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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

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Much of the Answering Brief of Appellee ("Kingfish") is dedicated to a distortion of Westmont's positions in the hope that they may be easier to rebut as a result. Kingfish attempts to substitute *its* version of Westmont's arguments for those set forth in Westmont's Opening Brief, much as Kingfish attempts to substitute *its* interpretation of the parties' Agreement for the Tribunal's own stated interpretation – to which Westmont merely asks the Tribunal be held. Westmont's arguments as to why vacatur is warranted in this case are clear, and Westmont will reiterate them here only to the extent necessary to respond to Kingfish's obfuscations.

ARGUMENT

I. THIS COURT CAN AND SHOULD VACATE THE TRIBUNAL'S AWARD FOR FAILING TO CONDUCT THE INDEPENDENT VALUATION OF THE FRANCHISE BUSINESS IT FOUND THE AGREEMENT REQUIRED.

In its Answering Brief, Kingfish feigns ignorance of Westmont's position so as to mischaracterize it. Westmont's basis for seeking vacatur of the Tribunal's wholesale adoption of the Kingfish/FTI valuation is clear: the Tribunal failed to conduct itself according to its own stated interpretation of its mandate as the third Qualified Appraiser under the Agreement. The Court of Chancery then erred in measuring the Tribunal's decision making process not against the Tribunal's interpretation but, instead, relying on its own reading of the contract's terms to conclude that "[n]othing in the LLC Agreement specifies a particular valuation methodology." (Opinion, Ex. A to Opening Brief, at 17.) Whether the Tribunal carried out its mandate according to the ***court's*** interpretation of the Agreement's terms is not the relevant question. In substituting its own view of the third Qualified Appraiser's role for that expressly put forward by the Tribunal, the court failed to hold the Tribunal to account for its manifest disregard of its own stated mandate.

Kingfish misstates the applicable scope of review when it argues that "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." (Answering Brief at 13-14, *quoting MHP Mgmt., LLC v. DTR MHP Mgmt., LLC*, 2022 WL 2208900,

at *5 (Del. Ch. June 21, 2022) (internal quotations omitted)). While that would be a true statement of the law were Westmont challenging the Tribunal's interpretation of the Agreement, that is ***not*** the basis of Westmont's challenge. Westmont (unlike Kingfish or, indeed, the Court of Chancery in this case) ***accepts*** the Tribunal's interpretation that the Agreement requires the Tribunal, as third Qualified Appraiser, to "undertake a valuation" of the company's assets. Westmont does not ask this Court to second-guess the Tribunal's contractual interpretation by going back to the language of the Agreement. It merely asks the Court to hold the Tribunal to the plain meaning of its own words in interpreting the Agreement – *i.e.*, to ensure that the Tribunal actually did what it said it must do. None of the cases Kingfish cites requires a reviewing court to ***presume*** that the Tribunal actually did what it said it must. To the contrary, the law of vacatur makes clear that a reviewing court can and should examine "whether the arbitrators did the job they were told to do — not whether they did it 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).

The relevant inquiry here, then, is for the Court to hold the Tribunal to the plain meaning of its own stated requirement that it "must undertake [a] valuation" of several assets, including a "[v]aluation of the Franchise Company." (A0175 ¶ 222.) As Westmont explained in its Opening Brief, that obligation requires an

independent exercise akin to that of an appraiser, which is distinct from the Tribunal's ordinary adjudicative process. That is precisely what Delaware courts have held when interpreting the plain meaning of a substantially similar mandate found in the Delaware shareholder appraisal statute (8 *Del. C.* § 262) requiring that courts "shall appraise" fair value.

Kingfish willfully misconstrues Westmont's reference to case law interpreting Delaware's appraisal statute. Westmont's purpose was not, as Kingfish appears to suggest, to argue that the parties intended their Agreement literally to incorporate the statute. Rather, Westmont's point in referencing this established body of case law is to argue that how this Court has interpreted the plain meaning of the phrase "shall appraise" should inform its understanding of the similar phrase "must undertake [a] valuation." Both contain an affirmative mandate that requires an adjudicator to change roles to that of an appraiser and, as this Court has held, imposes a "requirement that the court independently determine the value of the shares that are the subject of the appraisal section." *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 361 (Del. 1997).

That independent determination, recognized in *Gonsalves* and in numerous other decisions applying its holding, is precisely what the Tribunal found the Agreement to require it to do here, and precisely what the Tribunal then failed to do. Once again, Kingfish misconstrues Westmont's argument as somehow

acknowledging that the Agreement does not prohibit the Tribunal from adopting a methodology whereby it adopts the party's position it finds most reliable and persuasive. (Answering Brief at 14.) Rather, as Westmont has consistently argued, the problem with the Tribunal's "valuation" is not the fact it adopted the Kingfish/FTI values – not the result, in other words – but the process (or lack of process) that led to that result. (*See* Opening Brief at 22; *see also* A1400-02.) While *Gonsalves* and its progeny do not preclude an adjudicator's independent appraisal analysis reaching the same conclusions as those advocated by either of the parties to the dispute, what these cases do prohibit is a predetermined process that does not permit anything other than an either/or adoption of one of the party's valuations. *See, e.g.*, *Gonsalves*, 701 A.2d at 362; *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 526 (Del. 1999). What Kingfish misses in attempting to distinguish this line of cases is that the Tribunal's approach predetermined an either/or outcome just as much as the Court of Chancery's "hook, line and sinker" comment with which this Court took issue in *Gonsalves*.

Kingfish's attempts in its Answering Brief to identify points of independent analysis in the Tribunal's Award fail to address the core problem with the Tribunal's approach. It is of no consequence that the Tribunal articulated reasons for finding more persuasive and thus adopting FTI's "approach" of presuming a strategic buyer who would pass along synergistic, post-acquisition cost savings in a higher purchase

price. There are countless ways in which an appraiser might incorporate these concepts in its analysis to arrive at a wide range of outcomes – depending on the appraiser's specific conclusions as to both the projected amount of those synergies and the extent to which competition among prospective acquirers would require cutting into this projected post-acquisition gain in value by passing along some of it to a seller. What matters here, as Westmont explained at length in its Opening Brief, is the sudden leap from the Tribunal adopting this "approach" and then immediately adopting wholesale the exact numbers from the FTI analysis. That is, by deciding *a priori* not to conduct its own independent valuation, the Tribunal had no means of reaching a different result from Kingfish/FTI. The Tribunal accepted FTI's exact values not because of some independent analysis that arrived at the same result but because, having done no analysis of its own, FTI's was the only available example of the Tribunal's preferred approach. That is not a problem with the ***result***, but rather with the ***process*** the Tribunal used to arrive at that result, and it is no different than the either/or, "hook, line and sinker" predeterminations of an independent appraiser that are expressly prohibited in *Gonsalves* and its progeny.

II. THE TRIBUNAL'S AWARD OF PRE-JUDGMENT INTEREST VIOLATES THE AGREEMENT AND DELIVERS AN UNDESERVED WINDFALL TO KINGFISH.

As detailed in the Opening Brief, the Agreement provides that, once a value for the First Kingfish Interests was determined, Westmont was entitled to purchase those interests in three equal installments over a two-year, interest-free period. (A0086 § 10.18(b)(ii)-(iii).) The Tribunal exceeded its authority when it overrode the terms for which the parties had specifically bargained in the Agreement. Not only did the Tribunal fail to permit Westmont the required two years of installment payments in the Award, it went even further by awarding pre-judgment interest dating back to the onset of the arbitration proceedings, which was well before a purchase price had been established and, indeed, before Kingfish had even supplied its own proposed price.

In a decision affirmed by this Court, the Delaware Superior Court held,

> Pre-judgment interest should only be awarded in those cases in which the amount of damages owed by the defendant is so readily ascertainable-as it is, for example, in many contractual disputes-that the defendant could have opted to simply pay the plaintiff immediately, rather than force him or her to obtain judicial relief through litigation. It would be unfair, however, and contrary to the reason for awarding interest, to compel a defendant to pay pre-judgment interest on an obligation whose amount could not reasonably have been determined prior to the judgment.

Lum v. Nationwide Mut. Ins. Co., No. C.A. 78C-MY-55, 1982 WL 1585, at *5 (Del. Super. Ct. Apr. 27, 1982), *aff'd sub nom. Lum , Lum , Lum v. Nationwide Mut. Ins. Co*., 461 A.2d 693 (Del. 1983). Thus, in addition to the plain language of the Agreement, it is established law that pre-judgment interest should not be awarded before the amount owed can be ascertained.

Kingfish's arguments that the existence of a dispute and an eventual finding that Westmont was in breach caused Westmont to forfeit these rights are unavailing. Kingfish claims that the contractually guaranteed interest-free period being conditioned on the parties agreeing on a mutually acceptable form of security agreement is proof that this provision cannot apply in the event of a breach. Of course, as argued in the Opening Brief, the absence of a security agreement here was due only to the fact that the Award ordered immediate payment in full – not, as Kingfish now argues, because Westmont's breach rendered this condition "impossible." (Answering Brief at 29.)

Kingfish's claim of impossibility is absurd, as it suggests that any contractual term that requires mutual agreement or cooperation would become "impossible" where one side has previously breached an obligation. That is not what "impossibility of performance" means. Where "supervening events were reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement," the defense of impossibility

is not applicable. *Obsidian Fin. Grp., LLC v. Identity Theft Guard Sols., Inc.*, No. CV 2020-0485-JRS, 2021 WL 1578201, at *6 (Del. Ch. Apr. 22, 2021). Delaware courts find that the doctrine of impossibility "is not to be applied liberally." *Id*. (quoting *Wal-Mart Stores, Inc. v. AIG Life Ins. Co*., 2005 WL 5757653, at *6 n.35 (Del. Ch. July 27, 2005)) (internal quotations omitted and emphasis added). Here, the existence of a dispute regarding the terms of the Agreement was reasonably foreseeable and could have been anticipated by the parties; thus, the doctrine of impossibility is inapplicable.

Security agreements, of course, do not depend solely on trust. If trust were enough of an assurance of performance, there would be no need for any form of security. Similarly, were Kingfish to refuse a reasonably crafted form of security agreement simply because it claims it can no longer trust Westmont, then it would be Kingfish, not Westmont, who would be guilty of bad faith conduct.

Even if one were to ignore the clear language of the agreement to apply default rules regarding pre-judgment interest in damages awards, Kingfish's argument still misses the mark. Kingfish argues incorrectly that the award of interest was necessary to avoid a windfall to Westmont as a result of its wrongful delay. (Answering Brief at 30.) Yet, it is ***Kingfish*** who would receive a windfall were the Tribunal's award of interest to be affirmed. The purpose of pre-judgment interest is to deliver as best as possible the bargain struck, to put the parties in the same place they would have

occupied but for the breach. *See Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). Pre-judgment interest should not be punitive, but compensatory. *See In re Happy Child World, Inc*., No. CV 3402-VCS, 2020 WL 7240714, at *3 (Del. Ch. Dec. 9, 2020), judgment entered, (Del. Ch. 2020) ("An interest award in an appraisal action is neither intended to be punitive nor to increase the statutory recovery of the principal award."); *Schulze v. State Farm Mut. Auto. Ins. Co*, No. CIVA07C02289FSS, 2009 WL 3630837, at *1 (Del. Super. Ct. Aug. 17, 2009) ("Prejudgment interest is not punitive; rather, it represents full compensation."); *Delaware River & Bay Auth. v. Kopacz*, 584 F.3d 622, 634 (3d Cir. 2009) (prejudgment interest awards "must be compensatory rather than punitive").

The Tribunal made no findings (nor could it have) that would support a determination that, absent a breach by Westmont, Kingfish would have been entitled to interest payments on a purchase of the First Kingfish Interests as of November 1, 2020. At a bare minimum, the Agreement provides for 28 months *after* the exercise of the First Put Option for Westmont to complete its payment of the purchase price for the First Kingfish Interests (comprising 120 days until a closing on the purchase followed by three installment payments over a two-year period). (A0085 § 10.18(b)(ii).) During that period, *no interest* on the purchase price is due. (*Id.*) Kingfish exercised the First Put Option in December 2019. (A0155 ¶ 159.) Thus, absent a breach, Westmont still would not have completed its interest-free payments

until April 2022, making any accrual of interest prior to that date an unlawful punitive measure.

Moreover, the Tribunal's own findings dictate that the timeline provided under the Agreement was extended through no fault of Westmont. When determining an accrual date for its pre-judgment interest award, the Tribunal acknowledged that, until November 2020, the parties were in dialogue with each other and had mutually agreed to postponements of the First Put Option deadlines in the Agreement. (A0201 ¶ 304.) As already noted in the Opening Brief, the Tribunal further found that neither party was prejudiced by the delays in the exchanges of the parties' respective valuation reports. (Opening Brief at 37.) Even assuming, *arguendo*, that November 1, 2020 marked the date by which all mutual postponements had run their course and a closing should have occurred, Westmont still would have been entitled under the parties' original bargain to a further 24 months of interest-free payments. Based on the Tribunal's own findings, then, pre-judgment interest under Kingfish's compensatory damages theory should not have begun to accrue until at least November 2022, three months ***after*** the date of the Award.

