No. 08-293

In The
Supreme Court of the United States

SPLENDID SHIPPING SENDIRIAN BERHAD
and M/V HARMONY CONTAINER, *in rem*,

Petitioners,

v.

TRANS-TEC ASIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

GERALD L. GORMAN
Counsel of Record
BRADLEY M. ROSE
KAYE, ROSE & PARTNERS, LLP
402 West Broadway, Suite 1300
San Diego, California 92101
Tel.: (619) 232-6555
Fax: (619) 232-6577

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

Petitioner Splendid Shipping Sendirian Berhad (Splendid), a Malaysian company in good standing, is one hundred percent (100%) owned by Halim Mazmin Berhad, a Malaysian public company. The vessel *Harmony Container*, which Splendid owned during all events at issue in this litigation, has been sold to an affiliated company, Colville Shipping Sendirian Berhad (not a party to this litigation), which is also one hundred percent (100%) owned by Halim Mazmin Berhad. Because the vessel was sold free and clear of liens, Splendid is responsible for the payment of any judgment in this action, and Splendid therefore arranged the security that was substituted for the vessel to avoid its arrest by respondent.

Respondent Trans-Tec Asia is a Singapore corporation. *See* Pet. App. 88-89 n.4.

RULE 29.6 DISCLOSURE

Petitioner Splendid Shipping Sendirian Berhad (Splendid) is a Malaysian company in good standing. One hundred percent (100%) of Splendid's stock is owned by Halim Mazmin Berhad, a Malaysian public company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

INTRODUCTION

Respondent's effort to distract the Court from the important issues in this case does not obscure these four basic points supporting a grant of certiorari: (1) most of the nation's major ocean port circuits[1] are divided on the application of the Federal Maritime Lien Act (FMLA), 46 U.S.C. § 31301 *et seq.*, (2) the Ninth Circuit erred in extending the FMLA to a wholly foreign transaction on the basis of a choice-of-law clause when even respondent concedes that maritime liens may not be created by agreement, (3) the FMLA's proper scope is an issue of exceptional commercial importance that only this Court can resolve, and (4) the present case offers this Court an ideal vehicle to resolve an important question of statutory construction.

Respondent's oft-repeated theme is that the FMLA does not "discriminate" against foreign suppliers. But the issue here has nothing to do with discrimination. The issue is how close a connection with the United States is required for the FMLA to impose a U.S. lien. Some connection is undeniably necessary. The First and Eleventh Circuits require a U.S. supplier before the FMLA applies. The Second Circuit requires a connection under the standards of *Lauritzen v. Larsen*, 345 U.S. 571 (1953), before the

[1] Of the two remaining coastal circuits, one – the Fourth Circuit – is awaiting this Court's action in this case. *See infra* at 8-9 & n.5.

FMLA imposes a maritime lien. The Fifth and Ninth Circuits hold that a U.S. choice-of-law clause in a contract concluded not by the shipowner but by a charterer is sufficient. This Court should now grant certiorari and decide the extent to which a connection with the United States is required for the FMLA to impose a U.S. maritime lien.

I. The Decision Below Deepens an Entrenched Conflict.

Respondent tries to ignore the acknowledged conflict on the question before this Court by mischaracterizing both the question presented and also the circuit court decisions that have addressed the issue. Petitioner does not challenge the conclusion that respondent's U.S. choice-of-law clause was incorporated into its contract with the charterer. The case thus has nothing to do with "enforce[ing] freely-negotiated private international agreements." Opp. i. The question presented is whether that choice-of-law clause extends the application of the FMLA to create a maritime lien in an otherwise wholly foreign transaction. Pet. i.

Respondent asks this Court to believe that neither the First nor the Eleventh Circuit meant it when they said that only U.S. suppliers are entitled to FMLA liens.[2] Respondent criticizes the relevant

[2] In *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 613 (1991), this Court expressly left open whether the presence

(Continued on following page)

statement in *Trinidad Foundry & Fabricating Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613, 617 (11th Cir. 1992), as dictum, but it was clearly an alternative holding.[3] *See* 966 F.2d at 617; Pet. 12-13. Respondent argues that *Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42 (1st Cir. 1986), is distinguishable on its facts, but respondent has no persuasive answer for the First Circuit's unambiguous declaration that it would not extend the FMLA for the benefit of the foreign plaintiff because "[t]he primary concern of the [FMLA] is the protection of American suppliers." 805 F.2d at 46.

Respondent's real argument is that the First and Eleventh Circuits are wrong. *See* Opp. 12 (characterizing decisions in conflict with the Ninth Circuit as "lower court caselaw misreading the FMLA's plain, non-discriminatory language"); Opp. 20-23 (arguing that FMLA protects foreign suppliers). These merits arguments do not undermine the conflict. Even if those courts had "misread[] the FMLA's

---

of a U.S. supplier was a sufficient connection to invoke the FMLA. On remand in that case, a district court held that it was, *see infra* at 6-7, but the question has still not been resolved by this Court. *Cf.* Opp. 28.

[3] Contrary to respondent's suggestion (at 16 n.5), *Galehead, Inc. v. M/V Anglia*, 183 F.3d 1242 (11th Cir. 1999) (per curiam), does not signal a retreat from *Trinidad*. It is hardly surprising that the *Galehead* court would "ignor[e] *Trinidad*," Opp. 16 n.5. The *Galehead* suppliers all furnished bunker fuel in U.S. ports, *see* 183 F.3d at 1244, thus establishing substantial connections with the United States.

plain, non-discriminatory language," Opp. 12, as respondent argues, that simply means a conflict exists and this Court should resolve it.

Respondent's effort to ignore the Ninth Circuit's conflict with *Rainbow Line v. M/V Tequila*, 480 F.2d 1024 (2d Cir. 1973), is even less successful. Although respondent asserts that the court below "did the same thing" as the *Rainbow* court, Opp. 19, the Ninth Circuit actually rejected *Rainbow* because it "prefer[red] the Fifth Circuit's rule in [*Liverpool & London S.S. Protection & Indemnity Association v.*] *Queen of Leman* [296 F.3d 350 (5th Cir. 2002)]." Pet. App. 16. The Second Circuit explicitly declined to rely on a choice-of-law clause to trigger the application of the FMLA, instead holding that a U.S. maritime lien arises only when the *Lauritzen* analysis pointed to the application of U.S. law.

Respondent claims the conflict is not sufficiently entrenched because the petition did not burden this Court with citations of all lower court decisions to address the issue. Now that the question is settled in three of the major maritime circuits on the East Coast, there is little point for foreign suppliers to arrest vessels in ports in which their lien claims are bound to fail. (Such cases would be pursued in the Fifth or now Ninth Circuit, if possible.) Moreover, in none of the five relevant circuits would commercial parties have much incentive to appeal the issue, nor would the courts of appeals have reason to publish additional opinions addressing the settled issue. Nevertheless, district courts continue to confirm the

settled rule in published opinions. *E.g.*, *Metron Communications, Inc. v. M/V Tropicana*, 1993 AMC 1264, 1271 (S.D. Fla. 1992) ("Stated simply, Hansen's claim is that of a non-U.S. entity furnishing goods and services to a foreign vessel in a foreign port. Such an entity is not entitled to the application of U.S. law to an *in rem* claim."). The conflict is well-entrenched.

Finally, the Malaysia amicus brief highlights the existence of an international conflict on the scope of maritime liens (in addition to the 3-2 domestic conflict on the FMLA's scope). *See* Malaysia Amicus Br. 1; *see also* Pet. 7-8. This Court well recognizes the importance of international uniformity in commercial maritime matters. *See*, *e.g.*, *Vimar Sequros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 536-537 (1995). Although the Court cannot by itself ensure international uniformity, it can at least avoid exacerbating the international conflict.

II. The Ninth Circuit Erred in Extending the FMLA To Confer a Lien in a Wholly Foreign Transaction.

Much of the brief in opposition is devoted to arguments on the merits that this Court should address after full merits briefing. And much of respondent's argument is simply irrelevant because it addresses issues that are not before this Court. For example, this case has nothing to do with discrimination. *See supra* at 1. Similarly, "the proper application . . . of [*Lauritzen*]," Opp. 1, is not an issue here.

Indeed, petitioner agrees that *Lauritzen* points to the application of Malaysian law in this transaction. *See* Pet. 21-22. Nor is any issue of Malaysian law before this Court. *Cf.* Opp. 1. Petitioner does not challenge the district court's conclusion that Malaysian law would recognize the U.S. choice-of-law clause in the underlying sales contract.[4]

The issue actually before this Court is whether the choice-of-law clause provides a sufficient U.S. connection to invoke the FMLA. On that issue, respondent's arguments also miss the mark. Generalized statements about statutory language, *e.g.*, Opp. 11-12, must be considered in light of this Court's precedents on the application of U.S. statutes to cases without a sufficient connection to the United States, *see* Pet. 21-25. The best argument respondent can make is that U.S. lien law applies extraterritorially because prior courts have applied it in overseas transactions. *See* Opp. 23-28. But those prior cases all had strong U.S. connections. Respondent's principal authority, for example, is *Exxon Corp. v. Central Gulf Lines, Inc.*, 780 F. Supp. 191 (S.D.N.Y. 1991), in which the district court (on remand from this Court's

