IN THE SUPREME COURT OF THE STATE OF DELAWARE

RRI ASSOCIATES LLC and WB-US ENTERPRISES, INC.,

Defendants-Below/Appellants,

v.

HUNTINGTON WAY ASSOCIATES, LLC, as successor in interest to WHIPPOORWILL FARM ASSOCIATES, LLC, f/k/a KINGFISH RRI LLC, individually and derivatively on behalf of WRRH LLC,

Plaintiff-Below/Appellee,

v.

WRRH LLC,

Nominal Party.

Case No. 316, 2023

On appeal from the Court of Chancery of the State of Delaware Case No. 2022-0761-LWW

CORRECTED APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

In this appeal, Appellants RRI Associates LLC and WB-US Enterprises, Inc. ("Westmont") seek reversal of the Court of Chancery's Final Order granting judgment in favor of Appellee Huntington Way Associates, LLC ("Kingfish") on its Verified Complaint to Confirm Arbitration Award dated August 3, 2023 ("Award") and associated June 30, 2023 letter opinion and July 5, 2023 Order granting Kingfish's Motion for Summary Judgment to Confirm AAA Arbitration Award.

The parties to this dispute are members of WRRH LLC ("WRRH"), an ownership vehicle through which the parties jointly own the Red Roof Inn brand and the franchising rights thereto. Kingfish, a minority member of WRRH, instituted an arbitration proceeding against the company's managing member, WB-US, and its majority member, RRI Associates, seeking to enforce a First Put Option under the Amended and Restated Limited Liability Company Agreement of WRRH LLC ("Agreement"), which required the Westmont members to purchase half of Kingfish's 18% interest in WRRH (the "First Kingfish Interests"). Kingfish also asserted a claim against Westmont that certain loan guarantees that Kingfish asserted were improper, which is not at issue in this appeal.[1] The arbitration proceedings resulted in a manifestly unfair Award in favor of Kingfish that utterly disregarded

[1] Westmont has already complied with this portion of the Award and does not challenge it here.

the arbitrators' mandate in several critical respects: the Tribunal ignored its acknowledged mandate and exceeded its authority as third Qualified Appraiser, eschewing any independent valuation in favor of a "baseball arbitration"; it further disregarded the Agreement's clear terms concerning the required payment schedule for the acquisition and the mandatory sharing of appraisal fees; and it refused to account for the tax effects necessarily arising from the Tribunal's own interpretation of the assets being valued.

The parties filed competing motions to confirm and vacate the Award in different forums, with the Delaware Court of Chancery ultimately proceeding to a decision, affirming the Award in its entirety and finding that the Tribunal did not exceed its authority under the governing agreement or manifestly disregard established law.

Westmont timely filed this appeal and now asks this Court to reverse the Court of Chancery's Order and Letter Opinion and vacate the Award with regard to the First Put Option.

SUMMARY OF ARGUMENT

The Court of Chancery committed reversible error by affirming the Award of the Tribunal and declining to vacate the Award on the following grounds:

1. The Tribunal exceeded its authority as the third Qualified Appraiser under the Agreement by ignoring its own interpretation of the third Qualified Appraiser's contractual mandate to "undertake a valuation" of the assets at issue. The Tribunal disregarded that mandate most glaringly when it failed to conduct ***any*** independent valuation of the franchising business (Red Roof Franchising LLC) and, instead, merely adopted wholesale the valuation offered by the Kingfish member that it deemed the more persuasive of the two. The Court of Chancery then erred by failing to measure what the Tribunal actually did against what it expressly found it must do under the Agreement.

2. The Tribunal further exceeded its authority under the Agreement by ordering specific performance of an acquisition of the First Kingfish Interests pursuant to the Agreement, while at the same time ignoring the Agreement's plain terms respecting such an acquisition. Section 10.18 of the Agreement provides that, upon determining a purchase price for the First Kingfish Interests, the purchase price shall be paid in three equal installments over an ***interest-free, two-year period***. The Tribunal failed to honor those clear terms by requiring immediate payment in full, with interest arbitrarily found to have accrued since the commencement of the

arbitration action — well before a purchase price for the interests had even been determined. The Court of Chancery erred when it found that Westmont had effectively forfeited its right to rely on the Agreement's unambiguous terms by virtue of the finding that Westmont had breached the Agreement.

3. Similarly, the Court of Chancery erred when it affirmed the Tribunal's decision to require Westmont to cover 100% of the Tribunal's fees, despite the Agreement's clear mandate that the costs of the third Qualified Appraiser shall be split equally between Westmont and Kingfish. Again, the court erred in finding that Westmont forfeited its rights under the Agreement once it was found to be in breach.

4. Finally, the Court of Chancery erred when it affirmed the Tribunal's valuation of the First Kingfish Interests without accounting for the tax liabilities that necessarily arise and must be paid by Red Roof Inns, Inc. ***before*** any net proceeds could be distributed to its shareholder, WRRH. The Court of Chancery improperly deferred to what it mischaracterized as a finding of fact by the Tribunal regarding the nature of the hypothetical transaction forming the basis of the valuation analysis, when that fact was conclusively established by the Tribunal's own interpretation of the assets to be valued pursuant to the Agreement. The Tribunal's error, and the trial court's, was in manifestly disregarding the indisputable tax consequences that flow from the Tribunal's own characterization of the assets being valued.

STATEMENT OF FACTS

A. Kingfish Exercises the First Put Option

Kingfish exercised its First Put Option in December 2019 pursuant to Section 10.18 of the Agreement, which gave Kingfish a right to sell the First Kingfish Interests (9% of the company) to Westmont. (A0155 ¶ 159.) Under the Agreement, the purchase price was to be an amount equal to 90% of the First Kingfish Interests multiplied by the Fair Market Value ("FMV") of WRRH as of the exercise date. (A0086 § 10.18(b)(i).) The FMV of WRRH was, in turn, defined as the "projected amount all the Members would have received hereunder in a final liquidation (without any reserves) of the Company" in a hypothetical arms' length, third-party sale of the Company's assets. (A0058 § 1.11.)

The FMV determination was to be made pursuant to an appraisal process set forth in Exhibit A to the Agreement. Under that process, as is not uncommon in such circumstances, each party was to appoint a "Qualified Appraiser" who would "fairly and impartially determine the FMV of the Company." (A0097, Ex. A.) In the event the higher of the two appraisals exceeded 115% of the value of the lower appraisal, then the two Qualified Appraisers were to appoint a third Qualified Appraiser. (*Id.*) "The third Qualified Appraiser shall be instructed to fairly and impartially determine the FMV of the Company, provided however, that the third Qualified Appraiser's determination must be between the determinations of the other two Qualified

Appraisers." (*Id.*) The third Qualified Appraiser's determination would be binding as the FMV of the Company." (*Id.*)

