No. 13-879

IN THE

Supreme Court of the United States

PITCAIRN PROPERTIES, INC.,

Petitioner,

v.

LJL 33RD STREET ASSOCIATES, LLC,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

Theodore S. Steingut
152 Madison Ave.
14th Floor
New York, NY 10016

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

QUESTION PRESENTED

Whether Section 10(a)(3) of the Federal Arbitration Act compelled vacatur of the arbitral award in this case because the arbitrator excluded hearsay evidence regarding the valuation of an apartment building when (1) petitioner could have, but chose not to, make the relevant witness available for cross-examination at the hearing, and (2) the arbitrator considered ample other evidence regarding the value of the property, including the appraisals offered by petitioner's own expert and a neutral appraiser appointed by the arbitrator.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, respondent states that it has no parent company and that no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

Petitioner asks this Court to grant certiorari to establish a *per se* rule that the Federal Arbitration Act (FAA) compels arbitrators to admit hearsay evidence so long as it is pertinent, material, and "the sole relevant and non-cumulative evidence in support of a fact material to the controversy." Pet. i. No court has adopted such a rule, which is unsurprising given that the rule has no basis in the text of the statute and runs counter to settled principles of arbitration law and the decisions of this Court.

1. Respondent LJL 33rd Street Associates, LLC (LJL) and petitioner Pitcairn Properties, Inc. (Pitcairn) are equal members of a limited liability company, 35-39 West 33rd Street Associates, LLC (the Company). The Company's sole asset is an apartment building in Manhattan (the Property). LJL and Pitcairn's relationship is governed by an operating agreement (the Agreement), under which Pitcairn is charged with managing the apartment building.

The Agreement provides that if Pitcairn's CEO were ever to leave his job then LJL would have the option to buy Pitcairn out. Broadly stated, the purchase price for the buyout is defined in the Agreement as Pitcairn's pro rata share of the "Stated Value" of the Company (defined as the market value of its assets) minus the Company's debts and other prorations. If the parties were unable to agree upon a Stated Value, either party could submit the issue to arbitration "whereupon the arbitrator shall select an independent, third party . . . appraiser who shall determine the Stated Value." Pet. App. 4. The

arbitration shall be conducted under "the Expedited Arbitration procedures of the American Arbitration Association" (AAA Rules). *Id*. 6.[1]

In the summer of 2010, there was a battle among Pitcairn's shareholders for control of the corporation. Pet. App. 7. One of Pitcairn's preferred shareholders eventually prevailed and took over the board, which then fired Pitcairn's CEO, triggering LJL's right to purchase the Company. LJL exercised that right on November 2, 2010. *Id*. 7-8. When the parties were unable to agree on the Company's Stated Value, LJL invoked arbitration.

2. As required by the Agreement, the arbitrator appointed a neutral appraiser. At the hearings that followed, each side presented evidence regarding the value of the Property in hearings lasting five days with over 900 pages of recorded transcript and well over seventy-five documentary exhibits. Among other things, each side introduced testimony and reports from their own appraisers, who were subject to cross-examination. Pet. App. 9. LJL's appraiser valued the Property at $50-52 million, while Pitcairn's gave it a value of approximately $65 million. *Id*.

Pitcairn also attempted to introduce four other exhibits: (1) an "asset summary" from Eastdil, a real estate banking firm with offices in New York; (2) discussion materials provided to Pitcairn's board of

---

[1] These Rules are available from the American Arbitration Association *at* https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/z2uy/mde1/~edisp/adrstage2015619.pdf.

directors during a meeting with CBRE Capital Advisory, a New York-based commercial real estate company; (3) a letter from Eric Blum (a board member of Pitcairn's preferred shareholder) describing the views of William Porter (an accountant who, by the time of the arbitration hearing, had become chairman of Pitcairn's board (JA 403)) on the value of the Property; and (4) a non-binding "letter of intent" to purchase the Property written by a company called Equity Residential and secretly negotiated with Pitcairn (JA 406-07, 1167-68) after LJL exercised its purchase option. *See* Pet. App. 9-10, 28-31.

LJL objected to admission of these documents because, among other things, they were hearsay and Pitcairn could have, but did not, produce the authors of the documents for cross-examination at the arbitration hearing. *See* Pet. App. 10; JA 1126.[2] After hearing the parties' arguments, the arbitrator sustained LJL's objection. Pet. App. 10.

Based on the valuation of the neutral appraiser, the arbitrator entered an award establishing the Stated Value of the property at $56.5 million, approximately halfway between the values asserted by the parties' own appraisers. Pet. App. 10.

2. LJL filed a petition in New York state court seeking, among other things, confirmation of the

---

[2] Pitcairn claims that the authors of two of the four documents, although employed by firms with New York offices, were not subject to subpoena. Pet. 9. But the district court made no such finding, and the court of appeals found this claim unsubstantiated. Pet. App. 20-21.

arbitrator's determination of the Stated Value. Pitcairn removed the case to federal court and cross-petitioned to vacate the award, arguing that the arbitrator's exclusion of the hearsay evidence violated Section 10(a)(3) of the FAA, which provides that a court "may make an order vacating the award" in an arbitration

> 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 the party have been prejudiced.

9 U.S.C. § 10(a)(3).[3]

The district court vacated the award in relevant part. The court acknowledged that arbitrators are "not required to hear all the evidence proffered by a party," so long as they "give each of the parties to the dispute an adequate opportunity to present its evidence and argument." Pet. App. 39 (citations omitted). And the court did not dispute that Pitcairn had ample opportunity to present evidence and argument regarding the value of the Property. *Id*. 31. The court further did not question that the evidence Pitcairn submitted was hearsay that would

---

[3] Pitcairn also filed a separate suit in the district court raising various state law claims in an attempt to preclude LJL from exercising its option to purchase the property. The district court dismissed that suit and the Second Circuit affirmed the dismissal on appeal. *See* Pet. App. 12. Pitcairn does not seek review of that ruling.

have been inadmissible in any federal court. *Id*. 41. It nonetheless held that the arbitrator was "guilty of misconduct" within the meaning of the FAA for excluding the evidence from the arbitration. *Id*. 38-39.

2. The Second Circuit unanimously reversed in relevant part. Pet. App. 17-21. The court agreed with the "general proposition that an arbitrator's unreasonable exclusion of pertinent evidence, which effectively deprives a part of the opportunity to support its contentions, can justify vacating an award." *Id*. 18. But, the court explained, "we do not think this was an instance of such fundamental unfairness." *Id*.

The court reasoned that just because 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." Pet. App. 19. To the contrary, under the arbitration rules Pitcairn had agreed to, arbitrators "have substantial discretion to admit or exclude evidence." *Id*. 21 (citing AAA R-31(b)). The arbitrator properly exercised that discretion in this case, the court held, because "(a) the evidence could be presented without reliance on hearsay and (b) its hearsay nature is unfairly prejudicial to" LJL. *Id*. 19.

Specifically, the court found that "there was no good reason for Pitcairn to rely on hearsay" because it could have "call[ed] the makers of the exhibits – thus providing LJL with the opportunity to cross-examine these witnesses in an effort to undermine the probative value of the exhibits." *Id*. 19-20; *see also id*. 20-21 (finding that "there was no showing that Pitcairn could not call the makers of the exhibits,

thus eliminating the hearsay problem"). At the same time, the court noted that the basis of a property valuation can be highly variable and contestable. *Id*. 19-20. Accepting the hearsay exhibits "without LJL having had the opportunity to test their conclusions by cross-examination to explore the underlying reasoning" would have "severely prejudiced" LJL. *Id.* 20.

Accordingly, because the exclusion "did not impair the 'fundamental fairness' of the proceeding," the court ordered confirmation of the award. Pet. App. 21a (quoting *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997)).

