arbitrator's additional request for information. The Arbitrator was entitled to make its determination based on the submissions and the relevant provisions of the APA.
- b. **Reliance on s. 1.07(a) of the APA:** The Arbitrator relied on section 1.07(a) of the APA, which Tehama says was a new theory. However, in Tehama's submissions, they refer the Arbitrator to section 1.07(d), which refers in (i) to

section 1.07(a). I see no issue in the Arbitrator relying on a section of the APA (1.07(a)) that is referenced in another section of the APA (1.07(d)) referred to by Tehama in its submissions to the Arbitrator.

[71] The process contemplated by the parties, as set out in Appendix A to the Engagement Letter, gives each party two chances to make submissions (Initial Submissions and Reply), then the Arbitrator decides (subject to any questions the Arbitrator may have). Under the terms of the Engagement Letter, the Arbitrator, an accounting firm, was to “make a final and binding determination as to [...] the appropriate accounting treatment for each of the Disputed Items under the terms of the APA.” The determination was to be subject to the process. That is what was done by the Arbitrator.

[72] As stated above, the parties decided to retain an accounting firm to determine these disputes. The fact that the accounting firm determined that it did not need to go back to the parties to decide these issues does not result in a breach of natural justice. The parties retained an accounting firm with expertise in accounting, and that is what they got. If they had wanted a legally trained arbitrator, well versed in every aspect of legal procedure, they could have bargained instead for that. But they did not. Further, as detailed above, there was no reliance on a new theory because the Arbitrator relied upon a section referenced in the APA (1.07(a)) that was referred to in the APA section (1.07(d)) relied upon by Tehama in its submissions.

[73] As such, I find there was no breach of natural justice.

[74] For each of the above alleged breaches, I have determined that there was no breach of natural justice. Had I found that any of the above had been breaches of natural justice, I would have exercised my discretion not to set aside the award. In this case, the language in the APA, the expertise of the Arbitrator, and the summary procedure chosen by the parties are relevant considerations that would sway my decision to not set aside the award.

[75] The parties in this case chose final and binding arbitration by a technical, non-lawyer, subject matter expert. The Arbitrator they selected had specific accounting expertise, which was necessary for the task. The Arbitrator is entitled to considerable deference. As noted by Penny J. in *Consolidated v. Ambatov*, 2016 ONSC 7171, at para. 34, “[i]n the international arbitration context, courts have been warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual expert international arbitration tribunals.”

[76] In the instant case, the parties went even further and agreed in the APA that the arbitrator’s determination shall be final and binding absent fraud, bad faith, or manifest error. None of the evidence before me supports any fraud, bad faith, or manifest error. The Arbitrator followed the summary process the parties set out, each side was given the same opportunities to make initial submissions, reply, and submissions on the Arbitrator’s additional questions. The Arbitrator was tasked with making a final and binding determination of the appropriate accounting treatment for each of the disputed items, which it did.

Disposition and Costs

[77] Tehama's application is dismissed.

[78] The parties agreed that the successful party was entitled to \$100,000 costs. Accordingly, Tehama shall pay Pythian's costs fixed in the amount of \$100,000 (all inclusive) within 30 days.

J. Steele J.

Released: July 11, 2025

APPENDIX “A”

Sections 1.07 and 1.08 of the APA

Section 1.07. Purchase Price Adjustment.

(a) Within ninety (90) days after the Closing Date, Purchasers shall prepare and deliver to Canadian Seller a statement (the “Statement”) setting forth (i) the Adjusted Working Capital as of 12:01 a.m. on the Closing Date (the “Closing Adjusted Working Capital”) and the components and calculation of the Closing Adjusted Working Capital, (ii) the cash of Sellers and the Acquired Companies as of 12:01 a.m. on the Closing Date (which, for purposes of such determination, shall not exceed \$1,000,000), determined in accordance with the Agreed Accounting Policies, consistently applied (the “Final Cash Amount”), (iii) the Indebtedness of Sellers and the Acquired Companies as of 12:01 a.m. on the Closing Date (without giving effect to the Closing or any other events or transactions to occur on the Closing Date) (the “Final Indebtedness”), (iv) the Transaction Expenses as of the close of business on the Closing Date (the “Final Transaction Expenses”), (v) the Customer Credits as of the close of business on the Closing Date (the “Final Customer Credits Amount”) and (vi) a statement setting forth the calculations of