B. Kingfish Commences Arbitration Proceedings as a Means to Complete the Put Option Appraisal Process.

After Kingfish exercised its First Put Option, the appraisal process was delayed for several reasons, including the onset of the COVID-19 pandemic in March 2020. (A0157 ¶ 166.) Ultimately, after talks concerning the exchange of valuation reports broke down, Kingfish commenced an arbitration on October 23, 2020. (A0159 ¶ 174.) The parties' respective valuation reports were first exchanged during the arbitration process, with the report from Kingfish's appraiser, FTI Consulting ("FTI"), provided on September 24, 2021, the report from Westmont's appraiser, Ernst & Young ("EY"), provided on October 8, 2021, and rebuttal reports exchanged on November 16, 2021. (A0130 ¶ 51, A0132-A0133 ¶¶ 61-62.) Each party argued during the arbitration that the other's delay in providing a valuation report waived its right to submit a valuation. (A0183 ¶¶ 246-47.) The Tribunal rejected these arguments. Despite finding that Westmont had breached the Agreement in carrying out the exchange of reports, the Tribunal nevertheless found that the schedule it adopted for the exchange of reports during the arbitration "ensured that both sides were afforded a full and fair opportunity to comment on and be heard on the valuation reports." (A0184 ¶ 250.) "Accordingly," it went on, "the Tribunal finds that neither Claimant nor Respondents waived their right to submit a valuation report with respect to the First Put Option and further finds that ***no party has suffered any prejudice by the belated submission of a valuation report by the other party***." (*Id.* ¶ 251 (emphasis added).)

C. The Tribunal Agrees to Assume the Rule of Third Qualified Appraiser.

In the event the Tribunal declined to adopt either side's primary argument for excluding the other's valuation report, the considerable separation in values between the respective valuations necessitated completing the valuation process under Exhibit A to the Agreement by appointing a third Qualified Appraiser to conduct an independent, impartial valuation that would be binding on the parties. The parties mutually requested, and the Tribunal agreed, that the Tribunal would serve as the third Qualified Appraiser pursuant to the Agreement. (A0136 ¶ 75.)

Thus, when the Tribunal declined to grant either party's primary claim that the other's valuation report should be excluded, it found that "it now must assume the role of third Qualified Appraiser and ***determine the Fair Market Value of the assets in which WRRH LLC has an ownership interest through Red Roof Inns, Inc***." (A0174 ¶ 221 (emphasis added).) The Tribunal interpreted its obligation as the third Qualified Appraiser under the Agreement as follows:

> To determine the FMV of assets in which WRRH LLC has an ownership interest through Red Roof Inns, Inc., the Tribunal must ***undertake a valuation*** of several components including:

- Valuation of the Franchise Company;
- Valuation of the St. Clair Hotel (the parties having agreed on the respective values for other real estate properties);
- Valuation of the R&R Shares; and
- Net Working Capital

(A0175 ¶ 222 (emphasis added).)

D. The Tribunal Ignores Its Contractually Mandated Role as Third Qualified Appraiser.

Despite the Agreement's plain language regarding the role of the third Qualified Appraiser and, even more critically, the Tribunal's express language detailing its understanding of the Agreement's requirements, the Tribunal wholly abandoned its stated role and ignored the defined scope of its authority as the third Qualified Appraiser. The Tribunal undertook no independent valuation of any kind but, instead, continued to act solely as an adjudicator and limited itself to simply picking which of the parties' proffered valuations it preferred. Determining the Put Option's value in this way plainly exceeded the Tribunal's authority.

With respect to the fair market value of Red Roof Franchising LLC — the franchising business owned by Red Roof Inns, Inc., which was far and away WRRH's most valuable asset — the Tribunal adopted wholesale the Kingfish valuation, down to the penny, and without conducting any independent valuation of those assets itself. The Tribunal accepted Kingfish's argument that the hypothetical buyer for valuation purposes must be assumed to be a "strategic buyer" and thus accorded no weight to the possible purchase by a nonstrategic buyer. (A0188 ¶ 263.) It then likewise adopted Kingfish's argument that this hypothetical "strategic buyer" would employ various "cost synergies" with its existing businesses, and decided to "adopt[] this concept" in ***its*** analysis. (A0190 ¶ 268.) The Tribunal then proceeded to adjudicate the FMV of the Red Roof Inn franchise business as follows:

> 270. The Tribunal has considered the evidence of both parties. ***While the Tribunal does not adopt the full valuation submitted by either Claimant or Respondents, the Tribunal finds FTI's valuation approach***, based on a post-acquisition, bottom-up approach based on publicly available information, ***is the more suitable analysis***. Additionally, the Tribunal finds as a matter of fact that ***the assumptions underlying FTI's analysis are more reasonable than those underlying EY's analysis***.
>
> 271. Accordingly, ***the Tribunal adopts a valuation approach similar to that performed by FTI***. In this regard, the Tribunal finds Table 1 useful: Valuation Summary prepared by FTI and ***adopts the amounts listed in the "concluded" column***, which is an average of the high and low amounts:

Table 1: Valuation Summary *(in thousands of USD)*				
Enterprise Value Indication	**Low**		**High**	**Concluded (1)**
Range of Enterprise Value Indications - Income Approach				
Discounted Cash Flow Method - Terminal Multiple	262,600	--	306,900	284,750
Range of Enterprise Value Indications - Market Approach				
Guideline Public Company Method	259,500	--	308,300	283,900
Guideline Transaction Method	243,200	--	287,400	265,300
Selected Range of Enterprise Value Indications	**255,100**	**--**	**300,900**	**278,000**
Add: Cash & Equivalents (2)	8,547	--	8,547	8,547
Add: Receivable from Affilates (2) (3)	1,881		1,881	1,881
Less: Operating Expense over Transaction Period (4)	(8,800)	--	(8,800)	(8,800)
Less: Transaction Costs (5)	(5,000)	--	(5,000)	(5,000)
Concluded Range of Enterprise Value Indications	**251,700**	**--**	**297,500**	**274,600**

Footnotes:

(1) Reflects the average of the High and Low indications.
(2) Based on the 2019 audited consolidated financial statements for Red Roof Franchising, LLC and Subsidiaries provided by Management.
(3) Represents receivables from St. Claire property and other affiliates.
(4) Represents estimated operating expenses that will be phased out over the transaction execution period of 15 months.
(5) Represents estimated costs related to severance, merger integration costs, IT and training expenses and rebranding efforts.

(A0191 ¶¶ 270-71 (emphasis added).)

Contrary to its stated mandate and the foregoing description of its activities, however, the Tribunal conducted no independent valuation of its own. In other words, rather than change roles from adjudicator to appraiser, it carried on with an adjudicative process and confined itself to merely deciding which expert's analysis it preferred, which it would then adopt *in toto*. The Tribunal did not merely adopt a "valuation ***approach***" that was "***similar***" to that proposed by Kingfish's expert, FTI. Instead, it incorporated the Valuation Summary table ***copied directly from the FTI report*** and adopted as its own the exact values reflected therein.[2] FTI's valuation of

[2] Compare the September 24, 2021 Affidavit of Bradley Henn and Alan Tantleff, FTI Consulting, at page 6, Table 1: Valuation Summary (A0525.)

the franchise business at $274,600,000 amounted to 87% of the overall value of WRRH ($316,274,185) as determined in the Award. (A0199 ¶ 294.)