REASONS FOR DENYING THE WRIT

Pitcairn asks this Court to grant certiorari to decide whether Section 10(a)(3) of the FAA enacts a *per se* rule forbidding arbitrators from excluding hearsay evidence so long as the hearsay is "pertinent and material," and is the "sole relevant and non-cumulative evidence in support of a fact material to the controversy." Pet. i. No court has ever adopted that rule, which has no basis in the text of the FAA or this Court's interpretations of the statute. Nor would the rule apply in this case, as Pitcairn was permitted to offer ample substitute evidence to prove the Stated Value of the Property. The petition should be denied.

I. The Question Presented Is Not The Subject Of Any Circuit Conflict.

No circuit has ever accepted – and other than the Second Circuit in this case, no court of appeals has ever even *considered* – the rule Pitcairn proposes.

Pitcairn's attempt to nonetheless establish a relevant circuit conflict is entirely unsuccessful.

1. The circuits uniformly agree that Section 10(a)(3) does not require arbitrators to accept evidence simply because it is relevant; instead, vacatur is permitted only when the exclusion of evidence amounts to "misconduct" that deprives a party of a "fundamentally fair" hearing. *See Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997); *Century Indem. Co. v. Underwriters, Lloyd's, London*, 584 F.3d 513, 557 (3d Cir. 2009); *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 531 (4th Cir. 2007); *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399 (5th Cir. 2006); *Nat'l Post Office Mailhandlers, Watchmen, Messengers & Grp. Leaders Div., Laborers Int'l Union v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985); *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 280-81 & n.13 (7th Cir. 1992); *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 848 (8th Cir. 2001); *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1173-76 (9th Cir. 2010); *Bad Ass Coffee Co. of Haw. v. Bad Ass Coffee Ltd. P'ship*, 25 F. App'x. 738, 743 (10th Cir. 2001) (unpublished); *Rosenweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th Cir. 2007); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816, 818 (D.C. Cir. 2007).

Pitcairn suggests that the First and Second Circuits have adopted a *per se* rule that exclusion of relevant evidence results in a fundamentally unfair proceeding, thereby compelling vacatur, if the proffered evidence was the only evidence available to

support a fact material to the case. Pet. 23-24. But Pitcairn mischaracterizes the two cases it relies upon.

In *Hoteles*, the First Circuit established no *per se* rule, and even if it did, it would not apply to this case. The arbitrator in *Hoteles* refused to give any weight to sworn testimony given in a criminal trial by a witness who was unavailable to testify at the arbitration. 763 F.2d at 39-40. Rather than adopt any broad rule, the court simply concluded that, on the facts of the case before it, "the arbitrator's refusal to ascribe any weight to the testimony given at the criminal proceedings effectively denied the Company an opportunity to present any evidence in the arbitration proceeding." *Id*. (emphasis omitted).

The facts of this case are dramatically different. For one thing, there was no hearsay objection to the evidence in *Hoteles*. Instead, the arbitrator refused to consider sworn testimony subject to cross-examination in a prior criminal proceeding. *Id*. at 40. That evidence was plainly admissible under Fed. R. Evid. 804(b)(1). Nothing in *Hoteles* suggests that the First Circuit would have required the arbitrator to admit unreliable hearsay testimony simply because the Company had not come up with any other admissible evidence in its favor. Likewise, in *Hoteles* "*no* other evidence was available to substantiate or to refute the Company's charges." 763 F.2d at 40 (emphasis added). Here, the arbitrator heard ample evidence in support of Pitcairn's claims regarding the property's value, including the expert testimony and report of the parties' experts and his own appraiser. *See* Pet. App. 9; *infra* 17. Finally, as the court of appeals observed below, this case is different from

Hoteles because "there was no showing that Pitcairn could not call the makers of the exhibits, thus eliminating the hearsay problem." Pet. App. 20-21. Pitcairn may disagree with that conclusion, *see* Pet. 32; *infra* 16-17, but that fact-bound disagreement does nothing to change the fact that the Second Circuit's decision establishes no legal rule governing the situation addressed in *Hoteles* – *i.e.*, a case in which an arbitrator excludes what is, through no fault of its own, a party's only evidence in support of its case.

Pitcairn's claim that the Second Circuit's decision in this case conflicts with a Second Circuit decision in a prior case is as pointless as it is meritless. This Court does not sit to resolve intracircuit conflicts. *See, e.g.*, *Davis v. United States*, 417 U.S. 333, 340 (1974). To the extent Pitcairn is correct that the law of the Second Circuit is uncertain, that is a reason to deny review, not grant it.

But in any event, there is no conflict. Like the First Circuit in *Hoteles*, the panel in *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997), did not purport to establish any general legal rule, much less the *per se* rule Pitcairn proposes. Instead, the court found a denial of fundamental fairness because the arbitrators refused to grant a continuance to allow a critical, indeed the *only*, witness to testify. *Id*. at 20-21. As in *Hoteles*, there was no question regarding the admissibility of the excluded testimony, so the decision has no bearing on an arbitrator's refusal to admit hearsay evidence. Moreover, the court in *Tempo Shain* concluded that the excluded testimony was essential to a party's

case; here, Pitcairn presented substantial additional evidence to support its claim. Finally, unlike this case, there was no question of fault in *Tempo Shain* – the witness was unavailable because his wife was diagnosed with cancer. *Id*. at 17-18.

2. Unable to identify a circuit conflict on the Question Presented, Pitcairn discusses purported conflicts on *different* questions having nothing to do with the decision in this case. But even those claims of irrelevant conflicts have no basis.

a. Pitcairn first asserts that there is a conflict over "whether a party must show it suffered prejudice from the arbitrator's exclusion of pertinent and material evidence." Pet. 19-20. Specifically, Pitcairn claims that unlike other circuits, the Third and Seventh Circuits require no showing of prejudice to justify vacatur under Section 10(a)(3). *Id*. 20-21.

Just what this alleged conflict has to do with this case, Pitcairn does not say. The Second Circuit did not rely on the absence of prejudice to Pitcairn in ordering confirmation of the arbitral award; in fact, it acknowledged that Pitcairn "may well have been harmed by the exclusion of its exhibits," but nonetheless held that they were properly denied admission because they were hearsay and because Pitcairn "could have cured the problem simply by calling the makers of the exhibits as witnesses." Pet. App. 20.

In any event, there is no conflict. The only basis for Pitcairn's claim that the Third and Seventh Circuits do not require prejudice is the fact that in two opinions, those courts "applied" Section 10(a)(3) "without referring" to the portion of the provision

mentioning prejudice, thereby "*implying* that prejudice is not required." Pet. 20 (emphasis added). But even a cursory examination of the decisions shows that the question of prejudice never came up because in both of the cited cases, the courts held that the exclusion was not erroneous to begin with, inasmuch as the proffered evidence was irrelevant. *See Century Indem. Co.*, 584 F.3d at 559; *Flender Corp.*, 953 F.2d at 281.

b. Pitcairn next asserts a conflict over whether Section 10(a)(3) permits vacatur only upon a showing of "bad faith," claiming that the Third and Fourth Circuits require it, while the First and Second do not. Pet. 23-31. But again, that question has nothing to do with the outcome in this case. The Second Circuit denied vacatur because the evidence was properly excluded, not because of any lack of "bad faith." Indeed, on Pitcairn's accounting, the Second Circuit is on Pitcairn's side of the circuit conflict, rejecting any "bad faith" requirement. Pet. 23-24.

In any event, the alleged split is admittedly premised on dicta from a single Third Circuit opinion, *see* Pet. 30, which says nothing about bad faith, *see Century Indem. Co.*, 584 F.3d at 557, and conflicting decisions within the Fourth Circuit, Pet. 29-30 & n.7. Such an undeveloped conflict would not warrant review even if it were implicated in this case.

II. Petitioner's Proposed *Per Se* Rule Has No Basis In The FAA.

Pitcairn's proposed *per se* rule finds no support in the text or purposes of the FAA and runs counter to the arbitration decisions of this Court. Nor did the court of appeals err in upholding the arbitrator's

exclusion of the hearsay evidence in this particular case, given that Pitcairn could have submitted its hearsay evidence through admissible witness testimony and was allowed to present ample alternative evidence in support of its claimed value of the Property.

1. The FAA is premised on the principle that "arbitration is a matter of contract." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citation omitted). Accordingly, unless the parties specify otherwise, "the usual rules of evidence do not apply." *McDonald v. City of W. Branch*, 466 U.S. 284, 291 (1984) (citation omitted). But that does not mean, as Pitcairn insists, that the FAA requires arbitrators to ignore traditional evidentiary principles; it means that evidentiary rules in arbitration are also a matter of contract, ordinarily addressed by arbitral tribunal's rules. *See Italian Colors*, 133 S. Ct. at 2309 ("[C]ourts must rigorously enforce arbitration agreements according to their terms, including those that specify . . . the rules under which under which that arbitration will be conducted.") (citations and internal quotation marks omitted); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 39 (1987) (noting that parties are "free to set the procedural rules for arbitrators to follow" in an arbitration proceeding).

Accordingly, this Court has noted, for example, that an arbitration agreement may forbid "the arbitrator to consider hearsay evidence," or it may provide that "evidentiary matters [are] otherwise left to the arbitrator." *Misco*, 484 U.S. at 39. Whatever evidentiary rules the parties select, the FAA generally leaves interpretation and enforcement of such procedural rules to the arbitrators. *See, e.g.*, *id.* at 40-41; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

Pitcairn claims that Section 10(a)(3) displaces the right of the parties to select their own rules of evidence, and the power of arbitrators to make evidentiary rulings, by requiring admission of any relevant non-cumulative evidence that provides the sole support for any material fact at issue in an arbitration. But as this Court has explained, Section 10(a)(3) authorizes vacatur of an arbitration award only if the exclusion of relevant evidence "amount[s] to affirmative misconduct." *Misco*, 484 U.S. at 40; *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting that review under the FAA "focuses on misconduct rather than mistake"); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (noting that "Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration"). Section 10(a)(3) does not render "[e]very failure of an arbitrator to receive relevant evidence . . . misconduct requiring vacatur of an arbitrator's award." *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985). Misconduct arises only when the exclusion "so affects the rights of a party that it may

be said that he was deprived of a fair hearing." *Id*. (citation omitted).

It could hardly be otherwise. "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. "If parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process." *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (citation and internal quotation marks omitted).

Pitcairn cannot seriously contend that an arbitrator *always* engages in "misconduct" in excluding hearsay evidence, even if authorized by the arbitration rules the parties selected. Hearsay is excluded from federal court for good reason.

> Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the [finder of fact.]

Chambers v. Mississippi, 410 U.S. 284, 298 (1973). While parties to an arbitration are not *compelled* by the FAA to follow this sensible evidentiary rule, nothing in the statute *precludes* them from agreeing to arbitration rules that expressly forbid

consideration of hearsay evidence or leave its admission to the arbitrator's discretion. *See, e.g.*, *Misco*, 484 U.S. at 39. An arbitrator does not commit "misconduct" in excluding hearsay evidence in accordance with the arbitral rules to which the parties agreed.

2. Moreover, even if exclusion of hearsay evidence might in some circumstances amount to misconduct in violation of Section 10(a)(3), it certainly is not a basis for vacatur in this case.

Pitcairn agreed to arbitration rules that did not require conformance to "legal rules of evidence" but instead assigned the task of determining admissibility to the arbitrator. *See* Pet. App. 19 (quoting AAA R-31(a)); *id.* 21 (quoting AAA R-31(b)).[4] After receiving substantial briefing and argument from the parties on the admissibility question, the arbitrator acted well within his discretion in excluding Pitcairn's hearsay valuation evidence. As the court of appeals recognized, "expert valuations of this nature are the product of so many complex factors, and so many assumptions (especially when 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 conclusion by cross-

---

[4] Petitioner has abandoned the argument, made below, that the AAA rules permit exclusion of evidence only if it is irrelevant or cumulative. *See* C.A. Br. 27. Even if such an argument had been preserved, the FAA leaves the construction of arbitration rules to the arbitrators. *See, e.g.*, *Howsam*, 537 U.S. at 84.

examination." *Id*. 20. This is particularly true with respect to the unaccepted, non-binding purchase offer that is the focus of the petition. Indeed, this Court has long recognized that such offers to purchase property are poor indicators of market value. *See Sharp v. United States*, 191 U.S. 341, 350 (1903) ("In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject.").[5] If such evidence was to be considered at all in the arbitration, it was appropriately subject to cross-examination.

Moreover, the Second Circuit rightly concluded that "there was no showing that Pitcairn could not call the makers of the exhibits, thus eliminating the hearsay problem." Pet. App. 20-21. Pitcairn contests this finding with respect to the Equity Residential purchase offer and the Eastdil "asset summary," claiming that although both companies do substantial business in New York, the particular employees who authored the reports were not subject

---

[5] For that reason, many decisions, including some in New York's courts, hold non-binding purchase offers, standing alone, are inadmissible to prove market value. *See, e.g.*, *People v. Kirkwood*, 606 N.Y.S.2d 612, 613 (N.Y. App. Div. 1993) ("It has often been held that an offer to purchase is highly speculative and thus not competent evidence of market value.") (citing *Hine v. Manhattan Ry. Co.*, 132 N.Y. 477 (N.Y. 1892)); *Brummer v. New York*, 269 N.Y.S.2d 604, 607 (N.Y. App. Div. 1966) (noting the "well accepted general rule that an offer of settlement or an offer of purchase is inadmissible to show market value"). Petitioner may disagree, but the arbitrator was entitled to his own view of the case law. *See, e.g., Hall St. Assocs.*, 552 U.S. at 585-86.

to subpoena because they lived out of state. Pet. 9. But Pitcairn provided no support for that factual assertion in its Second Circuit brief. *See* C.A. Br. 38 n.12. And in any event, Pitcairn never asked the arbitrator to hold hearings where the witnesses were physically located and unquestionably subject to subpoena. *See* AAA R-11 (permitting hearings in other locations when "reasonably necessary and beneficial to the process"). Nor, to this day, has Pitcairn offered any reason why it could not have produced witnesses in support of the other hearsay documents, including the one written by Pitcairn's own Chairman.

Finally, although Pitcairn claims that these documents were the "only relevant fact evidence bearing on the sole issue" in the arbitration, Pet. 11, that is manifestly false. As Pitcairn elsewhere admits, the "sole issue to be decided" in the arbitration "was the 'Stated Value,' or fair market value, of the Property." Pet. 8; *see also* Pet. App. 9. And Pitcairn acknowledges that "[e]ach party introduced the oral testimony and written reports of retained expert appraisers regarding the Property's value." Pet. 8. Pitcairn says that the excluded evidence was the "only evidence of actual market activity presented by either party." *Id*. 11 n.3.[6] But

[6] Petitioner never adequately explains what it means by "actual market activity." The non-binding purchase offer hardly constitutes a market transaction or, as discussed, even particularly good evidence of market value. *See supra* 15-16 & n.5. And the other documents amount to the same kind of estimates of market value as the appraisal petitioner's expert submitted.

the question before the arbitrator was the Property's market *value*, not its "actual market activity," and Pitcairn was permitted to present ample evidence on that issue. Accordingly, even if the Court adopted Pitcairn's proposed rule, it would not apply in this case.

In such circumstances, it is impossible to say that any alleged error in excluding the evidence was in "bad faith or so gross as to amount to affirmative misconduct." *Misco*, 484 U.S. at 40.

CONCLUSION

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

Respectfully submitted,

Theodore S. Steingut
152 Madison Ave.
14th Floor
New York, NY 10016

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

April 2, 2014