No. 25-925

IN THE

Supreme Court of the United States

PETER MALKIN, *et al.*,

Petitioners,

v.

VIRGINIA SHASHA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a) in order to challenge confirmation of a fact-bound arbitration award that has been fully resolved and satisfied.

Question 1: Petitioners ask this Court to decide whether manifest disregard of the law remains a ground to vacate an arbitration award.

Question 2: Petitioners also ask this Court to decide whether email transmittal of a petition to vacate an arbitration award made at 10:00 p.m. to an opposing party's counsel on the second to last day of the three-month limitations period allowed for service of process complies with Section 12 of the FAA.

Neither question is properly presented. Petitioners are asking this Court for an advisory opinion. The Court lacks jurisdiction to decide both questions.

LIST OF PARTIES TO THIS OPPOSITION

Respondents in this Brief in Opposition are Virginia Shasha and Vivienne Pero, Co-Trustees of the Violet Shuker Shasha Trust, Debra B. Adler, Successor Trustee of the Adler Family Trust, Myrna Joy Edelman, Trustee of the 2006 Gilbert M. Edelman Inter Vivos Trust, Empire State Liquidity Fund, LLC, Mary Jane Fales, Melvyn H. Halper, Phyllis J. Halper, and Wendy Tamis. These parties were referred to as the "MTD Respondents" in the Federal District Court, Pet. App. E at 16a, and are referred to herein as the Shasha Parties.

Danielle P. Barger, Trustee of the Edelman Family Trust and a named Respondent, is not a party to this Opposition because she is separately represented and is not a party to the judgment entered below. In addition, she is not a party to the issue of service by email, Question No. 2, because she was not among the parties dismissed for lack of timely service.[1] Thus, this opposition is limited to the Shasha Parties, who are listed in the first paragraph above.

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1. Howard Edelman, Trustee of the Edelman Family Trust, was included with the parties who were Claimants in the arbitration. Danielle P. Barger became the Trustee after the death of Howard Edelman and was separately represented below in all judicial proceedings in state and federal court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14.1(b)(ii) and 29.6, the undersigned counsel for Empire State Liquidity Fund, LLC, discloses as follows: Respondent Empire State Liquidity Fund, LLC, discloses that its shares are not publicly traded and there is no parent corporation the stock of which is publicly traded or any publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF THE CASE

In October 2014, the Respondents commenced an arbitration before the American Arbitration Association to challenge the 2013 consolidation of the Empire State Building with 22 other New York properties to create Empire State Realty Trust, Inc. ("ESRT"). In the consolidation, Respondents were forced to exchange their partnership interests in the entity that owned the Empire State Building for shares of stock in ESRT. A panel of three arbitrators held 39 days of hearings that produced 4,000 pages of transcript and over 500 exhibits. On August 24, 2020, the arbitrators issued a 100-page opinion. They denied certain claims under the federal Securities Act and issued an Award of approximately $1.2 million on the grounds that the Malkin Parties had wrongfully retained 10% of the exchange shares to which Respondents were entitled. *Virginia Shasha and Vivienne Pero, Co-Trustees, et al. v. Peter L. Malkin, et al.*, AAA No. 01-14-0001-6986, Pet. App. G at 197a-198a.

On November 23, 2020, the Malkin Parties filed in the United States District Court for the Southern District of New York a petition to partially vacate the Award and otherwise to confirm.[2] Pet. at 12. The Shasha Parties

2. Following the arbitration, three different dockets were filed in the U.S. District Court for the Southern District of New York, and all three were assigned to Judge Analisa Torres: *Peter L. Malkin, et al. v. Virginia Shasha, et. al.,* No. 20-cv-09874 (petition for partial vacatur and otherwise to confirm arbitration); *Virginia Shasha, et. al., v. Peter L. Malkin, et al.,* No. 20-cv-06887 (petition to confirm arbitration); *Danielle P. Barger v. Peter L. Malkin, et al.,* No. 20-cv-0991 (petition to confirm arbitration filed in New York Supreme Court for New York County and removed to Federal Court by the Malkin Parties). Danielle Barger was not a party in

(the "MTD Respondents") filed a motion to dismiss on the grounds that the vacatur petition was untimely as it was not served within the three-month limitation period set by Section 12 of the Federal Arbitration Act ("FAA"). In an Order dated August 4, 2021, District Court Judge Analisa Torres, dismissed the Malkin Parties' vacatur case as untimely as to the MTD Respondents. Pet. App. F at 41a, 43a.