(A) the Estimated Closing TEV calculated using the Final Cash Amount, the Final Indebtedness, the Final Transaction Expenses, the Final Customer Credits Amount and the Closing Adjusted Working Capital in lieu of the Estimated Closing Cash Amount, the Estimated Closing Indebtedness, the Estimated Transaction Expenses and the Estimated Closing Adjusted Working Capital and (B) the amount by which the Estimated Closing TEV as calculated pursuant to the foregoing clause (A) exceeds or is less than, as the case may be, the Estimated Closing TEV as calculated pursuant to the definition thereof (such difference, the “Adjustment Amount”). Exhibit B attached hereto sets forth a sample calculation of Adjusted Working Capital, and the manner in which the Closing Adjusted Working Capital shall be calculated; provided, however, that the parties acknowledge and agree that all elements of the calculation of Closing Adjusted Working Capital shall be updated to reflect the actual numbers as of 12:01 a.m. on the Closing Date. Closing Adjusted Working Capital shall be calculated in a manner consistent with Exhibit B; provided that in the event that Exhibit B does not provide sufficient detail to enable a calculation of the Closing Adjusted Working Capital, the Agreed Accounting Policies shall apply.

(b) The Statement shall become final and binding upon the Parties on the 45th day following delivery thereof, unless Canadian Seller gives written notice of its disagreement with the Statement in accordance with this Section 1.07 (a

“Notice of Disagreement”) to Purchasers prior to such date. Any Notice of Disagreement shall (i) specify in reasonable detail the nature of any disagreement so asserted including the basis of such disagreement together with the dollar amount and supporting details such as calculations and schedules, and (ii) only include disagreements based on mathematical errors or based on the Final Cash Amount, Final Indebtedness, Final Transaction Expenses and Closing Adjusted Working Capital not being calculated in accordance with this Section 1.07. If a Notice of Disagreement is received by Purchasers in a timely manner, then the Statement (as revised in accordance with this sentence) shall become final and binding upon the Seller Parties and Purchasers on the earlier of (A) the date Canadian Seller and Purchasers resolve in writing any differences they have with respect to the matters specified in the Notice of Disagreement and (B) the date any disputed matters are finally resolved by the Accounting Firm. During the 30-day period following the delivery of a Notice of Disagreement, Canadian Seller and Purchasers shall seek in good faith to resolve any differences that they may have with respect to the matters specified in the Notice of Disagreement. At the end of such 30-day period, if Purchasers and Canadian Seller are unable to reach a resolution, Canadian Seller and Purchasers shall submit to the Accounting Firm for resolution of any and all matters that were included by Canadian Seller in the Notice of Disagreement and that remain in dispute. For the avoidance of doubt, any item or amount not included in a Notice of Disagreement shall be final and binding and shall not be subject to review by the Accounting Firm.

(c) In resolving matters submitted to it pursuant to Section 1.07(b), the Accounting Firm (i) shall make its final determination on all matters within thirty (30) days of its appointment, (ii) shall not hold any hearings, (iii) shall not have any *ex parte* communications with Purchasers or any of the Seller Parties, (iii) shall not be entitled to take or order the taking of depositions or other testimony under oath and (iv) with respect to each matter submitted to it, shall not resolve such matter in a manner that is more favorable to Purchasers than the Statement or more favorable to any Seller Party than the Notice of Disagreement.

(d) The scope of the disputes to be resolved by the Accounting Firm shall be limited to (i) whether the Statement and the calculations thereon were prepared in accordance with Section 1.07(a) and the related definitions set forth herein with respect to matters submitted to the Accounting Firm for resolution, (ii) whether there were mathematical errors in the Statement and (iii) the fees and expenses allocation pursuant to Section 1.07(f). Any disputes not within the scope of disputes to be resolved by the Accounting Firm pursuant to this Section 1.07(d) as well as any disputes about the scope of disputes to be resolved by the Accounting Firm pursuant to this Section 1.07(d) shall be resolved in accordance with Section 1.07(c).

(e) The final determination by the Accounting Firm of the matters submitted to it pursuant to Section 1.07(b) shall: (i) be in writing; (ii) include the Accounting Firm’s calculation of the Adjustment Amount; (iii) include the Accounting Firm’s determination of each matter submitted to it pursuant to Section

1.07(b); (iv) include the fees and expenses allocation pursuant to Section 1.07(f); and (v) include a brief summary of the Accounting Firm's reasons for its determination of each issue.

