No. 18-1211

IN THE

Supreme Court of the United States

NUSTAR ENERGY SERVICES, INC.,

Petitioner,

v.

ING BANK N.V., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Commercial Instruments and Maritime Liens Act, 46 U.S.C. §§ 31341-31343, includes two key sections relative to the maritime lien for necessaries. One section requires a supplier to demonstrate it acted "on the order of the owner or entity authorized by the owner" (§ 31342), and the other (§ 31341) identifies those entities with the presumptive authority to bind the vessel to a maritime lien as consisting of the vessel owner, the master, a person entrusted with the management of the vessel at the port of supply, or an officer or agent appointed by the owner or charterer. The question presented is:

Was the Fifth Circuit correct when it held (consistent with the holdings of the Second, Ninth and Eleventh Circuits addressing the same legal issues against virtually identical facts) that a physical supplier of necessaries (such as fuel) does not obtain a lien against the vessel when that supplier received its order from and was contracted by an entity without the requisite authority and no authorized entity directed the selection of that physical supplier or controlled its performance.

RULE 29.6 DISCLOSURE

Cosco Shipping Lines Co., Ltd. (formerly Cosco Container Lines Co., Ltd.) is the parent company of Respondents COSCO Haifa Maritime Ltd., COSCO Auckland Maritime Ltd., and COSCO Venice Maritime Ltd. The parent company of Respondent COSCON, full name Cosco Shipping Lines Co., Ltd. (formerly Cosco Container Lines Co. Ltd.), is Cosco Shipping Holding Co., Ltd.

All of the above entities are Chinese corporations. They are not publicly-held companies. No publicly-held company owns 10% or more of these companies.

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STATUTORY PROVISIONS

The Commercial Instruments and Maritime Liens Act ("CIMLA" or the "Lien Act"), 46 U.S.C. §§ 31341-31343, includes two sections that are relevant to consideration of the petition.

Section 31341 provides in pertinent part as follows:

(a) The following persons are presumed to have authority to procure necessaries for a vessel

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by – (A) the owner; (B) a charterer, (C) an owner pro hac vice or (D) an agreed buyer in possession of the vessel.

Section 31342 provides in pertinent part as follows:

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

INTRODUCTION

The Commercial Instruments and Maritime Liens Act ("CIMLA" or the "Lien Act") is quite clear. To obtain a maritime lien against a vessel, a supplier of necessaries to that vessel must have acted upon the order of the vessel owner or a person authorized by the owner to bind the vessel to the lien. 46 U.S.C. § 31341. This case concerns competing maritime lien claims arising out of fuel deliveries made on separate occasions to four vessels owned by the Cosco Respondents (collectively "Cosco"). The circumstances surrounding the contracting for the deliveries were not unusual. Cosco as owner contracted with an entity within the OW Bunker Group of companies which at the time was one of the world's largest sellers and suppliers of marine fuel. That OW entity, without Cosco's knowledge, entered into a subcontract with an OW affiliate. That OW affiliate then entered into a separate subcontract with Petitioner to physically supply the fuel. Petitioner had had a long-standing relationship with the OW affiliate, but when the OW Group became insolvent in 2014, the OW entity with whom Petitioner contracted failed to pay it. Petitioner and OW's assignee thereafter each pursued maritime liens against the Cosco vessels. Similar claims were filed in district courts in several circuits by other physical suppliers (like Petitioner) who

had delivered fuel to vessels at the request of the same OW affiliate.

As Petitioner readily admits, "[e]ach of the nation's premier maritime circuits" (Pet. at 11) has addressed the question of whether the physical supplier in the OW cases (like Petitioner) is entitled to a maritime lien. The circuits have all arrived at the same conclusion – the physical suppliers are not entitled to a lien because they cannot satisfy CIMLA's order authority requirement. No circuit has held to the contrary. Under the pretext of a circuit split, Petitioner is asking this Court to overrule all of the circuits and implement a rule that has already been considered and rejected by all of the circuits which have examined the issue. The circuits have however thoughtfully considered and applied CIMLA in accordance with long-standing maritime precedent. The circuits are in agreement, and there is no need for certiorari review. The petition should be denied.

STATEMENT OF THE CASE

1. The facts underlying this case are undisputed, but NuStar's presentation of the facts is not entirely accurate. Equally, the question that NuStar framed for consideration (Pet. at i) is premised on facts that do not exist in this case.[1] NuStar's portrayal is designed to blend

1. Petitioner asks the Court to consider whether NuStar (rather than Respondent ING Bank N.V.) possesses a maritime lien because "the vessel owner or its authorized agent ordered the necessaries and directed the supplier to provide them." Pet. at i. This case does not present that issue. As discussed herein, the district court and Fifth Circuit concluded that NuStar contracted with and received its order from another supplier (not Cosco or

the separate and distinct contractual layers that existed in these fuel supply transactions and to leave the Court with the mistaken impression that there was significant and direct involvement between Cosco and NuStar.

