No. 08-1553

SEP 29 2009

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD. and
K-LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION *et al.*,
Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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September 29, 2009

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Respondents do not dispute that the decision below conflicts with the decisions of four other circuits on the question whether the Carmack Amendment applies to overseas "through" bills of lading. Nor do respondents disagree that settlement in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), prevented this Court from resolving that conflict after granting certiorari to do so.

Respondents assert only that, in the last two years, carriers supposedly have found a "contractual solution" obviating any need to resolve this conflict. But contrary to respondents' argument, any such contractual solution is non-existent or illusory. As

demonstrated in the briefs filed by *amici curiae* representing railroads, international shipping lines, and organizations that insure nearly 90% of international shipping, all of whom argue that certiorari should be granted, having to opt out of Carmack by contract would sacrifice flexible and efficient shipping practices enabled by the container revolution. Nor do respondents offer any other credible basis to suppose that the ongoing conflict can be resolved without this Court's guidance.

Respondents also assert that this case is a poor vehicle for resolving the conflict because this Court might address other issues in the course of addressing the merits of the question presented. This is no ground for denying certiorari on a square conflict. In any event, contrary to respondents' assertion, this case provides a good vehicle for considering the question in its fullest practical context. The petitions should be granted.

ARGUMENT

I. CONTRARY TO RESPONDENTS' ARGUMENT, THE CONFLICT IN THE CIRCUITS HAS NOT BEEN OBVIATED BY ANY "CONTRACTUAL SOLUTION"

Respondents assert that "circumstances have changed" in the two years since the grant in *Altadis* because the shipping industry has implemented a "contractual solution" to the uncertainty created by the conflict in the circuits. Opp. 1, 12-15. According to respondents, carriers can free themselves from the impact of the decision below simply by inserting in their contracts new boilerplate offering Carmack terms, and supposedly have widely done so. Opp. 12-13. But that is not true, as made clear in the briefs

filed in support of the petitions by *amici curiae* The World Shipping Council and The International Group of Protection and Indemnity (P&I) Clubs.

To the contrary, "most, if not all, ocean carrier bills of lading do *not* contain such Carmack language," as the key source cited by respondents itself reports. Paul Keane, *US Law—COGSA Limitations and Intermodal Transportation*, 192 GARD NEWS 22, 23 (2008) (emphasis added). Respondents miscite this source to suggest that a supposedly single "standard contract that governs the legal relationship between railroads and ocean carriers . . . has been revised" (Opp. 13), when in fact the passage they quote merely states that "one of the two railroads [accepting overseas intermodal cargo] on the West Coast has issued a revision to its intermodal circular" (192 GARD NEWS at 24).

Carriers' general refusal to adopt respondents' "contractual solution" is not surprising, as to do so would sacrifice the flexible and efficient practices ocean carriers currently employ in shipping overseas goods. Rather than arranging individual shipments with specific inland carriers prior to shipping, ocean carriers negotiate contracts with multiple carriers for a volume of shipments over several-year periods, with correspondingly reduced volume rates. *See* World Shipping Council Br. 9. Ocean carriers also often decide which inland carriers to use after the shipment is underway or has reached its port of discharge—which may change en route because of port congestion, sale of the cargo in transit, or changes in the shipper's plans. *See* Int'l P&I Clubs Br. 5; World Shipping Council Br. 6, 9. Under current practices, ocean carriers thus are able to choose inland transportation after the final port of

discharge has been reached and to base that choice on availability and other considerations. *See* World Shipping Council Br. 9.

Respondents' "contractual solution" would force carriers to abandon these flexible and efficient practices. To opt out of Carmack under the decision below, an ocean carrier must offer to the party shipping the goods, at the time the shipping contract is executed, terms incorporating Carmack's rights and procedures for inland transportation. Pet. App. 32a-33a. Because railroads and other ground carriers offer different terms for transporting under Carmack rules, ocean carriers wishing to opt out of Carmack would have to designate an inland carrier at the time of contracting—limiting their ability to change ports of discharge en route or to select inland transportation based upon availability or other considerations at the time of arrival. And the additional cost of any extra protection Carmack affords is unnecessary because shippers can insure their shipments, which they can value more easily and accurately than can carriers. *See, e.g., Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 901 (9th Cir. 1989).

Thus no "contractual solution" has diminished the importance of clarifying whether Carmack applies to overseas "through" bills of lading.[1]

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[1] Nor has the practical importance of uniformity in maritime law diminished in the last two years. Respondents suggest (Opp. 20) that this Court's statement concerning the importance of such uniformity in *Norfolk So. Ry. Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14, 29 (2004), is inapposite because *Kirby* concerned liability limitation. That is incorrect, for *Kirby* also discussed the law governing overseas "through" bills of lading, *id.* at 22-30, and its observation concerning uniformity arose in that discussion, *id.* at 29.

II. RESPONDENTS FAIL TO SHOW THAT THE CURRENT 4-2 CIRCUIT SPLIT WILL BE RESOLVED WITHOUT THIS COURT'S INTERVENTION

Respondents suggest that the current 4-2 circuit split is "not so entrenched" (Opp. 10), but offer no reason to believe that the split will resolve itself without this Court's intervention. Nor is this likely. In three of the four circuits, panel decisions may be overruled only *en banc*, *see Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009); *McMellon v. United States*, 387 F.3d 329, 332-33 (4th Cir. 2004); *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997), and in the fourth a majority of judges must acquiesce to overruling a panel decision, 7TH CIR. R. 40(e).

Respondents also suggest waiting so that other circuits can digest the Second Circuit's decision in *Sompo Japan Insurance Co. v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006), or a recent law review article. Opp. 10-11. *Sompo*, however, was decided before this Court granted certiorari in *Altadis* and was discussed at length in the petition. *See* Petition for Writ of Certiorari at 2-25, *Altadis USA, Inc. v. Sea Star Line, LLC*, No. 06-606, 2006 WL 3101141 (U.S. Nov. 1, 2006). In the three years since *Sompo*, no other circuit has reconsidered its position, and respondents offer no evidence that any will do so in the future.[2]

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[2] Respondents also criticize "circuits on petitioners' side of the conflict" (Opp. 10) for relying on *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), when that case applied Carmack to the inland leg of an import shipment (Opp. 8). The holding in *Swift* is inapposite, however, because there was no "through" bill of lading in that case. *See id.* at 698.

Nor is there any reason to suppose that any circuit will change its view in light of a law review article respondents describe as the "most recent scholarly writing on the subject." Opp. 5, citing Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1 (2009). As respondents conspicuously fail to note, Professor Sturley represented shippers in both *Altadis* and *Kirby*.[3] Moreover, Professor Sturley errs in arguing that the pre-codification limits on Carmack should be ignored, *see id.* at 34, in spite of Congress's express admonition that the 1978 codification of Carmack "may not be construed as making a substantive change," Act of Oct. 17, 1978, Pub. L. No. 94-473, § 3(a), 92 Stat. 1337, 1466; *see* Int'l P&I Clubs Br. 15 n.12. Professor Sturley also fails to address Carmack's venue provisions (*see* Pet. 18), the 1920 amendment to the Interstate Commerce Act (*see* Pet. 22 n.6), or the federal appellate decisions prior to Carmack's codification in 1978 and to Carmack's reenactment in 1995 (*see* Pet. 19 n.5; Union Pacific Pet. 26). Nor does Professor Sturley provide any support for the Ninth Circuit's rulings concerning ocean carriers, *see* Sturley, *supra*, 40 J. MAR. L & COM. at 17 n.71, or the application of Section 10709's opt-out provision, *see id.* at 40 n.226.

This Court's intervention thus is still required if the circuit split that led to the *Altadis* grant is to be resolved.

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[3] *See* Petition for Writ of Certiorari, *Altadis USA, Inc. v. Sea Star Line, LLC*, No. 06-606, 2006 WL 3101141 (U.S. Nov. 1, 2006); *Kirby*, 543 U.S. at 17.

III. CONTRARY TO RESPONDENTS' ARGUMENTS, THIS CASE IS A GOOD VEHICLE FOR CLARIFYING WHETHER CARMACK APPLIES TO OVERSEAS INTERMODAL "THROUGH" BILLS OF LADING

Respondents do not contest that the material facts here are undisputed, there are no threshold issues, and reversal of the decision below would entail dismissal of the complaint. *See* Pet. 25; Union Pacific Pet. 25. Respondents nonetheless argue that this case is a poor vehicle for resolving a clear circuit conflict because resolution on the merits might entail consideration of further issues that, in respondents' view, should be allowed to percolate in the lower courts. Opp. 7-10, 17-18. This contention does not withstand analysis.

In the first place, respondents' attempt (*see* Opp. i) to fracture the simple question presented here into innumerable subparts is unavailing, for it conflates the question presented with reasons why the decision below was erroneous on the merits. The inapplicability of Carmack to ocean carriers, to imports, or to shipments from non-adjacent foreign countries, for example, are all reasons why Carmack should not be construed to govern intermodal overseas shipments under "through" bills of lading—not additional questions presented. *See* Pet. 17-20. Similarly, the opt-out provisions discussed in the petitions help show why Carmack does not apply to "through" bills that extend COGSA to inland transportation, as most such bills continue to do.

In any event, the presence of these additional arguments makes this case a better, not a worse, vehicle for considering the question presented. Because this case involves all the issues affecting

Carmack's application to overseas "through" bills of lading (*see* Pet. 25-26), it provides the Court with an opportunity to resolve the question in a single case while taking into account all relevant practical considerations.

Respondents argue that these additional arguments create a risk that the conflict among the circuits will not be resolved. Opp. 18. But the conflict will be resolved if the Court holds that Carmack does not apply to overseas "through" bills of lading based on arguments advanced in the petition.[4] In addition, the opt-out issues would become relevant only if the Court rejected the arguments concerning Carmack's applicability. And if the Court held that carriers may opt out of Carmack by extending COGSA to the inland leg of an overseas shipment, then Carmack would not apply to current "through" bills of lading, and the conflict would be resolved as a practical matter.

Respondents also urge this Court to allow the additional arguments raised in the petition to percolate in the lower courts. Opp. 10. But the four circuits already holding Carmack inapplicable to "through" bills have no reason to consider these arguments. Nor does the Ninth Circuit, which has considered and rejected the arguments raised in the petition. *See* Pet. App. 12a-19a, 26a-35a. The Second Circuit has addressed most of these arguments as well. *See Sompo*, 456 F.3d at 60-69 & n.13 (considering Carmack's application to goods imported

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[4] The one possible exception is the argument that petitioners are ocean carriers. This might not resolve the question if Carmack is interpreted to permit different treatment of ocean carriers and inland carriers under the same bill of lading.

from non-adjacent foreign country under a "through" bill of lading); *Rexroth Hydraudyne B.V. v. Ocean World Lines*, 547 F.3d 351, 356-64 (2d Cir. 2008) (considering Carmack's application to ocean carriers). Indeed, the Second Circuit has compounded the conflict presented here by holding, contrary to the decision below, that Carmack does *not* apply to ocean carriers issuing "through" bills of lading. *Id.*

Nor are arguments concerning the application of Carmack to overseas container shipments likely to percolate in other circuits. The six circuits that already have addressed this issue encompass the six largest ports in the country and more than 90% of the nation's container imports flow through them. *See* U.S. Dep't of Transp., Maritime Admin., U.S. Waterborne Foreign Container Trade by U.S. Custom Ports, http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm.

This case thus presents a good vehicle for resolving the question presented, and that question will not be resolved without this Court's guidance.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant this petition as well as the separate petition for certiorari filed by the Union Pacific Railroad Company from the same judgment, and consolidate both petitions for argument.

Respectfully submitted,

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