(f) The determinations of the Accounting Firm shall be final and binding, absent fraud, bad faith or manifest error. Judgment may be entered upon the determination of the Accounting Firm in any court having jurisdiction over the Party against which such determination is to be enforced in accordance with Section 7.08. The fees and expenses of the Accounting Firm incurred pursuant to this Section 1.07 shall be borne by the Seller Parties, on the one hand, and Purchasers, on the other hand, in inverse proportion as they may prevail on matters resolved by the Accounting Firm, which proportionate allocations shall also be determined by the Accounting Firm at the time the determination of the Accounting Firm is rendered on the merits of the matters submitted. For example, if Canadian Seller claims the Adjustment Amount is \$1,000 greater than the amount determined by Purchasers, and Purchasers contest only \$500 of the amount claimed by Canadian Seller, and if the Accounting Firm ultimately resolves the dispute by awarding the Seller Parties \$300 of the \$500 contested, then the costs and expenses of the Accounting Firm will be allocated sixty-percent (60%) (*i.e.*, $300 \div 500$) to Purchasers and forty percent (40%) (*i.e.*, $200 \div 500$) to the Seller Parties. Purchasers shall pay to the Accounting Firm its fees and expenses; provided, that if any fees or expenses of the Accounting Firm are allocated to the Seller Parties, then Canadian Seller and Purchasers shall jointly instruct the Escrow Agent to release to Purchasers (or its designees) from the Adjustment Escrow Amount such amount, by wire transfer of immediately available funds to the account(s) designated by Purchasers in the Escrow Agreement.

(g) If the Adjustment Amount is a positive number (the "Excess Purchase Price Amount"), Purchasers shall, within five (5) Business Days after the Statement becomes final and binding on the parties, make payment by wire transfer in immediately available funds to the account or accounts designated in writing by Sellers the Excess Purchase Price Amount, and Canadian Seller and Purchasers shall jointly instruct the Escrow Agent to release to Sellers the Adjustment Escrow Amount to the bank account or accounts designated in writing by Sellers. If the Adjustment Amount is a negative number (the "Purchase Price Deficiency Amount"), Canadian Seller and Purchasers shall jointly instruct the Escrow Agent to release to Purchasers (or its designees) from the Adjustment Escrow Amount the Purchase Price Deficiency Amount within five (5) Business Days after the Statement becomes final and binding on the parties; provided, however, that if the Adjustment Escrow Amount is insufficient to pay the Purchase Price Deficiency Amount, in addition to the payment of the entire Adjustment Escrow Amount to Purchasers, each Seller Party shall, jointly and severally, be obligated to pay to Purchasers an amount equal to the balance of such difference not satisfied from the Adjustment Escrow Amount. For the avoidance of doubt, to the extent a Seller Party actually pays any such amount under this Section 1.07(g), Purchasers shall not be entitled to duplicative recovery for such amount from the other Seller Parties. Notwithstanding the foregoing, if Purchasers reasonably determine that

a portion of an amount otherwise to be released from the Adjustment Escrow Amount to Sellers represents an amount that is needed to satisfy Indian withholding Taxes, Purchasers shall first provide notice to the Sellers which shall specify in reasonable detail the nature of the Indian withholding Tax together with the dollar amount to be withheld, and, thereafter, Canadian Seller and Purchasers shall jointly instruct the Escrow Agent to release such amount to Purchasers, rather than to Sellers, so that Purchasers may deposit such amount with Indian Taxing Authorities in respect of such withholding obligation.

(h) In connection with the determination of the Adjustment Amount pursuant to this Section 1.07, following the delivery of the Statement and through the resolution of any adjustment to the Purchase Price contemplated by this Section 1.07, Purchasers shall give, and shall cause Acquired Companies to give to Canadian Seller and its independent accountants reasonable access, upon reasonable prior notice during Business Days and business hours, to the personnel, properties, books and records of Purchasers and Acquired Companies solely for any purpose related to the adjustment contemplated by this Section 1.07; provided, however, that any disputes with respect to the extent or nature of reasonable information requests or reasonable access to personnel, properties, books and records of Purchasers and Acquired Companies shall be treated in the same manner as a disputed item included in a Notice of Disagreement, if any, and shall be referred to the Accounting Firm for its determination, which shall be final and binding upon the Parties.

(i) The finalization of the Statement or the Adjustment Amount pursuant to this Section 1.07, whether through the Accounting Firm or otherwise, shall not preclude indemnification under Section 6.02 in respect of any Taxes or current liabilities to the extent that such Taxes or current liabilities are indemnifiable pursuant to Section 6.02 and were not actually reflected in the final Adjustment Amount. For the avoidance of doubt, Purchasers shall not also be entitled to assert a claim for indemnification pursuant to Section 6.02 in respect of any Taxes or current liabilities actually reflected in the final Statement or the Adjustment Amount.

Section 1.08. Contingent Payment.

(a) Within thirty (30) days after Purchasers' auditor has delivered Purchasers' consolidated audited financial statements for the Earnout Period (the "Earnout Period Audited Financials"), Purchasers shall prepare and deliver to Canadian Seller: (i) a statement setting forth, and specifying in reasonable detail, Purchaser's determination of the Adjusted EBITDA for the Earnout Period (the "Earnout Statement"); and (ii) reasonable documentation supporting Purchasers' determination of Adjusted EBITDA. The Earnout Statement shall be based on the Earnout Period Audited Financials and shall be prepared based on the definition of Adjusted EBITDA set forth in this Agreement.

(b) The Earnout Statement shall become final and binding upon the Parties on the 45th day following Purchasers' delivery thereof, unless Canadian Seller

gives written notice of its disagreement with the Earnout Statement in accordance with this Section 1.08 (a “Notice of Earnout Disagreement”) to Purchasers prior to such date. Any Notice of Earnout Disagreement shall set forth (i) in reasonable detail the nature of any disagreement so asserted including the basis of such disagreement together with the dollar amount and supporting details such as calculations and schedules and (ii) Canadian Seller’s calculation of the Adjusted EBITDA for the Earnout Period not being determined in accordance with this Section 1.08. During the 45-day period following delivery of the Earnout Statement, Canadian Seller and its accountants shall have the right, at Canadian Seller’s expense, to inspect the books and records of Purchasers and Acquired Companies during normal business hours at their offices, upon reasonable prior notice and solely to the extent reasonably related to the determinations of the Adjusted EBITDA; provided that such access shall be subject to customary confidentiality arrangements and afforded in a manner that does not interfere with the normal business operations of Purchasers or Acquired Companies. If a Notice of Earnout Disagreement is received by Purchasers in a timely manner, then the Earnout Statement (as revised in accordance with this sentence) shall become final and binding upon the Seller Parties and Purchasers on the earlier of (A) the date Canadian Seller and Purchasers resolve in writing any differences they have with respect to matters specified in the Notice of Earnout Disagreement and (B) the date any disputed matters are finally resolved by the Accounting Firm. During the 30-day period following the delivery of a Notice of Earnout Disagreement, Canadian Seller and Purchasers shall seek in good faith to resolve any differences that they may have with respect to the matters specified in the Notice of Earnout Disagreement. At the end of such 30-day period, if Purchasers and Canadian Seller are unable to reach a resolution, Canadian Seller and Purchasers shall submit to the Accounting Firm for resolution of any and all matters that were included by Canadian Seller in the Notice of Earnout Disagreement and that remain in dispute and the dispute resolution procedures set forth in clauses (c) through (h) of Section 1.07 shall apply to such dispute, *mutatis mutandis*. Any item not objected to by Canadian Seller shall be final, binding and non-appealable by the Parties.

(c) If the final determination of the Adjusted EBITDA for the Earnout Period, as determined in accordance with this Section 1.08, is less than \$11,000,000, then the Purchase Price shall be reduced by the amount of \$10,000,000, and such amount shall be automatically set-off against the principal amount of the Contingent Payment Note, in full and final satisfaction of the Contingent Payment Note and the Contingent Payment.

(d) If, and solely to the extent that, the final determination of the Adjusted EBITDA for the Earnout Period, as determined in accordance with this Section 1.08, is greater than \$11,000,000, the principal amount of the Contingent Payment Note shall become due and payable in accordance with this Section 1.08; provided that the principal amount of the Contingent Payment Note shall also become due and payable in accordance with this Section 1.08 if:

(i) a Company Sale is consummated prior to December 31, 2021 and the beneficial owners of Purchasers receive Net Proceeds from such Company Sale equal to or greater than 4.0x their aggregate equity capital contributions in Purchasers (provided that, in the event of a Company Sale that does not meet such threshold, Purchasers will use commercially reasonable efforts to obtain from any purchaser in a Company Sale an assumption of the obligation to make payments in respect of the Contingent Payment Note); or

(ii) an event of default has occurred and is continuing under the Debt Financing Agreement which has not been waived or subject to forbearance or standstill and the lenders under the Debt Financing Agreement have accelerated all of Canadian Purchaser's obligations under the Debt Financing Agreement in accordance with the terms and provisions of the Debt Financing Agreement.

