No. ________

In The

Supreme Court of the United States

SPLENDID SHIPPING SENDIRIAN BERHARD
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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Neither U.S. law nor any relevant foreign law permits the parties to a maritime transaction to create a maritime lien by agreement when the lien would not otherwise arise by operation of law. Moreover, two federal circuits have held that the Federal Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq.*, does not recognize a U.S. maritime lien for goods or services provided by a foreign supplier to a foreign vessel in a foreign port. May a foreign supplier, by use of a U.S. choice-of-law clause in a sales contract with a foreign vessel's foreign charterer, nevertheless extend the application of the FMLA in order to create a U.S. maritime lien for goods that it furnished to the foreign vessel in a foreign port, as held below by the Ninth Circuit (in conflict with the decisions of three other federal circuits)?

PARTIES TO THE PROCEEDING

Petitioner Splendid Shipping Sendirian Berhard (Splendid), a Malaysian company (which is owned by a Malaysian public company and a Singapore corporation domiciled in Malaysia), owns petitioner *M/V HARMONY CONTAINER*. Splendid and the *M/V HARMONY CONTAINER* were defendants-appellees and cross-appellants below.

Respondent Trans-Tec Asia, a Singapore "sole proprietorship" (which is wholly owned by a Singapore private company that is, in turn, wholly owned by another Singapore private company), was the plaintiff-appellant and cross-appellee below.

RULE 29.6 DISCLOSURE

Halim Mazmin Berhad, a Malaysian public company, owns 60% of petitioner Splendid. Powick Marine (Singapore) Pte., Ltd., a Singapore corporation domiciled in Malaysia, owns 40% of petitioner Splendid. Splendid owns petitioner *M/V HARMONY CONTAINER,* a Malaysian flag vessel.

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PETITION FOR A WRIT OF CERTIORARI

Splendid Shipping Sendirian Berhard and the *M/V HARMONY CONTAINER* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

Under certain circumstances, federal maritime law provides a powerful form of security to those who furnish "necessaries" (such as fuel or supplies) to a vessel: a maritime lien binding the vessel receiving the necessaries. The lien, created at the time and place of the necessaries' delivery, follows the vessel wherever it goes and continues even if the vessel is sold to a good faith purchaser. On default, the holder of the lien may "arrest" the vessel and force its sale to recover the debt. The availability of the lien encourages suppliers to extend credit to vessels, thus facilitating commerce. But to facilitate commerce it is equally important that maritime liens not be granted too readily. Enforcing liens can slow commerce, the risk of competing liens can discourage suppliers and lenders from extending credit to vessels, and liens can impose inequitable burdens on third parties. Congress therefore struck a careful balance, making maritime liens available only in limited situations. They are, therefore, strictly construed by the courts.

In this case, the Ninth Circuit (in conflict with three other federal circuits) ignored Congress's careful balance and instead conferred a U.S. maritime lien on a foreign supplier that sold fuel in a foreign port to a foreign ship (owned by one foreign company and chartered to another foreign company). Relying on a contractual choice-of-law clause in the sales contract for the fuel, the court of appeals effectively allowed the contracting parties to create a maritime lien by agreement – a result that U.S. law has consistently rejected. No other country involved in this transaction would have granted a maritime lien on these facts, and those other nations would neither recognize nor enforce the U.S. maritime lien that the Ninth Circuit created.

This case offers the Court an ideal vehicle to resolve an entrenched conflict on a recurring issue of fundamental commercial importance. The Court should grant certiorari and clarify the confusion that has plagued the lower courts.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1) is reported at 518 F.3d 1120. The Ninth Circuit's order denying rehearing (App. 167) is unreported.

The district court's order of December 28, 2004, denying respondent's motion to extend time for discovery (App. 145) is unreported. The district court's order of August 17, 2005, denying summary

judgment to respondent on choice of law (App. 85) is unreported. The district court's order of October 19, 2005, granting partial summary judgment to petitioner on unjust enrichment (App. 64) is unreported. The district court's order of February 2, 2006, granting summary judgment to petitioner (App. 33) is reported at 437 F. Supp. 2d 1124.

JURISDICTION

The court of appeals entered its judgment on March 11, 2008, and denied a timely petition for rehearing on May 5. App. 167. On July 25, Justice Kennedy extended the time to file a petition for certiorari until September 2. No. 08A60. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Three relevant provisions of the Commercial Instruments and Maritime Lien Act, 46 U.S.C §§ 31301(4), 31341, and 31342, are reprinted at App. 168-69.

STATEMENT

This admiralty case arises out of a dispute over unpaid bunker fuel ordered by a foreign charterer from a foreign fuel broker and delivered to a foreign-owned and foreign-flagged vessel in a foreign port.

The Ninth Circuit, reversing the judgment of the district court and rejecting the decisions of three other courts of appeals, nevertheless granted a U.S. maritime lien.

A. Facts

In February 2003, respondent, a Singapore entity, sold 1150 metric tons of bunker fuel on credit to Kien Hung Shipping Co. ("Kien Hung"), the Taiwanese charterer[1] of the Malaysian owned and flagged *M/V HARMONY CONTAINER* (the "Vessel"). Respondent delivered the fuel to the Vessel in Busan, Korea, and that fuel was largely consumed during the following month on a voyage to Mexico, Panama, and South America. The transaction had no connection with the United States. The Vessel had previously called at ports in the United States, but more regularly visited ports in other countries. After the transaction at issue here, the Vessel made no U.S. port call until after Kien Hung's charter had terminated and the Vessel had been chartered to another company.

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[1] Under a charter agreement, known as a "charterparty," the owner of a vessel grants control of the vessel to a "charterer" for a stated term in exchange for a fee. The vessel then loads and discharges cargo and obtains provisions at ports as directed by the charterer, not the owner. The charterparty here, governed by English law, required Kien Hung to purchase bunker fuel, specified that the master was the charterer's (not the owner's) agent, and prohibited the charterer from binding the Vessel with any maritime liens.

The sales contract for the fuel, concluded through a series of faxes and e-mail messages, incorporated by reference respondent's Standard Terms and Conditions (furnished some three years earlier to the charterer), which contained lien and U.S. choice-of-law provisions.[2] Under U.K., Singapore, Malaysian, or Korean law, no lien for necessaries would arise in these circumstances.

Kien Hung failed to pay for the fuel. It declared bankruptcy in May 2003 and the Vessel was subsequently chartered to another company.

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[2] The incorporated terms and conditions provided:

8(a). Products supplied in each Transaction are sold and effected on the credit of the receiving vessel, as well as on the promise of the Buyer to pay thereof, and *it is agreed and the Buyer warrants that the Seller will have and may assert a maritime lien against the Receiving Vessel for the amount due for the Products delivered. This maritime lien shall extend to the vessel's freight payments for that particular voyage during which the bunkers were supplied and to freights on all subsequent voyages.* [emphasis added]

17. Law and Jurisdiction: Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each Transaction shall be governed by the laws of the U.S. and the State of Florida, without reference to any conflict of laws rules. The laws of the U.S. shall apply with respect to the existence of a maritime lien, regardless of the country in which the Seller takes legal action.

B. Statutory Background

The Commercial Instruments and Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq.*, grants a lien to "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31342(a), *reprinted* App. 168. Fuel qualifies as a necessary under the definition of § 31301(4), *reprinted* App. 169. A maritime lien remains with the ship even though the ship is transferred to another party. *E.g., Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 497 (1923) (maritime lien "accompanies the property into the hands of a bona fide purchaser") (quoting *Vanderwater v. Mills*, 60 U.S. (19 How.) 82, 89 (1857)).

No maritime lien can be created by agreement of the parties. *See, e.g.*, *Piedmont & George's Creek Coal Co. v. Seabound Fishing Co.*, 254 U.S. 1, 10 (1920); *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 555 (1867); *Blominflot v. THE M/V HENRICH S,* 465 F.3d 144, 146 (4th Cir. 2006). Maritime liens are *stricti juris* and arise automatically, by operation of law, independently of any contract with the supplier. *See*, *e.g.*, *Blominflot v. THE M/V HENRICH S,* 465 F.3d 144, 146 (4th Cir. 2006) (citing *Vanderwater v. Mills*, 60 U.S. (19 How.) 82, 89 (1857). They cannot be extended by construction, analogy, or inference. *Vanderwater v. Mills*, 60 U.S. (19 How.) 82, 89 (1857).

Maritime liens arise, if at all, at the time and place necessaries are furnished. *E.g.*, *Riffe Petroleum Co. v. Cibro Sales Corp.*, 601 F.2d 1385, 1389 (10th

Cir. 1979). Thus an *in rem* proceeding to enforce a maritime lien relates back to the time when it attached.

The U.S. approach to securing maritime suppliers of necessaries is unique. Most maritime nations, including those directly implicated in this transaction (U.K., Malaysia, Singapore, and Korea), do not recognize or permit maritime liens against a vessel to secure payment for necessaries. *See, e.g.*, WILLIAM TETLEY, MARITIME LIENS AND CLAIMS 555 (2d ed. 1998) (U.K.); *id*. at 1331 (Malaysia[3]); *id*. at 1365 (Singapore[4]); *id*. at 1329 (Korea).[5] Malaysia, Singapore, and other nations that follow the English House of Lords' decision in *Halcyon Isle Bankers Trust Int'l, Ltd. v. Todd Shipyards Corp*., [1981] A.C. 221, would not

[3] *See Ocean Grain Shipping Pte. Ltd. v. THE DONG NAI* (1996) 4 MLJ 454 (Malaysian High Ct. – Johor Bahru) (Malaysia and Singapore share the same English admiralty jurisdiction and maritime law); *The Ocean Jade* (1991) 2 MLJ 386 (Malaysian High Ct.) (categories of maritime liens in Malaysia same as in England).

[4] *The Andres Bonifacio* (1993) 3 S.L.R. 521 (Singapore C.A.). The Singapore High Court, in a non-conflicts case, also cited *The Halcyon Isle* in declaring the categories of maritime liens in that country to be the same as those recognized in England. *See The Ohm Mariana ex Peony* (1992) 2 S.L.R. 623 (Singapore High Ct.).

[5] In the countries touching this transaction, a claim for necessaries gives rise only to a statutory right *in rem*. The statutory right *in rem* is a limited right to attach the charterer's interest in the vessel or property at the time of seizure. That right terminates when the debtor's interest ceases.

even enforce a U.S. lien for necessaries in their courts. Thus, whether respondent can acquire a U.S. maritime lien enforceable in U.S. courts is critical; otherwise it would be entitled only to a statutory right *in rem* (in addition to its *in personam* rights against the party with which it contracted).

C. Procedural History

When the Vessel arrived at a U.S. port in 2004 under the subsequent charterparty, respondent asserted a lien and sued the Vessel *in rem*, along with petitioner Splendid, the Malaysian owner. App. 5. The district court initially determined that Malaysian law governed the dispute, but applied U.S. law to hold that the U.S. choice-of-law clause had *not* been incorporated into the contract. App. 85. On reconsideration, however, it applied Malaysian law to determine whether the U.S. choice-of-law clause had been incorporated into the contract and held, under Malaysian law, that it had been.

After applying U.S. law (based on the choice-of-law clause), the district court nevertheless granted summary judgment for petitioner because it determined that the FMLA did not provide respondent with a U.S. maritime lien. App. 55-62. The court noted that the FMLA "does not specify that any of the parties to the lien must be connected to the United States . . . but statutes are presumed to lack an extraterritorial extension in the absence of explicit language to the contrary." App. 56. Relying on this

Court's decisions in *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004), and *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991), App. 56, the court found no evidence to show any affirmative Congressional intent to extend the U.S. lien statute to a wholly foreign transaction in order to rebut the presumption. App. 56-57, 61.

Considering the powerful potential for prejudice of a U.S. lien, its impact upon maritime commerce, App. 59, and harmony with the international maritime system, App. 57, the district court relied upon a number of cases holding the U.S. statute did not extend to the foreign transaction. App. 57-62. In a footnote, the court observed the inclusion in the bunker contract of a maritime lien under U.S. law was irrelevant because maritime liens may not arise by contract, only by operation of law. App. 61 n.10.

On appeal, the Ninth Circuit parried the lack of any U.S. connection to the transaction and framed the issue as "whether a foreign supplier, by supplying fuel to a foreign-flagged vessel in a foreign port under an agreement that United States law applied to the transaction, may obtain a maritime lien under the [FMLA] on the vessel docked in an American port." App. 2. The court answered the question affirmatively "[b]ased on the plain language of the statute, coupled with an enforceable choice of law clause." App. 2-3.

The court of appeals explicitly declined to follow contrary decisions of the First and Eleventh Circuits. App. 29-31. In the process, it acknowledged the state

of confusion and uncertainty in prior courts' treatment of this issue, App. 28-31, describing the current caselaw as a "tangled web." App. 28.

In rejecting the district court's conclusion that extending the FMLA to govern this case would result in an extraterritorial application of U.S. law to a wholly foreign transaction, App. 25, the Ninth Circuit simply declared: "Hardly any area of law could be viewed as more extraterritorial than admiralty law." App. 26. The court asserted without discussion, analysis, or explanation that the U.S. lien extension here "does not interfere with Malaysian law . . . or the law of any other nation implicated in this transaction." App. 26.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Deepens an Entrenched Conflict on a Recurring Issue of Fundamental Commercial Importance That This Court Should Resolve.

The circuit courts are deeply split over how broadly 46 U.S.C. § 31342 (App. 168) extends. The Ninth Circuit's decision below extends the statute to a wholly foreign transaction, finding no Congressional intent to prohibit the FMLA's extraterritorial extension. The Fifth Circuit has also permitted the parties to a transaction to extend the reach of the FMLA with a choice-of-law clause. This expansive application of the FMLA conflicts with decisions of

the First and Eleventh Circuits, which follow Congress's intent to limit the FMLA to U.S. suppliers, and of the Second Circuit, which limits the FMLA's reach to cases in which U.S. law applies by its own force (thus precluding the creation of a maritime lien by agreement of the parties).

A. The First and Eleventh Circuits, Following Congress's Intent and the Principle of Strict Construction, Limit the FMLA to Protect Only U.S. Suppliers.

The First Circuit applies the FMLA based on its analysis of Congressional intent and the application of the principle of strict construction. The leading case is *Tramp Oil & Marine, Ltd. v. M/V MERMAID I*, 805 F.2d 42 (1st Cir. 1986), in which a Danish charterer ordered bunker fuel from an English fuel broker, which, in turn, arranged with a U.S. company to supply the fuel in the port of Savannah, Georgia. When the English broker asserted a lien against the vessel, the First Circuit denied the lien on the ground that Congress had not intended the FMLA to protect foreign suppliers. The court explained:

> The primary concern of the Federal Maritime Lien Act is the protection of American suppliers of goods and services. See H. Rep. No. 92-340, 92nd Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Ad. News 1363-65; . . . [additional citation omitted]. With this purpose in mind, and in light of the principle that maritime liens are to be

> strictly construed, [citation omitted] we decline to extend the law for [the English fuel broker's] benefit in the circumstances of this case. [The English fuel broker] is a foreign broker, not an American supplier, and thus not the intended beneficiary of the Maritime Lien Act."

805 F.2d at 46.

The Eleventh Circuit similarly follows Congress's intent, relying on cases holding that the predecessor to § 31342 (46 U.S.C. § 971) was intended to benefit U.S. suppliers. In *Trinidad Foundry and Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992), the parties to a repair contract chose English law. A foreign repairman, which had furnished necessaries to a foreign vessel in Trinidad, arrested the vessel in Florida and asserted two independent claims: (1) an *in rem* claim under English law and (2) a maritime lien under the FMLA. The Eleventh Circuit analyzed each ground separately. The first claim failed because English law does not recognize a maritime lien for necessaries. 966 F.2d at 616-17. The court held that the second claim failed because the FMLA does not recognize a U.S. maritime lien for goods and services supplied by a foreign plaintiff to a foreign vessel in a foreign port. Despite the U.S. lien statute's broad language, its purpose, as revealed by

Congress, was the protection of American, not foreign suppliers. 966 F.2d at 617 (following *Tramp Oil*).[6]

Under the First and Eleventh Circuit interpretation of the FMLA, respondent would have no lien in the circumstances of this case because Congress intended to benefit only U.S. suppliers. It never intended the FMLA to extend to wholly foreign transactions.

B. The Second Circuit Confers a U.S. Maritime Lien Only When the FMLA Is Applicable Under a Proper Choice-of-Law Analysis.

In *Rainbow Line v. M/V TEQUILA*, 480 F.2d 1024 (2d Cir. 1973), a charterer asserted a maritime lien in an effort to obtain priority for its claim over that of a mortgagee. The charterer argued that it was entitled to the benefit of the FMLA, which recognizes

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[6] *Dresdner Bank AG v. M/V OLYMPIA VOYAGER*, 465 F.3d 1267 (11th Cir. 2006), never addressed the issue here. A foreign P & I club insured a Greek cruise ship operating in the Mediterranean and Caribbean. The district court initially determined that the insurer had a maritime lien senior to the banks' mortgage. Because the banks had not appealed the finding of a maritime lien, the sole issue in the court of appeals was the computation of the amount of the lien. Only on remand did they challenge the lien itself. At that point, the district court declined to rule on the issue from which no appeal had been taken. 2007 U.S. Dist. LEXIS 2839 (S.D. Fla. 2007). *OLYMPIA VOYAGER* does not undermine *Trinidad Foundry*, which remains the law of the Eleventh Circuit.

a maritime lien for the breach of a charterparty, because the charterparty had included a U.S. choice-of-law clause. The Second Circuit quickly dismissed the choice-of-law clause, explaining that "maritime liens arise separately and independently from the agreement of the parties." 480 F.2d at 1026. Moreover, the "rights of third persons cannot be affected by the intent of the parties to the contract." *Id*. In other words, the court recognized that the parties to a transaction cannot create a maritime lien by agreement, for maritime liens arise only by operation of law. A clause specifying a nation's law that would recognize a maritime lien (if that law would not otherwise apply) is no more valid than a clause purporting to create the lien itself by agreement.

Having determined the choice-of-law clause was irrelevant to the existence of a maritime lien, the *Rainbow Line* court had to decide which law did apply. The mortgagee, which was seeking to avoid a maritime lien that would have priority over its mortgage, argued that the issue should be determined under English law (which does not recognize a maritime lien for a breach of charter) because the vessel was English. The Second Circuit also rejected this approach, concluding that the correct solution was a choice-of-law analysis under *Lauritzen v. Larsen*, 345 U.S. 571 (1953). *See* 480 F.2d at 1026.

By coincidence, the *Lauritzen* analysis in *Rainbow Line* pointed to U.S. law, and thus the charterer obtained its lien under the FMLA. *See* 480 F.2d at 1026-27. But that holding was based on the proper

law applicable to the transaction in view of its connections with various jurisdictions. The choice-of-law clause was irrelevant to the decision.

Applying the Second Circuit's analysis to the facts of this case, the Ninth Circuit plainly erred in granting a lien to respondent. Once the irrelevant U.S. choice-of-law clause is ignored, the most significant contacts are with Malaysia – as each court below held in doing its *Lauritzen* analysis. *See* App. 8-11 (Ninth Circuit's *Lauritzen* analysis); App. 42; 132-43 (district court's *Lauritzen* analysis). Thus the Second Circuit's rule would require respondent's claim to a maritime lien to be evaluated under Malaysian law (which plainly does not recognize such a lien).

C. The Fifth Circuit, Now Joined by the Ninth Circuit, Permits the Parties to a Commercial Transaction To Create a Maritime Lien by Contract, Simply by Including a Choice-of-Law Clause Conferring a Lien that Would Not Otherwise Arise.

In *Liverpool & London S.S. Protection & Indemnity Association v. QUEEN OF LEMAN M/V*, 296 F.3d 350, 353 (5th Cir. 2002), which the Ninth Circuit followed below, App. 15, an English marine insurer arrested two vessels and asserted a U.S. maritime lien to recover unpaid insurance premiums. Although English law generally governed the insurance contract, the insurer relied on a contract provision giving it the right to enforce a lien on an insured ship in

"any jurisdiction" "in accordance with local law." Competing creditors disputed their respective priorities to the proceeds of the sale, and two creditors challenged the English insurer's right to assert a lien.

The Fifth Circuit applied U.S. law as the "local law" of the place into which the vessel had sailed, concluding that this result was the intent of the parties as reflected in their insurance contract. 296 F.3d at 353-54. Although the court did not explicitly address whether Congress had intended the FMLA to protect foreign suppliers, it carefully dismissed any concerns about the need for uniformity with this statement:

> "We also reject . . . [the competing creditors'] suggestion that the application of United States substantive law would lead to uncertainty and undermine the goal of uniformity in maritime law. They argue that by resorting to the substantive law of foreign jurisdictions, a maritime lien would appear and disappear as the ship sailed to different jurisdictions that might or might not recognize such a lien. We do not share their concern. We note that the existence of a maritime lien would only change as the ship entered a jurisdiction that granted more expansive rights than English law. Moreover, there is nothing absurd about applying the law of the jurisdiction into which the ship sails, as the ship's presence in the jurisdiction represents a substantial contact. Therefore, having determined that local law controls the existence of the maritime lien, we disagree that

> this interpretation would lead to nonsensical results."

296 F.3d at p. 354.

Now that the Ninth Circuit has adopted the approach taken by the Fifth Circuit in *QUEEN OF LEMAN*, two of the largest maritime circuits (covering the entire West Coast and half of the Gulf Coast) stand in sharp conflict with three other maritime circuits (which cover the most important commercial centers on the East Coast and the other half of the Gulf Coast). While the eastern circuits carefully follow Congress's intent to limit the benefit of the FMLA to domestic suppliers, the Fifth and Ninth Circuit freely extend it to foreign suppliers in wholly foreign transactions. While the most important commercial circuit carefully limits the parties' ability indirectly to obtain a maritime lien by contract (through a choice-of-law clause), the Fifth and Ninth Circuit freely enforce choice-of-law clauses to create maritime liens for transactions having no connection with this country (relying on the vessels' subsequent call at a U.S. port).

D. District Court Decisions in Other Circuits Provide Further Evidence of the Confusion in the Lower Courts.

In addition to the decisions in the five circuits discussed above, district courts in other circuits have also had to grapple with the question presented here. One recent example is *Triton Marine Fuels, Ltd., S.A.*

v. M/V Pacific Chukotka, 504 F. Supp. 2d 68 (D. Md. 2007), *appeal pending* (07-1908). In *Pacific Chukotka*, a sub-charterer's Seattle business office used its Seattle agent to order fuel through a Canadian agent from a non-U.S. supplier for delivery to a foreign vessel in Odessa, Ukraine. The order confirmation included a U.S. choice-of-law clause.

The district court assumed for purposes of its decision that the choice-of-law provision was enforceable, but nonetheless concluded that no maritime lien was created in favor of the foreign supplier because (1) U.S. maritime lien law does not apply extraterritorially; (2) § 31342 does not confer a maritime lien for foreign suppliers to foreign vessels in foreign ports; and (3) Congress's primary concern when it enacted the U.S. maritime lien law was the protection of American suppliers. In other words, the *Pacific Chukotka* court aligned itself with the First and Eleventh Circuits.

In *Loginter SA v. M/V NOBILITY*, 177 F. Supp. 2d 411 (D. Md. 2001), on the other hand, the district court essentially followed the Second Circuit's approach, conducting a *Lauritzen* analysis to determine that Polish law should determine whether a maritime lien existed. Although these district court cases are obviously not part of the inter-circuit conflict, they still help to demonstrate the confusion that exists in the lower courts.

E. Foreign Decisions Attempting to Apply U.S. Law Provide Further Evidence of the Existing Confusion and the Need for Clarification by This Court.

The lower courts in this country are not the only ones in need of this Court's clarification of the proper scope of the FMLA. When foreign courts, under their own choice-of-law rules, are required to apply U.S. law, they are equally at a loss to determine the content of the law they are required to apply. This difficulty is well-illustrated by two recent Canadian cases reaching opposite results acknowledged even by the Ninth Circuit to be well neigh irreconcilable. *See* App. 28 n.11.

In *Kirgan Holding, S.A. v. Ship Panamax Leader*, 2002 F.T.C. 1235, 2002 AMC 2917 (Can. Fed. Ct. Trial Div. 2002), which was cited by the court below (at App. 16), a Panamanian seller contracted with a U.S. corporation that subcontracted with a German company to deliver the fuel in Valetta, Malta, to a vessel registered in Malta and Cyprus on the orders of a charterer from St. Vincent and Grenadines. Although English law governed the charter, the supply contract with the Ukrainian agent contained a U.S. choice-of-law provision. When the vessel was arrested in Canada (which does not recognize maritime liens for necessaries), the court gave effect to the choice-of-law clause and, following the example of the Fifth Circuit, enforced a maritime lien.

By contrast, in *JP Morgan Chase Bank v. Mystras Maritime Corp*., [2006] F.C. 409, 2006 Fed. C.C. LEXIS 412, 2006 AMC 812, a mortgagee arrested a Liberian vessel in Canada and competing claims were adjudicated. Three of the competing creditors had furnished fuel or supplies in foreign ports under contracts containing U.S. choice-of-law provisions. This time, the Canadian court cited and followed the decisions of the Second and Eleventh Circuits and explicitly rejected the Fifth Circuit's conflicting decision. It ruled the U.S. lien did not extend to the wholly foreign transaction because applying the U.S. choice-of-law clause would permit two parties to accomplish indirectly what they could not do directly; *i.e*., create a maritime lien binding third parties.

F. The Conflict Is Irreconcilable, Deeply Entrenched, and Acknowledged by the Court Below.

The conflict among the circuits is clear and irreconcilable. If the *M/V HARMONY CONTAINER* had been arrested in Boston, New York, or Jacksonville, respondent would have had no lien. Similarly, if the ship in *Rainbow Line* had been arrested in Houston or Los Angeles, a lien would have arisen.

The conflict is so entrenched that nothing would be gained by further percolation. Indeed, the circuits are not resolving their differences but moving into deeper conflict. The First, Second, and Eleventh

Circuits have held their current views for 22, 35, and 16 years, respectively. But during the current decade, the Fifth and Ninth Circuits have both rejected the majority views, first creating and then widening the conflict.

The Ninth Circuit itself acknowledged the "tangled web" of U.S. case law and the state of confusion and uncertainty on this issue. *See* App. 28. Although the court below went to heroic lengths to distinguish *Trinidad Foundry*, the simple fact remains that it explicitly rejected one of the stated rules of the case – an alternate holding on one of the independent issues before that court – because it disagreed with the Eleventh Circuit and wished to reach a different result than the Eleventh Circuit rule would have compelled. *See* App. 29-31.

II. The Ninth Circuit Erred in Extending the FMLA To Confer a Lien in a Wholly Foreign Transaction on the Basis of a Choice-of-Law Clause.

A. The Ninth Circuit Erred in Applying the FMLA to a Wholly Foreign Transaction.

The Ninth Circuit correctly recognized that *Lauritzen v. Larsen*, 345 U.S. 571 (1953), established the governing choice-of-law principles for maritime cases. App. 8-9 & n.6. Applying *Lauritzen*, it correctly determined that this case would be governed by Malaysian law but for the choice-of-law clause. App.

10. Unfortunately, the Ninth Circuit failed to appreciate that *Lauritzen* also guides the proper interpretation of a maritime statute to avoid extraterritorial applications that Congress did not intend. If the court of appeals had fully followed *Lauritzen*, it would have recognized that the existence of a maritime lien in this case should have been determined under Malaysian law.

In *Lauritzen*, this Court considered the application of a different U.S. shipping law, the Jones Act, which then provided (in language even more expansive than 46 U.S.C. § 31342) a negligence remedy under U.S. law to "[a]ny seaman who shall suffer personal injury in the course of his employment." 46 U.S.C. § 688 (1952) (recodified in 2006 as 46 U.S.C. § 30104). A Danish seaman employed in New York aboard a Danish-owned vessel who had been injured in Havana brought suit under the Jones Act in New York. This Court noted the breadth of the "literal language" of the Jones Act:

> If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be "any seaman who shall suffer personal injury in the course of his employment." It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured

> anywhere in the world in service of water-craft of every foreign nation – a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

345 U.S. at 576-77.

This Court rejected such a broad "plain language" interpretation, holding that "such statutes [are] construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." 345 U.S. at 577. The *Lauritzen* Court explained this result as a matter of international comity:

> [I]t has long been accepted in maritime jurisprudence that " * * * if any construction otherwise be possible, an Act [of Congress] will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."

345 U.S. at 578 (quoting *The Queen v. Jameson* [1896] 2 Q.B. 425, 430).

The *Lauritzen* vessel's "frequent and regular" contacts with U.S. ports did not change this analysis:

> [The Danish seaman] places great stress upon the assertion that petitioner's commerce and contacts with the ports of the

> United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

345 U.S. at 581. The Ninth Circuit, however, applied the FMLA (with its less expansive language) to a transaction having even fewer ties to the United States on the basis of the Vessel's less significant contact with a U.S. port.

Although the *Lauritzen* Court specifically ruled that the Jones Act's "[a]ny seaman" did not mean "all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation," 345 U.S. at 577, the Ninth Circuit reasoned that when Congress used the words "a person" in § 31342, it in fact meant "any person, not only an 'American person.'" App. 23.

B. The Ninth Circuit Erred in Failing to Require an Affirmative Statement of Congressional Intent Before Extending § 31342 Extraterritorially.

Lauritzen's approach to construing maritime statutes is consistent with the broader rule employed

by this Court when considering the extraterritorial reach of any act of Congress. An affirmative statement of Congress's intent is required before a federal statute will be construed to apply outside of the United States. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) ("To apply domestic law to foreign vessels entering U.S. waters, there must be present the affirmative intention of the Congress clearly expressed."); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952) ("This Court has often stated that the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears."). Here the Ninth Circuit reversed this long-standing presumption and held that the FMLA should be construed to apply to any transaction anywhere in the world in the absence of evidence that Congress had intended to restrict the statute to cases affecting U.S. interests. App. 23.

C. The Ninth Circuit Erred in Permitting the Parties to a Commercial Transaction To Create a Maritime Lien by Contract.

It is well recognized that no maritime lien can be created by agreement of the parties. *See supra* at 6

(citing cases). As a general matter, therefore, it is beyond dispute that a supplier could not obtain a U.S. maritime lien with a boilerplate clause – no matter how clearly drafted – asserting a lien under circumstances in which a lien would not otherwise have arisen. Thus clause 8(a) of the Standard Terms and Conditions, *supra* note 2, which purported not only to create a maritime lien but also to extend it to freights on subsequent voyages, is plainly invalid (and the Ninth Circuit did not rely on it).

The Ninth Circuit's reliance on clause 17 (the choice-of-law clause), however, was functionally equivalent to enforcing clause 8(a). In the absence of clause 17, no arguable basis exists for imposing a maritime lien. Malaysian law, which indisputably applies but for the choice-of-law clause, does not recognize even the possibility of a maritime lien in this context. The existence of the lien, therefore, depends entirely on clause 17. Although that clause does not provide explicitly for a lien, the effect is exactly the same: the Ninth Circuit conferred a lien that would not otherwise exist because respondent included a provision in its contract to achieve that result. Respondent should not be allowed to accomplish indirectly what it is prohibited from doing directly.

III. Whether the FMLA Applies To Confer Maritime Liens in Wholly Foreign Transactions Is an Issue of Exceptional Commercial Importance.

It is no exaggeration to say that the U.S. and world economies largely depend on the ocean shipping industry. The overwhelming majority of imports and exports – both for this country and for the world at large – are carried by sea, and thus the nation and the world depend heavily on the shipping industry. That industry, in turn, depends on ships operating on time and in sufficient numbers. For the industry to operate at all, ships must be built, which means that they must be financed, and once they are built they must be supplied, insured, fueled, and repaired. For these transactions to work efficiently, the legal system must provide clear and predictable rules so that parties will understand the risks that they take and can make their commercial decisions accordingly.

The global maritime lien system is a central part of the equation. No financial institution will loan money for shipbuilding, for example, unless it has sufficient confidence in the security interest that it will receive in the finished vessel. Suppliers, insurers, repairers, and everyone else who operates in the industry will base their prices, in part, on whether they can obtain a maritime lien to secure payment, and what they must do to enforce it.

Unlike liens on land, which generally follow a first-in-time, first-in-right rule, maritime liens are

generally subject to an inverse-order-of-priority rule. *See generally*, *e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 9-2, at 588 (2d ed. 1975). Even a preferred ship mortgage will lose priority to a subsequent preferred maritime lien. 46 U.S.C. § 31326(b)(1). Because most ships do not qualify for a preferred ship mortgage (which is available only for U.S. ships), the risks are generally even greater. Having clear rules for the creation of maritime liens is therefore essential for every player in the industry as anyone can be adversely affected by a maritime lien.

Having clear rules to govern commercial transactions is always important so that those who enter into transactions will be able to understand the terms on which they participate. Having clear rules to govern maritime liens is even more important than in other commercial fields because they affect not only the parties that enter into the particular transaction by which they are created but also every other person that deals with the vessel and may therefore have a claim against it. In this case, for example, the impact of the maritime lien would not be limited to respondent and Kien Hung (the two parties to the sales contract). Most obviously, a maritime lien would affect petitioner, who played no part in the underlying sales transaction (and did everything possible in its agreement with Kien Hung to ensure that Kien Hung did *not* create any liens on the Vessel). It would also affect mortgagees, anyone with a foreign *in rem* claim and any other person who might have a claim

secured by a maritime lien with a lower priority than respondent's.

It is particularly important for this Court to resolve the precise question presented by this case because the United States stands among very few countries recognizing maritime liens for necessaries. The Fifth and Ninth Circuits' expansive rule, applying the FMLA to transactions having no connection to the United States, is an open invitation to forum shopping – encouraging suppliers throughout the world to bring claims to this country to be resolved in our federal courts because they cannot succeed in any other forum. Indeed, this case is a perfect illustration of the problem. Respondent apparently took no action to recover the money that Kien Hung owed to it until the next time the Vessel called at a U.S. port, when it promptly filed the present action.

IV. The Present Case Provides an Ideal Vehicle for Resolving the Entrenched Conflict Among the Lower Courts.

This case offers the Court an ideal vehicle to resolve an entrenched conflict on an important issue. The undisputed facts are simple and straightforward. The case presents the legal issue in its cleanest form because all of the parties in the underlying transaction are foreign.[7] Every *Lauritzen* factor

[7] Most cases do not present the issue so cleanly. In *Triton Marine Fuels, Ltd. v. M/V PACIFIC CHUKOTAKA,* 504 F. Supp. 2d 68 (D. Md. 2007), *appeal pending* (4th Cir. docket no. 07-1908)

(Continued on following page)

points to the application of foreign law, and both lower courts have already agreed on the foreign law that should apply under *Lauritzen*. Thus the Court is offered a stark choice between construing the FMLA as the Ninth Circuit did, to apply whenever a supplier includes a U.S. choice-of-law clause in its standard terms and conditions, or allowing *Lauritzen*'s choice-of-law principles to govern, thus leaving the case to be resolved under Malaysian law.

It is also clear that the entire case turns solely on the one legal issue presented here. If petitioner prevails on this issue, respondent will have no claim; no other forum available to respondent would recognize a maritime lien in these circumstances. If respondent prevails on this issue, the Ninth Circuit has already decided § 31342 extends extraterritorially. There are no other issues in the case and no potential alternative grounds for decision.

(oral argument scheduled October, 2008), for example, the transaction was largely foreign but several significant U.S. contacts might cloud the analysis.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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