[4] Respondent's argument that U.S. law requires the recognition of the U.S. choice-of-law clause, Opp. 9-10, is triply irrelevant. First, recognition of the clause is uncontested. Second, the issue is governed by Malaysian law. Third, if U.S. law did govern (without reference to conflict-of-law rules, Pet. 5 n.2), it would not recognize the incorporation of the choice-of-law clause (as the district court held, Pet. App. 97-117, in a ruling that respondent did not appeal).

jurisdictional ruling) upheld a maritime lien for a U.S. supplier's fuel delivery to a U.S. charterer in a foreign port (a holding on an issue that this Court had explicitly left open, *see supra* note 2). All the remaining cases cited by respondent (at 25-28) also had strong U.S. connections. *See The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409 (1824) (U.S. supplier; U.S. port); *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819) (U.S. supplier; U.S. vessel; U.S. port); *The J.E. Rumbell*, 148 U.S. 1 (1893) (U.S. supplier; U.S. vessel; U.S. port); *The Roanoke*, 189 U.S. 185 (1903) (U.S. supplier; U.S. vessel; U.S. port).

Respondent properly recognizes that maritime liens serve an essential commercial purpose. Opp. 6. As the petition explained, "[t]he availability of the lien encourages suppliers to extend credit to vessels, thus facilitating commerce." Pet. 1. But respondent ignores the other half of the equation. Encumbering vessels with unjustified liens inhibits commerce. *Id*. Congress therefore struck a careful balance that the Ninth Circuit failed to respect. Enforcing a contractual choice-of-law clause against a party to the contract would be unremarkable. But enforcing a contractual term against a third party – a person that did not agree to be bound – is an extraordinary action that requires strong justification. Respondent's arguments provide no justification for that result. On the contrary, the strong public policy prohibiting the creation of maritime liens by agreement – a policy common to the United States, Malaysia, and other maritime nations – counsels against allowing

respondent to do indirectly what it may not do directly. *See* Pet. 25-26.

III. The Issue Is Important.

Respondent makes several unsuccessful efforts to undermine the importance of the question presented here. Most surprisingly, it quotes the Ninth Circuit's unsupported assertion that the judgment below "'does not interfere with Malaysian law.'" Opp. 23 (quoting Pet. App. 26). Of course, Malaysia itself is in a better position to make that determination, and it has filed an amicus brief explaining why this case is important not only to U.S. maritime interests but also to the world-wide maritime community. In its amicus brief (at 2), Malaysia directly contradicts respondent's assertion, saying "[t]he Ninth Circuit decision in this case, as well as decisions in the Fifth Circuit, interfere with the law of Malaysia."

Respondent also suggests that the issue is unimportant because the petition did not burden this Court with citations of all lower court decisions addressing it. Opp. 11. That suggestion fails just as its similar suggestion fails to undermine the existence of the conflict. *See supra* at 4-5. Indeed, recent lower court developments further highlight the importance of the issue. On October 16, the Fourth Circuit removed the oral argument in *Triton Marine Fuels, Ltd., S.A. v. M/V Pacific Chukotka* (CA4 No. 07-1908) from its calendar and placed the case "in abeyance pending a decision by the United States

Supreme Court in *Splendid Shipping v. Trans-Tec Asia*."[5] There is no need to speculate that this Court's decision on the merits will have an immediate impact on additional cases.

Finally, respondent (following the argument of the Ninth Circuit below) suggests that the issue is unimportant because foreign nations and shipowners have the power to correct the problem. Opp. 29-34. Even if a foreign nation could draft an effective law to prohibit those subject to its jurisdiction from relying on U.S. law, it is absurd to suggest that every other nation in the world should amend its own laws to correct the Ninth Circuit's extravagant application of the FMLA. Malaysia (like most other nations) would already refuse to enforce the lien that respondent claims, notwithstanding the U.S. choice-of-law clause. *See* Malaysia Amicus Br. 1, 4, 9; Pet. 7. It should not be required to do more. The responsibility for controlling the Ninth Circuit's extravagant application of the FMLA properly rests with this Court, not with the legislatures of the world's remaining maritime nations.

Respondent's suggestion that shipowners have the power to correct the problem is simply wrong (except to the extent that they can raise their charter

[5] The petition (at 17-18) discusses the district court's decision, which followed the First and Eleventh Circuits. Although *Triton Marine* raises the same legal issue as the present case, it would not provide as good a vehicle for this Court to decide the issue. *See* Pet. 18.

rates, thus increasing the cost of doing business with the United States, to fund the unexpected losses they will suffer when U.S. liens are enforced against them; *cf*. Malaysia Amicus Br. 3). Contrary to respondent's assertion (at 30-31), a shipowner cannot direct the master of the vessel to give notice of a no-lien clause to every supplier. Standard charterparties, including the charterparty in this case, routinely provide that the master acts under the charterer's (not the shipowner's) control in such matters. Moreover, the burden of identifying the supplier contracting with the charterer is very heavy, if not impossible to satisfy, by reason of the number and nationality of the various agents, brokers, suppliers, intermediaries, and delivering parties that act in the world's complex marine-fuel brokerage business.

IV. This Case Provides an Ideal Vehicle.

As the petition explains (at 29-30), this case offers the Court an ideal vehicle to resolve the question presented. The legal issue is cleanly presented on substantially undisputed facts and no extraneous issues would prevent this Court's resolving the question presented.

Although respondent does not directly challenge the petition's vehicle argument, it seeks to suggest this was not actually a wholly foreign transaction. *E.g.*, Opp. 12 n.3 (hinting that respondent should be considered a Florida company and noting that the vessel called at U.S. ports). Perhaps respondent

recognizes there is no basis for applying the FMLA unless the transaction has a genuine connection with the United States, and a choice-of-law clause by itself is inadequate. But the effort fails. Respondent admitted in its pleadings below that it is a Singapore entity and that it (not its ultimate parent company) was the party to the underlying sales contract. *See* Pet. App. 88-89. It is now judicially estopped from re-characterizing the transaction in this Court as a sale by the parent company.[6] *See New Hampshire v. Maine*, 532 U.S. 742 (2001) (discussing judicial estoppel). The vessel's prior and subsequent U.S. port calls are irrelevant. *See Lauritzen*, 345 U.S. at 581. The issue is whether the transaction giving rise to the lien (which respondent concedes to be delivery of the fuel in Korea, Opp. 32) has a sufficient connection to the United States. Prior U.S. port calls are obviously irrelevant. The subsequent port call is also irrelevant to the sales transaction because that fuel was fully consumed well before the vessel began its voyage to the United States. *See* Pet. 4.

Respondent also makes several other concessions that will further simplify the analysis in the case. For example, respondent concedes "that [maritime liens]

[6] In any event, respondent offers no plausible reason for looking to the ultimate corporate parent rather than the company that actually contracted for and supplied the fuel. Respondent has not even revealed how many corporate veils would need to be pierced. There appear to be at least four levels of corporate ownership between respondent and the Florida company, *see* Opp. ii, but there may be even more.

do not arise by agreement" when "the provider never had the right to rely on the vessel's credit and thereby receive a maritime lien," and that when the governing "law did not provide for a maritime lien, the provider ha[s] no right to rely on the vessel's credit." Opp. 5 n.1. Because it is undisputed that Malaysian law governs in the absence of the choice-of-law clause and Malaysian law does not provide for a maritime lien in this context (a conclusion reinforced by the Malaysian Amicus Brief), this amounts to a concession that the parties to the sales contract could not have imposed a maritime lien by explicit agreement and also that the maritime lien here arose only as a result of the choice-of-law clause.

Similarly, respondent concedes that a "charterer [is] without authority to bind the vessel with a maritime lien" when "a vessel's charter contain[s] a no-lien clause," Opp. 20, and that in this case "the charter did have a 'no-lien' provision," Opp. 31. Thus respondent concedes that charterer was without actual authority to bind the vessel with a maritime lien here. The only plausible argument for a lien in this case, therefore, depends on the presumption of authority (unique to U.S. law) under 46 U.S.C. § 31341, and section 31341 can apply only by virtue of the U.S. choice-of-law clause.

In sum, respondent's concessions reinforce the conclusion that the judgment below rests entirely on the existence of the U.S. choice-of-law clause. Without that provision, respondent has no tenable argument for a U.S. maritime lien. This case accordingly

provides an ideal vehicle for this Court to decide whether a U.S. choice-of-law clause provides a sufficient connection with the United States to justify the extension of the FMLA to an otherwise wholly foreign transaction.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

GERALD L. GORMAN
Counsel of Record
BRADLEY M. ROSE
KAYE, ROSE & PARTNERS, LLP
402 West Broadway, Suite 1300
San Diego, California 92101
Tel.: (619) 232-6555
Fax: (619) 232-6577

Attorneys for Petitioners