However, as correctly found by the district court and affirmed by the Fifth Circuit, these supplies involved separate contracts and dealings where NuStar acted on the order of O.W. Bunker USA, Inc. ("OW USA"), an entity without the requisite authority to bind the vessels to a lien. When NuStar contractually agreed to sell the fuel to OW USA and deliver the fuel to the Vessels, NuStar had had no communications with Cosco or any authorized entity. Further, as affirmed by the Fifth Circuit, NuStar's limited post-contracting interactions with the Vessels and Cosco's awareness that NuStar would physically deliver the fuel that Cosco ordered from O.W. Bunker Far East Singapore Pte. Ltd. ("OW Far East") is not enough to establish a lien against the Vessels. The following summarizes the key facts.

Cosco is the owner of the M/Vs *COSCO Haifa*, *COSCO Venice*, *COSCO Auckland*, and *Tian Bao He* (the "Vessels"). OW Far East was the Singapore-based subsidiary of the O.W. Bunker Group (the "OW Group"). The OW Group was a global network of physical suppliers

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its authorized agent) and that Cosco did not direct anyone to subcontract the fuel deliveries to NuStar. Therefore, the Question Presented by NuStar does not accurately describe the issues based on the facts of this case. NuStar's request for the Court to issue what is essentially an advisory opinion on hypothetical facts is inappropriate. *See*, *e.g.*, *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) (confirming Court does not decide abstract or hypothetical issues).

and traders of marine fuel. In Fall 2014, Cosco[2] as buyer contracted with OW Far East as seller to supply fuel to each of the Vessels during their respective calls to Houston. NuStar was not a party to the contracts between Cosco and OW Far East, and NuStar was not involved in the communications leading up to the entry of such contracts. ROA.2100-03, 2017-28.

In contracting with Cosco, OW Far East acted for its own account and risk. It was never authorized by Cosco to act as a broker or agent for Cosco or the Vessels. ROA.2101, 1988, 1990. Unbeknownst to Cosco, OW Far East subcontracted each of the orders to OW USA. The purchase and sale documents exchanged between those entities identified OW Far East as the buyer and OW USA as the seller. ROA. 1990, 2044-51, 2053-68. Cosco never contracted with OW USA and never communicated with that entity concerning any supply. ROA.1990, 2044-51, 2053-68.

Thereafter, again unbeknownst to Cosco, OW USA as buyer further subcontracted each order to NuStar as seller. ROA.2070-77, 2079-82. NuStar's first involvement in each chain of supply occurred when it was contacted by OW USA. Cosco had no role in OW USA's approach to or selection of NuStar. ROA.1990. OW USA was the only entity with whom NuStar communicated and contracted with concerning each respective supply of fuel. ROA.2114.

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2. The fuel was ordered from OW Far East through Cosco's authorized agent Chimbusco Americas, Inc. ("Chimbusco.") App. 3a. Because Chimbusco was authorized to act on Cosco's behalf, the term "Cosco" is used when discussing the fuel transactions, although the contracts and all discussions with OW Far East were actually handled by Chimbusco.

Indeed, NuStar had sold fuel to OW USA on a regular basis as part of a long-standing relationship between the two companies. ROA.2111. OW USA was one of NuStar's largest customers with NuStar's 2014 sales to OW USA approximating $200 million. ROA.2139, 2134, 2117. Given their extensive business dealings, NuStar had extended OW USA a significant line of credit. NuStar increased OW USA's line of credit from $30 million to $40 million in July/August 2014 upon the request of NuStar's sales personnel who were eager to do more business with OW USA. ROA.2139, 2134, 2117. NuStar knew, at all times, that OW USA was only a trader and not the owner or charterer of any of the Vessels. ROA.2112-13, 2115.

The fuel was physically supplied to each Vessel by Harley Marine, a third-party barge company that NuStar had contracted to effect delivery. After delivery was complete, the barging company prepared and tendered to the Vessels' crew a "Marine Fuel Delivery Note" (also known as a "bunker delivery note" or "bunker delivery receipt") ("BDN"). ROA.2030-33, 2125-26. The BDN is a technical document that served as a receipt for the fuel. The BDN is required by international environmental regulations and accompanies nearly every marine fuel supply in the world. As NuStar itself acknowledged, vessels always sign and stamp BDNs. NuStar was also required to issue and obtain a signed BDN to get paid by OW USA. ROA.2118, 2128-29. Accordingly, the Vessel's chief engineers signed the BDNs to acknowledge receipt of the fuel as per standard industry practice. ROA.2030-33.

NuStar prepared invoices for OW USA following each fuel delivery. ROA.2089-92. The NuStar invoices were addressed and sent only to OW USA; they were not sent

to Cosco or the Vessels. ROA.2089-92, 2114. Consistent with the separate contracts in the chain of supply, OW USA invoiced OW Far East. OW Far East invoiced Cosco a total of $2,987,792.63 for all four Vessels. The OW Far East invoices to Cosco were at different prices and on differing terms than NuStar's subcontract with OW USA. ROA.2084-87, 2035-38.

On November 7, 2014, before any invoices were paid, the OW Group became insolvent. OW USA, the company to which NuStar had extended $40 million in credit only months earlier, sought bankruptcy protection in the District of Connecticut.

2. Following OW's insolvency, Cosco received competing maritime lien claims from NuStar and from ING Bank N.V. ("ING") as OW Far East's assignee. NuStar and ING each argued that it and not the other held liens against the Vessels. To avoid the risk of having to pay twice for the same set of bunkers, Cosco deposited funds in escrow and interpleaded all parties. ROA.123-43; App. 14a. (Similar actions were taken by other vessel owners in various district courts throughout the country facing identical lien claims from physical suppliers and ING as assignee. *See* district court cases cited, *infra*, note 5.)

After discovery was completed, NuStar and ING cross-moved for summary judgment on their respective lien claims. The district court denied NuStar's motion and granted ING's. The district court correctly noted that the "sole issue" relative to NuStar's claims was whether it acted "on the order of the owner or a person authorized by the owner." App. 18a. The district court found that NuStar could not satisfy this statutory requirement.

The district court cited the general rule recognized with unanimity by all circuits that a subcontracted supplier generally is not entitled to a maritime lien. App. 19a. The district court correctly found that NuStar was such a subcontracted supplier as it had contracted with OW USA. "COSCO did not authorize O.W. Far East to bind the vessels," and OW Far East "contracted separately with O.W. USA, which contracted with NuStar." App. 23a. "Each of these contracts was separate, and no contract indicated an agency relationship with the vessel owners or any of the other entities." App. 23a.

The district court also addressed and rejected NuStar's arguments that its routine and limited interactions with the Vessels and local port agents to coordinate the deliveries and Cosco's awareness of NuStar's identity were sufficient to grant NuStar a lien. App. 23a-24a. Finally, the district court rejected NuStar's assertion that the Vessels' chief engineers' acceptance of the deliveries and signing of the BDNs in accordance with standard industry practice bestowed lien rights upon NuStar. App. 24a-25a. The court explained that those actions "demonstrate[] an acceptance of O.W. Far East's delivery, and do[] not establish NuStar's entitlement to a maritime lien." App. 25a.

3. NuStar appealed to the Fifth Circuit. Before NuStar's appeal was decided, the Fifth Circuit issued its decision in *Valero Mktg. & Supply Co. v. M/V Almi Sun*, 893 F.3d 290 (5th Cir. 2018).[3] *Valero* arose out of

3. By the time *Valero* was decided, the Eleventh and Second Circuits had also already determined that physical suppliers in OW cases (like NuStar) were not entitled to maritime liens. *See*

the OW insolvency and directly addressed whether a physical supplier of fuel (just like NuStar) is entitled to a maritime lien. The fact pattern in *Valero* was essentially identical to this case — *Valero* involved the same type of contractual chain, awareness by an authorized entity of the supplier's identity, logistics coordination by local agents, and acknowledgment by the vessel that the fuel had been received. *Valero*, 893 F.3d at 291-92.

The Fifth Circuit identified the "sole inquiry" for review in *Valero* as being whether the physical supplier furnished the fuel "on the order of the owner or a person authorized by the owner.'" *Id.* at 294. After examining the record in whole, the Fifth Circuit affirmed the district court and held that Valero was not entitled to a maritime lien because it provided the bunkers at OW's request, which was not a person with presumed authority under CIMLA. *Id.* The Fifth Circuit also affirmed the district court's findings that the physical supplier's interactions with the vessel and port agents and awareness of the physical supplier's identity did not demonstrate control by an authorized entity over the selection or performance of the physical supplier. *Id.* at 296-97.

Judge Haynes dissented from the *Valero* majority stating that the panel's decision "creates an unnecessary circuit split with the Eleventh Circuit." *Id.* at 298. But the panel majority addressed those concerns and rightfully determined there is no split created by the majority decision. The majority reviewed in depth the Eleventh

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ING Bank N.V. v. M/V Temara, 892 F.3d 511 2d Cir. 2018); *Barcliff, LLC v. M/V Deep Blue*, 876 F.3d 1063 (11th Cir. 2017).

Circuit's decision in *Barcliff* (another OW-related case)[4] in which the Eleventh Circuit affirmed the district court's denial of a maritime lien to the physical supplier in NuStar's shoes. The *Valero* majority concluded that *Barcliff* "dispel[s] any notion that we create a circuit split." 893 F.3d at 296.

Valero moved for rehearing en banc relying on the dissent and arguing that the decision creates a split between the Fifth and Eleventh Circuits. The en banc petition was denied, and no member of the Fifth Circuit requested that the court be polled for rehearing en banc. *See Valero Mktg. & Supply Co. v. M/V Almi Sun*, No. 16-30194 (5th Cir. Sept. 4, 2018) (order denying petition for rehearing en banc).

Valero was thus controlling precedent by the time NuStar's case was heard by the Fifth Circuit. Further, by that time, the Second, Ninth and Eleventh Circuits had each affirmed district courts within their respective circuits and denied the maritime lien claims of physical suppliers in OW cases. App. 6a n.2. Finding "no daylight" between the facts in *Valero* and the facts of this case, the Fifth Circuit affirmed the district court's denial of NuStar's lien claims. App. 6a. The Fifth Circuit agreed that Cosco's knowledge of NuStar's identity as physical supplier, the coordination of delivery logistics by port agents, and the vessels' receipt and acceptance of the deliveries did not rise to the level of conduct to establish the authorization required under the Lien Act. App. 5a. The Fifth Circuit, consistent with the district court, determined that those facts merely demonstrated Cosco's

4. *Barcliff*, 876 F.2d 1063.

awareness of NuStar's involvement. App. 5a. NuStar did not seek rehearing en banc.

NuStar has now petitioned this Court for certiorari. A companion petition has been filed by NuStar from the Second Circuit's decision which (consistent with the other circuits) rejected NuStar's maritime lien claims against vessels for marine fuel delivered by NuStar on the order of an OW entity. *NuStar Energy Services, Inc. v. ING Bank N.V.*, No. 18-1224 (U.S. filed Mar. 18, 2019).

REASONS FOR DENYING CERTIORARI

The decision below is straightforward and a factually-driven application of settled law concerning the maritime lien for necessaries. NuStar has not identified a decision from this Court or any court of appeals that is in conflict with the decision below. To the contrary, the decision is consistent with those of the Second, Fifth, Ninth and Eleventh Circuits (as well as numerous district courts)[5] in

5. *Aegean Bunkering (USA) LLC v. M/T Amazon IMO 9476654*, No. 14-cv-9447 (KBF), 2016 U.S. Dist. LEXIS 113623 (S.D.N.Y. Aug. 24, 2016), *aff'd*, 730 Fed. App'x (2d Cir. 2018); *Temara*, 203 F. Supp. 3d 355, 361 (S.D.N.Y. 2016), *aff'd*, 892 F.3d 511 (2d Cir. 2018); *O'Rourke Marine Servs. L.P., L.L.P. v. MV Cosco Haifa*, 179 F. Supp. 3d 333 (S.D.N.Y. 2016), *aff'd on reh'g, in part, vacated in part, O'Rourke Marine Servs. L.P., L.L.P. v. MV Cosco Haifa*, No. 15-cv-2992 (KBF), Dkt. 103, *aff'd*, 730 Fed. App'x (2d Cir. 2018); *Barcliff*, No. CA 14-0590-C (ADMIRALTY), 2016 U.S. Dist. LEXIS 133253 (S.D. Ala. Sep. 28, 2016), *aff'd*, 876 F.3d 1063 (11th Cir. 2017); *Bunker Holdings Ltd. v. M/V YM Success (IMO 9294800)*, No. C14-6002 BHS, 2016 U.S. Dist. LEXIS 73499 (W.D. Wash. June 6, 2016), *aff'd*, *Bunker Holdings Ltd. v. Yang Ming Liber. Corp.*, 906 F.3d 843 (9th Cir. 2018); *Valero*, No. 14-2712, 2015 U.S. Dist. LEXIS 172258 (E.D. La. Dec. 28, 2015), *reh'g denied*,

cases that addressed virtually identical legal and factual issues in the wake of the OW Bunker bankruptcy and is consistent with long-established precedent applying the Lien Act. There is no reason to grant certiorari.

I. There is No Circuit Split Between the Eleventh and Other Circuits.

Despite NuStar's attempt to manufacture a circuit split, none exists. No circuit has determined that a physical supplier in the OW Bunker chain of contracts (like NuStar) is entitled to a maritime lien for necessaries. Along with the Fifth Circuit, three other circuits, i.e., "[e]ach of the nation's principal maritime circuits" (Pet. at 11), have addressed the same fact pattern and unanimously reached the same conclusion. NuStar relies solely on the Eleventh Circuit's decision in *Barcliff* to assert there is a split, but that decision is entirely consistent with the Fifth Circuit as well as the Second and Ninth Circuits. The circuits are not divided at all – they all agree that physical suppliers like NuStar are not entitled to a maritime lien.

The requirements to establish a maritime lien for necessaries are statutory and set forth in CIMLA. CIMLA does not impose a lien on a vessel merely because necessaries are delivered to it by a supplier. Section 31342 mandates a supplier to establish three requirements, stating that "a person [1] providing necessaries [2] to a vessel [3] on the order of the owner or a person authorized by the owner … has a maritime lien on the vessel …."

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160 F. Supp. 3d 973 (E.D. La. 2016), *aff'd*, 893 F.3d 290 (5th Cir. 2018); *Clearlake Shipping PTE Ltd. v. Nustar Energy Servs.*, 239 F. Supp. 3d 647 (S.D.N.Y. 2017), *aff'd*, 911 F.3d 646 (2d Cir. 2018).

46 U.S.C. § 31342(a); *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220, 224 (5th Cir. 1999). In this case and the other OW cases, the sole issue in dispute in regards to the lien claims of the physical suppliers was whether they satisfied CIMLA's order authority requirement.

Congress elucidated the meaning of the authority requirement with § 31341. Section 31341 defines persons who "are presumed to have authority to procure necessaries for a vessel." These include the owner, the master, a manager, or an officer or agent appointed by the owner or charterer of the vessel. 46 U.S.C. §31341.[6] As recognized by noted admiralty jurist Judge Charles S. Haight, Congress "was at pains to enumerate the persons who shall be presumed to have authority." *Integral Control Systems Corp. v. Standard Marine Trans. Servs., Inc.*, 990 F.Supp. 295, 299 (S.D.N.Y. 1998) (quoting *The Juanita*, 277 F. 438, 441 (D.Md. 1922)).

Addressing these statutory requirements in the OW context and in an identical fact pattern as in this case, the Eleventh Circuit recognized and applied the same key established principles as the Fifth and other circuits. The Eleventh Circuit recognized the "time-honored principle that 'maritime liens are governed by the principle *stricti juris* and will not be extended by construction, analogy or inference." *Barcliff*, 876 F.3d at 1069-70. This reasoning is in accord with the pronouncements of this Court, the Fifth

6. The authority requirement has been an element of the Act since it was first enacted in 1910, as have the provisions specifying those with presumed authority to bind a vessel. *See* 46 U.S.C. §§ 971-973 (1970).

Circuit and a long line of maritime precedent requiring maritime liens to be strictly construed.[7] Strict construction is required to avoid a proliferation of maritime liens since they are secret liens which follow the vessel and encumber commerce. *See Temara*, 892 F.3d at 519 (citing *Piedmont*, 254 U.S. at 12) and cases cited, *supra*, note 7.

The Eleventh Circuit (like the others) also recognized the importance of examining the contractual relationships when evaluating whether a physical supplier at the end of a chain of contracts acts on the order of the owner or an entity authorized by the owner, as required by CIMLA. The Eleventh Circuit declared as follows:

> Where the owner directs a general contractor to provide necessaries to its vessel, a subcontractor

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7. *See People's Ferry Co. v. Beers*, 61 U.S. 393, 402 (1857); *Osaka Shosen Kaisha v. Pac. Exp. Lumber Co.*, 260 U.S. 490, 499 (1923); *Valero*, 893 F.3d at 292 ("We apply the provisions of CIMLA *stricti juris* to ensure that maritime liens are not 'lightly extended by construction, analogy, or inference.'"); *Temara*, 892 F.3d at 519; *Comar Marine, Corp. v. Raider Marine Logistics, L.L.C.*, 792 F.3d 564, 569-580 (5th Cir. 2015); *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220, 231 (5th Cir. 1999) (noting the Fifth Circuit's "respect for the principle of *stricti juris*" in maritime lien matters); *Bradford Marine v. M/V Sea Falcon*, 64 F.3d 585, 589 (11th Cir. 1995) (explaining that "maritime liens are governed by the principle of *stricti juris*") (internal citations and quotation marks omitted); *Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 982 F.2d 765, 768 (2d Cir. 1992) (quoting *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920)); *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 702 (9th Cir. 1987) (recognizing the importance of "the *stricti juris* principle, long a feature of the law of maritime liens").

> retained by the general contractor to perform the work or provide the supplies is generally not entitled to a maritime lien. This is because, absent facts indicating that the owner has designated the general contractor as its agent to procure the necessaries on its behalf, a general contractor does not have the authority to bind the ship.

Barcliff, 876 F.3d at 1071. The Eleventh Circuit added, "[t]he statute does not list a general contractor as a party presumed to have authority to bind the ship." *Id.* at 1071 n.12. Accordingly, the Eleventh Circuit recognized the general rule that subcontracted suppliers do not have a maritime lien because they act on the order of the general contractor who hired them, not an authorized entity. *Id.* The Eleventh Circuit relied on these principles when it determined that the physical supplier before it did not have a maritime lien because it "acted on the order of O.W. USA." *Id.*

This is the same approach applied by the Fifth Circuit in *Valero* and in the case below. The Fifth Circuit similarly recognized the importance of examining the nature of the relationships between each pair of entities that are involved in the transaction at issue. *Valero*, 893 F.3d at 293-94. The Fifth Circuit also cited the same general rule as the Eleventh Circuit against subcontractors hired by general contractors having their own maritime liens. *Id.* Applying these established principles, the Fifth Circuit concluded that the physical supplier in V*alero* (and hence NuStar in this case too) could not satisfy CIMLA's requirements since it provided the bunkers at OW's request and OW is not a person presumed to have

authority to procure necessaries on the vessel's behalf. *Id.* at 294. The Second and Ninth Circuits each followed the same approach. *Temara*, 892 F.3d at 520-22; *Bunker Holdings*, 906 F.3d at 845. The circuits are all in accord.

Using the *Valero* dissent as a springboard, NuStar asserts that a divergence occurs because, according to NuStar, the Eleventh Circuit employs a different test than the Fifth and other circuits for evaluating when a subcontractor is entitled to a lien notwithstanding that it acted on the order of a non-authorized entity. In the language used by the Fifth, Second and Ninth Circuits, a subcontracted supplier may be able to establish the authority element of CIMLA when it acts on the order of an unauthorized entity if an authorized entity controlled the selection or the performance of the subcontractor. *Valero*, 893 F.3d at 294-95; *Temara*, 892 F.3d at 520-22; *Bunker Holdings*, 906 F.3d at 845. The Eleventh Circuit employs different phraseology to describe the circumstances in which a subcontractor may have a lien, but the use of different phraseology does not create a circuit split.

A review of the Eleventh Circuit's decision in *Barcliff* confirms the consistency among the circuits. Like every other circuit to consider the issue, the Eleventh Circuit explained in *Barcliff* that in "***extraordinary circumstances***" a subcontractor may have a lien notwithstanding its lack of an order from an authorized entity. The Eleventh Circuit stated that such circumstances may exist where "the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transactions." *Barcliff*, 876 F.3d at 1071-72 (emphasis added.) The Eleventh Circuit

did not address whether the facts in *Barcliff* supported application of this significant and ongoing exception, but its explanation of this exception reveals no inconsistency with the Fifth Circuit. In fact, the Fifth Circuit in *Valero* closely examined *Barcliff* and found that it dispelled any notion that a circuit split exists between the two circuits.

In discussing the exception, the Eleventh Circuit reviewed its prior precedent to discern the extraordinary circumstances in which a question of fact may arise as to whether a subcontractor can obtain a lien even though the general contractor was the one which took the official order from the owner. *Barcliff,* 876 F.3d at 1072 (discussing *Galehead, Inc. v. M/V Anglia,* 183 F.3d 1242 (11th Cir. 1999); *Marine Coatings of Ala., Inc. v. United States*, 932 F.2d 1370 (11th Cir. 1991); *Stevens Tech. Servs., Inc. v. United States*, 913 F.2d 1521 (11th Cir. 1990)). The Eleventh Circuit explained that the significant and ongoing exception finds its roots in the ship repair cases of *Marine Coatings* and *Stevens* which, respectively, "involved extensive maintenance, such as painting, coating and cleaning" and "repair work." *Id.* Moreover, in those cases, "the owner and the subcontractor developed a relationship over an extended period of time as the work progressed." *Id.*

The type and level of involvement in *Marine Coatings* and *Stevens* where there were long-term repairs performed was distinguished by the Eleventh Circuit from cases involving a "one-off transaction 'where the degree of involvement with the owner is minimal or nonexistent." *Id.* The case cited by the *Barcliff* court as representative of the one-off transaction where the exception would not apply was one that involved a marine fuel delivery and the

claims of one acting at the request of another supplier. *Id.* (citing *Galehead*, 183 F.3d 1242).

Under the circumstances, "no circuit split results" from the holdings of the Fifth and Eleventh Circuits. *See Valero*, 893 F.3d at 297. Both circuits have confirmed that a subcontracted supplier has no lien in the facts presented in this case even though the vessel owner was aware of the supplier's identity, the supplier coordinated the delivery with the vessel, and, upon delivery, the vessel's chief engineer signed a delivery receipt. No case from the Eleventh Circuit (and NuStar cites to none) has applied the rationale of *Marine Coatings* and *Stevens* to find that a subcontractor may acquire a lien for one-off fuel transactions in the facts presented in this case. Moreover, the Eleventh Circuit's description of when the significant and ongoing exception might apply to aid a subcontractor is consistent with situations where, in the words of the other circuits, the owner controlled the subcontractor's selection or performance. There is simply no split among the circuits warranting review.

Moreover, the facts of this case are distinguishable from *Marine Coatings* and *Stevens*. In contrast to those two cases, the facts here were run-of-the mill. Cosco became aware that OW Far East selected NuStar and thereafter arranged for the delivery logistics to be coordinated, and vessel personnel acknowledged receipt upon completion of delivery by executing a BDN. There is nothing unique about these interactions. The same facts were present in every OW-related case and are likely to be present in every delivery to a vessel of fuel or other necessary. The Fifth Circuit correctly determined that these facts do not rise to what the Eleventh Circuit

described as "extraordinary circumstances" that might permit a subcontracted supplier to obtain a maritime lien. *See Barcliff*, 876 F.3d at 1071. Consequently, *Marine Coatings* and *Stevens* do not entitle NuStar to the relief it seeks. The facts here do not fit the "extraordinary circumstances" present in those cases.

II. NuStar's Assertions of a Circuit Split are a Pretext.

A cursory examination of NuStar's petition reveals that its cries of a circuit split are a pretext. NuStar is not advocating that this Court adopt one circuit's methodology over another. Under the guise of a supposed split between the Fifth, Second and Ninth Circuits on the one hand and the Eleventh Circuit on another, NuStar is actually challenging the approach employed by all the circuits. In reality, NuStar asks the Court to supplant the approach of the circuits with a new test that has not been endorsed by any circuit, is not supported by CIMLA, and has in fact been rejected by each circuit to have examined the issue.

As explained, every circuit (including the Eleventh) examined the contractual relationships of those involved in the chain of supply to determine if the physical supplier could satisfy the authority element of the Act or instead acted on the order of an unauthorized entity. *Valero*, 893 F.3d at 294-95; *Temara*, 892 F.3d at 520-22; *Bunker Holdings*, 906 F.3d at 845; *Barcliff*, 876 F.3d at 1068-71. This is the crux of NuStar's complaint, not a supposed split between the circuits concerning whether the given facts in a case support granting a physical supplier a lien even though it did not receive an order from an authorized entity.

