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 Fifth 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., COSCO Haifa Maritime Ltd., COSCO Auckland Maritime Ltd., COSCON, and COSCO Venice Maritime Ltd., appellees below.

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NuStar Energy Services, Inc. ("NuStar") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the Fifth Circuit can be found at ___ F. App'x ___, 2019 WL 192408 and is reproduced at page 1a of the Appendix to this petition ("App."). The opinion of the United States District Court for the Southern District of Texas can be found at 2016 WL 9307626 and is reproduced at App. 12a.

JURISDICTION

The judgment of the Fifth Circuit was entered on January 14, 2019. App. 1a. 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 ("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

[1] On this same date, NuStar has also petitioned this Court for a writ of certiorari to review two judgments of the Second Circuit in *Clearlake Shipping PTE Ltd.* v. *NuStar Energy Services, Inc.*, 911 F.3d 646 (2d Cir. Dec. 19, 2018), and *Nippon Kaisha Line Limited* v. *NuStar Energy Services, Inc.*, 745 F. App'x 414 (2d Cir. Dec. 19, 2018), which present the same question.

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 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

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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.

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

The relevant facts underlying this case are few and undisputed. NuStar physically provided bunkers to four vessels, the *COSCO Auckland*, the *COSCO Haifa*, the *COSCO Venice*, and the *Tian Bao He* (together, the "Vessels"). App. 14a; ROA.133-35.[3] The fuel NuStar provided was ordered by the Vessels' owner, the Chinese Ocean Shipping Group

[3] "ROA." refers to the Record on Appeal filed in the Fifth Circuit.

("COSCO"), which placed an order with its subsidiary, COSCO Petroleum ("Petroleum"). App. 14a. Petroleum then subcontracted with Chimbusco Americas, Inc. ("Chimbusco"), which acted as Petroleum's authorized agent. App. 14a. Chimbusco contracted with a foreign OW affiliate, O.W. Far East (Singapore) Pte. Ltd. ("OW Far East"), to arrange for provision of over 5,500 tons of fuel to the Vessels. App. 15a; ROA.2012, 2020, 2023, 2026. In correspondence with COSCO, OW Far East "referenced NuStar as the physical supplier." App. 15a. OW Far East "subcontracted the order" to its U.S. affiliate, O.W. Bunker USA, Inc. ("OW USA"), which "further subcontracted the order" to NuStar. App. 15a.

When each fueling took place, COSCO's local agent, SeaMark, "coordinate[d] with NuStar for delivery of the bunkers." *See* App. 15a. Each Vessel's chief engineer executed a delivery note or receipt that included language expressly preserving NuStar's right to assert a maritime lien for the fuel it provided. *See* App. 15a. In those documents, the chief engineer 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." ROA.1038-44.

Shortly after fueling each Vessel in October and early November 2014, NuStar billed OW USA for all four bunkering transactions, and the OW entities billed the Vessels those amounts plus a relatively small markup. *See* App. 14a. NuStar invoiced OW USA $2,690,804.70 for the bunkers NuStar supplied to the Vessels, and OW Far East invoiced Chimbusco a total of $2,987,792.63 and for the same bunkers.

ROA.1009, 1016, 1023, 1035; ROA.2035-38. Thus, for the fuel it physically supplied in the two cases, NuStar expected to receive $2,690,804, whereas the OW entities expected only to receive a net amount of $296,988, equaling about 9.9% of all four transactions, for their role in facilitating the transactions as intermediary brokers.

Before NuStar's invoices were paid, however, the entire OW group began filing bankruptcy petitions around the world. App. 13a-14a. OW USA then "informed NuStar that it ha[d] no intention of paying [NuStar] for the fuel provided." App 14a.

A. Proceedings In The District Court.

After OW's insolvency, NuStar filed a complaint *in rem* against COSCO asserting maritime liens against the Vessels that received fuel. App. 14a. To "avoid arrest of the vessels," COSCO deposited funds in escrow and interpleaded all parties involved. App. 14a. Relevant here, NuStar and ING Bank N.V. ("ING") [4] each claimed that those transactions resulted in a maritime lien in its favor.

After discovery, NuStar and ING each sought summary judgment that they were entitled to maritime liens under CIMLA for the fuel NuStar

[4] Although OW Far East initially received Chimbusco's fuel order and OW USA was NuStar's contractual counterparty, ING claimed the lien as OW Far East's assignee. *See* App. 25a. OW Far East never appeared in the case and OW USA was dismissed prior to appeal. NuStar and ING disputed the scope and enforceability of ING's purported assignment, and the district court held it to be valid and enforceable. App 25a. The Fifth Circuit, however, subsequently held that NuStar lacked standing on appeal to challenge the district court's holding as to ING's assignment. App. 11a. In this petition, NuStar does not seek review of that holding of the Fifth Circuit.

provided to the Vessels. App. 12a. The district court noted that the "sole issue" for NuStar was whether it provided fuel "on the order of the owner or a person authorized by the owner." App. 18a. The key issue for ING, however, was whether it could show, as the assignee of OW Far East, that OW Far East had provided the bunkers to the Vessels even though it was NuStar that had "delivered the fuel bunkers." *See* App. 26a.

The district court held that ING possessed liens for the full value of the transactions while NuStar had no liens. The court held that whether NuStar had acted on the order of the Vessels or their agents "depend[ed] on the nature of the relationships between the intermediate entities." App. 18a. It held that because "NuStar was not in an agency relationship with the vessel owner or any entity with authority to bind the vessel," App. 23a, it could not possess a lien unless "an entity with authority to bind the vessels directed that [NuStar] be selected as the supplier" or "[NuStar] was identified and accepted by the vessel's owner prior to performance." App. 23a-24a. The court then held that NuStar had no lien under that test because NuStar had not been selected by Chimbusco or Petroleum, since the evidence showed that OW USA—acting as a non-agent subcontractor—had selected NuStar. App. 24a.

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. NuStar had argued "forcefully" that the Vessels' direct involvement with its deliveries obviated any need to prove a direct contractual relationship with the Vessels' agent. App. 24a-25a. But the district court

held that the Vessels' acknowledgement of delivery did not "ratif[y]" the subcontractor's services and therefore could not supply the necessary link to the Vessels' agent. App. 24a-25a. Though the district court recognized the "dissonance in finding that a supplier of necessaries to a vessel is not entitled to a maritime lien under a federal statute designed to make it easier for suppliers to obtain liens," the court nonetheless held that "CIMLA does limit which suppliers are entitled to a lien" and felt it had no "commission to expand" CIMLA's reach. App. 25a.

