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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RRI ASSOCIATES LLC and WB-US ENTERPRISES, INC., 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, Appellee, v. WRRH LLC, Nominal Party.	No. 316, 2023 Case Below: On appeal from the Court of Chancery of the State of Delaware C.A. No. 2022-0761-LWW

APPELLEE'S ANSWERING BRIEF

Dated: November 16, 2023

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NATURE OF PROCEEDINGS

Appellants RRI Associates LLC ("RRI") and WB-US Enterprises, Inc. ("WB-US" and, together with RRI, "Westmont") seek to overturn the Court of Chancery's straightforward decision confirming, under the Federal Arbitration Act (the "FAA"), an arbitral award (the "Award") issued by an American Arbitration Association tribunal (the "Tribunal") in favor of Appellee Huntington Way Associates, LLC, as successor in interest to Whippoorwill Farm Associates, LLC, f/k/a/ Kingfish RRI LLC ("Kingfish"). The arbitration arose out of the parties' interests in WRRH LLC ("WRRH"), the indirect parent of Red Roof Inns, Inc. WB-US and RRI—affiliates of Westmont Hospitality Group, one of the largest privately held hospitality businesses in the world—are, respectively, the managing and majority member of WRRH, and Kingfish is a minority member.

The Award, a reasoned, thorough, 91-page decision, found Westmont liable to Kingfish for breaching the WRRH LLC Agreement (the "Agreement") by failing to abide by its obligations in connection with Kingfish's exercise, in 2019, of a put option (the "First Put Option") granted to it under the Agreement (the "First Put Option Claim"). In addition, the Award found WB-US liable for abusing its position as managing member of WRRH by using WRRH assets to guarantee hundreds of millions of dollars of loans given to WB-US's Westmont affiliates for hotel projects

having nothing do with the Red Roof brand (the "Wrongful Guarantee Claims").[1] The Award followed extensive proceedings, before three sterling-credentialed arbitrators (A0034 ¶ 21(a)–(c)), involving multiple pre-hearing motions, briefing, evidentiary submissions, expert reports, hearings with fact and expert testimony, and post-hearing briefing and expert submissions.

After Westmont refused to comply with the Award, Kingfish brought this action and moved for summary judgment confirming the Award under the FAA. Westmont cross-moved for vacatur, asserting that the Tribunal committed manifest disregard of the law. Westmont did not challenge the Tribunal's finding that it breached the Agreement. It argued only that the Tribunal's valuation of WRRH in connection with the First Put Option Claim failed to conform to some purportedly required methodology and that the Tribunal erred in awarding pre-judgment interest and administrative costs, and in rejecting a purported taxation discount.

On June 30, 2023, the Court of Chancery issued a letter opinion ("Op.") rejecting Westmont's contentions under well-established FAA precedent and granting Kingfish summary judgment confirming the Award. On August 3, 2023, the Court of Chancery issued its Final Order and Judgment (the "Order"), and on September 1, 2023, it denied Westmont's motion for a stay of the judgment pending

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[1] Westmont does not challenge the Tribunal's decision regarding the Wrongful Guarantee Claims.

appeal (B1–7; B8–10.) Westmont now raises the same erroneous manifest-disregard-of-the-law theories it argued below.

SUMMARY OF ARGUMENT

1. *Denied.* The Court of Chancery correctly held that the Tribunal's valuation of WRRH rested on its interpretation of the Agreement and did not reflect any disregard of governing law. Westmont concedes that the Tribunal interpreted the Agreement's description of the Tribunal's mandate, and Westmont cannot overcome that interpretation by twisting it to mean something that it does not—namely, that the Tribunal was prohibited from accepting the expert valuation it deemed most reasonable. The Award demonstrates that the Tribunal acted consistent with its mandate by conducting a considered analysis of the key valuation factors and the record evidence before arriving at its value determination.

2. *Denied.* The Court of Chancery properly rejected Westmont's challenge to the Tribunal's award of pre- and post-judgment interest. Whether or not Westmont would have been entitled to some interest-free payment period had it not flouted its contractual obligations with respect to Kingfish's exercise of the put option, Westmont's argument ignores the Agreement's binding dispute-resolution provisions, which empowered the Tribunal to assess pre- and post-judgment interest and determine the date from which pre-judgment interest accrued.

3. *Denied.* The Court of Chancery properly rejected Westmont's challenge to the Tribunal's award of arbitral costs. Again, the Tribunal interpreted, and exercised its authority under, the Agreement's dispute-resolution provisions,

which expressly empowered the Tribunal to award arbitral costs. Although Westmont tries to take advantage of a provision of the Agreement that may have applied outside of the Arbitration context, once in Arbitration, the dispute-resolution provisions governed. Westmont never argued to the Tribunal that the Agreement's express grant of authority to award costs somehow was trumped by a separate provision.

4. *Denied.* The Court of Chancery properly found no manifest disregard of the law in the Tribunal's decision not to discount its valuation by a purported tax liability that Westmont asserted, without evidence and in contradiction of its own expert's valuation, would have arisen in the sale of WRRH's assets. Westmont's argument depends on distorting the Tribunal's interpretation of the Agreement as well as the Agreement itself to somehow require a valuation of Red Roof Inns, Inc.'s assets as opposed to WRRH's assets (*i.e.*, WRRH's stock in Red Roof Inns, Inc.).

STATEMENT OF FACTS

A. Kingfish Exercises the First Put Option.

On January 1, 2011, the parties entered into the Agreement, which, among other things, provides Kingfish with several put options. (A0085–87, A0089–90 §§ 10.18, 10.20, 1022.)

On December 3, 2019, Kingfish served its First Put Option notice ("Notice") pursuant to Section 10.18 of the Agreement, which gives Kingfish a right to sell the "First Kingfish Interest" (*i.e.*, 9% of WRRH) to Westmont at a price reflecting 90% of its Fair Market Value ("FMV").[2] (A0155 ¶ 159; A00085–86 § 10.18(a)–(b)(i).)

To determine the FMV of WRRH for purposes of the First Put Option, the Agreement provides for an appraisal process set forth in Exhibit A to the Agreement

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[2] The Agreement defines "the Company" as WRRH, (A0366), and the "FMV of the Company" as:

> the fair market value of the Company 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 a willing seller, where neither party is under compulsion to act or under distress, each party has reasonable knowledge of the relevant facts and such sale occurs within a commercially reasonable period of time, with reasonable deductions for customary third party transaction costs.

(A0370.)

(the "Appraisal Process"). (A0097–98.) The Appraisal Process begins with each side's appointment of a "Qualified Appraiser" to render a valuation of WRRH. (A0097.) If the higher valuation is more than 115% of the lower, a third Qualified Appraiser is appointed and "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 determination of the third Qualified Appraiser is then final and binding and "shall be the FMV of the Company." (*Id.*)

In connection with its Notice, and in accordance with this Appraisal Process, Kingfish appointed FTI Consulting, Inc. ("FTI") as its Qualified Appraiser, notified Westmont, and sought to follow through with the Appraisal Process. (A0143 ¶ 114.)