The court addressed the merits in a separate decision dated September 27, 2021. Rejecting Petitioners' manifest disregard arguments, Judge Torres held that: "Petitioners' argument, at its essence, is that the Panel 'manifestly disregarded' the alleged evidence" not the law. Pet. App. E at 27a. She confirmed the arbitration award, and judgment was entered in favor of the Respondents.

Petitioners appealed. While the appeal was pending, this Court held in *Badgerow v. Walters,* 596 U.S. 1 (2022), that federal courts do not have subject matter jurisdiction over arbitration decisions under Sections 9 and 10 of the FAA based on whether federal claims were raised in the arbitration. Petitioners moved to dismiss their appeal, and the Second Circuit dismissed the appeal for lack of federal jurisdiction. *Malkin v. Shasha,* 21-2675 (2nd Cir. April 20, 2023) (Summary Order at 5, ECF Doc. No. 155).

Petitioners then re-filed their vacatur petition in New York Supreme Court, New York County. They raised the same arguments for partial vacatur they had made in federal court. The Shasha Parties filed their own

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Docket No. 20-cv-06887 but was a Respondent in No. 20-cv-09874 and was the petitioner in No. 20-cv-0991.

petition to confirm.[3] The state court denied the petition to vacate and granted the motion to confirm for the same reasons the federal court had. Pet. App. C at 6a; D at 11a. Petitioners once again appealed, this time to the First Department of the New York Supreme Court Appellate Division. Pet. App. B at 2a. In order to stay execution on the judgment pending their appeal, the Malkin Parties filed a surety bond in the lower court on January 23, 2024.

By Decision and Order entered on March 13, 2025, the Appellate Division, First Department affirmed the lower court. Pet. App. B at 2a. It held the "Supreme Court properly dismissed the Malkin parties' petition to vacate the arbitration award, as that petition was untimely" since it was served "more than 90 days after delivery of the arbitration award." *Id.* at 3a.

Regarding the merits, the Appellate Division held that the Malkin Parties failed to establish that the arbitrators acted in manifest disregard of the law. Pet. App. B at 4a. The court held that the evidence "more than meets the requirement that there be at least a barely colorable justification for the outcome reached." *Id.*

Thereafter, Petitioners filed with the Appellate Division a motion for re-argument or, in the alternative,

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3. As in federal court, three separate actions were filed, and all were assigned to the same justice: *Malkin v. Shasha,* Index No. 651974/2023; *Shasha v. Malkin,* Index No. 652074/2023; and *Barger v. Malkin*, Index No. 653772/2023. All three cases were appealed and consolidated in the Appellate Division. Danielle Barger was not a party in Index No. 652074/2023, but was a party in the other two dockets.

leave to appeal to the New York Court of Appeals. The motion was summarily denied without an opinion on June 17, 2025. Pet. App. H at 204a. After that, Petitioners filed a motion for leave to appeal directly with the New York Court of Appeals, which the New York Court of Appeals summarily denied without an opinion on January 13, 2026. Pet. at 15; Pet. App. A at 1a.

On January 23, 2026, Petitioners filed with the Supreme Court of New York County an "emergency" motion for a further stay of execution pending their filing of a petition for certiorari with the United States Supreme Court. Respondents on January 24, 2026, filed a letter urging the court to deny the stay. Justice Crane on January 28, 2026, issued a decision and order denying the motion for a stay. Justice Crane held that Petitioners had exhausted all avenues of appellate review in New York State court, and that, "[g]iven that most of the case law respondents cite to concoct a split in the federal circuits predates 2022, this motion appears to be a last ditch effort to avoid payment." *Shasha v. Malkin,* Case No. 652074/2023 NYECF Doc. No. 89. Respondents on January 31, 2026, made a formal demand to the bonding company for payment of the amount due on the judgment entered in Index No. 652074/2023. Petitioners made payment of the amounts due on the judgment by wire transfer on February 5, 2026. Respondents filed a satisfaction of payment of the judgment on February 10, 2026. Petitioners filed their Petition for Certiorari on February 6, 2026.

REASONS FOR DENYING THE PETITION

The Petition presents no issue warranting this Court's review. First, the case is an exceptionally poor vehicle because, *inter alia*, the lower courts dismissed Petitioners' vacatur action as untimely. That issue independently resolves the case and would prevent this Court from reaching Petitioners' primary issue of manifest disregard. Second, the decision below rests on adequate and independent state-law grounds for confirming the arbitration award. Third, Petitioners are asking this Court to correct claimed errors by the arbitrators in a fact-bound arbitration, relief that is not available from the Supreme Court.

I. THE COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257

To come within 28 U.S.C. §1257, Petitioners must demonstrate that a judgment or decree by the highest court of a state (a) calls into question the validity of a statute of the United States on constitutional grounds, or (b) challenges any title, right, privilege or immunity under state law on constitutional grounds. "There is no jurisdiction unless a federal question had both been raised and decided in the state court below." *Illinois v. Gates,* 462 U.S, 213, 218 (1983). Moreover, the constitutional issue must be substantial. If no substantial constitutional issue is presented, certiorari cannot be granted. "[I]t is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character." *Zucht v. King,* 260 U.S. 174, 176 (1922), *citing Sugarman v. United States,* 249 U.S. 182, 184 (1919).

A. THERE IS NO DECISION BY THE STATE'S HIGHEST COURT

The decision by New York's highest court, the Court of Appeals, does not address the issues on appeal. Petitioners requested *permission* to appeal the case to the Court of Appeals, but were denied twice, first by the Appellate Division and then again by the New York Court of Appeals. Pet. App. A, Pet. App. H. The last merits decision addressing the issues was issued by the Appellate Division, First Department, on March 13, 2025. Pet. App. B. It is not a decision by the state's highest court.

The Supreme Court has held that, "we should refrain from deciding questions not presented or decided in the highest court of the state." *State Farm Mutual Automobile Insurance Co. v. Duel,* 324 U.S. 154, 160 (1945); *Hill v. California,* 401 U.S. 797, 805-806 (1971); *McGoldrick v. Compagnie Generale,* 309 U.S. 430, 435-436 (1940). Because the Appellate Division is not the state's highest court, the Petition is not ripe for review, and certiorari should be denied.

B. THE PETITION RAISES NO FEDERAL QUESTION

The Petition references Sections 10(a) and 12 of the Federal Arbitration Act, 9 U.S.C. §§ 10(a), 12, and admits that *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576 (2008), held that the enumerated grounds for vacatur in Section 10 of the FAA are the exclusive grounds for vacating an arbitration award. Applying *Hall Street* here would require dismissal because manifest disregard is not an enumerated ground. *Hall Street, supra* at 588.

The Petition claims that "the precise question of whether manifest disregard is a viable ground for challenging an arbitration award was not at issue in *Hall Street*," Pet. at 17, and that the "Court should settle this question" in this case. Pet. at 17, 21. But it appears that *Hall Street* did settle this question. *Id.* at 585-588. Furthermore, Petitioners' "precise question" was not actually presented or decided below and therefore cannot be reviewed here.

The email service issue is equally without merit. The Petition does not allege that the email service issue involves an unconstitutional infringement of a right, title, privilege or immunity. Petitioners rely on lower court decisions to suggest a possible conflict between circuits on email service without citing any ruling by the New York Court of Appeals. Even more essential, Petitioners waived this very issue by filing an affidavit of service stating that their vacatur action was served *after* the three-month deadline. Pet. App. F at 38a.

Additionally, the Second Circuit's ruling granting Petitioners' motion to dismiss their own vacatur action, Pet. at 13, held: "Nor does the petition raise a federal question." *Malkin v. Shasha,* Case No. 21-2675, 2023 WL 3012381, ECF Doc. No. 155 at 6 (2d Cir. 4/20/2023).

Since there is no federal question, and Petitioners have not argued otherwise, there is no jurisdiction under 28 U.S.C. §1257 to grant their petition.

II. THERE IS NO CASE OR CONTROVERSY.

Under Article III, Section 2 of the Constitution, this Court's jurisdiction extends only to actual cases

and controversies "that are of the judicial sort." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The doctrines of standing, mootness, ripeness, and political question all relate to and arise from the case or controversy limitation of the Constitution. *Allen v. Wright,* 468 U.S. 737, 750 (1984), *citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471-476 (1982). *See also, Aetna Life Insurance Co. v. Hawthorne,* 300 U.S. 227, 239-240 (1937); *Muskrat v. United States,* 219 U.S. 346, 356-357 (1911). The Petition for Certiorari fails to present an actual case or controversy and instead seeks an advisory opinion from this Court. It accordingly should be denied.

A. THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO SERVICE BY EMAIL

We address Question Number 2 first because the vacatur case against the Shasha Parties was dismissed for failure to timely serve, and the Court therefore need not reach the merits concerning manifest disregard with respect to the Shasha Parties. Question Number 2 does not present a case or controversy because (1) it is not ripe for review, (2) the Petition fails to show a conflict between or among the circuits, and (3) the issue was waived by Petitioners' failure to file an affidavit of service regarding attempted service by email.

Petitioners' vacatur action was dismissed as untimely by the Federal court pursuant to Rule 12(b)(6). Pet. App. F at 40a-43a. The New York State Supreme Court for New York County also dismissed the vacatur petition as time barred. Pet. App. D at 12a-13a. Both courts held that Petitioners failed to file and serve their vacatur petition

within the three-month deadline of Section 12 of the FAA because their attempted eleventh hour service by email did not comply with the Federal Rules of Civil Procedure. The Appellate Division affirmed the dismissal. Pet. App. B at 3a. Petitioners contest the courts' dismissals, arguing that some lower courts have held that unconsented email service complies with Section 12 of the FAA. Pet. at ii. Petitioners, however, have failed to present an actual case or controversy and have failed to demonstrate a conflict among the circuits.

1. Issue Number 2 Is Not Ripe for Review

As noted above, New York's highest court has not addressed the issue raised here. The Court of Appeals denied leave to appeal. Thus, Petitioners seek review of the decision by the intermediate Appellate Division. The issue therefore is not ripe for review, and consequently there is no case or controversy with respect to Issue Number 2. *State Farm Mutual Automobile Insurance Co. v. Duel, supra.*

2. There Is No Conflict or Split Among State Courts and Federal Courts

Petitioners rest their claim that email service of process complies with Section 12 of the FAA primarily on a single district court decision from a different federal circuit, *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. 11-6008, 2012 WL 5232180 (E.D. Pa. Oct. 22, 2012). By contrast, the lower courts' rulings, that unconsented email service does not comply with FAA Section 12, are supported by the explicit language of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 5(b)(2)(E), and settled

Second Circuit law, *Martin v. Deutsche Bank Securities, Inc.*, 676 F. App'x 27 (2d Cir. 2017); *Dalla-Longa v. Magnetar Cap, LLC,* 33 F.4th 693 (2d Cir. 2022), as well as appellate decisions of at least four other circuits. *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 572 (7th Cir. 2007); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *Sheet Metal Workers' Int'l Ass'n Local 252 v. Standard Sheet Metal*, 699 F.2d 481, 483 (9th Cir.1983); *O'Neal Constructors, LLC v. DRT Am., LLC*, 991 F.3d 1376, 1380-81 (11th Cir. 2021).

In contrast, Petitioners rely on *Zimmerman* and three other *district court* decisions from only two different circuits with no citations to circuit court decisions.[4] Pet. at 28-29. Thus, there is no evidence of a split in the circuits based on Petitioners' arguments.

3. Petitioners Conceded Their Service Was Untimely

In this case, the Malkin Parties' attempted at the eleventh hour to effect service of process by email on two different counsel representing different parties, Griggs and Baez, one of whom accepted service and one of whom did not. They then filed affidavits of service stating that Baez' client, Barger, was served by email within the three months allowed by Section 12 of the FAA, and an affidavit admitting that Griggs' clients, the MTD Respondents, were NOT served until after three months. Pet. App. F at 37a-38a. They nevertheless argued to the trial court that the unconsented email to Griggs was effective and

4. *Zimmerman* and the other district court cases are easily distinguishable. *See* Pet. App. F at 42a-42a.

timely service of process to initiate the vacatur action because the parties had used email service of documents in the arbitration.

The trial courts did not agree. "[C]ounsel's acceptance of email service of filings in the arbitration and other proceedings did not establish consent to email service of the federal petition." Pet. App. B at 4a. The courts below held that Petitioners had conceded this issue. "[P]etitioners concede that they had not received written consent from Griggs to electronic service of the petition on November 23, 2020." Pet. App. F at 41a. These are fact based findings and are not properly subject to review here.

B. THERE IS NO CASE OR CONTROVERSY REGARDING MANIFEST DISREGARD

As noted above, Petitioners' argue that *Hall Street* implies that manifest disregard is no longer a viable restraint on arbitrators' decisions and request clarification. However, the Petitioners' "precise" question cannot be reviewed on the present record for multiple reasons. Not only has New York's highest court not decided the issue, and not only have they raised no federal question, but there is no case or controversy respecting manifest disregard. In short, Petitioners are asking the Court for an advisory opinion.

1. The Question in the Petition Was Not Presented to or Decided by the Appellate Division

The question posed by Petitioners is whether manifest disregard of the law is still grounds to vacate

an arbitration award. Pet. at i. However, the continued viability of manifest disregard was not the issue decided by the courts below. The issue decided by the Appellate Division, First Department, was not grounded on the arbitrators' disregard of the law. The courts did not apply manifest disregard of the law to overrule the arbitrators. On the contrary, the courts concluded the arbitrators had adequate factual grounds for reaching their decision. Under these facts, Petitioners' question is both different and immaterial. Not only has their question not been addressed by the state's highest court, but this issue was not addressed by the Appellate Division, an intermediate appeals court. Accordingly, the issue presented is not ripe for review.

2. The Decision Rests on Independent and Adequate Grounds

The Appellate Division found the Malkin Parties were actually arguing that the arbitrators *manifestly disregarded the facts*, which is not a basis for overturning an Award if at least a barely colorable justification for the outcome can be discerned. Pet. App. B at 4a-5a. Judge Torres held that "Petitioners misstate the nature of the Panel's inquiry and reasoning." Pet. App. E at 25a. She also stated that the Malkin Parties' manifest disregard argument was in essence that the Panel manifestly disregarded the alleged evidence, not that it disregarded the law. *Id.* at 27a. Manifest disregard of the facts is not a legal doctrine.

Accordingly, there is an independent basis to sustain the lower court decision, and a decision on the contested issue would not change the outcome. "If the state

court decision indicates clearly and expressly that it is alternatively based on a bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision." *Michigan v. Long,* 463 U.S. 1032, 1035 (1983). Therefore, the issue is not ripe for review and consequently there is no case or controversy.

3. The Decision Below Is Fact-Bound and Is Correct

Judge Torres held that "the Panel here specifically concluded that Malkin Holdings, as the Supervisor, '*did not* provide consideration in exchange for the Overrides.'" (emphasis in original). Pet. App. E at 25a. She further noted that the Award's "restatement of Petitioners' arguments…are not tantamount to a 'holding' or factual finding." *Id.* at 26a. She therefore rejected the Malkin Parties' claim that the arbitrators manifestly disregarded the law. Judge Torres' findings and conclusion were adopted by New York County Supreme Court Justice Crane. *Malkin v. Shasha,* Index No. 651974/2023, NYCEF Doc. No. 68 (7/31/23). Justice Crane was affirmed by the Appellate Division. Pet. App. B at 3a-4a.

Regarding Petitioners' alternative argument that the supervisor provided expanded services as consideration for the overrides, Judge Torres held that "again, Petitioners fail to establish 'clear law' that the Panel supposedly ignored—or even misapplied—in reaching its conclusions.… Petitioners do not claim that the consenting Participants 'bargained for' the expanded supervisory services in exchange for consenting to the Overrides, let alone that the Respondents agreed this benefit could flow

to Participants who had not consented to the Overrides in the first place." *Id.* at 28a. Hence, the Petitioners have not actually called into question the validity of the manifest disregard of the law doctrine, but have merely contested its application to the facts reviewed by the arbitrators.

Accordingly, the issue raised on certiorari—does manifest disregard of the law remain a ground to vacate an arbitration award—was not decided below. Instead, the lower courts assumed it applied and decided that the arbitrators did not manifestly disregard the law. Here again, the record fails to present an issue ripe for appeal, and there is therefore no case or controversy respecting manifest disregard of the law.

4. There Is No Split Among the Circuits

Although Petitioners claim that there is a conflict among the circuits, the present case has nothing to do with such a conflict. As noted above, Petitioners have not presented here a case or controversy involving manifest disregard of the law. As both the Federal District Court[5] and New York Appellate Division held, Petitioners claim manifest disregard of the facts, not the law. Further, Petitioners make no claim that there is a split in the circuits on the separate issue used by the lower courts to confirm the arbitrators—that the evidence "more than meets the requirement that there be at least a barely colorable justification for the outcome reached." Pet. App.

5. As held by Judge Torres: "Petitioners' argument, at its essence, is that the Panel 'manifestly disregarded' the alleged evidence…But 'the manifest disregard of evidence is not a proper ground for vacating an arbitral award.' (citations omitted)." Pet. App. E at 27a.

B at 4a. Accordingly, Petitioners have failed to present a conflict among the circuits.

III. THIS CASE IS A DEFECTIVE VEHICLE FOR REVIEW

Even if jurisdiction existed, which it does not, this case would not warrant review. The Petition challenges the arbitrators' evaluation of evidence. This Court has long emphasized that it will not review facts found by arbitrators. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 567 (2013). Here, there is no circuit split concerning manifest disregard; no disagreement among state courts; no recurring federal question of national importance; and no actual case or controversy. The petition merely asks this Court to reweigh arbitral evidence, reassess the existence of consideration, and substitute its judgment for that of the arbitrators. The requested relief is not available from this Court. The case is therefore a defective vehicle for review.

A. ON THE MERITS, THE FACT-BOUND DECISIONS BELOW WERE CLEARLY CORRECT

Petitioners in their Statement claim that the arbitrators and courts violated basic contract law. Pet. at 5-6. To make this point, Petitioners distort and misstate the facts. They incorrectly state that the decision below "involves undisputed facts," that the "panel retroactively invalidated certain contractual overrides," and that "both the Panel and the investors themselves repeatedly recognized that the supervisor had given investors who agreed to the overrides reduced fees for decades." Pet. at

5. They wrongly assert: "The Panel expressly found, on the face of the Award, that the Participants had received the fee reductions 'in exchange' for agreeing to the overrides." Pet. at 31. In the parts of the record Petitioners cite to claim "the Panel itself expressly found that consenting Participants had, in fact, received the fee reductions," Pet. at 11, the arbitrators were merely quoting and summarizing what the Malkins were contending and not making factual findings.[6]

Contrary to Petitioners' contentions, the issue of consideration was vigorously contested in the arbitration and lower court proceedings. Claimants submitted the testimony of numerous investors who denied even knowing what an override was and who stated that their agreement to the voluntary compensation program did not cover the "override" applied in the IPO.[7] Petitioner Thomas Keltner testified that the fee reductions were not the "real consideration." Pet. App. G at 86a.[8] Petitioner Anthony Malkin repeatedly testified that he stood behind what was stated in the S-4. Pet. App. G at 88a, n. 12. The S-4 explicitly stated that "the supervisor did not pay any consideration for the overrides." *Id.* at 87a, 88a. After fully recounting the conflicting evidence, the arbitrators held "we conclude that the Supervisor *did not* provide consideration *in exchange for* the Overrides." *Id.* at 88a. (emphasis added).

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6. Pet. App. G at 80a-81a ("According to Respondents.."; According to the Supervisor..").

7. *See, e.g.*, Pet. App. G at 83a-84a; Pet. App. E at 25a-29a.

8. "I think I called them almost nominal. They're like $15 a year on a $10,000 investment." Pet. App. G at 85a.

Petitioners' claim that the arbitrators wrongly rejected Thomas Keltner's alternative contention that an increase in supervisor services was the *real* consideration for the overrides. Pet. at 12, 32. This claim is specious. The supervisor increased the fees he charged for the very same services sevenfold, from $100,000 per year to $750,000 per year. Pet. App. G at 115a. He cannot both receive increased payment as consideration and also assert that the increased services are consideration for the overrides.

Moreover, Mr. Keltner had a preexisting duty to provide these services. Asserting that the increase in services can serve as consideration for the overrides violates the preexisting duty rule. The arbitrators recognized this principle. In rejecting the alternative consideration argument, the arbitrators cited *Granite Partners, L.P. v. Bear Stearns & Co.,* 58 F. Supp.2d 228, 252 (S.D. NY 1999), and quoted, "[n]either a promise to do that which the promisor is already bound to do, nor performance of any existing obligation constitutes valid consideration." Pet. App. G at 91a.

B. PERCEIVED MISSTATEMENTS IN THE PETITION

In accordance with Supreme Court Rule 15(2), Respondents note the following perceived misstatements set forth in the Petition.

The Introduction to the Petition states:

- "[T]he arbitration panel retroactively invalidated certain contractual overrides." Pet. at 5.

This is incorrect. Nowhere in the arbitration Award did the arbitrators "retroactively invalidate certain contractual overrides." The Panel devoted ten pages of their opinion discussing the so-called overrides, Pet. App. G at 78a-95a, and concluded that "[f]or all these reasons, the Overrides *are not enforceable* against Claimants." *Id.* at 92a (emphasis added).

The Statement section of the Petition contains misstatements as follows:

- Petitioners' statement No. 7 (Pet. at 10) states: "As the solicitation documents for the overrides themselves stated, Participants who agreed to the overrides received 'in exchange' a prospective reduction in Malkin Holdings' fees. The overrides were memorialized in written agreements that the Claimants (or their predecessors in interest) voluntarily signed."

This is incorrect. Petitioners throughout the proceeding have applied the term "overrides" to a program initiated in 1991 called the voluntary compensation program to which a majority of investors had agreed. No investors called this program an "override." The forms they signed did not use the word "override." All who testified specifically denied that they had agreed to a 10% reduction in their share entitlement as part of the pre-existing voluntary compensation program, and all but two testified that they did not even know what an override was.

- Petitioners' statement No. 8 (Pet. at 11) states: "Notably, the Panel itself expressly

> found that consenting Participants had, in fact, received the fee reductions. Claimants themselves conceded as much throughout these proceedings."

This is incorrect and was called out by Judge Torres. Petitioners refer to parts of the record where the arbitrators are summarizing Petitioners' contentions, not making their own findings, and Petitioners assert these are findings or holdings of the arbitrators. Judge Torres held that "the Panel's citation to the underlying consent solicitations, Award at 17-19, and its restatement of Petitioners' arguments, *id.* at 22-23, are not tantamount to a 'holding' or factual finding that Petitioners had, in fact, 'give[n] up compensation' in exchange for the Overrides, as Petitioners urge. Pl. Mem. at 15 (emphasis added). Indeed, the Panel's only 'conclusion' was to find that the Supervisor did not provide consideration for the Overrides." Pet. App. E at 26a.

- Petitioners' statement No. 10 (Pet. at 12) asserts that the Panel, after "expressly conceding" that another "undisputed" form of consideration was rendered by the supervisor, rejected his increased services "while not increasing its fees" as an alternative form of consideration.

This contention was not undisputed but was thoroughly contested by the Shasha Parties. The Panel did not "expressly concede" or agree that "undisputed" services were rendered for no increase in fees. The Panel explained that, because the increased services were provided to all investors, not just those who agreed to so-called overrides,

they were not "bargained for" in exchange for the overrides. Pet. App. G at 87a. Additionally, the "no increase in fees" assertion is a blatantly incorrect. The arbitrators received evidence that the increased services were separately paid for by a sevenfold increase in the annual fee charged for the services. *Id.* at 110a. Furthermore, the preexisting duty rule, mentioned in *Granite Partners, L.P. v. Bear Stearns & Co.*, 58 F. Supp.2d 228 (S.D.N. Y. 1999), cited by the arbitrators in the discussion of this issue (Pet. App. G at 91a),[9] also prevents the additional services from serving as consideration.

- Petitioners' statement No. 12 (Pet. at 12) states in reference to email communication: "In fact, counsel for Respondents had insisted that the parties *only* communicate by email in the Arbitration." (Emphasis in original).

This statement is incorrect and irrelevant. Respondents stated at one point that counsel should communicate by email rather than by telephone, but the context of the statement had nothing to do with service of process and did not relate to pleadings or other written documents, only to oral communication.

The Reasons for Granting section of the Petition contains the following misstatement:

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9. "Neither a promise to do that which the promisor is already bound to do, nor the performance of any preexisting obligation constitutes valid consideration." *Granite Partners, supra* at 257, *citing Tierney v. Capricorn Invertors, L.P.,* 189 App. Div, 2d 629, 631 (1st Dept. 1993).

- "[T]here is no dispute concerning the underlying facts. The Panel found, on the face of its Award, that the Participants had received the fee reduction 'in exchange' for agreeing to the overrides." Pet. at 31.

This is a repeat of the misstatements in Paragraph 8 of Petitioners' Statement that were called out by Judge Torres. In fact, the arbitrators expressly found the *opposite* of what Petitioners assert: "Accordingly, we conclude that the Supervisor *did not* provide consideration in exchange for the Overrides." Pet. App. at 88a (emphasis added).

Petitioners' arguments are based on numerous erroneous statements and, consequently, their Petition is not factually straightforward. Therefore, this case is a defective vehicle for review.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: March 13, 2026

Respectfully submitted,

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