By contrast, the district court held that CIMLA did grant a lien in favor of OW Far East and therefore ING as its assignee. Here, the key issue was whether OW had "provided" fuel under the statute. App 25a-26a. The court found that it had, because "a party need not be the physical supplier or deliverer" to satisfy CIMLA. App. 25a-26a. That meant that "the fact that NuStar delivered the fuel bunkers and not O.W. Far East [wa]s immaterial." App. 26a. Instead, OW Far East was entitled to the lien because it was "contractually obligated to deliver the supplies." App. 26a. That arrangement meant that the direct contractual counterparties of the Vessels' agents—OW Far East—was a "'provider of necessaries" even though it had never touched any fuel. *See* App. 26a.

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 declaring that that NuStar "does not possess maritime liens pursuant to CIMLA against the Cosco Vessels" such that NuStar's maritime lien claims were dismissed. App. 29a-30a. The district court also entered judgment that ING—as OW Far

East's assignee—could "enforce maritime liens under CIMLA against the COSCO Vessels *in rem*" for the full contract amount. App. 30a.

B. Proceedings In The Court Of Appeals.

NuStar appealed to the Fifth Circuit. But before the panel decided NuStar's case, a different panel of the Fifth Circuit decided a similar case, *Valero Marketing & Supply Co.* v. *M/V Almi Sun*, 893 F.3d 290 (5th Cir. 2018) ("*Valero*"), which also arose out of the OW insolvency. The court held that that case, which involved a lien claim by a physical supplier in substantially the same circumstances as NuStar, was "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." *Id.* at 294. That meant that the physical supplier, Valero, had no lien unless it showed "that an entity authorized to bind the ship 'controlled [its] selection * * * and/or its performance.'" *Id.* (quoting *Lake Charles Stevedores, Inc.* v. *Professor Vladimir Popov MV*, 199 F.3d 220, 229 (5th Cir. 1999) ("*Lake Charles*") (alterations original). Because the facts showed merely that the vessel owners had an "awareness of Valero" and not that they controlled Valero's selection, Valero had no lien. *Id.* at 294-95.

Judge Haynes, however, dissented because, in her view, the panel should have applied the test adopted by the Eleventh Circuit, under which the physical supplier would have prevailed. *Id.* at 298-300. She therefore criticized the majority for having "create[d] an unnecessary circuit split with the Eleventh Circuit." *Id.* at 298. In her view, the significant and ongoing involvement by the vessel owners in "directing, testing, and/or inspecting" Valero's provision of fuel to the vessel should have afforded a

lien even though there was no contractual privity between the supplier and the vessel or its agent. *Id.* at 300 (citation omitted).

In NuStar's case, the panel followed the *Valero* precedent in holding that NuStar did not possess maritime liens. The Fifth Circuit explained that it saw "no daylight between *Valero* and [NuStar's] case," and therefore "agree[d] with the district court that NuStar does not hold maritime liens." App. 6a. As in *Valero*, the facts in NuStar's case "showed no more than that the vessel's agents were aware of the physical supplier's identity—not that the physical supplier acted on the order of the vessel's agents." App. 5a (internal quotations removed).

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.[5]

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 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

[5] 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.

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. In *ING Bank N.V.* v. *M/V TEMARA, IMO No. 9333929*, 892 F.3d 511 (2d Cir. 2018) ("*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." *Id.* at 521. And in *U.S. Oil Trading LLC* v. *M/V VIENNA EXPRESS*, 911 F.3d 652 (2d Cir. 2018), 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*, 199 F.3d at 229). 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.[6]

In *Valero*, the Fifth Circuit followed the Second Circuit, *see* 893 F.3d 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

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[6] Accordingly, in the *Clearlake* and *Nippon Kaisha* cases, *see supra* note 1, the Second Circuit applied its *Temara* holding to deny NuStar's lien claims. NuStar's companion petition seeks review of those decisions.

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). In the case below, the Fifth Circuit applied its rule in *Valero* 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. 5a-6a.

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 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). 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.[7]

So too here. In this case, the Vessels' agents knew in advance that NuStar—rather than any OW intermediary—would physically provide the fuel the

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

Vessels ordered, and the Vessels did not object to NuStar's involvement. *See* App. 15a. Moreover, the Vessels' port agent directly coordinated with NuStar and its agent to fuel the Vessels, and the Vessels' own crew confirmed that NuStar had fulfilled the Vessels' orders by signing NuStar's delivery certificates. App. 15a. 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 Fifth 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. *See* App. 5a-6a.

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 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.[8] 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, 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

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[8] *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 Alabama, 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).

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.[9] But even if a 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.

[9] 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 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.

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.[10]

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 this case the Vessels' owner, COSCO, first passed its order through its subsidiary, Petroleum. App. 14a. Petroleum then passed that order to another affiliated party, Chimbusco, before it reached OW Far East. App. 14a-15a.[11] Chimbusco is a "corporate affiliate" of COSCO.

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[10] 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. 25a-26a.

[11] Similarly, in one of the Second Circuit cases that is the subject of NuStar's companion petition, the vessel owner procured its bunkers through its "sister" trading company. *See*

O'Rourke Marine Servs. L.P., L.L.P. v. *M/V COSCO Haifa*, 179 F. Supp. 3d 333, 335 (S.D.N.Y. 2016), *aff'd*, 730 F. App'x 89 (2d Cir. 2018). COSCO originally claimed Chimbusco was Petroleum's subcontractor and not its agent, though it later claimed otherwise. *See* ROA.133; ROA.1960 n.2. But 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*, 179 F. Supp. 3d at 339 ("[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

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Clearlake Shipping PTE Ltd. v. *O.W. Bunker (Switzerland) SA*, 239 F. Supp. 3d 674, 680 (S.D.N.Y. 2017).

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 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

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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.").

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. 15a (NuStar "referenced * * * as the physical supplier" before each delivery). 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. 15a (port agent "coordinate[d] with NuStar for delivery of the bunkers, and Vessels "accepted the bunkers by signing and stamping NuStar's Marine Fuel 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 Fifth 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, 444 (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 Fifth 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

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[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. The decision below was the subject of a Rule 54(b) judgment in the district court that resolved the maritime lien question, and the Fifth Circuit affirmed the district court on that dispositive question.[14] Accordingly, this Court's answer to the question presented will likely be dispositive in this case and will provide needed guidance on an important question of statutory interpretation that is critical to maritime commerce.

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

[14] The district court also held that ING's assignment of OW Far East's lien was valid and enforceable. App. 25a. But that holding is not at issue in this petition. *See supra* note 4.

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. [15] 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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[15] *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 judgment.

Respectfully submitted,

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March 18, 2019

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20246

United States Court of Appeals
Fifth Circuit
FILED
January 14, 2019
Lyle W. Cayce
Clerk

NUSTAR ENERGY SERVICES, INCORPORATED,

Plaintiff - Appellant

v.

M/V COSCO AUCKLAND, IMO No. 9484261, et al.

Defendants - Third Party Plaintiffs

COSCO Haifa Maritime Ltd., COSCO Auckland Maritime Ltd., COSCON, COSCO Venice Maritime Ltd.,

Third Party Plaintiffs - Appellees

v.

ING BANK N.V.,

Third Party Defendant - Appellee

Appeal from the United States District Court
For the Southern District of Texas
USDC No. 4:14-CV-3648

Before WIENER, SOUTHWICK, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:*

This lawsuit is the latest round in the maritime litigation spawned by the collapse of OW Bunker, formerly the world's largest supplier of fuel for ships. In federal courts across the country, OW's subcontractors have asserted maritime liens on the ships to which they physically delivered fuel. If successful, these claims would allow them a full recovery rather than the pennies on the dollar they would likely receive in bankruptcy court. But the subcontractors are not alone in their pursuit of maritime liens—OW's largest secured creditor has also staked a claim. Our ruling in an earlier OW Bunker case means that the subcontractor here does not possess liens on the vessels it supplied because it was not acting on the orders of the vessels or their agents. And because it does not have liens, we conclude that it is not able to appeal a ruling that the secured creditor does hold liens.

I.

The secured creditor, ING Bank, asserts maritime liens based on a $700 million revolving credit facility that a group of lenders provided OW Bunker and its affiliates almost a year before they went under. ING served as the syndicate's security agent. To secure the credit facility, each OW entity assigned ING "all of its rights, title and interest in respect of the Supply Receivables." "Supply Receivables" are amounts owed for the sale of oil products.

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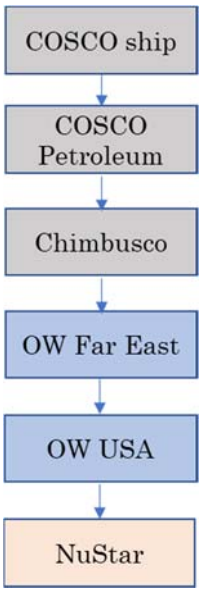
* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Four such sales gave rise to this case. Each sale involved the same series of transactions. COSCO ships ordered fuel bunkers from COSCO Petroleum, which then contracted through Chimbusco Americas, a COSCO agent with authority to bind the vessels. Chimbusco contracted with OW Far East to supply the bunkers. OW Far East subcontracted to its United States affiliate, OW USA. And OW USA subcontracted to NuStar, which physically supplied the fuel bunkers to the ships. NuStar is the other party that asserts maritime liens on the COSCO vessels that received the bunkers.

This chart showing the layers of intermediaries helps:



NuStar's invoices to OW USA went unpaid as the OW Bunker network collapsed. Two weeks after the last delivery, OW USA filed for Chapter 11 bankruptcy in Connecticut. Back in Houston, NuStar quickly sued the COSCO vessels in rem, asserting

maritime liens. To avoid arrest of the vessels, COSCO agreed to deposit the $2.69 million owed to NuStar into an escrow account to serve as a substitute res.

COSCO then filed a third-party claim interpleading NuStar, OW Far East, OW USA, and ING. OW Far East never appeared in the litigation. OW USA disclaimed its interest in "any claims arising from the bunker supply transaction" at issue, as required by its liquidation plan approved by the bankruptcy court. ING, though, claimed an interest and brought maritime lien and contract counterclaims of its own, asserting the rights assigned it in the security agreement.[1]

On competing motions for summary judgment, the district court first ruled that NuStar did not hold liens under the Commercial Instruments and Maritime Liens Act because it had delivered the bunkers on the order of OW USA, not "on the order of the [vessel] owner or a person authorized by the owner." *See* 46 U.S.C. § 31342(a). On the other hand, OW Far East was entitled to maritime liens because it was obligated—by a contract with one authorized to bind the vessels (Chimbusco)—to deliver the bunkers. And OW Far East had, the district court concluded, validly assigned those maritime liens to ING. As a result, the district court awarded ING a judgment against the COSCO vessels for the $2.99 million owed OW Far East for the fuel. NuStar appeals both the ruling that

[1] The district court later clarified that ING could not claim against the escrowed funds because of the terms of NuStar's escrow agreement. It nevertheless determined that NuStar's claim against the fund and ING's maritime lien claims against the vessels were sufficiently adverse, and COSCO's threat of double liability sufficiently high, to justify COSCO's use of the interpleader procedure. *See* FED. R. CIV. P. 22.

it does not hold maritime liens and the ruling that OW Far East validly assigned its maritime liens to ING.

II.

As NuStar's counsel acknowledged at oral argument, our recent decision in another OW Bunker case controls the first half of this one. Under the Commercial Instruments and Maritime Liens Act, "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel." 46 U.S.C. § 31342(a)(1). Trying to meet that requirement, NuStar relied largely on Chimbusco's being aware that NuStar would physically supply the fuel bunkers, and the vessels' employees' overseeing and accepting the deliveries. The district court held that those facts did not rise to the level of "authorization" by the vessel owner (COSCO) or one authorized by the owner (Chimbusco).

Since then, this court has agreed that "[m]ere awareness does not constitute authorization under CIMLA." *Valero Mktg. & Supply Co. v. M/V Almi Sun*, 893 F.3d 290, 295 (5th Cir. 2018). In *Valero*, as here, the vessel's agent knew that the OW intermediary had selected Valero as the physical supplier and did not object. *Id.* at 294. The vessel's employees "monitored and tested Valero's performance." *Id.* But those facts showed no more than that the vessel's agents were aware of the physical supplier's identity—not that the physical supplier acted "on the order of" the vessel's agents. *Id.*; *see also Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220, 229 (5th Cir. 1999) ("[S]ubcontractors . . . are generally not entitled to assert a [maritime] lien on their own behalf, unless it can be shown that an entity authorized to

bind the ship controlled the selection of the subcontractor and/or its performance.").

As we see no daylight between *Valero* and this case,[2] we agree with the district court that NuStar does not hold maritime liens.

III.

Now to the question not at issue in *Valero*. NuStar does not challenge the district court's ruling that OW Far East satisfied the statutory requirement for maritime liens. Unlike NuStar, OW Far East did receive the vessel owner's authorization to provide the fuel.

But NuStar does challenge the ruling that OW Far East validly assigned its maritime liens to ING as part of the security agreement for the $700 million credit facility. It contends that OW Far East's assignment of "all of its rights, title and interest in respect of the Supply Receivables" does not include the maritime liens securing the fuel contracts. And even if it does, NuStar argues that such an assignment would be unenforceable. Complicating the latter issue is the English choice-of-law clause that governs the security agreement, and thus the assignment. NuStar points

[2] *Valero* joined two other circuits that had ruled the same way in OW Bunker cases. *ING Bank N.V. v. M/V TEMARA*, 892 F.3d 511, 521–22 (2d Cir. 2018); *Barcliff, LLC v. M/V Deep Blue*, 876 F.3d 1063, 1071 (11th Cir. 2017). It now has even more support as the Ninth Circuit has since agreed with *Valero*. *See Bunker Holdings Ltd. v. Yang Ming Liberia Corp.*, 906 F.3d 843, 847 (9th Cir. 2018). The Ninth Circuit's ruling on this question in an OW Bunker case is especially noteworthy because it distinguished an earlier Ninth Circuit decision that is one of the main cases that NuStar relies on. *See id.* at 846 (concluding that the case was not controlled by *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1988)).

to authority stating that under English law "it appears that the maritime lien is not transferable," NIGEL MEESON & JOHN A. KIMBELL, ADMIRALTY JURISDICTION AND PRACTICE ¶ 1.53, at 21 (4th ed. 2011), and both sides submitted expert reports on this question.

But before we address the scope of the assignment, or the assignability of maritime liens, we must assure ourselves that NuStar still has a cognizable interest in the answer to these questions about ING's liens in light of our holding that NuStar does not have liens on the vessels. The concern is that the district court's ruling that OW Far East assigned its liens to ING no longer affects NuStar in a concrete way. This requirement of a live controversy, which stems from Article III limitations on our jurisdiction, is better known as part of the standing inquiry conducted at the beginning of a lawsuit. But a party's need to show that connection to a dispute is no less true for parties invoking the power of an appellate court than for parties filing suits in district courts. *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013); *see also Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994) ("Merely because a party appears in the district court proceedings does not mean that the party automatically has standing to appeal the judgment rendered by that court."). When "standing to appeal is at issue, appellants must demonstrate some injury *from the judgment below*." *Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993) (emphasis in original).

To appeal the assignment ruling, NuStar thus must show that it would be better off if the district court had not ruled that the assignment was valid. The standing label for this need to show that a "favorable

ruling" will benefit a party is redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The most direct route to that is not available: NuStar would not receive an immediate benefit from a reversal on the ING issue. That is, an appellate ruling that ING was not assigned the liens would not result in judgment being entered in NuStar's favor for the $2.99 million or any other sum.[3] Of course, if we had reversed and ruled that NuStar held maritime liens on the vessels, then it would have standing to challenge the ruling that ING holds a lien. But we have just held that NuStar does not hold liens. So our ruling against NuStar's maritime lien claims moots NuStar's interest in challenging the assignment as a competing lienholder. *See Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 940 (5th Cir. 1998) (holding that second issue the appellant raised was moot because resolution of the first issue meant that a win on the second would not benefit the appellant).

NuStar proposes an alternative theory of standing not dependent on its being a lienholder. NuStar is a creditor in OW USA's bankruptcy, and it argues that the ruling in favor of ING deprived OW USA's bankruptcy estate of $2.99 million. The idea is that if no claimant holds a lien on the vessels, then COSCO's payment for the fuel would end up in the bankruptcy. Even assuming that NuStar would have standing to fight this battle that affects all creditors,[4] and for

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[3] OW Far East could have appealed the ruling that it assigned its rights, but it has never appeared in this case.

[4] There may be third party standing problems that limit NuStar's ability to litigate on behalf of the estate. For example, although a question of standing under the bankruptcy statutes as opposed to constitutional standing, a trustee has exclusive

which as an unsecured creditor it likely would receive a tiny fraction of COSCO's fuel payment, the idea that any of this money would end up in NuStar's pockets rests on too "speculative [a] chain of possibilities." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 (2013).

The first bit of uncertainty is whether an appellate ruling rejecting ING's maritime liens would change the outcome of this case. On remand, ING would still pursue its as-yet-undecided contract claims asserting a security interest in OW Far East's supply receivables—which payment COSCO admits it owes. With neither COSCO nor OW Far East contesting this contract claim, there is a good chance ING would recover the $2.99 million in contract. And if ING can claim the money in contract, reversing on ING's maritime lien claims would leave the OW USA bankruptcy estate and its creditors in the same position they are in now.

More importantly, even if ING lost not only on its maritime lien claims but also on its contract claims, NuStar has not demonstrated a meaningful probability that the $2.99 million would find its way to the OW USA bankruptcy estate. In a world in which COSCO did not have to pay OW Far East's assignee (ING), it would still have to pay OW Far East. So NuStar's theory depends on inferring that some or all of the $2.99 million, if paid to OW Far East, would reach the OW USA bankruptcy estate.

Given the intricacies of international bankruptcy law, we cannot speak with certainty about whether NuStar's theory could work. But NuStar has not

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standing to recover property that belongs to the estate. *See In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 584 (5th Cir. 2008).

shown a substantial likelihood that the money would end up in Connecticut bankruptcy court. *Lujan*, 504 U.S. at at 561 (explaining that a party must show that a favorable ruling will "likely" benefit it); *Rohm & Hass*, 32 F.3d at 208 (noting appellant has burden to show standing to appeal). It relies on ING's agreement in OW USA's now-effective liquidation plan to transfer its interest in OW USA's receivables to OW USA's liquidating trust. *See* Debtors' First Modified Liquidation Plans at 8, 28, *In re O.W. Bunker Holding N. Am. Inc.*, No. 14-51720 (Bankr. D. Conn. Dec. 15, 2015) (Doc. 1279-1). But the $2.99 million is an OW *Far East* receivable, not an OW *USA* receivable. ING's giving up its right to OW USA's receivables thus appears to have no bearing on what would happen to the money if COSCO paid ING directly, or if ING claimed the funds after COSCO paid them to OW Far East. To the contrary, OW USA's liquidation plan does not appear to envision recoveries from foreign affiliates (like OW Far East) that acted as contract suppliers. On transactions like those at issue here, in which OW USA acted as an intermediary between the contract supplier (OW Far East) and the physical supplier (NuStar), the plan tells the OW USA liquidating trust to instruct customers like COSCO to pay invoices sent by the contract supplier. *See id.* at 29. The plan is silent on whether OW USA's liquidating trust should expect to see any of the money paid to the contract supplier under those invoices. And given what NuStar describes as the "collapse of the international O.W. Bunker ('OW') group of companies," as well as our having no reason to think ING or some other entity would not have a claim superior to the OW USA liquidating trust's, prospects for payment from OW

Far East appear remote at best based on what NuStar has presented to us.

NuStar has not shown that it is "likely, as opposed to merely speculative" that the nonpayment of the fuel "will be 'redressed by a favorable decision'" on ING's liens. *Lujan*, 504 U.S. at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38 (1976)). We thus lack jurisdiction to review the district court's ruling that OW Far East assigned its maritime liens to ING, and we must dismiss NuStar's appeal of that ruling. *See Hollingsworth*, 570 U.S. at 715.[5]

* * *

The district court's judgment rejecting NuStar's maritime liens is AFFIRMED. NuStar's appeal of the district court's judgment awarding ING Bank judgment against the vessels is DISMISSED.

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[5] NuStar suggests that if it lacks standing to appeal the district court's assignment ruling, we should vacate it. But we would vacate only if the district court also lacked jurisdiction, which it did not. ING's claim against COSCO alleged that COSCO owed ING $2.99 million. That is a classic, justiciable dispute over money. Of course, our inability to review the district court judgment as to ING means that this case is not resulting in circuit precedent on the question whether the liens are assignable to ING. So to the extent this issue arises in other OW Bunker cases in this circuit, it remains an open question.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NUSTAR ENERGY SERVICES, INC.	§	
	§	
Plaintiff,	§	
VS.	§	**CIVIL ACTION NO. 4:14-CV-3648**
	§	
M/V COSCO AUCKLAND, IMO NO. 9484261, et al,	§	
	§	
Defendants.	§	

MEMORANDUM & ORDER

The controversy in this case is over funds that have been interpleaded, and which of two parties holds a valid maritime lien. Cross-motions for summary judgment have been filed by Plaintiff NuStar Energy Services, L.P. ("NuStar") (Doc. No. 69) and Defendant ING Bank N.V. ("ING") (Doc. No. 71).

The dispute arises out of the delivery of fuel bunkers by NuStar, a physical supplier of fuel based in Texas, to four vessels owned and operated by the Chinese Ocean Shipping Group ("COSCO"). NuStar has not been paid for the delivered fuel as a result of the financial collapse of O.W. Bunker Trading and Supply A/S ("O.W. Bunker"), which until 2014 was the largest fuel supplier in the world. Two of O.W. Bunker's

entities, O.W. Far East and O.W. USA, were involved in selecting and contracting with NuStar to provide the fuel in this case. Both entities have filed for bankruptcy, and except for its claimed maritime lien, NuStar has only an unsecured claim in bankruptcy.

In order to receive payment for the fuel it provided, NuStar asks the Court to find that it has a maritime lien against the COSCO vessels pursuant to the Commercial Instruments and Maritime Lien Act ("CIMLA"), 46 U.S.C. §31341-43. Both COSCO and ING oppose this motion. COSCO argues that NuStar has no lien, and ING argues both that NuStar has no lien and that ING, as assignee of the O.W. Bunker groups' claims, has a lien against the COSCO vessels under CIMLA. After considering the parties' motions and responses thereto, the oral arguments, and all applicable law, the Court holds that NuStar's motion for summary judgment must be denied, while ING's motion for summary judgment must be granted.

I. BACKGROUND

A. Overview

This action stems from the financial collapse of O.W. Bunker Trading and Supply A/S ("O.W."), an international bunker supply conglomerate based in Denmark, which left approximately $650 million of unpaid debt and sparked litigation worldwide. Here, the agent for the COSCO vessels contracted with O.W. Bunker Far East, Inc. (the Singapore-based subsidiary of O.W. Bunker) for the delivery of fuel bunkers when the vessels docked in Houston, Texas. O.W. Far East in turn subcontracted with O.W. USA,

Inc. (one of O.W. Bunker's three U.S. subsidiaries,[1] incorporated in Texas), which subcontracted with NuStar. NuStar delivered almost $2.7 million worth of fuel to the four vessels. But in 2014, before NuStar was paid, O.W. Bunker collapsed, and filed for bankruptcy protection in Denmark. O.W. Far East is undergoing liquidation proceedings in Singapore. O.W. USA has filed a voluntary Chapter 11 petition in U.S. Bankruptcy Court for the District of Connecticut, and has informed NuStar that it has no intention of paying it for the fuel provided.

NuStar filed its complaint against COSCO in December 2014. To avoid arrest of the vessels, COSCO's agent deposited the funds owed to NuStar in an escrow account, and COSCO interpleaded NuStar, ING, and several O.W. Bunker entities.

B. The Provision of Fuel to COSCO's Vessels

On four separate occasions, NuStar, a Houston-based supplier of fuel bunkers, delivered fuel to COSCO vessels. (Doc. No. 69 at 3.) The transactional history between COSCO's initial order and NuStar's ultimate delivery of fuel is complex, but is virtually identical for each vessel.

In each instance, COSCO placed an order for fuel with COSCO Petroleum ("Petroleum"), a subsidiary of COSCO. Petroleum subcontracted these orders to Chimbusco Americas, Inc., an authorized agent of COSCO. As COSCO's agent, Chimbusco was authorized to bind the vessels. (Doc. No. 82 at 2 n. 2.) Chimbusco then solicited bids from various traders,

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[1] O.W. Bunker Holding North America, Inc. is a wholly owned subsidiary of O.W. Bunker, and is the direct, sole owner of O.W. Bunker USA, Inc. and O.W. Bunker North America, Inc.

including O.W. Far East, the Singapore-based subsidiary of O.W. Bunker. (*Id.* at 3.) Chimbusco contracted with O.W. Far East to supply the fuel to COSCO's vessels. (*Id.*) O.W. Far East was not authorized by COSCO to act as its agent, and COSCO held O.W. Far East responsible for supplying the fuel. (*Id.*)

O.W. Far East then subcontracted the order to O.W. USA, and O.W. USA further subcontracted the order to NuStar. (*Id.* at 4.) COSCO did not contract with O.W. USA or NuStar, nor did COSCO direct O.W. Far East to select NuStar. (*Id.*) Although the purchase confirmation from COSCO to O.W. Far East referenced NuStar as the physical supplier, NuStar's identity was obtained solely for delivery logistics and security. (*Id.*) To that end, the president of Chimbusco sent an email to the vessels' Houston agent SeaMark, instructing SeaMark to coordinate with NuStar for delivery of the bunkers. (*Id.*)

NuStar delivered the bunkers to the vessels using a NuStar-chartered tug, and the vessel's chief engineer accepted the bunkers by signing and stamping NuStar's Marine Fuel Delivery note. (Doc. No. 69 at 5.)

C. ING Bank

In December 2013, ING and a syndicate of lenders extended a $700 million credit facility to provide working capital for the O.W. Bunker group's global operations. (Doc. No. 71 at 2.) In exchange for the extension of this credit, O.W. Bunker assigned ING and the lenders the rights to all of O.W. Bunker's group receivables. (Doc. No. 71 at 2.) By the time O.W. Bunker declared insolvency, it had drawn on almost $650 million of those funds. (Doc. No. 71 at 2.)

II. LEGAL STANDARD

Summary judgment is proper when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). The court can consider any evidence in "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Crawford*, 234 F.3d at 902.

The party moving for summary judgment bears the burden of demonstrating the absence of a genuine dispute of material fact. *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001). If the moving party meets this burden, the non-moving party must go beyond the pleadings to find specific facts showing that a genuine issue of material fact exists for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Summary judgment is appropriate if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322.

III. APPLICABLE LAW

"The purpose of maritime liens is to enable a vessel to obtain supplies or repairs necessary to her continued operation by giving a temporary underlying pledge of the vessel which will hold until payment can be made or more formal security given." *Lake Charles*

Stevedores, Inc. v. Professor Vladimir Popov, MV, 199 F. 3d 220, 223 (5th Cir. 1999) (internal quotations omitted). Maritime liens are "largely statutorily created." *Id.* Both NuStar and ING assert that they are entitled to maritime liens under the Commercial Instruments and Maritime Liens Act ("CIMLA"), a statute that creates maritime liens for necessaries in certain instances. 46 U.S.C. §§ 31301-31343. CIMLA requires a party to show that (1) it furnished repairs, supplies, or other necessaries, (2) to any vessel, (3) upon the order of the owner or of a person authorized by the owner. *Id.* at § 31342. CIMLA defines "necessaries" as including "repairs, supplies, towage, and the use of a dry dock or marine railway," and also provides that:

> (a) The following persons are presumed to have authority to procure necessaries for a vessel:
>
> (1) the owner;
>
> (2) the master;
>
> (3) a person entrusted with the management of the vessel at the port of supply; or
>
> (4) an officer or agent appointed by—
>
> (A) the owner;
>
> (B) a charterer;
>
> (C) an owner pro hac vice;
>
> (D) an agreed buyer in possession of the vessel. 46 USC §§ 31301(4) &

31341(a). *Id.* at § 31341.

IV. ANALYSIS

A. NuStar's Right to a Lien

There is no dispute in this case that fuel is a necessary and that NuStar provided the fuel to the vessel. The sole issue is whether or not it was provided "on the order of the owner or a person authorized by the owner." What appears, at first, to be a relatively simple inquiry is complicated by the long chain of intermediaries between the vessel owners and NuStar, a pattern that is common in the maritime fuel industry. Whether or not NuStar provided fuel on the order of the owner or a person authorized by the owner depends on the nature of the relationships between the intermediate entities. *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220, 230 (5th Cir. 1999) ("it is not whether an intermediary can be expected to supply the necessaries itself that distinguishes instances in which the actual suppliers have liens, but it is rather the nature of the relationship between each pair of entities that are involved in the transaction at issue.").

Two lines of cases have developed to help courts determine the nature of the relationships: the general contractor/subcontractor line of cases, typified by the Fifth Circuit case *Lake Charles Stevedores*, 199 F.3d 220, and the principal/agent line of cases, typified by the Ninth Circuit case *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (1988).

In *Lake Charles Stevedores*, the Fifth Circuit considered a claim for a maritime lien brought by stevedores who had loaded cargo onto a vessel. 199 F.3d at 221. ED&F Man Sugar, Inc. ("Man Sugar") purchased rice from Broussard Rice Mill ("Broussard"). *Id.* at 222. Broussard was responsible

for providing the stevedoring services to get the rice onto the vessel, sub-chartered by Man Sugar, which would then deliver the rice to Man Sugar. *Id.* Freight forwarder Reid & Company asked Lake Charles Stevedores ("LCS") to submit a bid for loading the rice. *Id.* LCS was told it would be working for Broussard. *Id.* LCS was awarded the contract, and subsequently loaded the vessel. *Id.* at 222-23. The vessel's master signed LCS's Activity Sheets and receipt, Man Sugar made its final payment to Broussard, and LCS sent its invoice to Broussard. *Id* at 223. Broussard failed to pay LCS and subsequently went into receivership. *Id.* The district court denied LCS a lien and LCS appealed. *Id.*

In its opinion, the Fifth Circuit described the two lines of cases regarding maritime liens. In the general contractor/subcontractor line of cases, the general contractor supplying necessaries on the order of an entity with authority to bind the vessel has a lien, but subcontractors generally do not. *Id.* at 229. In the middle-man line of cases, however, "despite what can be a large number of intermediaries, the ultimate supplier of the necessaries may obtain a maritime lien under certain circumstances." *Id.*

The court concluded that the situation presented before it was not similar to the middle-man line of cases as represented by *Ken Lucky*, but was more akin to a general contractor/subcontractor relationship. *Id.* at 230. In order to obtain a maritime lien, then, LCS needed to show that the vessel owner retained control over its selection and/or performance. Because the court found that LCS was selected by Broussard and not Man Sugar, the court affirmed the district court's denial of the maritime lien. *Id.* at 231, 233.

Representing the agency, or middle-man, line of cases is *Ken Lucky*, 869 F.2d 473. There, the vessel's subcharterer, Bulkferts, Inc., placed an order for fuel with Bulkferts' managing agent, Eurostem. *Id.* at 475. Eurostem contacted Brook Oil, and Brook Oil instructed Gray Bunkering Services to place an order for the fuel with Marine Fuel. *Id.* Once the order was placed with Marine Fuel, the vessel's local agent arranged for delivery of the supplies, and on the designated date, Marine Fuel delivered the bunkers. *Id.* The chief engineer accepted the supplies with the approval of the master of the vessel. Marine Fuel then billed Gray for the supplies, but before either Gray or Marine Fuel was paid, Brook Oil went into receivership. *Id.*

The district court refused to grant Marine Fuel a maritime lien, finding that Brook Oil had no authority, presumed or implied, to subject the Ken Lucky to a lien, and that Brook Oil acted independently of Bulkferts in supplying the vessel. *Id.* at n.1 The district court found that because no agency relationship existed between Bulkferts (the sub-charterer) and Brook Oil, no presumed authority under the maritime lien act was established. *Id.* The district court also found that no implied authority existed, because the charter agreement included a no lien clause. *Id.*

On appeal, the Ninth Circuit found that it did not need to reach the district court's conclusion that no agency relationship existed between Brook Oil and Bulkferts, "because appellees have already admitted that the fuel and bunkers were sold *to Bulkferts*." *Id.* at 477 (emphasis in original). Therefore, the panel concluded, "Marine Fuel need not establish agency between Brook and Bulkferts to fall within the scope

of one entitled to a maritime lien under the Act." *Id.* Instead, the court focused on the fact that Bulkferts was authorized to bind the vessel, Eurostem (Bulkferts' managing agent) ordered the fuel, and Marine Fuel delivered the fuel to the vessel. As a result, the court found that the order originated from Bulkferts, who had presumed authority under CIMLA. *Id.*

The court also considered the master's implied authority to incur a lien against the vessel. *Id.* at 477-78. Ken Lucky conceded that the master of the ship accepted the supplies that Marine Fuel delivered, but argued that the master had no authority to accept the supplies because of a no lien clause in the charter agreement. *Id.* at 477. In finding that the master did have implied authority to incur a lien against the vessel, the Ninth Circuit pointed to the following sequence of events: 1) the order originated from Bulkferts; 2) Eurostem, Bulkferts' managing agent, placed the order with Brook; 3) Marine Fuel received a telex from Gray confirming that the owner authorized the order; 4) before delivering the bunkers, Marine Fuel notified Fillette (Ken Lucky's local husbanding agent) of the order, and Fillette arranged for delivery of the bunkers; 5) Fillette received a telex from Bulkferts' domestic agent, stating that it was arranging for a purchase of bunkers for the ship; 6) the ship's chief engineer accepted the bunkers, acknowledging receipt, with the approval of the master; 7) the ship's master had presumed authority to incur a lien under the Act; and 8) the vessel benefited from the bunker supply. *Id.* at 478. For these reasons, the Ninth Circuit reversed the district court and found that Marine Fuel was entitled to a maritime lien. *Id.* at 474.

ING contends that two major distinctions between the facts of *Ken Lucky* and the facts presented here dictate a different outcome. First, ING argues that there is no presumed authority because neither the owners of the vessels nor the agent of the vessels (the entities with presumed authority under CIMLA) admitted that NuStar sold fuel directly *to them*, as the vessel subcharterer had admitted in *Ken Lucky*. Rather, it contends that, pursuant to the contracts, NuStar sold the fuel to O.W. USA, which sold the fuel to O.W. Far East, which sold the fuel to Chimbusco, an entity with authority to bind the vessel. Therefore, ING asserts, NuStar never sold fuel to Chimbusco, and cannot show an agency relationship with O.W. USA. ING further argues that the fact that NuStar physically delivered the fuel to the vessels is of no import, because the chief engineer of the vessel, who accepted the fuel, did not have presumed authority to bind the vessel.

The second distinction identified by ING is that NuStar never received any communication from O.W. USA confirming that the owner of the vessel had authorized the order, as Marine Fuel did in *Ken Lucky*. This omission is important because if the court determines the entities to have general contractor/subcontractor relationships, there are limited means by which a physical supplier can still assert a lien against a vessel. One of these methods, approved of by the Ninth and Second Circuits, is to show that an entity with authority to bind the vessel directed that the general contractor hire a particular subcontractor. *Lake Charles Stevedores*, 199 F.3d at 231.

Another method, cited in *Lake Charles*, is to show that a subcontractor was identified and accepted by

the vessel's owner or charterer prior to performance. *Id.* However, the Fifth Circuit has made clear that awareness on the part of the vessel's agents that a certain subcontractor would be used is insufficient to constitute authorization. *Id.* Similarly, the vessel's "acceptance of services from a supplier does not alone create a maritime lien." *Valero Marketing and Supply Co. v. M/V/ Almi Sun*, 160 F.Supp.3d 973 at 984 (E.D. La. 2016).

Because no entity with authority to bind the COSCO vessels has admitted that NuStar sold fuel directly to it, as occurred in *Ken Lucky*, NuStar must show an agency relationship between itself and an entity with authority to bind the vessel. Otherwise, the *Lake Charles* line of cases controls, and the only way for NuStar to establish a maritime lien is to fit within the narrow exceptions described by the Fifth Circuit in *Lake Charles Stevedores*.

The facts show that NuStar was not in an agency relationship with the vessel owner or any entity with authority to bind the vessel. COSCO did not authorize O.W. Far East to bind the vessels, but instead authorized Chimbusco to contract with O.W. Far East. O.W. Far East subsequently contracted separately with O.W. USA, which contracted with NuStar. Each of these contracts was separate, and no contract indicated an agency relationship with the vessel owners or any of the other entities. The general contractor/subcontractor line of cases, represented by *Lake Charles Stevedores*, therefore applies.

As described above, NuStar can still establish a lien under *Lake Charles Stevedore* if it can show that 1) an entity with authority to bind the vessels directed that the subcontractor be selected as the supplier, or 2) in

some instances if the subcontractor was identified and accepted by the vessel's owner prior to performance. Unfortunately, NuStar cannot show either.

NuStar was not selected by the vessel owners or an entity with authority to bind the vessel as the physical supplier. Instead, Petroleum solicited bids from various brokers, and nominated Chimbusco to order the bunkers. Although NuStar is listed as the physical supplier on the nomination form, counsel for ING asserted at oral argument that NuStar had been selected by O.W. USA prior to the nomination form, and NuStar did not dispute this. As a result, NuStar cannot show that it was selected by an entity with authority to bind the vessel.

NuStar argues more forcefully that "[t]he fact that each COSCO Vessel's Chief Engineer accepted and signed for each delivery independently establishes NuStar's entitlement to a maritime lien." (Doc. No. 69 at 14.) However, the "ratification" argument NuStar is making was rejected by the Fifth Circuit in *Lake Charles Stevedores*. There, the plaintiff showed that the master of the vessel allowed the plaintiff on board to perform the stevedoring services and accepted those services. But the Fifth Circuit found that, under those circumstances, a maritime lien was not established. "A holding that awareness that necessaries are being supplied was sufficient, even though those necessaries were procured by an entity without authority to bind the vessel, would render the statute's authority requirement meaningless." *Lake Charles Stevedores*, 199 F.3d at 232. Furthermore, the Court held that the vessel's acceptance of the stevedoring services, by signing LCS's Activity Sheets and Mate's Receipt, was simply acceptance of the delivery of rice from Broussard (the general

contractor)—not ratification of the subcontractor's services. *Id.* Similarly, the fact that the Chief Engineer signed for each fuel delivery by NuStar demonstrates an acceptance of O.W. Far East's delivery, and does not establish NuStar's entitlement to a maritime lien.

The Court acknowledges the dissonance in finding that a supplier of necessaries to a vessel is not entitled to a maritime lien under a federal statute designed to make it easier for suppliers to obtain liens, and agrees with the Ninth Circuit that one of the purposes of CIMLA "is to create liens in favor of those who furnish necessaries for the vessel's operation. Permitting [a] contrived financial scheme to prevail effectively destroys the liens of suppliers and subverts the purposes of the Maritime Liens Act." *Ken Lucky*, 869 F.2d at 478. That said, CIMLA does limit which suppliers are entitled to a lien, and the Court does not feel it has a commission to expand the reach of CIMLA beyond what other courts have interpreted the statute to mean.

B. ING's Right to a Lien

Having established that NuStar is not entitled to a maritime lien, the Court turns to ING's claim that it possesses a maritime lien. The Court finds that ING is the assignee of O.W. Far East, and as such is entitled to recover amounts owed to O.W. Far East by Chimbusco. However, ING must still show that O.W. Far East is entitled to a lien under CIMLA. It is clear that the last two requirements of the statute are satisfied—necessaries were supplied to the vessels on the order of an entity authorized to bind the vessels (Chimbusco). As to the first requirement, "a party need not be the physical supplier or deliverer to have

'provided' necessaries under the statute." *Galehead v. M/V Anglia*, 183 F.3d 1242, 1245 (11th Cir. 1999). Thus, the fact that NuStar delivered the fuel bunkers and not O.W. Far East is immaterial. The party contractually obligated to deliver the supplies is entitled to the lien, and in this case that party was O.W. Far East. Because ING can satisfy the requirements of CIMLA, the Court finds that it is entitled to a maritime line.

In addition to recovering the principal amounts of their invoices from COSCO, ING also requests interest and fees "accrued due to Chimbusco's late payment." The Court cannot grant this request. COSCO (and, it follows, Chimbusco) did not withhold payment willfully. Rather, it did not pay O.W. Far East's invoices because it had been sued by NuStar for the amount owed to NuStar by O.W. USA. Thus, COSCO, facing competing claims for payment as a result of O.W. Bunker's demise, and also facing vessel arrest by NuStar, appropriately invoked interpleader and deposited the funds in question in an escrow account. It would be inequitable to penalize COSCO for properly invoking interpleader in order to allow the legal system to determine who should be paid—a situation brought about by O.W. USA's bankruptcy and nonpayment to NuStar. Thus, the Court finds that COSCO is not entitled to any prejudgment interest.

V. CONCLUSION

For the reasons set forth above, ING's Motion for Summary Judgment is **GRANTED** and NuStar's Motion for Summary Judgment is **DENIED**. ING's request for prejudgment interest is **DENIED**.

IT IS SO ORDERED.

SIGNED in Houston, Texas, on this the 1st day of December, 2016.

s/ Keith P. Ellison

HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NuStar Energy Services, Inc. Plaintiff, v. M/V COSCO AUCKLAND IMO NO. 9484261, her engines, apparel, furniture, equipment appurtenances, tackle, etc., *in rem*; M/V TIAN BAO HE, IMO NO. 9390616, her engines, apparel, furniture, equipment appurtenances, tackle, etc., *in rem*; M/V COSCO HAIFA, IMO NO. 9484338, her engines, apparel, furniture, equipment appurtenances, tackle, etc., *in rem*; and M/V COSCO VENICE IMO No. 9484405, her engines, apparel, furniture, equipment appurtenances, tackle, etc., *in rem*, Defendants/Third-Party Plaintiffs,	Civil Action No. 4:14-cv-3648 ADMIRALTY

v.

ING BANK N.V.,

Third-Party Defendant.

JUDGMENT

WHEREAS, NuStar Energy Services, Inc. ("NuStar") filed a motion for summary judgment [Dkt. 69] seeking an order finding that it has maritime liens pursuant to the Commercial Instruments & Maritime Lien Act ("CIMLA"), 46 U.S.C. § 31341-43, against the M/V COSCO AUCKLAND, M/V TIAN BAO HE, M/V/ COSCO HAIFA and M/V COSCO VENICE (the "COSCO Vessels");

WHEREAS, ING Bank N.V., as Security Agent ("ING") filed a motion for summary judgment [Dkt. 71] seeking an order dismissing NuStar's maritime lien claims and granting judgment in ING's favor 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 Memorandum and Order issued by the Court on December 1, 2016 [Dkt. 98], 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 Cosco Vessels, and

thus its Motion for Summary Judgment [Dkt. 69] is denied and its maritime lien claims are dismissed. NuStar takes nothing.

2) That portion of the Motion for Summary Judgment filed by ING Bank N.V. [Dkt. 71] seeking to enforce maritime liens under CIMLA against the COSCO Vessels *in rem* is granted, and ING is awarded a judgment against the Vessels in the amount of $ 2,987,523.85 without prejudgment interest or fees.

3) The Court makes no ruling on ING's *in personam* claims.

4) The COSCO Vessels take nothing against ING and NuStar.

5) Each party is to bear its own costs.

SIGNED at Houston, Texas this 9th day of March, 2017.

s/ Keith P. Ellison

HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE