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No. ______

In The
Supreme Court of the United States

NOVOLOG BUCKS COUNTY,

Petitioner,

v.

CSX TRANSPORTATION COMPANY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in determining, in conflict with the Seventh Circuit, that a transloader or other such entity – that is not a party to a rail carrier's transportation contract or any contract whereby it agrees to accept demurrage liability, has no beneficial ownership of the freight at issue, and does not authorize a consignee designation – is automatically liable for demurrage charges under a rail carrier's tariff because a third party unilaterally lists it as the consignee on a bill of lading and it accepts delivery of the freight, in the absence of compliance with the consignee-agent provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10743(a)(1).

2. Whether the Third Circuit erred in determining that the consignee-agent provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10743(a)(1), applies to the assessment of demurrage charges in conflict with the Seventh Circuit's decision to the contrary with respect to the predecessor of the statute.

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

The caption of this petition contains the names of all the parties to the proceeding in the court below whose judgment is sought to be reviewed.

Petitioner, Novolog Bucks County, the defendant-appellee below, is a non-governmental corporation whose parent corporations are: IQ Martrade Holding und Managementgesellschraft mbH and Levendaal Venture Capital, B.V. There are no publicly held companies that own 10% or more of Novolog Bucks County stock.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit"), vacating judgment as a matter of law in favor of Novolog Bucks County, and remanding the case for further proceedings in the United States District Court for the Eastern District of Pennsylvania ("district court"), as amended, is reported as *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007) and reproduced at Appendix ("App.") 1-34.

The district court's memorandum and order denying the parties' cross-motions for summary judgment is unpublished, but reported as *CSX Transp. Co. v. Novolog Bucks County*, No. 04-CV-4018, 2006 WL 1451280 (E.D. Pa. May 24, 2006) and reproduced at App. 37-79. The district court's order denying the motion for reconsideration of plaintiff, CSX Transportation Company ("plaintiff"), is not reported and is reproduced at App. 83-84. The district court's order denying plaintiff's second motion for reconsideration is not reported and is reproduced at App. 82. The district court's order modifying the reasons for its denial of plaintiff's initial motion for reconsideration is not reported and is reproduced at App. 81. The district court's order entering judgment as a matter of law in favor of defendant, Novolog Bucks County, is unpublished and reproduced at App. 80.

JURISDICTION

The Third Circuit filed the opinion and order at issue on September 5, 2007. The Third Circuit entered the judgment sought to be reviewed on September 5, 2007. The Third Circuit issued minor amendments to the September 5, 2007 opinion by order entered on September 14, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the Third Circuit on a writ of certiorari.

STATUTORY PROVISIONS AND REGULATION INVOLVED

49 U.S.C. § 10743(a)(1)

Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property –

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10746

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to –

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

CSX Transportation Tariff CSXT 8100,
Demurrage Section, Section VIII-C

The pertinent text of this tariff is reproduced at App. 85-99.

STATEMENT OF THE CASE[1]

Petitioner, Novolog Bucks County ("Novolog"), the defendant/appellee below, is a Pennsylvania corporation with its principal place of business in Pennsylvania.

[1] Unless otherwise noted the facts are taken from the Third Circuit opinion, *Novolog Bucks County*, 502 F.3d at 250-52, App. 1-8 and from the district court memorandum at App. 37-43.

Respondent, CSX Transportation Company ("CSX"), the plaintiff/appellant below, is a Virginia company with its principal place of business in Florida.

CSX filed a complaint in the United States District Court for the Eastern District of Pennsylvania ("district court") on August 24, 2004, and an amended complaint on November 18, 2004, asserting that Novolog was liable for demurrage[2] pursuant to its tariff entitled "CSXT 8100, Demurrage Section, Section VIII-C" ("CSX's Tariff"). The district court had diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1337 over CSX's claim which arose under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

CSX sought to impose demurrage against Novolog in the amount of $260,304.00 as set forth on twelve invoices that CSX referred to as "Original Incidental Bills" ("Incidental Bills"). The Incidental Bills have various waybill dates from October 14, 2002 through November 3, 2004. CSX asserted that seven of the Incidental Bills were for inbound demurrage charges in the amount of $214,632.00 assessed against Novolog in an alleged capacity as consignee for certain export steel, and five of the Incidental Bills were for outbound demurrage charges in the

[2] Demurrage, in the context of railroads, is defined as "a charge exacted by a carrier from a shipper or consignee on account of a failure on the latter's part to load or unload cars within the specified time prescribed by the applicable tariffs[.]" BLACK'S LAW DICTIONARY 432 (6th ed. 1990).

amount of $45,672.00 assessed against Novolog in an alleged capacity as shipper/consignor for certain import steel.

CSX filed certain admissions of fact (App. 118-119) and did not contest various facts set forth in Novolog's Statement of Undisputed Facts submitted in support of Novolog's Motion for Summary Judgment in the district court proceeding.[3] CSX also did not contest the district court's findings of fact on its appeal to the Third Circuit. The facts material to the consideration of the questions presented in this petition are as follows.

During the relevant times, Novolog operated a private railroad port on the Delaware River as a tenant at the U.S. Steel Fairless Works facility in Fairless, Pennsylvania, and CSX was a rail common carrier.

According to CSX's Tariff, which is published on CSX's web site and incorporated into CSX's transportation contracts, its purpose is "to describe how the time railcars are under the control of customers is

[3] Specifically, CSX did not contest the facts set forth in Novolog's statement of undisputed facts ("UDF") submitted in support of Novolog's motion for summary judgment at UDF ¶¶ 1-14, 18-20, and 22-24. App. 123-131. In its brief in opposition to Novolog's motion, CSX contested only UDF ¶¶ 15, 16, and 21. App. 120-122.

defined, and to specify the prices that CSXT[[4]] charges should a customer retain control of rail cars beyond the time incorporated into [CSX's] freight rates." App. 85. Application Item 8000 of CSX's Tariff indicates that the document "applies to all CSXT served customers." App. 85.[5]

Novolog's port functioned as a transfer point for the import, export, and domestic transportation of steel. Novolog was recognized as an open gate facility, meaning that within its 700 car facility it received and held railcars on its tracks at the convenience of rail carriers. Although Novolog operated the port at the Fairless Works facility, rail services within and around the port frequently were provided by Conrail Shared Assets ("Conrail"), an entity related to CSX. All railcars were delivered and picked up by Conrail, with the exception of "unit trains" which were delivered and picked up directly by CSX and the Norfolk Southern Railway Co. The Conrail crew routinely

[4] CSX was referred to as "CSX" or "CSXT" interchangeably in certain documents CSX produced during discovery in the district court proceeding.

[5] As set forth in CSX's Tariff, a person receiving its railcars for unloading, or ordering empty railcars for loading, had two days to do so and return the cars to service; if the cars were kept beyond this time, demurrage charges would be assessed. In particular, CSX's Tariff Item 8070-G provides: "[u]nless otherwise advised in WRITING, that another party is willing to accept responsibility for demurrage, consignor at origin or consignee at destination will be responsible for the payment of demurrage charges." App. 92-93.

moved railcars between Novolog's port and Conrail's local rail servicing yard at Morrisville, Pennsylvania.

In early 2003, CSX entered into numerous freight agreements with various steel companies for the shipment to and eventual export of steel freight from Novolog's port. CSX and the steel companies negotiated the timing and logistics of these agreements. Novolog was not a party to these negotiations or the resulting agreements. Novolog was not involved in the preparation of the bills of lading[6] for these freight shipments. The freight was not ordered in Novolog's name, and Novolog did not furnish forwarding directions for the freight. Novolog, however, was engaged in unloading full railcars for export and loading empty cars for import.

With respect to inbound railcars (Novolog's export business), Novolog received loaded railcars, unloaded them according to instructions from various domestic steel companies, transferred the freight onto other means of transportation, and eventually released the railcars back to CSX.[7] According to CSX,

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[6] A bill of lading is the basic transportation contract between the shipper/consignor and the carrier. *S. Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982).

[7] The district court determined that CSX asserted "without evidentiary support" that: (1) Novolog had contracts with these steel companies for the handling of the steel freight; and (2) Novolog knew the steel was inbound before it arrived and had specific instructions from shippers on how to handle the steel freight. App. 40-41.

the steel companies identified Novolog as the "ship to" party or the consignee on the waybills and bills of lading for the steel freight in these railcars.

With respect to outbound railcars (Novolog's import business), Novolog received empty railcars from Conrail, loaded them with steel freight at its facility according to instructions from various entities, and released them to Conrail with the shipping instructions and final destination information it was provided. According to CSX, Novolog was listed as the shipper on the waybills and bills of lading for the steel freight in these railcars.

Also in early 2003, fluctuations in the price of steel caused a significant increase in the amount of steel delivered for export to the Novolog facility. As a result, Novolog was unable to perform loading and unloading operations within the two-day time frame established by CSX's Tariff, and CSX began charging Novolog demurrage fees. Novolog refused to pay these charges, arguing it was not liable for demurrage.

On January 6, 2006, both Novolog and CSX filed motions for summary judgment in the district court proceeding in support of their respective positions concerning CSX's demurrage claim against Novolog and Novolog's counterclaim against CSX.[8]

[8] Novolog asserted a counterclaim against CSX for breach of a switching agreement between the parties set forth in a document called a "Refund Contract" on which it eventually prevailed at trial. The counterclaim was not a subject of CSX's

(Continued on following page)

With respect to the inbound demurrage invoices, CSX asserted that Novolog was the consignee for all inbound freight at issue because: (1) Novolog was named as the sole consignee on the purported waybills and bills of lading for the loaded railcars delivered to Novolog's facility without any limiting designations such as "care of" or "account of"; (2) the data fed by CSX into the "car and train reporting" computer system instructed the Conrail crew at Morrisville to deliver the cars to Novolog; (3) Novolog accepted delivery of these loaded railcars; (4) Novolog was liable for demurrage as an agent for various unnamed consignees; (5) Novolog failed to comply with the consignee-agent provision of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10743(a)(1); and (6) Novolog had knowledge of the rail industry's general demurrage practices.

With respect to outbound demurrage invoices, CSX asserted that Novolog was the shipper/consignor for all outbound freight at issue because: (1) Novolog was listed as the sole shipper and Fairless, PA was listed as the origin on the purported waybills and bills of lading; and (2) Novolog ordered the empty railcars for its own transportation purposes.[9]

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underlying appeal to the Third Circuit and has no relevance to the issues in this petition.

[9] CSX admitted in its brief to the Third Circuit that for each of the freight shipments (inbound or outbound) at issue, Novolog

(Continued on following page)

Novolog asserted that it was not bound by CSX's Tariff based on the following undisputed facts: (1) it was not a party to CSX's transportation contracts for the freight shipments at issue; (2) it never executed any contract, with CSX or other entity, whereby it accepted liability for demurrage charges; (3) it was simply a geographical place where freight was either loaded or unloaded – it was neither the consignee nor shipper/consignor of the freight shipments, and never executed any contract designating it as the consignee or shipper/consignor for such freight; (4) it never authorized any consignee or shipper/consignor designation for the freight shipments; (5) it had no beneficial ownership of the freight through consignment or otherwise; (6) it did not have responsibility for or control over the volume of railcars that entered its facility; (7) it did not order empty railcars for its own transportation purposes; and (8) portions of the documents CSX produced during discovery established that CSX had notice of the final destinations and identities of the actual consignees and shipper/consignors at issue – none of which were Novolog.

In connection with its summary judgment submissions, CSX presented the district court with a compendium of different documents it had produced during discovery, including many pages of computer

did not have any involvement in making the shipping arrangements or preparing the bills of lading.

spreadsheets, purporting to be supporting documentation reflecting the fact that Novolog was named as either the sole consignee or shipper on the bills of lading corresponding to the Incidental Bills.[10] Novolog contested the admissibility of these documents on various evidentiary grounds. Novolog also argued, *inter alia*, that these documents were not the actual waybills or bills of lading at issue.

After submission of various responses, replies, and sur-replies by the parties and oral argument, the district court issued a memorandum and order denying both parties' motions for summary judgment. App. 79. The district court – following, *inter alia*, authority established by the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") – rejected CSX's demurrage liability arguments.

The district court held that Novolog was not subject to demurrage liability pursuant to CSX's Tariff as it was not a party shipping or receiving under CSX's contracts for the transportation of the freight. It ruled that no industry-wide custom or statute imposed demurrage liability on a transloader such as Novolog merely by accepting freight for unloading or loading purposes as the unilaterally named consignee on bills of lading or by ordering cars

[10] CSX did not present any evidence in the district court proceeding that the bills of lading which purportedly correspond to the Incidental Bills were ever forwarded to Novolog upon their issuance or at any time, including any time prior to delivery of the freight to Novolog's facility.

as the named shipper. It further found that CSX's reliance on § 10743(a)(1) of the ICCTA, as a purported basis for imposition of liability on Novolog, was "misplaced." The district court found the statute relates only to the payment of rates for shipment of freight, not demurrage, and that demurrage charges are distinct from transportation rates. App. 56-75.

As a result, the district court declined to resolve the evidentiary issues raised by Novolog or to make a finding of fact as to whether Novolog was indeed named as the consignee or as the shipper on the relevant bills of lading. App. 46 n.6; *see also* App. 45 nn.3-5.

The district court stopped short of granting summary judgment in Novolog's favor because it concluded that there remained an issue of material fact as to whether a document entitled a "Refund Contract," that was the subject of Novolog's counterclaim against CSX, was a separate contractual agreement between Novolog and CSX that might subject Novolog to liability for demurrage. App. 75-76. Prior to trial, however, CSX filed an admission that "other than Novolog being the named consignee on bills of lading, and Novolog having accepted delivery of the loaded cars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained rail cars." App. 118-119. Following this admission, the district court entered judgment as a matter of law in favor of Novolog on CSX's claim. App. 80.

CSX then filed two motions for reconsideration and an alternative motion for referral to the United States Surface Transportation Board. The district court denied these motions. App. 81-84. CSX subsequently filed a timely appeal to the Third Circuit.

After the submission of briefs by the parties and an *amici curiae* brief by Norfolk Southern and BNSF Railway Companies in support of CSX's position on appeal, and oral argument, the Third Circuit issued an opinion whereby it vacated the district court's judgment and remanded this case to the district court for further proceedings as follows:

> We hold that the consignee-agent provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10743(a)(1), governs this dispute as to the charges assessed against Novolog as the consignee of freight. Under this provision a transloader or other such entity, if named on the bill of lading as the sole consignee, is presumptively liable for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status in writing prior to delivery. Because the factual record was not sufficiently developed, however, we cannot determine what the bills of lading showed here; thus we vacate the District Court's order granting judgment to the transloader as a matter of law and remand for further proceedings.

> With respect to the transloader's potential liability for demurrage charges in its role as the shipper (consignor) of freight, we refrain from announcing a holding because the question was not fully addressed or briefed, but we will vacate the District Court's grant of judgment on this claim as well and remand it for further consideration in light of our holding regarding consignee liability.

Novolog Bucks County, 502 F.3d at 250, App. 2-3.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT AND THE SEVENTH CIRCUIT ON A DEMURRAGE LIABILITY ISSUE OF VITAL IMPORTANCE TO THE TRANSLOADING AND RAILROAD INDUSTRIES

The Rules of the Court advise that "a writ of certiorari will be granted only for compelling reasons" such as when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals in the same important matter[.]" Rule 10(a).

A. The Third Circuit Rendered a Decision in Conflict with a Recent Decision of the Seventh Circuit as to Whether a Transloader or Other Such Entity That Accepts Delivery of Freight Is Automatically Liable for Demurrage Charges under a Rail Carrier's Tariff in Absence of Compliance with § 10743(a)(1) of the ICCTA Merely Because a Third Party Unilaterally Lists it as the Consignee on a Bill of Lading

The Third Circuit's decision below is in conflict with a recent decision of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") on the same important matter, *i.e.*, whether § 10743(a)(1) of the ICCTA automatically applies to a transloader or other such entity (*e.g.*, a warehouseman or pier operator) – that is not a party to a rail carrier's transportation contract or any contract whereby it agrees to accept demurrage liability, has no beneficial ownership of the freight at issue, and does not authorize a consignee designation – merely because a third party unilaterally lists it as the consignee on a bill of lading and it accepts delivery of the freight. *Compare Novolog Bucks County*, 502 F.3d 247, App. 1-34 (circuit court of appeals vacated, on § 10743(a)(1) grounds, district court's grant of judgment as a matter of law against a rail carrier), *with Illinois Cent. R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) (circuit court of appeals reversed district court's entry of summary judgment, on § 10743(a)(1) grounds, in favor of a rail carrier).

In *South Tec*, a printing company (Donnelley) had an agreement with a rail carrier (the Illinois Central Railroad) to transport paper from Donnelley's paper suppliers to the South Tec warehouse. There the paper was sorted and stored and the railcars released. When Donnelley needed the paper, it was loaded on other railcars or trucks and brought to the Donnelley facility. According to Donnelley's agreement with Illinois Central, the bills of lading should state simply that the car was "to stop at South Tec Warehouse.... Freight Charges Cover Shipments to Ultimate Destination." *Id.* at 814-15. Although the majority of the bills of lading named Donnelley as the consignee, there was a wide variation among the bills of lading, and a small percentage named South Tec as the consignee. *Id.* at 815, 821.

The district court in *South Tec* held (as the Third Circuit held in this case) that the South Tec warehouse was liable for the demurrage charges because it had failed to comply with the notification requirements of § 10743(a)(1). The Seventh Circuit disagreed with the district court's demurrage assessment, noting that it had apparently assumed that South Tec was indeed the consignee. *Id.* at 822. The Seventh Circuit determined that § 10743(a)(1) **"applies only to agents who are also consignees, and not to agents who are not consignees."** *Id.* at 817 (emphasis added). The Seventh Circuit reviewed the applicable law of agency and stated:

> We rejected, in *Evans Prods. [v. Interstate Commerce Comm'n]*, 729 F.2d [1107] at 1113-14 [7th Cir. 1984], the theory that the general rule of agency law that an agent that refuses to disclose the identity of its principal is personally liable for charges incurred on behalf of the principal, *see* Restatement (Second) of Agency § 321, permits railroads to broaden their tariffs to reach non-consignee agents. As the Restatement makes clear, this rule of law only applies where an agent is actually entering into a contract on behalf of the principal.

Id. at 820 n.5.

The Seventh Circuit also surveyed the existing law on demurrage and found no industry-wide custom which permitted the imposition of demurrage charges against non-consignees; as such, it determined that South Tec "would be liable only if it were a consignee or if it contractually assumed responsibility for the demurrage charges." *Id.* at 820. Finding no evidence that South Tec contractually assumed liability for demurrage, the Seventh Circuit analogized *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F. Supp. 880, 884 (N.D. Fla.) (where port was not party to the transportation contracts under which shipments to it were made, it could not be held liable for demurrage asserted under a rail carrier's tariff), *recon. denied*, 936 F. Supp. 880 (N.D. Fla. 1995) and *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974) (unilateral listing as consignee on bills of lading "was not enough to make Matson a

party to the transportation contract and liable for demurrage") and concluded that the unilateral designation of a party as consignee on bills of lading, without more, is not sufficient to make the party legally a consignee and, thus, liable for demurrage charges. *Id.* at 821-22 (citing *Evans Prods.*, 729 F.2d at 113 ("No liability exists merely on account of being named in the bill of lading, or handling the property.")).

As a result, the Seventh Circuit remanded the case to the district court "to determine who was the legal consignee (or consignees) of the paper shipments in question and presumably liable for the demurrage charges" and encouraged the district court to "consider whether [South Tec] contractually assumed responsibility for the demurrage charges." *Id.* at 822.

Expressly rejecting the Seventh Circuit's reasoning in *South Tec*, the Third Circuit held below:

> we decline to follow the Court of Appeals for the Seventh Circuit's recent conclusion in a similar case that the entity listed as the consignee on the relevant bills of lading was not, without more, the legal consignee under Section 10743. *See South Tec*, 337 F.3d at 821. *See also Union Pacific Railroad Co. v. Carry Transit*, No. 3:04-CV-1095-B (N.D. Tex. Oct. 27, 2005) (following *South Tec*).

Novolog Bucks County, 502 F.3d at 259, App. 25.

The Third Circuit, rejecting Novolog's arguments that it was not the legal consignee of the freight at

issue, also opined that the Seventh's Circuit's decision in *Evans Prods.* (cited with approval by the Seventh Circuit in *South Tec* and by the district court below in this case) was distinguishable because it involved a repair facility, and thus, was not "particularly instructive." *Id.* at 262 n.14, App. 31.

Since the Third Circuit rendered a decision in conflict with Seventh Circuit on a matter of vital importance to the transloading and railroad industries, among others, there is a compelling reason for the Court to grant a writ of certiorari in this case. As the Third Circuit acknowledged, two recent district court decisions used a demurrage analysis similar to that of the district court below.

The United States District Court for the Northern District of Texas followed the Seventh's Circuit's holding in *South Tec. See Carry Transit*, No. 3:04-CV-1095-B (App. 85-102) (transloader, that did not authorize shippers to list it as a consignee on bills of lading, not liable for rail carrier's demurrage charges by failing to provide notice of agency under § 10743(a)(1) because unilateral action by shippers in labeling it as consignee on such documents did not render it the consignee within the meaning of the statute). Additionally, prior to the Third Circuit's decision in this case, the United States District Court for the Western District of Pennsylvania, citing the district court's decision below, held that no demurrage liability could attach under CSX's Tariff against a custom injection molder that received shipments of plastic resin *via* CSX railcars because: "[t]he designation as consignee in the bills of

lading, without more, is insufficient to create liability under a tariff because '[a] tariff is an inappropriate instrument to legislate liability with respect to a nonconsenting party . . . '" *CSX Transp., Inc. v. Port Erie Plastics, Inc.*, No. 05-CV-139, 2006 WL 2847414, *4 (W.D. Pa. Sept. 29, 2006) (citing *Novolog Bucks County*, 2006 WL 1451280 and quoting *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109, 1122 (D.D.C. 1972)).[11]

The current conflict between the demurrage decisions of the Third Circuit and the Seventh Circuit should be resolved to provide uniformity of the law across the nation with respect to the applicability or non-applicability of a rail carrier's demurrage tariff to a transloader such as Novolog and other similarly situated entities.

B. The Court Should Reverse the Third Circuit's Decision Below and Mandate the Application of the Seventh Circuit's Demurrage Analysis

The Third Circuit's decision below is inherently inequitable to Novolog and other similarly situated entities, and thus, fails to serve the interests of justice. This fact provides the Court with another compelling reason to grant a writ of certiorari in this case.

[11] The *Port Erie Plastics* case is currently on appeal to the Third Circuit at docket number 06-4546.

The Third Circuit – rejecting Novolog's argument that it is inequitable to allow the shipper's unilateral and unauthorized designation of a transloader as the consignee to control the demurrage liability issues – concluded that no unfairness results from applying § 10743(a)(1)'s plain language to Novolog because under the statutory scheme, Novolog could avoid liability for demurrage in two ways: first, by refusing the freight; and second, by providing the carrier timely written notice of agency under § 10743(a)(1), if appropriate. *Novolog Bucks County*, 502 F.3d at 259, App. 24. This reasoning is inherently flawed for several reasons.

First, it is uncontested that Novolog had no part in the preparation of the bills of lading. There is no evidence that CSX or the shippers (who, according to CSX, prepared the bills of lading) ever forwarded the relevant bills of lading corresponding to the Incidental Bills to Novolog upon their issuance or at any time prior to delivery of the freight to Novolog's facility. Further, the district court expressly rejected CSX's arguments that Novolog knew the steel at issue was inbound before it arrived and had specific instructions from shippers on how to handle the steel freight.

Thus, as the record reflects, Novolog had no knowledge that the shippers incorrectly designated it as the "consignee" as opposed to the "care of" party on the purported bills of lading or that the steel was inbound to its facility before it arrived. In this situation, Novolog would be unable to provide CSX with

notice of its "care of" status along with "the name and address of the beneficial owner of the property if it [was] reconsigned or diverted to a place other than the place specified in the original bill of lading" before the delivery of the freight to its facility. As such, the Third Circuit's § 10743(a)(1) analysis – in contrast with the Seventh Circuit's (which mandates a thorough review of whether the intermediary is actually the legal consignee) – compels a "no-win" situation for all entities such as Novolog; it places their liability for demurrage charges exclusively within the shippers' control.[12]

Second, the Third Circuit's decision below – in contrast with the Seventh Circuit's decisions in *South Tec* and *Evans Prods.* – illogically puts the consequences of the failure to list the intermediary correctly on bills of lading as the "care of" party as opposed to the consignee, on the intermediary, instead of on the shippers, the entities who actually prepared the bills of lading, or on the rail carrier that had contracts with the shippers for the transportation of the freight.

In this case, Novolog had no control over the unilateral and unauthorized decision by the shippers to list it as the consignee on purported bills of lading,

[12] It is a fundamental tenet of contract law that parties to a contract cannot bind a nonparty, such as Novolog, to its terms. *See Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

but CSX had recourse under its tariff (which was incorporated in the transportation agreements between CSX and these shippers) to impose any requisite demurrage charges upon its shipper-customers. As the district court aptly stated below, CSX was not without recourse because it "may pursue its claim for demurrage against another party with which it did have a contractual relationship relating to the movement or handling of these railcars." App. 75. *See also Carry Transit*, No. 3:04-CV-1095-B ("[T]he Court finds that while Union Pacific may have a cause of action against shippers who named Carry Transit as the consignee in the bills of lading, they do not have a cause of action against Carry Transit."). App. 114.

Third, the terms of CSX's Tariff indicate that its application extends only to CSX's customers. *See* CSX's Tariff "Demurrage Provisions" and Application Item 8000. App. 85. Novolog is not one of CSX's customers and should not be bound by the demurrage provisions of CSX's Tariff.

Finally, portions of the documents CSX produced during discovery in the district court proceeding established that CSX had notice from Novolog of the final destinations and identities of the actual consignees and shipper/consignors – none of which were Novolog. The district court rendered the following finding of fact on this issue:

> Confusingly, the only legible and comprehensible portions of the supporting documentation appear to be created by Novolog. These

> documents show the port of origin to be "Fairless, PA (Shared Assets)," the shipper to be various steel companies, the consignee to be various other steel companies at various destinations, and the route to be via CSX.

App. 44 n.2.

Accordingly, the Seventh Circuit's analysis in *South Tec* and *Evans Prods.* of an intermediary's potential demurrage liability is not only in conformity with the existing body of demurrage law, but is inherently more equitable than the Third Circuit's flawed analysis. Hence, the Court should reverse the Third Circuit's decision below.[13]

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[13] Although the Third Circuit refrained from announcing a holding with respect to Novolog's potential liability for demurrage charges in its alleged role as the shipper/consignor of freight, it improperly remanded this issue for further consideration in light of its flawed consignee-liability holding. Based on the evidentiary record of this case, and the existing body of demurrage law, the Third Circuit should have affirmed the district court's entry of judgment as a matter of law in Novolog's favor for all the shipments of freight at issue, including those for which CSX alleged Novolog was the shipper/consignor.

II. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT AND THE SEVENTH CIRCUIT AS TO WHETHER § 10743(a)(1) OF THE ICCTA APPLIES TO THE ASSESSMENT OF DEMURRAGE CHARGES

The district court below held that § 10743(a)(1) of the ICCTA "relates only to the payment of rates for shipment of freight not demurrage and . . . demurrage charges are distinct from transportation rates." App. 61. Although CSX argued on appeal that this holding by the district court was incorrect, it previously stated in its motion for summary judgment that:

> Demurrage charges are not part of the rate charges by the rail carrier to transport the freight; courts have consistently recognized a distinction between the freight transportation charges and "incidental charges," including rail car demurrage[.] *Delaware and Hudson Railway Co., Inc. v. Offest Paperback Mfrs., Inc.*, 126 F.3d 426 (2d Cir. 1997) (citing numerous cases, including *ICC v. Oregon Pac. Indus., Inc.*, 420 U.S. 184, 190 n.7 (1975)).

CSX's Mot. Sum. Judg. at 7 n.1 (emphasis added).

The Third Circuit below disagreed with the district court's interpretation of § 10743(a)(1); it stated:

> Although to our knowledge no court has spoken directly to the applicability of Section 10743(a)(1) to demurrage rates, both the

> former ICC and a three-judge panel of the District Court for the District of Columbia, faced with a substantially identical provision applicable to motor carriers, have also found it applicable to detention (i.e., demurrage) charges. *In Payment for Detention Charges, Eastern Central States*, 335 I.C.C. 537 (I.C.C. 1969), the agency relied in part on Section 223 of the ICC Act, 49 U.S.C. § 323 (1964), to decide whether a trucking association's tariff was unlawful. The ICC held without hesitation that the phrase "transportation charges in respect to the transportation of . . . property" in that provision "of course [ ] would encompass charges for demurrage or detention of vehicles. . . . While detention charges have a purpose different from that of freight charges, . . . demurrage charges are part of the total transportation charges." *Payment for Detention Charges*, 335 I.C.C. at 539-40. Upon review, a three-judge panel of the District Court for the District of Columbia agreed with the ICC, writing that the term "transportation charges" in Section 223 of the ICC Act "may include detention charges." *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1121 n.34 (D.D.C. 1972).

Novolog Bucks County, 502 F.3d at 256, App. 17-18.

Seventh Circuit precedent (more recent than the ICC's 1969 *Payment for Detention Charges* and the United States District Court for the District of Columbia's 1972 *Middle Atlantic Conference* decisions relied upon by the Third Circuit), is contrary to the

Third Circuit's holding. In 1981, the Seventh Circuit interpreted a predecessor of the current § 10743(a)(1) as not applying to detention charges. *Blanchette v. Hub City Terminals*, 683 F.2d 1008, 1011 (7th Cir. 1981). In *Blanchette*, the Seventh Circuit held: "[t]he purpose of [49 U.S.C. § 3.2 (1976)] was to relieve from liability agent-consignees who paid in full carriers' initial bills, which the carrier later discovered were lower than the rate required by the tariff." *Id.*[14]

The Third Circuit declined to follow *Blanchette* and held that demurrage rates are "rates for transportation" under § 10743(a)(1). *Novolog Bucks County*, 502 F.3d at 257 n.9, App. 18-19. Therefore, since the Third Circuit rendered a decision in conflict with Seventh Circuit on this matter of vital importance to the transloading and railroad industries, among others, another compelling reason exists for the Court to grant a writ of certiorari in this case.

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[14] The Seventh's Circuit's decision in *South Tec* is not inconsistent with its decision in *Blanchette*. In *South Tec*, the Seventh Circuit made no ruling on whether the terms "rates for transportation" in § 10743(a)(1) included demurrage charges. Rather, the *South Tec* court: (1) concluded that district court erred by holding a warehouse liable for demurrage charges simply for non-compliance with § 10743(a)(1)'s consignee-agent notification provisions; and (2) instructed the district court to review the record for evidence of whether the warehouse contractually assumed liability for demurrage charges and was the legal consignee for the paper shipments at issue. 337 F.3d at 822.

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Third Circuit below.

Respectfully submitted,

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