Despite Kingfish's repeated inquiries, Westmont refused to engage, entirely flouting the contractually required valuation process and ignoring Kingfish's entreaties. (A0143–44, 0156–60, ¶¶ 115, 164–74.)

B. Westmont's Continued Refusal to Abide by Its Contractual Obligations or Offer Any Purported Justification Therefor Forces Kingfish to Initiate the Arbitration.

After months of Westmont's willfully obstructive conduct, Kingfish filed its Demand for Arbitration with the AAA on October 23, 2020, pursuant to Section 10.14 of the Agreement and the dispute-resolution provisions set forth in Schedule 10.14 thereto. (A0125 ¶ 34.) Contrary to Westmont's specious minimization of the

arbitration as a "[m]eans to [c]omplete the [p]ut [o]ption Appraisal Process," (Opening Brief ("Br.") 6), the arbitration was Kingfish's only recourse after Westmont flouted its contractual obligations and refused to engage.

Westmont's obstructive and dilatory conduct continued throughout the arbitration. Westmont spent nearly the entirety of the proceedings arguing frivolously that Kingfish had forfeited its rights with respect to the First Put Option and seeking to prevent the Tribunal from assessing valuation, going so far as to violate the Tribunal's order that Westmont produce its own expert's valuation report in response to Kingfish's document requests and moving unsuccessfully to strike Kingfish's expert valuation report. (A0131–33 ¶¶ 53–62 & n.30; A0160–70 ¶¶ 175–206 & n.111; A1299–1300.)

Only at the eleventh hour, perhaps after realizing the futility of its efforts to deprive Kingfish of its First Put Option rights, did Westmont pivot, agreeing—nearly one year after Kingfish initiated the arbitration and just weeks before the scheduled hearing—to submit the valuation issue to the Tribunal, and seeking and obtaining additional time to produce its valuation report to Kingfish, exchange rebuttal reports, and present live valuation testimony. (A0131–33 ¶¶ 53–62, 68–76.)

Ultimately, the record on valuation was extensive, comprising each side's opening expert valuation reports (A0692–814); an expert rebuttal valuation report from FTI (A0815–37); a fact-witness valuation rebuttal report from Westmont

(Westmont chose not to submit an expert rebuttal report) (A0839–90); a full day of live valuation testimony from the party's experts and fact witnesses (A0891–1214); a joint expert spreadsheet identifying, in detail, the financial data points and assumptions on which each side's valuation relied, as well as the bases therefor (A0658–91); and two rounds of post-hearing briefing on valuation and liability (A1215–97.)

C. The Tribunal Issues the Award.

On August 5, 2022, the Tribunal issued the Award, a thorough, 91-page decision. (A0112–209.) The Tribunal found Westmont liable for breaching the Agreement "by failing to perform [its] obligations in respect to the First Put Option process set out at Section 10.18 of the Agreement,"[3] and proceeded to determine the FMV of WRRH to calculate the amount that Westmont must pay for the First Kingfish Interests. (A0163 ¶ 186.)

The Tribunal reiterated its duty to "fairly and impartially determine the FMV of the Company," subject to the requirement that the "determination must be between the determinations of the other two Qualified Appraisers." (A0185–86

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[3] The Tribunal also held Westmont liable on the Wrongful Guarantee Claims, finding that Westmont breached the Agreement by using WRRH assets "to guarantee loan obligations relating to projects in which [Westmont] had interests wholly independent of the Company and which created financial risk to the Company." (A0170–74 ¶¶ 207–19.) Westmont does not challenge this portion of the Award on appeal.

¶ 256.) The Tribunal evaluated each side's arguments and evidence as to WRRH's FMV. (A0185–99 ¶¶ 256–94.) The Tribunal found that Kingfish's position was correct as to certain issues, while Westmont's position was correct as to others. (*Compare, e.g.*, A0191 ¶¶ 270–71 ("While the Tribunal does not adopt the full valuation submitted by either [Kingfish] or [Westmont], the Tribunal finds FTI's valuation approach . . . is the more suitable analysis . . . [and] adopts a valuation approach similar to that performed by FTI."), *with* A0196–97 ¶¶ 285–87 (finding Westmont's arguments with respect to net working capital to be "persuasive" and adopting its approach).) The Tribunal concluded that WRRH's fair market value was $316,274,185 and, after applying the formula set forth in Section 10.18 of the Agreement, determined that Westmont must acquire the First Kingfish Interests for $25,155,495 (A0199 ¶ 294; A0204 ¶ 316(d).)

The Tribunal then exercised its discretion under the Agreement and the AAA Commercial Rules to award pre- and post-judgment interest, as well as a portion of the fees and costs that Kingfish incurred in connection with the arbitration. (A0200–04 ¶¶ 299–315, 316(e)–(h).)

D. The Court of Chancery Confirms the Award.

Following issuance of the Award, Kingfish filed a confirmation action before the Court of Chancery and moved for summary judgment confirming the Award

under the FAA. (A0024–46; A0213–52.) Westmont cross-moved for summary judgment vacating the Award. (A0477–517.)

On June 30, 2023, the Court of Chancery issued a letter opinion granting Kingfish's motion for summary judgment and denying Westmont's, explaining that "[n]one of [Westmont's] arguments amounts to a manifest disregard of the law." (Op. 14–23.) On August 3, 2023, the Court of Chancery entered the Final Order and Judgment. (Br. Ex. C.) Westmont subsequently moved for a stay of judgment pending appeal, which the Court of Chancery denied on September 1, 2023. (B1–7; B8–10.) Among other reasons for denying Westmont's stay motion, the Court explained that Westmont's anticipated appeal did not "present[] a fair ground for litigation and more deliberative investigation" because "[t]he matter is rooted in considerable precedent concerning the review of arbitration awards." (B6–7.)

On appeal, Westmont reasserts the arguments rejected below.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY REJECTED WESTMONT'S CHALLENGE TO THE TRIBUNAL'S VALUATION.

A. Question Presented.

Whether the Court of Chancery correctly confirmed the Award where the Tribunal interpreted the Agreement's language that "[t]he third Qualified Appraiser . . . be instructed to fairly and impartially determine the FMV of the Company" as permitting the Tribunal's method of determining the FMV—a method whereby the Tribunal considered the parties' positions and evidence on the key valuation drivers and adopted the metrics it found most persuasive and reliable. (Preserved at A0626–28; A0632–40; *see also* Op. 14–18.)

B. Scope of Review.

"Although this Court reviews a trial court's decision on cross-motions for summary judgment *de novo*, review of an arbitration award is one of the narrowest standards of judicial review in all of American jurisprudence." *SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745, 750 (Del. 2014) (internal quotation marks omitted); *see also, e.g.*, *Auto Equity Loans of Del., LLC v. Baird*, 2020 WL 2764752, at *3 (Del. 2020) (TABLE); *Evolve Growth Initiatives, LLC v. Equilibrium Health Sols. LLC*, 2023 WL 4760547, at *10 (Del. Ch. July 26, 2023) ("Arbitral awards are nearly impervious to judicial oversight." (internal quotation marks omitted)). As the Court of Chancery recognized, a party seeking to vacate a tribunal's arbitral award "'bears

a heavy burden,'" (Op. at 13 (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013)); indeed, that party must climb a "nearly vertical mountain." *Carl Zeiss Vision, Inc. v. Refac Holdings, Inc.*, 2017 WL 3635568, at *1 (Del. Ch. Aug. 24, 2017); *see also, e.g.*, *Agspring, LLC v. NGP X US Holdings, L.P.*, 2022 WL 170068, at *3–4 (Del. Ch. Jan. 19, 2022).

Under the FAA, a court must grant a timely application for an order confirming an arbitration award "unless the award is vacated, modified, or corrected as prescribed in'" Sections 10 and 11 of the FAA. *MHP Mgmt., LLC v. DTR MHP Mgmt., LLC*, 2022 WL 2208900, at *3 (Del. Ch. June 21, 2022) (quoting 9 U.S.C. § 9). Where, as here, the underlying award is challenged on a manifest-disregard-of-the-law theory under Section 10(a)(4) of the FAA, vacatur is appropriate only if the arbitrator was "fully aware of the existence of a clearly defined governing legal principle but refused to apply it, in effect, ignoring it." *SPX Corp.*, 94 A.3d at 750 (internal quotation marks omitted). "To meet this standard, the evidence must establish that the arbitrator (1) knew of the relevant legal principle, (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." *Id.*

Where, as here, the arbitrator's decision turns on the interpretation of a contract, 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*, 2022 WL 2208900, at *5 (quoting *Oxford*, 569 U.S. at 569). "[C]onvincing a court of an arbitrator's error—even his grave error—is not enough." *Oxford*, 569 U.S. at 572; *SPX Corp.*, 94 A.3d at 751 ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced that he committed serious error does not suffice to overturn his decision." (internal quotation marks omitted)).

C. Merits of Argument.

Somewhat incoherently, Westmont asserts that the Tribunal interpreted the Agreement to prohibit the methodology the Tribunal itself then used to determine the FMV of WRRH—evaluating the parties' positions on the key valuation drivers and adopting those the Tribunal found most reliable and persuasive. Westmont does not argue that the Agreement prohibited this methodology. Nor could it, as the Agreement states simply that the third Qualified Appraiser—which the Tribunal served as pursuant to an agreement the parties reached during the arbitration (A0211–12)—"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." (A0097.) The Agreement does not specify a particular valuation methodology.

As the Court of Chancery correctly held, Westmont's argument fails to show even simple error. (Op. at 17 ("Even if I looked beyond the fact that the Tribunal interpreted the LLC Agreement's terms, I could not conclude that the valuation runs afoul of a governing contractual provision. Nothing in the LLC Agreement specifies a particular valuation methodology."). And it comes nowhere close to demonstrating that the Tribunal, in determining the FMV of WRRH, failed even arguably to interpret the Agreement, as is required to establish manifest disregard of the law.

1. *The Court of Chancery correctly determined that the Tribunal interpreted the Agreement.*

Westmont repeatedly concedes that the Tribunal in fact interpreted the Agreement's language regarding the third Qualified Appraiser's role. (*See, e.g.*, Br. at 3 (referencing the "[Tribunal's] own interpretation of the third Qualified Appraiser's role"), 7–8 ("The Tribunal interpreted its obligation as the third Qualified Appraiser under the Agreement as follows."), 19 ("[T]he deference required here was for the court to resist second-guessing the Tribunal's ***interpretation*** of the Agreement." (emphasis in original).) As the Court of Chancery explained, the Tribunal interpreted this language as follows:

> The Agreement requires the Tribunal to determine the FMV of assets in which WRRH LLC has an ownership interest through Red Roof Inns, Inc. In its capacity as the third Qualified Appraiser, the Tribunal has to undertake a valuation of several components . . . .

> Exhibit A of the Agreement further provides that 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." Therefore, acting as the third Qualified Appraiser, the Tribunal must arrive at an FMV determination that is within the appraisal determinations of FTI ([Kingfish's] appraiser) and EY ([Westmont's] appraiser).

(Op. at 16 (quoting A0185–86, ¶¶ 255–56).)

The fact that the Tribunal interpreted the Agreement's language regarding the role of the third Qualified Appraiser is fatal to Westmont's challenge. *See, e.g.*, *SPX Corp.*, 94 A.3d at 751 ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced that he committed serious error does not suffice to overturn his decision."); *MHP*, 2022 WL 2208900, at *5 ("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.'" (citing *Oxford*, 569 U.S. at 569)); *Hoolahan v. IBC Advanced Alloys Corp.*, 947 F.3d 101, 118 (1st Cir. 2020) (explaining that "[e]ven if . . . the arbitrator did not *correctly* interpret the Agreement, he nonetheless interpreted it[, a]nd that is enough" (emphasis in original)).

2. *The Tribunal did not render an Award inconsistent with its interpretation of its contractual mandate.*

Having conceded that the Tribunal interpreted the Agreement, Westmont argues that vacatur is nevertheless warranted because the Tribunal's interpretation purportedly prescribed some specific process that the Tribunal then failed to follow.

But Westmont's argument boils down to the erroneous assertion that, by stating it was to "undertake a valuation" and "determine the FMV," the Tribunal somehow triggered a requirement to use some specific methodology it then failed to employ. But nothing about the terms "undertake a valuation" and "determine the FMV" indicates that the Tribunal was prohibited from doing so through an assessment of the relative merits of each party's position, as well as the factual and expert evidence therefor, and the adoption of the positions it found most reliable and persuasive. And the Tribunal's use of this methodology makes clear that the Tribunal viewed it to be permissible under the Agreement—and did so correctly, given the Agreement's simple instruction that the third Qualified Appraiser "fairly and impartially determine the FMV of the Company," (A0097.)[4]

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[4] While focusing on the argument that the Tribunal violated its own interpretation of the Agreement, as opposed to the Agreement itself, Westmont, confusingly, seems also to contend that the Tribunal somehow ignored the plain language of the Agreement. (*See* Br. 27–28.) Setting aside the fact that, as discussed above, the Tribunal did no such thing, the cases on which Westmont relies are entirely off-point. *Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers (PACE) Local 7-0159*, 309 F.3d 1075, 1084 (8th Cir. 2022) (finding award failed to draw its essence from the parties' agreement where it did not discuss the relevant

In determining the FMV of WRRH through an assessment of the relative merits of each side's valuation analysis and evidence, the Tribunal followed the plain meaning of the term "undertake a valuation." As even Westmont acknowledges, "valuation" is defined to mean simply "the act or process of valuing." (Br. 19 (citing https://www.merriamwebster.com/dictionary/valuation).)[5] And in stating that it

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contractual language *at all*); *Transcontinental Gas Pipe Line Co. LLC v. Permanent Easement for 2.59 Acres*, 834 F. App'x 752, 761 (3d Cir. 2020) (acknowledged that proving entitlement to relief under § 10(a)(4) is a "terribly difficult task" and finding entitlement met only because there was "no discernable agreement" to arbitrate the dispute); *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) (arbitrator altogether ignored contractual language that gave hospital the "final," "exclusive," and "unilateral" right to change vacation schedules, when he ruled that hospital could not deny vacation schedules); *Muskegon Cent. Dispatch 911 v. Tiburon, Inc.*, 462 F. App'x 517, 525 (6th Cir. 2012) (finding, under Michigan law, that arbitrator exceeded powers where he ruled that one party alone had burden notwithstanding contractual provision stating that both "parties" had the burden); *United Food & Commercial Workers Union, Local 1119, AFL-CIO v. United Markets, Inc.*, 784 F.2d 1413, 1415–16 (9th Cir. 1986) (vacating arbitral award where arbitrator ignored plain language of agreement).

[5] Although Westmont argues that "the act or process of valuing" is "synonymous" with the "appraisal of property" (Br. 19), Merriam-Webster states that the "appraisal of property" is just one specific type of valuation—in other words, not all "valuations" are "appraisals" of property. MERRIAM-WEBSTER.COM DICTIONARY, "valuation," https://www.merriamwebster.com/dictionary/valuation (accessed October 23, 2023) ("specifically: appraisal of property"). In any event, even the term "appraisal" does not specify compliance with some particular method. Merriam-Webster defines the term as simply "an act or instance of appraising something or someone" and "especially: a valuation of property by the estimate of an authorized person." MERRIAM-WEBSTER.COM DICTIONARY, "appraisal,"

would "determine" the "FMV of the Company," the Tribunal did not say that it would do so using some specific method. For these reasons, the cases Westmont cites for its position that vacatur is appropriate where arbitrators do not follow their interpretation of their contractual mandate (*see* Br. 29) are inapplicable. In any event, they are distinguishable. *Boise Cascade*, 309 F.3d at 1084 (affirming vacatur where arbitrator did not interpret relevant contractual provision and instead balanced the equities); *Newark Morning Ledger Co. v. Newark Typographical Union Loc. 103*, 797 F.2d 162, 167 & n.6 (3d Cir. 1986) ("The Arbitrator . . . did not follow out the logic of his factual finding to the legal conclusion mandated by the collective bargaining agreement."); *Ruggiero v. State Farm Mut. Auto Ins. Co.*, 1999 WL 499459, at *7 (Del. Ch. June 23, 1999) (vacating award because arbitrators exceeded their authority by entertaining post-hearing motion after rendering final decision resolving all outstanding issues).

Further, as made clear in *Roadway Package System, Inc. v. Kayser*—a case on which Westmont relies[6]—"a reviewing court should presume that an arbitrator

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https://www.merriamwebster.com/dictionary/appraisal (accessed October 23, 2023).

[6] Westmont incorrectly suggests that *Roadway* is analogous to the case here. In *Roadway*, the court affirmed vacatur of the award because the arbitrator had ruled on an issue that was not before him (*i.e.*, whether the underlying events reflected a lack of due process in connection with the termination of a subcontractor) rather than the question that was before him (*i.e.*, whether the subcontractor's conduct had violated the operative agreement). 257 F.3d at 289 ("[T]he intrinsic fairness of [the

acted within the scope of his or her authority," and "this presumption may not be rebutted by an ambiguity in a written opinion." 257 F.3d 287, 301 (3d Cir. 2001); *see also, e.g.*, *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Secs., Inc.*, 953 A.2d 726, 732–33 (Del. Ch. 2008) (same). Thus, even to the extent the Tribunal's written interpretation of its contractual mandate was ambiguous (it was not), that ambiguity could not rebut the presumption that the Tribunal acted within the scope of its authority.

3. *Westmont's continued reliance on the Delaware shareholder appraisal statute is unavailing.*

Although Westmont argued to the Court of Chancery that case law interpreting Delaware's shareholder appraisal statute was "controlling" and "establishe[d] the appropriate standard" (A0506), Westmont now concedes that the appraisal statute and the case law interpreting it do not apply and the Tribunal thus was not required "to apply particular valuation methodologies contained in Delaware's appraisal statute." (Br. 31 n.7.) But in the same breath Westmont argues that Delaware's statutory appraisal case law informs "what the plain meaning of the terms 'valuation' or 'appraisal' are intended to connote" (*id.*), and Westmont

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contractor's termination] procedures was not before the arbitrator—he was empowered to decide only whether the [subcontractor's] termination was within the terms of the [agreement].").

repeatedly contends that the Tribunal *was* required to "meet th[e] standard" for conducting a valuation under the statute (*id.* at 24–25).

In any event, as the Court of Chancery correctly recognized, Delaware's statutory-appraisal case law does not apply to the valuation procedure set forth in the Agreement: "Nothing in the [WRRH] LLC Agreement specifies a particular valuation methodology" or "require[s] that the third Qualified Appraiser follow something akin to the court's statutory appraisal procedure." (Op. 17 (citing *Moore Bus. Forms Inc. v. Cordant Hldgs. Corp.*, 1995 WL 662685, at *7–8 (Del. Ch. Nov. 2, 1995) (rejecting a party's challenge to a contractual valuation process—specifically, party's effort to impose a requirement of the Section 262 process—where the party did not "cite any . . . provision of the [a]greement that creates a contractual duty to conduct the valuation inquiry in a particular manner")).) Although Westmont asserts that the "Tribunal . . . made th[e] determination" to conduct the valuation in a manner akin to that required by Delaware's statutory appraisal statute (Op. 30–31), the Tribunal did no such thing, and Westmont cites nothing in the Tribunal's commitment to "undertake a valuation" that incorporates the Delaware appraisal statute process (or any another specific process). Nor does Westmont cite case law outside of the Delaware statutory appraisal context requiring any particular valuation methodology where the parties' contract does not so specify.

But even if the statutory appraisal process were, for the sake of argument, at all instructive, Westmont is simply incorrect that the Tribunal could not adopt the valuation of a party expert. As this Court explained in *M.G. Bancorporation, Inc. v. Le Beau*, "it is entirely proper for the Court of Chancery to adopt any one expert's model, methodology, and mathematical calculations, *in toto*, if that valuation is supported by the credible evidence and withstands critical judicial analysis on the record." 737 A.2d 513, 526 (Del. 1999); *see also, e.g.*, *Kruse v. Synapse Wireless, Inc.*, 2020 WL 3969386, at *20 (Del. Ch. July 14, 2020) (adopting party expert's valuation and explaining that "[w]hile not perfect, [the expert's] valuation is far more credible than any of the valuations proffered by [the other party's expert], and far superior to any valuation [the court] might endeavor to undertake on [its] own"); *Manichaean Capital, LLC v. SourceHOV Holdings, Inc.*, 2020 WL 496606, at *2 (Del. Ch. Jan. 30, 2020) ("I am satisfied that I need not undertake my own appraisal. . . . In other words, I have more confidence in Petitioners' presentation than I have in my own ability to translate any doubts I may have about it into a more accurate DCF valuation."), *reconsideration denied*, 2020 WL 1166067 (Del. Ch. Mar. 11, 2020), *judgment entered*, 2020 WL 1511189 (Del. Ch. Mar. 26, 2020), *aff'd*, 246 A.3d 139 (Del. 2021). Westmont's reliance on *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357 (Del. 1997) for the proposition that "an adjudicative body assuming the role of appraiser" cannot "decid[e] which of the

parties' competing valuation proposals it prefers" is off base. (Br. 21.) The Court in *Gonsalves* found fault not with a decision agreeing with and adopting an expert's valuation, but with a pre-trial, on-the-record admission by the then-Chancellor that he intended to "'accept one expert or the other hook, line and sinker.'" 701 A.2d at 361; *see also, e.g.*, *Manichaean Capital*, 2020 WL 496606, at *17 ("The Supreme Court[, in *Gonsalves*,] was particularly concerned that the trial court stated before the trial (likely in jest) that it intended to listen to the evidence, pick an expert and call it a day.").

Although Westmont argues that, pursuant to Section 262, the Court of Chancery must "'independently determine the value of the shares that are the subject of the appraisal action'" (Br. 20 (quoting *Gonsalves*, 701 A.2d at 361)), that is exactly what the Tribunal did here. Contrary to Westmont's assertion that the Tribunal uncritically accepted FTI's valuation, the Tribunal analyzed, in detail, the key factors driving the valuation determination before deciding that FTI's valuation of the Red Roof franchising business was more persuasive and reliable, and thus adopting it. (A0186–92 ¶¶ 257–71.)

For example, in addressing whether the likely buyer in a hypothetical sale of Red Roof would be a strategic or financial buyer, the Tribunal noted the on-the-record admission by Westmont's experts at Ernst & Young ("EY") that the most likely buyer would be a "strategic buyer," the testimony on the issue from both sides'

fact and expert witnesses, the logic demonstrating the likelihood of a strategic buyer, and the actual indications of interest WRRH had received from several strategic buyers during the relevant period. (*See* A0186–88 ¶¶ 258–63.) Only after considering this evidence did the Tribunal independently conclude that "the most likely buyer would be a strategic buyer" and explain the bases for its conclusion. (A0188 ¶ 263.)

Similarly, in addressing the proper method of incorporating into the valuation a reasonable assumption as to a strategic buyer's cost savings, the Tribunal noted the logic and persuasiveness of FTI's position:

> FTI argues that the "basic conceptual error in EY's approach is that the value of the company is entirely a product of its pre-acquisition cost structure[,]" but a strategic buyer would not care about superfluous employees before acquisition: "Pre-synergy EBITDA—on which EY's valuation entirely relies—is a product of the target's cost structure, but a buyer would assume its own post-acquisition cost structure when valuing the company as there would be no reason to care what the target's costs are when the buyer knows it could cut them.

(A0188–89 ¶ 264.) The Tribunal further noted that, in attempting to rebut FTI's point by purporting to show that Red Roof's cost structure was in line with those of potential strategic acquirers, EY relied on a false comparison, excluding pass-through revenue from its calculation of Red Roof's profit margin (thereby inflating the figure) but including pass-through revenue when calculating the margins of the purportedly comparable public companies (thereby deflating the figure). (A0189–

190 ¶ 266.) The Tribunal also noted FTI's evidence—and EY's concession—that an accurate comparison shows that Red Roof was half as profitable as the comparators on which EY relied. (*Id.*) Only then—after "consider[ing] the arguments of both parties and examin[ing] comparable examples of cost synergies" (including those presented in a 2019 Morgan Stanley Report)—did the Tribunal adopt FTI's approach on the issue. (*Id.* ¶¶ 267–68.)

With respect to certain other projections and assumptions, the Tribunal similarly "considered the evidence of both parties." (A0191 ¶ 270.) The Tribunal found that "FTI's valuation approach" was "the more suitable analysis" because it was based on a "post-acquisition, bottom-up approach based on publicly available information." (*Id.*) The Tribunal also found "as a matter of fact that the assumptions underlying FTI's analysis are more reasonable than those underlying EY's analysis." (*Id.*) Based on this reasoning and the Tribunal's consideration of the parties' evidence, the Court of Chancery appropriately could not conclude that "'the record reveals no support whatsoever' for the Tribunal decision such that it is worthy of vacatur." (Op. 18 (quoting *Bebe Med. Ctr., Inc. v. InSight Health Services Corp.*, 751 A.2d 426, 441 (Del. Ch. 1999).)

Although Westmont may not like the Tribunal's valuation determinations and may wish the Tribunal gave an even more detailed justification for its conclusions, nothing more was required under the Tribunal's interpretation of the Agreement (or,

for that matter, under the Agreement or under the inapplicable Delaware statutory appraisal case law). As the Award itself makes clear, the Tribunal "undert[ook] a valuation" of the Red Roof franchising business and "determine[d] the Fair Market Value" of the same.[7]

[7] Although Westmont challenges only the Tribunal's valuation of the Red Roof franchising business, the Tribunal, in determining the FMV of WRRH, valued several other assets held by WRRH as well, including, among other things, shares in a Canadian Real Estate Investment Trust—with respect to which the Tribunal adopted Westmont's valuation. (A0194–97 ¶¶ 278–87.) That the Tribunal did not agree, in full, with Kingfish's position further demonstrates that the Tribunal "fairly and impartially determine[d] the FMV of the Company" and did not uncritically accept Kingfish's and FTI's valuation without analysis and due consideration.

II. THE COURT OF CHANCERY PROPERLY REJECTED WESTMONT'S CHALLENGE TO THE TRIBUNAL'S AWARD OF PRE- AND POST-JUDGMENT INTEREST.

A. Question Presented.

Whether the Court of Chancery correctly rejected Westmont's challenge to the Tribunal's assessment of pre- and post-judgment interest where, in light of Westmont's breach and the resulting arbitration, the Tribunal looked to the Agreement's dispute-resolutions provisions, the AAA rules, and Delaware law in determining that an award of interest was appropriate. (Preserved at A0628–29, 641–43; *see also* Op. at 18–20.)

B. Scope of Review.

See Section I.B, *supra*.

C. Merits of Argument.

Westmont attempts to take advantage of the staggered, interest-free payment period to which it may have been entitled had it not flouted the Appraisal Process and breached its contractual obligations thereunder. (Br. 33–34.) But as a result of Westmont's breach and the parties' dispute, the Tribunal looked to the Agreement's dispute-resolution provisions in Schedule 10.14, as well as the AAA rules and Delaware law they incorporate, to determine the appropriate relief. (A0200–01 ¶¶ 299–306 (explaining that "Rule 47 of the AAA Commercial Arbitration Rules" and "Section 2301(a) of the Delaware Code," both applicable under the Agreement's dispute resolution provisions, (A0084, 0108 § 10.14 & Schedule 10.14), expressly

permit an award of interest).) Westmont cites nothing—let alone the type of clearly established governing principle of law that could give rise to a finding of manifest disregard—supporting its contention that the Tribunal's interpretation of the Agreement, and the arbitral rules and substantive law it incorporates, to permit interest in this context was incorrect. As the Court of Chancery correctly held, "[t]he Tribunal's decision flouts neither governing principles of law nor the operative contract." (Op. 20.)

The case law on which Westmont relies does not support its position. In its principal case, *Towerhill Wealth Mgmt. LLC v. Bander Family P'ship, LP*, 2010 WL 2284943 (Del. Ch. June 4, 2010), the court awarded interest notwithstanding a prohibition in the contract providing that it would not have been available in the normal course. *Id.* at *8 ("Towerhill has not shown that the Operating Agreements in any way limit the payment of interest as a remedy."). And in *Philadelphia Housing Authority v. CedarCrestone, Inc.*, the court held enforceable a contract's express prohibition on an award of interest under state law in the event of breach. 562 F. Supp. 2d 653, 658–60 (E.D. Pa. 2008) ("Th[e contract's] language leaves no doubt that the parties intended to preclude the payment of interest for payments not timely made under the contract."). Here, the Agreement provided only that in the normal course, upon the satisfaction of certain contingencies (addressed below), interest would not accrue during the payment period. (A0085–86 § 10.18(b)(iii).)

Nothing in the Agreement suggests the parties, like those in *Philadelphia Housing Authority*, agreed to waive the right to pre- or post-judgment interest in the event of breach.

Moreover, as Kingfish explained to the Tribunal and the court below (A1238 n.8; *see also* A0641–42), Westmont's argument ignores the Agreement's provision making clear that the staggered, interest-free payment period was available only if the unpaid balance was "secured by a mutually reasonably acceptable form of security agreement covering the First Kingfish Interests." (A0085–86 § 10.18(b)(iii).) To the extent Westmont contends, as it did before the Court of Chancery (A0509 n.8), that this pre-condition to the interest-free payment period is irrelevant because the security was not yet due, this misses the point. Kingfish is not arguing that the interest-free payment period was unavailable because the security had not yet been provided. It is arguing that, given Westmont's refusal to abide by its contractual obligations and repeated pattern of going to extreme lengths to obstruct Kingfish's contractual rights, there was no form of security agreement that could provide Kingfish with sufficient protection against Westmont's nonpayment. A "mutually reasonably acceptable form of security agreement" thus was an impossibility.

Because the Agreement's dispute-resolution provisions authorized the Tribunal to award interest in the event of a breach and ensuing arbitration—and, in

any event, because the interest-free payment period is unavailable absent mutually acceptable security—Westmont's contention that the award of interest constitutes a "forfeiture" is incorrect. And the notion that the award of interest unfairly punishes Westmont is absurd. In awarding pre-judgment interest, the Tribunal rightfully avoided unfairly punishing Kingfish and providing a windfall to Westmont, the breaching party. As the Court of Chancery has explained:

> A central purpose of pre-judgment interest is to ensure that a plaintiff to whom payment was owed does not suffer injury by the defendant's unjustified delay. By requiring the defendant to pay a fair rate of interest during the period of unjustifiable delay, pre-judgment interest helps make the plaintiff more whole, while depriving the defendant of a windfall.

Citrin v. Int'l Airport Ctrs. LLC, 922 A.2d 1164, 1167 (Del. Ch. 2006) (internal quotation marks omitted).

Westmont's contention that the Tribunal's award of interest conflicts with its finding that "'no party has suffered any prejudice by the belated submission of a valuation report by the other party," (Br. 37 (citing A0184 ¶ 251)), is incorrect and misleading. In finding a lack of prejudice due to the "belated submission of a valuation report by the other party," the Tribunal was referring to a separate issue, *i.e.*, whether each party had a "full and fair opportunity to comment on and be heard on the valuation reports." (A0184 ¶ 250.) Indeed, the Tribunal's finding appeared only in the section of the Award addressing the parties' arguments that each side had

waived the right to submit a valuation report. (A0183 ¶ 247.) The Tribunal never determined that Kingfish would suffer no prejudice were Kingfish denied pre-judgment interest during the long period when Westmont refused to comply with its contractual obligations under Section 10.18 and stymied the Appraisal Process. To the contrary, the Tribunal specifically noted the "significant passage of time since [Kingfish] exercised its right to the First Put Option in 2019" and found that, as a result, pre-judgment interest was appropriate under Rule 47 of the AAA Commercial Arbitration Rules and Delaware law. (A0348–49 ¶¶ 299–304.)

Westmont's challenge to the start date of the Tribunal's interest award, on the grounds that the payment amount had not yet been determined, should also be rejected. Westmont ignores the fact that the absence of a determination regarding the payment amount was a result of its own willful refusal to engage in the contractually required valuation process, which, as Westmont does not dispute, breached the Agreement. When the breaching party's conduct is the reason the amount due had not yet been determined, interest appropriately runs prior to the date of the determination. *See, e.g.*, *Citrin*, 922 A.2d at 1167–68 ("International Airport cannot rely on Citrin's failure to specify the amount of reimbursement he sought as a defense to pre-judgment interest because its own actions prevented Citrin from doing so."); *Fillip v. Centerstone Linen Servs., LLC*, 2013 WL 6671663, at *14 (Del. Ch. Dec. 3, 2013), *as corrected* (Dec. 11, 2013); *Murphy Marine Servs. of Del., Inc.*

v. GT USA Wilmington, LLC, 2022 WL 4296495, at *1, 11–13, 24 (Del. Ch. Sept. 19, 2022) (holding that, where breaching party thwarted completion of valuation process for anticipated corporate acquisition, pre-judgment interest began to accrue at time of breach notwithstanding that valuation pursuant to which stock-purchase price would be determined had not yet been completed); *cf. T.B. Cartmell Paint & Glass Co. v. Cartmell*, 186 A. 897, 903 (Del. Super. 1936) ("It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned." (internal quotation marks omitted)). Otherwise, parties like Westmont would be rewarded for deliberately obstructing determination of the payment amount.

Finally, even if the Tribunal had erred in awarding interest or setting the accrual date, this would not provide grounds for vacatur. The Tribunal clearly interpreted the Agreement's dispute-resolution provisions to authorize the award of interest it rendered. (A0265–67, 348–49 ¶¶ 14–19, 299–306.). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced that he committed serious error does not suffice to overturn his decision." *SPX Corp.*, 94 A.3d at 751; *see also, e.g.*, *MHP*, 2022 WL 2208900, at *5 ("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.'" (citing *Oxford*, 569 U.S. at 569)).

III. THE COURT OF CHANCERY CORRECTLY REJECTED WESTMONT'S CHALLENGE TO THE TRIBUNAL'S AWARD OF ARBITRAL COSTS.

A. Question Presented.

Whether the Court of Chancery correctly rejected Westmont's challenge to the Tribunal's award of arbitral costs where the Agreement expressly authorized such an award. (Preserved at A0628–29, 643–44; *see also* Op. 20–21.)

B. Scope of Review.

See Section I.B, *supra*.

C. Merits of Argument.

In challenging the Tribunal's award of arbitral costs,[8] Westmont, as it does with respect to the award of interest discussed above, seeks to take advantage of a provision that may have applied had Westmont complied with its First Put Option obligations instead of flouting them. The Agreement does state that, in the normal course, the parties would equally share the fees and expenses of a third Qualified Appraiser. (A0097.) But Westmont cites no provision of the Agreement or legal principle suggesting that, in the event of Westmont's breach of the Agreement and the parties' resulting dispute, this language trumps the Agreement's express grant of

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[8] Westmont incorrectly asserts, as it did before the Court of Chancery, that the Tribunal ordered it to pay "100% of the Tribunal's recoverable fees and costs." (Br. 39; *see also id.* at 4; A0512.) As stated expressly in the Award, the Tribunal ordered Westmont to pay "75% of [Kingfish's share of] the . . . expenses of the arbitration." (A0351 ¶¶ 314–15.)

arbitral authority to shift fees and costs. (A0421 Schedule 10.14(j) ("If deemed appropriate by the Arbitrator(s), the non-prevailing party shall pay any administrative fee, any compensation of the Arbitrators and any expense of any witnesses or proof produced at the direct request of the Arbitrator(s)."); *id.* at Schedule 10.14(k) ("If deemed appropriate by the Arbitrator(s), the prevailing party shall be reimbursed for all of its fees and expenses (including fees and expenses of counsel and accountants, and travel, lodging, and meal expenses) incurred in connection with such Dispute and/or arbitration.").) The fact that the parties would have shared the costs of a third Qualified Appraiser had Westmont not flouted its contractual obligations is irrelevant. Having forced the parties into costly and time-consuming arbitration, Westmont must bear the consequences.

And, as with Westmont's other arguments, even setting aside the absence of error in the Tribunal's Award, Westmont's challenge fails, as the Tribunal clearly interpreted the Agreement's dispute-resolution provisions, which expressly authorize the shifting of costs, to permit the award. (A0350 ¶ 307 (explaining that "Schedule 10.14(a) provides in subsections . . . (j) and (k) that the Arbitrators may, if they deem it appropriate, require the non-prevailing party to pay administrative fees, compensation of the arbitrators, legal fees, and other expenses incurred in connection with the dispute and/or arbitration.").) Disagreement with this

interpretation does not provide grounds for vacatur. *See, e.g.*, *Oxford*, 569 U.S. at 569; *SPX Corp.*, 94 A.3d at 751; *MHP*, 2022 WL 2208900, at *5.

IV. THE COURT OF CHANCERY CORRECTLY REJECTED WESTMONT'S TAX-RELATED CHALLENGE TO THE AWARD.

A. Question Presented.

Whether the Court of Chancery correctly found no manifest disregard of the law in the Tribunal's decision not to discount its valuation for a purported tax liability that Westmont asserted, without evidence, would have arisen in the sale of WRRH's assets. (Preserved at A0629, 644–48; *see also* Op. at 21–22.)

B. Scope of Review.

See Section I.B, *supra*.

C. Merits of Argument.

The Court of Chancery correctly found no manifest disregard of the law in the Tribunal's decision not to discount for a purported tax liability that Westmont asserts would have arisen in the sale of WRRH's assets. As the Court of Chancery explained, Westmont's challenge boils down to a request for the type of "second-guess[ing]," "reworking," and weighing of evidence that courts are not permitted to engage in on a vacatur motion. (Op. 21–22; *see also* Br. 27 (conceding that the court must "resist second-guessing").)

At its core, Westmont's argument is dependent on legal assumptions unsupported by the Agreement (or the Tribunal's interpretation of the same) and factual assumptions unsupported by Westmont:

First, Westmont attempts to distort the Agreement's statement that the valuation of the First Put Option is derived from a determination of the FMV of the Company, a defined term that assumes the "sale of the Company's tangible and intangible assets." (A0058; A0097, Ex. A; A0086 § 10.18(b)(i).) Westmont contends that the Tribunal—in interpreting the Agreement to require a determination of "the FMV of assets in which WRRH LLC has an ownership interest through Red Roof Inns, Inc.'"—necessarily held that the Agreement requires a valuation of Red Roof Inns, Inc.'s assets, not WRRH's stock in Red Roof Inns, Inc. (Br. 42–43 (citing A0185 ¶ 255 (emphasis omitted)).) This argument presupposes incorrectly that stocks are not assets. *Ark. Best. Corp. v. Comm'r of Internal Revenue*, 485 U.S. 212, 222–23 (1988) (holding that, although the value of a stock is the present discounted value of the company's future profits, "stock is most naturally viewed as a[n] . . . asset"); *Lattera v. C.I.R.*, 437 F.3d 399, 406 (3d Cir. 2006) (finding that stocks are, in fact, assets). Indeed, Westmont's brief makes the incorrect and misleading assertion that "WRRH has no non-cash assets other than those held by Red Roof Inns, Inc." (Br. 42.) WRRH's primary asset is its stock in Red Roof Inns, Inc. Westmont's challenge, once again, is based on a misreading of the Tribunal's interpretation of the Agreement, intended to manufacture inconsistency between that interpretation and the Tribunal's valuation determination when there is none.

Second, Westmont's factual assertion that a sale of WRRH's assets would require an asset sale at the Red Roof Inns, Inc. level, as opposed to a sale of WRRH's stock in Red Roof Inns, Inc. is based on no more than counsel's say-so in the post-hearing brief Westmont submitted at the end of the arbitration. In connection with the arbitration, Westmont's experts at EY submitted a valuation that did not include any taxation discount. (*See generally* A0767–814, EY Report.) Subsequently, and just a few weeks before the valuation hearing, Westmont submitted—in lieu of an expert rebuttal report—a statement from Westmont Managing Director and fact witness Mohamed Thowfeek that included the following single conclusory statement: "[i]n a final liquidation of the Company, income taxes of 25.74% on the realized gain would be payable prior to any distribution to the Members." (A0855.) Because the Agreement defines "Company" as WRRH (A0054), Mr. Thowfeek appeared to be saying that WRRH, before distributing proceeds to its Members, would have to pay tax on any gain from an actual sale of its assets. But as Kingfish representative and witness Michael Klingher explained to the Tribunal, Mr. Thowfeek's assertion was wrong because—as even Westmont now acknowledges (Br. 44)—WRRH, an LLC, is a "pass-through entity" for which there would be "no taxes due" upon its liquidation.[9] (A0958–59, 313:11–314:6.)

[9] For federal income tax purposes, WRRH, as an LLC with at least two members, is classified as a partnership, and pursuant to Section 701 of the Internal Revenue Code,

After Kingfish demonstrated the falsity of Mr. Thowfeek's conclusory statement that WRRH would, in a liquidation, pay tax on gains, Westmont changed course in its post-hearing brief, asserting for the first time—and only through counsel—that the tax burden actually would be borne by WRRH-subsidiary Red Roof Inns, Inc. (A1268–69.) Westmont based this contention on counsel's unsupported factual assertion that a sale of WRRH's assets would require an asset sale at the Red Roof Inns, Inc. level, as opposed to a sale of WRRH's stock in the entity. (*Id.*) But Westmont recognized that whether the contemplated transaction would take the form of an asset sale at the Red Roof Inns, Inc. level or a stock sale at the WRRH level was a factual question, and sought to cover itself through counsel's assertion, again without support, that "[e]ven if the ultimate structure of the hypothetical transaction took the form of a" stock sale "it would be unrealistic to assume that a buyer would undertake to pay any embedded tax liability, especially in light of the very low tax basis of the assets of Red Roof Inns, Inc." (A1269 ¶¶ 95–96.) In other words, and even setting aside the factual inaccuracy of counsel's

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any tax burden would be borne by its individual members. IRS Publication 3402 (03/2020), *available at* https://www.irs.gov/publications/p3402 ("An LLC with at least two members is classified as a partnership for federal income tax purposes."); 26 U.S.C. § 701 ("A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.").

assertion,[10] Westmont's eleventh-hour effort to wipe out approximately 25% of the amount due to Kingfish rested entirely on counsel's say-so with respect to an empirical issue. Kingfish explained this in its post-hearing reply brief. (A1282.) Westmont never addressed why it would be realistic to assume a seller would take a discount for a speculative future taxation event.[11]

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[10] As Kingfish explained to the Tribunal, Westmont's assertion that a stock sale would be unlikely is meritless: "[A]cquisitions in the hospitality sector generally are of the seller's stock in the underlying C-Corp." (A1282.) A stock sale is the default structure. *See* Samuel C. Thompson, Jr., *Business Taxation Deskbook: Corporations, Partnerships, Subchapter S, and International*, § 10:6.2, Basic Tax Treatment to the Parties (2022) ("[A]n acquisition of a nonsubsidiary target corporation with appreciated assets generally is structured as a stock acquisition . . . , thereby avoiding the corporate level tax.").

[11] In a footnote, Westmont cites two cases, both addressing valuations for gift tax purposes, from which it argues that "tax liability adjustments" are warranted "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 the sale." (Br. 43 n.8 (citing *Est. of Welch v. Comm'r*, 2000 WL 263309, at *4 (6th Cir. Mar. 1, 2000) & *Eisenberg v. Comm'r*, 155 F.3d 50, 57 (2d Cir. 1998)).) As an initial matter, Westmont never made this argument to the Tribunal and, therefore, cannot demonstrate that the Tribunal "knew of the relevant legal principle," much less "appreciated that the principle controlled the outcome of the disputed issue" or "willfully flouted the governing law by refusing to apply it." *SPX Corp.*, 94 A.3d at 750 (citation and internal quotation marks omitted). But even if Westmont had made the argument before the Tribunal, it would not move the needle. As courts have recognized post-*Eisenberg*, valuations should not deduct taxes where—notwithstanding the hypothetical liquidation of stock for valuation purposes—a buyer would not actually liquidate the company in the foreseeable future and instead defer the recognition of the gain indefinitely. *See, e.g.*, *Floyd v. Floyd*, 198 F.3d 237, 1999 WL 812315, at *3 (4th Cir. 1999) (citing *Eisenberg*, 155 F.3d at 56 n.14)); *Bogosian v. Woloohojian*, 158 F.3d 1, 6 (1st Cir. 1998) (no potential capital gains taxes should be deducted from the valuation of real property "if there were no plans to sell any of the properties at any time in the foreseeable future, because none of

As the Court of Chancery found, the Tribunal considered the parties' positions and evidence, noted that Westmont "did not offer any expert evidence on th[is] issue" (Op. 22 (quoting A0198–99 ¶ 293)),[12] and found that Kingfish's explanation was "more persuasive" on the issue of Westmont's proposed taxation discount. (*Id.* at 21–22 (quoting A0198–99 ¶ 293).) The Tribunal was required to do nothing further and thus did not act in manifest disregard of the law. *See State Farm v. Clark*, 1999 WL 669366, at *2 (Del. Ch. Aug. 18, 1999) (noting the court does "not sit as an appellate authority reviewing arbitrators' independent view of application of the law to the facts").

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the liabilities would be incurred unless the properties were sold"); *Guge v. Kassel Enters., Inc.*, 962 N.W.2d 764, 773 (Iowa 2021), *reh'g denied* (Aug. 25, 2021) ("The weight of authority on the issue of tax deductions in fair-value determinations angles sharply" in the direction of not "discount[ing] for tax consequences" absent an actual, imminent sale unrelated to the transaction triggering the valuation).

[12] Perhaps to distract from the lack of merit to its argument, Westmont baselessly impugns the Tribunal's analysis, stating that the Tribunal "attempt[ed] to shift blame to Westmont for not providing an expert witness to educate the Tribunal on . . . basic principles of tax law." (Br. 45.) The Tribunal did no such thing. In citing Westmont's failure to introduce expert evidence, the Tribunal was noting the lack of evidentiary support for Westmont's non-legal contention regarding the nature of the hypothetical sale, not stating that it needed to be "educate[d]" on principles of tax law. (A0198–99 ¶¶ 292–93.)

CONCLUSION

For the foregoing reasons, the Court should reject Westmont's appeal.

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