No. _____

In The
Supreme Court of the United States

PITCAIRN PROPERTIES, INC.,

Petitioner,

vs.

LJL 33RD STREET ASSOCIATES, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should adopt a *per se* rule providing that an arbitrator commits "misconduct . . . in refusing to hear evidence pertinent and material to the controversy" within the meaning of section 10(a)(3) of the Federal Arbitration Act when an arbitrator excludes the sole relevant and non-cumulative evidence in support of a fact material to the controversy, without a need for the party to show prejudice or bad faith.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Second Circuit, whose judgment is sought to be reviewed, are:

- LJL 33rd Street Associates, LLC, claimant, appellant below and Respondent here.
- Pitcairn Properties Inc., respondent, appellee below and Petitioner here.

The parent corporation of Petitioner Pitcairn Properties, Inc. is Pitcairn Property Holdings, Inc. No public corporation owns ten percent or more of Petitioner's stock.

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OPINIONS BELOW

The Second Circuit's opinion filed July 31, 2013, the subject of this petition, is reported at 725 F.3d 184 (2d Cir. 2013) (Appendix ("App.") 1-24.) The Second Circuit's October 22, 2013 order denying rehearing and rehearing en banc was not published in the official reports. (App. 46-47.)

The district court's December 5, 2011 order granting Petitioner's petition to vacate the arbitration award (App. 44-45) and February 15, 2012 memorandum order were not published in the official reports, but the latter order is available at 2012 U.S. Dist. LEXIS 24986 (S.D.N.Y. Feb. 15, 2012). (App. 25-43.)

JURISDICTION

The Second Circuit filed its opinion on July 31, 2013. (App. 1-24.) Petitioner timely petitioned for rehearing and rehearing en banc, and on October 22, 2013, the Second Circuit denied the petition. (App. 46-47.) This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the Second Circuit's July 31, 2013 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioners brought the underlying action under 9 U.S.C. § 10(a), which states:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) 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.

STATEMENT OF THE CASE

This dispute arose out of an agreement between Petitioner Pitcairn Properties, Inc. ("Pitcairn" or "Petitioner") and Respondent LJL 33rd Street Associates, LLC ("LJL" or "Respondent") under which LJL purported to exercise an option, against Pitcairn's wishes, to buy Pitcairn's share of 35-39 West 33rd Street Associates, LLC (the "Company"), of which the parties

are essentially equal owners. According to the agreement, the amount LJL must pay to Pitcairn to exercise the option depends on the fair market value of the Company's sole asset – the Magellan, a Class A, high rise apartment building in Manhattan (the "Property"). Soon after LJL sent notice of its intent to exercise the option, a credible, independent buyer tendered a letter of intent to purchase the Property for $68 million. LJL refused to consider the offer, sought to chill the potential buyer's interest, and instead pursued its purchase option by submitting the issue of the fair market value of the Property to arbitration before the American Arbitration Association ("AAA").

Pitcairn was required by the parties' agreement to arbitrate the issue of the Property's fair market value, but never expected that the arbitrator would take the prejudicial step of excluding key evidence on this issue, including evidence of the $68 million offer. The excluded evidence was the sole evidence of the Property's fair market value that was generated independent of the arbitration at issue, and was central and decisive to Pitcairn's claims. As a result of the arbitrator's exclusion of this critical evidence, the arbitrator entered an award stating that the fair market value of the Property was $56.5 million, $11.5 million less than the offer the Company had received.

The United States District Court for the Southern District of New York found that the arbitrator's refusal to consider this pertinent and material evidence was misconduct, resulted in a fundamentally

unfair hearing, and prejudiced Pitcairn. The Court of Appeals for the Second Circuit reversed.

A. The Parties' Relationship and Background to the Dispute

Pitcairn and LJL are the only members of the Company, and Pitcairn, an owner, developer and manager of real estate assets, is the Manager of the Company. (App. 3.) LJL is a single purpose entity that holds the interests of family members of its owners in the Company. (App. 3.) The parties' interests are governed by an Amended and Restated Limited Liability Company Operating Agreement of the Company, dated June 5, 2001 (the "Operating Agreement"). (App. 3-4.) The Company's sole business interest is its ownership of the Property. (App. 3.)

In November 2010, LJL purported to exercise an option to purchase Pitcairn's interest in the Company under § 8.8 of the Operating Agreement, which requires that, after LJL gives notice of its intent to exercise the purchase option, the parties should agree on the "Stated Value" of the Property. (App. 5-6, 8.) The Stated Value is defined in § 6.12(a) of the Operating Agreement as the fair market value of the Property without deduction for any Company liabilities. (App. 4.) Section 8.8 of the Operating Agreement further provides that, if Pitcairn and LJL are unable to agree upon the fair market value within ten business days, either party may elect that the dispute as to fair market value be determined by arbitration

pursuant to § 11.19. (App. 5-6.) Section 8.8 also provides that the arbitrator appointed to determine fair market value shall select an independent, third party appraiser to advise the arbitrator as to the appraiser's determination of fair market value. (App. 6.) Ultimately, § 11.19(b)(iv) mandates a hearing at which each member "shall be entitled to present evidence and witnesses to support its position and to cross-examine witnesses presented by the other." (App. 6.)

B. Letters of Intent

In December 2010, the Company received an unsolicited offer to purchase the property for $68 million from Equity Residential ("Equity"). (JA 178.)[1] Equity is the largest publicly-traded owner of multi-family properties in the United States, with more than two dozen properties in the New York metropolitan area. (App. 29.) Equity had purchased three substantial properties in New York earlier in the year, and was looking to expand its presence in New York. (JA 165.) Accordingly, Equity contacted Pitcairn as the Manager of the Company, and initiated discussions regarding a potential sale of the Property. (App. 29; JA 165, 178.)

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[1] Pitcairn cites to the opinions in the Appendix whenever possible. However, where a fact does not appear in the opinions below, Pitcairn cites to the Joint Appendix ("JA") filed by the parties in the appeal in the Second Circuit.

On or about December 8, 2010, Equity sent a letter to Pitcairn, expressing Equity's interest in acquiring the Property. (JA 165.) The letter stated that Equity would value the Property at approximately $80 million based on general knowledge and requested access to the Property's financial information to determine a more precise price. (App. 29; JA 165.) The Company thereafter made financial information regarding the Property available to Equity pursuant to a confidentiality agreement. (App. 29; JA 165.) This was the same financial information later made available to the parties and their appraisers in the arbitration. (App. 29-30; JA 165.)

On or about December 22, 2010, Equity transmitted a letter of intent to Pitcairn, which proposed that Equity purchase the Property for $68 million. (JA 178.) On January 6, 2011, following further negotiations between Equity and Pitcairn (on behalf of the Company), Equity sent Pitcairn a revised letter of intent dated January 4, 2011 (collectively, with the December 22, 2010 letter, the "Letters of Intent"). (App. 10, 28.) The letter again proposed that Equity purchase the Property for $68 million. (App. 10, 28-29.) That same day, Pitcairn counter-signed the revised letter of intent on behalf of the Company. (JA 185.) Pitcairn thereafter requested LJL's consent, as Pitcairn's co-member in the Company, to proceed with the sale of the Property to Equity for $68 million. LJL refused to consent to the sale. (App. 8-9.) Because of LJL's refusal, the transaction with Equity Residential could not be pursued.

Despite Equity's $68 million offer in the Letters of Intent, LJL insisted that the Property was worth only $49.8 million. (App. 8.) Because the outstanding principal of the loan on the Property at the time was $48.4 million, LJL's asserted value, if accepted, would result in LJL taking Pitcairn's equity in the Company for nearly nothing. (App. 8.) Since Pitcairn would not accept this valuation, on or about December 28, 2010, LJL filed a demand for arbitration with the AAA, seeking, among other things, a declaration of the "Stated Value" of the Property. (App. 9.)

C. Eastdil Asset Summary Valuation

The Letters of Intent from Equity were not the only evidence that the Property's value was far above what LJL was willing to pay. Eastdil Secured ("Eastdil") is a leading real estate investment banking firm providing broker services in connection with commercial real estate transactions. (App. 29.) Real estate brokers, including Eastdil, routinely issue opinions as to the value of commercial real estate properties. (JA 167.)

Pitcairn contacted Eastdil to prepare a broker's opinion of value for the Property because Eastdil had announced publicly that it was the broker of record for the sale of a similar building in Manhattan. (JA 167.) Pitcairn provided Eastdil with the same financial information regarding the Property made available to the parties, their appraisers, and Equity. (App. 29-30.) Pitcairn did not compensate Eastdil

for preparing the broker's opinion of value, nor did Pitcairn and Eastdil have a pre-existing relationship or an agreement of any sort regarding the Property. (JA 167.) Further, Pitcairn did not tell Eastdil about the Equity letter of intent because it wanted Eastdil's opinion as an independent check on the reasonableness of Equity's offer. (JA 167.) On February 22, 2011, Eastdil transmitted its "Asset Summary" for the Property to Pitcairn. (App. 9-10; JA 167.) The Asset Summary stated that the Property's approximate valuation range was $63 million to $71.9 million, with a mid-point of $67.2 million. (App. 29.)

D. The Arbitration Hearing

In early 2011, the parties selected Theodore T. K. Cohen as the arbitrator for the dispute between LJL and Pitcairn. (App. 9.) The sole issue to be decided was the "Stated Value," or fair market value, of the Property. (App. 9.) The arbitration hearing was conducted over five days between April 26, 2011 to June 8, 2011. (JA 13.) The evidentiary record was closed on May 23, 2011, and the June 8, 2011 hearing session was limited to closing arguments. (JA 13.) Each party introduced the oral testimony and written reports of retained expert appraisers regarding the Property's value. (App. 9-10.) In addition, as provided for in the Operating Agreement, the arbitrator retained a neutral appraiser with whom he consulted after the close of evidence to determine the fair market value of the Property. (App. 9.)

While the evidentiary record was open, the arbitrator permitted Pitcairn to proffer the Equity Letters of Intent and the Eastdil Asset Summary as evidence of genuine market activity demonstrating the value of the Property. (App. 9-10.) Pitcairn had attempted to secure the live testimony of the Equity and Eastdil executives who were responsible for preparing the Letters of Intent and Asset Summary, respectively, but their representatives did not agree to testify. (JA 397, 402.) Due to the fact that the Equity executive was located in Wellesley, Massachusetts and the Eastdil executive in Washington, D.C., both more than 100 miles from the arbitration situs in New York, Pitcairn was unable to compel their testimony under subpoena. (JA 729, 739.) Neither did LJL attempt to subpoena those witnesses.

Pitcairn's expert appraiser, Joel Leitner, who ultimately valued the Property at $66,000,000, testified that he did not review the Equity Letters of Intent or the Eastdil Asset Summary in preparing his analysis, but reviewed them prior to issuing his report to determine if his analysis was consistent with other evidence of the Property's value. (App. 31.) He found it material, in his professional opinion, that his analysis of the Property's value was consistent with the analysis of every other professional, including a leading broker, Eastdil. (JA 282-283.) Mr. Leitner further testified that Equity's $68 million offer supported his analysis of its value. (JA 295.) During the hearing, LJL objected to the admission of the Letters of Intent and Asset Summary on several

grounds, including, but not limited to, hearsay. (App. 9, 41.)

The only person to suggest that the Property was worth less than $60 million was LJL's expert appraiser, Robert Von Ancken, who initially valued the Property at $49.8 million, but modified his appraisal to $51 million during the hearing. (App. 8-9.) Either value was barely above the Property's outstanding debt of approximately $48 million, so that, if LJL's expert's valuation were accepted, LJL would be able to take Pitcairn's interests in the Company for nothing or close to it. (App. 8.) Despite his opinion that the Property was worth only $51 million, when questioned regarding the Letters of Intent, Mr. Von Ancken agreed that Equity "is a significant owner of properties in the relevant market." (App. 29.) Mr. Von Ancken further testified that Equity is a credible buyer for the Property and that Equity has "a lot of money" and is "smart." (App. 29.)

