No. 18-____

IN THE

Supreme Court of the United States

NUSTAR ENERGY SERVICES, INC.,
Petitioner,
v.
ING BANK N.V., et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Commercial Instruments and Maritime Liens Act, 46 U.S.C. § 31342(a), affords a maritime lien against a vessel to any party that "provides necessaries to a vessel on the order of the owner or a person authorized by the owner." The question presented is:

Whether a party that physically supplies a vessel with fuel or other necessaries possesses a statutory maritime lien where the vessel owner or its authorized agent ordered those necessaries and directed the supplier to provide them, regardless of contractual relationships between the vessel owner and intermediate parties.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is NuStar Energy Services, Inc., appellant below. NuStar Energy Services, Inc. is 100% owned by NuStar Terminals Services, Inc., which is not publicly traded. NuStar Terminals Services, Inc. is an indirect subsidiary of NuStar Energy L.P., a publicly traded master limited partnership. No publicly held company owns 10% or more of its stock.

Respondents are ING Bank N.V. and Clearlake Shipping Pte. Ltd., appellees in No. 17-1458 below, and O.W. Bunker USA, Inc. and Nippon Kaisha Line Limited, appellees in No. 17-1378 below.

Pursuant to Supreme Court Rule 12.4, NuStar files this consolidated petition seeking review of both of the Second Circuit's decisions.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES & RULES:

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

Page(s)

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NuStar Energy Services, Inc. ("NuStar") respectfully petitions this Court for a writ of certiorari to review two judgments of the United States Court of Appeals for the Second Circuit. This petition is filed pursuant to Supreme Court Rule 12.4 and seeks review of two judgments of the Second Circuit that were issued at the same time and involve identical questions.

OPINIONS BELOW

The decision of the Second Circuit in No. 17-1458 ("*Clearlake*") is reported at 911 F.3d 646 and reproduced at page 1a of the Appendix to this petition ("App."). The decision of the Second Circuit in No. 17-1378 ("*Nippon Kaisha*") is reported at 745 F. App'x

414 and reproduced at App. 14a. The opinion of the United States District Court for the Southern District of New York in both cases is reported at 239 F. Supp. 2d 674 and reproduced at App. 21a.

JURISDICTION

Both judgments of the Second Circuit were entered on December 19, 2018. App. 1a, 14a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The pertinent text of 46 U.S.C. § 31342 is 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

This petition—along with a companion petition[1]—presents an opportunity for this Court to provide clarity on an important question of federal maritime law that has divided the courts of appeal. The Commercial Instruments and Maritime Lien Act

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[1] On this same date, NuStar has also petitioned this Court for a writ of certiorari to review the judgment of the Fifth Circuit in *NuStar Energy Services, Inc.* v. *M/V COSCO Auckland*, __ F. App'x __, 2019 WL 192408 (5th Cir. Jan. 14, 2019), which presents the same question.

("CIMLA") affords a lien against a vessel to any party that "provid[es] necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31342(a) ("Section 31342(a)"). CIMLA fulfills Congress's intent to encourage the free flow of maritime commerce by ensuring that American suppliers can rely on the credit of the vessels they serve, which are frequently foreign-owned and only briefly present at American ports. The question in this case is whether a party that physically supplies a vessel with fuel or other necessaries ordered by that vessel has no lien if, as commonly occurs in modern commerce, the order has been passed through one or more intermediary parties.

This case and its companion petition, along with numerous other cases throughout the country, arise from the collapse of the international O.W. Bunker ("OW") group, and all present the same basic fact pattern. Before its demise, OW facilitated as much as 7% of the worldwide business of providing oceangoing vessels with maritime fuel, known as "bunkers."[2] Owing to internal fraud, the OW group became insolvent in November 2014, leaving in its wake more than $650,000,000 of unpaid debts, including debts owed to NuStar and other physical suppliers of bunkers to merchant vessels. In the six weeks before OW's collapse, NuStar provided more than $18,000,000 worth of bunkers, in fulfillment of orders that originated with various vessels, their owners, or their charterers, including the vessels at issue in this case and the companion petition. OW affiliates were

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[2] *See* Allessandro Mauro, *OW Bunker: How One of the World's Largest Marine Fuel Traders Went From IPO To Bankruptcy*, Ship & Bunker.com (January 7, 2015), https://tinyurl.com/y5h4bfcy, for an account of O.W. Bunker's rise and fall.

involved in these transactions merely as intermediaries between the vessel interests and physical suppliers such as NuStar. The OW entities never physically supplied fuel to the vessels, and they never paid NuStar for the fuel that the vessels ordered and NuStar provided.

NuStar therefore asserted statutory liens against the vessels because NuStar had filled the vessels' orders by physically supplying them with millions of dollars' worth of bunkers that the vessels' authorized agents had ordered and had directed NuStar to provide. Yet the court below held that OW entities—intermediaries that physically provided no fuel to the vessels, that never saw or touched any of the fuel, and that never expected more than a small markup for facilitating the transactions—possess liens for the full value of the transactions, while NuStar has no liens at all. The result of this holding, if allowed to stand, is that vessels will be able to avoid all maritime liens to physical suppliers merely by employing affiliated intermediaries to procure their necessaries.

The Court should grant certiorari to resolve the division among the circuits on this important and recurring issue and confirm, as the statute provides, that a physical supplier of necessaries possesses a maritime lien when it has supplied necessaries ordered by a vessel and has done so at the express direction of the vessel's authorized agents.

STATEMENT OF THE CASE

This petition involves two cases (*Clearlake* and *Nippon Kaisha*) that involve the same operative facts and that were decided together in the district court, argued together on appeal, and decided by the same panel of the Second Circuit.

In *Clearlake*, NuStar physically provided bunkers to two vessels, the *M/V Venus Glory* and the *M/V Hellas Glory*, in Houston in October 2014. App. 29a. The fuel NuStar provided was ordered by the vessels' charterer, Clearlake Shipping PTE Ltd. ("Clearlake"), through its authorized agent Tarcona AS ("Tarcona"). App. 29a; *Clearlake* JA.293.[3] Tarcona contracted with a foreign OW affiliate, OW Bunker (Switzerland) ("OW Switzerland"), to arrange for provision of over 2,000 tons of fuel to the vessels. App. 29a; *Clearlake* JA.40, 259-65. In correspondence with Clearlake, OW Switzerland identified NuStar as the "supplier" and confirmed the "quantity, price, and date of delivery." App. 29a; *Clearlake* JA.260, 265. OW Switzerland then referred the orders to its U.S. affiliate, O.W. Bunker USA, Inc. ("OW USA"), which "confirmed the orders to NuStar the same day." App. 29a.

Similarly, in *Nippon Kaisha*, NuStar physically provided bunkers to the vessel M/V *Rigel Leader* in Houston in October 2014. App. 30a. The fuel NuStar provided was ordered by the vessel's charterer, Nippon Kaisha Line Limited ("NYK Line"), through its "sister company" Nippon Yusen Kaisha Trading Corporation ("NYK Trading"). App. 30a. NYK Trading contracted with OW USA, which identified NuStar as the supplier of the fuel in its correspondence to NYK Line. App. 30a. OW USA then confirmed the order to NuStar to physically supply the fuel. *See* App. 30a.

When each fueling took place, "delivery was coordinated between agents for NuStar and the local agents for the vessels." App. 31a. That meant

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[3] "JA." refers to the Joint Appendix filed in the Second Circuit.

communicating with the port agents for the Vessels[4] to "lock down the delivery time and location" and to arrange other "logistics of delivery." App. 31a. Each Vessel's chief engineer or master executed a delivery note or receipt that included language expressly preserving NuStar's right to assert a maritime lien for the fuel it provided. App. 31a. In those documents, the chief engineer or master confirmed that "no disclaimer by the purchaser of marine fuels covered by this note will alter or waive * * * [NuStar's] maritime lien against the receiving vessel for the cost of the marine fuels covered by this note; or the receiving vessel's liability for the cost of the marine fuels covered by this note." *Clearlake* JA.321, 328; *Nippon Kaisha* JA.253.

Shortly after fueling each Vessel in October 2014, NuStar billed OW USA for all three bunkering transactions, and the OW entities billed the Vessels those amounts plus a relatively small markup. App. 32a. In *Clearlake*, NuStar invoiced OW USA $1,208,032.76 for the bunkers NuStar supplied to the two vessels, and OW Switzerland invoiced Clearlake a total of $1,279,018.12 and for the same bunkers. *Clearlake* JA.330, 333, 373-74, 378. Likewise, in *Nippon Kaisha*, NuStar invoiced OW USA $484,256.30 for the bunkers NuStar supplied to the *Rigel Leader*, and OW USA invoiced NYK Trading $505,642.52 and for the same bunkers (excluding additional gasoil supplied by another company). *Nippon Kaisha* JA.457, 511. Thus, for the fuel it physically supplied in the two cases, NuStar expected to receive $1,692,288, whereas the OW entities expected only to receive a net amount of $92,372,

[4] In this petition, all of the vessels at issue in both cases are referred to collectively as the "Vessels."

equaling about 5.4% of the total transactions, for their role in facilitating the transactions as intermediary brokers.

A few weeks later, the entire OW group's "financial distress became known," leaving NuStar unpaid by either OW or the Vessels. App. 32a.

A. Proceedings In The District Court.

After OW's insolvency, the Vessel owners—like many others—filed interpleader actions in the Southern District of New York to "resolve the competing claims to payment" from various parties to the bunkering transactions. App. 27a. Relevant here, NuStar and the OW entities—or ING Bank N.V. ("ING") acting as assignee[5]—each claimed that those transactions resulted in a maritime lien in its favor. The district court selected a handful of "test cases" to "efficiently present for decision the significant legal issues that needed to be decided." App. 25a. Both *Clearlake* and *Nippon Kaisha* were among those test cases. *See* App. 28a-32a.

The district court decided the two cases together. In *Clearlake*, NuStar and ING each sought summary judgment that they were entitled to maritime liens under CIMLA for the fuel NuStar provided to the Vessels. App. 25a. In *Nippon Kaisha*, NuStar and OW USA did the same. *Id.* In both cases, the "crux of the dispute" was first whether NuStar had acted "on the order of" the Vessel owners or their authorized

[5] Although OW Switzerland initially received Clearlake's fuel order and OW USA was NuStar's contractual counterparty, ING claimed the lien in *Clearlake*. *See Clearlake* JA.101. ING alleged it was assigned OW Switzerland's lien rights under a security agreement with the OW group. Although the parties contested the existence and validity of any such assignment, the district court did not address that issue. App 50a n.16.

agents when it had contracted with an OW intermediary, and second whether that OW intermediary had "provided" fuel it had never touched. *See* App. 36a.

Both cases were decided in a single opinion holding that the OW entities possessed liens while NuStar did not. The district court held that NuStar had not acted on the order of the Vessels or their agents because "a direct contractual or agency nexus between the supplier and the vessel or its agents is typically required." App. 38a. The lack of contractual privity between NuStar and the Vessel interests meant NuStar was "indistinguishable" from subcontractors in other cases that had been found to not to have liens. App. 40a-41a.

The court also held that the Vessels' foreknowledge of NuStar's provision and NuStar's direct involvement with each Vessel's local agents and crew in providing the bunkers had no effect on the outcome. The court rejected NuStar's argument that CIMLA was satisfied because the fuel order originated from the Vessels and was fulfilled in coordination with the Vessels' agents. Though the district court recognized that argument as "viscerally appealing," the court nonetheless rejected it as inconsistent with the privity approach it had decided to apply. App. 41a-42a. The court noted that while these "[d]irect contacts between [NuStar] and agents of the vessel can be relevant if they demonstrate a direct contractual relationship," such evidence was not otherwise "legally significant." App. 43a.

The court noted that "close coordination can give rise to a lien" in the Eleventh Circuit, but held that that rule conflicted with the Second Circuit's perceived approach. App. 44a-45a. Because the

evidence showed "[a]t best * * * that the Vessel Interests viewed NuStar * * * as [an] acceptable supplier[]," NuStar could not demonstrate the requisite privity of contract. App 45a.

By contrast, the district court held that CIMLA did grant a lien in favor of the intermediary OW entities. Here, the key issue was whether OW had "provided" fuel to the Vessels "indirectly through performance by a subcontractor." App 51a. The court found that it had, because when "a subcontractor delivers necessaries to a vessel, * * * [its] performance is attributed to the contractor." App. 51a-53a. Because the fuel was provided through a chain of "back-to-back" contracts, the OW entities qualified as general contractors that caused their alleged subcontractor (NuStar) "to deliver the necessaries to the vessels." App. 53a. That arrangement meant that the direct contractual counterparties of the Vessels' agents—OW Switzerland in *Clearlake* and OW USA in *Nippon Kaisha*—were "'provider[s]' of necessaries" even though they had never touched any fuel. App. 53a. Consequently, the "O.W. entities [we]re entitled to a maritime lien" in both cases. App. 55a.

Pursuant to Fed. R. Civ. P. 54(b), the court certified that there was no just cause for delaying entry of judgment as to the validity of the *in rem* lien claims asserted by NuStar, and entered a partial final judgment in both *Clearlake* and *Nippon Kaisha* declaring that that NuStar "does not possess maritime liens pursuant to CIMLA against the Vessels" and therefore that its maritime lien claims are dismissed, and also that the OW entities hold maritime liens against the Vessels and *in rem* interests in the interpleader *res*. App. 61a, App. 64a.

B. Proceedings In The Court Of Appeals.

NuStar appealed both cases to the Second Circuit, where they were argued together to the same panel. But before the panel decided NuStar's cases, a different panel of the Second Circuit decided a similar case, *ING Bank N.V.* v. *M/V TEMARA, IMO No. 9333929*, 892 F.3d 511 (2d Cir. 2018) ("*Temara*"), also arising out of the OW insolvency. *Temara* held that a physical supplier in substantially the same circumstances as NuStar was "not entitled to a maritime lien because it provided the bunkers at the direction of O.W. USA rather than at the direction of the owner or the charterer of the Vessel, or any other statutorily-authorized person." *Id.* at 521. The Second Circuit explained that the chain of contracts between the vessel's charterer and the physical supplier indicated that the physical supplier "entered into a bilateral transaction with O.W. USA," which was neither the vessel's agent or owner. *Id.* at 521. That meant the supplier had no lien. *Id.* at 521-22.

In NuStar's cases, the panel simply followed the *Temara* precedent in holding that NuStar did not possess maritime liens. In *Clearlake*, the court held that NuStar's case "involved events not substantially dissimilar" to those at issue in *Temara*, such that NuStar's maritime lien was "foreclosed by [that] recent decision." App 8a. The court also held that NuStar did not fall within the "sole exception" to the subcontractor rule. App. 9a-11a. That exception applies when a vessel's owner or agent contracts with an intermediary but orders it to retain a specific supplier. App. 9a. Because the court held that NuStar could not show that the Vessels' owner or agents had ordered OW Switzerland to select NuStar

as the supplier, the exception did not apply. App. 10a-11a.

The same panel issued a perfunctory affirmance in *Nippon Kaisha*. That affirmance cited the *Clearlake* opinion and affirmed "substantially for the reasons stated by the district court." App. 18a. The Second Circuit then briefly explained that because NuStar "had no contractual relationship with NYK Line or NYK Trading," it had "presented no basis on which it could be concluded that it provided the bunkers to the vessel on the order of the charterer or its authorized agent." App. 18a. The Second Circuit held that, as in *Clearlake*, NuStar "did not come within the subcontractor exception because the record * * * showed at most that the charterer was merely aware of and tacitly accepted NuStar as the physical supplier." App. 19a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED OVER WHETHER, AND IN WHAT CIRCUMSTANCES, A PHYSICAL SUPPLIER POSSESSES A MARITIME LIEN WHEN A VESSEL ORDERS NECESSARIES THROUGH A CONTRACTUAL INTERMEDIARY.

A. The Circuits Apply Different Tests To Determine Whether A Physical Supplier Has Acted "On The Order" Of A Vessel Or Its Authorized Agent.

CIMLA furthers maritime commerce by providing certainty of payment to American suppliers that physically provide vessels with necessaries. Anyone that "provides necessaries to a vessel on the order of the owner or a person authorized by the owner" has a

maritime lien enforceable directly against the vessel. 46 U.S.C. § 31342(a). Under this plain language, a lien exists whenever a party provides necessaries (which all courts recognize includes bunker fuel) to a vessel "on the order" of the owner or an authorized agent. NuStar was therefore entitled to liens in these cases because it physically provided bunkers ordered by the Vessel owners or their authorized agents, and did so under the express direction of the Vessels' agents.[6]

Each of the nation's principal maritime circuits—the Second, Fifth, Ninth, and Eleventh—has confronted this issue in the context of the OW insolvency. These courts, however, are divided on whether, and in what circumstances, a physical supplier will possess a maritime lien when a vessel has ordered necessaries through a contractual intermediary like OW. The statute contains no requirement that the lienholder must have contracted directly with the vessel owner or its agent, or that the lienholder must be able to establish an agency relationship between each intermediate party. Yet the Second, Fifth and Ninth Circuits have all judicially amended the statute by adding such an atextual contractual privity requirement. In those circuits, a physical supplier of necessaries cannot obtain a lien unless it

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[6] In 46 U.S.C. § 31341, CIMLA sets forth a list of parties presumed to have authority to procure necessaries, including the vessel's owner and master, the person entrusted with the management of the vessel at the port of supply, and any officer or agent appointed by the vessel's owner or charterer. There is no dispute in this case that the bunkers at issue were ordered by authorized agents of the Vessels. The question is whether the NuStar possesses a lien where those orders were passed through intermediary parties before being filled by NuStar under the direction of the Vessels' agents.

demonstrates that the contractual intermediary was, in fact, acting as an agent of the vessel. By contrast, under the rule applied by the Eleventh Circuit, a physical supplier that contracts with an intermediary can still obtain a lien if—as occurred in NuStar's cases—the vessel had significant and ongoing involvement with the physical supplier by, for example, directing, inspecting, testing, and approving the supplier's services.

1. In *Bunker Holdings Ltd.* v. *Yang Ming Liberia Corp.*, 906 F.3d 843 (9th Cir. 2018), the Ninth Circuit held that a physical supplier that fills a vessel's order for necessaries cannot obtain a lien if it has contracted with an intermediary rather than directly with the vessel or its authorized agent. *Id.* at 845. Likening this situation to one where a vessel has employed a general contractor that in turn has employed a subcontractor, the Ninth Circuit held that the physical supplier cannot obtain a lien unless it can satisfy "one exception" that "applies when the vessel owner directs the general contractor to use a particular subcontractor." *Id.* at 846. This "exception," however is in reality no exception at all. As the court reasoned, when a vessel owner directs an intermediary to choose a specific supplier, the intermediary is in fact "act[ing] as the owner's agent and thus exercises authority to bind the vessel." *Id.* Thus, under the Ninth Circuit's rule, when a vessel has directed an intermediary to use a particular supplier, that intermediary has become an agent of the vessel and the physical supplier will possess a lien because it contracted directly with that agent.

The Second and Fifth Circuits apply a similar test. As noted, in *Temara*, the court held that a physical supplier was "not entitled to a maritime lien because

it provided the bunkers at the direction of O.W. USA rather than at the direction of the owner or the charterer of the Vessel, or any other statutorily-authorized person." 892 F.3d at 521. And in *U.S. Oil Trading LLC* v. *M/V VIENNA EXPRESS*, 911 F.3d 652 (2d Cir. 2018), decided the same day as these cases by the same panel, the court confirmed that "[t]he sole exception to the rule against the subcontractor lien will occur where the subcontractor has been engaged by a general contractor in circumstances where the general contractor was acting as an agent at the direction of the owner to engage specific subcontractors," *i.e.*, where "an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance." *Id*. at 662-63 (citing, *inter alia*, *Farwest Steel Corp.* v. *Barge Sea-Span 241*, 828 F.2d 522, 526 (9th Cir. 1987) and *Lake Charles Stevedores, Inc.* v. *Professor Vladimir Popov MV*, 199 F.3d 220, 229 (5th Cir. 1999)). But "[f]or the exception to apply so as to afford the subcontractor a lien on the vessel, there must have been (a) an order or direction (b) by the owner/charterer of the vessel or its authorized agent, that the particular subcontractor be used." *Id*. at 664. In the cases below, the Second Circuit applied its rules in *Temara* and *U.S. Oil Trading* to deny NuStar's maritime lien claims, because the vessels had not specifically directed that the OW intermediaries employ NuStar as the physical supplier. App. 8a; App 18a.

In *Valero Marketing & Supply Co.* v. *M/V Almi Sun, IMO No. 9579535*, 893 F.3d 290 (5th Cir. 2018), the Fifth Circuit followed the Second Circuit, *see id*. at 294 n.18, and held that a physical supplier that did not contract directly with the vessel or an authorized agent will have a lien only if "an entity authorized to

bind the ship 'controlled [its] selection * * * and/or its performance.'" *Id.* at 294 (quoting *Lake Charles*, 199 F.3d at 229) (alteration original). The majority—rejecting the view of Judge Haynes in dissent—made clear that this test does not allow a lien in NuStar's circumstances, where a physical supplier that contracted with an intermediary has provided necessaries ordered by a vessel or its agent and as directed by the vessel's agents. *Id.* at 294-97; *cf. id* at 298-300 (Haynes, J., dissenting).[7]

2. The Eleventh Circuit, by contrast, applies a different rule. In *Barcliff, LLC* v. *M/V DEEP BLUE, IMO No. 9215359*, 876 F.3d 1063 (11th Cir. 2017), the court reaffirmed that even if a supplier contracts with an intermediary rather than with the vessel owner or an authorized agent, the supplier will still have a lien if the vessel owner was "sufficiently aware of, and involved in" the supplier's work. *Id.* at 1071 (quoting *Galehead, Inc.* v. *M/V Anglia*, 183 F.3d 1242, 1245 (11th Cir. 1999)). Thus, when an owner has "directed, inspected, tested and approved" a supplier's work "on a continuing basis," that significant and ongoing involvement by the owner will afford a lien to the supplier notwithstanding a lack of contractual privity between the supplier and the vessel or its agent. *Id.* at 1072. The Eleventh Circuit has recognized certain factors that bear on this test, which include whether the vessel owner was aware of the supplier's performance before and during the performance, whether the supplier provided a substantial portion of what the owner ordered, and whether the owner

[7] Accordingly, in the *Cosco Auckland* case, *see supra* note 1, the Fifth Circuit applied its *Valero* holding to deny NuStar's lien claims. NuStar's companion petition seeks review of that decision.

inspected and accepted the supplier's work. *See id.* at 1072 n.13; *Galehead*, 183 F.3d at 1245-46; *Marine Coatings of Ala., Inc.* v. *United States*, 932 F.2d 1370, 1376 n.9 (11th Cir. 1991).

The Eleventh Circuit's rule conflicts with the rule applied by the other circuits. As Judge Haynes recognized in *Valero*, the Fifth Circuit's decision in that case "creates an unnecessary circuit split with the Eleventh Circuit" because it does not recognize the Eleventh Circuit's "significant and ongoing involvement" test. *Valero*, 893 F.3d at 298 (Haynes, J., dissenting); *see also* App. 44a-45a (district court declining to apply Eleventh Circuit's rule in these cases). The Eleventh Circuit did not have occasion to apply that test in *Barcliff* because it had not been raised in the district court. *See* 876 F.3d at 1072-73. But as Judge Haynes explained in *Valero*, the physical supplier in that case (Valero) would have possessed a lien under the Eleventh Circuit's test because the vessel owner knew beforehand that Valero would be the physical supplier and did not object; the owner knew that the intermediary OW entity could not physically fuel the vessel; and the vessel's local agents coordinated the provision of fuel with Valero and tested and approved of the fuel. 893 F.3d at 299. In Judge Haynes's view, this significant and direct involvement by the vessel owners in Valero's provision of fuel to the vessel would have afforded a lien under the Eleventh Circuit's test notwithstanding the absence of contractual privity between the supplier and the vessel or its agent. *Id.* at 300. The majority's erroneous refusal to apply that test was therefore determinative.[8]

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[8] The majority disputed that its test conflicted with the Eleventh Circuit's because the Eleventh Circuit had not yet

So too here. In these cases, the Vessels' agents knew in advance that NuStar—rather than any OW intermediary—would physically provide the fuel the Vessels ordered, and the Vessels did not object to NuStar's involvement. *See* App. 29a-30a; *Clearlake* JA.260, 265; *Nippon Kaisha* JA.399. Moreover, the Vessels' port agents directly coordinated with NuStar and its agent, directing them to fuel the Vessels, and the Vessels' own crew confirmed that NuStar had fulfilled the Vessels' orders by signing NuStar's delivery certificates. App. 30a-31a. As Judge Haynes confirmed in *Valero*—which involved essentially identical facts—under the Eleventh Circuit's test NuStar would have possessed maritime liens because the Vessels' significant and ongoing involvement in NuStar's provision of the bunkers meant that NuStar acted "on the order" of the Vessels or their agents. But the Second Circuit held that NuStar had no liens solely because NuStar did not directly contract with the Vessels or their agents and the Vessels had not selected NuStar to be the physical supplier. App. 8a-13a; App. 18a-20a.

B. The Rule Applied By The Court Below Is Unpredictable And Will Allow Vessel Owners To Effectively Nullify All Statutory Supplier Liens.

All commercial actors require legal certainty, and such certainty is particularly important to maritime suppliers that must rely on the statutory lien when

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expressly applied its test to circumstances like the OW cases. 893 F.3d at 296-97. But the *Valero* majority notably did not adopt the "significant-and-ongoing-involvement" test applied by the Eleventh circuit. And as Judge Haynes explained, a straightforward application of that test requires recognition of a lien in the circumstances of *Valero* and this case.

providing necessaries to foreign oceangoing vessels that can sail away at any time. The maritime lien conferred by Congress in CIMLA and its statutory predecessors was therefore intended to provide "simple and comprehensive rules" that "afford the material-man a reasonably certain criterion." *Dampskibsselskabet Dannebrog* v. *Signal Oil & Gas Co.*, 310 U.S. 268, 272, 280 (1940). Physical suppliers have long relied on that legal certainty. Indeed, NuStar is aware of no case in which a physical supplier of bunker fuel had ***ever*** been denied a statutory lien prior to the recent cases involving OW.[9] These recent cases, however, have upset that longstanding certainty, making it extremely difficult for physical suppliers to determine whether they possess liens and giving vessels a clear route to avoid all supplier liens in the future. This Court's review is therefore warranted to restore certainty to this important pillar of maritime commerce and to confirm that the statute is not in fact an empty letter.

In modern maritime commerce, it is commonplace for vessels—particularly large oceangoing vessels—to procure necessaries through intermediaries like OW,

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[9] *See*, *e.g.*, *Marine Fuel Supply & Towing, Inc.* v. *M/V Ken Lucky* ("*Ken Lucky*"), 869 F.2d 473 (9th Cir. 1988) (holding that physical supplier possessed lien even though order was placed by intermediary); *Tramp Oil & Marine, Ltd.* v. *M/V Mermaid I*, 805 F.2d 42, 44 (1st Cir. 1986) (noting, in case involving intermediaries, that "[n]o one disputes that * * * [the] direct suppliers of fuel to the [vessel] would be entitled to a maritime lien" and framing question as whether an intermediary "acquired the [physical] suppliers' rights to the lien when it paid [them] for the fuel"); *Belcher Co. of Ala., Inc.* v. *M/V Maratha Mariner*, 724 F.2d 1161, 1163-64 (5th Cir. 1984) (noting that physical fuel supplier "would have had a lien" under the statute despite lack of privity with vessel's charterer).

rather than attempt on their own to locate different suppliers in each of the many international ports the vessels may visit. *See*, *e.g.*, *Valero*, 893 F.3d at 293 ("It is not unusual for an entity supplying necessaries to lack privity of contract with the owner of that vessel."). But the statutory interpretation adopted by the Second, Fifth, and Ninth Circuits provides no certainty to physical suppliers that they will ever have liens where a vessel owner has required that a physical supplier contract with an intermediary like OW. And the perverse result of that rule is that, as here, maritime liens will be denied to physical suppliers that provide vessels with hundreds of thousands or millions of dollars' worth of those suppliers' own fuel, but be granted to intermediaries like OW (thereby awarding them a massive monetary windfall) even though they physically provide no fuel, expect only a small markup for their involvement, and may never pay the physical suppliers.

In those circuits, a physical supplier will have no lien unless it can prove the intermediary was the vessel's agent. But for a supplier to determine in advance whether it will have a lien under that rule, the supplier must first attempt to obtain and analyze the various agreements and other evidence pertaining to the relationship between the vessel owner and the intermediaries it has employed, and then try to determine whether those facts have made the intermediary an agent of the vessel under applicable law. The relevant evidence will likely be unavailable before any supply occurs in the real-time world of ever-moving maritime commerce.[10] But even if a

[10] For example, in *U.S. Oil Trading*, 911 F.3d at 666, the Second Circuit held that a fuel supplier that dealt with an OW intermediary had raised a triable issue regarding whether it had

supplier could access evidence relating to the relationships between the vessel owner and its intermediaries, it would then have to determine whether that evidence creates an agency relationship under applicable law, an inquiry that often turns on difficult questions of fact and law. *See*, *e.g.*, *Taylor* v. *Sturgell*, 553 U.S. 880, 905 (2008) (remanding for determination whether party acted as agent in light of ambiguous facts); Restatement (Third) of Agency §§ 2.01, 2.03 (2006).

That approach undercuts CIMLA's bedrock focus on simple, clear rules. *See Dampskibsselskabet*, 310 U.S. at 271-72. But what is even worse, the rule applied by the court below will allow vessel owners to entirely avoid ***all*** supplier liens simply by employing bona fide affiliates to procure their necessaries while making clear that those parties are not acting as their agents. Under the rule applied in the Second, Fifth and Ninth circuits, physical suppliers could never possess liens in such circumstances because they would never be acting on the order of an authorized party: by sending all orders through non-agent affiliates, owners could ensure that their own affiliates would be the only parties that could ever obtain maritime liens.[11]

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been "selected" by the vessel owner, thereby making the intermediary an agent for purposes of the lien statute. But the evidence supporting that triable issue came partly from internal documents between the vessel and the intermediary elicited through discovery and partly from deposition testimony and sworn declarations. *Id.* at 665-66.

[11] All circuits have held that an intermediary that does not physically supply necessaries can nonetheless obtain a statutory lien because it "provides" those necessaries by contracting with another party to do so. *See*, *e.g.*, App. 52a.

Vessel owners could easily nullify the statute this way, as many international shipping companies already procure necessaries through affiliated trading companies that are maintained as bona fide, separate legal entities. For example, in the *Nippon Kaisha* case below, the Vessel's charterer, NYK Line, contracted with NYK Trading, its "sister company," to procure the bunkers. App. 30a. It was NYK Trading, not the vessel owner or the charterer, that contracted with OW USA, which in turn contracted with NuStar to fuel the vessel. Although the charterer did not contest below that NYK Trading was acting as the vessel's agent, *see* App. 50a n.17, in future cases vessel interests could simply employ separate, bona fide affiliates—likely to be foreign companies without U.S. assets—as contractual intermediaries, and draft their procurement contracts to make clear that the intermediaries are not acting as agents of the vessels and that the vessels had no role in selecting the physical suppliers. That way, only the intermediary affiliates would ever possess liens, and the physical suppliers would lose their statutory security, being relegated instead to the uncertain, and unsecured, remedy of a contractual action against the affiliate.

Congress could not have intended this result. CIMLA's statutory protections do not depend on contractual arrangements. *See*, *e.g.*, *O'Rourke Marine Servs. L.P., L.L.P.* v. *M/V COSCO Haifa*, 179 F. Supp. 3d 333, 339 (S.D.N.Y. 2016), *aff'd*, 730 F. App'x 89 (2d Cir. 2018) ("[M]aritime liens are not creatures of contract—they are creatures of law, and solely of law."). But the decision below, by limiting CIMLA's reach only to suppliers in contractual privity with a vessel owner or its agent, would allow vessel interests to escape the intended liens of physical suppliers

merely by employing their own affiliates as contractual intermediaries. This decision not only strips parties like NuStar of their statutory protection but also offers vessel interests an easy path to nullify all statutory supplier liens. The Court should grant certiorari to ensure that Congressional intent is not so easily thwarted.[12]

C. The Court Should Restore Certainty And Predictability To CIMLA, Consistent With Congress's Purposes.

The rule advocated by NuStar below would restore certainty and predictability to the law, and prevent vessel owners from circumventing the statutory lien through contractual legerdemain. The statute provides that a party has a lien whenever it has provided necessaries "on the order" of a vessel's owner or authorized agent, 46 U.S.C. § 31342(a), and contains no contractual privity requirement. Accordingly, where, as here, a vessel owner or agent has ordered necessaries and a party has physically provided those necessaries with the knowledge of and under the direction of the vessel's owner or agent, that party has a lien under the plain language of the statute. This rule, which is compelled by the statute and consistent with the Eleventh Circuit's objective test, would provide suppliers with the certainty that Congress

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[12] *See Gulf Trading & Transp. Co.* v. *The Vessel Hoegh Shield*, 658 F.2d 363, 367 (5th Cir. 1981) ("The congressional intent is that an American supplier of goods, services or necessaries to a foreign vessel obtains a maritime lien in the vessel when the goods or services are supplied or performed in the United States."); *Dampskibsselskabet*, 310 U.S. at 273 (the predecessor to CIMLA "was intended to operate in aid of those who supply necessaries to ships and it correspondingly restricted the rights of the owners of the vessels.").

intended and prevent vessel owners from being able to nullify CIMLA's important protections at will.

Unlike the rule adopted by the court below, this rule would not require a physical supplier to scrutinize hidden contractual relationships between a vessel and its intermediaries to know whether it possesses a statutory lien. Here, for example, the Vessels' authorized procuring agents knew well before delivery that NuStar would provide the bunkers. *See* App. 29a-30a (NuStar "identified as the supplier" before each delivery); *Clearlake* JA.260, 265; *Nippon Kaisha* JA.399. And NuStar provided the fuel in coordination with and at the direction of agents of the Vessels, who confirmed that the fuel NuStar delivered complied with the Vessels' order. *See* App. 31a (coordinated with port agent to "lock down" delivery and sort out other logistics); *Clearlake* JA.321-25, 328 (delivery notes); *Nippon Kaisha* JA.454 (delivery note). NuStar therefore acted "on the order of" the Vessels or their authorized agents and is entitled to statutory liens. It is immaterial to the operation of the statute that the Vessels chose to pass their orders through contractual intermediaries.

This clear rule, moreover, would not allow vessels to override the statute merely by electing to procure their necessaries through affiliates or intermediaries (or both). There is of course nothing wrong with vessel interests using contractual intermediaries—even affiliates—to procure supplies, which is a common practice that can spur competition and streamline procurement. This practice encourages efficiency and competition and fosters a healthy marketplace. But simply passing an order through intermediaries should not suffice to nullify Congress's intended protection for American suppliers. If physical

suppliers are denied statutory liens whenever they are required to deal with contractual intermediaries, they will be forced to react with less efficient and costlier practices. When fuel is ordered, generally on tight deadlines, local suppliers like NuStar are in no position to analyze a chain of contracts and abstruse legal doctrines to discern whether they will have a lien. In the past, physical suppliers could keep commerce moving by relying on the credit of the vessels, confident in the protection of a maritime lien. Now, suppliers must calculate the risk of providing hundreds of thousands or millions of dollars of fuel without any real protection. They may simply assume they have no lien and require cash up front. Or they may decline to provide services if they cannot obtain substitute security on short notice. Not only are these alternatives commercially impractical, but neither serves Congress's goal of promoting maritime commerce. By contrast, granting a physical supplier a lien encourages the prompt furnishing of necessaries, which serves both the vessels' and suppliers' interests in the long run.

The Second Circuit's rule thus fails to support CIMLA's purposes. It disincentivizes physical suppliers, shifts risk away from the vessels that are best suited to bear it, and threatens to impede maritime commerce, restrict credit, and raise costs—all results that undermine Congress's goals of protecting American suppliers and promoting international maritime commerce. The Court should therefore grant certiorari to resolve the confusion in the circuits and restore certainty and predictability to the law as Congress intended.

II. THIS PETITION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE.

A. The Confusion In The Lower Courts Upsets Settled Expectations In An Entire Industry And Reimposes The Very Problem Congress Sought To Solve.

Congress has determined that the maritime lien accorded to the provision of bunkers and other necessities is vital to protecting the free flow of maritime commerce. Maritime liens help keep "the channels of maritime commerce open by ensuring that people who service vessels have an efficient way of demanding reimbursement for their labor and are thus willing to perform the services necessary to keep vessels in operation." *Mullane* v. *Chambers*, 438 F.3d 132, 138 (1st Cir. 2006). Maritime liens have always served this important purpose. *See*, *e.g.*, *The Willamette Valley*, 66 F. 565, 570 (9th Cir. 1895).

But whereas Congress enacted CIMLA precisely to foster clarity and predictability, the privity rule applied by the court below threatens to set the entire bunker fuel industry adrift in uncertainty. CIMLA and its predecessor, the Federal Maritime Lien Act ("FMLA"), *see* ch. 373, 36 Stat. 604 (1910), were enacted to supplant common law rules that were often unpredictable and easy to evade. For example, before enactment of the FMLA, state law governed suppliers' liens when they served in-state vessels, while federal common law governed suppliers' liens on foreign vessels. *The General Smith*, 17 U.S. 438, 443 (1819). The vagaries of that doctrine, along with other problems, eventually prompted Congress to take action. *See Dampskibsselskabet Dannebrog*, 310 U.S. at 271-73 (discussing FMLA's purpose and effect).

Congress's "primary concern" was "the protection of American suppliers of goods and services" by offering clear and predictable lien protections. *Tramp Oil*, 805 F.2d at 46; *see also Atl. & Gulf Stevedores, Inc.* v. *M/V Grand Loyalty*, 608 F.2d 197, 201 (5th Cir. 1979) ("[I]t was the intent of the Congress [in the FMLA] to make it easier and more certain for stevedores and others to protect their interests by making maritime liens available where traditional services are routinely rendered."). But maritime liens are not simply protectionism: "[m]aritime liens have special features designed to protect persons who own, sail, and service ships from the unique risks associated with the shipping industry." *Crimson Yachts* v. *Betty Lyn II Motor Yacht*, 603 F.3d 864, 869 (11th Cir. 2010); *see also Trans-Tec Asia* v. *M/V HARMONY CONTAINER*, 518 F.3d 1120, 1130 (9th Cir. 2008) ("Granting the materialman a lien encourages the prompt furnishing of necessaries to vessels so that they can be speedily turned around and put to sea. This is especially significant today when the emphasis on vessel performance is reduced port time and increased speed.") (quoting H.R. Rep. No. 92-340 at 4 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 1363).

"[A] maritime lien * * * keep[s] ships moving in commerce while preventing them from escaping their debts by sailing away." Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 9-1 (5th ed. 2015). Even before it was codified, the maritime lien was "designed not only for the benefit of material men, but for the advantage of the vessel, which, in contingencies that are liable to arise in navigation, might otherwise be unable to proceed upon her voyage." *The Willamette Valley*, 66 F. at 570. As this Court noted long ago, "[t]he maritime lien developed as a necessary incident

of the operation of vessels. * * * [A ship] is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs or supplies were promptly furnished." *Piedmont & George's Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920).

The holding below threatens to frustrate these purposes by requiring physical suppliers to scrutinize the chain of arrangements between vessels and their intermediaries, and by allowing vessel interests to avoid the statutory lien merely by contracting with affiliates to procure necessaries.

In fact, Congress enacted CIMLA in its present form to avoid the problem of vessel interests engaging in this kind of obfuscation and evasion. Before 1971, the FMLA had denied a lien if the supplier knew, or through reasonable diligence could have known, that "because of the terms of a charter party, agreement for sale of the vessel, or for any other reason," the person ordering necessaries "was without authority to bind the vessel therefor." 46 U.S.C. § 973 (1970). Vessel interests could therefore avoid liens merely by inserting "prohibition of lien" or "no lien" provisions in their contracts with charterers, providing that the charterer was prohibited from incurring liens. "This practice effectively shifted the risk of loss to the supplier," since the supplier would always have been on inquiry notice of the clause in the intermediary contract. *See Ken Lucky*, 869 F.2d at 478-79. Through "expansive judicial construction," that duty of inquiry swallowed the statute whole, since it allowed vessel owners to deny liens to suppliers through terms buried in their contracts with other parties. *Gulf Oil Trading Co.* v. *M/V Caribe Mar*, 757 F.2d 743, 747 (5th Cir. 1985).

Congress grew "concerned that the duty of inquiry had become a 'substantial obstacle' for persons furnishing supplies." *Ken Lucky*, 869 F.2d at 478 (citation omitted). Accordingly, when it amended the FMLA in 1971, Congress deleted the entire "reasonable diligence" provision. *Id.* "[T]he practical effect of the bill [was] to negate the operation of a 'no lien provision' in a charter to which the American [materialman] was not a party and of which he has no knowledge so that he will not be precluded from acquiring a lien for his services to which he would otherwise be entitled." *Atl. & Gulf Stevedores*, 608 F.2d at 201 n.7 (quoting H.R. Rep. No. 92-340 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 1363, 1364-65).

The holding below, however, has rebuilt the very kind of obstacles to maritime liens that Congress intended to tear down. The practical effect of the Second Circuit's privity rule is to reimpose the sort of cumbersome investigatory requirements that Congress sought to eliminate. As noted above, to determine whether they will have a lien, physical suppliers must attempt the often-impossible task of ascertaining whether an intermediary they contract with is or is not an agent of the vessel even when the order has unquestionably come from the vessel owner. Moreover, whereas Congress intended to prevent vessel owners from avoiding the liens of physical suppliers by inserting secret provisions into their contracts with intermediate entities, the holding below allows vessels to achieve the same result merely by contracting with affiliates to procure their supplies and making clear in those contracts that the intermediaries are not agents. The history recounted above shows that this is not merely a remote possibility, as vessels have long been adept at utilizing

intermediaries to avoid liens. But as Congress determined, allowing vessel interests to thwart the statutory lien through such contractual machinations would undercut CIMLA's overall purpose of encouraging the free and efficient flow of maritime commerce.[13]

The time has come for this Court to decide whether, and under what circumstances, American physical suppliers may obtain statutory liens under the commercial arrangements that prevail in the modern bunker market. This Court has not reviewed the merits of a maritime lien case since 1940. *See Dampskibsselskabet Dannebrog*, 310 U.S. 268. In the meantime, the market for bunkers has grown exponentially in light of the overall growth in world trade. In 2017, the global bunker fuel market was valued at $137.22 billion, and it is expected to reach $237.02 billion by 2025. *See Bunker Fuel Market by Type*, Allied Market Research, www.alliedmarketresearch.com/bunker-fuel-market (last visited Mar. 14, 2019). The Court should grant certiorari to restore the predictability and certainty

[13] In the OW cases, the lower courts have loosed CIMLA from its textual moorings by incorrectly analogizing a physical supplier's provision of bunkers ordered by a vessel to "general contractor" cases where a subcontractor not in privity with the vessel provided services or supplies that were ordered only by a general contractor rather than by the vessel or its agent. For example, in *Lake Charles Stevedores, Inc.*, 199 F.3d at 228-30, a vessel had ordered rice and a stevedoring company hired by the rice supplier was held to have no lien where the vessel itself had not ordered the stevedoring services and the rice supplier was not acting as its agent. In these cases, by contrast, NuStar provided the exact bunkers that the Vessels ordered and did so under the direction of the Vessels' authorized agents.

that Congress determined was vital to the efficient working of this critical market.

B. This Case Is An Ideal Vehicle For Review.

This petition is also an ideal vehicle for review of the question presented. The question was squarely presented and decided below, and there are no other issues that might complicate this Court's review. Both *Clearlake* and *Nippon Kaisha* were the subject of Rule 54(b) judgments in the district court that resolved only the maritime lien question, and the Second Circuit affirmed the district court on that dispositive question. Accordingly, this Court's answer to the question presented will likely be dispositive in these cases and will provide needed guidance on an important question of statutory interpretation that is critical to maritime commerce.

These cases were also specifically selected by the district court as "test cases" that present commonly occurring factual patterns bearing on whether a physical supplier of bunkers will have a maritime lien when it has filled a vessel's order that has been passed through intermediate entities. *See* App. 25a. Moreover, unlike in some other cases, the relevant facts underlying NuStar's lien claims are clear and undisputed, and NuStar has presented no alternative grounds for reversal in this petition. *Compare U.S. Oil Trading LLC*, 911 F.3d at 666 (finding triable issue whether vessel owner selected fuel supplier); *Martin Energy Services, LLC* v. *M/V Bravante IX*, 733 F. App'x 503 (11th Cir. 2018) (upholding judgment in favor of fuel supplier on non-CIMLA grounds).

Finally, while this issue has recurred frequently in the lower courts as a result of the OW insolvency, it is unlikely that other cases raising the issue would be

presented to this Court in either the near or long term. The vast majority of bunker transactions do not lead to litigation; it was only the extraordinary circumstances of the 2014 OW collapse that brought the issue to a head by requiring unpaid physical suppliers to seek to enforce their liens against the vessels they served. Those cases have now reached the courts of appeals in all of the jurisdictions in which they were filed, and all of those circuits have had occasion to state their governing tests.

But while it is unlikely that future cases will come before this Court presenting these issues, the rules adopted by the lower courts will continue to have a profound effect on the commercial practices of both vessels and suppliers. [14] As noted, vessels will be able to take advantage of the appellate courts' rules to entirely insulate themselves from statutory liens. And suppliers will have to engage in costly and inefficient practices, such as pre-payment requirements, or raise their prices or forego services to account for the lack of their promised statutory security. As explained above, all of this is contrary to Congress's intent in enacting CIMLA. Yet unless this Court intervenes now, the statute may effectively become a dead letter in the future.

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[14] *See*, *e.g.*, R. Ethan Zubic, *U.S. Fifth Circuit Affirms Fuel Supplier Does Not Have Maritime Lien for Bunkers*, Drill Deeper (July 27, 2018), www.drilldeeperblog.com/2018/07/u-s-fifth-circuit-affirms-fuel-supplier-does-not-have-maritime-lien-for-bunkers/ ("Without doubt, these decisions limiting the lien rights provided under CIMLA will torment the admiralty bar long after the memory of OWB fades.").

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and reverse the judgments.

Respectfully submitted,

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March 18, 2019

APPENDIX

TABLE OF CONTENTS

APPENDIX A

17-1458-cv
Clearlake Shipping PTE Ltd. v. NuStar Energy Services, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 2017

(Argued: April 19, 2018 Decided: December 19, 2018)

Docket No. 17-1458-cv*

CLEARLAKE SHIPPING PTE LTD.,

Plaintiff-Counter-Defendant-Appellee,

- v. -

NUSTAR ENERGY SERVICES, INC.,

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* This appeal was consolidated for purposes of oral argument with the appeals in *Nippon Kaisha Line Ltd. v. NuStar Energy Services, Inc.*, No. 17-1378, which is resolved today in a summary order, and *U.S. Oil Trading LLC v. M/V VIENNA EXPRESS*, No. 17-0922, and *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, No. 17-0931, which are resolved today in a separate opinion.

Defendant-Cross-Defendant-Cross-Claimant-Appellant,

ING BANK N.V.,

Defendant-Counter-Claimant-Cross-Claimant-Cross-Defendant-Appellee,

O.W. BUNKER (SWITZERLAND) SA, O.W. BUNKER USA, INC., O.W. BUNKER NORTH AMERICA, INC., O.W. BUNKER HOLDING NORTH AMERICA INC.,

*Defendants.***

Before: KEARSE, CABRANES, and LOHIER, *Circuit Judges*.

Appeal by interpleader defendant NuStar Energy Services, Inc. ("NuStar"), from orders and an April 18, 2017 partial final judgment of the United States District Court for the Southern District of New York, Valerie E. Caproni, Judge, rejecting its claims of entitlement to maritime liens against two chartered vessels to which NuStar, pursuant to arrangements with and among other entities, physically provided marine fuel for which it was not paid following the bankruptcies of the entity to which NuStar sold the fuel and of that entity's affiliate from which the charterer had ordered the fuel. The district court denied NuStar's motion for summary judgment on its maritime-lien claims and entered a partial final

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** The Clerk of Court is instructed to amend the official caption to conform with the above.

judgment dismissing those claims, ruling principally that the claims were governed by the Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 *et seq.*, and that bunker suppliers who were subcontractors were not entitled to maritime liens because their sales were not made "on the order of the owner or a person authorized by the owner" of the vessel, *id.* § 31342(a). *See Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA*, 239 F.Supp.3d 674 (S.D.N.Y. 2017). On appeal, NuStar contends principally that it was entitled to the claimed liens in light of CIMLA's plain text and purpose and as a matter of equity, regardless of its lack of contractual privity with the vessels' owner/charterer or their agent. We see no error in the district court's interpretation of CIMLA or its ruling that maritime liens may not properly be granted based on principles of equity. And as NuStar—unlike the physical supplier in U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, No. 17-0922, and Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, No. 17-0931, which are also resolved today—has not pointed to evidence that the owner or charterer or their agent directed that NuStar be the physical supplier, NuStar's claims are not meaningfully distinguishable from those rejected in *ING Bank N.V. v. M/V TEMARA*, 892 F.3d 511 (2d Cir. 2018).

Affirmed.

MARIE E. LARSEN, New York, New York (James H. Hohenstein, Holland & Knight, New York, New York, on the brief), *for Plaintiff-Counter-Defendant-Appellee.*

JONATHAN S. FRANKLIN, Washington, D.C. (Mark Emery, Norton Rose Fulbright US, Washington, D.C.; Keith B. Letourneau, Blank Rome, Houston, Texas, on the brief), *for Defendant-Cross-Defendant-Cross-Claimant-Appellant.*

BRUCE G. PAULSEN, New York, New York (Brian P. Maloney, Seward & Kissel, New York, New York, on the brief), *for Defendant-Counter-Claimant-Cross-Claimant-Cross-Defendant-Appellee.*

KEARSE, *Circuit Judge*:

Interpleader defendant NuStar Energy Services, Inc. ("NuStar"), a physical supplier of marine fuel ("bunkers") to two vessels time-chartered by interpleader plaintiff Clearlake Shipping PTE Ltd. ("Clearlake"), appeals from orders and an April 18, 2017 partial final judgment of the United States District Court for the Southern District of New York, Valerie E. Caproni, *Judge*, denying NuStar's motion for summary judgment and dismissing its claims to maritime liens against the vessels. The district court ruled that, under the Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 *et seq.*, NuStar was not entitled to maritime liens because it provided the fuel "on the order of" an

entity other than "the owner or a person authorized by the owner" of the vessels, *id.* § 31342(a). *See Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA*, 239 F.Supp.3d 674 (S.D.N.Y. 2017) ("*Clearlake*"). On appeal, NuStar contends principally that it was entitled to the claimed liens in light of CIMLA's plain text and purpose and as a matter of equity, regardless of NuStar's lack of contractual privity with the vessels' owner or charterer or their agent. We see no error in the district court's interpretation of CIMLA or its ruling that maritime liens may not properly be granted based on principles of equity. And given that—unlike the physical supplier in two companion appeals, U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, No. 17-0922, and Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, No. 17-0931, which are also decided today *sub nom. U.S. Oil Trading LLC v. M/V VIENNA EXPRESS*, --- F.3d --- (2d Cir. 2018) ("*USOT*")—NuStar has not pointed to evidence that the owner or charterer or their agent directed that NuStar be the physical supplier for the vessels in question, we affirm, as NuStar's claims are not meaningfully distinguishable from those rejected in *ING Bank N.V. v. M/V TEMARA*, 892 F.3d 511 (2d Cir. 2018) ("*Temara*").

I. BACKGROUND

This case is one of the many resulting from the financial collapse of O.W. Bunker & Trading A/S ("O.W. Denmark") and its subsidiaries and affiliates (collectively the "O.W. Bunker Group"), an international operation that both supplied bunkers to ships and arranged the supply of bunkers by others. *See generally Temara*, 892 F.3d at 515. In the wake of bankruptcy filings by O.W. Bunker Group

members, interpleader actions were initiated by numerous owners or charterers of vessels, including the present action by Clearlake, seeking judicial resolution of the competing claims to payment asserted by physical suppliers and by O.W. Bunker Group members that had engaged the physical suppliers. *See, e.g., Clearlake*, 239 F.Supp.3d at 678 ("24 interpleader cases [involving O.W. Bunker Group] . . . were pending before [Judge Caproni] as of June 30, 2015"). In the present case, the following facts, drawn from statements submitted by various parties pursuant to Rule 56.1 of the Local Rules for the Southern District of New York ("Rule 56.1 Statements"), are not in dispute.

In October 2014, Clearlake, charterer of the M/V HELLAS GLORY and the M/V VENUS GLORY (collectively the "Vessels"), acting through its agent AS Tarcona ("Tarcona"), placed orders for fuel bunkers for the Vessels with O.W. Bunker (Switzerland) SA ("O.W. Switzerland"). O.W. Switzerland, in turn, issued purchase orders to its affiliate O.W. Bunker USA, Inc. ("O.W. USA"). O.W. USA then issued purchase orders to NuStar. Local agents for the Vessels coordinated the deliveries by NuStar. In late October, NuStar delivered the ordered bunkers to the Vessels.

NuStar did not directly contract with Clearlake or with O.W. Switzerland. In early November 2014, NuStar invoiced O.W. USA for the bunkers; O.W. USA invoiced O.W. Switzerland; O.W. Switzerland invoiced Clearlake. On November 7, O.W. Denmark filed for bankruptcy; bankruptcy filings by other members of the O.W. Bunker Group followed. Neither NuStar nor any O.W. Bunker Group entity

has been paid for NuStar's bunker deliveries to Clearlake's Vessels.

Clearlake brought the present interpleader action against NuStar, O.W. Switzerland, O.W. USA, and others. In the district court, this case and three others—one other involving NuStar and two involving U.S. Oil Trading LLC ("USOT")—were selected to serve as test cases for the efficient resolution of the various *in rem* claims. Following coordinated discovery, and summary judgment motions by NuStar, USOT, and O.W. Bunker entities that had dealt with the vessels' owners or charterers, the district court addressed these four cases in its opinion in *Clearlake*.

The court stated that maritime liens arise exclusively under CIMLA, that such liens are construed narrowly under the doctrine of *stricti juris*, and that CIMLA "typically require[s]" a finding of "a direct contractual or agency nexus between the supplier and the vessel or its agents." *Clearlake*, 239 F.Supp.3d at 684. The court determined that NuStar had performed as a subcontractor that "lack[ed] a direct connection to the [Vessels]," noting the general rule that a subcontractor cannot assert a maritime lien. *Id.* at 685.

Adverting to an exception to that general rule, the court noted that "'[a]n owner can still become responsible for the services of a subcontractor, if the owner has ordered the general contractor to retain that subcontractor,'" *id.* at 687 (quoting *Port of Portland v. M/V PARALLA*, 892 F.2d 825, 828 (9th Cir. 1989) ("*Port of Portland*")). However, insofar as is pertinent to the present appeal, the court stated that the record showed at best that Clearlake was merely "aware" that NuStar had been named by

O.W. Switzerland as the physical supplier and that Clearlake accepted NuStar only "tacitly." *Clearlake*, 239 F.Supp.3d at 688 n.11. Seeing no evidence in the record that Clearlake had required O.W. Switzerland to use NuStar as the physical supplier, the court concluded that the subcontractor exception was not applicable to NuStar.

Accordingly, the district court denied NuStar's motion for summary judgment and effectively granted summary judgment against NuStar on its maritime-lien claims against Clearlake, entering a partial final judgment dismissing those claims.

II. DISCUSSION

On appeal, NuStar contends principally that it was entitled to maritime liens against the Clearlake Vessels in light of CIMLA's plain text and purpose and as a matter of equity, regardless of a lack of contractual privity between NuStar and Clearlake or its agent. We reject these contentions substantially for the reasons stated by the district court in *Clearlake*.

We see no error in the district court's interpretation of CIMLA or its ruling that maritime liens may not properly be granted based on principles of equity. NuStar's contentions as to the proper interpretation of CIMLA are foreclosed by our recent decision in *Temara*, which involved events not substantially dissimilar to those here. *See generally* 892 F.3d at 519 (CIMLA's "statutory requirements are construed strictly and may not be expanded by construction, analogy[,] or inference" (internal quotation marks omitted)); *id.* at 522-23 (rejecting the concept of entitlement to maritime lien through application of principles of equity).

Nor do we see any error in the district court's conclusion that the exception to the general rule against a subcontractor's entitlement to a maritime lien did not apply to NuStar. As discussed in *USOT*,

> a subcontractor is not entitled to assert a maritime lien "*unless* it can be shown that *an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance*."

--- F.3d at xxx (quoting *Cianbro Corp. v. George H. Dean, Inc.*, 596 F.3d 10, 17 (1st Cir. 2010) ("*Cianbro*"), and *Valero Marketing & Supply Co. v. M/V ALMI SUN*, 893 F.3d 290, 293 (5th Cir. 2018) ("*Valero*") (emphases ours)).

> "The sole exception to the rule against the subcontractor lien will occur where the subcontractor has been engaged by a general contractor in circumstances *where the general contractor was acting as an agent at the direction of the owner to engage specific subcontractors*" ….

USOT, --- F.3d at xxx (quoting *Farwest Steel Corp. v. Barge Sea-Span 241*, 828 F.2d 522, 526 (9th Cir. 1987) ("*Farwest*") (emphasis in *USOT*), *cert. denied*, 485 U.S. 1034 (1988)). The exception is applicable "if the owner has ordered the general contractor to retain that subcontractor." *Port of Portland*, 892 F.2d at 828; *see*, *e.g.*, *Bunker Holdings Ltd. v. Yang Ming Liberia Corp.*, 906 F.3d 843, 846 (9th Cir. 2018) (the "exception to th[e] general rule . . . applies when the vessel owner directs the general contractor to use a particular subcontractor").

As indicated in *Temara* and our other recent decisions in appeals involving fuel suppliers and O.W. Bunker Group entities, a subcontractor is not allowed to assert a maritime lien "without any indication that *a statutorily-authorized entity provided direction*" that that subcontractor be used. *Temara*, 892 F.3d at 522 n.7 (emphasis added); *see*, *e.g.*, *O'Rourke Marine Services L.P. v. M/V COSCO HAIFA*, 730 F. App'x 89, 91 (2d Cir. 2018) (affirming denial of maritime-lien claim by a physical supplier that did not "adduce evidence that *a statutorily authorized person controlled [its] selection . . . as the physical supplier*" (emphases added)); *Aegean Bunkering (USA) LLC v. M/T AMAZON*, 730 F. App'x 87, 89 (2d Cir. 2018) (same); *Chemoil Adani Pvt. Ltd. v. M/V MARITIME KING*, No. 16-3944, 2018 WL 3359609, at *2 (2d Cir. July 10, 2018) (same where there was "*no*[] . . . *evidence that a statutorily authorized person controlled the selection of Chemoil as the physical supplier*" (emphases added)).

Thus, the subcontractor exception does not apply where there is no significant evidence "that the owner intended that [the physical supplier] be engaged as a subcontractor." *Farwest*, 828 F.2d at 526. Mere awareness by the vessel's owner, charterer, or authorized agent that a particular physical supplier would be used is not sufficient to permit a conclusion that they had such intent or that they controlled or directed the subcontractor's selection. *See*, *e.g.*, *Valero*, 893 F.3d at 295; *Cianbro*, 596 F.3d at 17–18; *Port of Portland*, 892 F.2d at 828 (mere knowledge that a particular subcontractor will be used "has never been held to be sufficient to establish a lien").

Insofar as NuStar was concerned, the district court correctly applied these principles in *Clearlake* to conclude that NuStar did not fall within the subcontractor exception. The court viewed the record as showing

> - that NuStar "*d*[*id*] *not argue* that the [Clearlake/Tarcona] contracts *required* O.W. to use [NuStar] as supplier[]," 239 F.Supp.3d at 688 n.11 (emphases added);
>
> - that there was "*no evidence* that [Clearlake or Tarcona] *required* O.W. to use [NuStar] to satisfy its obligations," *id.* at 688 (emphases added);
>
> - that, although "aware of [NuStar's] identit[y]," Clearlake/Tarcona only "tacitly 'selected' [NuStar]," *id.* at 688 n.11; and
>
> - that "the undisputed evidence" was "that [Clearlake/Tarcona] did not require O.W. to use [NuStar]," *id.* at 690.

We see no error in these findings. Although we reach a different conclusion on the subcontractor-exception issue today in the appeals brought by USOT, we do so based on differences between the records in the NuStar and USOT cases.

In the USOT cases, Hapag-Lloyd Aktiengesellschaft ("Hapag"), the owner or charterer of the USOT-supplied vessels, issued to O.W. Bunker Germany GmbH ("O.W. Germany") purchase orders that named USOT as the physical supplier. *See USOT*, --- F.3d at xxx. And in response to USOT's motion for summary judgment relying on the purchase orders, Hapag described these orders as meaning that O.W. Germany was "permitted" to use

some other supplier "*if* USOT was unable to act as the physical supplier," *id.* at xxx (internal quotation marks omitted) (emphasis in *USOT*).

We see no similar evidence or admission by Clearlake in the present case. Whereas the record in the USOT cases contained copies of the purchase orders issued by the owner/charterer Hapag, *see*, *e.g.*, *Clearlake*, 239 F.Supp.3d at 682 ("The agreements between Hapag[] and O.W. Germany identify O.W. Germany as the seller, Hapag[] as buyer, and USOT as supplier."), NuStar here has pointed not to purchase orders issued by Clearlake or Tarcona but rather to the sales order confirmations issued by O.W. Switzerland. The district court stated that "[t]he Clearlake-O.W. Switzerland transactions are memorialized in . . . sales order confirmations," and it cited only to O.W. Switzerland documents. *Id.* at 680. Thus, we are aware of no evidence to suggest, much less confirm, that Clearlake or Tarcona identified NuStar as the physical supplier in any purchase order. Nor has NuStar pointed to any other evidence in the record to support a conclusion that Clearlake or Tarcona directed O.W. Switzerland to use NuStar as the physical supplier.

The closest that NuStar came to claiming that Tarcona directed the use of NuStar was asserting (a) that, several days in advance of delivery to the Clearlake Vessels, "Tarcona knew . . . that NuStar was the designated physical supplier of the bunkers it had ordered" (*see* NuStar Rule 56.1 Statement ¶¶ 11, 12 (emphasis added)), and (b) that Tarcona "*accepted* NuStar as the physical supplier of the bunkers it had ordered" (*id.* ¶ 13 (emphasis added)). As discussed above, however, evidence merely of such awareness and acceptance is insufficient to

show that the vessel owner/charterer or its agent controlled the selection of the physical supplier or that they ordered or directed that NuStar be used.

CONCLUSION

We have considered all of NuStar's arguments on this appeal and have found them to be without merit. The partial final judgment is affirmed.

APPENDIX B

17-1378-cv
Nippon Kaisha Line Limited v. NuStar Energy Services, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

S U M M A R Y O R D E R

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 19th day of December, two thousand eighteen.

Present: AMALYA L. KEARSE,
JOSÉ A. CABRANES,
RAYMOND J. LOHIER, JR.,

Circuit Judges.

NIPPON KAISHA LINE LIMITED, individually and on behalf of M/V RIGEL LEADER (IMO No. 9604940),

Plaintiff-Counter-Defendant-Appellee,

- v. - No. 17-1378*

NUSTAR ENERGY SERVICES, INC.,

Defendant-Cross-Defendant-Cross-Claimant-Appellant,

O.W. BUNKER USA, INC.,

Defendant-Cross-Claimant-Counter-Claimant-Appellee,

KIRBY INLAND MARINE LP,

Defendant,

ING BANK N.V.,

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* This appeal was consolidated for purposes of oral argument with the appeal in Clearlake Shipping PTE Ltd. v. NuStar Energy Services, Inc., No. 17-1458, which is resolved today in an opinion, and with the appeals in U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, No. 17-0922, and Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, No. 17-0931, which are resolved today in a separate opinion.

Defendant-Counter-Claimant-Cross-Defendant.[**]

For Plaintiff-Counter-Defendant-Appellee:	MARIE E. LARSEN, New York, NY (James H. Power, Holland & Knight, New York, NY, on the brief).
For Defendant-Cross-Defendant-Cross-Claimant-Appellant:	JONATHAN S. FRANKLIN, Washington, DC (Mark Emery, Norton Rose Fulbright US, Washington, DC; Keith B. Letourneau, Blank Rome, Houston, TX, on the brief).
For Defendant-Cross-Claimant-Counter-Claimant-Appellee:	DAVIS LEE WRIGHT, New York, NY (Vincent M. DeOrchis, Robert E. O'Connor, and Kaspar Kielland, Montgomery, McCracken, Walker & Rhoads, New York, NY, on the brief).

** The Clerk of Court is instructed to amend the official caption in this appeal to conform with the above.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is **AFFIRMED**.

Interpleader defendant NuStar Energy Services, Inc. ("NuStar"), a physical supplier of marine fuel ("bunkers") to the M/V RIGEL LEADER, a vessel time-chartered by interpleader plaintiff Nippon Kaisha Line Limited ("NYK Line"), appeals from orders and an April 18, 2017 partial final judgment of the United States District Court for the Southern District of New York, Valerie E. Caproni, *Judge*, denying NuStar's motion for summary judgment and dismissing its claim to a maritime lien against the vessel. We assume the parties' familiarity with the underlying facts, procedural history, and issues for review.

In this action and three others, among the many cases that have been brought in the wake of the financial collapse of O.W. Bunker & Trading A/S and its subsidiaries and affiliates, the district court ruled principally (a) that the bunkers' physical suppliers—NuStar in two cases and a different physical supplier in the other two—were subcontractors and were not entitled, under the Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 *et seq.*, to assert maritime liens against vessels because the physical suppliers had not supplied the bunkers "on the order of the owner or a person authorized by

the owner" of the vessels, *id.* § 31342(a), and (b) that such liens are not authorized on the basis of equitable principles. *See Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA*, 239 F.Supp.3d 674, 684–90, 692–94 (S.D.N.Y. 2017).

In the companion appeal from the dismissal of the maritime-lien claims asserted by NuStar in No. 17-1458, decided today, we affirmed these rulings substantially for the reasons stated by the district court, *see Clearlake Shipping PTE Ltd. v. NuStar Energy Services, Inc.*, --- F.3d --- (2d Cir. 2018) ("*NuStar I*"), noting, *inter alia*, that these conclusions are compelled by our recent decision in *ING Bank N.V. v. M/V TEMARA*, 892 F.3d 511, 520–23 (2d Cir. 2018).

As to the vessel at issue in the instant case, the record shows that the charterer NYK Line placed its order for bunkers with its affiliate NYK Trading Corporation ("NYK Trading"); that NYK Trading placed an order for the bunkers with O.W. Bunker USA, Inc. ("O.W. USA") and asked O.W. USA to advise NYK Trading of the identity of the physical supplier. O.W. USA placed its order for the bunkers with NuStar and so advised NYK Trading. NYK Line had no contractual relationship with O.W. USA or NuStar. NuStar had no contractual relationship with NYK Line or NYK Trading. Thus, here, as in *NuStar I*, NuStar has presented no basis on which it could be concluded that it provided the bunkers to the vessel on the order of the charterer or its authorized agent.

Nor is there any basis in the record of the present case for a remand such as that ordered in the other two companion appeals, U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, No. 17-0922, and Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, No. 17-

0931, *see U.S. Oil Trading LLC v. M/V VIENNA EXPRESS*, --- F.3d --- (2d Cir. 2018), for a trial as to whether the M/V RIGEL LEADER's charterer, NYK Line, or its authorized agent ordered or directed that NuStar be the physical supplier of the bunkers to that vessel, so as to bring NuStar within the exception to the general rule that subcontractors are not entitled to assert maritime liens, *see id.* at xxx (exception applicable where the owner/charterer or its agent controlled or directed the selection of a particular subcontractor). The record here shows that NYK Line placed its order for bunkers with NYK Trading pursuant to a preexisting contract that required NYK Trading to choose from a list of approved bunker suppliers and that explicitly left that choice to NYK Trading. NYK Trading in its purchase order to O.W. USA did not name a physical supplier but rather asked O.W. USA to inform NYK Trading who the physical supplier would be.

In *NuStar I*, we affirmed the district court's conclusion that NuStar did not come within the subcontractor exception because the record, rather than permitting a conclusion that the vessel's charterer directed use of NuStar as the physical supplier, showed at most that the charterer was merely aware of and tacitly accepted NuStar as the physical supplier. Given that ruling, *a fortiori* NYK Line's instructing NYK Trading to select the physical supplier, and NYK Trading's asking O.W. USA to make the selection, cannot support a conclusion of direction or control by the vessel's charterer or its agent.

We have considered all of NuStar's arguments on this appeal and have found them to be without merit. The judgment of the district court is **AFFIRMED**.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE,
Clerk of Court

s/ Catherine O'Hagan Wolfe

United States Court of Appeals
Second Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3/22/2017

CLEARLAKE SHIPPING PTE LTD,

Plaintiff,

-against-

14-CV-9287 (VEC)

O.W. BUNKER (SWITZERLAND) SA, O.W. BUNKER USA INC., O.W. BUNKER NORTH AMERICA INC., O.W. BUNKER HOLDING NORTH AMERICA INC., NUSTAR ENERGY SERVICES INC., ING BANK N.V.,

Defendants.

NIPPON KAISHA LINE LIMITED, individually and on behalf of M/V RIGEL LEADER (IMO No.9604940),

Plaintiff,

-against-

14-CV-10091 (VEC)

O.W. BUNKER USA INC., NUSTAR ENERGY SERVICES, INC., KIRBY

INLAND MARINE LP, ING BANK N.V.,	:	
Defendants.	:	
----------	X	
HAPAG-LLOYD AKTIENGESELLSCHAFT,	:	
Plaintiff,	:	
-against-	:	14-CV-9949 (VEC)
U.S. OIL TRADING L.L.C., O.W. BUNKER GERMANY GMBH, O.W. BUNKER & TRADING A/S, ING BANK N.V. AND CREDIT AGRICOLE S.A.,	:	
Defendants.	:	
----------	X	
U.S. OIL TRADING LLC,	:	
Plaintiff,	:	
-against-	:	15-CV-6718 (VEC)
M/V VIENNA EXPRESS, her tackle, boilers, apparel, furniture, engines appurtenances, etc., *in rem*, and M/V SOFIA EXPRESS, her tackle, boilers apparel, furniture, engines, appurtenances, etc., *in rem*, and HAPAG-LLOYD AKTIENGESELLSCHAFT, *as*	:	

claimant to the in rem defendant M/V VIENNA EXPRESS,

Defendants.

HAPAG-LLOYD AKTIENGESELLSCHAFT, as claimant to the in rem defendant M/V VIENNA EXPRESS,

Counter-Claimant and Third-Party Plaintiff,

-against-

U.S. OIL TRADING L.L.C.,

Counter-Defendant, and

O.W. BUNKER GERMANY GMBH, O.W. BUNKER & TRADING A/S, ING BANK N.V., CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, a division or arm of CREDIT AGRICOLE S.A.,

Third-Party Defendants.

AMENDED ORDER AND OPINION[1]

VALERIE CAPRONI, United States District Judge:

Before the Court are motions for summary judgment filed in each of the above-captioned interpleader actions. The cases arise out of the collapse and insolvency of O.W. Bunker & Trading A/S ("O.W. Denmark") and its international subsidiaries (collectively, "O.W."). O.W. Denmark's United States subsidiary, O.W. Bunker USA Inc. ("O.W. USA"), filed a petition for relief under Chapter 11 of the Bankruptcy Code on November 13, 2014, in the District of Connecticut. *In re O.W. Bunker Holding N. Am. Inc.*, No. 14-51720 (AHWS) (Bankr. D. Conn. filed Nov. 13, 2014).[2] O.W.'s primary line of business was the supply of marine fuel, also known as "bunkers." In the aftermath of O.W.'s insolvency, its customers were uncertain whom to pay and were concerned about subjecting

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1 This Opinion and Order supersedes the Court's January 9, 2017 Opinion and Order. The January 9, 2017 Opinion and Order mistakenly granted summary judgment to ING Bank, N.V. on its *in rem* claim against the stake in the Hapag-Lloyd test case (as defined below). ING Bank did not move for summary judgment on its entitlement to an *in rem* claim in the Hapag-Lloyd test case, and the Court expresses no opinion as to the merits of that claim. The Court's January 9, 2017 Opinion and Order is otherwise unchanged.

2 Facts relating to O.W. generally and the events giving rise to these cases are taken from the Court's earlier opinion in this case, *UPT Pool Ltd. v. Dynamic Oil Trading (Singapore) PTE. Ltd.* (*O.W. I*), No. 14-CV-9262 (VEC) et al., 2015 WL 4005527 (S.D.N.Y. July 1, 2015), *aff'd*, 814 F.3d 146 (2d Cir. 2016), supplemented, as necessary, by the Rule 56.1 Statements filed by the parties. This history is shared by these cases. Where appropriate, the Court cites to the factual record of the individual cases.

their vessels to multiple arrests while the issue was being sorted out. They initiated these interpleaders to resolve the competing claims to payment asserted by O.W., its lender, and suppliers in December 2014. The parties have been marooned in the Southern District ever since.

After discovery, which was conducted on a consolidated basis in the 24 interpleader cases that were pending before this judge as of June 30, 2015, the Court asked the parties to identify "test cases" that would efficiently present for decision the significant legal issues that needed to be decided. Thereafter, motions for summary judgment were filed by the claimants to the interpleader funds—O.W., its lender, and suppliers—and motions for discharge were filed by the vessel owners and charterers (the "Vessel Interests") in the three "test cases" designated by the Court. O.W., its secured lender, and its suppliers each moved for summary judgment on their asserted *in rem* claims to the interpleader funds.[3] O.W. and its secured lender also assert *in personam* breach of contract claims against the Vessel Interests. This Opinion resolves the competing *in rem* rights of O.W. and two of its suppliers. For the reasons that follow, the Court DENIES the suppliers' motions for summary judgment in Case Nos. 14-CV-10091, 14-CV- 9949, and 14-CV-9287, GRANTS IN PART O.W. USA's motion for summary judgment in Case No. 14-CV-10091, and GRANTS IN PART ING Bank's motion for summary judgment in Case No. 14-CV-9287.

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[3] In accordance with orders of the Court, the interpleader funds serve as a substitute *res*. *See*, *e.g.*, *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC et al.* (*Hapag-Lloyd*), No. 14-CV-9949 (VEC), Dkt. 5.

BACKGROUND

1. O.W.'s Collapse and the Interpleader Actions

It is an understatement to say that O.W.'s collapse caused a significant disruption in the world of maritime bunkers. As a bunker supplier and trader, O.W. both directly supplied bunkers to maritime vessels and acted as a bunker broker, arranging bunker deliveries by third- parties all over the world on behalf of O.W.'s customers. *Hapag-Lloyd*, Dkt. 258 (Maloney Decl.) Ex. 35 (PriceWaterhouseCoopers Press Release, dated July 20, 2015). O.W.'s trading business operated through a series of back-to-back contracts: between O.W. and the time- charterer or owner of the vessel; internally, between one O.W. entity and another; and finally, between a local O.W. entity—here O.W. USA—and a local supplier. Payments for many of these transactions were outstanding at the time O.W. went out of business.

The parties to these cases are the counterparties to several of O.W.'s trading contracts and O.W.'s primary secured lender, ING Bank, N.V. ("ING"). O.W.'s insolvency put the Vessel Interests in what this Court has described as a "Sophie's Choice." *O.W. I*, 2015 WL 4005527, at *2. Both O.W. and some of its third-party suppliers (collectively, the "Physical Suppliers") demanded payment from the Vessel Interests for fuel that had been supplied in the days leading up to O.W.'s collapse and threatened to arrest the vessels in order to obtain payment. *Id.* Facing the potential risk of double, and in some cases triple, liability, and the disruption to business that would have been caused by multiple arrests of their vessels, Vessel Interests instituted more than 30 interpleader actions in this and other

districts across the country. *Id.* Through the interpleaders, the Vessel Interests sought to resolve competing claims to payment in respect of the bunkers that had been delivered by the physical suppliers at the direction of O.W. In connection with each interpleader action, the Vessel Interests deposited into the Court's register an amount equal to the value of the bunkers supplied plus 6% per annum. *See*, *e.g.*, *Hapag- Lloyd*, Dkt. 5; *Nippon Kaisha Line Ltd. v. O.W. Bunker USA Inc. et al.* (*Nippon*) No. 14-CV- 10091 (VEC), Dkt. 4.

The parties identified the three test cases presently before the Court, and the Court set a briefing schedule. *See Hapag-Lloyd*, Dkt. 207. Summary judgment motions were filed on an array of issues by several of the O.W. entities; two of the Physical Suppliers, NuStar Energy Services, Inc. ("NuStar") and U.S. Oil Trading, LLC ("USOT"); ING; and the vessel charterers themselves.

This Opinion addresses a threshold issue in the interpleader actions. The Physical Suppliers, O.W. entities, and ING each assert an *in rem* right to the interpleader funds under the Commercial Instruments & Maritime Lien Act (CIMLA), 46 U.S.C. § 31342. CIMLA codifies the common-law maritime lien for "necessaries"—essential supplies and services provided to a vessel. To the extent any party has a maritime lien, the interpleader funds stand as a substitute *res* for that lien, giving that party a priority interest in the interpleader stake. *See Hapag-Lloyd*, Dkt. 5 ¶ 2. The parties' *in personam* contract claims to the interpleader funds, as well as the Vessel Interests' motions to be discharged, will not be resolved here; they will be

addressed separately to the extent they are not mooted by this Opinion.

2. The Test Cases

The test cases concern fuel delivered on O.W.'s behalf in mid-October 2014, shortly before O.W. USA filed for bankruptcy. To give every party an opportunity to be heard, the test cases each involve either a different Physical Supplier or Vessel Interest. Nonetheless, as is set forth in more detail below, the facts of the transactions at issue are materially similar: each case involves a time-charterer that arranged either directly or through an intermediary for O.W. to deliver bunkers at a U.S. port. In each case, O.W., through its U.S. affiliate, O.W. USA, entered into a separate contract with a Physical Supplier, either NuStar or USOT. None of the cases involves a direct contractual link between the Vessel Interests and the Physical Suppliers, although after the bunkers were ordered, the Physical Suppliers did coordinate delivery directly with the vessels and their local agents. There is no dispute that the bunkers were provided, that the vessels signed delivery receipts, and that in all but one instance neither the Physical Suppliers nor O.W. has been paid. [4]

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[4] O.W. has been paid by Hapag-Lloyd for bunkers delivered to the M/V *Santa Roberta*. *Hapag-Lloyd*, Dkt. 227 (USOT's Rule 56.1 Statement) ¶ 58.

A. The NuStar Test Cases: *Clearlake Shipping Pte Ltd. v. O.W. Bunker (Switzerland) SA*, No. 14-CV-9287 and *Nippon Kaisha Line Ltd. v. O.W. Bunker USA, Inc.*, No. 14-CV-10091

Two of the test cases relate to bunkers arranged by O.W. to be supplied at the Port of Houston. In the first transaction, on October 14, 2014, Clearlake Shipping PTE Ltd. ("Clearlake") ordered bunkers from O.W. Switzerland for two vessels, the M/V *Hellas Glory* and the M/V *Venus Glory*. *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA et al.* (*Clearlake*), No 14-CV-9287 (VEC), Dkt. 172 (ING's Rule 56.1 Statement) at ¶¶ 2, 5. The Clearlake-O.W. Switzerland transactions are memorialized in a pair of substantially similar sales order confirmations. *Clearlake*, Dkt. 170 (Belknap Decl.) Exs. 4, 5. Both confirmations identify the vessel (the M/V *Venus Glory* or M/V *Hellas Glory*), O.W. Switzerland as "seller," and NuStar as "supplier." *Id.*, Dkt. 170 (Belknap Decl.) Exs. 4, 5. The confirmations also specify the bunker fuel to be delivered, as well as the quantity, price, and date of delivery. *Id.*, Dkt. 170 (Belknap Decl.) Exs. 4, 5. O.W. Switzerland referred the orders to its affiliate, O.W. USA. *Id.* Exs. 6-9. O.W. USA confirmed the orders to NuStar the same day. *Id.*, Dkt. 170 (Belknap Decl.) Exs. 10-13. NuStar's sales confirmations identify O.W. USA as the buyer of the bunkers and NuStar as the seller. *Id.*, Dkt. 170 (Belknap Decl.) Exs. 11, 13.

The second transaction at the Port of Houston involves a similar series of back-to-back contracts. On October 7, 2014, Nippon Yusen Kabushiki Kaisha ("Nippon Yusen"), a company associated with the Nippon Yusen Kaisha Line family of companies

("NYK"), entered into an agreement with its sister company, Nippon Yusen Kaisha Trading Corporation ("NYKTC") for delivery of bunkers to the M/V *Riegel Leader*. *Nippon*, Dkt. 141 (O.W. USA's Rule 56.1 Statement) ¶¶ 4-6. NYKTC and Nippon Yusen operated pursuant to a purchase and sale agreement that was renewed quarterly and that required NYKTC to provide bunkers from one of several well-established physical suppliers, one of which was NuStar. *Id.*, Dkt. 136 (Belknap Decl.) Ex. 2; Dkt. 134 (NuStar's Rule 56.1 Statement) ¶ 6. NYKTC, in turn, contracted with O.W. USA to supply the bunkers to the *Riegel Leader*. *Id.*, Dkt. 141 (O.W. USA's Rule 56.1 Statement) ¶¶ 11-12. The confirmation between Nippon Yusen and O.W. USA is substantially the same as that between O.W. Switzerland and Clearlake. It identifies the vessel interest, Nippon Yusen, as the buyer, and it identifies O.W. USA as the Seller. NuStar is identified as the supplier. *Id.*, Dkt. 142 (O'Connor Decl.) Ex. E. O.W. USA then entered into a separate agreement with NuStar to provide the bunkers at the Port of Houston. *Id.*, Dkt. 142 (O'Connor Decl.) Ex I. The O.W. USA-NuStar agreement identifies NuStar as the seller and O.W. USA as the buyer of the bunkers. *Id.*, Dkt. 142 (O'Connor Decl.) Ex I. In both cases, O.W. acted as the contractual counterparty for NuStar and the Vessel Interests. NuStar did not contract directly with either Nippon Yusen or Clearlake.

The bunkers were delivered or "stemmed" to the M/V *Riegel Leader* on October 16, 2016, and to the M/V *Hellas Glory* and M/V *Venus Glory* on October 20 and 26, 2014. *Clearlake*, Dkt. 168 (NuStar's Rule 56.1 Statement) ¶ 15; *Nippon*, Dkt. 134 (NuStar's

Rule 56.1 Statement) ¶ 17. In all cases, delivery was coordinated between agents for NuStar and the local agents for the vessels. *Clearlake*, Dkt. 168 (NuStar's Rule 56.1 Statement) ¶ 14; *Nippon*, Dkt. 141 (O.W. USA's Rule 56.1 Statement) ¶ 21. While the significance of these interactions is disputed hotly, the facts are not: NuStar and its agents communicated with the port agents for the vessels to "lock down the delivery time and location." *Clearlake*, Dkt. 175 (Maloney Decl.) Ex. 22 (Thompson Tr.) at 17:23-18:14, 76:19-77:8; *Nippon*, Dkt. 142 (O'Connor Decl.) Ex. K (Thompson Tr.) at 17:12-18:14, 33:4-34:4, 76:19-77:8. Among other things, the local agents arranged a time for the bunkering operation and the logistics of delivery. *Id.* Delivery of the bunkers was accepted by the chief engineer or master of each vessel, who executed a "delivery note" or receipt. *Clearlake*, Dkt. 168 (NuStar's Rule 56.1 Statement) ¶¶ 15-17; *Nippon*, Dkt. 134 (NuStar's Rule 56.1 Statement) ¶¶ 17-19. The delivery notes each provide that

> Any disclaimer by the purchaser of the marine fuels covered by this note will have no force or effect. . . . Without limiting the foregoing, no disclaimer by the purchaser of marine fuels covered by this note will alter or waive: the information contained in this note; the seller's maritime lien against the receiving vessel or the cost of the marine fuels covered by this note; or the receiving vessel's liability for the cost of the marine fuels covered by this note.

Clearlake, Dkt. 168 (NuStar's Rule 56.1 Statement) ¶ 17; *Nippon*, Dkt. 134 (NuStar's Rule 56.1 Statement) ¶ 18.

NuStar billed O.W. USA for all three bunkering transactions pursuant to a "bulk contract" or "pricing agreement" between O.W. USA and NuStar. *Clearlake*, Dkt. 172 (ING's Rule 56.1 Statement) ¶¶ 18-21; *Nippon*, Dkt. 141 (O.W. USA's Rule 56.1 Statement) ¶ 25. The bulk contract identifies O.W. as the purchaser of the bunkers and provides for a monthly true-up of the price of bunkers provided by NuStar. *Clearlake*, Dkt. 175 (Maloney Decl.) Ex. 20; *Nippon*, Dkt. 142 (O'Connor Decl.) Ex. O. Under the contract, payments were due from O.W. within 30 days of delivery. *Clearlake*, Dkt. 175 (Maloney Decl.) Ex. 20; *Nippon*, Dkt. 142 (O'Connor Decl.) Ex. O. Based on a credit review, NuStar had previously extended O.W. USA a $40 million line of credit; the line of credit was in effect at the time of these events. *Clearlake*, Dkt. 172 (ING's Rule 56.1 Statement) ¶¶ 22-25. After O.W.'s financial distress became known to NuStar, it sent an invoice directly to Clearlake. *Id.*, Dkt. 168 (NuStar's Rule 56.1 Statement) ¶ 19.

B. *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading, LLC*, No. 14-CV-9949[5]

The third test case concerns bunkers provided by USOT to four vessels at the Port of Tacoma.[6] The orders for those bunkers originated with time-

[5] A companion case arising out of the same bunkering transactions, Docket No. 15-CV-6718, was also designated as a test case. That case was initiated by USOT in the Western District of Washington, transferred to this Court on January 29, 2015, and designated as related to the interpleader action in No. 14-CV-9949. *Hapag-Lloyd*, Dkt. 89.

[6] The vessels are the M/V *Santa Roberta*, the M/V *Seaspan Hamburg*, the M/V *Vienna Express*, and the M/V *Sofia Express*. *Hapag-Lloyd*, Dkt. 227 (USOT's Rule 56.1 Statement) ¶¶ 26, 60, 90, 122.

charterer Hapag-Lloyd Aktiengesellschaft ("Hapag-Lloyd"). In all four instances, Hapag-Lloyd solicited bids from several bunker traders to supply bunkers to the vessels somewhere on the West Coast of the United States in mid-October 2014. *Hapag-Lloyd*, Dkt. 227 (USOT's Rule 56.1 Statement) ¶¶ 29, 63, 92, 124. O.W. Germany offered Hapag-Lloyd several options for delivery at Tacoma, Oakland, or Los Angeles. *Id.*, Dkt. 258 (Maloney Decl.) Exs. 53-56. In each case, O.W. included pricing information for Tacoma from USOT and identified USOT as one of several possible suppliers at the port. *Id.* Personnel at Hapag-Lloyd included this information in internal spreadsheets used to analyze the competing bids, and in all four cases selected O.W. Germany to provide the bunkers. *Id.*, Dkt. 258 (Maloney Decl.) Exs. 47-50.

All four transactions were documented in a series of back-to-back contracts between Hapag-Lloyd and O.W. Germany, O.W. Germany and O.W. USA, and O.W. USA and USOT. *Hapag-Lloyd*, Dkt. 258 (Maloney Decl.) Exs. 4, 8, 12 (M/V *Santa Roberta*), Exs. 5, 9, 13 (M/V *Seaspan Hamburg*), Exs. 6, 10, 14 (M/V *Sofia Express*), Exs. 7, 11, 15 (M/V *Vienna Express*). The agreements between Hapag-Lloyd and O.W. Germany identify O.W. Germany as the seller, Hapag-Lloyd as buyer, and USOT as supplier. *Id.*, Dkt. 258 (Maloney Decl.) Exs. 4-7. The agreements between O.W. USA and USOT, in turn, identify O.W. USA as buyer and USOT as seller. *Id.*, Dkt. 258 (Maloney Decl.) Exs. 12-15. USOT disputes whether its counterparty was O.W. USA or its parent, O.W. Denmark, but it concedes that it had no contractual agreement with Hapag-Lloyd relative to these bunkers. *See id.*, Dkt. 261 (USOT's Resp. to ING's

Rule 56.1 Statement) ¶ 10. According to USOT, its customer for the bunkers was O.W. *Id.*, Dkt. 227 (USOT's Rule 56.1 Statement) ¶¶ 7-8.

Delivery of the bunkers was arranged by USOT and local agents for Hapag-Lloyd. In advance of delivery, the local agent confirmed the orders with USOT. *Hapag-Lloyd*, Dkt. 227 (USOT's Rule 56.1 Statement) ¶¶ 12-13, 48-51 (M/V *Santa Roberta*), 80-82 (M/V *Vienna Express*), 111-113 (M/V *Seaspan Hamburg*), 141-146 (M/V *Sofia Express*). USOT and the local agent then arranged the logistics of delivery. *Id.* The bunkers were delivered in mid and late October. *Id.* Dkt. 227 (USOT's Rule 56.1 Statement) ¶¶ 53 (M/V *Santa Roberta*), 84 (M/V *Vienna Express*), 116 (M/V *Seaspan Hamburg*), 149 (M/V *Vienna Express*). In each case, the chief engineer or master of the vessel signed a bunker delivery note or receipt, including the volume and quantity of the fuel received. *Id.* Dkt. 227 (USOT's Rule 56.1 Statement) ¶¶ 55 (M/V *Santa Roberta*), 86 (M/V *Vienna Express*), 118 (M/V *Seaspan Hamburg*), 151 (M/V *Vienna Express*). The delivery receipts provide that:

> No disclaimer stamp of any type or form will be accepted on this bunker certificate, nor should any such stamp . . . alter, change or waive U.S. Oil's Maritime Lien against the vessel or waive the vessel's ultimate responsibility and liability for the debt incurred through this transaction.

Id.

USOT initially billed O.W., *Hapag-Lloyd*, Dkt. 261 (USOT's Resp. to ING's Rule 56.1 Statement) ¶ 7, with payment due from O.W. within 30 days of

delivery. *Id.*, Dkt. 258 (Maloney Decl.) Exs. 18, 21, 24, 27. Previously, based on a review of O.W. Denmark's credit history, USOT had provided O.W. a $10 million line of credit; the line of credit was in effect at the time of these events. *Id.*, Dkt. 231 (ING's Rule 56.1 Statement) ¶¶ 13-15. When USOT did not receive timely payment, it demanded payment directly from Hapag-Lloyd. *Id.*, Dkt. 1 (Compl.) Ex. 6.

DISCUSSION

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal quotation marks omitted)). Courts "'construe the facts in the light most favorable to the non- moving party and resolve all ambiguities and draw all reasonable inferences against the movant.'" *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2d Cir. 2014) (*per curiam*) (quoting *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 79-80 (2d Cir. 2009) (alteration omitted)).

1. CIMLA

O.W. and the Physical Suppliers each contend that they are entitled to summary judgment on their *in rem* claim to a maritime lien. Maritime liens for necessaries arise exclusively under CIMLA. To be

entitled to a lien, a party must "provid[e] necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31342. Disaggregating Section 31342, there are three elements that a party must prove to establish possession of a maritime lien. A party must establish (1) that the goods or services at issue were "necessaries," (2) that it "provided" the necessaries "to a vessel" and (3) that it did so "upon the order of the owner of such vessel or a person authorized by the owner."[7] *Integral Control Sys. Corp. v. Consol. Edison Co. of N.Y.*, 990 F. Supp. 295, 298 (S.D.N.Y. 1998) (quoting *Port of Portland v. M/V Paralla*, 892 F.2d 825, 827 (9th Cir. 1989)). All parties agree that fuel bunkers qualify as "necessaries" for purposes of CIMLA. The crux of the dispute concerns the meaning of the term "provided" and whether either O.W. or the Physical Suppliers provided bunkers "on the order of the owner" of the vessels or the owners' agents.

The requirements of CIMLA are interpreted narrowly under the doctrine of *stricti juris*. *See Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 982 F.2d 765, 768 (2d Cir. 1992); *Bankers Trust Co. v. Hudson River Day Line*, 93 F.2d 457, 459 (2d Cir. 1937) ("Maritime liens are 'stricti juris and will not be extended by construction, analogy or

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7 As originally codified by Congress, a claimant was required to "furnish" as opposed to "provide" necessaries. CIMLA was re-codified in 1988. *See* Pub. L. 100-710, Title I, 102 Stat. 4748. It is generally accepted that no substantive changes were made at that time and that cases interpreting the original statute remain instructive. *See ING Bank N.V. v. M/V TEMARA* (*Temara I*), No. 16-CV-95 (KBF), 2016 WL 4471901, at *5 n.5 (S.D.N.Y. Aug. 24, 2016).

inference.'" (quoting *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920))). A strict approach is in keeping with the overriding purpose of maritime liens and necessary to prevent a proliferation of liens that might hinder international commerce. *See Itel*, 982 F.2d at 768 (maritime liens are for the benefit of "both the ship and its creditors" but must be narrowly construed because they are "secret lien[s] arising by operation of law"). Maritime liens reduce the counterparty risk associated with supplying a vessel that may not call at the same port again. But because maritime liens are not publicly documented, the risk that a vessel is secretly encumbered may deter parties from doing business with the vessel or its owners in the future. *Id.*; *see also Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42, 46 (1st Cir. 1986) (rejecting a less restrictive approach on the grounds that it might require a "vessel seeking to avoid a lien . . . to delve far deeper into every transaction than is commercially reasonable"). Perverse incentives are also possible; for example, parties confident that they have a lien on a vessel may be less likely to conduct due diligence or carefully memorialize their agreements.

2. USOT and NuStar did not provide necessaries "on the order" of the vessels or their agents

The Physical Suppliers did not provide necessaries "on the order" of the Vessel Interests. In reaching this conclusion, the Court joins the other district courts to consider this issue since O.W.'s collapse. *See Valero Mktg. & Supply Co. v. M/V ALMI SUN*, 160 F. Supp. 3d. 973 (E.D. La. 2016) (Brown, J.); *O'Rourke Marine Servs. L.P., L.L.P. v. M/V COSCO*

HAIFA, 179 F. Supp. 3d 333 (S.D.N.Y. 2016) (Scheindlin, J.); *Temara I*, No. 16-CV-95 (KBF), 2016 WL 4471901 (Forrest, J.); *NuStar Energy Servs., Inc. v. M/V COSCO AUCKLAND*, No. 14-CV-3648 (KPE), Dkt. 98 (S.D. Tex. Dec. 1, 2016) (Ellison, J.). Each of these courts rejected substantially the same arguments made by the Physical Suppliers in this case and on materially similar facts.

CIMLA creates a presumption that certain officers, such as the master of a vessel or an agent of the charterer, act with authority to encumber the vessel. *See* 46 U.S.C. § 31341(a); *O'Rourke,* 179 F. Supp. 3d at 338. While this list is not necessarily exhaustive, a direct contractual or agency nexus between the supplier and the vessel or its agents is typically required. *See O'Rourke*, 179 F. Supp. 3d at 338; *Integral Control Sys.*, 990 F. Supp. at 299; *see also Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV* (*Lake Charles*), 199 F.3d 220, 229 (5th Cir. 1999); *Galehead, Inc. v. M/V ANGLIA*, 183 F.3d 1242, 1245 (11th Cir. 1999); *Port of Portland*, 892 F.2d at 828. This rule can be criticized as formalistic, but it serves the purposes of CIMLA and is consistent with the Second Circuit's commitment to a strict approach to maritime liens. *See Integral Control Sys.*, 990 F. Supp. at 301 (citing *Itel*, 982 F.2d at 768). Requiring a direct contractual link between the vessels' agents and the provider of necessaries reduces the risk of a multiplicity of liens, which could be inadvertent and unknown to the vessel's owners. *Cf. Tramp Oil*, 805 F.2d at 46 (vessels owners should not be required to delve into every past transaction in order to ensure that no liens arose). Requiring a direct contractual link also lessens the potential that the vessels will become

embroiled in disputes between remote third parties. *See Temara I*, 2016 WL 4471901, at *9 (contrary rule would "allow vessels to be arrested and encumbered based on the contractual disputes that arise between general contractors and subcontractors or even, as in this case, between subcontractors and sub-subcontractors"). And, finally, like any bright-line rule, requiring a direct contractual relationship makes it less likely that a party without such a relationship will mistakenly believe that its payment is secured by virtue of a lien against a vessel, as opposed to through a contractual security interest, assignment, or letter of credit arranged by the counterparties.

Subcontractors who deal with a contractor or a middle-man lack a direct connection to the vessel. *See Lake Charles*, 199 F.3d at 229; *see also Integral Control Sys.*, 990 F. Supp. at 299 (quoting 2 *Benedict on Admiralty* § 40 (7th ed. 1997) for the proposition that "there is a considerable body of law . . . that a subcontractor cannot assert a maritime lien"). While a subcontractor may "provide" necessaries to the vessel,[8] its counterparty is the contractor, not any of the parties authorized by Section 31341(a) to encumber the vessel. *See Lake Charles*, 199 F.3d at 230 (explaining that the "nature of the relationship between each pair of entities" determines whether a party provides necessaries "on the order" of the vessel). For example, the stevedores in *Lake Charles* were subcontractors because they were engaged by the seller to complete its performance. *Id.* They did

8 Because the Physical Suppliers did not provide necessaries "on the order" of the vessels or their agents, the Court need not determine whether they "provided" necessaries within the meaning of the statute.

not enter into a contractual arrangement with the vessel itself. *See id.* ("We view the facts as more akin to those in which general contractors have been engaged to supply a service and have called upon other firms to assist them in meeting their contractual obligations."); *see also Integral Control Sys.*, 990 F. Supp. at 297 (identifying as subcontractors, independent contractors that had been hired to complete the general contractor's performance). *Lake Charles* is not binding on this Court, but its reasoning borrows from the decision in *Integral Control Systems*, and it has been endorsed by other judges in this district. *See O'Rourke*, 179 F. Supp. 3d at 337-38; *Temara I*, 2016 WL 4471901, at *7.

The Physical Suppliers are indistinguishable from the subcontractors in *Lake Charles* and *Integral Control Systems*.[9] As in those cases, the Physical

[9] NuStar contends that the difference between this case and *Lake Charles*, *Port of Portland*, and *Integral Control Systems* is that in those cases the "order" given to the supplier originated with the contractor rather than with the vessel. *Clearlake*, Dkt. 188 (NuStar Opp.) at 11-12. To the extent that is true, it is only because the subcontractors in those cases played a less significant role in the overall transaction. The fact that NuStar provided all or nearly all of the services required of O.W. may be evidence of a direct relationship between NuStar and the vessel's agents, as the Court discusses below, but it is not grounds to distinguish *Lake Charles* or *Integral Control Systems*. The Court in *Integral Control Systems* addressed essentially this argument in distinguishing the Eleventh Circuit's decision in *Marine Coatings*: "one would expect the factors upon which the Eleventh Circuit focused to be present in most cases where the owner of a vessel places her into the hands of a general contractor for substantial repair or conversion, except in the unlikely circumstance of an owner who disappears from the work site, leaves no agent behind, and does not return until the work has been completed." 990 F.

Suppliers contracted with another party, here O.W., that in turn contracted directly with the Vessel Interests. The Physical Suppliers invoiced O.W., and O.W. separately invoiced the Vessel Interests. In each case, there was no contractual agreement between the Physical Supplier and Vessel Interests, and the contracts uniformly describe O.W. as either buyer or seller. The economic realities of the transactions are also the same. Just as in *Lake Charles*, the general contractor, O.W., bore the risk of non-performance to the Vessel Interests. As counsel to NuStar candidly acknowledged at oral argument, had NuStar failed to perform, O.W. would have been required to find an alternative supplier, potentially at a higher cost. Tr. (Dec. 1, 2016 Oral Arg.) at 15:22-16:4 (THE COURT: "[If] you could not stem the vessel[,] [w]ould OW have been liable in breach to the vessel?" [NUSTAR]: "I think that's probably correct, yes."). *Cf. Lake Charles*, 199 F.3d at 230 ("[The contractor] accepted all the risk associated with the occurrence of events that would increase the costs of stevedoring services beyond what the sales contract provided."). Like Judges Forrest and Scheindlin, this Court concludes that the Physical Suppliers acted as subcontractors. *See O'Rourke*, 179 F. Supp. 3d at 338; *Temara I*, 2016 WL 4471901, at *7.

The Physical Suppliers argue that a contractual or agency relationship to the Vessel Interests is not required so long as the order for necessaries originated with a party that has statutory authority to encumber the vessel. It is a viscerally appealing

Supp. at 301. Likewise, in *Port of Portland*, the subcontractor's involvement was "rather certain" and seemingly well known to the vessel interests. *Port of Portland*, 892 F.2d at 828.

argument, but it is inconsistent with the strict approach described above. The Physical Suppliers rely heavily on *Marine Fuel Supply & Towing Inc. v. M/V KEN LUCKY*, 869 F.2d 473 (9th Cir. 1988). In *Ken Lucky*, the Ninth Circuit held that a physical supplier of bunkers could assert a maritime lien because the "managing agent [for the vessel] did order the fuel and it is also clear that [the supplier] delivered the fuel *to the vessel*." *Id.* at 477. The holding in *Ken Lucky* elides an important distinction, however: the defendants in *Ken Lucky* conceded that the physical supplier had sold the bunkers to an agent of the vessel. *See id.* at 476. The *Ken Lucky* court went on to detail the direct connections between agents of the vessel and the supplier. *See id.* at 477-78. Moreover, reading *Ken Lucky* to endorse the Physical Suppliers' approach is inconsistent with the Ninth Circuit's decision a year later in *Port of Portland*, which held that subcontractors could not assert a lien without evidence of a direct connection to an agent of the vessel. *Port of Portland*, 892 F.2d at 828.

As a fallback position, both Physical Suppliers argue that a direct relationship exists to the Vessel Interests. Because USOT was identified as O.W.'s supplier in internal analyses prepared by Hapag-Lloyd personnel, USOT contends that it, rather than O.W., was nominated as the supplier. Both USOT and NuStar were identified as the supplier in the order confirmations exchanged by O.W. and the Vessel Interests. The Physical Suppliers also worked directly with the port agents for the vessels to arrange delivery and to complete the bunkering operations. And, finally, the chief engineer of each

vessel executed a receipt, or delivery note, confirming that the fuel had been received.

Direct contacts between the Physical Suppliers and agents of the vessel can be relevant if they demonstrate a direct contractual or agency relationship.[10] For example, when a vessel requires a contractor to use a specific subcontractor there may be a basis to argue that the contractor engaged the subcontractor with actual authority from the vessel, creating a direct link between the vessel and the subcontractor. *See Port of Portland*, 892 F.2d at 828 ("[A]n owner can still become responsible for the services of a subcontractor, if the owner has ordered the general contractor to retain that subcontractor." (citing *The Juniata*, 277 F. 438, 440 (D. Md. 1922))). But evidence that the supplier was known to the vessel and coordinated with the vessel to satisfy its obligations to a third party does not establish a legally significant relationship between the vessel and subcontractors. *See Integral Control Sys.*, 990 F. Supp. at 299-300 (subcontractor's selection must be

[10] In other cases, the Physical Suppliers have argued that O.W. was an agent of the Vessel Interests. The Physical Suppliers make that argument in these cases as well, albeit in footnotes. *See Hapag-Lloyd*, Dkt. 262 (USOT Opp.) at 19 n.15; *Nippon*, Dkt. 150 (NuStar Opp.) at 7 n.11. This argument has been rejected by the other district courts involved in the O.W. universe of cases. *Temara I*, 2016 WL 4471901, at *6-7; *Valero Mktg. & Supply Co. v. M/V ALMI SUN*, No. 14-2712, 2015 WL 9459971, at *10 (E.D. La. Dec. 2, 2015), *reconsideration denied* 160 F. Supp. 3d 973 (E.D. La. 2016). This Court agrees. There is no evidence that O.W. was an agent of the Vessel Interests, either on a theory of implied or apparent authority. *See Hapag-Lloyd*, Dkt. 261 (USOT's Resp. to ING's Rule 56.1 Statement) ¶ 18 (conceding that Hapag-Lloyd never communicated directly with USOT or informed USOT that O.W. would act as Hapag-Lloyd's agent).

"ordered" by the vessel (quoting *Port of Portland*, 892 F.2d at 828)); *see also O'Rourke*, 179 F. Supp. 3d at 338. Underscoring the legal insignificance of such contacts, bunkering could not occur without such coordination.

Several cases, nearly all from the Eleventh Circuit, suggest that close coordination can give rise to a lien even if there is no legally significant relationship between the supplier and vessel. *See Galehead*, 183 F.3d at 1245-46; *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1565 (11th Cir. 1992); *Marine Coatings, Inc. of Ala. v. United States*, 932 F.2d 1370, 1376 (11th Cir. 1991); *Stevens Tech. Servs., Inc. v. United States*, 913 F.2d 1521, 1535 (11th Cir. 1990). In *Stevens Technical Services*, for example, the Eleventh Circuit considered, among other things, the fact that the vessel interests approved the subcontractor's work and coordinated its performance and that the general contractor refused to take responsibility for the subcontractors. 913 F.2d at 1535. The Physical Suppliers rely on these cases to argue that a "totality of the circumstances" analysis should apply. *See* Tr. (Dec. 1, 2016 Oral Arg.) at 8:12-24 (arguing that under Fifth Circuit case law "you have to look at the totality of the circumstances in evaluating whether or not a maritime lien exists"), 76:4-19 ([NUSTAR]: "we should have a maritime lien for Nustar premised upon that, premised upon an evaluation of the totality of the circumstances.").

But as Judge Haight said, describing *Marine Coatings*, these cases are "navigating outside the mainstream" of American maritime law. *See Integral Control Sys.*, 990 F. Supp. at 301 (explaining that *Marine Coatings* is inconsistent with *Itel*). The

Eleventh Circuit's multi-factor analysis has all the shortcomings that the Second Circuit's *stricti juris* approach is designed to avoid: a multi-factor analysis that looks at whether the subcontractor was sufficiently well known to the vessel, whether it was identified in advance, the significance of its performance to the overall job, and whether the vessels accepted performance directly from the subcontractor. Such a test would add significant uncertainty in an area of the law that demands definite answers. As the Physical Suppliers acknowledge, it is possible under a totality-of-the-circumstances analysis for multiple parties to the same transaction to be entitled to a lien. *See* Tr. (Dec. 1, 2016 Oral Arg.) at 11:3-10 ([NUSTAR]: "I've seen case law that suggests that there is only one party that has a maritime lien, but I've seen no justification as to why that should be so." THE COURT: "Because otherwise, the vessel runs the risk of being arrested twice on the same debt." [NUSTAR]: "That's true."). If that were the prevailing rule, it would ultimately complicate maritime commerce because it would make it harder for vessels to procure supplies. Nor is such a test easy to apply: there is no principled distinction between a subcontractor responsible for approximately 40% of a project, as in *Marine Coatings*, 932 F.2d at 1376 n.9, and one that does 60% or even 90% of the work.

At best (from the Physical Suppliers' perspective), the summary judgment record shows that the Vessel Interests viewed NuStar and USOT as acceptable suppliers. There is no evidence that the Vessel Interests required O.W. to use the Physical Suppliers to satisfy its obligations or that the Physical

Suppliers were directly engaged by agents of the Vessel Interests. To the contrary, the evidence on this point is that the Vessel Interests were indifferent to the identity of the suppliers. The representatives of each of the Vessel Interests testified that the physical supplier was O.W.'s choice. *See Hapag-Lloyd*, Dkt. 233 (Maloney Decl.) Ex. 3 (Kock Tr.) at 58:7-13, 141:19-22; *Clearlake*, Dkt. 175 (Maloney Decl.) Ex. 1 (Saifulin Tr.) at 56:15-19; *Nippon*, Dkt. 142 (O'Connor Decl.) Ex. B (Sano Tr.) at 19:12-20:2. Nippon Yusen's agreement with NYKTC bears this out: it requires NYKTC to provide bunkers from a group of major suppliers, including, in addition to NuStar, Bomin, BP, Chemoil, Matrix, Total and Shell. *Nippon*, Dkt. 142 (O'Connor Decl.) Ex. B (Sano Tr.) at 19:6-11. Likewise, when O.W. provided bids to Hapag-Lloyd, it included multiple different suppliers, depending on the port of call. For example, in Los Angeles, O.W. used O.W. itself, and in Oakland it used P66. *Hapag-Lloyd* Dkt 258 (Maloney Decl.) Ex. 55. The uncontradicted testimony from the Vessel Interests is that they saw the choice of physical supplier as essentially O.W.'s to make. *See Hapag-Lloyd*, Dkt. 233 (Maloney Decl.) Ex. 3 (Kock Tr.) 138:3-18, 141:12-22, 158:5:16; *Nippon*, Dkt. 142 (O'Connor Decl.) Ex. B (Sano Tr.) at 19:12-20:2. In short, the inclusion of the Physical Suppliers on the confirmations provided by O.W. and the Vessel Interests does not amount to a "selection" by the Vessel Interests of NuStar or USOT.[11]

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[11] The evidence that the Vessel Interests were aware of the Physical Suppliers' identities and tacitly "selected" them is potentially a question of fact, particularly as to Hapag-Lloyd, which included USOT in internal analyses of competing bids. If a question of fact exists on this point, however, it is not

The interactions between the Physical Suppliers and the port agents for the Vessel Interests also do not establish a direct relationship between the suppliers and vessels.[12] In each of the test cases there is evidence that the Physical Suppliers communicated with the local company that had been hired by the Vessel Interests to arrange supplies in port. For example, before docking at the Port of Tacoma, the M/V *Sofia Express*'s port agent kept USOT personnel informed of her anticipated time of arrival and scheduled a time for the bunkering operation. *Hapag-Lloyd*, Dkt. 227 (USOT's Rule 56.1 Statement) ¶¶ 141-147. The Physical Suppliers try to transmute this evidence of logistical arrangements into evidence that the port agents themselves *ordered* the Physical Suppliers to provide bunkers. But all of these interactions concerned performance of existing obligations of O.W. and the Physical Suppliers. None of the communications purports to create a new contract, and the record evidence is that port agents do not normally purchase bunkers on behalf of the vessels. *See Hapag-Lloyd*, Dkt. 258 (Maloney Decl.) Ex. 3 (Kock Tr.) at 58:14-59:17; *Clearlake*, Dkt 175 (Maloney Decl.) Ex. 23 (Laney Tr.) at 17:10-18, 33:6-15; *Nippon*, Dkt. 142 (O'Connor Decl.) Ex. K (Thompson Tr.) at 18:15-25. Assuming

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material. There is no dispute that the Vessel Interests did not contract with the Physical Suppliers, and the Physical Suppliers do not argue that the contracts required O.W. to use them as suppliers.

[12] The Court assumes *arguendo* that the port agents with whom the Physical Suppliers interacted had legal authority to bind the vessels. The parties dispute this point, but it is ultimately irrelevant because no legally significant relationships were formed.

that the port agents could have ordered bunkers from the Physical Suppliers, they did not do so in these cases.[13]

Finally, the bunker receipts signed by the chief engineers for each vessel did not create a contract nor do they amount to a ratification of a contract. Accepting the bunkers and signing a receipt may give rise to a maritime lien when doing so creates a contractual relationship. *See Atl. & Gulf Stevedores, Inc. v. M/V GRAND LOYALTY*, 608 F.2d 197, 202 (5th Cir. 1979). But here, the contractual relationships between O.W., the Vessel Interests, and Physical Suppliers had already been fully formed when the bunkers were delivered. Nor do the receipts amount to a ratification of the contracts by the Vessel Interests. The doctrine of contract ratification requires evidence of "full knowledge of the material facts relating to the transaction" and "clearly established" assent to be bound. *Aegan Bunkering (USA) LLC v. M/T AMAZON*, No. 14-CV-9447 (KBF), 2016 WL 4471895, at *10 (S.D.N.Y. Aug. 24, 2016) (Forrest, J.) (quoting *Chem. Bank v.*

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[13] The Physical Suppliers devote significant effort to arguing that they were under no duty to inquire whether their counterparties had authority to encumber the vessels. *Hapag-Lloyd*, Dkt. 262 (USOT Opp.) at 21-24; *Nippon*, Dkt. 150 (NuStar Opp.) at 7 n.11. This argument largely misses the mark. CIMLA relieved suppliers of a duty of inquiry with respect to "no lien" clauses by codifying a presumption that certain agents act with authority to bind the vessel. *See* 46 U.S.C. § 31341(a). The presumption only applies, however, when the supplier is given an order by one of the parties listed in the statute who have presumptive authority. The question here is whether the Physical Suppliers were given an order by such a party and not whether they would hypothetically be entitled to rely on such an order if they had received one.

Affiliated FM Ins. Co., 169 F.3d 121, 128 (2d Cir. 1999)). As the other district courts involved in O.W. cases have explained, bunkering receipts do not come close to meeting this standard. *See*, *e.g.*, *Temara I*, 2016 WL 4471901 at *10; *O'Rourke*, 179 F. Supp. 3d at 339. Read most charitably, the receipts are evidence that the fuel was delivered to and accepted by the vessels. Without more, acceptance of performance under a pre-existing contract does not establish a direct relationship giving rise to a lien.[14] *See Lake Charles*, 199 F.3d at 229.

In sum, while the Court sympathizes with the Physical Suppliers, which apparently believed that they held maritime liens and may be financially harmed by this Court's holding that they do not, the contractual relationships between the parties in this case are clear, and those relationships must be respected. The Physical Suppliers delivered the bunkers to the vessels at the direction of O.W. None of the Physical Suppliers entered into a contract with the Vessel Interests or their agents, and the undisputed evidence is that the Vessel Interests did not require O.W. to use the Physical Suppliers. These back-to-back contracts were intended, in part, to avoid multilateral obligations that could embroil the vessels in litigation between suppliers. It is unfortunate that it may be that the Physical Suppliers, the only parties who are out of pocket, will suffer from O.W.'s bankruptcy (although ING is also likely to be out millions of dollars as a result of

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[14] Although the Physical Suppliers do not argue that the bunker receipts themselves give rise to maritime liens, that argument has been raised and rejected in other cases. *See*, *e.g.*, *Temara I*, 2016 WL 4471901 at *10.

O.W.'s bankruptcy).[15] Ultimately, however, that is not a reason for the Court to depart from the Second Circuit's strict approach to maritime liens.

3. The O.W. Entities "Provided" Necessaries to the Vessel Interests and Hold Maritime Liens

Having found that the Physical Suppliers do not hold liens, the Court must address whether the O.W. entities hold *in rem* claims against the vessels.[16] The parties agree that O.W. received the order for necessaries directly from the Vessel Interests and their agents.[17] Until recently, uniform case law held

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[15] The O.W. liquidation plan carves out from the Bankruptcy discharge any claims in this action. *Nippon*, Dkt. 150 (NuStar Opp.) at 16.

[16] The Court does not address in this Opinion whether any liens held by O.W. were properly assigned to ING.

[17] Belatedly, NuStar has questioned whether O.W. provided necessaries "on the order of" Nippon Yusen. *Nippon*, Dkt. 150 (NuStar Opp.) at 12-13 & n.18. O.W.'s counterparty in the Nippon transaction was NYKTC, which is an affiliated subsidiary of the NYK group of companies. *See supra* at 7. NuStar admitted in its amended answer that NYKTC was an agent of Nippon Yusen. *Nippon*, Dkt. 102 (Am. Answer) ¶ 4. The parties did not take discovery relative to whether NYKTC was an agent of Nippon Yusen, presumably because the question appeared settled. *See* Tr. (Dec. 1, 2016 Oral Arg.) at 64:1:17 ([O.W.]: "OW USA has consistently alleged that NYKTC was an agent for the vessel. NYK line has never, up until apparently today, denied that allegation. NuStar, up until it responded to O.W. USA's Rule 56.1 Statement of facts, had actually admitted to that fact. These are facts which OW USA had relied upon throughout the discovery process for the last two years. Had we known that their positions were different earlier, perhaps we might have litigated the case differently during the discovery process."). NuStar is bound by its admission. The Court assumes for purposes of analysis that

that a contractor like O.W. could "provide" necessaries to a vessel indirectly through performance by a subcontractor. *See*, *e.g.*, *Galehead*, 183 F.3d at 1245; *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 780 F. Supp. 191, 194 (S.D.N.Y. 1991) (finding that intermediary "furnished" bunkers within the meaning of CIMLA). The Physical Suppliers did not raise this issue in their briefs. Nonetheless, the Court recognizes that other district courts hearing O.W.-related cases have split on this issue. In *O'Rourke* and *Valero*, Judges Scheindlin and Brown held that O.W. provided necessaries through the physical suppliers. *O'Rourke*, 179 F. Supp. 3d at 339, at *5; *Valero*, 160 F. Supp. 3d at 985-86. Recently, in *Temara II*, Judge Forrest held that O.W. was not a statutory "provider" of necessaries. *ING Bank, N.V. v. M/V TEMARA* (*Temara II*), No. 16-cv-95, 2016 WL 6156320, at *9 (S.D.N.Y. Oct. 21, 2016). The Court concludes below that a contractor such as O.W., dealing directly with a vessel owner or representative, may "provide" necessaries through an intermediary, so long as the necessaries are provided to a vessel, rather than for the vessel owner's personal use.

The Second Circuit has given relatively little guidance on the meaning of the term "provided" in CIMLA. In *Itel Containers*, the Circuit held that a supplier did not provide necessaries if the necessaries were sold to a charterer in bulk for use by a fleet. *See Itel Containers*, 982 F.2d at 768; *see also Piedmont & George's Creek Coal Co.*, 254 U.S. at 12. The Court concluded that necessaries must be

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NYKTC acted as an agent of Nippon Yusen in the transactions at issue in these cases.

ear-marked for a specific vessel at the time of the sale to give rise to a lien. *See Itel Containers*, 982 F.2d at 768. The reasoning in *Itel* reflects CIMLA's underlying policy that a lien should be available when a supplier relies on the credit of the vessel, rather than on the *in personam* credit of its counterparty. *See Equilease Corp v. M/V SAMPSON*, 793 F.2d 598, 605 (5th Cir. 1986) ("the idea of credit to the vessel being a prerequisite to a lien . . . [is] still very much with us today"); *cf. Bankers Trust Co.*, 93 F.2d at 459 (supplies must be delivered to a specific ship, "otherwise they are furnished to the owner"). The party that bears the risk of dealing with a transient vessel is the "provider" of necessaries. *See Lake Charles*, 199 F.3d at 230; *see also Temara II*, 2016 WL 6156320, at *6 ("In terms of statutory intent and relevant case law, the term 'provided' clearly embodies a concept of payment protection for an entity that has put itself at financial or other risk in providing necessaries to vessels.").