In sum, the Tribunal's award of interest exceeded its authority both under the Agreement and as an application of the law of compensatory damages. Either way, this unsupported and unsupportable award should be vacated.

III. THE AGREEMENT DOES NOT PERMIT THE TRIBUNAL TO ORDER WESTMONT TO PAY THE FULL COSTS OF THE THIRD QUALIFIED APPRAISER.

When including its own costs as part of the Award, the Tribunal made no allowance for that portion of its costs that related to its work as the third Qualified Appraiser, which even Kingfish admits the Agreement requires to be shared equally in the normal course. (Answering Brief at 33, *citing* A0097.) Because of that, the award of costs failed to draw its essence from the contract and must be vacated.

In its Answering Brief, Kingfish tries to justify this departure from the "normal course" by arguing that, "[h]aving forced the parties into costly and time-consuming arbitration, Westmont must bear the consequences." (Answering Brief at 34.) This argument is irrelevant. Westmont did not challenge the award of the Tribunal's costs to the extent they related to the resolution of Kingfish's breach claim. Instead, it challenged only that portion where the Tribunal assumed the role of third Qualified Appraiser.[1] Because the parties would have been required to engage and bear the costs of a third Qualified Appraiser in any event – with or without an arbitration and with or without a finding of breach – there is no merit to

[1] Kingfish notes in a footnote that the Tribunal ordered Westmont to bear only 75% of Kingfish's fees and costs. (Answering Brief at 33 n.8.) The cited portion of the Award makes no indication that this reflected a deduction of its costs to account for its role as third Qualified Appraiser. On the contrary, the Tribunal seems to have been acknowledging some responsibility on the part of Kingfish for the delay brought about by the arbitration.

the suggestion that any actions by Westmont caused those costs to be incurred. As with its award of pre-judgment interest, the Tribunal's departure from the Agreement's clear mandate cannot be justified as compensatory in nature but is instead entirely and improperly punitive.

IV. KINGFISH IGNORES THE TRIBUNAL'S OWN DESCRIPTION OF THE ASSETS BEING VALUED, AND THE TAX CONSEQUENCES FROM A SALE OF THOSE ASSETS.

Once again, Kingfish willfully misconstrues Westmont's argument regarding the tax issues. Kingfish claims that Westmont attempted to distort the definition of fair market value ("FMV") in the Agreement. (Answering Brief at 37.) All Westmont does, however, is to apply the Tribunal's own statements about the assets being valued, according to the ***Tribunal's*** own interpretation of the Agreement.

As the Tribunal interpreted its obligations, it was required to "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.) Kingfish claims that Westmont's argument "presupposes incorrectly that stocks are not assets." (Answering Brief, at 37.) To the contrary, Westmont merely argues that the assets the Tribunal valued are those it described – *i.e.*, assets in which WRRH LLC has an ownership interest ***through*** Red Roof Inns, Inc. According to the Tribunal, the assets it valued were not the Red Roof Inns, Inc. stock but, rather, the underlying assets owned ***by*** Red Roof Inns, Inc., which the Tribunal specified as the Franchise Company, the St. Clair Hotel, the R&R Shares, and Net Working Capital. (A0175 ¶ 222.) Thus, Westmont did not presume a stock sale, it presumed a sale of the assets the Tribunal indicated it had valued.

Kingfish does not dispute – nor can it – that, in a sale of assets held through a C-corporation, the C-corporation will be taxed on any gain recognized from that sale, prior to distributing any net proceeds to its shareholders as part of a final liquidation. The Tribunal failed to account for this undisputed tax liability that, based on its own description of the assets being valued, necessarily arose when those assets were sold.

CONCLUSION

For the reasons stated above and in their Opening Brief, 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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CERTIFICATE OF SERVICE

I, Tiffany Geyer Lydon, Esquire, do hereby certify that on the 1st day of December 2023, I caused a true and correct copy of the foregoing to be served on the following counsel of record via File & Serve*Xpress:*

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