E. The Arbitrator's Evidentiary Ruling, Closing Arguments, and the Award

On June 1, 2011, after the close of evidence, the arbitrator entered an order excluding from evidence the Letters of Intent, the Asset Summary, and related testimony (the "Excluded Evidence").[2] (App. 10, 28;

[2] Two other documents evidencing a fair market value for the Property over $60 million also were excluded from evidence by the arbitrator. First, in a July 2010 presentation to the Board

(Continued on following page)

JA 1082-1083.) More specifically, the order stated that the Letters of Intent and Asset Summary would "not be admitted into evidence," and that the Excluded Evidence could "not be considered by the Arbitrator or the neutral appraisal expert in connection with a determination of the subject property's relevant valuation." (JA 1083.) The arbitrator's order provided no reasoning for the ruling. (App. 10, 28.) Because this order was entered after the close of evidence, Pitcairn had no opportunity to present other evidence of genuine market activity. By this ruling, the arbitrator excluded the only relevant fact evidence bearing on the sole issue he was asked to decide.[3]

On June 8, 2011, the parties provided closing arguments to the arbitrator and the neutral appraiser. (JA 13.) Pitcairn was barred from making any

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of Directors of Pitcairn's parent company, CBRE Capital Advisors, an investment banking arm of CB Richard Ellis, valued the Property between $63.19 and $71.54 million. (App. 10.) Second, in a letter dated from June 2010, the managing member of the preferred sole shareholder of Pitcairn's parent company valued the Property at more than $62 million, even though the managing member, at the time the letter was written, had an incentive to understate the Property's value. (App. 10, 30.) Although exclusion of these documents also was prejudicial error, for purposes of this Petition, Pitcairn focuses its analysis here on the Letters of Intent and the Eastdil Asset Summary.

[3] Although both parties submitted expert reports and testimony regarding the fair market value of the Property, the Excluded Evidence was the only evidence of actual market activity presented by either party.

argument relating to the Excluded Evidence, and was prohibited from pointing out that Equity, Eastdil, and others, despite different perspectives, approaches and interests, all agreed that the Property was worth somewhere between $62 million and $71.9 million. Pitcairn also could not impeach LJL's expert based on the fact that his opinion of value was far below all others. (*See generally*, JA 421-442.)

On July 21, 2011, the arbitrator entered an award stating that the fair market value of the Property as of December 1, 2010 was $56.5 million (the "Award"). (App. 28.) The Award provided no reasoning for the decision. (JA 21-22.)

F. Pitcairn's Petition to Vacate is Granted

LJL petitioned the Supreme Court of New York to confirm in part and vacate in part the arbitrator's award.[4] (App. 11.) The case was later removed to the United States District Court for the Southern District of New York. (App. 11.) Pitcairn filed a cross-petition to vacate the Award based on the arbitrator's exclusion of the Excluded Evidence. (App. 11.) On December 5, 2011, the District Court granted Pitcairn's cross-petition and vacated the award. (App. 11, 44-45.) In a Memorandum Order issued on February 14, 2012, the District Court explained the reasons for its decision to vacate the award. (App. 25 to 43.); *LJL*

[4] LJL's grounds for seeking partial vacatur of the award are not pertinent to this petition.

33rd Street Assocs., LLC v. Pitcairn Props., Inc., 2012 U.S. Dist. LEXIS 24986 (S.D.N.Y. Feb. 14, 2012).

The District Court applied a standard that required a showing that the arbitrator's error "was made in bad faith or was so gross as to amount to affirmative misconduct." (App. 38.) Based on this high standard, the District Court nonetheless found that the arbitrator had excluded "essentially all of the factual evidence about genuine market activity and valuation even though this evidence was critical to a determination of fair market value," which was the sole issue for the arbitrator to decide. (App. 40.) The District Court further found that the exclusion of this "material and pertinent" evidence prejudiced Petitioner because Petitioner was prevented from demonstrating that its expert's opinion of value was consistent with the value suggested by this actual market activity, and that Respondent's expert's opinion "was an outlier," evidence that "might well have changed the outcome of the arbitration." (App. 40-41.) Finally, the District Court noted that Respondent's technical objections to the evidence were misplaced, because both case law and the AAA Rules firmly established that compliance with evidentiary rules was not required or even warranted. (App. 42.) In short, the District Court found that the arbitrator's decision to exclude the evidence was so unreasonable as to rise to the level of "affirmative misconduct." (App. 41-42.)

G. The Second Circuit Reverses

LJL filed an appeal of the District Court's order vacating the award. In an Order and Opinion dated July 31, 2013, the United States Court of Appeals for the Second Circuit reversed. (App. 1 to 24.) Although it was undisputed that the arbitrator had not stated his reasons for excluding the evidence and that the rules of evidence did not apply to the proceeding, (*see* App. 10, 19, 28, 41-42) the Second Circuit stated that "the arbitrator excluded four pieces of hearsay evidence offered by Pitcairn to support higher values for the Property."[5] (App. 18.) The Second Circuit also expressed agreement with the District Court's statement of the law that "an arbitrator's unreasonable exclusion of pertinent evidence, which effectively deprives a party of the opportunity to support its contentions, can justify vacating an award." (App. 18.) However, the Court of Appeals found that the arbitrator's exclusion of the evidence did not amount to fundamental unfairness because arbitrators are not

[5] The Second Circuit also stated that "[t]he district court recognized that the excluded valuations were all hearsay." (App. 19.) This statement is not accurate. Rather, the District Court recognized that Respondent "made several evidentiary objections, such as hearsay," and stated that "the evidentiary issues raised by [Respondent] should have gone to the weight afforded to the Excluded Evidence rather than its admissibility." (App. 41-42.) Further, the Letters of Intent were not actually hearsay because they were an offer to contract, a legal act of independent significance. Fed. R. Evid. 801(c), Advisory Committee Notes; *E.g., New Era Publ'ns Int'l ApS v. Henry Holt & Co.*, 873 F.2d 576, 592 (2d Cir. 1989) (Oakes, Chief Judge, concurring).

prohibited from excluding hearsay (1) when the evidence could be presented in a non-hearsay manner and (2) when the admission of hearsay would be unfairly prejudicial to the opposing party. (App. 19.) Essentially, the Second Circuit sidestepped the issue of whether the arbitrator committed "misconduct" within the meaning of section 10(a)(3) by concluding that the arbitrator had the authority to exclude pertinent and material evidence solely because it was hearsay, although neither a decision of this court nor the Federal Arbitration Act ("FAA") provide grounds for this conclusion.

The Second Circuit's first reason why the exclusion of the evidence was not fundamentally unfair rests on an apparent misunderstanding of the geographic reach of the subpoena power of the arbitrator in this case. The court noted that Petitioner "may well have been harmed by the exclusion of its exhibits, [but] it is not clear that this harm can be considered unfair when [Petitioner] could have cured the problem simply by calling the makers of the exhibits as witnesses." (App. 20.) This reasoning is at odds with the Second Circuit's own decision in *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89 (2d Cir. 2006), which established that subpoenas issued by arbitrators may not be served or enforced outside the 100 mile area provided for in Federal

Rule of Civil Procedure 45(b)(2).[6] It is undisputed that the authors of the exhibits resided in Wellesley, Massachusetts and Washington, D.C., outside this 100 mile radius, and that they refused to appear voluntarily at the hearing. (JA 397, 402, 729, 739.) Therefore, Petitioner literally was unable to compel their testimony at the hearing and the Excluded Evidence was the only available evidence of the actual market value of the Property.

With respect to the second reason cited by the court below, that of prejudice to Respondent, the Court of Appeals determined, without citation to legal authority, that "expert valuations of this nature are the product of so many complex factors . . . as to make it particularly important that the opponent of the valuations be offered the opportunity to test their conclusions by cross-examination," and "[i]f the arbitrator had presented Pitcairn's hearsay exhibits to the appraiser without LJL having had the opportunity to test their conclusions by cross-examination to explore the underlying reasoning, LJL would have been severely prejudiced." (App. 20.) At the same time, however, the Court of Appeals ignored Respondent's ability to cross-examine Petitioner's witnesses regarding the circumstances under which the documents were produced or obtained.

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[6] Rule 45 was amended as of December 1, 2013, after the events at issue here, to allow service of a subpoena to be made "at any place within the United States."

On August 14, 2013, Pitcairn petitioned the Second Circuit for rehearing or rehearing en banc. This petition was denied on October 22, 2013. (App. 46-47.)

REASONS TO GRANT THE PETITION

An arbitration award may be vacated "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). In the time since this Court's decisions in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), and *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the circuit courts have struggled to apply a uniform standard for when an arbitrator's refusal to hear evidence warrants vacatur of an award under section 10(a)(3) of the FAA. As a result, the lower court decisions lack consistency and fail to give district courts reviewing arbitration awards adequate guidance regarding the standards for the admission or exclusion of evidence that should apply in an arbitration proceeding.

The effect of this lack of consistency in the application of section 10(a)(3) is that circuit courts disagree regarding whether an award should be vacated when an arbitrator excludes non-cumulative and relevant evidence of a fact material to the dispute. As a result, some courts give arbitrators near-unfettered discretion to admit or exclude evidence, no matter whether it is pertinent, material or

non-cumulative. Other circuit courts, however, find that an arbitrator committed the "misconduct" required by section 10(a)(3) when the evidence excluded was neither cumulative nor irrelevant.

This case, like similar cases discussed below, involves a straightforward assessment of whether an award should be vacated where the arbitrator excluded the only evidence on a material point in controversy regardless of whether the evidence arguably is hearsay and whether prejudice was shown. Given the pervasive use of arbitration as a means for dispute resolution, Petitioner respectfully submits that this Court should adopt a *per se* rule that when an arbitrator excludes the only relevant and non-cumulative evidence of a material fact critical to the controversy, as was done here, this constitutes "misconduct" *per se* within the meaning of section 10(a)(3) of the FAA and the award should be vacated.

I. Section 10 of the FAA Is Intended to Ensure the Parties Receive a Fair Hearing.

In enacting the FAA, Congress intended to provide not just for *any* arbitration, but a fair arbitration. *See Commonwealth Coatings Corp.*, 393 U.S. at 147. The provisions in section 10 regarding vacatur of awards are designed to ensure that certain minimal due process protections are afforded to parties in arbitration. *See U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1173 (9th Cir. 2010); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d

987, 998 (9th Cir. 2003) (en banc). Moreover the inclusion of subsection (3), which provides for vacatur when an arbitrator has "refus[ed] to hear evidence pertinent and material to the controversy," demonstrates that arbitrators are under some legal duty to hear pertinent and material evidence submitted by the parties to ensure the fairness of the proceeding. Indeed, a fair hearing necessarily affords each party the opportunity to present relevant and material evidence. *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985); *Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co.*, 933 F.2d 1481, 1491 (9th Cir. 1991); *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994).

II. The Third and Seventh Circuits Have Not Required Parties to Show That An Arbitrator's Exclusion of Evidence Caused Prejudice, But the Ninth, Eleventh and District of Columbia Circuits Have Required a Showing of Prejudice.

Section 10 provides that an arbitration award may be vacated "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). The ambiguous punctuation of this section has left many lower courts confused regarding whether a party

must show it suffered prejudice from the arbitrator's exclusion of pertinent and material evidence. The Third and Seventh Circuits have applied this section of the statute without referring to the text after the semicolon, implying that prejudice is not required. *See Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 557, 559 (3d Cir. 2009) (citing section 10(a)(3) without language requiring prejudice and stating that a court might uphold an award even where an error was not harmless); *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992) (not mentioning prejudice in 10(a)(3) analysis).

The Ninth Circuit, in *U.S. Life Insurance*, addressed the disagreement on this point directly and concluded that prejudice was required. The court first stated that "an argument can be made that [the text of section 10(a)(3)] is ambiguous given its language and punctuation." 591 F.3d at 1174. The court then determined, without stating its reasoning, that it was unnecessary to resolve the ambiguity because "the phrase 'refusing to hear evidence pertinent and material to the controversy' necessarily implies prejudice to the rights of a party, without regard to the final catch-all phrase [of section 10(a)(3)]." *Id.*; *see also Employers Ins. of Wausau*, 933 F.2d at 1490 (stating that "a showing of prejudice is a prerequisite to relief based on an arbitration panel's evidentiary rulings"). The Eleventh and District of Columbia Circuits have followed suit. *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992) (stating that the refusal to hear evidence

must prejudice the rights of the parties); *Scott v. Prudential Secs., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998) (same); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 818 (D.C. Cir. 2007) (same).