A supplier may "provide" necessaries to a vessel indirectly through a subcontractor. *See Lake Charles*, 199 F.3d at 232 ("Under the circumstances here, the delivery of the rice, though performed by LCS, is attributed to Broussard."); *Galehead*, 183 F.3d at 1245 ("The bunkers were supplied pursuant to an agreement made between Genesis and Polygon. That agreement caused, or provided for, the delivery of the fuel to the vessel. Therefore, Polygon 'provided' necessaries to the vessel under the contract irrespective of how, or by whom, the delivery was carried out."); *The Golden Gate Knutsen v. Associated Oil Co.*, 52 F.2d 397, 400 (9th Cir. 1931). When a subcontractor delivers necessaries to

a vessel, it does so pursuant to its contract with the contractor, and the subcontractor's performance is attributed to the contractor. *Galehead*, 183 F.3d at 1245. Ultimately, in this scenario, the contractor is responsible to the vessel for performance. This rule has been adopted previously in this district, under somewhat similar circumstances. In *Exxon*, the Court held that Exxon could assert a lien for supplying bunkers, even though Exxon's involvement was limited to arranging for a local supplier to deliver the fuel. 780 F. Supp. at 194.

The back-to-back contracts entered into by O.W., the Physical Suppliers, and the Vessel Interests establish O.W. as the "provider" of necessaries. In this respect, O.W. is indistinguishable from the contractors in *Lake Charles* and *Galehead*: it entered into a contract that required it to provide necessaries; then, through a chain of separate, but clearly documented transactions, caused its subcontractors to deliver the necessaries to the vessels. Had the subcontractors, NuStar and USOT, failed to deliver the bunkers, O.W. would have been liable to the Vessel Interests for breach. *See* Tr. (Dec. 1, 2016 Oral Arg.) at 37:10-17 ([HAPAG]: "What the testimony reflects is that at all times OW Germany remained responsible to Hapag. If for whatever reason US Oil could not or would not do the supply, OW Germany -- and this is in the testimony -- had the obligation to substitute similar fuel at the agreed price."); *see also id.* at 51:1-5 (THE COURT: "It sounds like everybody agrees that OW was on the hook. So that if who[m]ever the physical supplier was supposed to be had failed to deliver, the vessel would have had a claim against OW, and OW would have had to find a supplier, and with prices

going up, OW would bear that risk."). As far as the Vessel Interests were concerned, O.W. bore the risk of arranging for delivery and would have been required to provide an alternative bunker supplier if the chosen supplier had failed to perform. *See Hapag-Lloyd*, Dkt. 258 (Maloney Decl.) Ex. 3 (Kock Tr.) at 133:10-24 ("[W]e are trying to secure not only the quality of the product, but also the legal status of the contract, that's why we are just working with parties accepting our terms and conditions of purchasing . . . we are taking advantage of the services of a bunker trader."). Likewise, O.W. was obligated to pay the Physical Suppliers even if it was not paid by the Vessel Interests.

The Court's analysis is consistent with the reasoning in *Temara II*. In that case Judge Forrest concluded that O.W. had not "provided" the bunkers at issue because it did not face "real risk of financial loss" in the transactions. *Temara II*, 2016 WL 6156320, at *8. Notably, the record in Temara II was "devoid of information regarding O.W. Bunker's arrangements down the chain." *Id.* By contrast, in this case O.W. has submitted sales confirmations documenting each discrete transaction, and the parties to these cases agree that O.W. bore financial risk in the transactions and O.W. was liable to the Vessel Interests in the event NuStar or USOT failed to deliver. *See* Tr. (Dec. 1, 2016 Oral Arg.) at 59:15-60:2 ([ING]: "To address briefly the Temara action, as has been pointed out already, the issue there was a record 'devoid of documentation' …. Here, by contrast, we know the supply chain is fully documented, and as everyone has admitted, both Hapag and the physical suppliers, OW Germany bore the risk of loss and had direct contractual liability to

Hapag-Lloyd."). The fact that O.W., by virtue of its bankruptcy proceedings, is no longer required to satisfy its debt to the Physical Suppliers does not alter the analysis. The potential for a maritime lien is intended to encourage parties to agree to provide necessaries to vessels. Considered *ex ante*, at the time O.W. agreed to provide necessaries and entered into its arrangement with the Physical Suppliers and Vessel Interests, it bore the risk of non-payment by the vessels and the risk that the Physical Suppliers would not deliver.

The Court concludes that the O.W. entities are entitled to a maritime lien in case nos. 14- CV-9287 and 14-CV-10091.

4. Equity and Public Policy Do Not Require a Different Result

The Physical Suppliers argue, with some force, that permitting O.W. or ING to benefit from a maritime lien without paying the suppliers that actually delivered the fuel is an inequitable result. Although these cases involve interpretation of a Federal statute, there is no doubt that maritime liens are an equitable remedy. *See Mullane v. Chambers*, 438 F.3d 132, 138 (1st Cir. 2006). The Court is required to balance Congress's intent to protect American materialmen who deal with flighty vessels with the longstanding Federal policy disfavoring maritime liens. *See Piedmont & George's Creek Coal Co.*, 254 U.S. at 12. Evidence of unclean hands or bad faith on the part of O.W. might be grounds to disregard or equitably transfer its lien. CIMLA incorporates traditional equitable doctrines like unclean hands and equitable subrogation. *See Tramp Oil & Marine Ltd. v. M/V MERMAID I*, 630 F. Supp. 630, 633

(D.P.R. 1986); *Session v. I.T.O. Corp. of Ameriport*, 618 F. Supp. 325, 329 (D.N.J. 1985).

The Physical Suppliers have not seriously argued that any equitable doctrine bars O.W.'s recovery and the parties agreed at oral argument that fraud and bad faith have not been pled in these cases. Tr. (Dec. 1, 2016 Oral Arg.) at 86:2-4 (THE COURT: "Does anybody disagree? Does anybody say that fraud or bad faith was at all alleged either in claims or counterclaims in these cases? I'm seeing shakes of head all around."). Maritime law recognizes a right of subrogation in two circumstances: first, in respect of "advances" of money to a vessel owner or agent that satisfy a third party's lien, and second, through contractual assignment pursuant to an agreement. *Tramp Oil*, 630 F. Supp. at 633 (citing Tetley, *Assignment and Transfer of Maritime Liens: Is There Subrogation of the Privilege?*, 15 J. Mar. L. & Comm. 3, 393 (1984)). The Physical Suppliers did not satisfy any debt owed by the Vessel Interests nor did they insist that O.W. assign its rights against the Vessel Interests. Likewise, while "unclean hands" equitably bars a party from benefitting from its own breach, it typically requires, at a minimum, evidence of bad faith. *See CMA CGM S.A. v. AZAP Motors, Inc.*, No. 14-CV-504, 2015 WL 9601157, at *7 (E.D. Va. Nov. 25, 2015), *adopted*, 2016 WL 50926 (E.D. Va. Jan. 4, 2016). There is no evidence in these test cases that O.W. provided false information to the Physical Suppliers or entered into agreements with them knowing that it would not pay for the bunkers.

The unfortunate reality of these cases is that O.W.'s bankruptcy has caused hardship for creditors, especially trade creditors like the Physical Suppliers. The underlying contractual arrangement between

the parties—back-to-back contracts between the vessels, bunker traders, and suppliers—shifted to O.W. the risk that the vessels would not pay their bills. In so doing, it substituted O.W. as the counterparty to the Physical Suppliers. In ordinary times, the Physical Suppliers benefit from this arrangement, as they can better evaluate the credit of bunker traders, like O.W., with whom they deal repeatedly than the credit of owners or charters of vessels with whom they interact only sporadically. *See Hapag-Lloyd*, Dkt. 227 (USOT's Rule 56.1 Statement) ¶ 18 ("Given the time and operational constraints of the vessels . . . it has not been practical for USOT to conduct an adequate credit check of each vessel's [owner or charterer]."). The parties agree that both Physical Suppliers undertook a careful review of O.W.'s credit before extending O.W. a line of credit with 30-day terms. *Hapag-Lloyd*, Dkt. 231 (ING's Rule 56.1 Statement) ¶¶ 13-15; *Clearlake*, Dkt. 172 (ING's Rule 56.1 Statement) ¶¶ 22-27; *Nippon*, Dkt. 141 (O.W. USA's Rule 56.1 Statement) ¶¶ 18-19. Additional contractual protections were available to the Physical Suppliers. Notably, they could have demanded an assignment of O.W.'s rights against the charterers, or they could have insisted that the Vessel Interests become parties to the supply contracts. *Cf. Tramp Oil*, 805 F.2d at 46 (noting that equity did not favor a broker because they "already have the means to protect their interests [] with no additional delay in payment" by securing an assignment of the . . . lien); Tr. (Dec. 1, 2016 Oral Arg.) at 14:9-18 (THE COURT: "Couldn't they get an assignment of lien from their counterparty?" [NUSTAR]: "That is a possibility, assuming their counterparty is willing to give one.").

The Court's sympathetic view of the Physical Suppliers' situation is not, however, boundless, and it does not extend to rewriting the consistent, and nearly uniform, case law denying subcontractors a maritime lien. This rule is rooted in the long-standing Federal policy disfavoring maritime liens. *See Piedmont & George's Creek Coal Co.*, 254 U.S. at 12. Because the Physical Suppliers do not hold maritime liens, they do not have *in rem* claims against the interpleader stake. Ultimately, their real problem is the low priority given to an unsecured creditor in a bankruptcy.[18] A low priority in bankruptcy almost always causes hardship, but that is not something that this Court, even sitting in equity, can alleviate.

CONCLUSION

The Physical Suppliers' motions for summary judgment in each of the three tests cases are DENIED: in case no. 14-CV-9287, docket entry 167; in case no. 14-CV-10091, docket entry 133; in case no. 14-CV-9949, docket entry 223; and in case no. 15-CV-6718, docket entry 173.

ING's motion for summary judgment in the Clearlake test case (*Clearlake*, Dkt. 171) is GRANTED IN PART to the extent ING has moved for summary judgment on its claim that O.W. Switzerland holds a maritime lien and *in rem* interest in the interpleader *res*. ING's motion for summary judgment as to the validity of the O.W.

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[18] NuStar's priority in the O.W. bankruptcy is uncertain. NuStar filed proofs of claim in the O.W. bankruptcy cases, but the value of those claims depends on whether it is entitled to administrative priority under Section 503(b)(9) of the Bankruptcy Code. That issue is not before this Court.

entities' assignment of their liens to ING remain pending.

O.W. USA's motion for summary judgment in the Nippon Yusen test case (*Nippon*, Dkt. 140) is GRANTED IN PART with respect to O.W. USA's claim that the O.W. entities hold a maritime lien and *in rem* interest in the interpleader *res*. O.W. USA's motion for summary judgment on its *in personam* claims against Nippon Yusen remains pending.

By **January 16, 2017**, the parties are directed to inform the Court of the following:

1. ING must inform the Court whether its motions for summary judgment with respect to its possession of a valid assignment of the O.W. entities' liens are moot in light of this Opinion;
2. O.W. USA must inform the Court whether its *in personam* claims against Nippon Yusen are moot in light of this Opinion; and
3. O.W. Germany must inform the Court whether its *in personam* claims against Hapag-Lloyd are moot in light of this Opinion.

The Clerk of Court is respectfully directed to close the open motions at the following docket entries: in case no. 14-CV-9287, docket entry 167; in case no. 14-CV-10091, docket entry 133; and in case no. 14-CV-9949, docket entry 223.

SO ORDERED.

s/ Valerie Caproni
VALERIE CAPRONI
United States District Judge

Date: March 3, 2017
New York, New York

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/18/2017

CLEARLAKE SHIPPING PTE LTD.,

Plaintiff,

- against -

O.W. BUNKER (SWITZERLAND) SA, O.W. BUNKER USA INC., O.W. BUNKER NORTH AMERICA INC., O.W. BUNKER HOLDING NORTH AMERICA INC., NUSTAR ENERGY SERVICES INC., ING BANK N.V.

Defendants.

No. 14 Civ. 9287 (VEC)

PARTIAL FINAL JUDGMENT

WHEREAS, NuStar Energy Services, Inc. ("Nustar") filed a motion for summary judgment [Dkt. 167] seeking an order finding that it has maritime liens pursuant to the Commercial Instruments & Maritime Line Act ("CIMLA"), 46 U.S.C. § 31341-43, against the M/V VENUS GLORY and the M/V HELLAS GLORY (the "Vessels");

WHEREAS, ING Bank N.V., as Security Agent ("ING") filed a motion for summary judgment [Dkt. 171] seeking an order dismissing NuStar's maritime lien claims and granting judgment in favor of ING, as assignee of O.W. Bunker (Switzerland) S.A. ("O.W. Switzerland"), on ING's *in rem* claims and on its *in personam* claims to the extent the Court asserted jurisdiction over the *in personam* claims;

WHEREAS, having considered the parties' motion papers, oral argument in respect of the above motions, and all pleadings and proceedings had in this case;

IT IS HEREBY ORDERED that for the reasons set forth in the Order and Opinion issue by the Court on January 9, 2017 [Dkt. 218] (as amended on March 3, 2017 [Dkt. 230], and March 22, 2017 [Dkt. 235]), pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that there is no just cause for delaying entry of partial final judgment as to the validity of the *in rem* lien claims asserted in this action, and partial final judgment is hereby entered as follows:

1) Nustar does not possess maritime liens pursuant to CIMLA against the Vessels, and thus its Motion for Summary Judgment [Dkt. 167] is denied and its maritime lien claims are dismissed.

2) ING's Motion for Summary Judgment [Dkt. 171] is granted in part to the extent ING has moved for summary judgment on its claim that O.W. Switzerland holds a maritime lien atgainst the Vessels and *in rem* interest in the interpleader *res*.

Signed at New York, New York this 18th day of April, 2017.

s/ Valerie Caproni
HONORABLE VALERIE E. CAPRONI
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/18/2017

NIPPON KAISHA LINE LIMITED, individually and on behalf of M/V RIGEL LEADER (IMO No. 9604940)

Plaintiff,

- against -

O.W. BUNKER USA INC., NUSTAR ENERGY SERVICES, INC., KIRBY INLAND MARINE LP, ING BANK N.V.

Defendants.

14 Civ. 10091 (VEC)

PARTIAL FINAL JUDGMENT

WHEREAS, interpleader plaintiff Nippon Yusen Kabushiki Kaisha a/k/a Nippon Yusen Kaisha on December 23, 2014 filed a complaint for interpleader seeking to deposit funds for payment of a parcel of fuel delivered to the vessel M/V Rigel Leader on October 16, 2014 and an injunction against *in personam* and *in rem* claims against Nippon Yusen Kabushiki Kaisha a/k/a Nippon Yusen Kaisha and

the M/V Rigel Leader by any of the named defendants who may assert a claim for payment of the fuel delivered to the Vessel;

WHEREAS, NuStar Energy Services, Inc. ("Nustar") filed a motion for summary judgment [Dkt. 133] seeking an order finding that it has a maritime lien pursuant to the Commercial Instruments & Maritime Line Act ("CIMLA"), 46 U.S.C. § 31341-43, against the M/V RIGEL LEADER (the "Vessel");

WHEREAS, O.W. Bunker USA Inc. ("O.W. USA") filed a motion for summary judgment [Dkt. 140] seeking an order dismissing NuStar's maritime lien claim and granting judgment in favor of O.W. on its *in personam* and *in rem* claims; and

WHEREAS, having considered the parties' motion papers, oral argument in respect of the above motions, and all pleadings and proceedings had in this case;

IT IS HEREBY ORDERED that for the reasons set forth in the Order and Opinion issue by the Court on January 9, 2017 [Dkt. 176] (as amended on March 3, 2017 [Dkt. 184], and March 22, 2017 [Dkt. 190]), pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that there is no just cause for delaying entry of partial final judgment as to the validity of the *in rem* lien claims asserted in this action, and partial final judgment is hereby entered as follows:

1) Nustar does not possess maritime liens pursuant to CIMLA against the Vessel, and thus its Motion for Summary Judgment [Dkt. 133] is denied and its maritime lien claim is dismissed.

2) O.W. USA's Motion for Summary Judgment [Dkt. 140] is granted in part with respect to O.W. USA's claim that it holds a maritime lien against the Vessel and *in rem* interest in the interpleader *res*.

3) That this partial final judgment shall not be binding in any other interpleader matter pending before this Court between plaintiff Nippon Yusen Kabushiki Kaisha a/k/a Nippon Yusen Kaisha and its affiliates and any of the named defendants.

Signed at New York, New York this 18th day of April, 2017.

s/ Valerie Caproni
HONORABLE VALERIE E. CAPRONI
UNITED STATES DISTRICT JUDGE