The Agreement also determined the specific payment process to be followed once the FMV of the Company and, thus, the valuation of the Put Option had been determined. The Agreement provided that Westmont would pay the purchase price for Kingfish's interest in three equal installment over a two-year period without accrual of interest. (A0086, Agreement § 10.18(b)(ii)-(iii).) Instead, after setting the value of the Put Option, the Tribunal ordered Westmont to pay Kingfish the full assessed value of the Put Option without any provision for the installment payments directed by the Agreement. (A0204 ¶ 316.) It further awarded Kingfish pre- and post-Award interest, at a rate of 5.25% per annum, accruing from November 1, 2020 (*id.*), noting the "significant passage of time since Claimant exercised its right to the First Put Option in 2019," and choosing the arbitrary accrual date of November 1, 2020 based upon the questionable rationale that the parties had agreed to delay the appraisal process and were in dialogue until the commencement of the arbitration proceeding in October 2020. (A0201 ¶¶ 303-04.) In doing so, the Tribunal once again disregarded the Agreement's plain language and thereby exceeded its authority.

E. The Tribunal Awards Additional Relief with Respect to the Put Option that Further Exceeds Its Authority.

The Tribunal also refused to adjust the adopted values to reflect income tax liabilities that would be triggered in any hypothetical liquidation of the WRRH assets held through its subsidiary, Red Roof Inns, Inc. (A0198 ¶ 293.) In so doing, the Tribunal accepted Kingfish's contrary position denying any consideration of tax liabilities as "more persuasive." The Tribunal admitted it did not fully understand this issue, although it inexplicably laid the blame for its lack of understanding on Westmont for not providing expert opinion on this application of established tax law. (*Id.*)

Finally, the Tribunal ordered Respondents to bear 100% of the discounted amount of the Tribunal's costs. (A0203 ¶ 315.) The Tribunal once again exceeded its authority under the Agreement in charging these costs to Respondents, as the Agreement clearly mandated that the parties ***shall share*** the third Qualified Appraiser's fees and expenses ***equally***. (A0097, Exhibit A.)

F. The Court of Chancery confirmed the Award in its entirety.

Following issuance of the Award, both parties filed competing actions to confirm or vacate the Award, with Westmont's action in Ohio ultimately giving way to Kingfish's action to confirm the Award in the Delaware Court of Chancery. In the Court of Chancery matter, both parties moved for summary judgment, with Kingfish seeking confirmation of the Award and Westmont seeking vacatur. On December

14, 2022, the Court of Chancery held oral argument on the parties' cross-motions for summary judgment. (A1326.) On June 30, 2023, the Court of Chancery issued a letter opinion ("Opinion" or "Op.", appended as Exhibit A), granting Kingfish's motion for summary judgment and denying Westmont's motion for summary judgment.

In granting summary judgment in favor of Kingfish, the Opinion affirmed the Award in its entirety. First, the court affirmed the Award's valuation of the First Kingfish Interest and declined to find that the Tribunal had abdicated its role as the Third Qualified Appraiser by simply adopting the FTI valuation of the franchising business without having undertaken any valuation of its own. The court found that "[i]t is evident that the Tribunal interpreted the LLC Agreement." (Op. 16.) Yet, rather than apply ***the Tribunal's interpretation*** of its duty as the Third Qualified Appraiser to "undertake a valuation," the court instead relied on ***its own interpretation*** of the governing contractual provisions, concluding for itself that "[n]othing in the LLC Agreement specifies a particular valuation methodology," and that the Agreement "does not, for example, require that the third Qualified Appraiser follow something akin to this court's statutory appraisal procedure." (*Id.* 17, *citing Moore Bus. Forms, Inc. v. Cordant Hldgs. Corp.*, 1995 WL 662682, at *7-8 (Del. Ch. Nov. 2, 1995).) The court thus failed to determine whether the Tribunal in fact performed the job that it had expressly stated it must do under the Agreement.

The court further affirmed the Award's requirement of immediate payment in full, with pre- and post-judgment interest accruing since the inception of the arbitration proceedings, in direct contradiction to the plain terms of the Agreement, Sections 10.18(b)(ii) and (b)(iii) of which clearly established an interest-free payment schedule. (*Id.* 18.) In reaching that determination, the court effectively reasoned that the finding of breach by Westmont caused a forfeiture of Westmont's rights under the very provisions that the Award ordered to be specifically performed (*i.e.*, the purchase of the First Kingfish Interests). (*Id.* 18-19.)

Similarly, the Court of Chancery also found that Westmont could no longer rely on the Agreement's clear and unambiguous mandate that the parties share equally the costs of the third Qualified Appraiser — here, the Tribunal — because "there is nothing in the LLC Agreement requiring the parties to split a third Qualified Appraiser's costs during arbitration." (*Id.* 20). Here again, the court found that the Agreement's dispute resolution provisions trumped the provisions establishing the process for carrying out the First Put Option, even where that was the process that the Tribunal's work as the third Qualified Appraiser and its order requiring purchase of the First Kingfish interests were carried out. (*Id.* 20-21).

Finally, the Court of Chancery affirmed the Award notwithstanding clearly established tax liabilities that the Tribunal refused to account for, deferring to the Tribunal and declining, in the court's words, to "second guess how the Tribunal weighed evidence" (*id.* 22), even where the Tribunal's own characterization of the assets at issue would necessarily have generated a significant tax liability for the seller in a hypothetical sale.

Following its Opinion, on July 5, 2023, the Court of Chancery issued an order granting Kingfish's Motion for Summary Judgment as well as an order denying Westmont's motion for summary judgment. (Exhibit B.) On August 3, 2023, the Court of Chancery issued a Final Order and Judgment granting judgment in favor of Kingfish on its Verified Complaint to Confirm Arbitration Award. (Exhibit C.) This timely appeal ensued.

ARGUMENT

I. THE COURT OF CHANCERY FAILED TO HOLD THE TRIBUNAL TO ITS STATED CONTRACTUAL MANDATE TO UNDERTAKE A VALUATION OF THE RED ROOF FRANCHISING BUSINESS.

A. Question Presented

Whether the Court of Chancery erred by affirming the Award where the Tribunal failed to conduct its own valuation of Red Roof Franchising LLC, contrary to the Tribunal's express interpretation of its contractual mandate. (A0502-0508, Westmont's Answer Brief in Opposition to Plaintiff's Motion for Summary Judgment to Confirm AAA Arbitration Award and Opening Brief in Support of Defendants' Cross-Motion for Summary Judgment to Vacate the Award ("Westmont MSJ"), at pp. 16-22.)

B. Scope of Review

This Court "review[s] decisions on cross-motions for summary judgment *de novo*." *Auto Equity Loans of Delaware, LLC v. Baird*, 232 A.3d 1293 (Del. 2020). The grounds for a court to vacate an arbitration award include "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C.A. § 10(a).[3] "Of course, '[n]either the FAA nor the Delaware Uniform Arbitration Act derogates

[3] Where, as here, the Agreement did not designate the Delaware Uniform Arbitration Act as governing their arbitration, the FAA applies. 10 *Del. C.* § 5702(c).

this Court's inherent equity jurisdiction to enforce, modify or vacate arbitration awards.'" *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Secs., Inc.*, 953 A.2d 726, 732 (Del Ch. 2008) (*quoting SBC Interactive, Inc. v. Corp. Media P'rs*, 1998 WL 749446, at *1 (Del. Ch. Oct. 7, 1998)).

Arbitrators exceed their authority when they act "in manifest disregard of the law." *Auto Equity Loans of Del., LLC v. Baird*, 2020 WL 2764752, at *3 (Del. May 27, 2020). "To act in manifest disregard of the law, the arbitrator must be 'fully aware of the existence of a clearly defined governing principle but refuse[ ] to apply it, in effect, ignoring it.' " *Id.* (*quoting SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745, 750 (Del. 2014)). This occurs when "the arbitrator (1) knew of the relevant legal principles, (2) appreciated that this principle controlled the outcome of the disputed issue, and (3) nonetheless willfully flouted the governing law by refusing to apply it." *SPX Corp.*, 94 A.3d at 750.

C. Merits of Argument

The Tribunal abdicated its duties as the third Qualified Appraiser pursuant to the parties' agreed valuation process when it failed to "undertake a valuation" that the Tribunal interpreted the Agreement to require of it. When determining the value of Red Roof Franchising LLC — representing 87% of the assets to be valued — the Tribunal opted not to conduct any valuation of the business. Instead, it acted not as an appraiser but as an adjudicator by simply deciding which of the competing valuations offered by the parties' appointed appraisers it found more persuasive. By refusing to undertake the valuation that the Tribunal itself said was required, and not allowing for anything but an either/or decision between two existing valuations, the Tribunal exceeded its authority under the Agreement ***as the Tribunal itself interpreted it***. The Court of Chancery erred in affirming the Award because the court failed to defer to the Tribunal's express interpretation of the Agreement, which required a third, independent appraisal of the assets, and because the court thus failed to consider whether the Tribunal actually did the job that it had said was required of it. For these reasons, the Court of Chancery's order affirming the Award should be overturned and the Award vacated.

1. The Tribunal Correctly Interpreted Its Duties as the Third Qualified Appraiser as Requiring It to Undertake a Valuation of the Red Roof Assets.

By agreement of the parties, after the Tribunal rejected Kingfish's principal claim to simply exclude Westmont's appraisal report and adopt the Kingfish report, the Tribunal was required to assume the role of third Qualified Appraiser as defined under the Agreement in order to complete the valuation process according to the Agreement's terms. (A0136, A0174, A0219 ¶¶ 75, 221 and Annex.) The parties' intention with respect to the valuation process they contemplated is clearly reflected in the Agreement. Under the Agreement, the parties provided that, in the event the appraisal reports of each side's appointed appraiser arrived at valuations that were more than 15% apart, then a third Qualified Appraiser would be appointed to conduct a third and binding appraisal of the assets. (A0097 Ex. A.) The Agreement provides that the job of the third Qualified Appraiser is to "fairly and impartially determine the FMV of the Company." (*Id.*) The structure the parties used for their appraisal process is a relatively common one. Should the parties' competing valuations end up too far apart, then a third, neutral appraiser is appointed — ***not*** to decide between the two (as in a "baseball arbitration") but to ***conduct its own appraisal***, which will then be binding on the parties.

The Tribunal understood its prescribed role perfectly when it stated in the Award that, as the third Qualified Appraiser, it was required to "***determine*** the Fair Market Value" of WRRH's assets by "***undertak[ing] a valuation***" of each of those assets. (A0174-0175 ¶¶ 221-22.) The Tribunal's description of its contractual mandate is clear and unambiguous. To "undertake a valuation" has a plain meaning, which should be immediately recognizable to the parties and to this Court. Merriam-Webster defines a "valuation" as "the act or process of valuing" and as synonymous with an "appraisal of property."[4] That process of valuing or appraising business assets is eminently familiar to courts, which routinely hear matters involving valuations and hold appraisers accountable when they fail to conduct proper

[4] Merriam-Webster.com Dictionary, "valuation," https://www.merriam-webster.com/dictionary/valuation (accessed September 28, 2023).

valuations using accepted and reliable methods. *See Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 21 (Del. 2017) (describing the duty of an appraiser to "give fair consideration to proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court"). By describing its affirmative obligation to "undertake a valuation," the Tribunal thus recognized its responsibility to change hats from one of an adjudicator to that of an appraiser.

This Court has drawn that same key distinction – between an adjudicative and an appraisal process – in an analogous context arising under Delaware's appraisal statute, 8 *Del. C.* § 262, where a court (a similarly adjudicative body) is required to assume the role of an appraiser. Courts construe the comparably plain meaning of that statute's mandate directing that the court "shall appraise" the fair value of a company's shares to impose a "requirement that the court independently determine the value of the shares that are the subject of the appraisal action." *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 361 (Del. 1997); *see also Golden Telecom, Inc. v. Glob. GT LP*, 11 A.3d 214, 217 (Del. 2010) ("Section 262(h) unambiguously calls upon the Court of Chancery to perform an independent evaluation of 'fair value' at the time of a transaction."); *Crescent/Mach I P'ship, L.P. v. Turner*, 2007 WL 2801387, at *9 (Del. Ch. May 2, 2007) (recognizing that the court, sitting as appraiser, "may not adopt an 'either-or' approach and must use its judgment in an independent valuation exercise to reach its conclusion"). Where an adjudicative body assuming the role of appraiser adopts a method of merely deciding which of the parties' competing valuation proposals it prefers, it has "created a standard for value determination which is entirely at odds with Section 262's command that the Court 'shall appraise' fair value." *Gonsalves*, 701 A.2d at 361 (reversing appraisal determination where court merely accepted one side's valuation "hook, line and sinker"). The Tribunal's self-proclaimed mandate in this case is no different. When it assumed an affirmative obligation to assume the role of an appraiser and undertake a valuation, that required an independent valuation exercise that allowed for the possibility of something other than an either/or adjudication between two existing valuations.

2. The Tribunal Abdicated Its Contractual Duties as the Third Qualified Appraiser by Adopting the Kingfish Valuation Rather than Undertaking Its Own Valuation of the Red Roof Franchising Business.

Notwithstanding the Agreement's clear terms, and the arbitrators' recognition of their obligation to "undertake a valuation," the Tribunal failed to do what it said it must. Faced with the difficult burden it agreed to assume, it punted. It effectively rewrote the terms of the valuation process that it had understood so perfectly and, instead, converted the process to a "baseball arbitration" procedure that neither party had ever agreed to. Rather than undertake its own valuation, the Tribunal instead continued to act as an adjudicator and merely adopted whichever of the party's valuations it found more persuasive — quite literally copying the summary table from Kingfish's appraisal report and pasting it into the Award as its own. The Tribunal abandoned its role as appraiser not because of the fact that it adopted the Kingfish values, but because its failure to undertake the required valuation left it no other alternative.

That the Tribunal abdicated its own mandate to undertake a valuation is readily apparent from the Award. Although the Tribunal purported to "***adopt a valuation approach similar*** to that performed by FTI (A0191 ¶ 271), nowhere in the Award did the Tribunal demonstrate that it applied ***its own*** approach — or any approach — to ***any*** valuation that ***it*** independently performed. It merely adopted the FTI valuation as its own, despite stating that this was precisely what it would ***not*** do. (*Id*. ¶ 270.) It did not derive a ***similar*** value through any identified valuation approach that ***it*** undertook. Indeed, the Tribunal's adoption of the FTI "approach" consisted merely of copying a table summarizing FTI's valuation taken from the FTI report and pasting it directly into the Award. (*Id.*)

The Award's discussion of how the Tribunal arrived at its concluded valuation (the entirety of which can be found at paragraphs 257-271 of the Award) demonstrates its failure to carry out its appointed task as the Tribunal itself had interpreted it. The Tribunal noted only two points on which the parties differed: whether a hypothetical buyer would be a strategic buyer, and whether the parties adopted reasonable projections and valuation assumptions. In each case, the Tribunal confined its consideration of these points to the arguments advocated by each side, from which the Tribunal merely chose which it found more persuasive.

In its discussion of the "strategic buyer" and its impact on potential cost synergies, the Tribunal stated that it agreed with Kingfish's arguments "that a strategic buyer will indeed consider potential cost synergies" in assessing value, and it "adopt[ed] this concept in its analysis." (A0190 ¶ 268.) Yet the Tribunal did far more than adopt the ***concept*** of potential synergistic cost savings as a factor in the price a willing buyer would pay for these assets. Without any further analysis or discussion, the Tribunal assumed that the value of potential cost synergies would be precisely equal to the value proposed by FTI, and, again like FTI, it further presumed that 100% of those synergistic savings would be passed along to the seller through a reduction of the sale price. We know this, because the Tribunal jumps immediately from its adoption of a "valuation approach similar to that performed by FTI" to, in the very next sentence, adopting the precise ***amounts*** arrived at in FTI's Valuation Summary table, which the Tribunal lifted directly from FTI's report and inserted into the Award as ***its*** concluded values without analysis. (A0191 ¶ 271.)

With regard to the "other projections and assumptions" on which the parties differed (A0190 ¶ 269), the Tribunal merely noted the differences, again without providing any analysis or findings of its own. Despite asserting that it "does not adopt the full valuation submitted by either Claimant or Respondent" (A0191 ¶ 270), it determined that FTI's was "the more suitable analysis" of the two and found that its assumptions "are more reasonable that those underlying EY's analysis." (*Id.*). Thus, again, the Tribunal merely picked from the two existing valuations, without ever allowing for the possibility of any other assumptions that the Tribunal may have reached through an independent analysis.

In both instances, the Tribunal went directly from Point A (a conceptual approach the Tribunal decided to adopt) to Point Z (the overall concluded value copied from the FTI report), without providing any underlying basis for doing so — no indication that the Tribunal considered the actual calculations that led to those concluded values or allowed for the possibility that a "similar valuation approach" to that performed by FTI could still generate a wide range of concluded values.

The Tribunal's adoption of the FTI values "hook line and sinker" is irreconcilable with its professed duty to "undertake a valuation," not because of the result it reached, but because the process (or lack thereof) it used to arrive at its concluded values did not allow for the possibility of anything other than an either/or approach. Here, as in *Gonsalves*, the Tribunal, upon assuming the role of third Qualified Appraiser, assumed an affirmative obligation to appraise WRRH's assets. It failed to discharge that obligation when it simply chose between the parties' competing valuations without conducting its own appraisal. The Tribunal's approach here, exemplified by its unanalyzed and uncritical adoption and literal copying and pasting of Kingfish's proposed valuation, is precisely the sort of either/or, "hook, line and sinker" adoption that, as a matter of Delaware law, is inconsistent with an affirmative duty to appraise.[5] As the Delaware Supreme Court has noted, where a court adopts a methodology or even a valuation proposed by one of the party's experts, the court's analysis must be made on the record and be shown to be "based on a solid foundation of record evidence, independent of the positions of the parties." *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 527 (Del. 1999), as modified on denial of reargument (May 27, 1999). The Tribunal did not meet that standard here. The Tribunal abdicated its responsibilities as the third Qualified Appraiser by continuing to wear its adjudicator hat, merely comparing the relative merits of the parties' competing valuations and wholesale adoption of Kingfish's proposed valuation of WRRH's chief asset — the Red Roof Inn franchise business.

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[5] *Gonsalves* distinguished a court's adoption of one party's valuation models as a "general framework," which is permissible, from the impermissible either/or, "hook, line and sinker" approach used by the court in that case and by the Tribunal here. *Id*. at 362. The appraising court must in all cases perform its own independent appraisal, even if the methods used or the ultimate result are similar to one or another of the parties' proposed appraisals. *Id.*

3. The Court of Chancery Erred by Failing to Hold the Tribunal to Its Stated Interpretation of Its Duties as the Third Qualified Appraiser.

Although the standard for a court's review of an arbitral decision is highly deferential, this "deference is not unlimited. If it were, court review would be an oxymoron. Hence we will not 'rubber stamp' an arbitrator's decision." *See Monongahela Valley Hosp. Inc. v. United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO CLC*, 946 F.3d 195, 199 (3d Cir. 2019). Here, however, that is precisely what the Court of Chancery did when it affirmed the Tribunal's wholesale adoption of the FTI valuation without any evidence of the Tribunal having undertaken any valuation of its own — contrary to its own express interpretation of the contractual authority granted to it under the Agreement as the Third Qualified Appraiser. The court misapplied the required standard of review because it was at once too deferential and not deferential enough. First, it failed to defer to the Tribunal's stated interpretation of its mandate, instead substituting its own interpretation of the Agreement. It then refused to consider whether the Tribunal actually performed the role of third Qualified Appraiser ***as the Tribunal interpreted it***, and instead simply assumed that whatever the Tribunal did must have been enough.

An arbitration panel's disregard for governing law includes its application of the contract that governs the arbitration proceedings and grants the arbitrators their authority. In such cases, a court reviewing an arbitration award affirms it so long as the award "draws its essence from the contract." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 30 (1987). "The only question for the court 'is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *MHP Mgmt., LLC v. DTR MHP Mgmt., LLC*, 2022 WL 2208900, at *5 (Del. Ch. June 21, 2022) (*quoting Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013)). That is, the deference required here was for the court to resist second-guessing the Tribunal's ***interpretation*** of the Agreement and instead to apply that interpretation (so long as it is plausible) as the measure for what the Tribunal did and the decision it reached.

As noted, however, this deference is not unlimited. *See Monongahela Valley Hosp. Inc.*, 946 F.3d at 199. Reviewing courts are still empowered to consider the plain meaning of the authorizing agreement, and of the arbitrators' interpretation of that agreement, to determine whether the arbitrators failed to do what they were required to. *See id.* ("We begin with the obvious: an arbitrator 'may not ignore the plain language of the contract.'" (*quoting United Paperworkers*, 484 U.S. at 38)). Thus, courts will vacate an award when the arbitrators disregard the plain language of the agreement from which they draw their authority. *See Transcontinental Gas Pipe Line Co. LLC v. Permanent Easement for 2.59 Acres,* 834 Fed. Appx. 752, 761 (3d Cir. 2020) (affirming order vacating award where arbitrator acted outside the scope of his contractually delegated authority) (*citing Oxford Health Plans LLC*, 569 U.S. at 569); *Muskegon Cent. Dispatch 911 v. Tiburon, Inc.*, 462 Fed. Appx. 517, 525 (6th Cir. 2012) (affirming decision by district court to vacate award where arbitrator exceeded his authority by disregarding contract's plain language); *Boise Cascade Corp. v. Paper Allied-Indus., Chemical and Energy Workers (PACE), Local 7-0159,* 309 F.3d 1075, 1081-84 (8th Cir. 2002) (affirming vacatur of award that failed to draw its essence from the parties' agreement, and citing similar cases); *United Food & Commercial Workers Union, Local 1119, AFL-CIO v. United Markets, Inc.*, 784 F.2d 1413, 1415-16 (9th Cir. 1986) (vacating an arbitral award by holding arbitrators to the plain meaning of the contract they were required to apply).[6]

Moreover, deference to the arbitrators' interpretation does not extend to the question of whether the arbitrators actually did what they themselves interpreted the authorizing agreement to require. The Third Circuit Court of Appeals has stated that the deference standard in reviewing arbitral awards ***does*** ask the court to determine "whether the arbitrators did the job they were told to do — not whether they did it

[6] Delaware Courts look to federal case law as authoritative sources for interpreting the grounds for vacatur. *See Travelers Ins. Co.*, 886 A.2d at 49 (Del. Ch. 2005) ("Examining federal jurisprudence is particularly helpful in this case as incidences of vacatur for manifest disregard in federal court, though still rare, are far more plentiful than in Delaware.").

well, or correctly, or reasonably, but simply whether they did it." *U.S. Airline Pilots Ass'n v. U.S. Airways, Inc.,* 604 Fed. App'x 142, 146 (3d Cir. 2015). That is, even where deference is required regarding the correctness of the outcome or the interpretation of the governing contract, no deference is called for when asking whether the arbitrators actually did the job they set out to do, which is precisely what Westmont is asking this Court to determine.

Where arbitrators fail to follow their own interpretation of their contractual mandate, good grounds exist for vacating an award. *See, e.g.*, *Ruggiero v. State Farm Mut. Auto Ins. Co.*, 1999 WL 499459, at *7 (Del. Ch. June 23, 1999) (vacating award where arbitrators entertained post-hearing motion practice to consider new legal authority after they issued an award that, by their own description, the arbitrators manifestly construed as being final); *Boise Cascade Corp.*, 309 F.3d at 1085-86 (affirming vacatur of an award where the arbitrator engaged in an analysis contrary to his stated interpretation of the contractual requirements, which "suggests efforts to balance the equities of the situation, rather than to interpret and apply the agreement").

As explained by the Third Circuit Court of Appeals, while a reviewing court "should presume that an arbitrator acted within the scope of his or her authority, … a court may conclude that an arbitrator exceeded his or her authority when it is obvious from the written opinion." *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d

287, 301 (3d Cir. 2001), abrogated on other grounds by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). In *Roadway Package System*, the Third Circuit determined that the arbitrator had exceeded his authority, and thus affirmed vacatur of an award, when the award demonstrated that the arbitrator based his decision on a determination that was outside the scope of the arbitrator's contractual authority. Similarly, in *Newark Morning Ledger Co. v. Newark Typographical Union Loc. 103*, 797 F.2d 162 (3d Cir. 1986), the Third Circuit affirmed the modification of an award that did not follow from the logic of the arbitrator's own findings, and it expressly dismissed the notion that the deference standard for review of an arbitration award "requires a court to disregard what an arbitrator says in order to justify what the arbitrator does." *Id*. at 167 & n.6.

Here, the Court of Chancery concluded that "[i]t is evident that the Tribunal interpreted the LLC Agreement." (Op. 16.) However, the Opinion contains no analysis of what the Tribunal actually interpreted the Agreement to require of the third Qualified Appraiser, nor whether the Award comported with the Tribunal's stated interpretation of its contractual duty. Instead, the court did what the law instructs it should not do and substituted its own interpretation of the governing contractual provisions, concluding for itself that "[n]othing in the LLC Agreement specifies a particular valuation methodology," and that the Agreement "does not, for example, require that the third Qualified Appraiser follow something akin to this court's statutory appraisal procedure." *Id.* at 17, *citing Moore Bus. Forms, Inc. v. Cordant Hldgs. Corp.*, 1995 WL 662685, at *7-8 (Del. Ch. Nov. 2, 1995). The court's reasoning, and the authority on which it relied, misconstrues the relevant issue here, however. There is no need for the reviewing court to determine whether the Agreement created a contractual duty for the Tribunal to conduct the valuation inquiry in a particular manner, because the Tribunal already made that determination in recognizing its affirmative duty as the third Qualified Appraiser to "undertake a valuation."[7] The Court of Chancery erred both in failing to defer to the Tribunal's own interpretation of its mandate — to "undertake a valuation" — and then in failing to consider whether the Tribunal in fact undertook the valuation that it said it must.

Westmont did not and does not ask this Court to impose some other interpretation of the Agreement on the Tribunal, but simply to determine whether the Tribunal did the job it said it was required to do based on the Tribunal's own interpretation of the Agreement. The Tribunal was free to interpret its duties as third Qualified Appraiser under the Agreement without second-guessing from a reviewing

[7] The decision in *Moore Bus. Forms, Inc.*, moreover, focused on whether the parties' agreement was intended to incorporate the "fair value" standard employed in Delaware's appraisal statute. 1995 WL 622685 at *8. The Court of Chancery appears to have misconstrued Westmont's argument as suggesting that the appraisal statute literally applies here, *sub silencio*, and that the Tribunal was thus required to apply particular valuation methodologies contained in Delaware's appraisal statute. To the contrary, as outlined above, Westmont's argument merely concerns what the plain meaning of the terms "valuation" or "appraisal" are intended to connote.

court. But having done so, the Tribunal was then bound to perform its role in accordance with its own stated mandate. That is, having interpreted the Agreement as requiring that the Tribunal, sitting as appraiser, undertake a valuation of the assets, the Tribunal then manifestly disregarded its own mandate by abdicating the very job it set for itself.

II. THE COURT OF CHANCERY ERRED IN AFFIRMING THE AWARD'S PAYMENT TERMS THAT DEPARTED FROM THOSE REQUIRED UNDER THE AGREEMENT.

A. Question Presented

Whether the Court of Chancery erred by failing to vacate the Tribunal's award of pre- and post-judgment interest from the commencement of arbitration proceedings, in disregard of the clear payment terms required in the Agreement. (A0508-0511.)

B. Scope of Review

See Section I.B, *supra.*

C. Merits of Argument

The Tribunal exceeded its authority when it ordered Westmont to complete the purchase of the First Kingfish Interests in a manner that directly contradicted the Agreement's clear terms regarding the completion of that transaction. The Agreement specifically provides that the purchase of the First Kingfish Interests was to be made in ***three equal installments*** over a two-year interest-free period: one-third due at closing, one-third upon the first anniversary after closing, and one-third upon the second anniversary. (A0086 § 10.18(b)(ii)-(iii).) In awarding immediate payment in full, along with pre- and post-award interest accruing from the commencement of the arbitration proceedings, the Tribunal patently ignored the Agreement's clear terms, instead purporting to award pre- and post-award interest as an exercise of its discretion under the AAA Commercial Arbitration Rules and Delaware common law. (A0200-0201 ¶¶ 299-301.)

"We begin with the obvious: an arbitrator 'may not ignore the plain language of the contract.'" *Monongahela Valley Hosp. Inc.*, 946 F.3d at 199 (quoting *United Paperworkers*, 484 U.S. at 38). The law in Delaware is clear, moreover, that the discretionary rules on which the Tribunal relied that permit pre- and post-judgment interest cannot supersede the Agreement's clear terms to the contrary. *See Towerhill Wealth Mgmt. LLC v. Bander Fam. P'ship, LP*, 2010 WL 2284943, at *7 (Del. Ch. June 4, 2010) (in determining whether prevailing party was entitled to statutory interest on damages award, "a threshold issue in this matter is whether the Operating Agreements preclude [defendant] from receiving the relief which he seeks"); *cf. Philadelphia Hous. Auth. v. CedarCrestone, Inc.*, 562 F. Supp. 2d 653, 660 (E.D. Pa. 2008) (finding that party can "agree to forego the statutory right to interest completely" in which case an award of statutory interest is improper).

The Court of Chancery attempted to justify the Tribunal's Award by suggesting that the clear payment terms required under Section 10.18 of the Agreement no longer applied once Westmont breached the Agreement and Kingfish invoked the Agreement's dispute resolution provisions. (Op. 18.) The court's reasoning is flawed in several respects.

First, the overriding purpose of the Award was to order specific performance of the purchase of the First Kingfish Interests: by completing the contractually mandated appraisal process by assuming the role of third Qualified Appraiser in order to establish a purchase price for the interests and then by requiring Westmont to complete the purchase of the interests at the determined price. "Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties." *In re Del Monte Foods Co. S'holders Litig.,* 25 A.3d 813, 840–41 (Del. Ch. 2011). Thus, it is a fundamental principle of specific performance, and of equity more broadly, that "those bargained-for rights be enforced," and thus that specific performance must be undertaken ***pursuant to the parties' bargained-for terms***. *Id.*

Moreover, "equity will not enforce a forfeiture pure and simple." *Wilkins v. Birnbaum*, 278 A.2d 829, 830 (Del. 1971); *see also Garrett v. Brown*, 1986 WL 6708, at *8 (Del. Ch. June 13, 1986), *aff'd*, 511 A.2d 1044 (Del. 1986) ("Forfeitures are not favored and contracts will be construed to avoid such a result."). The notion relied on by the Court of Chancery – that Westmont, by virtue of a contract breach, somehow forfeited its ability to enforce its rights under the Agreement when the Tribunal ordered the parties to complete the bargained-for transaction – is anathema to established law and to the parties' own expectations.

Even under a damages theory, the Award is arbitrary and nonsensical, serving merely as a punitive sanction to Westmont and a windfall to Kingfish. The only rational reading of the Agreement dictates that a purchase of the interests via the first of three interest-free installment payments cannot precede the determination of the purchase price to be paid. Without any price having been set until the Tribunal, as third Qualified Appraiser under the Agreement, established it in the Award, Westmont had no means to perform any earlier under the Agreement and avoid this accrual of interest. Indeed, as of November 1, 2020, not only had no price been finally determined but Kingfish had yet even to ***suggest*** a purchase price for the interests. In other words, the Tribunal ordered Westmont to pay interest dating back to 10 months ***before*** Kingfish had even disclosed its proffered valuation and a full 21 months ***before*** the Tribunal, as third Qualified Appraiser, issued its Award that determined the Put Option's value. Prior to those events, no purchase of the First Kingfish Interests could possibly have occurred.

The Tribunal's reference to the "significant passage of time" since the exercise of the First Put Option (A0201 ¶ 303) cannot not justify its departure from the Agreement's clear terms under a theory of delay damages. The Tribunal acknowledged that a closing within 120 days of exercise (as normally required under Section 10.18) was rendered impossible by the parties' mutual agreements to extend the appraisal process for various reasons. (A0143 ¶ 114.) Moreover, the Tribunal expressly rejected Kingfish's primary claim that Westmont had forfeited its rights to complete the appraisal process pursuant to the Agreement, and it instead chose to use the arbitration proceedings to carry out the remainder of the appraisal process, resulting in the determination of a purchase price and the order of specific performance. (A0184 ¶¶ 250-51.) It expressly found that this process "ensured that both sides were afforded a full and fair opportunity to comment on and be heard on the valuation reports," and "that ***no party has suffered any prejudice by the belated submission of a valuation report by the other party***." (*Id.* (emphasis added).) Attempting to justify the award of pre-award fees under a damages theory, then, would be contrary to the Tribunal's own findings.

Finally, even accepting that the Tribunal's arbitrary and unsupportable selection of November 1, 2020 represented the date by which a purchase price would have been established, absent a breach, that date merely started the clock on the two-year interest-free period under the Agreement. By ordering that interest accrued as of November 1, 2020, the Tribunal in effect was suggesting that Westmont's first installment payment would have been due two years earlier – over a year before Kingfish had even exercised the First Put Option. The purpose of contractual damages is to deliver the expectations of the parties *ex ante*, to place them as close as possible to the position they would have occupied but for one party's breach. *See Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). Even under a theory of delay damages, the Tribunal grossly miscalculated the parties' expectations and awarded what can only be described as a windfall for Kingfish and a punitive sanction for Westmont.

III. THE COURT OF CHANCERY ERRED IN FAILING TO CORRECT THE TRIBUNAL'S DISREGARD OF THE AGREEMENT'S FEE AND COST PROVISIONS.

A. Question Presented

Whether the Court of Chancery erred by failing to vacate the Tribunal's award of the arbitrators' costs, in disregard of the clear terms of the Agreement. (A0512.)

B. Scope of Review

See Section I.B, *supra.*

C. Merits of Argument

The Court of Chancery similarly erred by deferring to the Tribunal despite its disregard of a clear contractual language mandating that the parties split fees and costs associated with the third Qualified Appraiser – a role carried out here by the Tribunal. In ordering that Westmont was responsible for bearing 100% of the Tribunal's recoverable fees and costs (A0203 ¶ 315), the Tribunal disregarded the clear provision of the Agreement that, "[f]or any Third Qualified Appraiser, the Managing Member [Westmont] and the Kingfish Member shall share its fees and expenses equally." (A0097 Exhibit A (emphasis added).)

The Court of Chancery again pointed to the Tribunal's discretion under the AAA Rules to award fees and costs and found simply that "there is nothing in the LLC Agreement requiring the parties to split a third Qualified Appraiser's costs ***during arbitration***." (Op. 20 (emphasis added).) This finding completely ignores the Agreement's plain language. It ignores that, for a substantial portion of its time, the

Tribunal was purporting to act in the role as the third Qualified Appraiser (however imperfectly it performed this role). While this was obviously outside of the parties' original contemplations in drafting the Agreement, there can be no question that, in appointing the Tribunal to serve as the third Qualified Appraiser, the parties intended for the Tribunal to carry out their contractually agreed appraisal process, notwithstanding the invocation of the dispute resolution provisions.

While the Tribunal did have discretionary authority under the AAA rules to award arbitrator costs where the Tribunal was acting in its adjudicative role, that authority cannot supersede the express terms of the Agreement requiring an even splitting of the Tribunal's costs while it served as third Qualified Appraiser. In contradicting the Agreement's plain language, the Tribunal exceeded the authority granted to it under the Agreement.