(e) Canadian Purchaser or US Purchaser, as guarantor, shall transfer to Canadian Seller the aggregate principal amount of the Contingent Payment Note within ten (10) Business Days after the final determination that the Contingent Payment Note is due and payable in accordance with Section 1.08(d) by wire transfer to the bank account or accounts designated in writing by Sellers in immediately available funds.

(f) Payment of the principal amount of the Contingent Payment Note is expressly subordinated and junior to prior payment in full, in cash, of all Indebtedness of Purchasers and their Subsidiaries under the Credit and Guaranty Agreement, dated of even date herewith, by and among Canadian Purchaser, the financial institutions party thereto from time to time as lenders thereunder, and Brightwood Loan Services LLC, as agent for all of the lenders thereunder (the "Debt Financing Agreement") (it being understood that any replacement or refinancing of the Debt Financing Agreement shall not constitute "payment in full" of such obligations for purposes of this Section 1.08(f)). The Parties hereby covenant and agree that no payment of any portion of the Contingent Payment shall be due or made (and no default shall arise under this agreement as a result of the failure to make such blocked payment) if (i) there exists, or would exist after giving effect to any proposed payment, a default or event of default (either in itself or with the giving of notice or passage of time or both) under the terms of the Debt Financing Agreement or (ii) the conditions to making such proposed payment are not, or would not after giving effect to such proposed payment be, satisfied under the Debt Financing Agreement. It is expressly understood by the Parties that, as of the date hereof, additional borrowings could be made under the Debt Financing Agreement, at the sole discretion of Purchasers, for purposes of making the Contingent Payment, if any, pursuant to this Section 1.08. Notwithstanding the foregoing, if the payment of any portion of the Contingent Payment would not result in a default or event of default (either in itself or with the giving of notice or passage of time or both) under the terms of the Debt

Financing Agreement and the conditions to making such proposed payment are satisfied under the Debt Financing Agreement, then Purchasers shall make the largest partial payment which would not result in such a default or event of default and the balance of the principal of the Contingent Payment Note shall remain outstanding. Once the conditions giving rise to any such delay in payment of any portion of the Contingent Payment have been remedied, Purchasers shall promptly pay the remaining principal amount of the Contingent Payment Note which has not been paid by operation of this Section 1.08(f).

(g) During the Earnout Period, Purchasers shall use commercially reasonable efforts to manage the operations of Purchasers and Acquired Companies and their respective businesses on a basis consistent with the operational and business plan, as set forth on Exhibit C hereto, and shall not take any action or fail to take any action intended to impair the Contingent Payment. Subject to the foregoing, the Seller Parties understand that Purchasers and their Affiliates will be free to operate the Business and Acquired Companies as they determine (including with respect to pricing and continuation or noncontinuation of operations); provided, that no action shall be intentionally taken, nor shall any action be intentionally refrained from being taken, by Purchasers or their Affiliates with the primary purpose of reducing the likelihood or amount of any Contingent Payment. The Seller Parties understand that Purchasers and their Affiliates shall have no obligation to maximize the Contingent Payment and any Contingent Payment may vary based on the performance of the Business, Purchasers and Acquired Companies. The Seller Parties acknowledge that the operational and business plan set forth on Exhibit C (as well as all prior versions of such operation and business plan provided to the Seller Parties, the “Business Plans”) are subject to numerous assumptions, subject to numerous contingencies and subject to change in the discretion of Purchasers and their Affiliates. The actual results for the Business following the Closing may differ materially from the results set forth in any Business Plans. The Seller Parties expressly acknowledge and agree that Purchasers makes no representations or warranties of any kind or nature, express or implied, at law or in equity, or otherwise, relating to any Business Plans, the future financial results of the Business, Purchasers or Acquired Companies or the amount of any Contingent Payment, and the Seller Parties have not relied on any such representations or warranties in entering into this Agreement.

(h) During the Earnout Period, Purchasers shall, within forty-five (45) days of the last day of a calendar quarter, provide Canadian Seller with an estimate of Adjusted EBITDA in respect of the relevant calendar quarter then-ended.

[79]

DATE: 20250711

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

TEHAMA GROUP INC.

Applicant

– and –

PYTHIAN SERVICES INC and PYTHIAN SERVICES
USA INC.

Respondents

REASONS FOR JUDGMENT

Justice Jana Steele

Released: July 11, 2025