NuStar complains repeatedly that an analysis of contractual relationships is not appropriate. (*See* Pet. at 18, 20, 21).[8] NuStar posits that it should be entitled to a lien merely because Cosco ordered fuel from OW Far East, NuStar delivered the fuel (albeit after layers of contracts and contracting parties), and Cosco was aware of NuStar's identity. (Pet. at 21). Since a vessel and its owner of course are aware of every delivery of fuel or other necessary made to a vessel, and every order for fuel or other necessary can ultimately be traced to an owner or authorized entity,[9] NuStar's argument at bottom is that delivery of fuel or any other necessary to a vessel conveys a lien in that supplier's favor regardless of the circumstances and contractual arrangements under which it agreed to make the delivery.[10]

This same order origination and delivery theory was advocated by NuStar and the other OW physical suppliers in the district and circuit courts. The argument was correctly rejected by the courts. *See Clearlake Shipping PTE Ltd. v. Nustar Energy Servs.*, 911 F.3d 646 (2d

8. Contrary to its position here, when NuStar filed its complaint in the district court, NuStar recognized the application of contractual and agency principles to the maritime lien analysis, as NuStar premised its lien claim on an allegation that OW USA was the Vessels' agent. ROA.20. When that allegation became utterly unsupportable, NuStar argued that contractual and agency principles should have no role in the analysis.

9. *See*, *e.g.*, *Lake Charles*, 199 F.3d at 225 & 227 (stevedore arguing cargo loading services can be traced to owner).

10. In the context of this case, NuStar's argument flies in the face of § 31341 because it would serve no purpose to define what entities are presumed to have authority under CIMLA if all that needed to be shown is an order and a delivery.

Cir. 2018); *Nippon Kaisha Line Ltd. v. Nustar Energy Servs.*, 745 F. App'x 414 (2d Cir. 2018) *Barcliff*, 876 F.3d 1063; *Bunker Holdings*, 906 F.3d 843; *Valero*, 893 F.3d 290. Notably, the Eleventh Circuit in *Barcliff* explicitly rejected the order origination theory advocated by NuStar before this Court. Like NuStar here, the physical supplier in *Barcliff* argued for imposition of a rule holding that "any time an owner orders fuel for its ship, and that fuel is accepted from the third-party supplier by a member of the crew, a maritime lien arises in favor of the supplier –even if the owner ordered the fuel from a different entity." *Barcliff*, 876 F.3d at 1069. Relying on the principle of *stricti juris*, the Eleventh Circuit held that it would "decline [the physical supplier's] invitation to read 'on the order of the owner' so broadly." *Id.* at 1070. It is telling that the Eleventh Circuit, whose jurisprudence NuStar relies upon so heavily in its effort to fabricate a circuit split, has explicitly rejected the theory NuStar ultimately asks this Court to adopt.

CIMLA itself speaks in terms of authority, the words of agency. It does not refer to delivery alone or order origination and does not grant a supplier a lien merely because it delivered a necessary. The Act has consistently been applied as written and its words of agency given effect by countless courts. The precedent (including before the collapse of OW) confirms the propriety of employing a factual analysis and applying contractual and agency principles when a supplier is contracted by and receives its order from a non-§ 31341 entity.[11] When the entity placing

11. *Lake Charles*, 199 F.3d at 227-28 ("An important feature of the instant case is the absence of a contract between Man Sugar (or Sugar Chartering) and LCS [the stevedores]"); *Galehead*, 183 F.3d at 1246; *Port of Portland v. M/V Paralla*, 892 F.2d 825, 828 (9th Cir. 1989) (since port did not contract with persons with

the order with a supplier falls within one of the categories of the entities specified in § 31341, there is a presumption of authority that arises in the supplier's favor. When a supplier receives its order from and acts upon the order of a non-§ 31341 entity (like OW USA), no presumption of authority exists. In such a circumstance, as illustrated by the cases that have applied CIMLA for decades, a factual analysis is undertaken to determine if that entity possesses the requisite authority to bind the vessel.

No case has employed the analysis suggested by NuStar or equated mere delivery and order origination with the authority requirement under CIMLA.[12] This is a significant absence. The Lien Act has been in existence for over a century, and cases involving multiple parties in the chain of supply are not of recent vintage. *See* cases cited *supra* note 11. Yet, NuStar can cite to no case that has abandoned the factual analysis and use of agency and contract principles required by CIMLA and employed by the courts, in favor of the approach now

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presumed authority, "we must therefore consider the status and authority" of the company that did contract with the port); *Integral Control*, 990 F. Supp. at 299 (S.D.N.Y. 1998).

12. In the courts below, NuStar had argued that the Ninth Circuit's decision in *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1988), supported its assertion that tracing the order ultimately to the owner coupled with vessel awarness and acceptance were sufficient. *Ken Lucky* however turned on a critical factual admission by the vessel owner in that case. This distinction was confirmed by the Ninth Circuit in *Bunker Holdings*, 906 F.3d at 846. *Bunker Holdings* is another OW-related case. The Ninth Circuit joined all other circuits in holding the physical supplier had no lien against the vessels and made clear that *Ken Lucky* did not sweep as broadly as the physical supplier in that case (and NuStar in this case) portrayed.

advocated by NuStar. Abandonment of these established principles through certiorari review here is not warranted particularly when each principal maritime circuit has addressed virtually identical facts and contractual relationships, confirmed the importance of examining the contractual relationships, and ***unanimously*** agreed that the physical suppliers are not entitled to a maritime lien.

III. The Petition Does Not Implicate a Question of Law About Which the Courts are Confused.

NuStar also seeks review on the ground that this case supposedly presents an issue of vital importance about which the lower courts are confused and on which they need clarity because (NuStar says) the decision will "set the fuel industry adrift in uncertainty." Pet. at 24. The assertions greatly overstate the effect of the decision below.

The consistency among the circuits and their respective district courts and the conformity of their decisions with the precedent belies any suggestion of confusion in the courts as to how to apply CIMLA. Moreover, the OW Group collapsed in 2014. Since that time, the maritime lien claims of physical suppliers such as NuStar have been consistently rejected where they acted on the order of an OW entity and not an entity authorized by the owner to bind the vessels. The rejection of physical supplier lien claims in the OW cases came first at the district court level in 2016.[13] This was over three years ago and yet there is

13. *See O'Rourke*, 179 F. Supp. 3d 333 (S.D.N.Y. Apr. 2016) (District Judge Scheindlin rejecting the physical supplier's lien claims), *aff'd on reh'g*, *in part*, *vacated in part*, *O'Rourke Marine Servs. L.P., L.L.P. v. MV Cosco Haifa*, No. 15-cv-2992 (KBF), slip

no evidence that the fuel industry is adrift. Marine fuel continues to be supplied in the U.S. and trading companies continue to flourish. *See, e.g.*, Complaint at 2-3, *Indelpro S.A. de C.V. v. Valero Mktg. & Supply Co.*, No. 3:19-cv-00116 (S.D. Tex. Mar. 25, 2019) (noting supply of bunkers to more than 150 vessels in the U.S. area through contracts entered with "intermediary sellers and suppliers" from January – May 2018).

Further, the notion that vessel owners will surreptitiously employ affiliated companies to act as intermediaries in an effort to avoid maritime liens is unfounded and contradicted by the record in this case. Cosco utilized an affiliate to purchase the fuel from OW Far East. This arrangement did not prevent a lien from accruing. To the contrary, OW Far East (and hence its assignee ING) was determined to possess an enforceable lien against the Vessels because OW Far East (not NuStar) acted on Cosco's order. Thus, Cosco's use of an affiliate did not avoid a lien; it simply bestowed the lien on the appropriate party under CIMLA. The same result was reached in other OW-related cases which determined that the OW entity acting on the order of an authorized entity through its affiliate was entitled to the lien. *See Clearlake*, 911 F.3d at 649-52; *Nippon Kaisha*, 745 F. App'x at 415-16. There is no evidence this same rationale will not be applied in the future. There is equally no evidence that the current or future use of affiliates or other intermediaries somehow insulates vessels from maritime liens or turns the marine fuel industry into disarray. NuStar's assertions to the contrary are pure conjecture.

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op. (S.D.N.Y. Aug. 24, 2016) (District Judge Forrest affirming the rejection of the physical supplier lien claims), *aff'd*, 730 Fed. Appx. 89 (2d Cir. 2018).

Similarly, there is no evidence that the decision below will force suppliers to embark on an insurmountable quest under tight time pressure to find the anointed person to bless the transaction. (Pet. at 27.) The facts of this case demonstrate the fallacy in the assertion. NuStar sold fuel to OW USA, a company with whom NuStar had years of business and to whom NuStar extended a $40 million line of credit. Indeed, NuStar sold roughly $200 million of fuel per year to OW USA. ROA.2139, 2134, 2117. Given their years-long relationship, NuStar could have taken steps to ascertain whether OW USA possessed authority to bind the vessels for the multi-million dollars worth of fuel it was buying. It did not. Nothing in the record supports the contention that time constraints prevented NuStar from confirming that authority.

IV. The Decision Below is Correct.

Finally, review is not warranted because the decision below is plainly correct. Maritime liens are not a matter of right. They are statutorily created. A supplier does not obtain a lien merely because it delivered a necessary (such as fuel) to a vessel or because the delivery was coordinated or accepted by vessel personnel. The supplier must prove it acted on the order of someone authorized to bind the vessel. A supplier is not entitled to presume the requisite authority exists merely because it received an order from whomever.

To determine if NuStar satisfied the statutory requirements, the Fifth Circuit, in accord with the Second, Ninth and Eleventh Circuits, examined the evidentiary record and the nature of the relationships between the parties in the supply chain. The Fifth Circuit correctly

concluded that NuStar acted on OW USA's order and that OW USA did not have the authority to bind the vessel. The Fifth Circuit also properly rejected the assertion that this case presented "extraordinary circumstances" to justify granting NuStar a lien merely because Cosco was aware that NuStar would be making the physical delivery and vessel personnel coordinated the logistics and acknowledged receipt of the delivery. Those same facts are associated with virtually every delivery to a vessel and thus nothing extraordinary occurred in this case. No circuit has reached the opposite conclusion, and the decision accords with long-standing precedent.

CONCLUSION

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

Respectfully submitted,

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