IV. THE COURT OF CHANCERY ERRED IN FAILING TO VACATE THE TRIBUNAL'S DISREGARD OF ESTABLISHED TAX LAW

A. Question Presented

Whether the Court of Chancery erred by failing to vacate the Tribunal's disregard of established undisputed tax consequences arising from the Tribunal's own characterization of the assets being valued. (A0512-0516.)

B. Scope of Review

See Section I.B, *supra.*

C. Merits of Argument

The Court of Chancery erred by deferring to the Tribunal's clear disregard of established, and undisputed, tax law. The Court of Chancery declined to reconsider the Tribunal's decision with respect to the tax consequences of the hypothetical transaction that was the subject of the valuation analysis, reasoning that "[i]t is not for me to second guess how the Tribunal weighed evidence." (Op. 22.) The court upheld the Tribunal's decision based on a "lack of evidentiary support" provided by Westmont to support its position. (*Id.*) This merely repeated the Tribunal's original error, however, as the support for Westmont's position arises not from any evidence that Westmont could bring to bear but, rather, from the Tribunal's own characterization of the transaction at issue. As before, the court erred when it failed to hold the Tribunal accountable to ***its own*** interpretation of the contractual valuation process. *See supra*, pages 29-30; *Newark Morning Ledger*, 797 F.2d at 167 n.6 (a reviewing court may not "disregard what an arbitrator says in order to justify what the arbitrator does"); *Roadway Package Sys., Inc.*, 257 F.3d at 301 ("[A] court may conclude that an arbitrator exceeded his or her authority when it is obvious from the written opinion.").

Contrary to the Court of Chancery's finding, Westmont merely asked the court to hold the Tribunal to its own expressed interpretation of the Agreement. Under the Agreement, the valuation of the Put Option is derived from a determination of the FMV of WRRH. (A0097, Agreement, Exhibit A.) The "FMV of the Company" is in turn defined, in pertinent part, as follows:

> **"FMV of the Company"** means the fair market value of the Company [WRRH] and more specifically, the projected amount all the Members would have received hereunder in a final liquidation (without any reserves) of the Company, assuming an arms'-length, third-party ***sale of the Company's tangible and intangible assets*** between a willing buyer and seller . . . .

(A0086, Agreement § 10.18 (emphasis added).) WRRH has no non-cash assets other than those held by Red Roof Inns, Inc. (A0175 ¶ 222.) Determining the FMV of WRRH, then, meant determining the distributions that would be made to its members in a final liquidation of WRRH, following a hypothetical sale of the Red Roof Inns, Inc. assets — *i.e.*, the franchise company, various real properties, equity interests and net working capital. (*Id.*) In the Tribunal's own words, "[t]he Agreement requires the Tribunal to determine the FMV of ***assets in which WRRH***

LLC has an ownership interest through Red Roof Inns, Inc." (A0185 ¶ 255.) That is, the Tribunal held that the hypothetical sale of assets on which a valuation must be based was not a sale of WRRH's equity interests but, rather, of the underlying ***assets*** it held through the C corporation, Red Roof Inns, Inc. Thus, the valuation the Tribunal adopted was a valuation not of WRRH's stock in Red Roof Inns, Inc., but, rather, those underlying assets, including most notably an enterprise valuation of Red Roof Franchising LLC, a wholly owned subsidiary of Red Roof Inns, Inc.

Among the most basic principles of corporate tax law is that C corporations are subject to tax on their income, including gains on the sale of company assets. 26 U.S.C. §§ 11, 1001; *see also, e.g.*, *Cent. Tablet Mfg. Co. v. U.S.*, 417 U.S. 673, 678 (1974) ("A corporation is a taxable entity separate and distinct from its shareholders. Ordinarily, a capital gain realized by the corporation is taxable to it."). In a sale of the ***assets*** held through Red Roof Inns, Inc., as opposed to a sale of the Red Roof Inns, Inc. stock, there can be no question that any gain from such sale would subject Red Roof Inns, Inc. to tax liability that would have to be accounted for at the level of ***that*** entity before any proceeds from the sale could flow up to WRRH and its members.[8] Indeed, no party has disputed this well-established legal principle. (*See*

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[8] Indeed, courts have held that it is reversible error to fail to make tax liability adjustments when valuing corporate stock even where the hypothetical transaction in the valuation analysis could be structured so as to avoid tax liability at the time of sale. *See Est. of Pauline Welch v. Comm'r*, 2000 WL 263309, at *4 (6th Cir. Mar. 1, 2000) (recognizing the need to adjust a valuation of corporate stock to reflect "built-

A0646, Plaintiff's Reply in Support of Mot. Summ. J., at 21) (disputing only whether the hypothetical deal would take the form of an asset or stock sale, but not the tax consequences of these two different deal structures).

The Tribunal manifestly disregarded these well-established principles of corporate taxation in its Award when it failed to apply them according to ***its own*** unambiguous statements about the nature of the assets being valued. It incorrectly held that no adjustments needed to be made to the valuation to account for any income tax liability that would occur via such a liquidation, because ***WRRH***, as a limited liability company, is not subject to tax at an entity level. (A0198 ¶ 293.) Although the statement that WRRH is not itself subject to entity-level taxation is correct in and of itself, it misses the point. The Tribunal expressly held that the valuation adopted in the Award was a valuation of the underlying assets of Red Roof Inns, Inc. — the franchise business, certain real estate and stock holdings, and cash — premised on a hypothetical sale ***of those assets***. (A0175, A0185 ¶¶ 222, 255.) The Tribunal then manifestly disregarded the clear and indisputable legal

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in" capital gains tax liability in a hypothetical sale of stock – even if such a sale could be structured so as to avoid tax liability — because a "hypothetical willing buyer today would likely pay less for the shares of a corporation because of the buyer's inability to eliminate the contingent tax liability." (*quoting Eisenberg v. Comm'r*, 155 F.3d 50, 57 (2d Cir. 1998)); *Eisenberg*. 155 F.3d at 57 ("The issue is not what a hypothetical willing buyer plans to do with the property, but what considerations affect the fair market value of the property he considers buying.").

implications of its own analysis of the appraisal requirements under the Agreement, which would necessitate taking into account that gains from a sale of the underlying assets held by Red Roof Inns, Inc. are unquestionably subject to entity-level taxation.

The Court of Chancery then repeated the Tribunal's error when it deferred to the same flawed decision despite the plain language of the Tribunal's characterization of the assets demanding a different treatment. The Tribunal's attempt to shift blame to Westmont for not providing an expert witness to educate the Tribunal on these basic principles of tax law does not excuse its faulty reasoning, nor the Court of Chancery's unwillingness to correct the obvious error, which was clearly within the court's authority to do. *See Travelers Ins. Co. v. Nationwide Mut. Ins. Co.,* 886 A.2d 46, 51 (Del. Ch. 2005) (applying the "manifest disregard" standard to vacate an award where panel ignored a clear statutory mandate that capped respondent's liability).

CONCLUSION

Appellants respectfully request that this Court vacate and reverse the Court of Chancery's Opinion and Order granting summary judgment to Appellee, and direct further proceedings consistent therewith.

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