This Court has not clarified this textual ambiguity. However, in *Commonwealth Coatings*, this Court did suggest that a showing of prejudice need not be made to vacate an arbitration award based on arbitrator partiality, a separate ground for vacatur contained in section 10(a). In *Commonwealth Coatings*, this Court set aside an arbitral award under section 10 where the arbitrator had failed to disclose a relationship with one of the parties, despite the lack of any indication, or even an allegation, that the arbitrator actually was biased or partial. *Commonwealth Coatings*, 393 U.S. at 147, *see also* Fortas, J. dissenting at 152. The holding in that case appears to stand for the proposition that a party does not have to show it was prejudiced by an arbitrator's misconduct to justify vacatur of the award under one of the specifically enumerated grounds set out in section 10(a). In other words, the corruption or unfairness of the arbitral process alone justifies setting aside an award regardless of whether the infirmity had any effect on the outcome of the proceeding. However, some courts still require a party to show it was prejudiced by an arbitrator's refusal to hear pertinent and material evidence. This uncertainty should be clarified.

III. The Sole Decision of This Court Addressing a Petition to Vacate Under Section 10(a)(3) Did Not Address the Precise Situation At Issue Here – Where the Excluded Evidence Is the Sole Pertinent and Material Evidence – and, As a Result, the Circuit Courts Have Not Followed It Consistently.

Misco is the sole decision from this Court to address the standard for granting or denying a petition to vacate under section 10(a)(3). In *Misco*, this Court held that an arbitrator's decision to refuse to consider evidence was not a basis to vacate the award because the error did not rise to the level of "bad faith" or "affirmative misconduct." 484 U.S. at 40. In that case, in which a union brought suit against an employer for unfair termination of an employee, both the District Court and the Court of Appeals held that an arbitration award should be vacated because the arbitrator refused to consider evidence that marijuana was found in the employee's car on work premises. The arbitrator justified the exclusion of the evidence on the ground that the employer had not known that information at the time the employee was discharged. *Id.* at 34. The evidence that the arbitrator excluded was not, however, the only evidence presented regarding the employer's grounds for termination. *Id.*

This Court reversed, holding that refusal to consider the evidence, even if an error, was not "misconduct" under section 10(a)(3) because the "error was not in bad faith or so gross as to amount to

affirmative misconduct." *Id.* at 40. However, the Court did not set forth a standard for lower courts to apply to determine when an arbitrator's decision to exclude evidence would rise to the requisite level to warrant setting aside an award.

In addition, the Court noted that the pertinent contract required the arbitrator to "look only at the evidence before the employer at the time of discharge." *Id.* at 39. Under this standard, the arbitrator did not commit "misconduct" in refusing to consider the evidence because the employer was not aware of the evidence at the time of discharge, and therefore, it was not relevant or material to the employer's decision. Therefore, the Court in *Misco* did not need to reach the issue of whether an arbitrator's deliberate refusal to hear the sole, non-cumulative evidence relevant to a material fact in dispute would have risen to the level of affirmative misconduct.

A. The First and Second Circuits Hold that the Exclusion of the Only Evidence of a Material Fact Is Misconduct Requiring Vacatur.

In the 26 years since *Misco* was decided, the circuit courts have struggled to determine whether an arbitrator's exclusion of pertinent and material evidence rises to the level of "bad faith" or "affirmative misconduct" under the holding in *Misco.* The First and Second Circuits hold that an arbitrator commits such misconduct when he or she excludes the only

evidence of a fact at issue in the proceeding. In *Hoteles Condado Beach*, decided a few years before *Misco*, the First Circuit upheld the decision of the United States District Court for the District of Puerto Rico to vacate an arbitration award where the arbitrator had refused to consider the only evidence available to support a fact that was both "central and decisive" to a party's position. *Hoteles Condado Beach*, 763 F.2d at 40.

In that case, an employee of the Hoteles Condado resort was convicted in 1981 of criminal indecent exposure in the Superior Court of Puerto Rico, which conviction was overturned in 1982. The employee also was dismissed from his employment at the resort. After his dismissal, the Union of which he was a member filed a grievance against Hoteles Condado alleging that the employee had been dismissed without justification in violation of the Union's collective bargaining agreement. An arbitration hearing was held in the time between when the employee was convicted and when the conviction was overturned. *Id.* at 36-37. At the hearing, the woman to which the employee allegedly had exposed himself refused to testify because the arbitrator prohibited her husband from remaining in the hearing room during her testimony. *Id.* at 37. Hoteles Condado then introduced the transcript of her testimony at the criminal trial into evidence to support its decision to terminate the employee. *Id.* However, the arbitrator refused to give the transcript any weight, found that Hoteles Condado had not submitted evidence to justify the

termination, and ordered it to reinstate the employee with back pay. *Id.*

Both the District Court and the Court of Appeals found that the arbitrator's refusal to give any weight to the criminal trial transcript deprived Hoteles Condado of a full and fair hearing. *Id.* at 37-38. In so finding, the court first reviewed the duty of an arbitrator to hear evidence submitted by a party. An arbitrator, unlike a court of law, "enjoys wide latitude in conducting an arbitration hearing," and is not "constrained by formal rules of procedure or evidence." *Id.* at 38. Instead, an arbitrator has a "duty to afford each of the parties sufficient latitude to present evidence central to the dispute," and to resolve the dispute "based on [a] consideration of all relevant evidence, once the parties to the dispute have had a full opportunity to present their cases." *Id.* Although an arbitrator is not required to hear all of the evidence submitted by the parties, he or she must give each of them an adequate opportunity to present their evidence and arguments. *Id.* at 39.

The First Circuit held that an arbitrator's failure to hear evidence that is cumulative or irrelevant does not warrant vacating an award. However, "if the arbitrator's refusal to hear pertinent or material evidence prejudices the rights of the parties to the arbitration proceeding," vacatur is appropriate. *Id.* at 40. On the facts of that case, the arbitrator's refusal to consider the only evidence supporting Hoteles Condado's decision to terminate the employee was misconduct. Because the live witness refused to

testify, there was no other evidence of the reason for termination available, and prejudice could be assumed from the arbitrator's failure to give that evidence any weight. The transcript was therefore "central and decisive" to Hoteles Condado's position, and the Court of Appeals held that the arbitrator's refusal to consider it was fundamentally destructive of its case. *Id.*

Several rules of law emerge from the *Hoteles Condado* decision. First, when an arbitrator excludes or refuses to consider *the only evidence* of a fact that is central to a party's case, this constitutes misconduct sufficient to vacate an award under section 10(a)(3). Second, because there is no other evidence available, its exclusion can be presumed to have caused the party prejudice. In sum, exclusion of non-cumulative evidence of a material fact deprives a party of a fair hearing. If, however, the evidence is cumulative or irrelevant, its exclusion does not rise to the level of "misconduct."

Even after *Misco* was decided, other Courts of Appeals have followed the principles established in *Hoteles Condado*. The Second Circuit in *Tempo Shain* found that arbitrators who had refused to continue a hearing to allow time for a witness to testify had no reasonable basis to conclude that the witness's testimony would be cumulative, and thus wrongly excluded evidence "pertinent and material" to the controversy. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997). In that case, both parties alleged that they had been fraudulently induced into

entering a contract with the other. *Id.* at 19. The former President of one party, Wayne Pollock, was willing to testify regarding the parties' negotiations of the contract, which he alone had participated in on behalf of one party; however, he became temporarily unable to testify due to the illness of his wife. *Id.* at 17-18. The party that wished to call Pollock urged the arbitration panel to keep the record open until he could testify either in person or by deposition, but the panel refused to do so, on the basis that Pollock's testimony would have been cumulative. *Id.* at 18.

The Court of Appeals found that the arbitrators' decision to close the record without waiting for Pollock to testify resulted in the denial of a fundamentally fair hearing. The court determined that the arbitrators had no reasonable basis to determine that his testimony would be cumulative with regard to the parties' fraudulent inducement claims, given that Pollock was the only individual involved in negotiating the contract on behalf of his company, and therefore was the only person who could have testified as to those negotiations. *Id.* at 20-21. Because Pollock's testimony was not cumulative, and was central to an issue in dispute in the arbitration, it was misconduct to exclude it. *Id.* The Second Circuit did not comment on whether the exclusion of the testimony had caused prejudice to the party, *i.e.*, whether the outcome would have been different if the testimony had been admitted.

Other circuit courts have agreed that when an arbitrator excludes evidence that is cumulative and

irrelevant, there is no prejudice and no misconduct under section 10(a)(3). *See Glencore Ltd. v. Agrogen, S.A.*, 36 Fed. Appx. 28, 29 (2d Cir. 2002) (noting that exclusion of cumulative and irrelevant testimony was not improper); *Century Indem. Co.*, 584 F.3d at 559 (finding no error in refusal to vacate award for exclusion of irrelevant evidence); *Flender Corp.*, 953 F.2d at 281 (finding no error in excluding evidence regarding mitigation of damages where arbitrator determined mitigation was not an issue in the case); *Bruner v. Merrill Lynch, Inc.*, 266 Fed. Appx. 625, 626 (9th Cir. 2008) (refusal to admit evidence that was not "crucial" and that was cumulative of the testimony of other witnesses was not misconduct); *Employers Ins. of Wausau*, 933 F.2d at 1491 (failure to admit irrelevant evidence was not reversible error); *Robbins v. Day*, 954 F.2d at 685 (refusal to admit evidence party itself called "unimportant" was not error); *Scott v. Prudential Secs., Inc.*, 141 F.3d at 1017 (no error where testimony excluded was irrelevant to question before the arbitrators and where witness was permitted to submit an affidavit); *Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1336 (11th Cir. 2007) (refusal to hear evidence that was cumulative and not determinative of claims on which other party prevailed did not deny fair hearing); *Lessin*, 481 F.3d at 819-20 (refusal to hear evidence rendered immaterial by prior evidence was not error); *Howard Univ. v. Metro. Campus Police Officer's Union*, 512 F.3d 716, 722-23 (D.C. Cir. 2008) (refusing to vacate award due to lack of prejudice from excluding cumulative testimony).

These decisions find their basis in the text of section 10(a)(3), which can be read to define "misconduct" not as an arbitrator's refusal to hear *any* evidence offered by a party, but the refusal to hear evidence "pertinent and material to the controversy." Considered as a whole, these cases establish the reasonable rule that when an arbitrator has excluded evidence that is neither cumulative nor irrelevant, *i.e.*, evidence that is the sole support for a material fact at issue in the case, the arbitrator has committed misconduct within the meaning of section 10(a)(3).

B. The Third and Fourth Circuits Refuse to Find "Misconduct" Without "Bad Faith," Even When An Arbitrator Excludes Material and Non-Cumulative Evidence to a Party's Prejudice.

However, in conflict with the decisions cited above, the Third and Fourth Circuits appear to grant an arbitrator nearly unfettered discretion to admit or exclude evidence under a heightened standard of "misconduct" like that referred to in *Misco.* In *Brand*, the Fourth Circuit held that arbitrators' decision to award $1.1 million in attorney fees under South Carolina's Frivolous Civil Proceeding Act without holding a hearing as required by the statute was not so gross as to constitute bad faith or affirmative misconduct in refusing to hear evidence under section 10(a)(3). *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 479 (4th Cir. 2012). The court reasoned that even assuming that the arbitrators had made a mistake in

refusing to hold the hearing, such mistakes "lack the requisite intentionality to fall within § 10(a)(3)'s reach." Because the party did not allege intentional misconduct, section 10(a)(3) was not applicable.[7] *Id.*

In *Century Indemnity*, the Third Circuit ruled that the arbitrators' exclusion of evidence they found irrelevant was not "misconduct" under section 10(a)(3). 584 F.3d at 558. Even assuming the evidence was relevant, however, the court went so far as to say that "a court reviewing an arbitrator's decision to reject evidence might uphold an award even if an appellate court when reviewing a trial court's erroneous rejection of the evidence in similar circumstances might not find that the error was harmless," and that the rejection of evidence that should have been admitted "hardly can be characterized as 'misconduct'." 584 F.3d at 557. This decision reflects that even when an arbitrator excludes material and pertinent evidence in a way that prejudices a party, the Third Circuit would not vacate the award without an increased showing of affirmative misconduct.

Other courts similarly defer to arbitrators' decisions even when it is clear that pertinent and material evidence was excluded. *See Householder Group v. Caughran*, 354 Fed. Appx. 848, 851 (5th Cir. 2009)

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[7] *But see Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383 (4th Cir. 2000), where the court cited *Misco*, but found that an arbitrator committed misconduct by excluding evidence that was neither cumulative nor irrelevant, without a finding of intentionality. 232 F.3d at 389-90.

(even assuming arbitrators erred in refusing to allow witnesses to testify, *pro se* party did not show that errors rose to the level of depriving him of a fair hearing). As these cases illustrate, the unresolved questions regarding the degree of misconduct an arbitrator must exhibit, regardless of whether his or her error causes prejudice to a party or whether the evidence is pertinent and material, result in circuit court decisions that are in conflict.

IV. This Court Should Resolve the Conflicts in the Courts Below and Adopt a *Per Se* Rule That It Is Misconduct When an Arbitrator Excludes Relevant, Non-Cumulative Evidence of a Material Fact.

Pitcairn respectfully submits that this Court should adopt a *per se* rule holding that when an arbitrator excludes the sole evidence of a material fact, which evidence is neither cumulative nor irrelevant, an arbitrator has committed "misconduct" within the meaning of section 10(a)(3). In such a situation, prejudice may be presumed because the evidence at issue was the only evidence available to make a material fact more or less likely. Moreover, a showing of bad faith should not be required because whether or not the arbitrator had an evil motive has no bearing on whether a party was denied a fundamentally fair hearing. This rule is appropriate because it would harmonize the decisions of the circuit courts and clarify their disparate holdings, which sometimes

require a party to show that evidence was non-cumulative and relevant, sometimes require a showing of prejudice, and other times require a party to show that the arbitrator acted in bad faith.

In this case, Pitcairn and LJL's expert appraisers proffered opinions of the value of the Property that differed by $15 million. The only evidence of genuine market activity in support of the actual value of the Property were the documents submitted by Pitcairn, which included Letters of Intent from a prospective purchaser and a valuation by an independent commercial real estate broker. The Excluded Evidence supported Pitcairn's expert valuation of $66 million, and rendered LJL's valuation an aberration. Further, Pitcairn had no ability to submit other evidence of this same market activity because the arbitrator had no power to subpoena the documents' authors, all of whom lived more than 100 miles from the arbitration site and all of whom refused to voluntarily attend the hearing. Finally, the arbitrator's decision to wait to exclude the documents until after the close of evidence left Pitcairn with no notice that the evidence would be excluded and no opportunity to submit other supporting evidence if it could.

Under the *per se* rule proffered by Pitcairn, the arbitrator's decision was misconduct. The Excluded Evidence indisputably was "pertinent and material" to the controversy, and was the only evidence presented of actual market activity. As the District Court found in its opinion dated February 15, 2012,

> [i]n determining fair market value, evidence of genuine market activity is certainly pertinent and material. In particular, the offer of intent from Equity was a critical piece of concrete evidence as to how the market valued the Property. . . . Moreover, the Equity letter of intent was not the only piece of evidence that the arbitrator excluded; rather, the arbitrator excluded essentially all of the factual evidence about genuine market activity and valuation even thought this evidence was critical to a determination of fair market value.

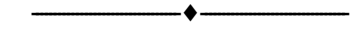
(App. 39-40.)

Further, the district court found that exclusion of this highly relevant evidence caused prejudice: "the exclusion of the evidence was highly prejudicial because it prevented Pitcairn from effectively demonstrating that four experts . . . all agreed that the Property was worth between $62 and $71.9 million. . . . When viewed in light of all of the relevant and pertinent evidence, LJL's expert was an outlier, and thus Pitcairn was highly prejudiced by the exclusion of the Excluded Evidence." (App. 40-41.) In total, the district court found that the exclusion of the evidence was such a radical departure from the arbitrator's responsibility to decide the case based on the evidence that it "constituted affirmative misconduct and rendered the proceedings fundamentally unfair." (App. 42.)

Tellingly, nowhere did the Second Circuit hold that the Excluded Evidence was cumulative or irrelevant, or that its exclusion was not prejudicial; indeed, it

found that "Pitcairn may well have been harmed by the exclusion of the exhibits." (App. 20.) Rather, in reversing the district court, the Second Circuit relied on its conclusion that an arbitrator may refuse to hear pertinent, material and non-cumulative evidence solely because it is hearsay. No decision of this Court ever has held that exclusion of the sole evidence of a material fact offered in an arbitration is justified on formal evidentiary grounds. Further, it is well-settled that arbitrators are not required to follow the rules of evidence or civil procedure. *E.g., Coppinger v. Metro-N. Commuter R.R.*, 861 F.2d 33, 39 (2d Cir. 1988); *U.S. Life Ins. Co.*, 591 F.3d at 1173.

Arbitration is the forum chosen to resolve an increasing number of disputes in this country. Although the standard of review under the FAA undoubtedly is deferential, the statute also limits an arbitrator's ability to refuse to hear evidence that is pertinent and material to the controversy. This limit must have meaning. Due to the likelihood that arbitration will continue to be used to resolve a substantial proportion of disputes, this Court should adopt a *per se* rule that is straightforward and easy to follow: that it is "misconduct" within the meaning of section 10(a)(3) for an arbitrator to exclude pertinent, material and non-cumulative evidence, *i.e.,* the sole evidence, of a fact bearing on the controversy. Because this case presents an opportunity for the Court to clarify the law, Pitcairn respectfully petitions this Court for a writ of certiorari.



CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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LJL 33RD STREET ASSOCIATES, LLC, Plaintiff-Cross-Defendant-Appellant, v. PITCAIRN PROPERTIES INC., Defendant-Cross-Claimant-Appellee. PITCAIRN PROPERTIES INC., Plaintiff-Appellant, v. LJL 33RD STREET ASSOCIATES, LLC, Defendant-Appellee.

Docket No. 11-5425-cv, Docket No. 12-1382-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

725 F.3d 184; 2013 U.S. App. LEXIS 15625

December 13, 2012; April 15, 2013, Argued July 31, 2013, Decided.

COUNSEL: For LJL 33rd Street Associates, LLC: THEODORE S. STEINGUT, New York, NY.

For Pitcairn Properties, Inc.: GLENN A. WEINER (Brian R. Fitzgerald, on the brief), Klehr Harrison Harvey Branzburg LLP, Philadelphia, PA.

JUDGES: Before: LEVAL, POOLER, LIVINGSTON, Circuit Judges.

OPINION BY: LEVAL

OPINION

LEVAL, *Circuit Judge*:

LJL 33rd Street Associates, LLC ("LJL") and Pitcairn Properties Inc. ("Pitcairn"), adversaries in two related litigations in the United States District

Court for the Southern District of New York (Rakoff, *J.*), each appeal from district court rulings. The controversy between LJL and Pitcairn arises out of LJL's exercise of its contractual option to purchase Pitcairn's ownership stake in a jointly owned high-rise luxury residential building in New York City, after which the parties pursued an arbitration to determine the value of the property. The arbitrator determined that the Stated Value (essentially the fair market value) of the building was $56.5 million, but refused to make a determination of the Purchase Price to be paid by LJL (Stated Value minus certain specified deductions for liabilities, etc.). The district court vacated the arbitrator's determination of the Stated Value, based on its conclusion that the arbitrator committed misconduct in violation of the Federal Arbitration Act, 9 U.S.C. § 10(a)(3), in excluding certain hearsay evidence offered by Pitcairn. The district court upheld the arbitrator's refusal to determine the Purchase Price. LJL appeals from both rulings.

In a separate action, Pitcairn appeals from the court's dismissal of Pitcairn's claims that LJL breached its fiduciary duties and the covenant of good faith and fair dealing in its exercise of the purchase option and in alleged subsequent interference with Pitcairn's efforts to ascertain the market value of Pitcairn's ownership stake in the building.

In LJL's appeal, we agree with its contention that the arbitrator's exclusion of Pitcairn's hearsay exhibits was within the arbitrator's authorized discretion. We therefore vacate the district court's order

overturning the arbitrator's determination of the Stated Value. We agree with the district court's conclusion that the arbitrator acted in accordance with the terms of the arbitration agreement in refusing to determine the Purchase Price. We therefore remand with instructions to confirm the arbitration award in its entirety. In Pitcairn's appeal, we find no error in the district court's dismissal of Pitcairn's claims for breach of fiduciary duties and breach of the covenant of good faith and fair dealing. We therefore affirm that judgment.

BACKGROUND

A. The Property and the Operating Agreement

LJL and Pitcairn are the sole equity owners of a limited liability company known as 35-39 West 33rd Street Associates, LLC (the "Company"), whose sole asset is a luxury high-rise apartment complex at 35-39 West 33rd Street in Manhattan (the "Property"). Pitcairn is a wholly owned subsidiary of Pitcairn Properties Holdings, Inc. ("Pitcairn Holdings") and owns 49.99% of the Company. Pitcairn is an owner, developer, and manager of real estate assets, and manages the Property. LJL is a New Jersey limited liability company, owned by Les Lustbader and his children, Jared and Lauren Lustbader, that owns 50.01% of the Company.

LJL and Pitcairn have an elaborate and specific Operating Agreement governing aspects of their shared ownership of the Company; the agreement

provides an arbitration clause of limited scope. The sections of the Operating Agreement of particular pertinence to this appeal are Sections 8.8, 6.12(c), and 11.19. The agreement specifies two terms of significance: Stated Value and Purchase Price, which are defined in Section 6.12 to mean *grosso modo* fair market value and fair market value minus liabilities.

Section 8.8 gives LJL the option, if Salah A. Mekkawy ceases to be employed by Pitcairn, to purchase Pitcairn's interest "pursuant to the terms, conditions and procedures set forth in Section 6.12(c)." It goes on to add that the Stated Value shall be determined by agreement between Pitcairn and LJL, but "[i]f Pitcairn and LJL are unable to agree upon the Stated Value . . . , then either party may elect that such dispute be determined by Expedited Arbitration pursuant to Section 11.19, whereupon the arbitrator shall select an independent, third party . . . appraiser who shall determine the Stated Value."

Section 6.12(c) explains how the Purchase Price (the price to be paid by LJL for Pitcairn's interest) is to be derived from Stated Value. (The full text of Sections 8.8 and 6.12(c), insofar as pertinent, are set out in the margin.)[1]

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[1] Section 6.12(c) of the Operating Agreement provides, in relevant part:

> The purchase price ("Buy/Sell Purchase Price") of the Interest of the selling Member ("Selling Member") shall be payable in cash by the purchasing Member

(Continued on following page)

("Purchasing Member") and will be such as will produce for Selling Member the same cash consideration as Selling Member would have received if the assets of the Company had been sold on the Buy/Sell Transfer Date to a third party in an all-cash sale for a purchase price equal to the Stated Value (subject to the prorations provided in Section 6.12(c)(iii)(D)), as if the Company had been dissolved and wound up following such sale and the proceeds of such sale remaining after discharge and payment of all Company liabilities had been distributed to the Members in accordance with the provisions of Articles V and X of this Agreement (including, without limitation, the repayment of any loans made by the Selling Member or the Purchasing Member to the Company).

(Emphases omitted).

Section 8.8 of the Operating Agreement provides, in relevant part:

> If at any time after the date of this Agreement, Salah A. Mekkawy shall no longer be employed by Pitcairn or its parent company, Pitcairn Properties Holdings, Inc. ("PPHI"), then, within 5 days after such termination of employment, Pitcairn or PPHI shall be obligated to provide written notice of such termination of employment to LJL. Upon receipt by LJL of such aforementioned written notice, LJL shall by written notice to Pitcairn and the Company, have the right to purchase Pitcairn's Interest (in whole but not in part), pursuant to the terms, conditions and procedures set forth in Section 6.12(c) of this Agreement (as modified pursuant to this Section 8.8); provided, however, such right to purchase shall expire thirty (30) days after the last date of employment of Salah A. Mekkawy by Pitcairn or PPHI, provided that LJL shall have received notice of such termination of employment of Salah A. Mekkawy. The Stated Value in effecting the sale and purchase of Pitcairn's Interest pursuant to this Section 8.8 shall be determined by agreement be-

(Continued on following page)

Section 11.19 states that arbitrated disputes will be resolved by "the Expedited Arbitration procedures of the American Arbitration Association" with certain modifications, including that each party "shall be entitled to present evidence and witnesses to support its position and to cross-examine witnesses presented by the other." It specifies,

> Any provision of this Agreement which specifically provides that a dispute will be resolved by the Expedited Arbitration provided in this Section 11.19 shall be resolved by the Expedited Arbitration Procedures of the American Arbitration Association. . . . In rendering such decision and award, the arbitrators shall not add to, subtract from or otherwise modify the provisions of the Agreement and may only determine the issue or question presented as their award.

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tween Pitcairn and LJL. If Pitcairn and LJL are unable to agree upon the Stated Value within ten (10) Business Days, then either party may elect that such dispute be determined by Expedited Arbitration pursuant to Section 11.19, whereupon the arbitrator shall select an independent, third party MA1 appraiser who shall determine the Stated Value.

(Emphases omitted).

B. The ouster of Mekkawy and LJL's exercise of the option

In the summer of 2010 a preferred shareholder of Pitcairn Holdings sought to take over its board. The management, led by then-CEO Mekkawy, tried to block the takeover through an action in Delaware Chancery Court, and also filed for bankruptcy. That litigation was settled in September 2010. After the settlement, the preferred shareholder took over the board of Pitcairn Holdings and Mekkawy received a new employment agreement involving a "change of title and duties," and a diminished role. In early October 2010, without the knowledge of Pitcairn's senior officers or Board, Mekkawy told LJL that he would be leaving Pitcairn.

On October 7, 2010, Pitcairn's Chief Operating Officer and two other employees met with Jared Lustbader (one of LJL's principals). At the time, Pitcairn was considering whether it should terminate Mekkawy. During this meeting, there was discussion of Mekkawy's potential termination. Pitcairn alleges that:

> Pitcairn's representatives met with Lustbader and specifically discussed Mekkawy's potential separation from Pitcairn. Lustbader, having been tipped off by Mekkawy, and knowing and intending that Pitcairn would take action accordingly, told Pitcairn's representatives that LJL did not like Mekkawy, did not want to deal with him and did not trust him. Lustbader further acknowledged

> that Mekkawy was not involved with management of the Property and that LJL had no problem with Mekkawy's departure from Pitcairn. Lustbader also said that LJL was comfortable with Pitcairn's management of the Property, which he complimented. Lustbader did not tell Pitcairn's representatives that LJL would try to exercise the purchase option in § 8.8 of the Operating Agreement if Pitcairn terminated Mekkawy.

Pitcairn did not ask LJL whether it would exercise its option if Mekkawy were terminated. There was no mention of the option during the meeting. The Board of Pitcairn Holdings voted on October 18, 2010 to terminate Mekkawy's employment. Pitcairn asserts in its Complaint that the decision was made "relying in part on Lustbader's comments regarding Mekkawy." Ten days later, Pitcairn informed LJL of Mekkaway's termination. Pitcairn alleges that in this conversation, Les and Jared Lustbader reiterated their dislike for Mekkawy and their approval of his termination, and said nothing of their plan to exercise the Purchase Option.

On November 2, 2010 LJL formally exercised its Purchase Option under Section 8.8 of the Operating Agreement. LJL asserted that the value of the Property was $49.8 million, barely more than the $48.4 million in debt on the Property. Pitcairn asserted that the Property was worth $62-$72 million. Pitcairn proposed selling the Property to Equity Residential, which Pitcairn asserts had offered $68 million, or alternatively offering the property for sale so as to

determine the true market price. LJL refused both proposals. LJL's attorney also sent a letter to Equity advising that it "respectfully demands that you cease and desist from any further involvement in this matter" and stating that LJL "reserve[s] all of its rights and remedies at law or in equity concerning the Company, or against you or [Pitcairn] with respect to the matters embraced hereby."

C. The arbitration proceeding and the excluded evidence

As the parties did not agree on the price, LJL filed an arbitration demand pursuant to its option agreement, asking for determination of both the Stated Value and Purchase Price. Pitcairn objected to the demand for determination of the Purchase Price, arguing that the agreement provides for arbitration of only the Stated Value, and not the Purchase Price.

The parties selected Jonathan T.K. Cohen as their arbitrator, and he selected appraiser James Levy to determine the Property's value. At the arbitration hearing, each party introduced testimony and reports of appraisers, and each party cross-examined the other side's witnesses. LJL's appraiser testified that the Property had a value of approximately $50-52 million, while Pitcairn's appraiser testified to a value of approximately $65 million.

LJL objected on hearsay and other grounds to four of Pitcairn's exhibits. These were: (1) An "asset summary" report of Eastdil, a real estate banking

firm, stating that the value of the Property is between $63 million and $71.9 million, with a midpoint of $67.2 million; (2) A valuation of the Property made by CBRE Capital Advisors, drawn from discussion materials presented by CBRE to Pitcairn's board of directors on July 22, 2010, which values the Property between $63,194,800 and $71,541,600; (3) A June 22, 2010 letter of Eric Blum, the managing member of PPH Investments Management, LLC (which was at the time of the letter the preferred shareholder of Pitcairn Holdings, and which later took over its board and ousted Mekkawy) stating that PPHI valued the Property "in the low $60 millions"; and (4) Equity Residential's non-binding "letter of intent" to purchase the Property for $68 million. Pitcairn did not call witnesses to testify to or defend what was stated in the four exhibits. The arbitrator sustained LJL's objections to these four exhibits, without explanation beyond the statement that they "shall not be admitted into evidence and shall not be considered by the Arbitrator or the neutral appraisal expert. . . ."

Based on the appraiser's appraisal, the arbitrator entered an award determining the Stated Value as $56.5 million and declined to determine the Purchase Price. LJL moved to modify the award with respect to the decision not to determine the Purchase Price. The arbitrator denied the motion. Subsequent to the arbitration, Pitcairn initiated a "Buy/Sell" procedure provided for in Section 6.12 of the Operating Agreement, under which one owner of the Company may send the other an opinion on the value of the Property,

and the other owner may choose either to buy the interest of the first owner or to sell its own interest to the first owner based on that value. LJL declined to participate.

D. The proceedings in the district court

LJL petitioned the Supreme Court of New York on September 7, 2011, to confirm the arbitrator's determination of Stated Value, but to vacate the arbitrator's refusal to also determine the Purchase Price. On the latter question, LJL argued, in part, that Pitcairn had forfeited objection to arbitrating the Purchase Price by failing to move for a stay of arbitration of the Purchase Price within 20 days of LJL's demand as required by New York's state arbitration law, N.Y. CPLR § 7503(c). Pitcairn removed the case to federal court on the basis of diversity of citizenship, 28 U.S.C. § 1332, and cross-petitioned to vacate the award because the arbitrator had excluded evidence in violation of the FAA, 9 U.S.C. § 10(a)(3).

On both issues, the district court ruled in favor of Pitcairn. The court vacated the arbitrator's determination of Stated Value by reason of the exclusion of the four Pitcairn exhibits. The court sustained the arbitrator's refusal to determine the Purchase Price, ruling that determination of the Purchase Price was not within the arbitration agreement and rejecting LJL's contention that Pitcairn had waived objection. LJL appeals those rulings.

Pitcairn meanwhile sued in the district court, alleging that LJL's conduct breached fiduciary duties as well as its implied covenant of good faith and fair dealing, and that LJL was equitably estopped from exercising its purchase option because it misled Pitcairn to believe that it would not exercise the option if Mekkawy were fired. LJL moved to compel arbitration, or in the alternative to dismiss the suit for failure to state a claim. The district court denied the motion to arbitrate, finding that these claims did not fall within the terms of the narrow arbitration clause, but granted the motion to dismiss. Pitcairn appeals the dismissal of the claims for breach of fiduciary duty and implied covenants.

DISCUSSION

In reviewing a district court's decision to vacate an arbitration award, this Court reviews findings of fact for clear error and questions of law *de novo*. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.,* 492 F.3d 132, 136 (2d Cir. 2007). A district court's dismissal of claims by reason of the insufficiency of the pleading presents a pure question of law, which is reviewed *de novo*. *Berrios v. N.Y.C. Housing Auth.,* 564 F.3d 130, 134 (2d Cir. 2009).

A. Pitcairn did not waive its objection to arbitrating the Purchase Price

LJL contends that Pitcairn forfeited its right to object to arbitration of the Purchase Price by failing to move to stay the aspect of LJL's arbitration demand which sought determination of the Purchase Price within twenty days of service of LJL's notice of intention to arbitrate the Purchase Price in accordance with N.Y. CPLR § 7503(c). *See, e.g., In re Fiveco, Inc. v. Haber,* 11 N.Y.3d 140, 144-45, 863 N.Y.S.2d 391 (N.Y. 2008) (holding that a party could not stay arbitration where it did not file an application within twenty days per § 7503(c)).

We reject LJL's contention. In our view, § 7503(c) does not apply to these facts.[2] Section 7503(c) provides,

> A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate . . . stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. . . . An application to stay arbitration must be made by the party served within twenty days after

[2] We assume without deciding that § 7503(c) applies in an action brought in a federal court on the basis of diversity of citizenship.

> service upon him of the notice or demand, or he shall be so precluded.

As we understand this provision, it applies to objections to arbitrate on the grounds that "valid agreement was not made or has not been complied with" and to objections based on time limitations. *Id.* Pitcairn's objection is not based on one of these grounds. Pitcairn's argument is that the agreement to arbitrate is limited to specified issues, which do not include the Purchase Price.

B. The arbitrator properly refused to exercise jurisdiction to determine the Purchase Price

LJL further contends that the arbitrator was required by the Operating Agreement to decide the Purchase Price of the Property. We disagree.

Section 8.8 of the agreement expressly provides for arbitration to determine Stated Value, under the provisions of Section 11.19. Nowhere in the agreement is there a suggestion that the Purchase Price be determined by arbitration. Furthermore, Section 11. 19, the clause that governs arbitration procedures, states that it applies to "[a]ny provision of this Agreement which *specifically* provides" (emphasis added) for resolution by arbitration and adds, "[T]he arbitrators shall not add to, subtract from, or otherwise modify the provisions of the Agreement and may only determine the issue or question presented as their award."

In an effort to rebut this apparent prohibition of expansion of the scope of the arbitration, LJL relies on the close linkage between Stated Value and Purchase Price and seeks support from *Dialysis Access Center, LLC v. RMS Lifeline, Inc.,* 638 F.3d 367 (1st Cir. 2011) and *McAllister Bros., Inc. v. A & S Transportation Co.,* 621 F.2d 519 (2d Cir. 1980). Neither opinion is helpful.

Dialysis Access involved a broad arbitration clause which provided for arbitration of "any dispute that may arise under this Agreement." *Dialysis Access,* 638 F.3d at 371. It has no application where the parties have elected arbitration of narrow precisely specified issues and have instructed the arbitrators not to expand the scope of the arbitration to other issues. Notwithstanding the general view expressed in that case favoring resolution of disputes by arbitration where the parties have agreed to that procedure, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

LJL cites *McAllister Bros.* as authority for the proposition that an issue arising out of an arbitrated issue is itself arbitrable when it is "inextricably tied up with the merits of" the arbitrated matter. *McAllister Bros.,* 621 F.2d at 523. Our case differs materially from *McAllister. McAllister* involved the agreement of a transporter of sludge ("Modern") to

employ McAllister Brothers, Inc. ("McAllister") for all towing services it required, and the contract in that case prohibited Modern from employing another tower's services unless "the service rendered by McAllister does not meet the standards of the industry." *Id.* at 521. Any disagreement with respect to McAllister's failure to meet industry standards was to be settled by arbitration. *Id.* When Modern terminated the employment of McAllister and sought towing services elsewhere, McAllister claimed breach and demanded arbitration. Modern refused, and McAllister sued in the district court to compel arbitration. Modern raised the defense that McAllister had abandoned the contract "by failing to provide [Modern] with all necessary tugboat services." *Id.* at 523. The district court ruled that Modern's defense of abandonment should be heard by the arbitrator, and our court affirmed. According to Modern's contention, McAllister's abandonment consisted of its failure to provide Modern with all necessary tugboat services, and that claim was, at least arguably, within the scope of the conformity of McAllister's services to industry standards – the very issue the parties had agreed to arbitrate. We ruled that in deciding whether the arbitration agreement "arguably cover[s] the dispute at hand . . . doubts should be resolved in favor of coverage and arbitration should be compelled unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 522 (citations and internal quotation marks omitted).

McAllister's holding has no application to the present case, where the two issues (Purchase Price and Stated Value) are unquestionably analytically distinct, and thus the disputed issue is not even "arguably" within the scope of the arbitration clause. In *McAllister* we held that the abandonment defense must be arbitrated because the claim of abandonment derived from, and was related to, the issue compelled to arbitration by the arbitration clause, as Modern contended that McAllister's failure to provide conforming service constituted its abandonment. *McAllister* is also inapposite because the arbitration clause there did not contain a clause expressly confining the scope of arbitration to specifically enumerated issues, as Section 11.19 of this agreement does.

In any event, even if we were to assume, despite § 11.19's restriction of the arbitration to "specifically" designated issues, that the arbitrator would have acted within the limits of his lawful discretion had he expanded his determination to encompass Purchase Price, it was certainly not an abuse of the arbitrator's discretion to decline to do so. The district court correctly rejected this contention.

C. The arbitrator's exclusion of evidence was not an abuse of discretion

LJL contends that the district court was unjustified in overturning the arbitration award setting the Stated Value. We agree.

As explained above, the arbitrator excluded four pieces of hearsay evidence offered by Pitcairn to support higher values for the Property. The district court held that the arbitrator's decision to exclude this evidence constituted illegal "misconduct" under the FAA, 9 U.S.C. § 10(a)(3). That statute provides that a reviewing court may vacate an arbitration award "where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy." The district court ruled that the arbitrator's exclusion of this evidence denied Pitcairn a meaningful opportunity to present pertinent and material evidence of the value of the Property, which rendered the proceeding "fundamentally unfair" and therefore constituted misconduct that justified setting aside the award. *LJL 33rd St. Assoc., LLC v. Pitcairn Props., Inc.,* No. 11-cv-6399, 2012 U.S. Dist. LEXIS 24986, 2012 WL 613498, at *7 (S.D.N.Y. Feb. 15, 2012). In the district court's view, this exclusion "prevented Pitcairn from effectively demonstrating" the agreement of four experts that the Property was worth substantially more than LJL's valuation. 2012 U.S. Dist. LEXIS 24986, [WL] at *6.

We do not disagree with the district court's general proposition that an arbitrator's unreasonable exclusion of pertinent evidence, which effectively deprives a party of the opportunity to support its contentions, can justify vacating an award. Nonetheless, we do not think this was an instance of such fundamental unfairness.

The district court recognized that the excluded valuations were all hearsay. It noted, however, that in arbitration proceedings there is no need to comply with strict evidentiary rules, *see Coppinger v. Metro-N. Commuter R.R.,* 861 F.2d 33, 39 (2d Cir. 1988), and that the AAA Rules and Mediation Procedures provide that "conformity to legal rules of evidence shall not be necessary." AAA Rule 31. The court concluded that LJL's objections to those exhibits, based on hearsay and other grounds,[3] "should have gone to the weight afforded to the Excluded Evidence rather than its admissibility." *LJL 33rd St. Assoc.,* 2012 U.S. Dist. LEXIS 24986, 2012 WL 613498, at *6.

While it is indisputably correct that arbitrators are not bound by the rules of evidence and may consider hearsay, it does not follow that arbitrators are prohibited from excluding hearsay evidence, especially when (a) the evidence could be presented without reliance on hearsay and (b) its hearsay nature is unfairly prejudicial to the adversary. As to Pitcairn's four exhibits, both conditions applied. So far as appears, there was no good reason for Pitcairn to rely on hearsay. It could have presented this evidence, unencumbered by the hearsay objection, merely by calling the makers of the exhibits – thus providing LJL with the opportunity to cross-examine

[3] The grounds of LJL's objections included, in addition to hearsay, that Equity's offer was not binding, and that the other sources of evidence were hired guns or were unreliable for other reasons.

these witnesses in an effort to undermine the probative value of the exhibits. Furthermore, expert valuations of this nature are the product of so many complex factors, and so many assumptions (especially where the controversy is over a valuation differential as small as 20%), as to make it particularly important that the opponent of the valuations be offered the opportunity to test their conclusions by cross-examination.

Section 8.8 called for the parties to agree on an arbitrator, who would in turn appoint an appraiser. Stated Value was to be determined by the appraiser. If the arbitrator had presented Pitcairn's hearsay exhibits to the appraiser without LJL having had the opportunity to test their conclusions by cross-examination to explore the underlying reasoning, LJL would have been severely prejudiced. While Pitcairn may well have been harmed by the exclusion of its exhibits, it is not clear that this harm can be considered unfair when Pitcairn could have cured the problem simply by calling the makers of the exhibits as witnesses. Therefore, these circumstances were crucially different from those that led the First Circuit to vacate an arbitration award by reason of the arbitrator's refusal to give any weight to testimony from a trial transcript, *see Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901,* 763 F.2d 34 (1st Cir. 1985), where the court of appeals concluded that the transcript was central to a litigant's position and no other evidence was available to sustain it. In this case, there was no

showing that Pitcairn could not call the makers of the exhibits, thus eliminating the hearsay problem.

For these reasons, we do not agree with the district court that the arbitrator's exclusion of Pitcairn's exhibits constituted "misconduct" in violation of § 10(a)(3) of the FAA. Arbitrators have substantial discretion to admit or exclude evidence. *See* Commercial Arbitration Rules of the American Arbitration Association, Rule R-31(b) ("The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."). The exclusions in this case did not impair the "fundamental fairness" of the proceeding. *See Tempo Shain Corp. v. Bertek, Inc.,* 120 F.3d 16, 20 (2d Cir. 1997). We therefore conclude it was within the bounds of the arbitrator's permissible discretion to exclude the exhibits.

D. Pitcairn has not stated a claim for breach of fiduciary duties

Pitcairn claims that LJL violated its fiduciary duties by failing to disclose its intention to exercise the buyout option upon the discharge of Mekkawy and refusing to sell the property to a third party or to entertain third party offers. We disagree.

The purchase option upon discharge of Mekkawy was LJL's contractual right. The contract furthermore contains a fair mechanism (arbitration) for resolving any dispute over the price of the buyout should the

parties disagree. Pitcairn does not contend that LJL ever made false representations about Mekkawy, or stated that it would not exercise the purchase option should Mekkawy be terminated. Indeed, Pitcairn did not ask whether LJL intended to exercise the purchase option, or request that it be waived.

Nor did LJL violate fiduciary duties by refusing Pitcairn's plea to market the Property to third parties to help determine its value. The contract between LJL and Pitcairn specifically contemplated an adversarial arbitration procedure to determine the value of the Property should the parties disagree. LJL had no obligation to agree to participate in the conduct of an illusory auction, deceiving potential purchasers into bidding for a property that was in fact not for sale, for the purpose of helping Pitcairn obtain evidence of value. There is no contention that LJL prevented Pitcairn from obtaining reliable evidence on the value of the Property by conventional methods – such as having it appraised by experts.

Pitcairn relies on *Richbell Information Services v. Jupiter Partners,* 309 A.D.2d 288, 765 N.Y.S.2d 575 (N.Y. App. Div. 2003), where the New York court found a breach of the fiduciary duties owed by one party to a joint venture to the other. The facts of *Richbell* were very different from the present case, as they included a bid-rigging scheme by one party to force its co-venturer into default and thereby obtain its assets on the cheap. LJL is not accused of any analogous misconduct. *Richbell,* accordingly, does not

furnish a precedent for imposing such liability on LJL.

E. Pitcairn has not stated a claim for breach of good faith and fair dealing

Pitcairn also claims that by exercising the buyout option, LJL has violated its implied duty of good faith and fair dealing. The implied covenant of good faith and fair dealing bars a party from taking actions "so directly to impair the value of the contract for another party that it may be assumed that they are inconsistent with the intent of the parties." *Bank of China v. Chan,* 937 F.2d 780, 789 (2d Cir. 1991). However, the implied covenant of good faith cannot create duties that negate explicit rights under a contract. *Murphy v. Am. Home Prods. Corp.,* 58 N.Y.2d 293, 304, 448 N.E.2d 86, 461 N.Y.S.2d 232 (N.Y. 1983) ("New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied, will be enforced. . . . No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship."); *D & L Holdings v. RCG Goldman Co.,* 287 A.D.2d 65, 73, 734 N.Y.S.2d 25 (N.Y. App. Div. 2001) ("The covenant of good faith and fair dealing cannot be used to add a new term to a contract, especially to a commercial contract between two sophisticated commercial parties represented by counsel."). Pitcairn had agreed with LJL in Section 8.8 of the Operating Agreement that LJL would have the right

to exercise a buyout option if Mekkawy ceased to be employed by Pitcairn. The mere fact of LJL's decision to exercise its contractual right, absent bad faith conduct, cannot be deemed a breach of its duty to deal with Pitcairn in good faith.

CONCLUSION

For the foregoing reasons, the opinion of the district court is AFFIRMED IN PART and VACATED IN PART. We REMAND the case to the district court with instructions to confirm the arbitration award.

LJL 33rd STREET ASSOCIATES, LLC, Petitioner/Cross-Respondent -v- PITCAIRN PROPERTIES INC., Respondent/Cross-Petitioner.

11 Civ. 6399 (JSR)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2012 U.S. Dist. LEXIS 24986

February 14, 2012, Decided
February 15, 2012, Filed

JUDGES: JED S. RAKOFF, U.S.D.J.

OPINION BY: JED S. RAKOFF

OPINION

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

This is an action brought by petitioner LJL 33rd Street Associates, LLC ("LJL") to confirm in part and vacate in part an arbitration award. Respondent Pitcairn Properties, Inc. ("Pitcairn") opposed and filed a cross-petition seeking to vacate the arbitration award. The parties are members of a limited liability company that owns a luxury high-rise residential building in Manhattan. The Operating Agreement between the parties contained a triggering event that would allow LJL to make an offer to purchase Pitcairn's share of the company. The triggering event happened, and LJL made the offer. Because the parties could not agree on the fair market value of the

property, LJL sought arbitration of that question as provided for in the Operating Agreement. The arbitrator made a fair market value determination, but declined to take jurisdiction over the issue of the Buy/Sell Price referenced in a separate provision of the agreement. LJL's petition asserts that the arbitrator erred in declining to address the Buy/Sell Price. Pitcairn's cross-petition asserts that the arbitrator excluded relevant evidence related to the fair market value of the property and thus that the arbitration proceedings were fundamentally unfair.

After carefully considering the parties' written submissions and oral argument, the Court issued a "bottom-line" Order on December 5, 2011 denying LJL's petition but granting Pitcairn's cross-petition and vacating the arbitration award. This Memorandum explains the reasons for that Order and remands the case to the arbitrator.

The relevant facts are the following. Pitcairn and LJL are the equal members of 35-39 West 33rd Street Associates, LLC (the "Company"). Pitcairn is an owner, developer, and manager of real estate assets, with a principal place of business in Pennsylvania. Memorandum of Law of Respondent Pitcairn Properties, Inc. in Opposition to Petition ("Resp't Mem.") at 2, 6. LJL is a New Jersey Limited Liability Company that holds the interests of Les Lustbader and his children in the Company. *Id.* at 2. The Company owns the apartment building located at 35-39 West 33rd Street in Manhattan (the "Property"). On June 5, 2001, the parties entered into an Amended and

Restated Limited Liability Company Operating Agreement (the "Operating Agreement"), which governs the ownership, development, and management of the Property.

On November 2, 2010, LJL exercised its option to buy Pitcairn's shares.[1] The parties could not agree on the fair market value of the Property, and on December 28, 2010, LJL filed its arbitration demand and statement of claims. The statement of claims asserted three claims for relief: (1) a declaration of the Stated Value; (2) a declaration of the Buy/Sell Purchase Price (the "Buy/Sell Price"); and (3) damages for alleged breaches of the Operating Agreement.[2] *Id.* at 3.

Pitcairn filed its answering statement and objections on January 13, 2011 and expressly objected to the arbitrator's exercise of jurisdiction over the Buy/Sell Price. Cross-Pet'r Ex. 1. Throughout the course of the arbitration, Pitcairn also asserted that it objected to the arbitrator's exercise of jurisdiction over the Buy/Sell Price, because it contended that the Operating Agreement did not provide for arbitration of the Buy/Sell Price. Resp't Mem. at 4.

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[1] The validity of the exercise of that option is the subject of related litigation between the partiess [sic]. *See Pitcairn Properties, Inc. v. LJL 33rd Street Associates, LLC,* 11 Civ. 7318 (JSR) (S.D.N.Y. 2011).

[2] This third claim for relief is not at issue here.

On July 21, 2011, the arbitrator issued his award that the fair market value of the Property was $56.5 million.[3] The arbitrator declined to take jurisdiction over the Buy/Sell Price. In his award, the arbitrator wrote, "the Arbitrator, with the parties' consent, has not exercised jurisdiction over" the Buy/Sell Price. Cross-Pet'r Ex. 14 at 2. LJL filed a motion with the arbitrator seeking to modify the Award; in its motion, LJL specifically argued that it did not consent to the arbitrator's jurisdiction over the Buy/Sell Price. Cross-Pet'r Ex 16. The arbitrator denied LJL's motion. Pet'r Ex B.

Respondent's cross-petition centers on four pieces of evidence that the arbitrator did not allow into evidence (the "Excluded Evidence"). The arbitrator stated that the exhibits would "not be admitted into evidence" and that the Excluded Evidence could "not be considered by the Arbitrator or the neutral appraisal expert . . . in connection with a determination of the subject property's relevant valuation." Cross-Pet'r Ex 13 at 2. The arbitrator did not explain his reasons for excluding the evidence. The four pieces of evidence are as follows:

First, a letter of intent dated January 6, 2011 from Equity Residential ("Equity") making an offer to

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[3] This amount was also the amount recommended by the third-party independent appraiser who was appointed, pursuant to the Operating Agreement, to assist the arbitrator in determining the fair market value of the building.

buy the Property. Memorandum of Law of Cross-Petitioner Pitcairn Properties, Inc. in Support of Its Cross-Petition to Vacate Arbitration Award ("Cross-Pet'r Mem") at 4. Equity is the largest publicly-traded owner of multi-family properties in the United States. *Id.*[4] Equity initially told Pitcairn that it valued the Property at approximately $80 million based on publically available information and requested access to the property's financial information to determine a more precise price. Cross-Pet'r Ex. 10 at PPI000002. Pitcairn gave financial information about the property to Equity, and Equity then sent the letter of intent, which proposed that Equity purchase the Property for $68 million. *Id.* at PPI000068. Pitcairn countersigned the letter of intent, *id.* at R-8, and sought LJL's consent to sell the property to Equity. LJL did not give its consent and thus the sale did not go forward. Cross-Pet'r Mem. at 5.

Second, a report from Eastdil, a real estate banking firm entitled "asset summary"; this report stated that the Property was worth between $63 million and $71.9 million, with a mid-point of $67.2 million. Cross-Pet'r Ex. 10 at PPI000644.[5]

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[4] During the arbitration, LJL's expert appraiser, Robert Von Ancken, agreed that Equity "is a significant owner of properties in the relevant market." *See* Cross-Pet'r Ex. 4 at 203-04. Mr. Von Ancken further testified that Equity is a credible buyer for the Property and that Equity has "a lot of money" and is "smart." *Id.*

[5] Pitcairn provided Eastdil with the same financial information made available to the parties, their appraisers, and

(Continued on following page)

Third, a valuation of the property from CBRE Capital Advisors ("CBRE"). On July 22, 2010, CBRE made a presentation to Pitcairn's Board of Directors. The "Discussion Materials" that CBRE distributed in conjunction with that presentation gave CBRE's assessment of the Property's value as between $63,194,800 and $71,541,600.12. *Id.* at PPI000719.

Fourth, a letter from Eric Blum, the managing member of Pitcairn's sole preferred shareholder. Cross-Pet'r Mem. at 7. Blum wrote the letter, which discussed the value of Pitcairn's assets including the Property, while the preferred shareholder was in a dispute with Pitcairn. The dispute stemmed in large part from the preferred shareholder's belief that Pitcairn was underperforming financially and that Pitcairn was overvaluing its assets. *Id.* at PPI000747-48.[6] The letter reported that William Porter, an accountant who was advising the preferred shareholder, had performed an analysis of Pitcairn's assets. Relying on Mr. Porter's analysis, the letter stated that the preferred shareholder valued the Property "in the low $60 millions." Cross-Pet'r Ex. 10 at PPI000748.

Equity, so that Eastdil could prepare a broker's opinion of value for the property. Pitcairn did not pay Eastdil to produce the report. Cross-Pet'r Mem. at 6.

[6] Pitcairn argues that "[d]ue to the nature of the dispute between Pitcairn Holdings and [its preferred shareholder], Mr. Blum and Mr. Porter had, if anything, a strategic interest in understating the value of Pitcairn's assets, including the Property." Cross-Pet'r Mem. at 7-8.

LJL's expert estimated that the Property was worth $51 million, with a debt of $48 million. *Id.* at 8. Pitcairn's expert valued the property at $66 million. *Id.* The expert testified that he reviewed the four disputed materials prior to issuing his report to determine if his independent analysis of the building's value was consistent with the evaluations conducted by other entities. *See* Cross-Pet'r Ex. 7 (5/23/11 Tr.) at 598-99.

As a preliminary matter, the parties dispute whether the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), governs the Operating Agreement. The FAA governs the Operating Agreement if: "(1) the parties have entered into a written arbitration agreement; (2) there exists an independent basis for federal jurisdiction; and (3) the underlying transaction involves interstate commerce." *In re Arbitration Between Chung & President Enters. Corp.,* 943 F.2d 225, 229 (2d Cir. 1991).

Here, it is clear that the first and second prongs of this test have been met: the parties entered into a written arbitration agreement and diversity jurisdiction provides an independent basis for federal jurisdiction. Therefore, the critical question is whether the transaction "involves interstate commerce." The Supreme Court has held that " 'involving commerce' in the FAA [is] the functional equivalent of the more familiar term 'affecting commerce' – words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v.*

Alafabco, Inc., 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003).

The transaction affects interstate commerce because Pitcairn and LJL are from Pennsylvania and New Jersey, respectively, and together they developed the Property in New York and now manage and own the Property in that state.[7] Because of the broad reading afforded to the term affecting interstate commerce, the Court concludes that the Federal Arbitration Act governs the instant transaction.

Having determined the proper governing statute, the next question is whether the arbitrator was required to arbitrate the Buy/Sell Price. LJL argues that the arbitrator [sic] failure to do so constituted an imperfect execution of the arbitrator's power. Therefore, LJL requests that the Court remand the case to the arbitrator to determine the Buy/Sell Price of the Property.

The Court disagrees and finds that the arbitrator correctly declined to exercise jurisdiction over the

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[7] LJL argues that this is a residential real estate transaction with no connection to interstate commerce. It points to cases that decline to apply the FAA to individual residential real estate contracts. *See, e.g., Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.,* 538 F. Supp. 2d 468 (D.P.R. 2008). But, the instant transaction is not the sale of residential real estate, but rather the ongoing development and management of a large-scale real estate project by out-of-state entities. Even LJL's strongest case acknowledges that courts have applied the FAA to large-scale real estate transactions involving out-of-state entities. *See id.* at 474.

Buy/Sell Price. The Operating Agreement governed which issues were subject to arbitration, and "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *First Options, Inc. v. Kaplan,* 514 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The scope of an arbitrator's authority "generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission. Such an agreement or submission serves not only to define, but to circumscribe, the authority of arbitrators." *Ottley v. Schwartzberg,* 819 F.2d 373, 376 (2d Cir. 1987). According to the clear terms of the Operating Agreement, the parties did not agree to arbitrate the Buy/Sell Price of the Property.

Section 11.19, the arbitration clause, stated that arbitration would apply to "[a]ny provision of this Agreement which *specifically provides* that a dispute will be resolved by the Expedited Arbitration" described in Section 11.1." *Id.* § 11.19 (emphasis added). Under a narrow arbitration clause such as this one,[8] the court must ask "whether the conduct in issue is on its face within the purview of the clause." *Rochdale Vill., Inc.*

[8] A narrow arbitration clause specifies which issues or types of disputes will be arbitrated. *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.,* 858 F.2d 825, 832 (2d Cir. 1988). By contrast, a broad arbitration clause requires arbitration of "disputes of any nature or character," or "any and all disputes." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.,* 252 F.3d 218, 225 (2d Cir. 2001).

v. Pub. Serv. Emp. Union, 605 F.2d 1290, 1295 (2d Cir. 1979).

Section 8.8 of the Operating Agreement gave LJL the option to buy Pitcairn's interest in the Company if there came a time when Pitcairn's CEO, Salah Mekkawy, was no longer employed by Pitcairn. That section stated that if this triggering event occurred, LJL would "have the right to purchase Pitcairn's Interest (in whole but not in part), pursuant to the terms, conditions and procedures set forth in Section 6.12(c) of this Agreement." Operating Agreement § 8.8. That section also stated that if Pitcairn and LJL were unable to agree upon the fair market value of the Property,[9] either party could choose to have "such dispute" determined by Expedited Arbitration pursuant to the arbitration clause of Section 11.19. *Id.* A separate provision of the Operating Agreement, section 6.12, governed the procedure for calculating the Buy/Sell Price and did not mention arbitration.[10] Therefore, the narrow arbitration clause here did not provide for arbitration of the Buy/Sell Price, and the

[9] The Stated Value was defined as "the fair market value of the Property without deduction for any Company liabilities." Operating Agreement § 6.12(a).

[10] The price would be calculated by determining the price that would "produce for Selling Member the same cash consideration as Selling Member would have received if the assets of the Company had been sold on the Buy/Sell Transfer Date to a third party in an all-cash sale for a purchase price equal to the Stated Value." *Id.* § 6.12.

arbitrator correctly declined jurisdiction over that issue.[11]

Pitcairn repeatedly objected to the arbitrator's exercise of jurisdiction over the Buy/Sell Price before the arbitration commenced and during the arbitration. This was enough to indicate its disagreement with the arbitrator's exercise of jurisdiction over that issue. *See, e.g., Opals on Ice Lingerie v. Bodylines Inc.,* 320 F.3d 362, 368 (2d Cir. 2003). LJL contends that Pitcairn consented to having the Buy/Sell Price decided at a later point in the proceeding. As proof of this purported agreement, LJL points to the following statement from Pitcairn's attorney during the arbitration:

> "Those issues [relating to Buy/Sell Price] may – *when and if we get to a closing someday on this transaction need to be addressed,* but that is not the purpose of this hearing. And, again, just to clarify – I think we're in agreement on this Mr. Steingut, but this hearing is limited to coming up with the fair market value number for the property. It is not to – intended to proceed to the next step of either, A, are we – is Pitcairn required to sell its interest or, B, if it is at what actual amount when you actually take out the liabilites [sic] and escrows and accruals and all that kind of good stuff. We've *also*

[11] The Court also rejects LJL's request that the Court take ancillary jurisdiction over the determination of the Buy/Sell Price.

> *reserved that* for a later *day*. Correct, Mr. Steingut [LJL's attorney].

Petition at 10 (emphases added).

This statement is far from the smoking gun that LJL claims it to be. In fact, when read in context, it undermines LJL's claim that Pitcairn agreed to have the Buy/Sell Price decided later in the arbitration proceeding. Pitcairn first said that the Buy/Sell Price would need to be addressed when and if the parties got to closing. A few seconds later, when Pitcairn's attorney said Pitcairn was reserving the Buy/Sell Price for a later *day*, he did not say a later day in the arbitration proceeding, and he had earlier made clear that the later day was around the time of a closing on the property. But, before closing could happen, Pitcairn made clear that it was also going to challenge the validity of the exercise of the option, which had not been a subject of the arbitration.

LJL also argues that Pitcairn proceeded to arbitration without moving for a stay of arbitration, and that Pitcairn thereby waived any argument that the arbitrator should not arbitrate the Buy/Sell Price. Even assuming arguendo that the twenty-day time limit for seeking a stay in N.Y. CPLR § 7503(c) did apply in this FAA case,[12] Pitcairn did not waive its

[12] The law of this Circuit is not settled as to whether the time limit set forth in CPLR § 7503(c) applies in cases governed by the FAA. *See Irving R. Boody & Co., Inc. v. Win Holdings Intern., Inc.,* 213 F. Supp. 2d 378 (S.D.N.Y. 2002) (collecting cases).

right to object to jurisdiction over the buy/sell provision. Pitcairn's decision not to seek a stay of arbitration based on a jurisdictional objection does not waive that objection where, as here, the objecting party is subject to the arbitrator's jurisdiction on at least some issues. *See Amedeo Hotels Ltd. P'ship v. N.Y. Hotel & Motel Trades Council, AFL-CIO,* 10 Civ. 6150, 2011 U.S. Dist. LEXIS 55032, 2011 WL 2016002, *6 (S.D.N.Y. May 18, 2011).

It is true, however, that the arbitrator incorrectly stated that he had the parties' consent not to address the Buy/Sell Price. It is clear that the arbitrator did not have LJL's consent for this decision. However, the Court need not decide whether the arbitrator's statement was error or merely inartful phrasing, because any error here was harmless. As discussed above, the Buy/Sell Price was not properly the subject of arbitration. *LJL's* consent was irrelevant to that issue, because the Operating Agreement simply did not provide for arbitration over the Buy/Sell Price. Therefore, the arbitrator properly declined to exercise jurisdiction over the Buy/Sell Price of the Property, and Pitcairn did not waive any objections to the exercise of that jurisdiction.

The Court now turns to Pitcairn's cross-petition. As Pitcairn concedes, arbitration awards are entitled to great deference by a reviewing court. *See Hill v. Staten Island Zoological Soc'y, Inc.,* 147 F.3d 209, 212 (2d Cir. 1998). This is so "because an overly expansive judicial review of arbitration awards would undermine the litigation efficiencies which arbitration

seeks to achieve." *Fine v. Bear, Stearns & Co.,* 765 F. Supp. 824, 827 (S.D.N.Y. 1991) (quoting *Transit Cas. Co. v. Trenwick Reinsurance Co.,* 659 F. Supp. 1346, 1350-51 (S.D.N.Y. 1987)).

The FAA provides that a court may vacate an arbitration award, however, "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). This provision of the FAA "has been narrowly construed so as 'not to impinge on the broad discretion afforded to arbitrators to decide what evidence should be presented' during the course of the arbitration proceedings." *GFI Secs. LLC v. Labandeira,* No. 01 Civ. 00793, 2002 U.S. Dist. LEXIS 4932, 2002 WL 460059, at *6 (S.D.N.Y. Mar. 26, 2002) (quoting *Ripa v. Cathy Parker Mgmt., Inc.,* No. 98 Civ. 0577, 1998 U.S. Dist. LEXIS 6759, 1998 WL 241621, at *3 (S.D.N.Y. May 13, 1998)). Ultimately, as this Court has previously ruled, "[i]n order to obtain relief under Section 10(a)(3), a party must demonstrate that the error complained of 'was made in bad faith or was so gross as to amount to affirmative misconduct.'" *Global Intern. Reinsurance Co. v. TIG Ins. Co.,* No. 08 Civ. 7338, 2009 U.S. Dist. LEXIS 7697, 2009 WL 161086, *3 (S.D.N.Y. Jan. 21, 2009) (quoting *Local 530 v. Dist. Council No. 9,* No. 99 Civ. 2703, 1999 U.S. Dist. LEXIS 17309, 1999 WL 1006226, at *2 (S.D.N.Y. Nov. 5, 1999)).

Pitcairn argues that the arbitrator committed affirmative misconduct because he denied Pitcairn a "meaningful opportunity to present pertinent and

material evidence demonstrating both the reasonableness of Pitcairn's expert's opinion and the unreasonableness of LJL's expert's opinion." Cross-Pet'r Mem. at 11. The Court agrees. "Although not required to hear all the evidence proffered by a party, an arbitrator 'must give each of the parties to the dispute an adequate opportunity to present its evidence and argument.'" *Tempo Shain Corp. v. Bertek, Inc.,* 120 F.3d 16, 20 (2d Cir. 1997) (quoting *Hoteles Condado Beach v. Union De Tronquistas Local 901,* 763 F.2d 34, 39 (1st Cir. 1985)). In determining fair market value, evidence of genuine market activity is certainly pertinent and material.[13] In particular, the offer of intent from Equity was a critical piece of concrete evidence as to how the market valued the Property. *See First Nat'l Bank of Kenosha v. United States,* 763 F.2d 891 (7th Cir. 1985) (considering an unenforced option contract when evaluating the fair market value of a property); *see also Manhattan Church of Christ, Inc. v. 40 East 80 Apartment Corp.,* 55 A.D.3d 416, 866 N.Y.S.2d 53, 55 (N.Y. App. Div. 2008) (defining fair market value as the "price for which the property would sell if there was a willing

[13] LJL argues that this case is analogous to this Court's decision in *Duferco, S.A. v. Tube City IMS, LLC,* No. 10 Civ. 7377, 2011 U.S. Dist. LEXIS 12585, 2011 WL 666365 (S.D.N.Y. Feb. 4, 2011). Such reliance is misplaced because in *Duferco,* the arbitrator bifurcated the proceeding and excluded evidence that was, without more, irrelevant to the first stage of the proceeding. Here, as discussed above, the evidence was both relevant and material.

buyer who was under no compulsion to buy and a willing seller under no compulsion to sell.") Moreover, the Equity letter of intent was not the only piece of evidence that the arbitrator excluded; rather, the arbitrator excluded essentially all of the factual evidence about genuine market activity and valuation even though this evidence was critical to a determination of fair market value.[14]

Although it is clear that the Excluded Evidence was material and pertinent, that is not the end of the Court's inquiry, because "every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award." *Hoteles Condado,* 763 F.2d at 40. In fact, according to the statute, vacatur is only appropriate "if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings." *Id.* (citing 9 U.S.C. § 10(c)). Here, however, the exclusion of the evidence was highly prejudicial because it prevented Pitcairn from effectively demonstrating that four experts – Equity, Eastdil, CBRE, and William Porter – all agreed that the Property was worth between $62 million and $71.9 million. Pitcairn's expert's valuation of $66 million was consistent with all of those analyses, and

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[14] Arbitrators are not required to state the reason for their rulings, *DiRussa v. Dean Witter Reynolds Inc.,* 121 F.3d 818, 822 (2d Cir. 1997), although their failure to state their reasons on evidentiary matters such as this one does add unnecessary difficulty to a review of that decision.

with the bona fide offer of $68 million, but LJL's expert valued the Property at only $51 million. When viewed in light of all of the relevant and pertinent evidence, LJL's expert was an outlier, and thus Pitcairn was highly prejudiced by the exclusion of the Excluded Evidence.

LJL made several evidentiary objections, such as hearsay, to the Excluded Evidence and thus argues that the arbitrator properly excluded the evidence on those grounds. In arbitration proceedings, however, there is no need to comply with strict evidentiary rules. After noting that arbitrators are allowed to accept hearsay evidence, the Second Circuit in *Petroleum Separating Co. v. Interamerican Ref. Corp.,* 296 F.2d 124 (2d Cir. 1961) stated the following: "[i]f parties wish to rely on such technical [hearsay] objections they should not include arbitration clauses in their contracts. The appeal is quite insubstantial." *Id.* at 124. Compliance with strict evidentiary rules is especially not required here because the arbitration was conducted under the AAA's Expedited Arbitration procedures.[15] Operation Agreement § 11.19. Those procedures incorporate the AAA Rules and Mediation Procedures ("AAA Rules"), which state that "conformity to legal rules of evidence shall not be necessary."

[15] The Operating Agreement provided for a hearing at which each side "shall be entitled to present evidence and witnesses to support its position." Operating Agreement § 11.19(b)(iv).

AAA R. 31.[16] Instead, those rules provide that "the parties may offer such evidence as is relevant and material to the dispute" and that "the arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant." *Id.* Therefore, the evidentiary issues raised by LJL should have gone to the weight afforded to the Excluded Evidence rather than its admissibility.

The "touchstone" for a finding of arbitral misconduct under the FAA is the concept of "fundamental fairness." *See, e.g., The Home Indem. Co. v. Affiliated Food,* No. 96 Civ. 9707, 1997 U.S. Dist. LEXIS 19741, 1997 WL 773712, at *3 (S.D.N.Y Dec. 12, 1997). The arbitrator's refusal to hear this evidence constituted affirmative misconduct and rendered the proceedings fundamentally unfair. *See Tempo Shain,* 120 F.3d at 20. The Court recognizes that arbitrators are to be given great leeway, and it also recognizes the inefficiencies associated with expansive judicial review of arbitration. On the other hand, some judicial review is critical in order to ensure the fundamental fairness of the proceedings. While courts are not in the business of reviewing every evidentiary decision that arbitrators make, here, the arbitrator excluded every piece of factual evidence that Pitcairn proffered regarding genuine market activity and valuations of the Property – evidence that might well have changed

[16] Pitcairn repeatedly advised the arbitrator of the applicability of AAA Rule 31. *See* Cross-Pet'r Exs. 17; 18.

the outcome of the arbitration. In light of the particular facts of this case, the Court must vacate the arbitration award.

For the foregoing reasons, the Court, by Order dated December 5, 2011, denied LJL's petition, and granted Pitcairn's cross-petition. The Clerk of the Court is now directed to enter judgment vacating the arbitration award and remanding the matter to the arbitrator for further proceedings consistent with this opinion.

SO ORDERED.

Date: New York, NY
February 14, 2012

/s/ Jed S. Rakoff, U.S.D.J.

JED S. RAKOFF, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LJL 33rd STREET ASSOCIATES, LLC, Petitioner/Cross-Respondent, -v- PITCAIRN PROPERTIES, INC., Respondent/Cross-Petitioner	11 Civ. 6399 (JSR) ORDER

JED S. RAKOFF, U.S.D.J.

Petitioner LJL 33rd Street Associates, LLC ("LJL") brings this action against Pitcairn Properties, Inc. ("Pitcairn") to confirm in part and modify or vacate in part an arbitration award. The arbitration related to the fair market value of a residential apartment building at 35-39 West 33rd Street ("the Property"). The parties had jointly owned the Property through 35-39 West 33rd Street Associates, LLC. LJL sought to confirm the arbitrator's determination of the fair market value of the Property but to vacate or modify the arbitrator's decision not to exercise jurisdiction over the purchase price of the Property. Pitcairn opposed LJL's petition and brought a cross-petition to vacate the arbitration award on the grounds that the arbitrator had denied Pitcairn any "meaningful opportunity to present pertinent and material evidence demonstrating both the reasonableness of Pitcairn's expert's opinion and the

unreasonableness of LJL's expert's opinion" about the fair market value of the Property. Memorandum of Law of Respondent/Cross Petitioner Pitcairn Properties, Inc. in Support of its Cross-Petition to Vacate Arbitration Award at 11. The Court hereby denies LJL's petition and grants Pitcairn's cross-petition. An opinion explaining the reasons for this ruling will issue in due course, at which time final judgment will be entered.

The Clerk of the Court is directed to close documents number 3 and 10 on the docket of this case.

SO ORDERED.

Dated:
~~November~~ [12/5/], 2011 /s/ Jed S. Rakoff
New York, NY JED S. RAKOFF, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of October, two thousand thirteen,

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LJL 33rd Street Associates, LLC,

Plaintiff-Cross
Defendant-Appellant,

v.

Pitcairn Properties Inc.,

Defendant-Cross
Claimant-Appellee.

ORDER
Docket No: 11-5425

Appellee Pitcairn Properties Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe