46 USCS § 31341

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 46. SHIPPING (§§ 101 — 80509) > Subtitle III. Maritime Liability (Chs. 301 — 313) > CHAPTER 313. Commercial Instruments and Maritime Liens (Subchs. I — III) > Subchapter III. Maritime Liens (§§ 31341 — 31343)

§ 31341. Persons presumed to have authority to procure necessaries

(a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by—

(A) the owner;

(B) a charterer;

(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

History

HISTORY:

Added Nov. 23, 1988, *P. L. 100-710*, Title I, § 102(c), *102 Stat. 4748*; Dec. 12, 1989, *P. L. 101-225*, Title III, § 303(5), *103 Stat. 1924*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Effective date of section:

Amendment Notes

1989.

Other provisions:

Prior law and revision:

Revised Section	*Source section (U.S. Code)*
31341(a)	46:972 (1st sentence), 973
31341(b)	46:972 (2d sentence)

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Section 31341(a) lists those persons who are presumed to have authority to procure necessaries for a vessel. These include the owner, master, or a manager at the port of supply; and an officer or agent appointed by the owner, charterer, owner pro hac vice, or buyer in possession of the vessel. This subsection makes no substantive change to law.

Section 31341(b) provides that any person that is tortiously or unlawfully in possession of or in charge of a vessel has no authority to procure necessaries. This subsection makes no substantive change to law.

Effective date of section:

This section is effective January 1, 1989 as provided by § 107 of Title I of Act Nov. 23, 1988, *P. L. 100-710*, Title I, *102 Stat. 4752*.

Amendment Notes

1989.

Act Dec. 12, 1989 (effective on enactment as provided by § 309(a) of such Act), in subsec. (a)(3), substituted “management” for “mangement”.

Other provisions:

Application and effect of section. For the application and effect of this section, see § 107 of Title I of Act Nov. 23, 1988, *P. L. 100-710*, *102 Stat. 4752*.

NOTES TO DECISIONS

1.Authority to procure necessaries

2.Practice and procedure

1. Authority to procure necessaries

Barge company hired by independent service company to remove "slops" from vessel could not bring in rem action against vessel for unpaid charges; barge company was aware that service company was independent company and not agent of vessel. *Crescent City Marine v. M/V Nunki, 20 F.3d 665, 1994 A.M.C. 2195 (5th Cir. 1994)*, reh'g denied, *1994 U.S. App. LEXIS 16248 (5th Cir. June 15, 1994)*.

Owner of vessel failed to overcome presumption that charterer was authorized to contract for necessaries for vessel since there was no evidence that supplier of maritime fuel had actual knowledge that charterer was not authorized to bind vessel, and contract for fuel expressly precluded any attempt to disclaim maritime lien. *World Fuel Servs. Trading v. Hebei Prince Shipping Co., 783 F.3d 507, 2015 A.M.C. 929 (4th Cir. 2015)*.

State ports authority cannot claim that its rental of cranes and container-handling equipment to subcontractor or its stevedore usage fees give rise to maritime lien against vessels, where subcontractor was independent contractor hired for its special knowledge and expertise in field of stevedoring, because authority's services and equipment were not ordered by person with actual or presumptive authority to incur liens against vessels, under *46 USCS § 31341(a)*. *South Carolina State Ports Auth. v. M/V Tyson Lykes ex rel. Delaware Bay, 837 F. Supp. 1357, 1994 A.M.C. 1294 (D.S.C. 1993)*, aff'd, *67 F.3d 59, 1996 A.M.C. 242 (4th Cir. 1995)*.

Charter company qualified as either "a person entrusted with management of vessel at port of supply," or "agent appointed by . . . charterer or owner pro hac vice," pursuant to *46 USCS § 31341(a)*; specifically, there was no dispute that its prior owner purported to sell vessel to charter company, agreed to finance transaction, and was aware of charter company's intended modifications and use of vessel as crewboat. *Hinson v. M/V Chimera, 661 F. Supp. 2d 614, 2010 A.M.C. 50 (E.D. La. 2009)*.

Suppliers hired by charter company were entitled to claimed maritime liens against vessel because no genuine issue of material fact existed regarding charter company's entitlement to benefit of statutory presumption of authority to procure services for vessel under *46 USCS § 31341*, nor did defendants establish suppliers' actual knowledge regarding charter company's alleged lack of authority. *Hinson v. M/V Chimera, 661 F. Supp. 2d 614, 2010 A.M.C. 50 (E.D. La. 2009)*.

Unpublished decision: In dispute concerning transport of yacht from Missouri to Florida, subcontractor was not entitled to maritime lien against vessel because owner did not personally authorize subcontractor to transport yacht or provide yacht with necessaries beyond cost owner agreed upon with boat transport company; company could not have authorized on owner's behalf expenditures that subcontractor incurred because boat transport company was not owner's agent. *D & M Carriers LLC v. M/V Thor Spirit, 2014 A.M.C. 2644, 2014 U.S. App. LEXIS 18045 (11th Cir. Sept. 22, 2014)*, vacated, sub. op., reh'g denied, *586 Fed. Appx. 564, 2015 A.M.C. 292 (11th Cir. 2014)*.

2. Practice and procedure

Fact that petitioner owner's home floated did not make it "vessel" under *1 USCS § 3* for maritime lien under *46 USCS § 31342* sought by respondent city or maritime jurisdiction under *28 USCS § 1331(1)*, as it was not designed to any practical degree for transportation over water, had no steering mechanism, could move only under tow, and had no power except through land line; there was little reason to classify floating homes as "vessels" because admiralty law, for example, provided special attachment procedures lest vessel avoid liability by sailing away, *46 USCS §§ 31341-31343*, liability statutes such as Jones Act recognized that sailors faced special "perils of sea," and maritime safety statutes subjected vessels to U.S. Coast Guard inspections. *Lozman v. City of Riviera Beach, 568 U.S. 115, 133 S. Ct. 735, 184 L. Ed. 2d 604, 23 Fla. L. Weekly Fed. S 556, 2013 A.M.C. 1 (2013)*.

Maritime Commercial Instruments and Lien Act supports in personam action against United States based on in rem principles. *Turecamo of Savannah v. United States, 36 F.3d 1083, 8 Fla. L. Weekly Fed. C 787, 1996 A.M.C. 2003 (11th Cir. 1994)*, cert. denied, *516 U.S. 1028, 116 S. Ct. 673, 133 L. Ed. 2d 522 (1995)*.

Seller of sails is denied leave to intervene in action to foreclose preferred ship mortgage, despite argument that seller did not need to comply with 10-day filing deadline because it is not asserting maritime lien since purchaser was unlawfully in possession of ship due to ineffectual transfer of title, because purchaser had bill of sale for yacht from owner of record, had apparent authority to purchase necessaries for yacht, and thus maritime lien was created under *46 USCS §§ 31341* et seq. *Key Bank v. Palmer Johnson, Inc., 838 F. Supp. 419, 1994 A.M.C. 1291 (E.D. Wis. 1993)*.

Permanently moored riverboat casino that received power, computer, communication, water and sewer services from shore was not "vessel" and lease agreement for land, wharf, and water bottom for mooring was not maritime contract, so court lacked admiralty jurisdiction over contract and tort claims by plaintiff lessor. *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans, 439 F. Supp. 2d 1178 (S.D. Ala. 2006)*, aff'd in part and rev'd in part, remanded, *535 F.3d 1299, 21 Fla. L. Weekly Fed. C 956, 38 Envtl. L. Rep. 20188 (11th Cir. 2008)*.

Creditor's motion for interlocutory sale of vessel pursuant to *46 USCS §§ 31341*–*31343* and Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions E(9)(b) was granted because creditor's shipyard repairs and fabrication work to barge, which were performed at barge owner's request, gave rise to maritime lien over vessel as barge was clearly vessel, and repairs were specifically enumerated by *46 USCS §§ 31301*, *31342* as type of necessary, and creditor's lien also attached to structure on barge consisting of exhibit containers because structure was reasonably needed for barge to function as mobile exhibit hall and, thus, was necessary, and even if structure was not necessary, it was fairly deemed appurtenance as it was critical to barge's mission of serving as floating exhibit hall. *Ironhead Marine, Inc. v. Barge Exiderdome No. 1, 635 F. Supp. 2d 386, 2010 A.M.C. 179 (D.N.J. 2009)*.

Research References & Practice Aids

Cross References:

This section is referred to in *46 USCS §§ 31301*, *31323*.

Code of Federal Regulations:

Maritime Administration, Department of Transportation—Regulated transactions involving documented vessels and other maritime interests, *46 CFR 221.1* et seq.

Am Jur:

12 Am Jur 2d, Boats and Boating § 33.

70 Am Jur 2d, Shipping §§ 142, 150, 154, 484.

Federal Procedure:

29 *Moore's Federal Practice (Matthew Bender 3d ed.), ch 704*, Admiralty Pleading and Procedure § 704.02.

29 *Moore's Federal Practice (Matthew Bender 3d ed.), ch 705*, Admiralty Arrest and Attachment § 705.01.

29 *Moore's Federal Practice (Matthew Bender 3d ed.), ch 706*, Admiralty Sales § 706.01.

Other Treatises:

2-III Benedict on Admiralty, Principles of Admiralty Law, Source of Maritime Liens §§ 35, *40*.

2-IV Benedict on Admiralty, Principles of Admiralty Law, Priorities of Maritime Liens § 51.

2-V Benedict on Admiralty, Principles of Admiralty Law, Discharge of Liens § 61.

2-VI Benedict on Admiralty, Principles of Admiralty Law, Ship Mortgages § 70.

3A-X Benedict on Admiralty, The Law of Salvage, The Salvage Lien § 142.

8-VII Benedict on Admiralty, Desk Reference, Maritime Liens § 7.01.

Hierarchy Notes:

46 USCS, Subtit. III

46 USCS, Subtit. III, Ch. 313

End of Document

Current through Public Law 116-91, approved December 19, 2019.

§ 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

(1)has a maritime lien on the vessel;

(2)may bring a civil action in rem to enforce the lien; and

(3)is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

History

HISTORY:

Added Nov. 23, 1988, *P. L. 100-710*, Title I, § 102(c), *102 Stat. 4748*; Dec. 12, 1989, *P. L. 101-225*, Title III, § 303(6), *103 Stat. 1924*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Effective date of section:

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Other provisions:

Prior law and revision:

Revised Section	*Source section (U.S. Code)*

Revised Section	*Source section (U.S. Code)*
31342	46:971

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Section 31342 provides that any authorized person providing necessaries for a vessel has a maritime lien on the vessel, may bring a civil action in rem in admiralty to enforce the lien, and is not required to allege or prove that credit was given to the vessel. “Providing” has been substituted for “furnishing” for consistency with other laws. This section makes no substantive change to law. This section does not supersede the prohibition under the Public Vessels Act, the Foreign Sovereign Immunities Act, or the Suits in Admiralty Act, on bringing an in rem action against a public vessel.

Effective date of section:

This section is effective January 1, 1989 as provided by § 107 of Title I of Act Nov. 23, 1988, *P. L. 100-710*, Title I, *102 Stat. 4752*.

Amendment Notes

1989.

Act Dec. 12, 1989 (effective on enactment as provided by § 309(a) of such Act) designated the existing provisions as subsec. (a), and in such subsec., substituted “Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner” for “A person providing necessaries to a vessel (except a public vessel) on the order of a person listed in section 31341 of this title”; and added subsec. (b).

Other provisions:

Application and effect of section. For the application and effect of this section, see § 107 of Title I of Act Nov. 23, 1988, *P. L. 100-710*, *102 Stat. 4752*.

NOTES TO DECISIONS

I.IN GENERAL

1.Attachment of lien to specified vessel

2.Security and release

3.Waiver of lien

4.Laches

5.Interest

I. IN GENERAL

1. Attachment of lien to specified vessel

In applying Merchant Marine Act lien, supplies to be subjected to lien must be for use of named vessels in specified portions; materialman is not deemed to have fulfilled obligations imposed by Act simply by delivering supplies to owner and then leaving owner free to redistribute them at his discretion. *Itel Containers Int'l Corp. v. Atlanttrafik Express Service, Ltd., 982 F.2d 765, 1993 A.M.C. 609 (2d Cir. 1992)*.

Because vessel repairer provided no services to replacement vessel, its attempt to enforce lien over that vessel violated principle that maritime lien attached only to specific vessel to which services were provided; replacement vessel could not be held responsible for debts of sunken vessel. *PNC Bank Del. v. F/V Miss Laura, 381 F.3d 183, 2004 A.M.C. 2314 (3d Cir. 2004)*, cert. denied, *543 U.S. 1090, 125 S. Ct. 972, 160 L. Ed. 2d 900 (2005)*.

Suppliers hired by charter company were entitled to claimed maritime liens against vessel pursuant to *46 USCS § 31342(a)* because no genuine issue of material fact existed regarding charter company's entitlement to benefit of statutory presumption of authority to procure services for vessel under *46 USCS § 31341*, nor did defendants establish suppliers' actual knowledge regarding charter company's alleged lack of authority. *Hinson v. M/V Chimera, 661 F. Supp. 2d 614, 2010 A.M.C. 50 (E.D. La. 2009)*.

Unpublished decision: Jurisdiction to enforce supplier's maritime lien against floating oil and gas production facility and its owner did not exist in federal district court because oil and gas production facility, which was moored miles offshore on Outer Continental Shelf, was not practically capable of transportation on water and thus did not meet definition of vessel. *Warrior Energy Servs. Corp. v. ATP Titan M/V, 551 Fed. Appx. 749, 2014 A.M.C. 2514 (5th Cir. 2014)*.

2. Security and release

Although stevedore corporation returned security posted by owners for release of their vessels pursuant to Supp. R. Certain Adm. & Mar. Cl. E(5) in action under Maritime Lien Act, *46 USCS § 31342*, and Supp. R. Certain Adm. & Mar. Cl. C(3) after district court granted summary judgment for owners, district court retained in rem jurisdiction over remand from appellate court and had ample equitable authority to order owners to reinstate security regardless of fact they were no longer in possession of same security originally transferred to trust fund. *Ventura Packers, Inc. v. F/V Jeanine Kathleen, 424 F.3d 852 (9th Cir. 2005)*.

Where bond was ordered as part of City's in rem maritime action for damages, brought pursuant to this section, order that City post $25,000 bond to protect defendant in event that its arrest of his floating home was wrongful was analogous to *Fed. R. Civ. P. 65(c)* bond its expressly stated purpose was to secure value of home in case district court found it lacked jurisdiction to order arrest. *City of Riviera Beach v. Lozman, 672 Fed. Appx. 892 (11th Cir. 2016)*.

Court did not have in rem jurisdiction over claim by yacht club that was originally asserted in rem against vessel, and in personam against vessel owner and vessel master because yacht club had agreed voluntarily to release vessel and did not obtain substitute security for vessel. *Capital Yacht Club v. Vessel Aviva, 409 F. Supp. 2d 1 (D.D.C. 2006)*.

Neither security deposit paid to creditor on lease nor Uniform Commercial Code financing statement could be construed as intent to waive maritime lien; however, deposit was set off against unpaid lease payments; creditor was not entitled to maritime lien for attorney fees because they were not necessaries; as game equipment was not necessary for vessel's care and preservation after its arrest, interest accrual ended on arrest date. *Patricia Hayes & Assocs. v. M/V Big Red Boat, II, 2002 A.M.C. 1722, 2002 U.S. Dist. LEXIS 9867 (S.D.N.Y. May 31, 2002)*, aff'd, *339 F.3d 76, 2003 A.M.C. 2357, 56 Fed. R. Serv. 3d (Callaghan) 227 (2d Cir. 2003)*.

3. Waiver of lien

Submission by supplier of bill of lading for necessaries to ship owner's agent with whom supplier had already been dealing, rather than to owner, did not waive supplier's lien. *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express, 120 F.3d 304, 1997 A.M.C. 2845, 38 Fed. R. Serv. 3d (Callaghan) 440 (1st Cir. 1997)*.

Testimony regarding which party creditor relied on can be determinative of whether maritime lien is waived under *46 USCS § 31342(a)*, but that conclusion does not weaken heavy burden placed on party attacking presumption; if evidence shows that claimant relied on credit of vessel to some extent, no waiver of maritime lien will be found. *Maritrend, Inc. v. Serac & Co., 348 F.3d 469, 2003 A.M.C. 2743 (5th Cir. 2003)*.

District court erred in finding that stevedoring company waived its maritime lien under *46 USCS § 31342(a)* where company's conduct reflected its expectation that agent would pay for stevedoring services, but un-rebutted trial testimony showed that company had relied on vessel's credit as fallback position. *Maritrend, Inc. v. Serac & Co., 348 F.3d 469, 2003 A.M.C. 2743 (5th Cir. 2003)*.

Neither security deposit paid to creditor on lease nor Uniform Commercial Code financing statement could be construed as intent to waive maritime lien. *Patricia Hayes & Assocs. v. M/V Big Red Boat, II, 2002 A.M.C. 1722, 2002 U.S. Dist. LEXIS 9867 (S.D.N.Y. May 31, 2002)*, aff'd, *339 F.3d 76, 2003 A.M.C. 2357, 56 Fed. R. Serv. 3d (Callaghan) 227 (2d Cir. 2003)*.

4. Laches

Laches does not prevent enforcement of maritime lien by port agent under *46 USCS § 31342*, even though agent extended credit to charterer for 17 days, where it had vessel arrested just one day after it was notified that charterer

could not render payment since its bank accounts had been frozen, because agent acted in timely manner to enforce maritime lien. *Barwil ASCA v. M/V SAVA, 44 F. Supp. 2d 484, 1999 A.M.C. 2408 (E.D.N.Y. 1999)*.

Not-for-profit English mutual insurance association diligently pursued subject marine vessel to recover outstanding debts incurred as insurance calls beginning in August of 2000 and diligently searched various ports in effort to seize vessel prior to its ultimate seizure in February 2001; therefore, while delay of approximately nine months may have occurred prior to institution of suit, delay was excusable given diligence of association's search, and, furthermore, vessel's owner at time vessel was arrested, as claimant, put forth no evidence that any prejudice resulted from delay that occurred while association searched for vessel, so defense of laches failed. *Liverpool & London S.S. Prot. & Indem. Ass'n v. M/V Abra, 295 F. Supp. 2d 674, 2004 A.M.C. 1025 (M.D. La. 2003)*.

5. Interest

Pursuant to *46 USCS § 31342*, fuel supplier was entitled to judgment of $260,400, plus prejudgment interest at rate of 2.34 percent, because $260,400 reflected price of fuel—necessary—and contract interest rate was greater than required to compensate supplier, so court assessed prejudgment interest at three-month average Treasury bill rate of 2.34 percent. *Triton Marine Fuels, Ltd. v. M/V Pac. Chukotka, 671 F. Supp. 2d 753, 2009 A.M.C. 2948 (D. Md. 2009)*.

Neither security deposit paid to creditor on lease nor Uniform Commercial Code financing statement could be construed as intent to waive maritime lien; however, deposit was set off against unpaid lease payments; creditor was not entitled to maritime lien for attorney fees because they were not necessaries; as game equipment was not necessary for vessel's care and preservation after its arrest, interest accrual ended on arrest date. *Patricia Hayes & Assocs. v. M/V Big Red Boat, II, 2002 A.M.C. 1722, 2002 U.S. Dist. LEXIS 9867 (S.D.N.Y. May 31, 2002)*, aff'd, *339 F.3d 76, 2003 A.M.C. 2357, 56 Fed. R. Serv. 3d (Callaghan) 227 (2d Cir. 2003)*.

It was not error for bankruptcy court to determine that creditor having lien against vessel was entitled to interest from vessel proceeds as part of necessaries contemplated under *46 USCS § 31342*. *In re Buholm Fisheries, Inc., 308 B.R. 491 (W.D. Wash. 2003)*.

6. Miscellaneous

Neither Federal Arbitration Act nor Convention on Recognition and Enforcement of Foreign Arbitral Awards serves basis for maritime action in rem. *Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 1993 A.M.C. 1341 (5th Cir.)*, reh'g, en banc, denied, *963 F.2d 372 (5th Cir. 1992)*.

Fax notifying shipping company, that provided service for ship, that owner of ship asserted prohibition of liens clause was sufficient to provide shipping company with actual notice that it could not claim lien; facsimiles were reliable and customary method of communicating in shipping business and fax confirmation sheet created rebuttable presumption that shipping company had actual knowledge of no-liens clause. *Stevens Shipping & Terminal Co. v. Japan Rainbow II MV, 334 F.3d 439, 2003 A.M.C. 1647 (5th Cir. 2003)*, reh'g denied, *2003 U.S. App. LEXIS 15382 (5th Cir. July 15, 2003)*.

Since maritime insurer conceded that it provided post-arrest insurance for vessel without seeking court's imprimatur and no other piece of evidence established that equities somehow favored insurer, district court acted well within its discretion by declining to award insurer priority claim for provision of post-arrest insurance. *Dresdner Bank AG v. M/V Olympia Voyager, 465 F.3d 1267, 19 Fla. L. Weekly Fed. C 1073, 2006 A.M.C. 2299 (11th Cir. 2006)*.

46 USCS § 31342, which provides for maritime lien for necessaries, imposes no restriction on nationality or other identity of supplier or vessel, and no geographic restriction on place of provision of necessaries. *Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120, 2008 A.M.C. 684 (9th Cir.)*, cert. denied, *555 U.S. 1062, 129 S. Ct. 628, 172 L. Ed. 2d 639 (2008)*.

Person providing necessaries means any person, not only American person; Federal Maritime Lien Act, 46 USCS §§ 31301 et seq., by its plain language, is not restricted in application to U.S. citizens, U.S. companies, or companies doing business in U.S. *Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120, 2008 A.M.C. 684 (9th Cir.)*, cert. denied, *555 U.S. 1062, 129 S. Ct. 628, 172 L. Ed. 2d 639 (2008)*.

Allegations of injury caused by fall from gangway when vessel unexpectedly moved came within maritime jurisdiction as maritime tort because gangway was part of vessel, injury occurred while vessel was docked for maintenance and repairs in navigable waters, and impact on maritime commerce was potentially disruptive; nothing in this section, which addresses completely different question of materialmen's liens, has abrogated ability to assert common-law maritime tort claim. *Minott v. M/Y Brunello, 891 F.3d 1277, 27 Fla. L. Weekly Fed. C 958, 2018 A.M.C. 1548 (11th Cir. 2018)*.

Repair company had maritime lien for maintenance and repair services performed on certain ship pursuant to agreement entered into with ship's owner; although parties understanding was oral, agreement was not barred by Statute of Frauds as it was capable of being performed within year, and company performed work on ship as requested by its owner and to comply with terms of survey. *Constructive Hands, Inc. v. Baker, 446 F. Supp. 2d 88 (N.D.N.Y. 2006)*.

Establishing that supplier of necessaries is engaged in joint venture as to vessel is one way to overcome presumption established in *46 USCS § 31342(a)*; specifically, joint venturers cannot hold maritime liens because they are not strangers to vessel. *Hinson v. M/V Chimera, 661 F. Supp. 2d 614, 2010 A.M.C. 50 (E.D. La. 2009)*.

There is some confusion about whether *46 USCS § 31342* is still called "Federal Maritime Liens Act" or whether it is now referred to as part of "Commercial Instruments and Maritime Liens Act." *Triton Marine Fuels, Ltd. v. M/V Pac. Chukotka, 671 F. Supp. 2d 753, 2009 A.M.C. 2948 (D. Md. 2009)*.

Cases concerning maritime mortgage liens arising out of mortgages are not directly applicable to cases involving lien for necessaries under *46 USCS § 31342*. *Triton Marine Fuels, Ltd. v. M/V Pac. Chukotka, 671 F. Supp. 2d 753, 2009 A.M.C. 2948 (D. Md. 2009)*.

Terms in underlying contract for necessaries are not automatically covered by resulting maritime lien; rather, maritime lien under Federal Maritime Liens Act, *46 USCS § 31342*, appears to only cover price of necessaries themselves plus interest. *Triton Marine Fuels, Ltd. v. M/V Pac. Chukotka, 671 F. Supp. 2d 753, 2009 A.M.C. 2948 (D. Md. 2009)*.

Company provided first category of services pursuant to management agreement and before filing of supplements to preferred mortgages; however, those services did not give rise to preferred maritime lien since vessel was not yet complete when services were performed; accordingly, to extent that company possessed maritime lien for necessaries, that lien did not have higher priority than first mortgage to proceeds of vessel's sale. *United States v. Huakai, 768 F. Supp. 2d 832 (E.D. Va. 2011)*.

Unpublished decision: Vessel owner sent plaintiff payment for fuel delivery to defendant ship, and plaintiff confirmed payment was received and debt was satisfied; plaintiff therefore no longer had valid lien on ship, and district court correctly granted motion to dismiss/vacate arrest. *World Fuel Servs. v. Magdalena Green M/V, 464 Fed. Appx. 339 (5th Cir. 2012)*.

Unpublished decision: Federal Maritime Lien Act was premised on concept that vessel was distinct entity, and therefore statutorily liable only for its own debts; as such, ship could not be held liable for other outstanding debts of vessel owner. *World Fuel Servs. v. Magdalena Green M/V, 464 Fed. Appx. 339 (5th Cir. 2012)*.

Where private international agreement, for maritime insurance, specified that Norwegian law governed, insurer may not rely on Federal Maritime Lien Act, *46 USCS § 31342*, to claim liens for unpaid insurance premiums, where Norwegian law does not recognize such liens; accordingly, district court affirmed bankruptcy court's denial of insurer's motion for summary judgment, and grant of summary judgment on cross-motion filed by mortgagees that

held valid liens. *Assuranceforeningen Skuld (Gjensidig) - Den Danske Afdeling v. Allfirst Bank (In re Millenium Seacarriers, Inc.), 292 B.R. 25, 2003 A.M.C. 1185 (S.D.N.Y. 2003)*, aff'd, *96 Fed. Appx. 753 (2d Cir. 2004)*.

II. PARTICULAR CASES

7. Charterer of vessel provided goods or services

Maritime lien against defendant container vessels did not arise in favor of supplier of containers for vessels where supplier provided containers to vessels' charterer rather than to vessels themselves. *Redcliffe Ams. v. M/V Tyson Lykes, 996 F.2d 47, 1993 A.M.C. 2294 (4th Cir. 1993)*.

Foreign supplier was entitled to maritime lien under Federal Maritime Lien Act (FMLA), *46 USCS § 31342(a)*, because supplier delivered fuel bunkers to vessel in response to sub-charterer's request, sub-charterer never paid for fuel bunkers, FMLA protected foreign suppliers of necessities, and there was no problem of extraterritorial application of FMLA where parties agreed to apply United States law to their transaction and fuel procured from supplier enabled vessel to deliver its cargos to United States port. *Triton Marine Fuels Ltd., S.A. v. M/V Pacific Chukotka, 575 F.3d 409, 2009 A.M.C. 1885 (4th Cir. 2009)*.

Bermuda corporation that paid for fuel supplied to foreign flagged vessel was not entitled to maritime lien under *46 USCS § 31342* for charterer's failure to reimburse it for fuel payment, where there was no evidence that charterer had direct relationship with corporation, that vessel owner was aware of corporation's involvement, or that corporation had ongoing relationship with either charterer or vessel. *Galehead, Inc. v. M/V Anglia, 15 F. Supp. 2d 1304, 1999 A.M.C. 292 (S.D. Fla. 1998)*, aff'd in part, vacated in part, remanded, in part, *183 F.3d 1242, 12 Fla. L. Weekly Fed. C 1155, 1999 A.M.C. 2952 (11th Cir. 1999)*.

Fuel oil supplier did not improvidently extend credit to time charterer by delivering bunkers to vessel at time that charterer was in default of payment for prior delivery and thus was not precluded from asserting maritime lien under *46 USCS § 31342*, where delivery was made upon charterer's assurance of partial payment of prior debt and there was no evidence that supplier knew that charterer would be unable to live up to its obligations. *American Oil Trading, Inc. v. M/V Sava, 47 F. Supp. 2d 348, 1999 A.M.C. 1729 (E.D.N.Y. 1999)*.

Maryland maritime services company is entitled to maritime lien under *46 USCS § 31342*, where stevedoring and dockage services it provided to vessel have been deemed necessaries under *46 USCS § 31301(4)*, because agent appointed by charterer of vessel is presumed to have authority to procure necessaries, and that presumption has not been rebutted here. *Loginter S.A. v. M/V Nobility, 177 F. Supp. 2d 411, 2002 A.M.C. 283 (D. Md. 2001)*.

Unpublished decision: District court properly found that fuel supplier properly asserted maritime lien under Federal Maritime Lien Act (FMLA) on vessel when it docked because it had not been paid for fuel it arranged to have delivered to vessel, and fact that choice-of-law clause in contract did not specifically refer to laws of United States did not restrict district court from giving effect to contracting parties' intent and recognizing maritime lien under FMLA when vessel docked; chief engineer's placement of "no lien" stamp on delivery receipts was insufficient to give supplier notice that owner had limited charterer's authority to bind vessel. *O.W. Bunker Malta Ltd. v. MV Trogir, 602 Fed. Appx. 673 (9th Cir. 2015)*.

8. Containers and container-related services

Maritime lien against defendant container vessels did not arise in favor of supplier of containers for vessels where supplier provided containers to vessels' charterer rather than to vessels themselves. *Redcliffe Ams. v. M/V Tyson Lykes, 996 F.2d 47, 1993 A.M.C. 2294 (4th Cir. 1993)*.

Where stevedoring company acted independently in contracting with state Port Authority for crane rental, container handling services and stevedore usage fees, and billed Authority, not bankrupt charterer of vessel, company had no authority to bind vessel to Authority's rental charges and fees, and Authority therefore had no maritime lien for those charges. *South Carolina State Ports Auth. v. M/V Tyson Lykes, 67 F.3d 59, 1996 A.M.C. 242 (4th Cir. 1995)*.

For purposes of *46 USCS § 31342(a)*, containers are necessaries. *Container Applications Int'l, Inc. v. Lykes Bros. S.S. Co. (In re Lykes Bros. S.S. Co.), 233 F.3d 1361, 14 Fla. L. Weekly Fed. C 181, 2001 A.M.C. 967, 37 Bankr. Ct. Dec. (LRP) 32 (11th Cir. 2000)*.

Cargo containers leased in bulk to owner of group of vessels for unrestricted use on board vessels in that group are not "provided" to any particular vessel within meaning of *46 USCS § 31342(a)*. *Container Applications Int'l, Inc. v. Lykes Bros. S.S. Co. (In re Lykes Bros. S.S. Co.), 233 F.3d 1361, 14 Fla. L. Weekly Fed. C 181, 2001 A.M.C. 967, 37 Bankr. Ct. Dec. (LRP) 32 (11th Cir. 2000)*.

Common carrier is entitled to summary dismissal of freight consolidator's maritime lien claims, even though consolidator contends that it performed stuffing and drayage of containers that constitute "necessaries" within meaning of *46 USCS § 31342*, because consolidator is not stevedore, containers were stuffed 30-minute drive away from marine terminals, and consolidator's labor was not "maritime" in nature and does not give rise to maritime lien. *Sea-Land Serv. v. Atlantic Pac. Int'l, 61 F. Supp. 2d 1102, 1999-2 Trade Cas. (CCH) P72669, 1999-2 Trade Cas. (CCH) P72670 (D. Haw. 1999)*.

9. Equipment

Where stevedoring company acted independently in contracting with state Port Authority for crane rental, container handling services and stevedore usage fees, and billed Authority, not bankrupt charterer of vessel, company had no authority to bind vessel to Authority's rental charges and fees, and Authority therefore had no maritime lien for those charges. *South Carolina State Ports Auth. v. M/V Tyson Lykes, 67 F.3d 59, 1996 A.M.C. 242 (4th Cir. 1995)*.

Where plaintiff did not rely on vessel's credit but owner's credit, and did not provide equipment to vessel but to vessel's owner, plaintiff had no lien against vessel as supplier of necessaries under FMLA. *Racal Survey U.S.A., Inc. v. M/V Count Fleet, 231 F.3d 183, 2001 A.M.C. 456 (5th Cir. 2000)*, cert. denied, *532 U.S. 1051, 121 S. Ct. 2192, 149 L. Ed. 2d 1024, 2001 A.M.C. 2999 (2001)*.

Neither security deposit paid to creditor on lease nor Uniform Commercial Code financing statement could be construed as intent to waive maritime lien; however, deposit was set off against unpaid lease payments; creditor was not entitled to maritime lien for attorney fees because they were not necessaries; as game equipment was not necessary for vessel's care and preservation after its arrest, interest accrual ended on arrest date. *Patricia Hayes & Assocs. v. M/V Big Red Boat, II, 2002 A.M.C. 1722, 2002 U.S. Dist. LEXIS 9867 (S.D.N.Y. May 31, 2002)*, aff'd, *339 F.3d 76, 2003 A.M.C. 2357, 56 Fed. R. Serv. 3d (Callaghan) 227 (2d Cir. 2003)*.

10. Joint ventures

Joint venture existed between owner of arrested fishing vessels and alleged lien holder, seafood company, thereby precluding lien where company had control over vessels and directed kind of fishing to be done. Fulcher's Point Pride Seafood v M/V "Theodora Maria" *935 F.2d 208 (CA11 Ga 1991)*.

Party was entitled to maritime lien for work performed on vessel where work was done prior to period when parties entered into joint venture agreement and during time when parties were attempting to negotiate, but failed to reach written joint venture agreement. Rose v M/V "Gulf Stream Falcon" *186 F.3d 1345, 12 Fla. L. Weekly Fed. C 1237, 2000 A.M.C. 38 (CA11 Fla 1999)*.

Where not-for-profit English mutual insurance association which sought to enforce in rem maritime lien against marine vessel for necessaries provided to vessel, more specifically, form of marine "insurance," retained no control or proprietary interest in subject matter of venture—vessel against which action was brought—did not share in profits or losses of management company or vessel, and there was no evidence of intent to form joint venture put forth, there was no joint venture sufficient to negate maritime lien held by association against marine vessel; moreover, while association might not have conducted its business like typical insurance company, it retained large degree of independence from individual members, and, while Kappa and other members of Association pooled their resources and shared losses in order to maintain insurance at affordable rate, this relationship did not rise to level of joint venture. *Liverpool & London S.S. Prot. & Indem. Ass'n v. M/V Abra, 295 F. Supp. 2d 674, 2004 A.M.C. 1025 (M.D. La. 2003)*.

Defendants could not overcome presumption established in *46 USCS § 31342(a)* on theory that particular plaintiffs who supplied vessel were not entitled to maritime liens because they both were "joint venturers" with charter company that requested their services; fact that suppliers were family members with owners of charter company, limited liability company, was insufficient was insufficient to make them joint venturers. *Hinson v. M/V Chimera, 661 F. Supp. 2d 614, 2010 A.M.C. 50 (E.D. La. 2009)*.

11. Legal services

Court declines to become "first court in history of American maritime law" to declare that legal services are necessities; maritime lien for legal services would conflict with purpose of FMLA. *Gulf Marine & Indus. Supplies, Inc. v. Golden Prince M/V, 230 F.3d 178, 2001 A.M.C. 817 (5th Cir. 2000)*.

Pursuant to *46 USCS § 31342*, fuel supplier was not entitled to attorney's fees incurred in collection of monies owed for fuel supplied to vessel because, even if contractual attorneys' fees were recoverable under FMLA lien, provision allowing "legal costs, and any other ancillary costs attendant upon enforcement" did not in fact cover those fees. *Triton Marine Fuels, Ltd. v. M/V Pac. Chukotka, 671 F. Supp. 2d 753, 2009 A.M.C. 2948 (D. Md. 2009)*.

Neither security deposit paid to creditor on lease nor Uniform Commercial Code financing statement could be construed as intent to waive maritime lien; however, deposit was set off against unpaid lease payments; creditor was not entitled to maritime lien for attorney fees because they were not necessaries; as game equipment was not necessary for vessel's care and preservation after its arrest, interest accrual ended on arrest date. *Patricia Hayes & Assocs. v. M/V Big Red Boat, II, 2002 A.M.C. 1722, 2002 U.S. Dist. LEXIS 9867 (S.D.N.Y. May 31, 2002)*, aff'd, *339 F.3d 76, 2003 A.M.C. 2357, 56 Fed. R. Serv. 3d (Callaghan) 227 (2d Cir. 2003)*.

12. Public vessels

Although Maritime Commercial Instruments and Liens Act does not per se preclude imposition of maritime lien for repair services on public vessel, plaintiff was not proper lienor under Suits in Admiralty Act, where government had no knowledge of work performed on vessel. *Bonanni Ship Supply, Inc. v United States, 959 F.2d 1558, 6 Fla. L. Weekly Fed. C 534, 1992 A.M.C. 2165 (CA11 Fla 1992)*.

Where engine repair company sought maritime lien against United States for providing new parts, summary judgment was inappropriate because (1) Maritime Commercial Instruments and Liens Act, *46 USCS §§ 31301–31343*, did not prohibit imposition of maritime lien against public vessels, (2) engine repair company, as subcontractor, could assert maritime lien, and (3) factual issues existed as to whether engine repair company had been authorized to provide necessaries. *Thorn's Diesel Serv. v. Houston Ship Repair, Inc., 233 F. Supp. 2d 1332, 49 U.C.C. Rep. Serv. 2d (CBC) 380 (M.D. Ala. 2002)*.

13. —Subcontractors

Subcontractor's claim that it has maritime lien against public vessel for necessaries furnished to contractor in connection with overhaul and repair of vessel is dismissed, because maritime liens may not be imposed against public vessels. *Hopeman Bros. v. USNS Concord, 898 F. Supp. 338, 1995 A.M.C. 2900 (E.D. Va. 1995)*.

Subcontractor can assert maritime lien against United States (as owner of public vessel) for necessaries provided to vessel if person authorized to procure necessaries for vessel approves subcontractor's services or if subcontractor meets requirements for determining whether United States procured necessaries from subcontractor since (1) owner of vessel was aware of subcontractor's performance before and during performance; (2) subcontractor performed between 35 percent and 50 percent of work performed on vessels; (3) owner inspected subcontractor's work; (4) owner gave provisional and final acceptance to subcontractor's work; and (5) repairs were fully accepted and compensated for. *Thorn's Diesel Serv. v. Houston Ship Repair, Inc., 233 F. Supp. 2d 1332, 49 U.C.C. Rep. Serv. 2d (CBC) 380 (M.D. Ala. 2002)*.

14. Repairs

Foreign supplier of necessaries is not entitled to lien for repair of foreign vessel in foreign port. *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla, 966 F.2d 613, 6 Fla. L. Weekly Fed. C 799, 1992 A.M.C. 2636, 23 Fed. R. Serv. 3d (Callaghan) 130 (11th Cir. 1992)*.

Because vessel repairer provided no services to replacement vessel, its attempt to enforce lien over that vessel violated principle that maritime lien attached only to specific vessel to which services were provided; replacement vessel could not be held responsible for debts of sunken vessel. *PNC Bank Del. v. F/V Miss Laura, 381 F.3d 183, 2004 A.M.C. 2314 (3d Cir. 2004)*, cert. denied, *543 U.S. 1090, 125 S. Ct. 972, 160 L. Ed. 2d 900 (2005)*.

District court erroneously held it lacked maritime in rem jurisdiction over yacht because despite her massive overhaul, yacht maintained her vessel status during repair period; neither manner of her repair, nor fact that needed repairs were so extensive as to temporarily disable her, divested her of her status as vessel. *Crimson Yachts v. Betty Lyn II Motor Yacht, 603 F.3d 864, 22 Fla. L. Weekly Fed. C 685, 2010 A.M.C. 1414 (11th Cir.)*, cert. denied, *562 U.S. 838, 131 S. Ct. 178, 178 L. Ed. 2d 41 (2010)*.

Yacht undergoing repairs need merely have been capable of transportation on water to be vessel; law did not require that she be able to self-propel (although she could not self-propel, she could have been towed upon 24 hours notice); nor did fact that she was drydocked for repairs divest her of vessel status. *Crimson Yachts v. Betty Lyn II Motor Yacht, 603 F.3d 864, 22 Fla. L. Weekly Fed. C 685, 2010 A.M.C. 1414 (11th Cir.)*, cert. denied, *562 U.S. 838, 131 S. Ct. 178, 178 L. Ed. 2d 41 (2010)*.

Extensiveness of yacht's overhaul was not so great as to virtually transform repair work into new-ship construction, which would not have been subject to admiralty jurisdiction. *Crimson Yachts v. Betty Lyn II Motor Yacht, 603 F.3d 864, 22 Fla. L. Weekly Fed. C 685, 2010 A.M.C. 1414 (11th Cir.)*, cert. denied, *562 U.S. 838, 131 S. Ct. 178, 178 L. Ed. 2d 41 (2010)*.

Marina operator was entitled to maritime lien against boat under *46 USCS § 31342*, arising out of repair work that it had provided at boat owner's request; repair work constituted provision of necessaries to boat for purposes of Maritime Lien Act, *46 USCS §§ 31341* et seq. *Georgetown Yacht Basin, Inc. v. M/V Fourth Pawn, 455 F. Supp. 2d 370 (E.D. Pa. 2006)*.

Creditor's motion for interlocutory sale of vessel pursuant to *46 USCS §§ 31341*–*31343* and Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions E(9)(b) was granted because creditor's shipyard repairs and fabrication work to barge, which were performed at barge owner's request, gave rise to maritime lien over vessel as barge was clearly vessel, and repairs were specifically enumerated by *46 USCS §§ 31301*, *31342* as type of necessary, and creditor's lien also attached to structure on barge consisting of exhibit containers because structure was reasonably needed for barge to function as mobile exhibit hall and, thus, was necessary, and even if structure was not necessary, it

was fairly deemed appurtenance as it was critical to barge's mission of serving as floating exhibit hall. *Ironhead Marine, Inc. v. Barge Exiderdome No. 1, 635 F. Supp. 2d 386, 2010 A.M.C. 179 (D.N.J. 2009)*.

Unpublished decision: Contractor engaged in refurbishment of two drilling barges was properly denied recovery of costs that it paid on owner's behalf for living and incidental expenses of owner's employees who were on job site because costs associated with living expenses were not "necessaries" within meaning of Federal Maritime Lien Act since there was no showing that employees were actively engaged in repair or refurbishment work, nor was their presence reasonably needed for repair or refurbishment of barges. *Superior Derrick Servs., L.L.C. v. Lonestar 203, 547 Fed. Appx. 432 (5th Cir. 2013)*.

15. Stevedores and stevedoring services

Where stevedoring company acted independently in contracting with state Port Authority for crane rental, container handling services and stevedore usage fees, and billed Authority, not bankrupt charterer of vessel, company had no authority to bind vessel to Authority's rental charges and fees, and Authority therefore had no maritime lien for those charges. *South Carolina State Ports Auth. v. M/V Tyson Lykes, 67 F.3d 59, 1996 A.M.C. 242 (4th Cir. 1995)*.

Acceptance by vessel's master and crew of stevedoring company's services engaged by shipper to load shipment F.O.B. did not provide authorization to entitle it to lien against vessel for necessaries. *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV, 199 F.3d 220, 2000 A.M.C. 2273 (5th Cir. 1999)*, cert. denied, *529 U.S. 1130, 120 S. Ct. 2006, 146 L. Ed. 2d 956 (2000)*.

Maryland maritime services company is entitled to maritime lien under *46 USCS § 31342*, where stevedoring and dockage services it provided to vessel have been deemed necessaries under *46 USCS § 31301(4)*, because agent appointed by charterer of vessel is presumed to have authority to procure necessaries, and that presumption has not been rebutted here. *Loginter S.A. v. M/V Nobility, 177 F. Supp. 2d 411, 2002 A.M.C. 283 (D. Md. 2001)*.

16. Subcontractors, generally

Subcontractor has valid maritime liens against vessels in amounts of $156,089.81 and $135,637.64 respectively, where vessel masters stamped subcontractor's labor slips with statements that contractor was liable to pay for specific services rendered only after subcontractor had performed work for vessels, because, under these circumstances, any notice given by stamps was insufficient to destroy subcontractor's right to rely on statutory presumption of contractor's authority to create liens. *Ceres Marine Terminals v. M/V Harmen Oldendorff, 913 F. Supp. 919, 1995 A.M.C. 2769 (D. Md. 1995)*.

Summary judgment will enter in favor of shipowner dismissing claims of subcontractors against vessel in rem, where general rule is that subcontractors cannot assert maritime lien against vessel, because subcontractors also cannot argue that shipowner appointed shipyard as its agent to order their services since contract between owner and yard explicitly stated otherwise. *Integral Control Sys. Corp. v. Consolidated Edison Co., 990 F. Supp. 295, 1998 A.M.C. 1905 (S.D.N.Y. 1998)*.

Unpublished decision: In dispute concerning transport of yacht from Missouri to Florida, subcontractor was not entitled to maritime lien against vessel because owner did not personally authorize subcontractor to transport yacht or provide yacht with necessaries beyond cost owner agreed upon with boat transport company; company could not have authorized on owner's behalf expenditures that subcontractor incurred because boat transport company was not owner's agent. *D & M Carriers LLC v. M/V Thor Spirit, 2014 A.M.C. 2644, 2014 U.S. App. LEXIS 18045 (11th Cir. Sept. 22, 2014)*, vacated, sub. op., reh'g denied, *586 Fed. Appx. 564, 2015 A.M.C. 292 (11th Cir. 2014)*.

Unpublished decision: Transport subcontractor was not entitled to maritime lien against yacht, as district court did not clearly err in finding that subcontractor did not provide necessaries upon order of yacht's owner or agent of owner; district court found that contractor was only entity authorized by owner to transport yacht and did not know

that contractor had retained subcontractor, and neither contractor nor translator had authority to act as owner's agent. *D & M Carriers LLC v. M/V Thor Spirit, 586 Fed. Appx. 564, 2015 A.M.C. 292 (11th Cir. 2014)*.

17. Third party deliverer or supplier

Party need not be deliverer or physical supplier to have "provided" necessaries to ship under 46 USCS § 3142; where party arraigned for delivering fuel bunkers by agreement with physical supplier, party "provided" necessaries to vessel under contract irrespective of how or by whom delivery was carried out. *Galehead, Inc. v. M/V Anglia, 183 F.3d 1242, 12 Fla. L. Weekly Fed. C 1155, 1999 A.M.C. 2952 (11th Cir. 1999)*.

Defendant, supplier who delivered steel to sub-contractor's fabrication facility, failed to show that it provided necessaries to vessels as required by *46 USCS § 31342(a)*; only plaintiff general contractor supplied "necessaries" (i.e., components that were fabricated using steel) to vessels, and thus only it may have had standing to assert maritime lien on its own behalf; nothing supported conclusion that supplier relied on vessels' credit in supplying its steel and labor to sub-contractor. *Cianbro Corp. v. George H. Dean, Inc., 596 F.3d 10, 2010 A.M.C. 1189 (1st Cir. 2010)*.

Defendant, supplier of steel to sub-contractor's fabrication facility, failed to show that by providing material and labor to sub-contractor, it acted on order of vessels' owners or person authorized by owners as required by § 31342(a)(1); there was no evidence that plaintiff owners had any dealings or communications with supplier, much less that they authorized it to provide material and labor to anyone; thus, supplier could not claim maritime lien against vessels. *Cianbro Corp. v. George H. Dean, Inc., 596 F.3d 10, 2010 A.M.C. 1189 (1st Cir. 2010)*.

Owner of vessel failed to overcome presumption that charterer was authorized to contract for necessaries for vessel since there was no evidence that supplier of maritime fuel had actual knowledge that charterer was not authorized to bind vessel, and contract for fuel expressly precluded any attempt to disclaim maritime lien. *World Fuel Servs. Trading v. Hebei Prince Shipping Co., 783 F.3d 507, 2015 A.M.C. 929 (4th Cir. 2015)*.

Summary judgment was proper against supplier of bunkers in action for maritime lien against containership because supplier did not provide bunkers on order of owner or person authorized by owner where owner ordered bunkers from fuel broker, which purchased bunkers by separate contract from supplier and did not act as owner's agent or have authority to bind owner. *Bunker Holdings Ltd. v. Yang Ming Liber. Corp., 906 F.3d 843, 2018 A.M.C. 2484 (9th Cir. 2018)*.

Supplier of fuel bunkers to several vessels was not entitled to assert a maritime lien against the vessels because the supplier did not act on the authorization of the vessels' owner or one authorized by the owner to contract for the fuel, as required under the Commercial Instruments and Maritime Liens Act, *46 U.S.C.S. § 31342(a)(1)*. The supplier lacked standing to appeal a lien assignment granted to another party. *Nustar Energy Servs. v. M/V Cosco Auckland, 760 Fed. Appx. 245 (5th Cir. 2019)*, cert. dismissed, *2019 U.S. LEXIS 6485 (U.S. Oct. 17, 2019)*.

Bunker fuel supplier is awarded $31,592.18 plus prejudgment interest and costs, even though it did not obtain assignment of lien from either of 2 subcontractors that actually provided fuel, because supplier arranged and paid for delivery of fuel and was "provider" of bunkers within meaning of *46 USCS § 31342(a)* even though it never had title nor physically delivered fuel to ship. *A/S Dan-Bunkering v. M/V Zamet, 945 F. Supp. 1576, 1996 A.M.C. 2417 (S.D. Ga. 1996)*.

18. Miscellaneous

Fact that petitioner owner's home floated did not make it "vessel" under *1 USCS § 3* for maritime lien under *46 USCS § 31342* sought by respondent city or maritime jurisdiction under *28 USCS § 1331(1)*, as it was not designed to any practical degree for transportation over water, had no steering mechanism, could move only under tow, and

had no power except through land line. *Lozman v. City of Riviera Beach, 568 U.S. 115, 133 S. Ct. 735, 184 L. Ed. 2d 604, 23 Fla. L. Weekly Fed. S 556, 2013 A.M.C. 1 (2013)*.

Not just any creditor whose money goes to discharge maritime liens himself acquires maritime lien; advances must be on credit of vessel. *Wilkins v. Commercial Inv. Trust Corp., 153 F.3d 1273, 12 Fla. L. Weekly Fed. C 74, 1999 A.M.C. 164 (11th Cir. 1998)*.

District court clearly erred in granting defendant contractor maritime lien under *46 USCS § 31342* for refurbishing plaintiff vessel manager's vessel where there was no testimony on reasonableness of goods and materials used; agreement for mark-up on goods and materials, and testimony on reasonableness of mark-up, was not relevant on reasonableness of underlying prices of goods and materials used. *Sweet Pea Marine, Ltd. v. APJ Marine, Inc., 411 F.3d 1242, 18 Fla. L. Weekly Fed. C 621, 2005 A.M.C. 1842 (11th Cir. 2005)*.

Where creditors legally seized vessel after owners discharged mortgage but before transaction was recorded, owners were not entitled to maritime lien under *46 USCS § 31342(a)* or rule of advances, because: (1) discharge did not further goal of making provision of services to vessels safe and predictable; and (2) even assuming lien was created, owners already received appropriate compensation for advance: ownership of vessel. *Mullane v. Chambers, 438 F.3d 132, 2006 A.M.C. 467 (1st Cir. 2006)*.

Italian catering company was entitled to maritime lien for necessaries under *46 USCS § 31342* of Commercial Instruments and Maritime Liens Act, *46 USCS §§ 31301* et seq., for providing foodstuffs to Greek-flagged vessel while it was docked in its home port in Florida; that company organized its supply activities in Italy was inconsequential because necessaries were actually loaded onto vessel in U.S., as required under *46 USCS § 31326(b)(2)*. *Dresdner Bank AG v. M/V Olympia Voyager, 463 F.3d 1210, 19 Fla. L. Weekly Fed. C 1019, 2006 A.M.C. 2227 (11th Cir. 2006)*.

Where district court determined that maritime insurer's lien was limited to premiums it had invoiced before vessel's arrest, that determination was in error; insurer possessed maritime lien for insurance it provided before vessel's arrest, timing of invoices notwithstanding; under Maritime Commercial Instruments and Liens Vessel Identification Act, lien arose automatically upon furnishing of necessaries. *Dresdner Bank AG v. M/V Olympia Voyager, 465 F.3d 1267, 19 Fla. L. Weekly Fed. C 1073, 2006 A.M.C. 2299 (11th Cir. 2006)*.

Maritime lien for necessaries under *46 USCS § 31342* applied to provision of fuel bunkers by foreign supplier to foreign vessel in foreign port, since statute expressly extended to any supplier of necessaries to any vessel, contract for fuel bunkers expressly elected application of U.S. law, and vessel routinely sailed into U.S. port. *Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120, 2008 A.M.C. 684 (9th Cir.)*, cert. denied, *555 U.S. 1062, 129 S. Ct. 628, 172 L. Ed. 2d 639 (2008)*.

Defendant watercraft was "vessel" under *1 USCS § 3*, as it was capable of transportation over water by means of tow; so it was not error to find federal admiralty jurisdiction over vessel. Likewise, it was not error to find that factual findings reguarding amount vessel's owner owed supported city's maritime lien for necessaries under *46 USCS § 31342*. *City of Riviera Beach v. Unnamed Gray, 649 F.3d 1259, 23 Fla. L. Weekly Fed. C 290, 2011 A.M.C. 2891 (11th Cir. 2011)*, rev'd, *568 U.S. 115, 133 S. Ct. 735, 184 L. Ed. 2d 604, 23 Fla. L. Weekly Fed. S 556, 2013 A.M.C. 1 (2013)*.

Subcontractor physical supplier was not entitled to maritime lien against vessel because it did not provide bunkers on order of entity specified in Commercial Instruments and Maritime Liens Act (CIMLA); however, bunker contract supplier, and thus, its assignee, was entitled to assert maritime lien under CIMLA because it contracted with charterer of vessel, entity specified in statute for delivery of necessaries, and those necessaries were delivered pursuant to that arrangement, even if by subcontractor. *ING Bank N.V. v. M/V Temara, 892 F.3d 511, 2018 A.M.C. 1521, 100 Fed. R. Serv. 3d (Callaghan) 1495 (2d Cir. 2018)*.

Maritime lien against passenger ship will be enforced under *46 USCS § 31342*, where lienholder performed embarkation services of collecting, accounting for, and delivering passenger fares to pier supervisors, because

embarkation services contract was maritime in nature, warranting admiralty jurisdiction, and services provided were "necessaries" under Federal Maritime Lien Act (*46 USCS §§ 31341* et seq.). Kaleidoscope Tours v M/V "Tropicana" *755 F. Supp. 382, 1991 A.M.C. 1462 (SD Fla 1990)*.

Corporation argued that although owner was not personally bound by choice of law provision in bunker confirmation, vessel—against which in rem action was filed—was bound by provision and under U.S. law maritime lien did arise in its favor when it delivered fuel in foreign port; however, under U.S. law no maritime lien was created in favor of corporation as result of bunkers transaction; the case involved provision of goods by foreign plaintiff to foreign flag vessel in foreign port; U.S. courts have held that under such circumstances Federal Maritime Lien Act, *46 USCS § 31342(a)*, was not to be applied extraterritorially to confer maritime lien. *Triton Marine Fuels, Ltd., S.A. v. M/V Pac. Chukotka, 504 F. Supp. 2d 68, 2007 A.M.C. 2113 (D. Md. 2007)*, rev'd, remanded, *575 F.3d 409, 2009 A.M.C. 1885 (4th Cir. 2009)*.

Sale of owner's vessel was confirmed and objections to sale were overruled because dock owner had valid lien against vessel in amount sufficient to require sale, even if actual amount of lien was in dispute, and lien arose immediately from time service was provided because docking services were considered necessaries. *Canton Port Servs., LLC v. M/V Snow Bird, 690 F. Supp. 2d 405, 2010 A.M.C. 1118 (D. Md. 2010)*.

Research References & Practice Aids

Am Jur:

12 Am Jur 2d, Boats and Boating § 33.

67B Am Jur 2d, Salvage § 31.

70 Am Jur 2d, Shipping §§ 459, 471, 499, 735.

Federal Procedure:

29 *Moore's Federal Practice (Matthew Bender 3d ed.), ch 703*, Admiralty Jurisdiction §§ 703.04, 703.06.

29 *Moore's Federal Practice (Matthew Bender 3d ed.), ch 704*, Admiralty Pleading and Procedure § 704.10.

29 *Moore's Federal Practice (Matthew Bender 3d ed.), ch 705*, Admiralty Arrest and Attachment §§ 705.01, 705.03.

29 *Moore's Federal Practice (Matthew Bender 3d ed.), ch 706*, Admiralty Sales § 706.01.

Commercial Law:

4 *Goods in Transit (Matthew Bender), ch 26*, Lien of Carrier Upon Cargo §§ 26.02, 26.03.

6 *Goods in Transit (Matthew Bender), ch 51*, The Controlling Law § 51.02.

Annotations:

Construction and Application of Maritime Commercial Instruments and Liens Vessel Identification System Act of 1988, *Pub. L. No. 100-710*, *102 Stat. 4735*, Codified as Amended *46 U.S.C.A. §§ 31301–31343* [*46 USCS §§ 31301–31343*]. *173 ALR Fed 305*.

Other Treatises:

1-VIII Benedict on Admiralty, Jurisdiction, The Jurisdiction of Federal and State Courts to Hear Maritime Cases § 131.

2-III Benedict on Admiralty, Principles of Admiralty Law, Source of Maritime Liens §§ 33, *35*, *37*, *38*.

2-IV Benedict on Admiralty, Principles of Admiralty Law, Priorities of Maritime Liens § 51.

2-V Benedict on Admiralty, Principles of Admiralty Law, Discharge of Liens § 61.

2-VI Benedict on Admiralty, Principles of Admiralty Law, Ship Mortgages § 70.

3A-X Benedict on Admiralty, The Law of Salvage, The Salvage Lien § 142.

8-III Benedict on Admiralty, Desk Reference, Admiralty Practice and Procedure § 3.04.

8-IV Benedict on Admiralty, Desk Reference, Sovereign Immunity § 4.03.

8-VII Benedict on Admiralty, Desk Reference, Maritime Liens § 7.01.

8-XIV Benedict on Admiralty, Desk Reference, Towage § 14.03.

8-XIX Benedict on Admiralty, Desk Reference, Marinas § 19.06.

10-X Benedict on Admiralty, Cruise Ships, Cruise Line Bankruptcies § 10.02.

Hierarchy Notes:

46 USCS, Subtit. III

46 USCS, Subtit. III, Ch. 313

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

MARTIN ENERGY SERVICES, LLC,

Plaintiff,

v. CASE NO. 5:14cv322-RH/GRJ

M/V BRAVANTE IX, etc., et al.,

Defendants.

_____/

OPINION ON THE MERITS

In this interpleader action, two parties assert competing claims to a specific fund that would have been paid in the first instance to another party had that other party not initiated bankruptcy proceedings. As both claimants agree, the fund must properly be distributed outside the bankruptcy proceeding; there will be no share-and-share-alike with other creditors. After a bench trial, this order reaches the substantive result that all parties to the underlying transaction intended—the substantive outcome that would have occurred had there been no bankruptcy.

This result flows from the applicable law and the equitable principles that apply in interpleader actions. The only complicating factor is that a ship is

involved and cases can be cited on both sides of the question whether the party who should get the fund acquired a maritime lien. That party has a winning contract or quantum-meruit claim, whether or not it has a winning maritime-lien claim.

I. Facts

Boldini Ltd. is a Brazilian company that, perhaps together with related companies Grupo Bravante and Boldini S.A., arranged to have a ship, the M/V Bravante VIII, built in Panama City, Florida. The record is unclear on the relative roles of Boldini Ltd., Grupo Bravante, and Boldini S.A., and their relative roles make no difference for purposes of this case. This order uses "Boldini" to refer to any or all.

To arrange to have fuel provided to the Bravante VIII, apparently for its maiden voyage, Boldini contacted O.W. Bunker & Trading do Brasil ("O.W. Brasil"). Together with two affiliated entities—O.W. Bunker Middle East DMCC ("O.W. Middle East") and O.W. Bunker USA Inc. ("O.W. USA")—O.W. Brasil arranged for Martin Energy Services, LLC ("Martin"), a company based in Mobile, Alabama, to provide the necessary fuel to the Bravante VIII.

The transaction was structured not as a sale of fuel by Martin to Boldini but as a sale by Martin to O.W. USA, a sale by O.W. USA to O.W. Middle East, and a sale by O.W. Middle East to Boldini. O.W. Brasil functioned only as a broker. Had

there been no intervening bankruptcy, Boldini would have paid O.W. Middle East, who would have paid O.W. USA (probably through bookkeeping entries rather than cash), who would have paid Martin. The invoices reflected this. Thus Martin invoiced only O.W. USA., and O.W. Middle East invoiced Boldini.

Even so, Boldini and Martin were not strangers. Martin closely coordinated its delivery of the fuel with Boldini's local agent in Panama City, the Hirth Agency ("Hirth"), and with the Bravante VIII's captain and engineer. The ship was at sea for a test when Martin's barge approached Panama City from Mobile, necessitating logistical changes. Martin coordinated those changes directly with Hirth and the ship's officers; neither O.W. USA nor O.W. Middle East was involved.

Martin delivered the fuel on credit; it was not paid at the time of delivery. In agreeing to this arrangement, Martin relied partly on O.W. USA's creditworthiness—Martin had dealt with O.W. USA on other occasions and had provided it a line of credit. But Martin relied more heavily on the maritime lien that Martin believed it would have against the ship.

Before transferring the fuel, Martin tendered a bunkering certificate it expected an appropriate official to sign. After the transfer, the ship's engineer, with the captain's approval, signed the certificate. The certificate functioned as a receipt and confirmed compliance with governing regulations. But the certificate also had

contractual features. The certificate said the sale was subject to Martin's "STANDARD TERMS & CONDITIONS OF SALE," and the certificate added:

> No disclaimer stamp of any type or form will be accepted on this bunkering certificate, nor, should any such stamp be applied, will it alter, change or waive MARTIN ENERGY SERVICES LLC's Maritime Lien against the vessel or waive the vessel's ultimate responsibility and liability for the debt incurred through this transaction.

Martin's Ex. 8.

Boldini did not disclaim a maritime lien at any stage of the transaction. Quite the contrary, Boldini knew—or would have known had it sought to find out—that under United States law, delivery of the fuel would create a lien. Likewise, no O.W. entity disclaimed a maritime lien. That a lien came into existence upon delivery of the fuel was beyond doubt; the only issue was who possessed the lien. For its part, Martin expected payment from O.W. USA, but Martin believed it had a lien entitling it to recover against the ship if payment was not made.

II. Proceedings

All of this was a straightforward commercial transaction that came off without a hitch. The fuel met standards; the fuel was successfully loaded; and the ship sailed away. The transaction came off without a hitch, that is, until, shortly after delivery of the fuel, the O.W. entities collapsed. At that point no payment had been made by anyone. The parent O.W. entity, O.W. Bunker & Trading A/S,

initiated bankruptcy proceedings in the Netherlands. O.W. Middle East initiated bankruptcy proceedings in Dubai. O.W. USA initiated bankruptcy proceedings in Connecticut.

ING Bank N.V. ("ING") was the lead participant in a syndicate that provided working capital for the O.W. entities prior to their collapse. The syndicate held a security interest in assets that included receivables of O.W. Middle East and O.W. USA. ING has authority to act for the syndicate and asserts, without objection from the O.W. entities or anyone involved in the bankruptcy proceedings, that ING is entitled to collect outside of the bankruptcy proceedings the receivables of O.W. Middle East and O.W. USA. This includes receivables arising from the sale of fuel for the Bravante VIII. In short, ING holds and may enforce in this proceeding any relevant right that otherwise would belong to any O.W. entity.

Martin and ING assert conflicting claims for payment for the fuel. A tortuous and now irrelevant procedural background began with Martin's filing of this action and attachment of a different ship—the Bravante IX—as a means of obtaining quasi-in-rem jurisdiction over Boldini. Boldini submitted to this court's in personam jurisdiction, filed a counterclaim for interpleader, deposited into the court's registry the disputed principal amount plus an allowance for interest, and was discharged. Martin and ING appeared in personam and asserted their

conflicting claims. As all parties agree, the court has jurisdiction over the entire controversy, which will properly be resolved in this action.

The action was tried to the court. This order sets out the court's findings of fact and conclusions of law.

III. The Equitable Outcome

The intended result of this transaction was this. Boldini would pay $290,100 and would receive 300 metric tons of fuel on board the Bravante VIII. Martin would provide the fuel, deliver it, and receive $286,200. The O.W. entities would pocket the difference: $3,900. ING would advance nothing and would be more secure—not less—in that its borrowers would be better off by $3,900 than its borrowers would have been had this transaction never occurred.

The parties' intended result can easily be achieved in this action. Boldini has paid into the court's registry the agreed amount, $290,100. Boldini has received the fuel on board the Bravante VIII and by now undoubtedly has consumed it. Martin delivered the fuel and can be paid the agreed amount, $286,200, from the court's registry. ING, acting to enforce the rights of the O.W. entities, can receive from the court's registry the same $3,900 the O.W. entities would have received. This will leave ING $3,900 better off than it would have been had its borrowers not entered this transaction in the first place. Interest can be added as appropriate.

As a matter of common sense and simple fairness, anyone seeking to do justice in this situation would distribute the fund in precisely this way, achieving the parties' intended result. Giving the entire $290,100 to ING would provide it a windfall—a payment far beyond anything it could have achieved from the underlying transaction. The bankruptcy proceedings ought not impair ING's security, but neither should ING reap a windfall from those proceedings.

ING says, though, that Martin has no claim against Boldini or the Bravante VIII or the fund, and so cannot recover in this action, no matter how inequitable that might be. This order addresses in turn whether Martin has a contractual claim, a maritime lien, or a quantum-meruit claim. As it turns out, here, as in most other things, the law makes sense. ING's contrary position does not.

IV. Contract

Boldini initially contacted O.W. Brasil to arrange to purchase fuel. This led to entry into a contract between Boldini and O.W. Middle East. The contract was with O.W. Middle East regardless of whether Boldini knew of O.W. Middle East's involvement. This is so because O.W. Brasil acted only as an agent for O.W. Middle East—an agent for a disclosed or undisclosed principal. The contract between Boldini and O.W. Middle East was entered into at arm's length; these were unrelated entities.

O.W. Middle East in turn contracted with O.W. USA. This was not an arm's length contract, but that does not matter. The involvement of these two O.W. entities instead of either alone does not affect the analysis in any way.

O.W. USA entered into a contract with Martin requiring Martin to deliver fuel aboard the Bravante VIII. This was again an arm's length contract. In entering into this contract, O.W. USA acted as principal, not as an agent for Boldini. Boldini was not a party to this contract.

This means that Martin had a contract with Boldini only if a contract was entered into between these companies at the time of delivery of the fuel. I find as a fact that Martin and Boldini did enter into a contract at that time. The terms were these: Martin would provide the previously agreed amount and type of fuel on board the Bravante VIII. Boldini would pay Martin's price if the intermediary who was primarily liable did not do so, but Martin's only recourse against Boldini would be against the ship.

These terms square precisely with the contemporaneous written documentation. The ship's engineer, acting within the course and scope of his authority for Boldini, signed a certificate acknowledging "the vessel's ultimate responsibility and liability for the debt incurred through this transaction." Martin's Ex. 8. The engineer could properly bind the ship and its owner. *See Atl. & Gulf Stevedores, Inc. v. M/V Grand Loyalty*, 608 F.2d 197, 200 (5th Cir. 1979). ING's

assertion that Boldini had no contract with Martin and no liability for this debt cannot be squared with this certificate.

ING notes, though, that under Florida law, a contract arises only when there is an offer and acceptance—a meeting of the minds on the contract's essential terms. *See, e.g.*, *Perkins v. Simmons*, 15 So. 2d 289, 290, 153 Fla. 595, 599 (1943). When Martin showed up with fuel and tendered the certificate, that was an offer to deliver the fuel on the terms stated in the certificate. When Boldini, through its captain and engineer, accepted the fuel, Boldini accepted Martin's terms. When the engineer signed the certificate, he confirmed acceptance of the terms.

There was also the requisite "meeting of the minds." The test is of course objective, not subjective; what is required is an agreement on a set of external signals, not the same subjective understanding of those signals. *See, e.g.*, *Macky Bluffs Dev. Corp. v. Advance Const. Servs., Inc.*, No. 3:06cv397/MCR/EMT, 2008 WL 4525018, *8 n.19 (N.D. Fla. Sept. 26, 2008) ("[C]ourts look not to 'the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.' " (quoting *Leopold v. Kimball Hill Homes Fla., Inc.*, 842 So. 2d 133, 136 (Fla. 2d DCA 2003))). Here the external signals were set out in the bunkering certificate in terms that could bear only one meaning: the ship bore ultimate liability for the debt arising from Martin's delivery of the fuel. That the

amount of the debt was not specified did not matter; it was a set amount that could readily be determined by reference to Martin's prior contract with the intermediary, if necessary.

To be sure, Martin had a preexisting duty to deliver the fuel. And the question whether a contract can be entered into in this way is not free of doubt. As it turns out, this makes no difference, because, as set out below, Martin is entitled to payment from the interpleader fund on additional grounds.

V. Maritime Lien

The Eleventh Circuit traced the history and purpose of maritime liens in *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 868–72 (11th Cir. 2010). The full discussion is not repeated here. But three points deserve emphasis.

First, a purpose of maritime liens is to enable ships to obtain repairs or supplies in distant ports without immediate payment. A lien accomplishes this by giving a supplier a security interest in the ship—a security interest that has priority over preexisting liens. So, for example, a supplier of fuel can obtain a lien with priority over a preexisting secured creditor.

Second, although maritime liens originated under the common law, in the United States liens are now entirely creatures of statute. A lien exists, if at all, under the Federal Maritime Lien Act, 46 U.S.C. §§ 31341–43.

Third, the proper rule of construction is this: "the literal language of the statute . . . control[s] the disposition of the cases interpreting it." *Crimson Yachts*, 603 F.3d at 872 (quoting H.R. REP. NO. 100-918, at 16 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6104, 6109); *see also Galehead, Inc. v. M/V Anglia*, 183 F.3d 1242, 1244 (11th Cir. 1999) ("The test for determining who is entitled to a maritime lien must come from a plain reading of the statute itself . . . ."). Other rules of construction of course are useful in interpreting the statute—but there is no rule requiring the statute to be interpreted more narrowly than called for by the statutory language itself.

The statute provides:

> Except [with respect to a public vessel], a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31342(a).

Under the statute's plain terms, a person acquires a maritime lien if the person (1) provides necessaries (2) to a vessel (3) on the order of the owner or a person authorized by the owner. *See Galehead*, 183 F.3d at 1244.

Martin supplied necessaries—fuel—to a vessel, the Bravante VIII. By supplying the fuel, Martin "provided" it, at least when that term is given its ordinary meaning. *See, e.g.*, *Provide*, OXFORD ENGLISH DICTIONARY (9th ed. 1971) (listing definitions of "provide" including "[t]o supply or furnish for use"). On that view, Martin acquired a maritime lien on the vessel if it provided the fuel "on the order of the owner or a person authorized by the owner."

The statute does not limit the term "a person authorized by the owner," but the statute does list persons who are *presumed* to have the requisite authority:

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

Id. § 31341(a).

Here there are no facts that alter the statutory presumption one way or the other. The captain, the engineer, and Hirth, as Boldini's agent at the port, all had authority to procure necessaries for the Bravante VIII.

All of these—the captain, the engineer, and Hirth—dealt directly with Martin (through its agents) on the logistics for delivery of the fuel. Before delivery began, Martin provided the bunkering certificate that an official would be required to sign. The bunkering certificate made clear that Martin claimed a maritime lien. After delivery of the fuel, the engineer signed the certificate.

As a matter of ordinary English, it is difficult to assert that Martin did not deliver the fuel "on the order of" the captain and the engineer, if not also Hirth. Martin delivered the fuel when, where, and how the captain and engineer directed.

So a plain reading of the statute suggests that Martin acquired a maritime lien.

But there are complicating factors. Although Martin physically provided the fuel, O.W. Middle East and O.W. USA contracted to have the fuel provided. In that sense these entities also "provid[ed]" the fuel within the meaning of § 31342. And O.W. Middle East plainly acted on the order of the owner. ING says there can be only one maritime lien and only one provider in whose favor the lien runs. This is not self-evident; the statute includes no such explicit limitation, and in any event an owner could surely agree to grant a second lien even if one would not otherwise

exist. But the ship and its owner can properly be required to pay only once for any given product or service. A regime that allowed multiple maritime liens would have to recognize that any proper, full payment by the owner would discharge all liens.

So there is much to be said for the view that a single provision of necessaries produces only a single lien, at least absent an owner's agreement to grant a second lien. On that view, there is a reasonable argument that the holder of this lien, absent any agreement to grant a second lien, was O.W. Middle East, the party who contracted directly with Boldini. Had all gone as intended, it is O.W. Middle East to whom Boldini would properly have directed payment. ING embraces the single-lien theory and says the only party who obtained a lien against the Bravante VIII was O.W. Middle East.

The law of the circuit does not explicitly call into question the single-lien theory, but the law of the circuit *does* call into question the assertion that only O.W. Middle East acquired a lien against the Bravante VIII.

The most important Eleventh Circuit decision is *Galehead, Inc. v. M/V Anglia*, 183 F.3d 1242, 1245 (11th Cir. 1999). There the court addressed three fuelings of a vessel. The vessel's charterer—equivalent to the owner for maritime-lien purposes—was Genesis. Genesis contacted Polygon, who in turn contacted Asamar for the first two fuelings. Asamar in turn engaged physical suppliers. For

the third fueling, Polygon directly contacted physical suppliers; Asamar was not involved. To that point the case mirrored ours: the owner or charterer contacted an intermediary who (with or without another intermediary) contacted a physical supplier.

What happened next was markedly different from the case at bar. An intermediary (Asamar for the first two fuelings, Polygon for the third) paid the physical suppliers. In each instance the intermediary who made the payment assigned its rights to Galehead, who sued to enforce the three maritime liens purportedly arising from the three fuelings.

The Eleventh Circuit upheld the claim for the third fueling but not for the first two. The difference was this: Polygon—the intermediary who paid the physical suppliers for the third fueling—dealt directly with, and thus acted "on the order of," the charterer, as required by § 31342. But Asamar acted only on Polygon's order. Asamar had no contact at all with the charterer, with any agent of the charterer, or with anyone aboard the vessel. So Asamar did not act "on the order of" anyone with authority to procure necessaries for the vessel.

Galehead does not determine the outcome of the case at bar because the facts are different. But the court's analysis cuts strongly in Martin's favor. The court did *not* say, as ING would have it, that the party who contracts with the owner to provide necessaries is always the party who acquires a maritime lien.

Instead, the court said that a downstream provider—referred to in the opinion as a "third-party provider"—sometimes does and sometimes does not acquire a lien, depending on whether "the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transaction." *Galehead*, 183 F.3d at 1245.

The court gave two examples of cases in which the third party—the party analogous to Martin—acquired a maritime lien, and two examples of cases in which the third party did *not* acquire a maritime lien.

First, in *Marine Coatings, Inc., of Alabama v. United States*, 932 F.2d 1370 (11th Cir. 1991), as summarized in *Galehead*, the owner was aware of the third party's role before and during performance; the third party performed 35 to 50% of the underlying contract; the owner inspected the third party's work; and the owner accepted the work. Martin has met and indeed exceeded this showing. Boldini, through its agent Hirth as well as through the captain and engineer, knew of Martin's role before and during performance; Martin performed 100% of the underlying contract; and Boldini, through the engineer, inspected and accepted the fuel. If, as the court held in *Marine Coatings* and reaffirmed in *Galehead*, the third party had a maritime lien on those facts, then Martin had a maritime lien here.

Similarly, in *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521 (11th Cir. 1990), again as summarized in *Galehead*, the owner was aware

beforehand of the third party's role; the underlying contract listed the third party as a party who would perform 15% of the work; and the owner knew the principal contractor was incapable of performing all the work itself. Martin has again met these standards, performing not 15% but 100% of the contract, as Hirth, the captain, and the engineer all knew.

In contrast to these cases, *Galehead* also gave two examples of cases in which the third party did *not* acquire a lien. In *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1559 (11th Cir. 1992), the owner was unaware of the third party's involvement. In *Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42, 45 (1st Cir. 1986), the third party was a fuel broker who neither dealt with the owner nor physically supplied the fuel; the owner learned of the third party's involvement only when the transaction was billed.

After discussing these cases, the Eleventh Circuit concluded that the facts relating to Asamar were "much more like *Bonanni Ship Supply* and *Tramp Oil* than like *Marine Coatings* or *Stevens Technical*." *Galehead*, 183 F.3d at 1246. The court continued: "On this record, the evidence is insufficient to show that Asamar had the kind of relationship with Genesis that would establish that Genesis authorized Asamar's work on the vessel." *Id.* This phrasing makes clear that the court regarded this as a factual inquiry.

The same analysis—the same factual inquiry—produces a different result in the case at bar. Martin supplied 100% of the fuel, was known to and indeed closely coordinated the operation with Boldini, and obtained from Boldini a signed bunkering certificate that included both an assent to Martin's standard conditions and a recognition of Martin's maritime-lien claim. This case is much more like *Marine Coatings* and *Stevens Technical* than like *Bonanni Ship Supply* or *Tramp Oil*.

The parties cite cases from other jurisdictions on both sides of these issues. *Compare, e.g.*, *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1988) (recognizing a maritime lien in favor of the physical supplier of fuel), *and Belcher Co. of Ala., Inc., v. M/V Martha Mariner*, 724 F.2d 1161 (5th Cir. 1984) (stating that a physical supplier of fuel who was retained by an intermediary, not by an owner or charterer, would have acquired a maritime lien had the transaction occurred in the United States), *with Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220 (5th Cir. 1999) (holding that a stevedore who was hired not by the charterer but by a company who contracted with the charterer did not acquire a maritime lien). None of the cases changes the law of the Eleventh Circuit as set out in *Galehead*.

Finally, ING relies heavily on an ever-growing line of district-court decisions arising from the O.W. collapse. Not surprisingly, Martin is not the only

supplier whose ox has been gored. Litigation has gone forward between ING and other suppliers in the Southern District of New York and elsewhere. ING apparently was, until now, undefeated. The most recent of the other decisions, at least at this writing, is *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA*, No. 14-CV-9287 (VEC), 2017 WL 78514 (S.D.N.Y. Jan. 9, 2017). *Clearlake* cites earlier decisions reaching the same result. *See id.* at *6 (citing *Valero Mktg. & Supply Co. v. M/V ALMI SUN*, 160 F. Supp. 3d 973 (E.D. La. 2016); *O'Rourke Marine Servs. L.P., L.L.P. v. M/V COSCO HAIFA*, 179 F. Supp. 3d 333 (S.D.N.Y. 2016); *ING Bank N.V. v. Temara*, No. 16-cv-95 (KBF), 2016 WL 4471901 (S.D.N.Y. Aug. 24, 2016); *NuStar Energy Servs., Inc. v. M/V COSCO AUCKLAND*, No. 14-CV-3648 (KPE), Dkt. 98 (S.D. Tex. Dec. 1, 2016)). All of these cases have been decided on summary judgment.

Clearlake seemingly recognized that its result smacked of inequity—the court said it "sympathize[d] with" the physical suppliers, who believed they held maritime liens, and that the outcome was "unfortunate." 2017 WL 78514, at *10. But the court said the result was required, in part, by the Second Circuit's rule that maritime liens are "*stricti juris*." Black's Law Dictionary defines "*strictissimi juris*," apparently the same thing, *see Atl. & Gulf Stevedores, Inc. v. M/V Grand Loyalty*, 608 F.2d 197, 201 (5th Cir. 1979), to mean "to be interpreted in the strictest manner." *Strictissimi Juris,* BLACK'S LAW DICTIONARY (9th ed. 2009). If,

when applied to the Maritime Lien Act, this means anything other than to construe the statute to mean what it says, it is not the law of the Eleventh Circuit. *See Galehead*, 183 F.3d at 1244 ("The test for determining who is entitled to a maritime lien must come from a plain reading of the statute itself . . . ."); *see also Atl. & Gulf Stevedores*, 608 F.2d at 201 (holding that analogous provisions of the prior version of the statute are "not to be viewed through the constricting glass of Stricti juris"). And if, in this context, "*stricti juris*" means anything other than to render an honest construction of the statute, it is a lousy canon of construction. *Cf.* A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) (addressing the canon requiring strict construction of statutes in derogation of the common law and concluding that a court should instead adopt a "fair construction").

More importantly, *Clearlake* rejected *Galehead* and the other Eleventh Circuit decisions on the ground that the Eleventh Circuit is "navigating outside the mainstream" of American maritime law. 2017 WL 78514, at *9 (quoting *Integral Control Sys. Corp. v. Consol. Edison Co. of N.Y., Inc.*, 990 F. Supp. 295, 301 (S.D.N.Y. 1998)). The Eleventh Circuit does not stand alone in recognizing maritime liens for physical suppliers of necessaries, as *Ken Lucky* and *Belcher*—decided by the Ninth and Fifth Circuits—demonstrate. Nor has anyone outside the current line of O.W. cases reached a result quite so inequitable as ING proposes

here. Moreover, when faced with new circumstances, a court that rejects blind adherence to inapplicable precedents has ordinarily been heralded, not criticized for "navigating outside the mainstream." *See, e.g.*, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (L. Hand, J.). In any event, this case is being litigated in the Eleventh Circuit, whose decisions are binding.

Under the *Galehead* analysis, Martin acquired a maritime lien. Boldini discharged the lien by paying the disputed funds into the court's registry. Martin is entitled to recover from those funds.

VI. Quantum Meruit

If Martin is not entitled to recover for breach of contract (see section IV above), then with or without a maritime lien (see section V above), Martin is entitled to recover in quantum meruit.

In an admiralty case, general maritime law applies. General maritime law is federal law, but when neither statutory nor judicially created maritime law answers a specific legal question, a court may apply state law, if state law does not frustrate the national interest in uniformity in admiralty law. *See Sea Byte, Inc. v. Hudson Marine Mgmt. Servs., Inc.*, 565 F.3d 1293, 1298 (11th Cir. 2009). This means that on a quantum-meruit claim in an admiralty case arising in Florida, a court properly applies Florida quantum-meruit law. *Id.* at 1301 (applying Florida law on a quantum-meruit claim arising in admiralty in Florida). The quantum-meruit

principles that would apply under federal common law would not produce a different result.

Under Florida law, to prevail on a quantum-meruit claim, a plaintiff must show that (1) it conferred a benefit on the defendant; (2) the defendant had knowledge of the benefit; (3) the defendant accepted or retained the benefit; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying its fair value. *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 386 (Fla. 4th DCA 1997) (en banc).

Martin has satisfied each of these elements in spades. Martin conferred a benefit: 300 tons of fuel. Boldini knew of, accepted, and retained the benefit; indeed, Boldini signed a certificate acknowledging the fuel's delivery. It would be inequitable for Boldini to retain the benefit without paying for it. Boldini has not sought to do so.

ING insists, though, that Martin cannot recover in quantum meruit because there were relevant contracts—between Boldini and O.W. Middle East, at one end of the transaction, and between O.W. USA and Martin, at the other end. ING invokes a line of factually dissimilar Florida cases that provide superficial support for ING's position. "Quantum meruit damages cannot be awarded when an enforceable contract exists." *Cross v. Strader Const. Corp.*, 768 So. 2d 465, 466

(Fla. 2d DCA 2000) (citing *Corn v. Greco*, 694 So. 2d 833 (Fla. 2d DCA 1997)); *see also Sea Byte*, 565 F.3d at 1301. This principle would preclude Martin from recovering on a quantum-meruit claim against O.W. USA; Martin's only claim against O.W. USA would be for breach of contract.

This principle does not, however, bar Martin's quantum-meruit claim against Boldini. Two Florida decisions illustrate the point.

First, in *Commerce*, the owner of an office building entered into a contract with a general contractor for improvements to the building. The general contractor in turn entered into a subcontract with a stucco provider for a relatively small portion of the work. The general had a contract with, and a contractual duty to pay, the subcontractor; the owner did not. Accordingly, the subcontractor expected to be paid by the general, not by the owner. The subcontractor did not perfect a mechanic's lien.

When the general did not pay the sub, the sub sued the general, but the general declared bankruptcy. The sub then sued the owner in quantum meruit. The Court of Appeal, sitting en banc, thoroughly analyzed Florida quantum-meruit law and concluded that a subcontractor can recover from an owner, even though the subcontractor has a contract with the general contractor, if two conditions are met: first, the owner has received a benefit from the subcontractor's work, and second, the owner has not paid for that work under the owner's own contract with the

general. If the owner has paid the general for the work, the owner cannot be required to pay the subcontractor.

Martin's quantum-meruit claim is on all fours with *Commerce*'s description of the circumstances in which a subcontractor has a quantum-meruit claim against an owner. Martin (the sub) provided a benefit to Boldini (the owner). Boldini has not paid O.W. Middle East (the general). So Martin has a valid quantum-meruit claim against Boldini. That there was a contract and subcontract does not change this—not in *Commerce*, and not here.

Similarly, in *GFR Leasing Corp. v. Transportation Equipment Specialists, Inc.*, 737 So. 2d 628 (Fla. 1st DCA 1999), GFR, an owner of shipping containers, leased them to a shipping company. The shipping company hired TES to make repairs. TES made the repairs, but the shipping company went out of business before paying TES. Citing *Commerce*, the court held that TES could recover from GFR in quantum meruit, because GFR knew about the repairs while they were in progress and eventually took back the containers, thus receiving the benefit of the repairs.

If, as *GFR* squarely held, TES could recover from GFR, even though GFR had a contract with the shipping company and the shipping company had a contract with TES, then Martin can recover from Boldini, even though Boldini had a

contract with O.W. Middle East and O.W. USA had a contract with Martin. There is no meaningful difference between the cases.

In sum, in *Sea Byte*, the Eleventh Circuit looked to Florida law to determine the validity of a quantum-meruit claim in an admiralty case arising in Florida. Under Florida law, if Martin does not have a valid contract claim against Boldini (as addressed above in section IV of this order), then Martin has a valid quantum-meruit claim, entitling Martin to an appropriate payment from the fund in the court's registry. The value of the fuel at the time and place of delivery was the price Martin quoted for the job, $286,200. That is the principal amount due on the quantum-meruit claim.

VII. Interpleader

The analysis to this point fully establishes Martin's entitlement to prevail on its claim. Further support is provided by the equitable nature of an interpleader proceeding. "Interpleader generally is a suit in equity which invokes equitable principles." *Fulton v. Kaiser Steel Corp.*, 397 F.2d 580, 583 (5th Cir. 1968) (citing *Sanders v. Armour Fertilizer Works*, 292 U.S. 190, 200 (1934)). *Sanders* said that in an interpleader action, "The court is to weigh the right or title of each claimant under the law of the state in which it arose, and determine which according to equity is the better." *Sanders*, 292 U.S. at 200 (quoting *Armour Fertilizer Works v. Sanders*, 63 F.2d 902, 906 (5th Cir. 1933)). "In an interpleader . . . the remedy

draws on equitable principles and common sense." *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 588 (D.C. Cir. 1993).

This order provides for the only equitable distribution of this fund—the only distribution that accords with common sense.

VIII. Conclusion

The law usually makes sense. In this case, as in most, the parties disagree on the applicable law. It turns out that here, as in most cases, the law makes sense. Despite the O.W. bankruptcies, this fund can be distributed precisely as the parties intended, making all parties whole.

For these reasons,

IT IS ORDERED:

1. It is declared that Martin had a valid contract claim, or alternatively a valid quantum-meruit claim, against Boldini that was satisfied by Boldini's tender into the court's registry of the full amount due on these claims.

2. It is declared that Martin had a valid maritime lien against the Bravante VIII that was discharged by Boldini's tender into the court's registry of the full amount it agreed to pay for the fuel at issue.

3. The clerk must disburse the funds in the court's registry as follows: $286,200 to Martin; $3,900 to ING; and a proportional share of the remainder

(interest paid into the court's registry by Boldini and interest earned on the funds after deposit in the registry) to Martin and ING.

4. The clerk must enter judgment providing for Martin and ING to recover from the fund as set out in paragraph 3 and dismissing all remaining claims with prejudice.

5. The clerk must make the disbursement required by paragraph 3 no earlier than the date specified in this paragraph 5. If a timely notice of appeal is *not* filed from the judgment entered under paragraph 4, the specified date is 14 days after the (expired) deadline to file a notice of appeal. If a timely notice of appeal *is* filed from the judgment entered under paragraph 4, the specified date is 14 days after the Court of Appeals issues its mandate dismissing the appeal or affirming the judgment.

SO ORDERED on January 26, 2017.

s/Robert L. Hinkle
United States District Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10899

D.C. Docket No. 5:14-cv-00322-RH-GRJ

MARTIN ENERGY SERVICES, LLC,

Plaintiff–Counter Defendant-Appellee Cross-Appellant,

versus

M/V BRAVANTE IX,
Its engines, machinery, tackle, appurtenances, apparel, etc., *et al.*,

Defendants,

BOLDINI LTD, *et al.*,

Defendants–Cross-Claimants–Counter Claimants–Counter Defendants,

OW BUNKER MIDDLE EAST DMCC,

Cross-Defendant,

ING BANK N.V.,

Cross Defendant–Counter Claimant–Appellant Cross Appellee.

Appeals from the United States District Court
for the Northern District of Florida

(May 10, 2018)

Before WILSON and JORDAN, Circuit Judges, and CONWAY,* District Judge.
PER CURIAM:

ING Bank appeals the district court's final judgment following a bench trial awarding interpleaded funds to Martin Energy Services ("Martin") for fuel delivered to a maritime vessel. ING Bank asserts the district court erred by awarding Martin the fair value of the fuel provided. After review, we affirm.

I.

Boldini Ltd., a Brazilian company, arranged to have fuel provided to its ship, the M/V Bravante VIII, in Panama City, Florida, by contacting O.W. Bunker & Trading do Brasil, who in turn contacted two affiliated O.W. Bunker entities. The transaction was structured as a sale of fuel by Martin—not directly to Boldini—but to O.W. Bunker USA Inc., who sold the fuel to another O.W. Bunker affiliate, who in turn contracted to sell the fuel to Boldini.

Martin coordinated its delivery of the fuel with Boldini's local agent, the Bravante VIII's captain, and the ship's engineer who signed the bunkering

*Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

certificate acknowledging delivery. Martin delivered the fuel on credit, and was not paid at the time of delivery. Unfortunately, the O.W. Bunker entities worldwide filed for bankruptcy in their respective countries of origin shortly after the fuel was delivered, and Martin remained unpaid for the fuel provided to the Bravante VIII, which had left the territorial waters of the United States.

Martin subsequently filed an admiralty action asserting *in personam* claims against Boldini for breach of contract and quantum meruit arising out of the fuel provided to the Bravante VIII. Martin also asserted a *quasi in rem* claim against a different Boldini-owned vessel within the court's jurisdiction, the Bravante IX, which Martin sought to attach pursuant to Rule B of the Supplemental Rules for Admiralty and Maritime Claims governing *in personam* actions.

Eight days later, Boldini filed an answer before the Bravante IX was attached, and asserted a counterclaim and cross-claim for interpleader, 28 U.S.C. § 1335, against all of the parties with competing claims to the payment sought by Martin for the fuel provided to the Bravante VIII. Boldini included as a cross-defendant ING Bank, a secured lender of certain O.W. Bunker entities. Boldini eventually deposited the appropriate funds owed for the fuel into the registry of the district court and was discharged from further liability.

Following a two-day bench trial, the district court determined that Martin had a valid quantum-meruit claim against Boldini that was satisfied by Boldini's

tender into the court's registry of the full amount due.[1] The court awarded Martin the fair value of the fuel ($286,200) for providing and delivering the fuel, and awarded ING Bank the amount the relevant O.W. Bunker entities would have received as "resellers" or "traders" of the fuel ($3,900), plus a proportional share of interest on the principal deposited. ING Bank appealed the district court's determination that Martin had valid contract and quantum-meruit claims as well as the award of the interpleaded funds. After review and oral argument, we affirm.

II.

"We review a district court's factual findings when sitting without a jury in admiralty under the clearly erroneous standard. We review the district court's conclusions of law de novo." *Sea Byte, Inc. v. Hudson Marine Management Services, Inc.*, 565 F.3d 1293, 1298 (11th Cir. 2009) (citation omitted). "A finding of fact is clearly erroneous when the entirety of the evidence leads the reviewing court to a definite and firm conviction that a mistake has been committed." *Id.*

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[1] Although the district court also found "Martin had a valid maritime lien against the Bravante VIII," Martin's Complaint was not filed as an *in rem* action, Martin did not seek a Rule C arrest of the ship it had fueled, the Bravante VIII, because that ship had left the jurisdiction of the court, and no party asserted a maritime lien. *Cf. Barcliff, LLC v. M/V Deep Blue*, 876 F.3d 1063 (11th 2017) (resolving competing maritime lien claims under the Commercial Instruments and Maritime Liens Act, 46 U.S.C. § 31342, in an *in rem* suit brought under Supplemental Rule C against the vessel which had been supplied with fuel). At oral argument the parties agreed that a maritime lien "is not an issue" in the case. In addition, the district court acknowledged at the summary judgment hearing that the claim at issue was *in personam* and not a Rule C *in rem* action to enforce a maritime lien against the vessel supplied with fuel, the Bravante VIII. *See, e.g., Dresdner Bank Ag v. M/V Olympia Voyager*, 463 F.3d 1233, 1238 (11th Cir. 2006) ("A Supplemental Rule B action is an *in personam* action that would give rise to, at most, an *in personam* lien claim–not a maritime lien.").

(quoting *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377, 1380 (11th Cir. 2006)). "We will not disturb the district court's choice of an equitable remedy except for abuse of discretion." *Commodity Futures Trading Comm'n v. Levy*, 541 F.3d 1102, 1110 (11th Cir. 2008). We "may affirm a decision of the district court on any ground supported by the record." *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 714 F.3d 1234, 1236 n.1 (11th Cir. 2013) (citation omitted).

Where a case arises in admiralty, we apply the general maritime law, which is federal law. *Sea Byte*, 565 F.3d at 1298 (citing *Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co., Inc.*, 207 F.3d 1247, 1250-51 (11th Cir. 2000)). However, "when neither statutory nor judicially created maritime principles provide an answer to a specific legal question, courts may apply state law provided that the application of state law does not frustrate national interests in having uniformity in admiralty law." *Id.* (applying Florida law of quantum meruit in an admiralty case).

Because ING Bank had argued that the bunkering certificate did not give rise to a contract between Boldini and Martin,[2] the district court found in the alternative that Martin was entitled to payment for the fuel on the basis of quantum meruit. Under Florida law, to prevail on a quantum-meruit claim, a plaintiff must show that (1) it conferred a benefit on the defendant; (2) the defendant had

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[2] Because it is unnecessary to the resolution of this appeal, our decision does not address the district court's decision concerning Martin's breach of contract claim. *See Merle Wood & Assocs.*, 714 F.3d at 1236 n.1 (We "may affirm a decision of the district court on any ground supported by the record.").

knowledge of the benefit; (3) the defendant accepted or retained the benefit; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying its fair value. *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 386 (Fla. 4th DCA 1997) (en banc); *Merle Wood & Assocs.*, 714 F.3d at 1237 (reciting elements of quantum meruit under Florida law).

The district court found Martin had conferred a benefit on Boldini by providing 300 metric tons of fuel to Boldini's vessel, the Bravante VIII, which Boldini knew of, accepted, retained, and memorialized in a bunkering certificate acknowledging the fuel's delivery. The district court determined it would be inequitable for Boldini to retain the benefit of the fuel without paying for it and awarded Martin the fair value of the fuel.

The district court relied on two Florida cases allowing a subcontractor to recover in quantum meruit against the owner where the general contractor had declared bankruptcy or gone out of business before the owner paid for the subcontracted work. *See Commerce P'ship*, 695 So. 2d at 387-88; and *GFR Leasing Corp. v. Transportation Equipment Specialists, Inc.*, 737 So. 2d 628, 629 (Fla. 1st DCA 1999). Under Florida law, a subcontractor can recover in quantum meruit from the owner, even though the subcontractor had a contract with the general contractor, if the owner had received a benefit from the subcontractor's

work and the owner had not paid for that work under the owner's own contract with the general. *Commerce*, 695 So. 2d at 387-88; *GFR Leasing*, 737 So. 2d at 629. Applying Florida law, in the absence of a valid contract claim against Boldini, and with the relevant O.W. Bunker entity in bankruptcy and unpaid, Martin can recover in quantum meruit from Boldini for the benefit of the fuel Martin delivered and provided to Boldini. Accordingly, the district court did not err by entering judgment which awarded Martin the value of the fuel provided from the fund in the registry of the court, and awarding ING Bank the remaining portion earned by the "resellers."[3]

AFFIRMED.

[3] To the extent Martin's cross-appeal challenges the district court's award to ING Bank, we find no error in the court's finding that O.W. Bunker Brazil functioned as the broker for O.W. Bunker Middle East, who contracted to sell the fuel to Boldini. The motion filed by ING Bank to strike portions of the reply brief filed by Martin in the cross-appeal is denied as moot.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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May 10, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-10899-JJ
Case Style: Martin Energy Services LLC v. ING
District Court Docket No: 5:14-cv-00322-RH-GRJ

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against the appellant.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tiffany A. Tucker, JJ at (404)335-6193.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs

46 U.S. Code § 31343. Recording and discharging notices of claim of maritime lien

U.S. Code Notes

(a) Except as provided under subsection (d) of this section, a person claiming a lien on a vessel documented, or for which an application for documentation has been filed, under chapter 121 may record with the Secretary a notice of that person's lien claim on the vessel. To be recordable, the notice must—

(1) state the nature of the lien;

(2) state the date the lien was established;

(3) state the amount of the lien;

(4) state the name and address of the person; and

(5) be signed and acknowledged.

(b)

(1) The Secretary shall record a notice complying with subsection (a) of this section if, when the notice is presented to the Secretary for recording, the person having the claim files with the notice a declaration stating the following:

(A) The information in the notice is true and correct to the best of the knowledge, information, and belief of the individual who signed it.

(B) A copy of the notice, as presented for recordation, has been sent to each of the following:

(i) The owner of the vessel.

(ii) Each person that recorded under subsection (a) of this section an unexpired notice of a claim of an undischarged lien on the vessel.

(iii) The mortgagee of each mortgage filed or recorded under section 31321 of this title that is an undischarged mortgage on the vessel.

(2) A declaration under this subsection filed by a person that is not an individual must be signed by the president, member, partner, trustee, or other individual authorized to execute the declaration on behalf of the person.

(c)

(1) On full and final discharge of the indebtedness that is the basis for a notice of claim of lien recorded under subsection (b) of this section, the person having the claim shall provide the Secretary with an acknowledged certificate of discharge of the indebtedness. The Secretary shall record the certificate.

(2) The district courts of the United States shall have jurisdiction over a civil action in Admiralty to declare that a vessel is not subject to a lien claimed under subsection (b) of this section, or that the vessel is not subject to the notice of claim of lien, or both, regardless of the amount in controversy or the citizenship of the parties. Venue in such an action shall be in the district where the vessel is found or where the claimant resides or where the notice of claim of lien is recorded. The court may award costs and attorneys fees to the prevailing party, unless the court finds that the position of the other party was substantially justified or other circumstances make an award of costs and attorneys fees unjust. The Secretary shall record any such declaratory order.

(d) A person claiming a lien on a vessel covered by a preferred mortgage under section 31322(d) of this title must record and discharge the lien as provided by the law of the State in which the vessel is titled.

(e) A notice of claim of lien recorded under subsection (b) of this section shall expire 3 years after the date the lien was established, as such date is stated in the notice under subsection (a) of this section.

(f) This section does not alter in any respect the law pertaining to the establishment of a maritime lien, the remedy provided by such a lien, or the defenses thereto, including any defense under the doctrine of laches.

(Pub. L. 100–710, title I, § 102(c), Nov. 23, 1988, 102 Stat. 4748; Pub. L. 107–295, title II, § 205(a)(1), Nov. 25, 2002, 116 Stat. 2095; Pub. L. 111–281, title IX, § 913(a)(1), Oct. 15, 2010, 124 Stat. 3017.)

Barcliff, LLC v. M/V Deep Blue

United States Court of Appeals for the Eleventh Circuit

November 30, 2017, Decided

No. 16-17755

Reporter
876 F.3d 1063 *; 2017 U.S. App. LEXIS 24187 **; 2017 AMC 2980; 27 Fla. L. Weekly Fed. C 401; 2017 WL 5894901

BARCLIFF, LLC, d.b.a. Radcliff/Economy Marine Services, Plaintiff - Appellant, versus M/V DEEP BLUE, IMO NO. 9215359, her engines, apparel, furniture, equipment, appurtenances, tackle, etc., in rem, Defendant - Appellee, ING BANK N.V., P. O. Box 1800 ALP B.02.050 Amsterdam 1000 BV Netherland, Intervenor - Appellee.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Alabama. D.C. Docket No. 1:14-cv-00590-C.

Barcliff, LLC v. M/V Deep Blue, 2016 U.S. Dist. LEXIS 133253 (S.D. Ala., Sept. 28, 2016)

Disposition: AFFIRMED.

Overview

HOLDINGS: [1]-The district court did not err in determining the subcontractor did not have a maritime lien on the pipe-laying vessel because the subcontractor acted on the order of an affiliate of a global marine fuel supplier, not the vessel owner, and the subcontractor failed to present the district court with the possibility that it fell into the significant-and-ongoing-involvement exception, so the argument was not preserved for appeal; [2]-The district court properly determined that the fuel supplier had a lien on the vessel because it had provided the bunkers to the vessel within the meaning of *46 U.S.C.S. § 31342(a)* and that the supplier had assigned the lien to the assignee under a security agreement.

Outcome
Judgment affirmed.

Core Terms

fuel, bunkers, subcontractor, ship, district court, assigned, Marine, maritime lien, general contractor, vessel, supplied, supplier, parties, tons, contractual, security agreement, Receivables, involvement, delivery, agreed to sell, entities, cases, Port, bind, stricti juris, subcontracted, quotations, ongoing, metric, liens

Case Summary

LexisNexis® Headnotes

Admiralty & Maritime Law > Practice & Procedure

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Admiralty & Maritime Law, Practice & Procedure**

When a district court sitting in admiralty conducts a bench trial, the appellate court reviews the court's factual findings for clear error and its conclusions of law de novo.

Admiralty & Maritime Law > Maritime
Liens > Priority & Sources > Maritime Lien Act Liens

HN2[] **Priority & Sources, Maritime Lien Act Liens**

A maritime lien is a special property right in a ship given to a creditor by law as security for a debt or claim, and it attaches the moment the debt arises. The Federal Maritime Lien Act (*FMLA*) determines when a person is entitled to such a lien. It reads: A person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel. *46 U.S.C.S. § 31342(a)*. Under a plain reading of the statute, to obtain a maritime lien, a person must: (1) provide necessaries; (2) to a vessel; (3) on the order of the owner or agent.

Governments > Courts > Judicial Precedent

HN3[] **Courts, Judicial Precedent**

Any decision of another circuit, published or unpublished, is only of persuasive value.

Admiralty & Maritime Law > Maritime
Liens > Priority & Sources > Maritime Lien Act Liens

HN4[] **Priority & Sources, Maritime Lien Act Liens**

Where the owner directs a general contractor to provide necessaries to its vessel, a subcontractor retained by the general contractor to perform the work or provide the supplies is generally not entitled to a maritime lien. This is because, absent facts indicating the owner has designated the general contractor as its agent to procure necessaries on its behalf, a general contractor does not have the authority to bind the ship. It is the general rule that a general contractor does not have the authority to bind a vessel. As such, the subcontractor is merely a contractual counterparty of the general contractor; it has no relationship with the owner. It is the general contractor that, on the order of the owner, provides the necessaries to the ship. Whether it does so with its own employees and supplies or by retaining a subcontractor is immaterial. Absent certain extraordinary circumstances as discussed below, a subcontractor cannot meet the third statutory element required to obtain a maritime lien. *46 U.S.C.S. § 31342(a)*.

Admiralty & Maritime Law > Maritime
Liens > Priority & Sources > Maritime Lien Act Liens

HN5[] **Priority & Sources, Maritime Lien Act Liens**

Even where the general contractor is not an agent of the owner, and the owner does not initially order the subcontractor to perform the work, it might still be said that the owner somehow authorized the work if it was sufficiently aware of, and involved in, the work that it might be said that the subcontractor was working for the owner. Specifically, where the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transaction, a question of fact may arise as to whether the third-party provider (i.e., the subcontractor) in effect performed the work on the order of the owner.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6[] **Reviewability of Lower Court Decisions, Preservation for Review**

An issue not raised in the district court and raised for the first time in an appeal will not be considered by the court.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7[] **Reviewability of Lower Court Decisions, Preservation for Review**

Arguments raised for the first time on appeal are not properly before the court.

Civil Procedure > Appeals > Reviewability of Lower

Court Decisions > Preservation for Review

HN8[] **Reviewability of Lower Court Decisions, Preservation for Review**

Although the appellate court has the discretion to consider an argument that was not presented to the district court, it does so only when special circumstances exist.

Business & Corporate Compliance > ... > Standards of Performance > Contracts Law > Standards of Performance

HN9[] **Contracts, Standards of Performance**

Basic contract principles provide that in general, a party meets its obligations under an agreement when the party's delegate renders performance.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN10[] **Priority & Sources, Maritime Lien Act Liens**

46 U.S.C.S. § 31342(a) merely requires that the would-be lienor provide necessaries to the vessel. It does not forbid the supplier from using a subcontractor to do so, or require that the parties be current on their accounts payable before a lien arises. A maritime lien attaches the moment the necessaries are supplied; subsequent administrative matters such as tendering an invoice are irrelevant. A maritime lien is a special property right in a ship given to a creditor by law as security for a debt or claim subsisting from the moment the debt arises. Likewise, payment by the general contractor to the subcontracted supplier is immaterial to the general contractor's lien, it arises at the moment the subcontractor renders performance on the general contractor's behalf.

Admiralty & Maritime Law > Maritime Liens > Nature > Assignability

HN11[] **Nature, Assignability**

Maritime liens are assignable.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Contract Interpretation

HN12[] **Standards of Review, De Novo Review**

Questions of contract interpretation and matters of foreign law are reviewed de novo.

Contracts Law > Contract Interpretation > Intent

HN13[] **Contract Interpretation, Intent**

Under English principles of contract interpretation, a court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. That intention is discerned by looking to the words of the contract in their documentary, factual and commercial context, considering, inter alia, the natural and ordinary meaning of the clause and the overall purpose of the contract.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN14[] **Priority & Sources, Maritime Lien Act Liens**

The whole purpose of a lien is to secure a debt. A maritime lien is security for a debt.

Counsel: For BARCLIFF, LLC, d.b.a. Radcliff/Economy Marine Services, Plaintiff - Appellant: Gilbert Larose Fontenot, Maples & Fontenot, LLP, MOBILE, AL.

For M/V DEEP BLUE, IMO NO. 9215359, her engines, apparel, furniture, equipment, appurtenances, tackle, etc., in rem, Defendant - Appellee: William Cuthbert Baldwin, Richard Scott Jenkins, Jones Walker, LLP, NEW ORLEANS, LA; Matthew C. McDonald, Jones Walker, LLP, MOBILE, AL.

For ING BANK N.V., P. O. Box 1800 ALP B.02.050 Amsterdam 1000 BV Netherland, Interested Party - Appellee: James Marshall Gardner, Thomas S. Rue, Maynard Cooper & Gale, PC, MOBILE, AL; Brian Paul Maloney, Bruce G. Paulsen, Seward & Kissel, NEW YORK, NY.

Judges: Before ED CARNES, Chief Judge and BLACK, Circuit Judges, and MAY,* District Judge.

Opinion by: BLACK

Opinion

[*1065] BLACK, Circuit Judge:

The M/V Deep Blue is a pipe-laying vessel deployed in the Gulf of Mexico. In late 2014, the Deep Blue required a routine refueling. Its owner contacted a global marine fuel supplier. The supplier agreed to sell the fuel and deliver it to the Deep Blue at the Port of Mobile, Alabama. Rather than fulfill **[**2]** the order out of its own stocks, the supplier purchased the fuel from an affiliate. The affiliate, in turn, subcontracted with Plaintiff-Appellant Barcliff, LLC, d/b/a Radcliff/Economy Marine Services (Radcliff), a Mobile-based maritime fuel provider, to supply and deliver the fuel. Radcliff rendered performance and fueled the Deep Blue in November 2014.

This otherwise ordinary transaction ultimately became a problem for Radcliff because, before any money changed hands, the global marine fuel conglomerate collapsed into bankruptcy. Radcliff found itself in the position of having supplied several hundred metric tons of fuel on the credit of a now-insolvent counterparty. Radcliff asserted a maritime lien on the Deep Blue in a bid to recover directly from the ship, giving rise to this litigation.

After a bench trial, the district court determined Radcliff did not have a lien on the Deep Blue. Instead, a lien had arisen in favor of the global fuel supplier, and was duly assigned to ING Bank N.V. (ING), an intervenor in the suit. Radcliff appeals, and we affirm.

I. BACKGROUND

The significance of the contractual structure of the sale outlined above will become clear in the course of our analysis. **[**3]** Accordingly, we begin by introducing the parties to the transaction in relation to their contractual counterparties.

A. The Sequence of Contracts

1. Technip purchases bunkers from O.W. UK

Technip UK Limited (Technip) is a U.K.-based company and the owner of the Deep Blue. Since 2001, Technip has used the Deep Blue to lay pipe for oil rigs in the Gulf. The Deep Blue requires periodic refueling. Each time, Technip's Scotland-based procurement team solicits bids from a handful of international fuel suppliers. The suppliers respond with price quotes, and Technip selects the most appropriate proposal.

O.W. Bunkers (UK) Limited (O.W. UK), also a U.K. entity, is a member of the O.W. Bunker Group, a global fuel supply conglomerate. On October 22, 2014, Technip sent out a request for quotations to O.W. UK and two other suppliers, seeking bunker fuel[1] for the Deep Blue in the Port of Mobile, Alabama. After reviewing the bids, Technip awarded the supply contract to O.W. UK, whose offer, at $824 per metric **[*1066]** ton, was the least expensive.[2] Payment was to be due

* Honorable Leigh Martin May, United States District Judge for the Northern District of Georgia, sitting by designation.

[1] Bunker fuel (or "bunkers") is synonymous with maritime fuel. *See Bunker fuel*, Webster's Third New International Dictionary, Unabridged, http://unabridged.merriam-webster.com/bunker%20fuel (last visited Nov. 13, 2017) (defining bunker fuel as "any of various fuel oils used especially on ships"). This opinion uses the terms interchangeably.

[2] O.W. UK agreed to sell fuel to Technip; it did not agree to become Technip's agent or broker to bind Technip to a fuel purchase agreement with a third party. The sales order confirmation listed O.W. UK as seller and was addressed to Technip as purchaser and it stated the price, date of delivery, and port of delivery, but there was no indication of any delegation of authority to purchase on Technip's behalf.

within thirty days of delivery.

2. O.W. UK purchases bunkers from O.W. USA

Now obligated to supply the Deep Blue in the Gulf of Mexico, **[**4]** O.W. UK entered into a second purchase and sale contract in order to procure the 850 metric tons of bunkers it had agreed to sell to Technip. This time, O.W. UK was the buyer of the fuel and O.W. Bunker USA, Inc. (O.W. USA) was the seller. O.W. USA, a Houston-based sibling company of O.W. UK, agreed to sell 850 metric tons of bunker fuel to O.W. UK for $823.30 per ton, with delivery to be made to the Deep Blue in Mobile.

3. O.W. USA purchases bunkers from Radcliff

O.W. USA had agreed to sell O.W. UK 850 tons of fuel, but the fuel would not come from its own stocks. Rather, O.W. USA added a final link to the chain of contracts by retaining Radcliff to supply the bunkers. Radcliff agreed to sell the fuel to O.W. USA and deliver it to the Deep Blue at a price of $823 per ton, payment due within thirty days.

B. The Fueling

After the contractual arrangements were worked out, O.W. USA emailed Radcliff and put Radcliff in touch with the Chief Engineer of the Deep Blue, Ian Ladyka, to coordinate delivery. Radcliff communicated with Ladyka, rather than O.W. USA, from that point on with respect to the logistics of the fueling.

Radcliff fueled the Deep Blue outside the Port of Mobile on November 1, **[**5]** 2014. When the fueling was complete, Ladyka signed a bunker delivery certificate acknowledging that the 850 tons of fuel had been conveyed. Each seller sent an invoice to its respective buyer at their agreed prices: Radcliff to O.W. USA for the fuel sold to it and delivered to the Deep Blue; O.W. USA to O.W. UK; and O.W. UK to Technip.

Evidence presented at trial indicated that, consistent with their purchaser-seller relationship, if Technip had had any quality or quantity issues, they would have been addressed with O.W. UK, and not with any downstream local supplier-subcontractors retained by O.W. UK. This is also Radcliff's understanding, as its pretrial stipulations indicate.

C. ING Bank and the Collapse of the O.W. Bunker Group

The ship now fueled and having recommenced its operations, all that remained was settlement. Had everything gone according to plan, Technip would have paid O.W. UK $700,400 for 850 tons of fuel at $824 per ton; O.W. UK would have paid O.W. USA $699,805; and O.W. USA would have paid Radcliff $699,550. But none of these sums was remitted because the O.W. Bunker Group, the global marine fuel conglomerate of which O.W. UK and O.W. USA were members, imploded. The Group's parent company filed for bankruptcy in its native Denmark on November 7, 2014, one week after the Deep Blue was fueled, and concurrent bankruptcy cases were opened for its subsidiaries, including O.W. UK and O.W. USA, in jurisdictions around the world. Relevant here, O.W. USA's proceeding commenced on November 13, 2014, in the District of **[**6]** Connecticut. *See* Chapter 11 Voluntary Petition, *In re* **[*1067]** *O.W. Bunker USA Inc.*, No. 14-51722 (Bankr. D. Conn. Nov. 13, 2014). Thus, Radcliff remained unpaid.

An overview of the O.W. Bunker Group explains the involvement of ING in this case. The O.W. Bunker Group was founded in Denmark in 1980 and grew to be one of the world's largest maritime fuel providers. The Group's operations consisted of a physical supply division, which provided bunkers directly from the Group's onshore stocks using its own fleet of ships, and a trading and reselling division, which bought fuel from third parties and sold it at a markup.

In December 2013, eleven months before the transaction at issue in this case, members of the O.W. Bunker Group, including O.W. UK and O.W. USA, entered into a $700 million revolving credit agreement with ING and a syndicate of other lenders to supply working capital. The credit was secured by O.W. Bunker Group's receivables due from customers around the world pursuant to a security agreement governed by English law (the Security Agreement).

Over the course of 2014, the Group drew down nearly the entire facility, which empowered ING to take its security, namely, payments that third **[**7]** parties owed to members of the Group. ING began to do so pursuant to a cooperation agreement between ING and the bankruptcy estate of O.W. UK, by which ING became entitled to collect on O.W. UK's outstanding receivables, with all recoveries to be paid into ING accounts. Among them was Technip's unpaid invoice for the fuel supplied to the Deep Blue.

D. This Suit

Having received no payment, and with its contractual counterparty, O.W. USA, in bankruptcy, Radcliff filed this suit in the Southern District of Alabama on December 19, 2014, seeking a lien on the Deep Blue so that it could collect from the ship. Notwithstanding the fact that its contractual obligation to supply the ship had been owed to O.W. USA, not to Technip, Radcliff contended that it had supplied the vessel and not been paid, so it was entitled to a lien. Technip made a restricted appearance for the purpose of defending the claim against the vessel. Technip was willing to pay for the fuel supplied to its ship, but wanted to be sure it only paid once, since its contractual debt was to O.W. UK, not to Radcliff, with whom it had no contractual relationship at all. Consequently, Technip deposited $705,529.50 into the registry **[**8]** of the court, equal to the value of the invoice from O.W. UK for the fuel plus interest, to be distributed according to the court's ultimate determination.

In April 2015, ING intervened in the suit. ING alleged that O.W. UK supplied the fuel to the ship, albeit using subcontractors, and Technip had not yet paid O.W. UK, so O.W. UK, not Radcliff, had a lien on the Deep Blue. In addition, ING had taken title to O.W. UK's accounts receivable as a result of the credit arrangements. Thus, ING asserted that it, not Radcliff, was entitled to the money Technip paid into the court.

The parties consented to try the case before a magistrate judge.[3] Following a two-day bench trial, the court entered an order concluding that Radcliff did not possess a lien on the ship. O.W. UK, on the other hand, did have a lien, and had duly assigned it to ING. The court entered judgment against Radcliff and in favor of ING and directed that the full amount Technip paid into its registry be disbursed to ING. Radcliff appealed.

[*1068] II. STANDARD OF REVIEW

HN1[↑] When a district court sitting in admiralty conducts a bench trial, we review the court's factual findings for clear error and its conclusions of law *de novo. Venus Lines Agency, Inc. v. CVG Int'l Am., Inc., 234 F.3d 1225, 1228 (11th Cir. 2000)*.

[3] As such, we have appellate jurisdiction under *28 U.S.C. § 636(c)(3)*.

III. DISCUSSION **[**9]**

HN2[↑] "A maritime lien is a special property right in a ship given to a creditor by law as security for a debt or claim, and it attaches the moment the debt arises."*Crimson Yachts v. Betty Lyn II Motor Yacht, 603 F.3d 864, 868 (11th Cir. 2010)* (quotations omitted). The *Federal Maritime Lien Act (FMLA)*[4] determines when a person is entitled to such a lien. It reads:

> [A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel . . . .

46 U.S.C. § 31342(a). We have held that under a plain reading of the statute, "to obtain a maritime lien, a person must: (1) provide necessaries; (2) to a vessel; (3) on the order of the owner or agent."[5] *Galehead, Inc. v. M/V Anglia, 183 F.3d 1242, 1244 (11th Cir. 1999)*.

In this case, the parties agree Radcliff satisfied the first and second elements of the statute when it provided 850 metric tons of bunker fuel to the Deep Blue in Mobile, Alabama. The subject of their dispute is whether Radcliff supplied the ship "on the order of the owner." If not, then Radcliff has no lien.

ING's asserted lien, on the other hand, requires us to answer two questions. First, did O.W. UK actually "provide necessaries" to the Deep Blue, even though it subcontracted the job to O.W. USA, and in turn to Radcliff? Second, **[**10]** even if a lien arose in O.W. UK's favor, did O.W. UK assign the lien to ING? If we answer both those questions in the affirmative, the district court was correct that ING has a lien on the Deep Blue.

We begin with Radcliff.

A. Whether Radcliff Has a Lien

[4] In 1989, *FMLA* was recodified under the heading "Commercial Instruments and Maritime Liens." *See* ***Coast Guard Authorization Act of 1989, Pub. L. 101-225, 103 Stat 1908***. The parties and the district court refer to the statute as "CIMLA," but this opinion will retain the act's original title. The amendments did not change the substance of the statute. ***Crimson Yachts, 603 F.3d at 872***.

[5] *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.* adds an additional requirement that the necessaries be supplied "at a reasonable price," *411 F.3d 1242, 1249 (11th Cir. 2005)*, but that is not at issue in this case.

1. The general rule: A subcontractor does not receive a lien

As noted above, the parties agree that neither O.W. UK nor O.W. USA was Technip's agent or broker.[6] Thus, Radcliff cannot aver that Technip authorized those entities to establish an agreement between Radcliff and Technip. Rather, as we have discussed, each party entered into a separate contract—Technip with O.W. UK, O.W. UK with O.W. USA, and O.W. USA with Radcliff. Radcliff's case turns, then, on whether it can show that it acted "on the order of the owner," Technip, in some more indirect way.

To that end, we first address Radcliff's contention that the district court erred in refusing to follow *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky, 869 F.2d 473 (9th Cir. 1988)*. In Radcliff's view, this nearly three-decades-old Ninth Circuit case "applies with dispositive force" because of its ostensible factual similarity. **[*1069]** Brief of Appellant at 15. In *Ken Lucky*, Bulkferts, a subcharterer of the ship the Ken Lucky, ordered its managing agent, Eurostem, **[**11]** to procure fuel for the ship.[7] *Ken Lucky, 869 F.2d at 475*. Eurostem contacted Brook which, in turn, instructed Gray to place an order with Marine Fuel. Marine Fuel supplied the ship, billed Gray, and sought payment from Brook, but Brook went bankrupt. Marine Fuel asserted a lien on the vessel. *Id.* The district court wanted to know whether Brook was also Bulkferts's agent, in which case Marine Fuel might be said to have performed the work on the order of "a person authorized by the owner." *Id. at 476*. The Ninth Circuit, however, concluded such a determination was unnecessary because the defendants had admitted that "Marine Fuel sold marine fuel and bunkers to Bulkferts." *Id.* Because the parties had "agree[d] that the order originated from Bulkferts" and Bulkferts accepted the fuel when Marine Fuel delivered it, Marine Fuel obtained a lien on the ship. *See id. at 477*. In essence, the court decided that the appellees' admission satisfied the order-of-the-owner requirement.

Radcliff appears to read *Ken Lucky* as standing for the proposition that any time an owner orders fuel for its ship, and that fuel is accepted from the third-party supplier by a member of the crew, a maritime lien arises in favor of the supplier—even if the owner ordered **[**12]** the fuel from a different entity. That view of *Ken Lucky* is strained because of the appellees' admission noted above. *See id.* ("[W]e need not reach the question whether the district court's conclusion that Brook was not Bulkfert's [sic] agent is erroneous because appellees have already admitted that the fuel and bunkers were sold *to Bulkferts*." (emphasis in original)). We read the case as highly dependent upon that particular factual stipulation, which is not present here. But more fundamentally, we have difficulty comprehending how the district court here could have committed an error of law in declining to follow *Ken Lucky*, as it is not binding law in this Circuit. *See United States v. Rosenthal, 763 F.2d 1291, 1294 n.4 (11th Cir. 1985)* (***HN3***[↑] "[A]ny decision of another circuit, published or unpublished, is only of persuasive value.").

Radcliff's rejoinder is that *Ken Lucky* "mirrors this Circuit's broad[ ] interpretation of 'order of the owner.'" Brief of Appellant at 14. That is, whereas the district court invoked the principle of *stricti juris*,[8] it should have construed the *FMLA* broadly, in which case it would have found *Ken Lucky* persuasive. Radcliff cites *Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty, 608 F.2d 197, 202 (5th Cir. 1979)*,[9] for the proposition that *FMLA* is to be given a liberal application. Some of the Court's statements in that **[**13]** case might appear on their face to cast doubt on the time-honored principle that "[m]aritime liens are governed by the principle *stricti juris* and will not be extended by construction, analogy or inference."[10] *Inbesa Am., **[*1070]** Inc. v. M/V Anglia,*

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[6] *See supra* note 2.

[7] Full names of the entities are omitted for clarity.

[8] "Of strict right of law; according to the exact law, without extension or enhancement in interpretation." *Stricti juris*, Black's Law Dictionary (10th ed. 2014).

[9] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

[10] Specifically, in *Grand Loyalty*, the Court opined that, in light of the legislative history of the 1971 amendments to the *FMLA*, the Act "is not to be viewed through the constricting glass of Stricti juris, or as some would suggest, Strictissimi juris." ***Grand Loyalty, 608 F.2d at 201***. The case centered on the question of which individuals have authority to procure necessaries such that a maritime lien would attach. The Court cited legislative history indicating Congress was concerned with the problem of materialmen furnishing necessaries to a vessel without having the time or ability to check if the

134 F.3d 1035, 1037 n.3 (11th Cir. 1998) (quotations omitted). However, our subsequent decisions have clarified this Court's position. In *In re Container Applications International, Inc.*, we held that *Grand Loyalty*'s sweeping statement is confined to its facts. *233 F.3d 1361, 1366 (11th Cir. 2000)* ("*Grand Loyalty* simply held that it was unnecessary to apply this rule of construction [*stricti juris*] because it was clear that Congress intended, through the 1971 amendments, to make it easier and more certain for stevedores performing traditional services to be protected."). Indeed, we expressly rejected the argument that *Grand Loyalty* "requires that we interpret all provisions of the FMLA liberally," stating that "[w]e do not find this to be the holding in *Grand Loyalty*." *Id.*; *cf. Crimson Yachts, 603 F.3d at 872* ("Like its predecessors, Congress passed the current version of the Federal Maritime Lien Act to resolve misunderstandings that had developed about the meaning of the Act; Congress did not intend to effect any dramatic substantive change.").

Accordingly, **[**14]** we decline Radcliff's invitation to read "on the order of the owner" so broadly. Were we presented with an issue of first impression, we might also question the practical utility of Radcliff's desired interpretation. *Stricti juris* or not, however, we have already had occasion to construe "on the order of the owner," and the result we reached is inconsistent with Radcliff's position. *Galehead, Inc. v. M/V Anglia, 183 F.3d 1242 (11th Cir. 1999)*, is our leading case in this area and it squarely controls this appeal. In light of *Galehead*, it cannot be said that Technip ordered Radcliff to supply the fuel to the Deep Blue within the meaning of the *FMLA*.

In *Galehead*, we considered three purported liens on the M/V Anglia arising from three occasions on which fuel was supplied to it. First, in August 1995, Genesis, the charterer, contacted Polygon to obtain bunkers.[11] *Id. at 1244*. Polygon subcontracted with Asamar, and Asamar found a supplier, which supplied and delivered the fuel to the ship. Asamar paid the supplier, but never received payment. It assigned its claim to Galehead, a collection agency. *Id.* The same sequence of events occurred again in September 1995, and Asamar assigned its second claim against the ship to Galehead as well. *Id.* In October 1995, Genesis **[**15]** once again sought fuel for the Anglia. This time, Polygon bypassed Asamar and subcontracted directly with the supplier. Once again, Genesis did not pay. Polygon assigned its claim to Galehead. *Id.*

Galehead brought suit seeking payment and asserted three liens on the ship, the first two assigned by Asamar and the third by Polygon. We held Asamar had no liens to assign to Galehead because it did not **[*1071]** act "on the order of the owner;" rather, Asamar acted at Polygon's request. *Id. at 1245* ("Asamar did not provide the bunkers on order of the owner or an authorized agent. Asamar provided the bunkers at Polygon's request, and Polygon is not [an agent of Genesis]."). Polygon, however, was in direct privity with Genesis, and clearly acted on Genesis's orders. *Id.* Although Polygon subcontracted to a third party rather than supply the vessel with its own personnel, it nevertheless satisfied all three elements of the maritime lien statute: Polygon provided necessaries (the fuel) to the ship (the Anglia) on the order of the owner (Genesis). *Id.* Galehead was entitled to one lien on the Anglia, that assigned by the general contractor, Polygon, but it was not entitled to the liens ostensibly assigned by the subcontractor, **[**16]** Asamar.

Galehead stands for the rule in this Circuit: ***HN4***[↑] Where the owner directs a general contractor to provide necessaries to its vessel, a subcontractor retained by the general contractor to perform the work or provide the supplies is generally not entitled to a maritime lien. *Id. at 1245*; *accord Cianbro Corp. v. George H. Dean, Inc., 596 F.3d 10, 17 (1st Cir. 2010)*; *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV, 199 F.3d 220, 229 (5th Cir. 1999)*; *S.C. State Ports Auth. v. M/V Tyson Lykes, 67 F.3d 59, 61 (4th Cir. 1995)*; *Port of Portland v. M/V Paralla, 892 F.2d 825, 828 (9th Cir. 1989)*. This is because, absent facts indicating the owner has designated the general contractor as its agent to procure necessaries on its behalf, a general contractor does not have the authority to bind the ship.[12] *See Port of Portland, 892 F.2d at 828* ("It is the

charterer and the owner had entered into a "no lien" clause, the effect of which would be to limit the agency of the charterer and specifically to prevent him from ordering necessaries that would result in a lien under the statute. *Id. at 201-202 n.7* (citing 1971 U.S.C.C.A.N. 1364-65). From the perspective of the materialman, it would be impossible to know whether or not the charterer's authority was so limited. Congress enacted the 1971 amendments to provide a presumption in such situations, analogous to the apparent authority rule in agency law. *Id.* However, it is important to note that *Grand Loyalty* did not involve the meaning of "on the order of the owner," but only "a person authorized by the owner."

[11] Once again, full names of the entities are omitted for clarity.

[12] The statute does not list a general contractor as a party

general rule that a general contractor does not have the authority to bind a vessel."). As such, the subcontractor is merely a contractual counterparty of the general contractor; it has no relationship with the owner. It is the general contractor that, on the order of the owner, provides the necessaries to the ship. Whether it does so with its own employees and supplies or by retaining a subcontractor is immaterial. Absent certain extraordinary circumstances as discussed below, a subcontractor cannot meet the third statutory element required to obtain a maritime lien. *Id.*; *46 U.S.C. § 31342(a)*.

Under the general rule as stated, Radcliff does not have a maritime lien on the Deep **[**17]** Blue. Radcliff acted on the order of O.W. USA, not Technip.

2. The exception: Significant and ongoing involvement

However, *Galehead* recognizes an exception to the general rule. ***HN5***[↑] Even where the general contractor is not an agent of the owner, and the owner does not initially order the subcontractor to perform the work, it might still be said that the owner "somehow authorized" the work if it "was sufficiently aware of, and involved in, [the] work that it might be said that [the subcontractor] was working for [the owner]." *Galehead, 183 F.3d at 1245*. Specifically, we held that "[w]here the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transaction," a question **[*1072]** of fact may arise as to whether the third-party provider (i.e., the subcontractor) in effect performed the work on the order of the owner. *Id.*

Galehead arrived at the significant-and-ongoing-involvement exception by looking to prior Eleventh Circuit cases on the subject. On the one hand, our Court has discerned certain circumstances in which a subcontractor could obtain a lien even though the general contractor was the one that took the official order from the owner. Those cases involved extensive **[**18]** maintenance, such as painting, coating, and cleaning, *Marine Coatings of Ala., Inc. v. United States, 932 F.2d 1370 (11th Cir. 1991)*, or repair work, *Stevens Tech. Servs., Inc. v. United States, 913 F.2d 1521 (11th Cir. 1990)*. Moreover, in those cases, although the initial order to do the work was given to the general contractor, the owner and the subcontractor developed a relationship over an extended period of time as the work progressed. In *Stevens*, for example, the owner was in contact almost exclusively with the subcontractor because the general contractor did not have the capability to perform the work. *Id. at 1535*. Instead, the owner dealt directly with the subcontractor and its employees directed, inspected, tested, and approved the subcontractor's work on a continuing basis. *Id. at 1525-26, 1535*. Thus, the owner's participation with the subcontractor was so substantial that it could not seriously be argued the work was not done on the owner's orders. *Id.*

The *Galehead* panel juxtaposed *Marine Coatings* and *Stevens* with cases involving a one-off transaction, "where the degree of involvement with the owner is minimal or nonexistent." *Galehead, 183 F.3d at 1246*. One of those cases involved fuel provision. *Id.* (citing *Tramp Oil & Marine, Ltd. v. M/V Mermaid I, 805 F.2d 42, 45 (1st Cir. 1986)*). In those circumstances, the subcontractor would not receive a lien. *Id.*

In light of these precedents, the *Galehead* panel determined Asamar did not fall within the exception **[**19]** to the general rule that subcontractors do not receive liens. There was no genuine dispute as to whether Asamar "had the kind of relationship with Genesis that would establish that Genesis authorized Asamar's work on the vessel." *183 F.3d at 1246*. Asamar's contact with Genesis was much more limited than the significant and ongoing involvement between the subcontractors and the owners in *Marine Coatings* and *Stevens*.

Radcliff attempts to avail itself of the significant-and-ongoing-involvement exception in this case. The problem for Radcliff is that it does so for the first time on appeal.[13] It offered the district court no occasion to

presumed to have authority to bind the ship. *See 46 U.S.C. § 31341(a)*. It is, of course, entirely possible that the facts of a case would show that the general contractor was in an actual agency relationship with the vessel, in which case it would have authority to bind it. *See Galehead, 183 F.3d at 1245 n.2*. However, as noted above, *see supra* note 2, the parties stipulated in this case that neither O.W. UK nor O.W. USA was an agent of Technip. To the extent Radcliff suggests otherwise, the district court did not clearly err in so finding.

[13] Radcliff contends that *Galehead* established a five-factor test for significant and ongoing involvement, consisting of the following elements: (1) whether the owner was aware of the subcontractor's performance before and during the performance; (2) the amount of work performed by the subcontractor; (3) whether the owner inspected the subcontractor's work; (4) whether the owner gave provisional and final acceptance of the subcontractor's work; and (5)

consider the exception, so the trial proceeded without any reference to it. Rather, Radcliff argued that, even if *Ken* ***[*1073]*** *Lucky* did not control the case, the acceptance of the fuel by the Deep Blue's Chief Engineer constituted "ratification" of a contract between Technip and Radcliff directly. *See* Amended Brief in Support of Summary Judgment at 5; Trial Transcript at 216, 221-223, 245. This "ratification" argument is markedly different from *Galehead's* significant-and-ongoing-involvement test. Radcliff's failure to present the district court with the possibility that it fell into **[**20]** the *Galehead* exception deprived the court of the opportunity to weigh the facts in light of it. Consequently, the argument is not properly before us.[14] *Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004)* ("This Court has repeatedly held that ***HN6***[] an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." (quotations omitted)); *accord Hurley v. Moore, 233 F.3d 1295, 1297 (11th Cir. 2000)* (***HN7***[] "Arguments raised for the first time on appeal are not properly before this Court.").

As a result, the district court did not err in determining Radcliff does not have a lien on the Deep Blue.[15]

B. Whether ING Has a Lien

As previously stated, whether ING has a lien on the Deep Blue depends first on whether O.W. UK had a lien and second on whether that lien was assigned to ING under the Security Agreement. The district court answered both questions in the affirmative, and we find no error in its determination.

1. Whether O.W. UK Had a Lien

There is no dispute that O.W. UK acted "on the order" of Technip, the owner of the Deep Blue, when it agreed to sell 850 metric tons of bunker fuel to Technip for the ship's use. Whether O.W. UK had a lien on the ship comes down to whether it "provided" the fuel within **[**21]** the meaning of the statute. Radcliff contends O.W. UK did not. After all, Radcliff ultimately delivered it.

The last time we considered this question was, once again, in *Galehead*. And under that case, the answer would appear to be straightforward: O.W. UK clearly "provided" the fuel, by delegating performance to Radcliff, who then delivered it. ***HN9***[] Basic contract principles provide that in general, a party meets its obligations under an agreement when the party's delegate renders performance. *See Galehead, 183 F.3d at 1245* ("A contracts to deliver to **[*1074]** B coal of specified kind and quality. A delegates the performance of this duty to C, who tenders to B coal of the specified kind and quality. The tender has the effect of a tender by A." (citing *Restatement (Second) of Contracts § 318 cmt. a, illus. 2* (1979))). When we were presented with this question in *Galehead*, on materially identical facts, we held that the general contractor, Polygon, obtained a lien when its subcontractor delivered fuel on its behalf. *Id.* ("[A]lthough [general contractor] Polygon did not

whether the work was fully accepted and compensated. *See Galehead, 183 F.3d at 1245-46*; Brief of Appellant at 18. While we are not required to address Radcliff's new reading of *Galehead* because it was not raised before the district court, we nonetheless are not persuaded by it. *Galehead*, rather than enshrining those factors into a legal test, merely listed them as some of the facts present in *Marine Coatings* that were relevant to the disposition of that case. *Id.* Though analogous facts could be relevant, they are not dispositive: the touchstone is significant and ongoing involvement. *See id. at 1245* ("Where the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transaction, the courts have found a triable issue of fact about whether the third-party deserved a lien.").

[14] Radcliff admitted at oral argument that it did not make this argument to the district court, but urged us to consider it nonetheless. ***HN8***[] Although we have the discretion to consider an argument that was not presented to the district court, we do so only when "special circumstances" exist. *Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1332 (11th Cir. 2004)* (listing five instances when this Court may consider an argument raised for the first time on appeal). Radcliff does not show how any of those special circumstances are present here; it merely asserts that the record is sufficiently developed for this Court to apply the legal test it submits on appeal. We disagree and decline to consider the merits of Radcliff's argument.

[15] It is unfortunate that Radcliff supplied the fuel and was not paid. But by entering into a contractual relationship exclusively with O.W. USA, Radcliff became O.W. USA's creditor. It is assuredly not the only one. O.W. USA's other creditors are doubtless vying for repayment in bankruptcy court. Rather than pursue its claim there, Radcliff elected to go after Technip for the full amount by asserting a lien on the Deep Blue, even though Technip purchased the fuel from O.W. UK and was contractually obligated to pay O.W. UK for it. It was Radcliff's right to gamble, but its choice should elicit no sympathy.

physically supply the bunkers, a party need not be the physical supplier or deliverer to have 'provided' necessaries under the statute."). We specifically stated that Polygon "provided" the necessaries within the meaning of **[**22]** § 31342(a) when it caused them to be delivered by contract. *Id.* ("[The agreement between Genesis and Polygon] caused, or provided for, the delivery of the fuel to the vessel. Therefore, Polygon 'provided' necessaries to the vessel under the contract irrespective of how, or by whom, the delivery was carried out.").

Nevertheless, Radcliff contends that the general contractor bears an additional obligation not mentioned in *Galehead* before it can receive a lien: it must pay the subcontractor to whom it delegated performance. Radcliff acknowledges that no authority directly supports this proposition, but submits that it lies latent in the case law.

Radcliff's argument is meritless. First and foremost, it finds no support in the text of the statute. **HN10**[↑] Section 31342(a) merely requires that the would-be lienor "provid[e] necessaries" to the vessel. It does not forbid the supplier from using a subcontractor to do so, or require that the parties be current on their accounts payable before a lien arises. We have consistently held that a maritime lien attaches the moment the necessaries are supplied; subsequent administrative matters such as tendering an invoice are irrelevant. Dresdner Bank AG v. M/V OLYMPIA VOYAGER, 465 F.3d 1267, 1276-77 (11th Cir. 2006); *see also Container Applications, 233 F.3d at 1362 n.1* ("A maritime lien is [a] special property **[**23]** right in a ship given to a creditor by law as security for a debt or claim subsisting from the moment the debt arises." (internal quotation marks and citation omitted)). Likewise, payment by the general contractor to the subcontracted supplier is immaterial to the general contractor's lien—it arises at the moment the subcontractor renders performance on the general contractor's behalf.

Accordingly, the district court did not err in determining that O.W. UK provided the bunkers to the vessel within the meaning of § 31342(a), and as a result that O.W. UK had a lien on the Deep Blue.

2. Whether O.W. UK Assigned the Lien to ING

The district court found that O.W. UK assigned its lien on the Deep Blue to ING pursuant to the Security Agreement. Radcliff contests that determination on appeal. Here too, we are unpersuaded.

To begin with, we note that **HN11**[↑] maritime liens are assignable. Robert Force & Kris Markarian, Fed. Judicial Ctr., Admiralty and Maritime Law Second Edition, 2013 WL 6732869 ("Maritime liens are assignable; the assignee ordinarily assumes the rank of the assignor in determining lien priority."); Thomas J. Schoenbaum, 1 Admiralty and Maritime Law § 9-1 (5th ed.) ("A maritime lien may be assigned, and one who advances money for the discharge of a lien occupies the position of an assignee."). The question, **[**24]** then, is simply whether the Security Agreement in fact assigned O.W. UK's lien on the Deep Blue. The Security Agreement is, as the parties agree, governed by English law. **HN12**[↑] Questions of contract interpretation and matters of **[*1075]** foreign law are reviewed *de novo.* Hegel v. First Liberty Ins. Corp., 778 F.3d 1214, 1219 (11th Cir. 2015); *Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1163 n.5 (11th Cir. 2009)*.

Pursuant to § 2.3(a) of the Security Agreement, O.W. UK assigned all "rights, title and interest in respect of the Supply Receivables." "Supply Receivables" is defined to include the monetary sum Technip owed to O.W. UK for supplying the fuel.[16] Radcliff asserts that any maritime lien that arose in O.W. UK's favor was not a "right[ ], title [or] interest in respect of" Technip's obligation to pay O.W. UK for the fuel. That is, O.W. UK assigned the monetary debt but not the corresponding maritime lien. There is no merit to this contention.

English principles of contract interpretation ring familiar to the American ear. **HN13**[↑] A court "is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean." *Arnold v. Britton*, [2015] AC 1619, ¶ 15 (UKSC), https://www.supremecourt.uk/cases/docs/uksc-2013-0193-judgment.pdf (quotation **[**25]** omitted). That intention is discerned by looking to the words of the contract in their "documentary, factual and commercial context," considering, inter alia, "the natural and ordinary meaning of the clause" and "the overall

[16] "Supply Receivables" means "any amount owing, or to be owed, to a Receivables Chargor under any Supply Contract," which would include the contract to fuel the Deep Blue between O.W. UK and Technip, because O.W. UK is a "Receivables Chargor" under the Agreement and the contract between Technip and O.W. UK was a "Supply Contract."

purpose" of the contract. *Id.*

The lien on the Deep Blue is, without a doubt, a "right" or "interest" under the agreement "in respect of"—in other words, "[a]s regards, as relates to; with reference to"[17]—Technip's obligation to pay O.W. UK for the fuel. Indeed, ***HN14***[↑] the whole purpose of the lien is to secure the debt. *See* *Galehead, 183 F.3d at 1247* (noting that a maritime lien is "security for a debt" (citation omitted)). The debt was assigned; it is only reasonable that the security would be assigned as well. The documentary, factual, and commercial context confirm that it was the intention of the O.W. Bunker Group and ING to assign the lien to ING. As ING notes, the Security Agreement was executed in connection with a $700 million credit facility extended to the O.W. entities during their financial hardship. There is little reason to believe parties intended to exclude the lien, by which the bank could enforce the debts it had acquired to secure the loan to the O.W. Bunker entities.

The district court did not err in determining that O.W. UK had a lien on the Deep Blue and that O.W. UK assigned it to ING.

IV. CONCLUSION

For the foregoing reasons, the district court did not err in finding that ING has a lien on the Deep Blue and Radcliff does not. Accordingly, its judgment is**AFFIRMED**.

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[17] *See In respect **[**26]** of*, Oxford English Dictionary Online, *http://www.oed.com/view/Entry/163779?redirectedFrom=in+respect+of#eid177413195* (last visited Nov. 13, 2017).

Clearlake Shipping PTE Ltd. v. Nustar Energy Servs.

United States Court of Appeals for the Second Circuit

April 19, 2018, Argued; December 19, 2018, Decided

Docket No. 17-1458-cv*

* This appeal was consolidated for purposes of oral argument with the appeals in Nippon Kaisha Line Ltd. v. NuStar Energy Services, Inc., No. 17-1378, which is resolved today in a summary order, and U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, No. 17-0922, and Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, No. 17-0931, which are resolved today in a separate opinion.

Reporter
911 F.3d 646 *; 2018 U.S. App. LEXIS 35522 **; 2019 AMC 385

CLEARLAKE SHIPPING PTE LTD., Plaintiff-Counter-Defendant-Appellee, - v. - NUSTAR ENERGY SERVICES, INC., Defendant-Cross-Defendant-Cross-Claimant-Appellant, ING BANK N.V., Defendant-Counter-Claimant-Cross-Claimant-Cross-Defendant-Appellee, O.W. BUNKER (SWITZERLAND) SA, O.W. BUNKER USA, INC., O.W. BUNKER NORTH AMERICA, INC., O.W. BUNKER HOLDING NORTH AMERICA INC., Defendants.[**]

Subsequent History: US Supreme Court certiorari dismissed by *Nustar Energy Servs. v. Ing Bank, 2019 U.S. LEXIS 6484 (U.S., Oct. 17, 2019)*

Prior History: Appeal by interpleader defendant NuStar Energy Services, Inc. ("NuStar"), from orders and an April 18, 2017 partial final judgment of the United States District Court for the Southern District of New York, Valerie E. Caproni, Judge, rejecting its claims of entitlement to maritime liens against two chartered vessels to which NuStar, pursuant to arrangements with and among other entities, physically provided marine fuel for which it was not paid following the bankruptcies of the entity to which NuStar sold the fuel and of that entity's affiliate from which the charterer had ordered the fuel. The district court denied NuStar's motion for summary judgment on its maritime-lien claims and entered a partial final judgment dismissing those claims, ruling principally that the claims were governed by the *Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 et seq.*, and that bunker suppliers who were subcontractors were not entitled to maritime liens because their sales were not made "on the order of the owner or a person authorized by the owner" of the vessel, id. *§ 31342(a)*. See *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA, 239 F.Supp.3d 674 (S.D.N.Y. 2017)*. On appeal, NuStar contends principally that it was entitled to the claimed liens in light of CIMLA's plain text and purpose and **[**2]** as a matter of equity, regardless of its lack of contractual privity with the vessels' owner/charterer or their agent. We see no error in the district court's interpretation of CIMLA or its ruling that maritime liens may not properly be granted based on principles of equity. And as NuStar—unlike the physical supplier in U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, No. 17-0922, and Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, No. 17-0931, which are also resolved today—has not pointed to evidence that the owner or charterer or their agent directed that NuStar be the physical supplier, NuStar's claims are not meaningfully distinguishable from those rejected in *ING Bank N.V. v. M/V TEMARA, 892 F.3d 511 (2d Cir. 2018)* **[**1]** .

Clearlake Shipping Pte Ltd v. O.W. Bunker (Switz.) SA, 239 F. Supp. 3d 674, 2017 U.S. Dist. LEXIS 30904 (S.D.N.Y., Mar. 3, 2017)

Disposition: Affirmed.

Core Terms

supplier, Bunker, subcontractor, Vessels, maritime lien, charterer, district court, purchase order, entity, cases, general contractor, interpleader

Case Summary

Overview

HOLDINGS: [1]-A subcontractor that supplied marine fuel (bunkers) to two vessels time-chartered by interpleader plaintiff was not entitled to assert a maritime lien against the vessels under the Commercial Instruments and Maritime Liens Act (CIMLA), *46 U.S.C.S. § 31301 et seq.*, because it did not provide the fuel "on the order of" the owner or a person authorized by the owner of the vessels as required under *46 U.S.C.S. § 31342(a)*; [2]-The charterer contracted with another entity to supply the fuel, and that entity contracted with an intermediary, which then contracted with the subcontractor; [3]-An exception to the subcontractor rule, allowing a subcontractor to assert a

[**] The Clerk of Court is instructed to amend the official caption to conform with the above.

lien if the owner required the general contractor to use the subcontractor, did not apply here because there was no evidence of such a requirement; the charterer's awareness that the subcontractor would be used was insufficient.

Outcome
Partial final judgment affirmed.

LexisNexis® Headnotes

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN1[] **Priority & Sources, Maritime Lien Act Liens**

Maritime liens arise exclusively under the Commercial Instruments and Maritime Liens Act (CIMLA), *46 U.S.C.S. § 31301 et seq.*; such liens are construed narrowly under the doctrine of stricti juris, and CIMLA typically requires a finding of a direct contractual or agency nexus between the supplier and the vessel or its agents.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN2[] **Priority & Sources, Maritime Lien Act Liens**

As an exception to that general rule that a subcontractor cannot assert a maritime lien under the Commercial Instruments and Maritime Liens Act (CIMLA), *46 U.S.C.S. § 31301 et seq.* an owner can still become responsible for the services of a subcontractor, if the owner has ordered the general contractor to retain that subcontractor.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

Governments > Legislation > Interpretation

HN3[] **Priority & Sources, Maritime Lien Act Liens**

The statutory requirements of the Commercial Instruments and Maritime Liens Act (CIMLA), *46 U.S.C.S. § 31301 et seq.*, are construed strictly and may not be expanded by construction, analogy, or inference.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN4[] **Priority & Sources, Maritime Lien Act Liens**

A subcontractor is not entitled to assert a maritime lien under the Commercial Instruments and Maritime Liens Act (CIMLA), *46 U.S.C.S. § 31301 et seq.*, unless it can be shown that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance. The sole exception to the rule against the subcontractor lien will occur where the subcontractor has been engaged by a general contractor in circumstances where the general contractor was acting as an agent at the direction of the owner to engage specific subcontractors. The exception is applicable if the owner has ordered the general contractor to retain that subcontractor.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN5[] **Priority & Sources, Maritime Lien Act Liens**

A subcontractor is not allowed to assert a maritime lien under the Commercial Instruments and Maritime Liens Act (CIMLA), *46 U.S.C.S. § 31301 et seq.*, without any indication that a statutorily-authorized entity provided direction that that subcontractor be used.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN6[] **Priority & Sources, Maritime Lien Act Liens**

The subcontractor exception allowing a subcontractor to assert a maritime lien under the Commercial Instruments and Maritime Liens Act (CIMLA), *46 U.S.C.S. § 31301 et seq.*, does not apply where there is no significant evidence that the owner intended that the

physical supplier be engaged as a subcontractor. Mere awareness by the vessel's owner, charterer, or authorized agent that a particular physical supplier would be used is not sufficient to permit a conclusion that they had such intent or that they controlled or directed the subcontractor's selection.

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BRUCE G. PAULSEN, New York, New York (Brian P. Maloney, Seward & Kissel, New York, New York, on the brief), for Defendant-Counter-Claimant-Cross-Claimant-Cross-Defendant-Appellee. **[**3]**

Judges: Before: KEARSE, CABRANES, and LOHIER, Circuit Judges.

Opinion by: KEARSE

Opinion

[*648] KEARSE, *Circuit Judge*:

Interpleader defendant NuStar Energy Services, Inc. ("NuStar"), a physical supplier of marine fuel ("bunkers") to two vessels time-chartered by interpleader plaintiff Clearlake Shipping PTE Ltd. ("Clearlake"), appeals from orders and an April 18, 2017 partial final judgment of the United States District Court for the Southern District of New York, Valerie E. Caproni, *Judge*, denying NuStar's motion for summary judgment and dismissing its claims to maritime liens against the vessels. The district court ruled that, under the *Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 et seq.*, NuStar was not entitled to maritime liens because it provided the fuel "on the order of" an entity other than "the owner or a person authorized by the owner" of the vessels, *id. § 31342(a)*. *See Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA, 239 F.Supp.3d 674 (S.D.N.Y. 2017)* ("*Clearlake*"). On appeal, NuStar contends principally that it was entitled to the claimed liens in light of CIMLA's plain text and purpose and as a matter of equity, regardless of NuStar's lack of contractual privity with the vessels' owner or charterer or their agent. We see no error in the district court's interpretation of CIMLA or its ruling **[**4]** that maritime liens may not properly be granted based on principles of equity. And given that—unlike the physical supplier in two companion appeals, U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, No. 17-0922, and Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, No. 17-0931, which are also decided today *sub nom. U.S. Oil Trading LLC v. M/V VIENNA EXPRESS, 911 F.3d 652, 2018 U.S. App. LEXIS 35632 (2d Cir. 2018) ("USOT")*—NuStar has not pointed to evidence that the owner or charterer or their agent directed that NuStar be the physical supplier for the vessels in question, we affirm, as NuStar's claims are not meaningfully distinguishable from those rejected in *ING Bank N.V. v. M/V TEMARA, 892 F.3d 511 (2d Cir. 2018)* ("*Temara*").

I. BACKGROUND

This case is one of the many resulting from the financial collapse of O.W. Bunker & Trading A/S ("O.W. Denmark") and its subsidiaries and affiliates (collectively the "O.W. Bunker Group"), an international operation that both supplied bunkers to ships and arranged the supply of bunkers by others. *See generally Temara, 892 F.3d at 515*. In the wake of bankruptcy filings by O.W. Bunker Group members, interpleader actions were initiated by numerous **[*649]** owners or charterers of vessels, including the present action by Clearlake, seeking judicial resolution of the **[**5]** competing claims to payment asserted by physical suppliers and by O.W. Bunker Group members that had engaged the physical suppliers. *See*, *e.g.*, *Clearlake, 239 F.Supp.3d at 678* ("24 interpleader cases [involving O.W. Bunker Group] . . . were pending before [Judge Caproni] as of June 30, 2015"). In the present case, the following facts, drawn from statements submitted by various parties pursuant to *Rule 56.1 of the Local Rules* for the Southern District of New York ("*Rule 56.1* Statements"), are not in dispute.

In October 2014, Clearlake, charterer of the M/V HELLAS GLORY and the M/V VENUS GLORY (collectively the "Vessels"), acting through its agent AS Tarcona ("Tarcona"), placed orders for fuel bunkers for the Vessels with O.W. Bunker (Switzerland) SA ("O.W. Switzerland"). O.W. Switzerland, in turn, issued purchase orders to its affiliate O.W. Bunker USA, Inc. ("O.W. USA"). O.W. USA then issued purchase orders to NuStar. Local agents for the Vessels coordinated the deliveries by NuStar. In late October, NuStar delivered the ordered bunkers to the Vessels.

NuStar did not directly contract with Clearlake or with O.W. Switzerland. In early November 2014, NuStar invoiced O.W. USA for the bunkers; O.W. USA invoiced O.W. Switzerland; O.W. Switzerland invoiced **[**6]** Clearlake. On November 7, O.W. Denmark filed for bankruptcy; bankruptcy filings by other members of the O.W. Bunker Group followed. Neither NuStar nor any O.W. Bunker Group entity has been paid for NuStar's bunker deliveries to Clearlake's Vessels.

Clearlake brought the present interpleader action against NuStar, O.W. Switzerland, O.W. USA, and others. In the district court, this case and three others—one other involving NuStar and two involving U.S. Oil Trading LLC ("USOT")—were selected to serve as test cases for the efficient resolution of the various *in rem* claims. Following coordinated discovery, and summary judgment motions by NuStar, USOT, and O.W. Bunker entities that had dealt with the vessels' owners or charterers, the district court addressed these four cases in its opinion in *Clearlake*.

The court stated that ***HN1***[↑] maritime liens arise exclusively under CIMLA, that such liens are construed narrowly under the doctrine of *stricti juris*, and that CIMLA "typically require[s]" a finding of "a direct contractual or agency nexus between the supplier and the vessel or its agents." *Clearlake, 239 F.Supp.3d at 684*. The court determined that NuStar had performed as a subcontractor that "lack[ed] a direct connection to the **[**7]** [Vessels]," noting the general rule that a subcontractor cannot assert a maritime lien. *Id. at 685*.

Adverting to ***HN2***[↑] an exception to that general rule, the court noted that "'[a]n owner can still become responsible for the services of a subcontractor, if the owner has ordered the general contractor to retain that subcontractor,'" *id. at 687* (quoting *Port of Portland v. M/V PARALLA, 892 F.2d 825, 828 (9th Cir. 1989)* (*"Port of Portland"*)). However, insofar as is pertinent to the present appeal, the court stated that the record showed at best that Clearlake was merely "aware" that NuStar had been named by O.W. Switzerland as the physical supplier and that Clearlake accepted NuStar only "tacitly." *Clearlake, 239 F.Supp.3d at 688 n.11*. Seeing no evidence in the record that Clearlake had required O.W. Switzerland to use NuStar as the physical supplier, the court concluded that the subcontractor exception was not applicable to NuStar.

Accordingly, the district court denied NuStar's motion for summary judgment **[*650]** and effectively granted summary judgment against NuStar on its maritime-lien claims against Clearlake, entering a partial final judgment dismissing those claims.

II. DISCUSSION

On appeal, NuStar contends principally that it was entitled to maritime liens against the Clearlake Vessels in light of CIMLA's plain text **[**8]** and purpose and as a matter of equity, regardless of a lack of contractual privity between NuStar and Clearlake or its agent. We reject these contentions substantially for the reasons stated by the district court in *Clearlake*.

We see no error in the district court's interpretation of CIMLA or its ruling that maritime liens may not properly be granted based on principles of equity. NuStar's contentions as to the proper interpretation of CIMLA are foreclosed by our recent decision in *Temara*, which involved events not substantially dissimilar to those here. *See generally 892 F.3d at 519* (***HN3***[↑] CIMLA's "statutory requirements are construed strictly and may not be expanded by construction, analogy[,] or inference" (internal quotation marks omitted)); *id. at 522-23* (rejecting the concept of entitlement to maritime lien through application of principles of equity).

Nor do we see any error in the district court's conclusion that the exception to the general rule against a subcontractor's entitlement to a maritime lien did not apply to NuStar. As discussed in *USOT*,

> ***HN4***[↑] a subcontractor is not entitled to assert a maritime lien "*unless* it can be shown that *an entity authorized to bind the ship controlled the selection of the subcontractor **[**9]** and/or its performance*."
>
> *F.3d at xxx, 2018 U.S. App. LEXIS 35632 at *22*

(quoting *Cianbro Corp. v. George H. Dean, Inc., 596 F.3d 10, 17 (1st Cir. 2010)* ("*Cianbro*"), and *Valero Marketing & Supply Co. v. M/V ALMI SUN, 893 F.3d 290, 293 (5th Cir. 2018)* ("*Valero*") (emphases ours)).

"The sole exception to the rule against the

> subcontractor lien will occur where the subcontractor has been engaged by a general contractor in circumstances *where the general contractor was acting as an agent at the direction of the owner to engage specific subcontractors*" . . . .

USOT, F.3d at xxx, 2018 U.S. App. LEXIS 35632 at 22 (quoting *Farwest Steel Corp. v. Barge Sea-Span 241, 828 F.2d 522, 526 (9th Cir. 1987)* ("*Farwest*") (emphasis in *USOT*), *cert. denied*, *485 U.S. 1034, 108 S. Ct. 1594, 99 L. Ed. 2d 909 (1988))*. The exception is applicable "if the owner has ordered the general contractor to retain that subcontractor." *Port of Portland, 892 F.2d at 828*; *see*, *e.g.*, *Bunker Holdings Ltd. v. Yang Ming Liberia Corp., 906 F.3d 843, 846 (9th Cir. 2018)* (the "exception to th[e] general rule . . . applies when the vessel owner directs the general contractor to use a particular subcontractor").

As indicated in *Temara* and our other recent decisions in appeals involving fuel suppliers and O.W. Bunker Group entities, ***HN5***[↑] a subcontractor is not allowed to assert a maritime lien "without any indication that *a statutorily-authorized entity provided direction*" that that subcontractor be used. *Temara, 892 F.3d at 522 n.7* (emphasis added); *see*, *e.g.*, *O'Rourke Marine Services L.P. v. M/V COSCO HAIFA, 730 F. App'x 89, 91 (2d Cir. 2018)* (affirming denial of maritime-lien claim by a physical supplier that did not "adduce evidence that *a statutorily authorized person controlled* [*its*] *selection* ***[**10]*** . . . *as the physical supplier*" (emphases added)); *Aegean Bunkering (USA) LLC v. M/T AMAZON, 730 F. App'x 87, 89 (2d Cir. 2018)* (same); *Chemoil Adani Pvt. Ltd. v. M/V Mar. King, No. 16-3944, 742 Fed. Appx. 529, 2018 U.S. App. LEXIS 18656, 2018 WL 3359609, at *2 (2d Cir. July 10, 2018)* (same where there was "*no*[] . . . **[*651]** *evidence that a statutorily authorized person controlled the selection* of Chemoil *as the physical supplier*" (emphases added)).

Thus, ***HN6***[↑] the subcontractor exception does not apply where there is no significant evidence "that the owner intended that [the physical supplier] be engaged as a subcontractor." *Farwest, 828 F.2d at 526*. Mere awareness by the vessel's owner, charterer, or authorized agent that a particular physical supplier would be used is not sufficient to permit a conclusion that they had such intent or that they controlled or directed the subcontractor's selection. *See*, *e.g.*, *Valero, 893 F.3d at 295*; *Cianbro, 596 F.3d at 17-18*; *Port of Portland, 892 F.2d at 828* (mere knowledge that a particular subcontractor will be used "has never been held to be sufficient to establish a lien").

Insofar as NuStar was concerned, the district court correctly applied these principles in *Clearlake* to conclude that NuStar did not fall within the subcontractor exception. The court viewed the record as showing

> - that NuStar "*d*[*id*] *not argue* that the [Clearlake/Tarcona] contracts *required* O.W. to use [NuStar] as supplier[]," *239 F.Supp.3d at 688 n.11* (emphases added);
>
> - that there was "*no evidence* that [Clearlake or Tarcona] *required* O.W. **[**11]** to use [NuStar] to satisfy its obligations," *id. at 688* (emphases added);
>
> - that, although "aware of [NuStar's] identit[y]," Clearlake/Tarcona only "tacitly 'selected' [NuStar]," *id. at 688 n.11*; and
>
> - that "the undisputed evidence" was "that [Clearlake/Tarcona] did not require O.W. to use [NuStar]," *id. at 690*.

We see no error in these findings. Although we reach a different conclusion on the subcontractor-exception issue today in the appeals brought by USOT, we do so based on differences between the records in the NuStar and USOT cases.

In the USOT cases, Hapag-Lloyd Aktiengesellschaft ("Hapag"), the owner or charterer of the USOT-supplied vessels, issued to O.W. Bunker Germany GmbH ("O.W. Germany") purchase orders that named USOT as the physical supplier. *See USOT, ___ F.3d at xxx, 2018 U.S. App. LEXIS 35632 at *30*. And in response to USOT's motion for summary judgment relying on the purchase orders, Hapag described these orders as meaning that O.W. Germany was "permitted" to use some other supplier "***if*** USOT was unable to act as the physical supplier," *id. at xxx, 2018 U.S. App. LEXIS 35632 at *30* (internal quotation marks omitted) (emphasis in *USOT*).

We see no similar evidence or admission by Clearlake in the present case. Whereas the record in the USOT cases contained copies of the purchase **[**12]** orders issued by the owner/charterer Hapag, *see*, *e.g.*, *Clearlake, 239 F.Supp.3d at 682* ("The agreements between Hapag[] and O.W. Germany identify O.W. Germany as the seller, Hapag[] as buyer, and USOT as supplier."), NuStar here has pointed not to purchase orders issued by Clearlake or Tarcona but rather to the sales order confirmations issued by O.W. Switzerland.

The district court stated that "[t]he Clearlake-O.W. Switzerland transactions are memorialized in . . . sales order confirmations," and it cited only to O.W. Switzerland documents. *Id. at 680*. Thus, we are aware of no evidence to suggest, much less confirm, that Clearlake or Tarcona identified NuStar as the physical supplier in any purchase order. Nor has NuStar pointed to any other evidence in the record to support a conclusion that Clearlake or Tarcona directed O.W. Switzerland to use NuStar as the physical supplier.

The closest that NuStar came to claiming that Tarcona directed the use of NuStar was asserting (a) that, several days in **[*652]** advance of delivery to the Clearlake Vessels, "Tarcona *knew* . . . that NuStar was the designated physical supplier of the bunkers it had ordered" (*see* NuStar *Rule 56.1* Statement ¶¶ 11, 12 (emphasis added)), and (b) that Tarcona "*accepted* **[**13]** NuStar as the physical supplier of the bunkers it had ordered" (*id. ¶ 13* (emphasis added)). As discussed above, however, evidence merely of such awareness and acceptance is insufficient to show that the vessel owner/charterer or its agent controlled the selection of the physical supplier or that they ordered or directed that NuStar be used.

CONCLUSION

We have considered all of NuStar's arguments on this appeal and have found them to be without merit. The partial final judgment is affirmed.

Ing Bank N.V. v. M/V Temara

United States District Court for the Southern District of New York

December 20, 2019, Decided; December 20, 2019, Filed

16 Civ. 95 (LLS); 16 Civ. 2051 (LLS); 16 Civ. 6453 (LLS)

Reporter
2019 U.S. Dist. LEXIS 220114 *

ING BANK N.V., Plaintiff, - against - M/V TEMARA, Defendant.ING BANK N.V., Plaintiff, - against - M/V VOGE FIESTA, Defendant.ING BANK N.V., Plaintiff, - against - M/V JAWOR, Defendant.

Core Terms

vessel, maritime lien, good faith, subcontractors, supplier, bad faith, ship

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For Jawor M/V, IMO No. 9452608, her engines, tackle, equipment, furniture, appurtenances, etc., in rem, Defendant (1:16-cv-06453-LLS): Gina Maria Venezia, Michael James Dehart, Michael E. Unger, Freehill, Hogan & Mahar, LLP, New York, NY.

For ING Bank N.V., Plaintiff (1:16-cv-00095-LLS): James D Bercaw, LEAD ATTORNEY, King Krebs and Jurgens PLLC, New Orleans, LA; James Denman Bercaw, LEAD ATTORNEY, King & Jurgens, L.L.C., New Orleans, LA; Laura Elizabeth Avery, LEAD ATTORNEY, PRO HAC VICE, King Krebs and Jurgens PLLC, New Orleans, LA; Brian Paul Maloney, Bruce G. Paulsen, Laura Elizabeth Miller, Seward & Kissel LLP, New York, NY; Laura Elizabeth Avery, LEAD ATTORNEY, King Krebs and Jurgens PLLC, New Orleans, LA; Robert J Stefani, King Krebs & Jurgens, New Orleans, LA.

For M/V Temara, IMO No. 9333929, her engines, tackle, equipment, furniture, appurtenances, etc., in rem, Defendant (1:16-cv-00095-LLS): Geoffrey S. Tobias, LEAD ATTORNEY, Ober Kaler, Baltimore, MD; **[*3]** Sean Patrick Barry, LEAD ATTORNEY, Marie Elizabeth Larsen, Holland & Knight LLP (NY), New York, NY; Jack Daley, Ober Kaler Grimes and Shriver PC, Baltimore, MD; James H. Power, PRO HAC VICE, Holland & Knight LLP, New York, NY.

For M/V Temara, IMO No. 9333929, her engines, tackle, equipment, furniture, appurtenances, etc., Intervenor Defendant (1:16-cv-00095-LLS): James H. Power, PRO HAC VICE, Holland & Knight LLP, New York, NY; Marie Elizabeth Larsen, Holland & Knight LLP (NY), New York, NY.

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For CEPSA International BV, CEPSA International BV, Intervenor Plaintiffs (1:16-cv-00095-LLS): John T Ward, PRO HAC VICE, Simms Showers LLP, Hunt Valley, MD; J. Stephen Simms, Simms Showers LLP, Hunt Valley, MD.

For Cimship Transportes Maritimos, S.A., Claimant (1:16-cv-00095-LLS): Geoffrey S. Tobias, LEAD ATTORNEY, Ober Kaler, Baltimore, MD; Sean Patrick Barry, LEAD ATTORNEY, Marie Elizabeth Larsen, Holland & Knight LLP (NY), New York, NY; Jack Daley, Ober **[*4]** Kaler Grimes and Shriver PC, Baltimore, MD; James H. Power, PRO HAC VICE, Holland & Knight LLP, New York, NY.

Judges: LOUIS L. STANTON, UNITED STATES DISTRICT JUDGE.

Opinion by: LOUIS L. STANTON

Opinion

OPINION & ORDER

The issue to be decided on these applications for partial summary judgment is whether ING Bank's maritime liens on the defendant vessels, created by *Section 31342* of the Commercial Instruments and Maritime Liens Act, *46 U.S.C. § 31301 et seq.* ("CIMLA"), and whose assignment was previously validated by this Court, are vulnerable to the defense that the underlying Case 1:16-cv-06453-LLS Document 92 Filed 12/20/19 Page 2 of 7 transactions were made in bad faith by ING's assignors. ING Bank moves for partial summary judgment striking any such defense. See 16 Civ. 95 (Dkt. No. 228); 16 Civ. 2051 (Dkt. No. 122); 16 Civ. 6453 (Dkt. No. 85).

The motions are granted.

BACKGROUND[1]

ING, as assignee of the now-defunct O.W. Bunker group, asserts maritime liens against each particular defendant vessel, for non-payment for fuel sold to each vessel's charterer by an O.W. Bunker group entity and delivered to each vessel by one of its subcontractors. The vessel owners assert that there are no liens on the vessels because the O.W. entities knew, and accepted, **[*5]** that their fuel-providing subcontractors would probably never be paid, and therefore lacked the good faith necessary for a maritime lien.

DISCUSSION

The Maritime Lien Act

Section 31342 of CIMLA, which created the maritime liens, states, in full text:

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner--
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.
>
> (b) This section does not apply to a public vessel.

46 U.S.C. § 31342.

The vessel owners argue that, although none is

[1] This background is abbreviated. For more detail, see the Second Circuit's opinion, ***ING Bank N.V. v. M/V TEMARA, IMO No. 9333929, 892 F.3d 511 (2d Cir. 2018)***, and this Court's subsequent opinion, *ING Bank N.V. v. M/V Temara, 342 F. Supp. 3d 558 (S.D.N.Y. 2018)*.

mentioned in the statute, an equitable defense of bad faith bars the creation of the statutory maritime lien. In support, the vessel owners point to the statutory history, the 1971 Report of the House of Representatives' Committee on Merchant Marine and Fisheries, which twice uses the words "in good faith." See H. Rep. No. 92-340, at 1, 3 (1971).

Neither mention of good faith implies, or conceives, meaning that the seller must be fair to his buyers. On the contrary, "good faith" describes the seller's trust that he will be paid for what **[*6]** he supplies, before the ship sails away. The Report states that "The purpose of the bill, H.R. 6239, is to protect terminal operators, ship chandlers, ship repairers, stevedores and other suppliers who in good faith furnish necessaries to a vessel." Id. at 1. And in the Report's General Statement, it describes the issue it faced: "The question presented was where a loss occurs in this situation, whether it should be suffered by the owner of the vessel, or the American materialman who furnished such necessaries in good faith." Id. at 3. It concluded, after careful consideration of the entire record, "that, as a matter of equity, the [ship] owner should bear the loss in such a situation." Id. at 3.

Those are the only two mentions of good faith in the Report, and they both refer to the seller's good faith in providing essentials to a vessel, which is tempted to sail away without paying. Nothing in the Report burdens the lien it grants the seller with any collateral duty to deal properly with his counterparties.

The vessel owners retreat to a broader argument: that apart from the statute itself, there is a general principle of equity which requires good faith in all dealings, by all participants and denies a profit **[*7]** to a wrongdoer. Having treated its own suppliers shabbily, they argue, O.W. (and thus its assignee INC) is not entitled to the benefits of the maritime lien.

There are two obstacles to that argument: the first is that if such a general standard were to be engrafted on a maritime lien, the whole function of the lien - to assure payment to the supplier - would be frustrated in every case by an audit of his related business dealings. The second is that such an approach would be inconsistent with the uniform characterizations of the elements of a lien being the ones set forth in the statute, with no additional embellishments, regardless of how morally appealing.

As stated in *Barcliff, LLC v. M/V DEEP BLUE, IMO No. 9215359, 876 F.3d 1063 (11th Cir. 2017)*, the lien holder's obligation to pay his subcontractors is immaterial to its lien:

> Nevertheless, Radcliff contends that the general contractor bears an additional obligation not mentioned in Galehead before it can receive a lien: it must pay the subcontractor to whom it delegated performance. Radcliff acknowledges that no authority directly supports this proposition, but submits that it lies latent in the case law.
>
> Radcliff's argument is meritless. First and foremost, it finds no support in the text of the statute. *Section 31342(a)* merely **[*8]** requires that the would-be lienor "provid[e] necessaries" to the vessel. It does not forbid the supplier from using a subcontractor to do so, or require that the parties be current on their accounts payable before a lien arises. We have consistently held that a maritime lien attaches the moment the necessaries are supplied; subsequent administrative matters such as tendering an invoice are irrelevant. Likewise, payment by the general contractor to the subcontracted supplier is immaterial to the general contractor's lien—it arises at the moment the subcontractor renders performance on the general contractor's behalf.

Barcliff, 876 F.3d at 1074 (citations omitted).

Thus it is not surprising that in *The Kalfarli, 277 F. 391 (2d Cir. 1921)*, the Second Circuit held that even where a materialman's agreement to supply a vessel with necessaries was based on the materialman's fraudulent deception, the materialman had a statutory maritime lien on the vessel for the necessaries he delivered.

> That the libelant actually performed work for the ship and furnished her with certain materials cannot be denied. For such work and for such supplies the maritime law gives a lien. We do not think that a court of admiralty can deprive him of that right on the ground that **[*9]** he claimed fraudulently to have done more work than he did, or charged fraudulently for the labor or supplies he in fact furnished.

Id. at 397. Here, it is similarly undisputed that the fuel was delivered to the vessels. Thus, the materialmen's assignee has liens on the vessels, no matter the morality of the suppliers' conduct with their subcontractors.

As "maritime liens are strictly creatures of statute," *ING Bank N.V. v. M/V TEMARA, IMO No. 9333929, 892*

F.3d 511, 523 (2d Cir. 2018), and there is no basis in CIMLA, the Report, or the general maritime lien law supporting the vessel owners' imagined application of a theory of bad faith, their bad faith defense is unavailing and is stricken.

CONCLUSION

Plaintiff ING's motions for partial summary judgment striking the defendant vessels' bad faith affirmative defense (16 Civ. 95 (Dkt. No. 228); 16 Civ. 2051 (Dkt. No. 122); 16 Civ. 6453 (Dkt. No. 85)) are granted.

The further request in the notice of motion that the vessels TEMARA and VOGE FIESTA be directed to show cause why ING should not have judgment granting its lien claims, with its reference to the transcript of the October 4, 2019 conference and "all of the prior pleadings and proceedings in this matter, and to any additional arguments to be properly presented in support **[*10]** of the relief requested . . ," is too broad and vague to be given effect as an order and is therefore denied.

A conference will be held on Wednesday, January 15, 2020 at 3:00 PM to discuss and schedule further proceedings.

So ordered.

Dated: December 20, 2019

New York, New York

/s/ Louis L. Stanton

LOUIS L. STANTON

U.S.D.J.

Martin Energy Servs., LLC v. M/V Bourbon Petrel

United States District Court for the Eastern District of Louisiana

June 6, 2019, Decided; June 6, 2019, Filed

CIVIL ACTION NO. 14-2986; 15-79; 15-81 SECTION "L" (4)

Reporter
2019 U.S. Dist. LEXIS 95702 *; 2019 AMC 985; 2019 WL 2403145

MARTIN ENERGY SERVICES, LLC VERSUS M/V BOURBON PETREL, her engines, tackle, bunkers, Etc., in rem, and BOURBON PETREL SNC AND BOURBON OFFSHORE GREENMAR, S.A., in personam

Prior History: *Martin Energy Servs., LLC v. M/V Bourbon Petrel, 2015 U.S. Dist. LEXIS 63929 (E.D. La., May 13, 2015)*

Core Terms

Vessels, fuel, Bunker, Seismic, supplier, maritime lien, supplied, tanks, invoices, diesel, cargo, offshore, Confirmations, deliveries, Fourchon, meters, cubic, conclusions of law, purchase order, transferred, ship, rem, chartered, Oil

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For Martin Energy Services, LLC, Plaintiff (2:15-cv-00079-EEF-KWR): Walter P. Maestri, LEAD ATTORNEY, Deutsch Kerrigan LLP, New Orleans, LA; F. William Mahley, PRO HAC VICE, Strasburger & Price, LLP (Houston), Houston, TX.

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Judges: Eldon E. Fallon, UNITED STATES DISTRICT JUDGE.

Opinion by: Eldon E. Fallon

Opinion

FINDINGS OF FACT [*5] AND CONCLUSIONS OF LAW

I. FACTUAL AND PROCEDURAL HISTORY

These consolidated cases arise out of three instances in which Plaintiff Martin Energy Services, LLC ("Martin Energy") supplied fuel and water to a fleet of vessels chartered by C.G.G. Services, U.S., Inc. ("CGG"). In the fall of 2014, CGG was conducting seismic operations off the coast of Louisiana with the GEO CELTIC, OCEANIC SIRIUS, and OCEANIC VEGA (collectively, the "Seismic Vessels"). CGG was responsible for ensuring that the Seismic Vessels were supplied with fuel and water.

Before the three fuel deliveries at issue in this case, CGG purchased fuel directly from suppliers like Martin

Energy. In October 2014, however, CGG reached its credit limit with Martin Energy and began purchasing fuel for the Seismic Vessels through O.W. Bunker USA Inc. ("O.W. Bunker"). Martin Energy was selected as supplier of the fuel because it offered the lowest sales price.

The fuel was delivered to the Seismic Vessels by three supply vessels — the M/V BOURBON PETREL, the M/V OMS RESOLUTION, and the M/V MISS LILLY (collectively, the "Supply Vessels"). Soon after, O.W. Bunker declared bankruptcy and failed to pay Martin Energy for the three fuel deliveries. **[*6]** Martin Energy sued each of the Supply Vessels *in rem*, claiming a maritime lien for the amounts owed for the bunkering. The vessels deny *in rem* liability.

This case mirrors dozens of *in rem* actions resulting from the global collapse of O.W. Bunker and related bankruptcy proceedings. It presents two issues in particular: (1) whether CGG controlled the selection of Martin Energy as physical supplier, and (2) whether the bunkers qualify as necessaries for the Supply Vessels (thereby triggering *in rem* liability) when they were ultimately consumed by the Seismic Vessels.

The Court has carefully considered the testimony of the witnesses, the exhibits entered into evidence, the post-trial memoranda, and the entire record, and hereby enters the following findings of fact and conclusions of law. To the extent that a finding of fact constitutes a conclusion of law, the Court adopts it as such. And to the extent that a conclusion of law constitutes a finding of fact, the Court adopts it as such.

II. FINDINGS OF FACT

(1)

Plaintiff Martin Energy is a Houston, Texas based provider of fuels, lubricants, and full-service logistical support along the United States Gulf of Mexico

(2)

CGG Services U.S., Inc. **[*7]** ("CGG") is the United States subsidiary of CGG SA, a global geoscience company that conducts seismic operations for oil and gas companies.

In the fall of 2014, CGG U.S. was conducting seismic operations off the coast of Louisiana with the survey vessels M/V GEO CELTIC, M/V OCEANIC SIRIUS, and M/V OCEANIC VEGA (collectively, the "Seismic Vessels").

(4)

CGG was responsible for ensuring that the Seismic Vessels were supplied with fuel and water. The fuel and water were delivered from Port Fourchon, Louisiana to the Seismic Vessels off the coast of Louisiana by three supply vessels: the M/V BOURBON PETREL, M/V OMS RESOLUTION, and M/V MISS LILLY (collectively, the "Supply Vessels").

(5)

The M/V BOURBON PETREL is a Seismic Support Vessel. It was owned by SNC Bourbon CE Petrel. The M/V OMS RESOLUTION is also a Seismic Support Vessel that was owned by Rederij Groen BV. The M/V MISS LILLY is an Offshore Supply Vessel that was owned by Sea Support Ventures, LLC. All of the Supply Vessels were chartered directly or indirectly by CGG.

(6)

Prior to October 2014, CGG purchased fuel for the Seismic Vessels directly from the two suppliers at Port Fourchon, Martin Energy and Stone Oil. In October 2014, however, **[*8]** CGG had reached its credit limit with Martin Energy. Martin Energy informed CGG that CGG must either pay in advance or "free up space" on its credit limit before Martin Energy would sell any more fuel directly to CGG. CGG then began purchasing fuel for the Seismic Vessels from O.W. Bunker USA, Inc. ("O.W. Bunker") pursuant to a September 16, 2013 Bunker Supply Contract.

When purchasing fuel from O.W. Bunker, CGG would notify O.W. Bunker of its anticipated fuel needs and the estimated date that the M/V BOURBON PETREL, M/V OMS RESOLUTION, and M/V MISS LILLY would arrive in Port Fourchon to receive the fuel. O.W. Bunker would contact Martin Energy and Stone Oil to determine their fuel availability and the sales price, which O.W. Bunker would then communicate to CGG. CGG instructed O.W. Bunker to purchase fuel from the supplier with the lower cost, Martin Energy.

(8)

For each of the transactions at issue here,

a. CGG issued purchase orders to O.W. Bunker for the fuel to be loaded aboard the Supply Vessels
b. O.W. Bunker issued sales order confirmations to CGG
c. O.W. Bunker issued purchase order

confirmations to Martin Energy

d. Martin Energy issued invoices to the Supply Vessels care of O.W. **[*9]** Bunker for the sale of the fuel

e. O.W. Bunker issued invoices addressed to the applicable Supply Vessel "and/or Owners/Charterers, CGG Services, US, Inc." in Houston for the sale of the fuel, which included a commission to O.W. Bunker.

(9)

Pursuant to these purchase orders and invoices, Martin Energy delivered:

a. 450 cubic meters (118,000 gallons) of low sulfur diesel and 15,200 gallons of water to the M/V MISS LILLY on October 27, 2014, in the amount of $314,013.00.

b. 800 cubic meters (210,860 gallons) of low sulfur diesel and 10,900 gallons of water to the OMS RESOLUTION on October 29, 2014, in the amount of $557,069.29.

c. 500 cubic meters (132,000 gallons) of low sulfur diesel to the M/V BOURBON PETREL on November 5, 2014, in the amount of $355,212.00

(10)

The three fuel deliveries were put in the cargo tanks of the M/V BOURBON PETREL, M/V OMS RESOLUTION, and M/V MISS LILLY.

(11)

The M/V BOURBON PETREL and OMS RESOLUTION have fuel cargo tanks that are physically separate from and not connected to the vessels'"day tanks" that supply fuel to the vessels' engines.

(12)

Because their cargo tanks and day tanks are physically separated, the M/V BOURBON PETREL and OMS RESOLUTION did not consume **[*10]** any of the fuel supplied by Martin Energy. That fuel was cargo to be delivered to the Seismic Vessels for the Seismic Vessels' use. The M/V BOURBON PETREL transferred 750 cubic meters of fuel (including the 500 cubic meters supplied by Martin Energy) to the Seismic Vessel GEO CELTIC. The OMS RESOLUTION transferred 800 cubic meters of fuel to the Seismic Vessel OCEANIC VEGA.

(13)

The M/V MISS LILLY has piping that connects its cargo tanks to its day tanks, and it is capable of and did in fact transfer quantities of fuel from its cargo tanks to its day tanks during the time period at issue.

(14)

The M/V MISS LILLY already had approximately 13,895 gallons of diesel fuel onboard ("Onboard Diesel") before it was loaded with 450 cubic meters (118,800 gallons) of Martin Energy low sulfur diesel on October 27, 2014. On November 6, 2014, the M/V MISS LILLY transferred 34,654 gallons of diesel to the OCEANIC VEGA. On November 10, 2014, the M/V MISS LILLY transferred 45,598 gallons of diesel to the OCEANIC SIRIUS. On November 15, 2014, the M/V MISS LILLY transferred 112,000 gallons of diesel to the OCEANIC VEGA.

(15)

Between October 27, 2014, the date when the Martin Energy was put in the M/V MISS **[*11]** LILLY's cargo tanks, and November 15, 2014, the date the M/V MISS LILLY made the final fuel transfer, the M/V MISS LILLY transferred 12,788 gallons of diesel fuel from its cargo tanks to its day tanks. Thus, the MISS LILLY had sufficient fuel onboard to reach the Seismic Vessels prior to being loaded with the Martin Energy fuel.

III. CONCLUSIONS OF LAW

(1)

This Court has subject matter jurisdiction pursuant to 33 U.S.C. § 1333 and *Rule 9(h) of the Federal Rules of Civil Procedure*.

(2)

The *Commercial Instruments and Maritime Liens Act ("CIMLA")*, provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner ... has a maritime lien on the vessel [and] may bring a civil action in rem to enforce the lien." *46 U.S.C. § 31342(a)*. In this case, for a maritime lien to exist, the bunkers must qualify as necessaries and they must have been provided on the order of the owner.

(3)

The term "necessary" "includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function." *Equilease Corp. v. M/V Sampson, 793 F.2d 598, 603 (5th Cir. 1986)* (en banc). Necessaries are the "things

that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged," and, importantly, "it is the present, **[*12]** apparent want of the vessel, not the character of the thing supplied, which makes it a necessary." *Id.*

(4)

To determine which goods and services are necessaries, "regard must be had to the character of the voyage or the employment in which the vessel is being used." *J. Ray McDermott & Co. v. Off-Shore Menhaden Co., 262 F.2d 523, 525 (5th Cir. 1959)*. *See also Foss Launch & Tug Co. v. Char. Ching Shipping U.S.A., Ltd., 808 F.2d 697, 699 (9th Cir. 1987)* (The term "has been expanded to encompass any item which is reasonably needed for the venture in which the ship is engaged"); *Ajubita v. S/S Peik, 428 F.2d 1345, 1346 (5th Cir. 1970)* (Necessaries "include expenditures that are not absolutely indispensable" and are "convenient or useful to the vessel").

(5)

Courts have broadly interpreted what constitutes "necessaries" under the Act in light of the vessel's particular function. *See, e.g.*, *Stern, Hays & Lang, Inc. v. M/V Nili, 407 F.2d 549 (5th Cir. 1969)* (advertising services for cruise ship); *Walker-Skageth Food Stores v. The Bavois, 43 F. Supp. 109, 111 (S.D.N.Y. 1942)* (liquor for pleasure yacht); *Allen v. The Contessa, 196 F. Supp. 649, 651* (cigarettes for shrimping vessel); *Portland Pilots v. NOVA STAR, M/V, 875 F.3d 38, 45 (1st Cir. 2017)* (linens supplied to a vessel serving as "the functional equivalent of a mobile hotel").

(6)

The M/V BOURBON PETREL and the M/V OMS RESOLUTION are seismic support vessels. Their missions were to deliver fuel, water, and other supplies to the Seismic Vessels and to tow the Seismic Vessels if they lost power or steerage. R. Doc. 152 at 100-111. In any two-week period, the M/V BOURBON PETREL and the M/V OMS RESOLUTION spent 12 days offshore **[*13]** with the Seismic Vessels and 2 days traveling to and from Port Fourchon delivering fuel, water, and other supplies to the Seismic Vessels.

(7)

The Martin Energy fuel was necessary for the M/V BOURBON PETREL and the M/V OMS RESOLUTION to function as seismic support vessels. Part of that function required the M/V BOURBON PETREL and the M/V OMS RESOLUTION to serve as "floating gas stations" so that the Seismic Vessels could remain offshore. The Martin Energy fuel enabled the M/V BOURBON PETREL and the M/V OMS RESOLUTION to perform their intended function as seismic support vessels for the benefit of the Seismic Vessels.

(8)

The M/V MISS LILLY is an offshore supply vessel. She traveled to and from Port Fourchon once a week to transport fuel, equipment, personnel, and data tapes to and from Port Fourchon. Martin Energy's bunkers were necessary for the M/V MISS LILLY to function as an offshore supply vessel for the Seismic Fleet.

(9)

Next, for a lien to exist, Martin Energy must have provided the fuel on the order of the owner or a person authorized by the owner. It is undisputed that Martin Energy supplied the fuel at the request of O.W. Bunker. The Fifth Circuit has established that this situation **[*14]** falls within the "subcontractor" line of cases. *Valero Marketing & Supply Co. v. M/V Almi Sun, 893 F.3d 290 (5th Cir. 2018)*. Subcontractors "are generally not entitled to assert a lien on their own behalf, unless it can be shown that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance." *Stevedores, Inc. v. Professor Vladimir Popov MV, 199 F.3d 220, 229 (5th Cir. 1999)*. Thus, to be entitled to a maritime lien, CGG must have "controlled [Martin Energy's] selection ... and/or its performance," and "mere awareness" that Martin Energy would be the physical supplier is not enough. *Valero, 893 F.3d at 294*.

(10)

CGG controlled the selection of Martin Energy. For each of the deliveries, O.W. Bunker contacted Stone Oil and Martin Energy to determine their fuel ability and sales price. O.W. Bunker communicated two quotes — one from Stone Oil and one from Martin Energy — to CGG. R. Doc. 152 at 74, 132-33. CGG instructed O.W. Bunker to select the supplier with the lowest price, and CGG incorporated the price quoted by Martin Energy in the Purchase Order Confirmations it issued to O.W. Bunker.[1] That is more than "mere awareness." *See*

[1] Defendants often stress that "None of the Purchase Order Confirmations issued by CGG or Sale Order Confirmations from O.W. Bunker make any mention of Martin." R. Doc. 154 at 3. That is partly true. O.W. Bunker's Sale Order Confirmations do identify "Martin" as the physical supplier

Defense Exhibit 5, emails from Daria Vlasova to CGG personnel, stating: "OW Bunkers will revert with 2 offers from the 2 physical suppliers in fourchon ... *You have to indicate to OW which offer* ***[*15]*** *you'd like to proceed* (cheapest price provided that all conditions are the same, i.e. delivery date, quantity);" "As per contract OW will propose open book two quotes from 2 physical suppliers + service fee (8.5$/MT). *CGG would choose the best option / physical source* for us based on the 2 quotes provided." (emphasis added). *See also* R. Doc. 152 at 77 ("Q. O.W. Bunker went out and got those two quotes? A. Yes. Q. Reported them back to CGG, correct? A. Yes. Q. CGG picked the lowest price, correct? A. Yes, sir. Q. And then O.W. Bunker went back and bound the deal with Martin based on that election, correct? A. Yes, sir ...").

(11)

Lastly, Martin Energy must have relied on the credit of the vessels. Under the CIMLA, a supplier of necessaries "is not required to allege that credit was given to a vessel." *46 U.S.C. § 31342(a)(3)*. Rather, a presumption arises that the supplier acquires a maritime lien, and the party attacking this presumption must establish that the personal credit of the owner or another third party was solely relied upon. *Racal Survey U.S.A., Inc. v. M/V COUNT FLEET, 231 F.3d 183, 189 (5th Cir. 2000)*. "To meet this burden, evidence must be produced that would permit the inference that the supplier purposefully intended to forego the lien." *Id., see also Pacorini USA Inc. v. ROSINA TOPIC MV, 127 F. App'x 126, 130 (5th Cir. 2005)* ("To overcome this **[*16]** presumption, a defendant bears the burden of showing that the plaintiff took affirmative actions that manifested plaintiff's clear, purposeful, and deliberate intention to forego the maritime lien.").

(12)

"[T]he statutory presumption in favor of a maritime lien is a strong one," and courts are "usually reluctant to conclude that a supplier has waived its lien." *Maritrend, Inc. v. Serac & Co. (Shipping) Ltd., 348 F.3d 469, 471 (5th Cir. 2003)*. As long as the supplier relied on the vessel *to some extent*, waiver will not be found. *Id. at 473* ("[A]lthough the testimony as a whole shows that Maritrend relied on [the charterer] for payment, it also shows that Maritrend did not rely solely on [the charterer] because it was aware of and generally relied upon its maritime lien rights against the SEVILLA WAVE ... Maritrend always intended to rely on the credit of the vessel as a 'fallback'").

(13)

The fact that Martin Energy refused to extend credit directly to CGG and instead contracted with O.W. Bunker does not establish that Martin Energy deliberately intended to forego its lien. The Martin Energy invoices for the fuel at issue here incorporated Martin Energy's General Terms & Conditions, which provided that:

> In performing the Work, MES has relied upon the credit of Purchaser and, **[*17]** if Work has been supplied to a vessel, MES has also relied upon the credit of the vessel. MES shall have a maritime lien against said vessel until the invoice relating to said Work has been paid in full and MES expressly DOES NOT WAIVE any such maritime lien.

Additionally, at each delivery, an Authorized Officer of the Supply Vessel signed a Bunkering Certificate, which stated that:

> No disclaimer or stamp of any type or form will be accepted on this bunkering certificate, nor, should any such stamp be applied, will it alter, change, or waive MARTIN ENERGY SERVICES LLC's Maritime Lien against the vessel or waive the vessel's ultimate responsibility and liability for the debt incurred through this transaction.

(14)

That Martin Energy relied partly — or even primarily — on O.W. Bunker in supplying the fuel does not establish that it intended to forego its lien. The Bunkering Certificates and invoices suggest that Martin Energy was aware of its lien rights and ability to assert them as a "fallback position" in the event of non-payment by O.W. Bunker. *See C-Port/Stone, LLC v. Gulf Logistics, LLC in personam, M/V GREY CUP in rem, No. 17-256, 2018 U.S. Dist. LEXIS 167684, 2018 WL 4680213, at *2 (E.D. La. Sept. 28, 2018)* ("Further, the standard language in C-Port/Stone's delivery tickets **[*18]** expressly stated that C-Port/Stone was affirmatively relying on its presumed rights under maritime law to encumber the vessel in satisfaction of the invoices for the products delivered.").

(15)

"Under maritime law, the awarding of prejudgment interest is the rule rather than the exception, and, in

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(Defense Exhibits 12, 18, 26). And although CGG's Purchase Order Confirmations do not name Martin Energy, they do incorporate the price quoted by Martin Energy.

practice, is well-nigh automatic." *Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C., 779 F.3d 345, 351 (5th Cir. 2015)* (quoting *Reeled Tubing, Inc. v. M/V Chad G, 794 F.2d 1026, 1028 (5th Cir. 1986))*. "Courts often look to invoices when fixing prejudgment interest." *Id.* Martin Energy's invoices provide for an interest rate of 1.5% per month after 30 days from the date of the invoice. In the Fifth Circuit, "the date of injury, rather than the date of judicial demand, [is] the proper date from which prejudgment interest should run." *Sea Link Cargo Servs. Inc. v. Marine Ctr. Inc., 380 F. App'x 460, 464 (5th Cir. 2010)*.

IV. CONCLUSION

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Court finds that Plaintiff Martin Energy Services, LLC is entitled to: $314,013.00 for the fuel provided to the M/V MISS LILLY; $355,212.00 for the fuel provided to the M/V BOURBON PETREL; and $557,069.29 for the fuel provided to the M/V OMS RESOLUTION, plus prejudgment interest at the rate of 1.5% per month from the date of each purchase (excluding the time the matter was stayed upon joint request by the parties), and postjudgment **[*19]** interest at the federal rate until paid.

New Orleans, Louisiana this 6th day of June, 2019.

/s/ Eldon E. Fallon

UNITED STATES DISTRICT COURT JUDGE

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U.S. Oil Trading LLC v. M/V Vienna Express

United States Court of Appeals for the Second Circuit

April 19, 2018, Argued; December 19, 2018, Decided

Docket Nos. 17-0922-cv[*], 17-0931-cv[*]

[*] These appeals were consolidated for purposes of oral argument and are consolidated for purposes of the present opinion. They were also consolidated for oral argument with the appeals in Nippon Kaisha Line Ltd. v. NuStar Energy Services, Inc., No. 17-1378, and Clearlake Shipping PTE Ltd. v. NuStar Energy Services, Inc., No. 17-1458, which are resolved today in separate decisions.

[*] These appeals were consolidated for purposes of oral argument and are consolidated for purposes of the present opinion. They were also consolidated for oral argument with the appeals in Nippon Kaisha Line Ltd. v. NuStar Energy Services, Inc., No. 17-1378, and Clearlake Shipping PTE Ltd. v. NuStar Energy Services, Inc., No. 17-1458, which are resolved today in separate decisions.

Reporter
911 F.3d 652 *; 2018 U.S. App. LEXIS 35632 **; 2019 AMC 394

U.S. OIL TRADING LLC, Plaintiff-Appellant, - v. - M/V VIENNA EXPRESS, her tackle, boilers, apparel, furniture, engines, appurtenances, etc., in rem, M/V SOFIA EXPRESS, her tackle, boilers, apparel, furniture, engines, appurtenances, etc., in rem, Defendants-Appellees, HAPAG-LLOYD AKTIENGESELLSCHAFT, as claimant to the in rem defendant M/V VIENNA EXPRESS, Third-Party-Plaintiff-Counter-Claimant-Counter-Defendant-Appellee, - v. - U.S. OIL TRADING LLC, Counter-Defendant-Third-Party-Cross-Defendant-Appellant, ING BANK N.V., Third-Party-Defendant-Counter-Claimant-Cross-Claimant-Appellee, O.W. BUNKER GERMANY GMBH, Third-Party-Defendant-Counter-Claimant-Appellee, O.W. BUNKER & TRADING A/S, CREDIT AGRICOLE CORPORATE & INVESTMENT BANK, a division or arm of Credit Agricole S.A., Third-Party-Defendants.HAPAG-LLOYD AKTIENGESELLSCHAFT, Plaintiff-Counter-Defendant-Appellee, - v. - U.S. OIL TRADING LLC, Defendant-Cross-Defendant-Appellant, O.W. BUNKER GERMANY GMBH, Defendant-Counter-Claimant-Appellee, ING BANK N.V., Defendant-Cross-Claimant-Counter-Claimant-Appellee, O.W. BUNKER & TRADING A/S, CREDIT AGRICOLE S.A., O.W. BUNKER USA, INC., CREDIT AGRICOLE CORPORATE & INVESTMENT BANK, Defendants.**

Prior History: Appeals by U.S. Oil Trading LLC ("USOT") from orders and May 2, 2017 partial final judgments of the United States District Court for the Southern District of New York, Valerie E. Caproni, Judge, rejecting claims by USOT that it was entitled to assert maritime liens against vessels, owned or chartered by Hapag-Lloyd Aktiengesellschaft ("Hapag"), to which USOT, pursuant to arrangements with and among other entities, physically supplied marine fuel for which USOT was not paid following the bankruptcies of the entities involved in the supply contracts with USOT or Hapag. The district court denied USOT's motions for summary judgment on its maritime-lien claims and entered partial final judgments dismissing those claims, ruling that the claims were governed by the Commercial Instruments and *Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 et seq.*, and that physical suppliers who were subcontractors were not entitled to maritime liens because their fuel sales were not made "on the order of the owner or a person authorized by the owner" of the vessel, id. *§ 31342(a)*. See *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA, 239 F.Supp.3d 674 (S.D.N.Y. 2017)* **[**1]** . On appeal, USOT contends principally that the district court erred in finding it was not entitled to a maritime lien in the absence of a contractual or agency **[**2]** relationship with the vessels or with an authorized entity specified in CIMLA, and that USOT was entitled to the liens because Hapag's purchase orders specified that the physical supplier of the fuel was to be USOT. We conclude that purchase orders and admissions by Hapag in these actions permit a conclusion that Hapag directed that USOT be the subcontractor to supply the fuel, thereby bringing USOT within an established exception that allows maritime liens to be asserted by subcontractors whose selection was controlled or directed by the vessel's owner/charterer. We therefore vacate the judgments and remand for trial on the issue of whether Hapag directed that USOT be the physical supplier.

Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switz.), 2017 U.S. Dist. LEXIS 30847 (S.D.N.Y., Mar. 3, 2017)
Clearlake Shipping Pte Ltd v. O.W. Bunker (Switz.) SA, 239 F. Supp. 3d 674, 2017 U.S. Dist. LEXIS 30904 (S.D.N.Y., Mar. 3, 2017)

Disposition: Vacated and remanded.

Core Terms

Vessels, bunkers, supplier, subcontractor, maritime lien, fuel, district court, purchase order, Port, charterer, cases, confirmations, bids, general contractor, interpleader, orders, contracts, delivery, entity, summary judgment, undisputed, quotation, supplied, appeals, marks, ship, authorized person, inter alia, contractual, liens

Case Summary

** The Clerk of Court is instructed to amend the official caption in each appeal to conform with the above.

Overview

HOLDINGS: [1]-In a vessel's claims of entitlement to maritime liens for physically supplying marine fuel -- bunkers -- to certain ships owned or chartered by interpleader plaintiff, the purchase orders and admissions by the interpleader plaintiff permitted a finding that the interpleader plaintiff had directed that the vessel be the subcontractor to supply the fuel, thereby bringing the vessel within an established exception that allowed maritime liens to be asserted by subcontractors whose selection was controlled or directed by the vessel's owner/charterer or authorized agent; [2]-In particular, the record showed that the interpleader plaintiff was not indifferent to who would be the material supplier for the bunkers contract vessel, and the record showed that each of the interpleader plaintiff's purchase orders expressly listed only the vessel as the supplier.

Outcome

Decision vacated; case remanded.

LexisNexis® Headnotes

Admiralty & Maritime Law > Maritime Liens > Nature

HN1 **Maritime Liens, Nature**

A maritime lien is a special property right in a vessel, arising in favor of the creditor by operation of law as security for a debt or claim, which arises when the debt arises. The primary function of such liens is to facilitate maritime commerce by reducing the risk associated with supplying a vessel that may not return to the same port again. Maritime liens arise only by operation of law and not by contract, and are construed under the doctrine of stricti juris, meaning that the statutory requirements are construed strictly and may not be expanded by construction, analogy, or inference.

Admiralty & Maritime Law > ... > Priority & Sources > Contracts > Authority to Encumber

HN2 **Contracts, Authority to Encumber**

The Commercial Instruments and Maritime Liens Act provides, inter alia, that a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel and may bring a civil action in rem to enforce the lien. *46 U.S.C.S. § 31342(a)*. It also provides that the following are persons who are presumed to have authority to procure necessaries for a vessel: (1) the owner; (2) the master; (3) a person entrusted with the management of the vessel at the port of supply; or (4) an officer or agent appointed by--(A) the owner; or (B) a charterer.

Admiralty & Maritime Law > Maritime Liens > Nature

HN3 **Maritime Liens, Nature**

Maritime liens cannot properly be conferred on the basis of equitable principles such as unjust enrichment.

Admiralty & Maritime Law > Maritime Liens > Nature

HN4 **Maritime Liens, Nature**

Subcontractors who deal with a contractor or a middle-man lack a direct connection to the vessel, and there is a considerable body of law that a subcontractor cannot assert a maritime lien.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Contracts

HN5 **Priority & Sources, Contracts**

The sole exception to the rule against the subcontractor lien will occur where the subcontractor has been engaged by a general contractor in circumstances where the general contractor was acting as an agent at the direction of the owner to engage specific subcontractors, i.e., where an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance. Thus, under this "minimal exception, a subcontractor is not entitled to assert a maritime lien unless it can be shown that an entity

authorized to bind the ship controlled the selection of the subcontractor and/or its performance. The exception to the general rule applies when the vessel owner directs the general contractor to use a particular subcontractor.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Contracts

HN6[] **Priority & Sources, Contracts**

The subcontractor exception does not apply where there is no significant evidence that the owner intended that the physical supplier be engaged as a subcontractor. The owner/charterer's mere awareness of a particular subcontractor does not show that the vessel controlled or directed the subcontractor's selection or intended to do so. Mere knowledge that a particular subcontractor will be used has never been held to be sufficient to establish a lien.

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Contracts

Admiralty & Maritime Law > Maritime Liens > Priority & Sources > Maritime Lien Act Liens

HN7[] **Priority & Sources, Contracts**

For the subcontractor exception to apply so as to afford the subcontractor a lien on the vessel, there must have been (a) an order or direction (b) by the owner/charterer of the vessel or its authorized agent, that the particular subcontractor be used. The mere fact that an entity who is given that order or direction is a general contractor will not preclude it from being an agent under proper circumstances. In the scenario in which the vessel owner directs the general contractor to use a particular subcontractor, the general contractor essentially acts as the owner's agent and thus exercises authority to bind the vessel. As to the provision of necessaries, proper application of the subcontractor exception is thus within the scope of the Commercial Instruments and Maritime Liens Act, *46 U.S.C.S. § 31301 et seq.*

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BRUCE G. PAULSEN, New York, New York (Brian P. Maloney, Seward & Kissel, New York, New York, on the brief), for ING Bank **[**3]** N.V.

JUSTIN M. HEILIG, New York, New York (Hill Rivkins, New York, New York; Andrew B. Kratenstein, Darren Azman, McDermott Will & Emery, New York, New York, on the brief), for O.W. Bunker Germany GmbH.

Judges: Before: KEARSE, CABRANES, and LOHIER, Circuit Judges.

Opinion by: KEARSE

Opinion

[*655] KEARSE, *Circuit Judge*:

In these appeals, U.S. Oil Trading LLC ("USOT" or "U.S. Oil")—the plaintiff in No. 17-0922, and an interpleader defendant in No. 17-0931—challenges (a) orders entered in the United States District Court for the Southern District of New York, Valerie E. Caproni, *Judge*, denying USOT's motions for summary judgment on its claims of entitlement to maritime liens for physically supplying marine fuel ("bunkers") to certain vessels owned or chartered by interpleader plaintiff Hapag-Lloyd Aktiengesellschaft ("Hapag"), and (b) partial final judgments entered on May 2, 2017, dismissing USOT's maritime-lien claims. Pursuant to the *Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 et seq.*, **[*656]** which permits a maritime lien to be asserted by "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner," *id.* *§*

31342(a)—*see also* *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, 814 F.3d 146, 151 n.13 (2d Cir. 2016)* ("[f]or the purposes of *§ 31342*, bunkers are 'necessaries'")—the district **[**4]** court denied USOT's motions for summary judgment and entered the partial judgments dismissing USOT's claims for liens, ruling that USOT had not provided the fuel to the vessels on the order of the owner or a person authorized by the owner to place such an order. On appeal, USOT contends that the district court erred in finding it was not entitled to maritime liens in the absence of a direct contractual or agency relationship with the vessels or with an authorized entity specified in CIMLA, arguing principally that it was entitled to the liens because Hapag's purchase orders specified that the physical supplier of the fuel was to be USOT. For the reasons that follow, we conclude that purchase orders and admissions by Hapag in these actions permit a finding that Hapag directed that USOT be the subcontractor to supply the fuel, thereby bringing USOT within an established exception that allows maritime liens to be asserted by subcontractors whose selection was controlled or directed by the vessel's owner/charterer or authorized agent. We therefore vacate the judgment and remand for trial on the issue of whether Hapag directed that USOT be the physical supplier.

I. BACKGROUND

The present **[**5]** cases are among many that have their origin in the financial collapse of O.W. Bunker & Trading A/S ("O.W. Denmark") and its subsidiaries and affiliates (collectively the "O.W. Bunker Group"), a global network of traders and suppliers of bunkers. *See generally ING Bank N.V. v. M/V TEMARA, 892 F.3d 511, 515 (2d Cir. 2018)* ("*Temara*"); *see also* *Chemoil Adani Pvt. Ltd. v. M/V Mar. King, No. 16-3944, 742 Fed. Appx. 529, 2018 U.S. App. LEXIS 18656, 2018 WL 3359609 (2d Cir. July 10, 2018)* ("*Chemoil*"); *Aegean Bunkering (USA) LLC v. M/T AMAZON, 730 F. App'x 87 (2d Cir. 2018)* ("*Aegean*"); *O'Rourke Marine Services L.P. v. M/V COSCO HAIFA, 730 F. App'x 89 (2d Cir. 2018)* ("*O'Rourke*"). Except as indicated below, the following facts, drawn from statements submitted by various parties pursuant to *Rule 56.1 of the Local Rules* for the Southern District of New York ("*Rule 56.1* Statements"), are not in dispute.

A. *USOT's Delivery of Bunkers to Hapag Vessels*

In the fall of 2014, Hapag was the owner and operator of the M/V VIENNA EXPRESS and the M/V SOFIA EXPRESS, and was the time charterer of the M/V SEASPAN HAMBURG and the M/V SANTA ROBERTA (collectively the "Subject Vessels" or "Vessels"). The O.W. Bunker Group, an international operation that both supplied bunkers to ships and arranged the supply of bunkers by others, included O.W. Denmark, O.W. Bunker Germany GmbH ("O.W. Germany" or "OWG"), and O.W. Bunker USA Inc. ("O.W. USA"). USOT was in the business of physically supplying bunkers to oceangoing vessels.

In September—October 2014, Hapag, upon receiving fuel replenishment requests from **[**6]** the masters of the respective Vessels, solicited fuel supply bids from a number of potential counterparties. In response, O.W. Germany and several others submitted bids. O.W. Germany, to do so, had requested quotes from its affiliate O.W. USA, which was in charge of the O.W. Bunker **[*657]** Group's bunker procurement in the Americas. O.W. USA, to obtain the necessary information, had contacted physical suppliers, including USOT. For two of the Hapag Vessels, O.W. Germany submitted several bids, each bid describing fuel to be provided by a different physical supplier; for each of the four Vessels, O.W. Germany submitted one bid that listed USOT as the physical supplier. Hapag analyzed the submitted responses in internal spreadsheets that set out for each bid the bidder, the price, details as to fuel quality, and the identity of the physical supplier.

For each of the Subject Vessels, Hapag accepted the O.W. Germany bid that identified the physical supplier as USOT. For each contract, Hapag sent O.W. Germany a purchase order that stated that the supplier would be USOT. (*See* Hapag's Interpleader Complaint ¶ 20, Exhibit 2 ("SUPPLIER: US OIL"); *id. ¶ 23*, Exhibit 3 (same); *id. ¶ 26*, Exhibit 4 ("SUPPLIER: **[**7]** US Oil"); *id. ¶ 30*, Exhibit 5 (same).) After receiving the purchase orders, O.W. Germany sent Hapag sales order confirmations that listed the buyer as Hapag, the seller as O.W. Germany, and the supplier as USOT. (*See* Hapag's Response to USOT's 56.1 Statement ¶¶ 42-43, 74-75, 105-06, 136-37.)

In order to fulfill its contracts with Hapag for the supply of bunkers to the Vessels, O.W. Germany then subcontracted to purchase the bunkers from O.W. USA. (*See* OWG's *Rule 56.1* Statement and USOT's Response ¶¶ 36, 72, 103, 133; *see, e.g., id.* ¶ 39 (as to the SEASPAN HAMBURG, "on October 10, 2014, after entering into a contract with Hapag, . . . OW Germany advised . . . OW USA that OW Germany had sold to Hapag at a price of $534 per metric ton, and requested that OW USA purchase the bunker stem offered by USOT")).

With respect to these fuel orders for the four Subject Vessels, USOT delivered the ordered bunkers in October 2014. USOT, on the premise that it had made the sales to O.W. Denmark, sent invoices to O.W. Denmark (O.W. Germany contends instead that USOT sold to O.W. USA); O.W. USA sent invoices to O.W. Germany; O.W. Germany sent invoices to Hapag. On November 7, 2014, O.W. Denmark entered bankruptcy; **[**8]** bankruptcy filings by other members of the O.W. Bunker Group followed. On November 6, Hapag had paid O.W. Germany for the bunkers delivered to the SANTA ROBERTA; O.W. Germany received no payments with respect to the other three Vessels. USOT has received no payments for the bunkers it supplied to any of the four Vessels.

B. *The District Court's Dismissal of USOT's Lien Claims*

Following the collapse of the O.W. Bunker Group, Hapag, faced with the prospect of competing *in rem* claims by USOT and by O.W. Germany or its lender-assignee, commenced its present interpleader action against USOT, O.W. Germany, O.W. Denmark, and others. Hapag provided security for the amounts due for the bunkers delivered to the Subject Vessels, in the form of a bond with respect to three of the Vessels and a letter of undertaking with respect to the fourth. Hapag requested a determination by the court as to which of the claimants was entitled to recover against the posted security, and a declaratory judgment that Hapag and the Vessels are discharged from all liability with respect to the supply of the bunkers. The court ordered that the interpleader funds would serve as a substitute *res*. *See* Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA, 239 F.Supp.3d 674, 678 n.3 (S.D.N.Y. 2017) ("*Clearlake*").

[*658] USOT **[**9]** commenced its present action *in rem* in the United States District Court for the Western District of Washington against the VIENNA EXPRESS and the SOFIA EXPRESS and commenced a similar *in rem* action in the Central District of California against the SEASPAN HAMBURG and the SANTA ROBERTA, seeking to assert maritime liens for the amounts due on the bunkers USOT had delivered to the Vessels. The action filed in Washington was transferred to the Southern District of New York (or "Southern District"); the other action is being held in abeyance in light of the numerous suits pending before several judges in the Southern District, *see generally* Clearlake, 239 F.Supp.3d at 678 ("24 interpleader cases [involving O.W. Bunker Group] . . . were pending before [Judge Caproni] as of June 30, 2015").

Following consolidated discovery proceedings, the parties, at the request of the court, identified test cases for the efficient decision of significant legal issues with respect to the *in rem* claims. *See generally* id. at 678-79. To the extent pertinent to these appeals, USOT's present *in rem* action and Hapag's interpleader action were among those so identified; motions for summary judgment were filed by USOT and O.W. Germany, with each interested **[**10]** party (including Hapag) filing *Rule 56.1* Statements as to allegations they disputed and facts they contended were undisputed.

O.W. Germany, opposing USOT's lien claims, contended that USOT could not meet the CIMLA lien prerequisite that USOT show that it provided the bunkers to the Vessels "on the order of" an owner or a person authorized by the owner to order them, 46 U.S.C. § 31342(a). O.W. Germany asserted—and USOT agreed, to an extent—that USOT had no contract with Hapag or anyone authorized to act as Hapag's agent in the ordering of bunkers. USOT conceded that it did not enter into a contract with Hapag for the bunker sales at issue here (*see, e.g.*, USOT's *Rule 56.1* Statement and Hapag's Response ¶ 7), and that Hapag placed these fuel orders with O.W. Germany and did not contract with O.W. USA, or O.W. Denmark, or USOT (*see* USOT's Response to OWG's 56.1 Statement ¶¶ 26, 69, 100, 130).

However, in response to O.W. Germany's *Rule 56.1* Statement asserting that USOT had no "account or direct business relationship with Hapag in October 2014," USOT stated:

> Admits that USOT did not have an account with Hapag, but denies that USOT did not have a direct business relationship with Hapag in October 2014. The undisputed record shows that **[**11]** Hapag, as the Vessels' owner or charterer, analyzed and compared the price and quality of the bunkers offered by USOT with the price and quality offered by other suppliers, and then ***selected USOT to deliver the bunkers to Hapag's Vessels***. . . . Hapag specifically named USOT as the supplier of the bunkers on its . . . purchase orders, which Hapag prepared well ***before*** each delivery.

(USOT's Response to OWG's *Rule 56.1* Statement ¶ 14 (emphases in original).) USOT also noted that "[t]he sales order confirmations prepared by O.W. Germany and sent to Hapag" for each delivery specified that the physical supplier would be "USOT." (*Id.*) For the same reasons, USOT also disputed O.W. Germany's

assertion that "Hapag did not instruct OW Germany . . . to use USOT . . . for the supply of bunker fuel to [the relevant] vessels . . . and did not control the selection of a physical supplier," reiterating, *inter alia*, that Hapag in its purchase orders, and O.W. Germany in its sales confirmations, had specifically named USOT as the physical supplier for the bunkers ordered. **[*659]** (USOT's Response to OWG's *Rule 56.1* Statement ¶ 19.)

In addition, while USOT admitted that "Hapag never advised USOT" that O.W. Germany or O.W. USA would **[**12]** be acting as Hapag's agents for the bunker purchases (OWG's *Rule 56.1* Statement and USOT's Response ¶ 31), USOT denied O.W. Germany's assertion that "Hapag never authorized or appointed OW Germany or OW USA as agents to order bunker fuel on Hapag's behalf" (USOT's Response to OWG's *Rule 56.1* Statement ¶ 30). USOT stated that "[t]he undisputed record shows that O.W. Germany and O.W. USA were cloaked with at least implied authority while procuring the subject bunkers for Hapag's account." (USOT's Response to OWG's *Rule 56.1* Statement ¶ 30 (citing evidence of discussions between USOT and O.W. USA).) USOT also argued that other entities with which it had contact—including Hapag's port coordinator Norton Lilly International, Inc. ("Norton Lilly"), which forwarded the Hapag bunker orders in emails to USOT, and the Vessels' masters or chief engineers who gave USOT receipts upon delivery of the bunkers—possessed at least implied or apparent authority to bind the Vessels with respect to orders of bunkers.

USOT argued further that as it had physically supplied the fuel, the price of which was in the range of approximately $1.3-$1.5 million for each Vessel—and that as O.W. Germany was merely a middleman that could earn **[**13]** only a small fraction of the value of the fuel—USOT, rather than O.W. Germany, was entitled to the maritime liens as a matter of equity.

In its opinion in *Clearlake*, to the extent pertinent to these two appeals, the district court denied USOT's motions for summary judgment, rejecting its claims for maritime liens because USOT did not provide the bunkers "on the order" of the Vessels or their agents. *239 F.Supp.3d at 684-90* (internal quotation marks omitted). The court stated that maritime liens arise exclusively under CIMLA, that such liens are construed narrowly under the doctrine of *stricti juris*, and that CIMLA "typically require[s]" a finding of "a direct contractual or agency nexus between the supplier and the vessel or its agents." *Id. at 684*. It determined that, because USOT acted as a subcontractor, it "lack[ed] a direct connection to the [Vessels]." *Id. at 685*.

The court—referring to O.W. Denmark and its international subsidiaries collectively as "O.W.," and collectively to the vessels, their owners, or authorized agents as the "Vessel Interests"—noted that USOT contended that it in fact had "a direct relationship . . . to the Vessel Interests":

> Because USOT was identified as O.W.'s supplier in internal analyses prepared **[**14]** by Hapag[] personnel, USOT contends that it, rather than O.W., was nominated as the supplier. . . . USOT [was also] identified as the supplier in the order confirmations exchanged by O.W. and the Vessel Interests.

Id. at 686. The court found this contention unpersuasive:

> Direct contacts between . . . Physical Suppliers and agents of the vessel can be relevant if they demonstrate a direct contractual or agency relationship. For example, *when a vessel requires a contractor to use a specific subcontractor there may be a basis to argue that the contractor engaged the subcontractor with actual authority from the vessel*, creating a direct link between the vessel and the subcontractor. *See Port of Portland v. The M/V Paralla*], 892 F.2d [825,] 828 [(9th Cir. 1989)] ("[*A*]*n owner can still become responsible for the services of a subcontractor, if the owner has ordered the general contractor to retain that subcontractor*." (citing *The **[*660]** Juniata, 277 F. 438, 440 (D. Md. 1922)))*. But evidence that the supplier was known to the vessel and coordinated with the vessel to satisfy its obligations to a third party does not establish a legally significant relationship between the vessel and subcontractors. *See Integral Control Sys. Corp.[v. Consolidated Edison Co.*], 990 F.Supp [295,] 299-300 [(S.D.N.Y. 1998)] (subcontractor's selection must be "ordered" by the vessel (quoting *Port of Portland, 892 F.2d at 828*)) . . **[**15]** . .

Clearlake, 239 F.Supp.3d at 686-87 (footnote omitted) (emphases ours). The court concluded that

> [*a*]*t best* (from [USOT's] perspective), the summary judgment record shows that the Vessel Interests viewed . . . USOT as [an] *acceptable* supplier[]. *There is no evidence that the Vessel Interests required O.W. to use* [*USOT*] *to satisfy its*

> *obligations* or that [USOT was] directly engaged by agents of the Vessel Interests. *To the contrary, the evidence on this point is that the Vessel Interests were indifferent to the identity of the supplier*[]. The representatives of each of the Vessel Interests *testified that the physical supplier was O.W.'s choice*. . . . [W]hen O.W. provided bids to Hapag[], it included multiple different suppliers, depending on the port of call. For example, in Los Angeles, O.W. used O.W. itself, and in Oakland it used P66. . . . *The uncontradicted testimony from the Vessel Interests is that they saw the choice of physical supplier as essentially O.W.'s to make*. . . . In short, *the inclusion of* [*USOT*] *on the confirmations provided by O.W. and the Vessel Interests does not amount to a* "*selection*" *by the Vessel Interests of* . . . *USOT*.

Id. at 688 (emphases ours). The court added that

> [t]he evidence that the Vessel Interests **[**16]** were *aware* of [USOT's] identit[y] and *tacitly* "selected" [it] is potentially a question of fact, particularly as to Hapag[], which included USOT in internal analyses of competing bids. If a question of fact exists on this point, however, it is not material. There is no dispute that the Vessel Interests did not contract with [USOT], and [*USOT does*] *not argue that the contracts required O.W. to use* [*USOT*] *as supplier*[].

Id. at 688 n.11 (emphases added).

The district court also rejected contentions by USOT that it was entitled to rely on theories of apparent or implied authority or on principles of equity. *See id. at 686 n.10, 688-89, 692-94*. The court concluded:

> In sum, while the Court sympathizes with [USOT], which apparently believed that [it] held maritime liens and may be financially harmed by this Court's holding that [it does] not, the contractual relationships between the parties in this case are clear, and those relationships must be respected. [USOT] delivered the bunkers to the [V]essels at the direction of O.W. [USOT did not enter] into a contract with the Vessel Interests or their agents, and *the undisputed evidence is that the Vessel Interests did not require O.W. to use* [*USOT*]. These back-to-back contracts were intended, **[**17]** in part, to avoid multilateral obligations that could embroil the [V]essels in litigation between suppliers. It is unfortunate that it may be that [USOT] . . . will suffer from O.W.'s bankruptcy . . . . Ultimately, however, that is not a reason for the Court to depart from the Second Circuit's strict approach to maritime liens.

Id. at 689-90 (emphasis added).

Effectively granting summary judgment against USOT on its maritime-lien claims, the court entered a partial final judgment **[*661]** in both the *in rem* action brought by USOT and the interpleader action brought by Hapag, ruling "that USOT does not possess maritime liens pursuant to [CIMLA] against the vessels M/V SANTA ROBERTA, M/V VIENNA EXPRESS, M/V SEASPAN HAMBURG, or the M/V SOFIA EXPRESS," and "dismissing [USOT's] maritime lien claims." Partial Final Judgment, May 2, 2017, at 2.

II. DISCUSSION

On appeal, USOT contends principally (1) that the district court erred in concluding that USOT did not show that it had a sufficient contractual nexus with the Vessels' owner/charterer or agents to entitle it to assert maritime liens under the "plain" language of CIMLA (USOT briefs on appeal in No. 17-0922, at 21, and No. 17-0931, at 25); (2) that the court overlooked **[**18]** parts of the record in determining whether USOT was a subcontractor that was entitled to a maritime lien; and (3) that the court should have concluded that USOT is entitled to assert the requested maritime liens as a matter of equity.

Reviewing the district court's summary dismissal of USOT's maritime-lien claims *de novo*, construing the record in the light most favorable to USOT as the party against which summary judgment was entered, and drawing all reasonable inferences in its favor, *see, e.g., Temara, 892 F.3d at 518*; *June v. Town of Westfield, 370 F.3d 255, 257 (2d Cir. 2004)*, we reject USOT's first and third arguments, which are largely foreclosed by our recent decision in *Temara*; but we find merit in the second.

A. *CIMLA, Contracts, and Equitable Principles*

As discussed in *Temara*, ***HN1***[↑] "[a] maritime lien is a special property right in [a] vessel, arising in favor of the creditor by operation of law as security for a debt or claim, which arises when the debt arises," *892 F.3d at 518* (internal quotation marks omitted). The primary function of such liens "is to facilitate maritime commerce by reducing the . . . risk associated with supplying a vessel that may not return to the same port again." *Id. at 519*. "Maritime liens arise only by operation of law and

not by contract," and are "construed **[**19]** under the doctrine of *stricti juris*, meaning that the statutory requirements are construed strictly and may not be expanded by construction, analogy[,] or inference." *Id.* (internal quotation marks omitted).

HN2[↑] CIMLA provides, *inter alia*, that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel [and] may bring a civil action in rem to enforce the lien." *46 U.S.C. § 31342(a)*. It provides, to the extent at issue here, that the following are "persons [who] are presumed to have authority to procure necessaries for a vessel":

> (1) the owner;
> (2) the master;
> (3) a person entrusted with the management of the vessel at the port of supply; or
> (4) an officer or agent appointed by--
> (A) the owner; [or]
> (B) a charterer . . . .

Id. *§ 31341(a)*. There being no question that fuel bunkers are necessaries, and no question in these cases that the bunkers were provided to the Subject Vessels by USOT, the only question under the language of CIMLA was whether USOT did so "on the order of" Hapag or a person authorized by Hapag.

[*662] We conclude, substantially for the reasons stated by the district court in *Clearlake*, which parallel those leading our Court to answer **[**20]** such a question in the negative in *Temara*, that the district court correctly ruled that USOT did not adduce evidence that it was ordered to provide the bunkers by Hapag or by an agent authorized by Hapag to order bunkers. As described in Part I.B. above, there is no dispute that, for the Subject Vessels, Hapag ordered the bunkers from O.W. Germany; that O.W. Germany ordered the bunkers from O.W. USA; that O.W. USA ordered the bunkers from USOT; and that USOT had no contract with Hapag or with O.W. Germany. Although USOT argues that it complied with a chain of contracts for orders that originated with the Vessels' owner or charterer, we agree with the district court that in each of the contracts requiring USOT to deliver the bunkers, USOT's counterparty was neither Hapag nor O.W. Germany. USOT in fact acted upon orders placed by an intermediary between itself and O.W. Germany, and the intermediary was not authorized by the Vessels' owner or charterer to order bunkers for the Vessels.

We also reject, substantially for the reasons stated by the district court, *see* *Clearlake, 239 F.Supp.3d at 689*, USOT's argument that either communications from Hapag's port agent Norton Lilly in arranging for delivery, or receipts issued **[**21]** by a Vessel's master or chief engineer acknowledging USOT's bunker deliveries, constituted evidence that USOT provided the bunkers on the order of an agent of the Vessels. *See generally Temara, 892 F.3d at 521 n.6*. Coordinating delivery and acknowledging receipt do not indicate that the persons so coordinating and/or acknowledging had placed the bunker orders or been authorized by the owner to do so.

Finally, the district court properly rejected USOT's additional arguments for entitlement to maritime liens purely as a matter of equity. As we stated in *Temara*, *HN3*[↑] such liens cannot properly be conferred on the basis of equitable principles such as unjust enrichment. *See id. at 522-23*; *id. at 523* (rejecting "the concept of an equitable maritime lien").

B. *The Subcontractor Rule and Its Exception*

In rejecting USOT's claims for maritime liens, the district court noted that *HN4*[↑] "[s]ubcontractors who deal with a contractor or a middle-man lack a direct connection to the vessel," and that "there is a considerable body of law . . . that a subcontractor cannot assert a maritime lien." *Clearlake, 239 F.Supp.3d at 685* (internal quotation marks omitted) (citing, *inter alia, Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR POPOV MV, 199 F.3d 220, 229-30 (5th Cir. 1999)* ("*Lake Charles*"), *cert. denied*, *529 U.S. 1130, 120 S. Ct. 2006, 146 L. Ed. 2d 956 (2000)*; and 2 *Benedict on Admiralty § 40* (7th ed. 1997)). The district court applied this general rule, stating **[**22]** that

> [w]hile a subcontractor may "provide" necessaries to the vessel, its counterparty is the contractor, not any of the parties authorized by *Section 31341(a)* to encumber the vessel. *See Lake Charles, 199 F.3d at 230* (explaining that the "nature of the relationship between each pair of entities" determines whether a party provides necessaries "on the order" of the vessel).

Clearlake, 239 F.Supp.3d at 685 (footnote omitted).

1. *The Exception to the General Rule*

There is, however, an exception to the general rule: *HN5*[↑] "The sole exception to the rule against the subcontractor lien will **[*663]** occur where the subcontractor has been engaged by a general contractor in circumstances *where the general contractor was acting as an agent at the direction of the*

owner to engage specific subcontractors," *Farwest Steel Corp. v. Barge Sea-Span 241, 828 F.2d 522, 526 (9th Cir. 1987)* ("*Farwest*") (emphasis added), *cert. denied*, *485 U.S. 1034, 108 S. Ct. 1594, 99 L. Ed. 2d 909 (1988)*, *i.e.*, where "an entity authorized to bind the ship *controlled the selection* of the subcontractor and/or its performance," *Lake Charles, 199 F.3d at 229* (emphasis added). *See, e.g., Port of Portland v. M/V PARALLA, 892 F.2d 825, 828 (9th Cir. 1989)* ("*Port of Portland*") (the subcontractor may be entitled to a lien "if the owner has ordered the general contractor to retain that subcontractor"). Thus, under this "minimal exception," *Cianbro Corp. v. George H. Dean, Inc., 596 F.3d 10, 17 (1st Cir. 2010)* ("*Cianbro*"), a subcontractor is not entitled to assert a maritime lien "unless it can be shown that an **[**23]** entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance," *id.* (internal quotation marks omitted); *Valero Marketing & Supply Co. v. M/V ALMI SUN, 893 F.3d 290, 293 (5th Cir. 2018)* ("*Valero*") (internal quotation marks omitted). The "exception to th[e] general rule . . . applies when the vessel owner directs the general contractor to use a particular subcontractor." *Bunker Holdings Ltd. v. Yang Ming Liberia Corp., 906 F.3d 843, 846 (9th Cir. 2018)* ("*Yang Ming*").

HN6[↑] The subcontractor exception does not apply where there is no significant evidence "that the owner intended that [the physical supplier] be engaged as a subcontractor," *Farwest, 828 F.2d at 526*. The owner/charterer's mere awareness of a particular subcontractor does not show that the vessel controlled or directed the subcontractor's selection or intended to do so. *See, e.g., Valero, 893 F.3d at 295*; *Cianbro, 596 F.3d at 17-18*. Mere knowledge that a particular subcontractor will be used "has never been held to be sufficient to establish a lien." *Port of Portland, 892 F.2d at 828* (citing *Farwest, 828 F.2d at 526*).

In *Temara*, citing, *inter alia, Lake Charles, 199 F.3d at 229*; *Cianbro, 596 F.3d at 17*; and *Port of Portland, 892 F.2d at 828*, we stated the "long-recognized rule that the services of an independent subcontractor *generally* do not give rise to a maritime li[en]" and noted the exception for a subcontractor who "can . . . show[] that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance," *892 F.3d at 521* (internal **[**24]** quotation marks and brackets omitted) (emphasis ours); *see also id. at 522 n.7* (no subcontractor maritime lien "without any indication that a statutorily-authorized entity provided direction"). We referred to the subcontractor exception again several times in other recent decisions in the O.W. Bunker Group related appeals, while noting that the evidence in their respective records was insufficient to trigger the exception. *See, e.g.,* *O'Rourke, 730 F. App'x at 91* ("O'Rourke did not supply the bunkers upon the order of a statutorily authorized person, thus failing to meet CIMLA's third requirement for a maritime lien. . . . *Nor did it adduce evidence that a statutorily authorized person controlled the selection* of O'Rourke as the physical supplier." (emphasis added)); *Aegean, 730 F. App'x at 89* ("Nor did [Aegean] adduce evidence that a statutorily authorized person *controlled the selection* of Aegean as the physical supplier." (emphasis added)); *Chemoil, 2018 U.S. App. LEXIS 18656, 2018 WL 3359609, at *2* ("*no*[] . . . *evidence* that a statutorily authorized person *controlled the selection* of Chemoil as the physical supplier" (emphases added)).

[*664] As is evident from the above statements of the requirements for application of the subcontractor exception, the exception is rooted in the same concerns that are reflected **[**25]** in the elements set out in CIMLA: ***HN7***[↑] For the exception to apply so as to afford the subcontractor a lien on the vessel, there must have been (a) an order or direction (b) by the owner/charterer of the vessel or its authorized agent, that the particular subcontractor be used. "[T]he mere fact that an entity [who is given that order or direction] is a general contractor will not preclude it from being an agent under proper circumstances." *Port of Portland, 892 F.2d at 828*. "In th[e] scenario" in which "the vessel owner directs the general contractor to use a particular subcontractor," "the general contractor essentially acts as the owner's agent and thus exercises authority to bind the vessel." *Yang Ming, 906 F.3d at 846*. As to the provision of necessaries, proper application of the subcontractor exception is thus within the scope of CIMLA.

2. *The Record in the Present Cases Involving USOT*

The district court in the present cases adverted to the subcontractor exception, *see* *Clearlake, 239 F.Supp.3d at 687* ("[a]n owner can still become responsible for the services of a subcontractor, if the owner has ordered the general contractor to retain that subcontractor" (quoting *Port of Portland, 892 F.2d at 828*)), but concluded that the exception was not applicable. We note that in *Clearlake*, the district court was addressing **[**26]** four test cases and dealing with maritime-lien claims asserted by two physical suppliers—USOT in the cases that are the subject of the present appeals, and NuStar Energy Services, Inc. ("NuStar") in the other two cases—and in some critical instances the court made

findings collectively with respect to "the Vessel Interests" and "the Physical Suppliers," *239 F.Supp.3d at 688-90*, without distinguishing among the various owner/charterers or between USOT and NuStar. We consider here only the record that was created in the USOT cases.

Insofar as concerns USOT, the court viewed the record as showing

> - that USOT "d[id] not argue that the [Hapag] contracts required O.W. to use [USOT] as supplier[]," *id. at 688 n.11*;
>
> - that there was "no evidence that the Vessel Interests required O.W. to use [USOT] to satisfy its obligations," *id. at 688*;
>
> - that, although "aware of [USOT's] identit[y]," Hapag only "*tacitly* 'selected' [USOT]," *id. at 688 n.11* (emphasis added);
>
> - that "the *undisputed* evidence" was "that the Vessel Interests did not require O.W. to use [USOT]," *id. at 690* (emphasis added);
>
> - that there was "uncontradicted" evidence that Hapag viewed "the choice of physical supplier as essentially O.W.'s to make," *id. at 688*;
>
> - that Hapag "w[as] indifferent to the identity of the supplier[]," **[**27]** *id.*;
>
> - that "[*a*]*t best*," Hapag "viewed . . . USOT as "acceptable," *id.* (emphasis added); and
>
> - that "the inclusion of [USOT] on the confirmations provided by . . . [Hapag] d[id] not amount to a 'selection' by the Vessel Interests of . . . USOT," *id.*

Although in the two companion appeals being decided today we agree that the district court correctly viewed the records in the NuStar cases as not warranting application of the subcontractor exception, *see* Clearlake Shipping PTE Ltd. v. NuStar Energy Services, Inc., No. 17-1458 (2d Cir. Dec. 19, 2018), and Nippon Kaisha Line Ltd. v. **[*665]** NuStar Energy Services, Inc., No. 17-1378 (2d Cir. Dec. 19, 2018), we do not share the above view of the record in the instant cases involving USOT.

First, USOT did argue that the Hapag purchase orders to O.W. Germany required O.W. Germany to use USOT as the physical supplier. USOT directly "[*d*]*enie*[*d*]" O.W. Germany's assertion that "*Hapag did not instruct OW Germany . . . to use USOT* . . . for the supply of bunker fuel to [the relevant] vessels . . . and did not control the selection of a physical supplier." (USOT's Response to OWG's *Rule 56.1* Statement ¶ 19 (emphases added).) USOT added—to this response as well as others—that **[**28]** the

> undisputed record shows that *Hapag, as the Vessels' owner or charterer*, analyzed and compared the price and quality of the bunkers offered by USOT with the price and quality offered by other suppliers, and then ***selected USOT to deliver the bunkers to Hapag's Vessels***. . . . Hapag specifically named USOT as the supplier of the bunkers on its . . . purchase orders, which Hapag prepared well ***before*** each delivery.

(USOT's Response to OWG's *Rule 56.1* Statement ¶ 19 (first emphasis added; second and third emphases in original); *id.* ¶¶ 14, 20; USOT's Response to Hapag's *Rule 56.1* Counter-Statement ¶¶ 186, 191, 193, 197, 198, 200, 204, 211, 212, 214, 231, 232.)

Second, viewing the record in the light most favorable to USOT as the party against which summary judgment was granted, we cannot agree that it shows as a matter of law that when Hapag decided to award the bunkers contracts to O.W. Germany, Hapag was "indifferent" to who would be the physical supplier and merely "tacitly" accepted USOT as a name of which it was merely "aware" because it had been introduced by O.W. Germany in the initial bidding. The notion that Hapag did not care who supplied the fuel—although cultivated in the deposition testimony of **[**29]** Hapag's fuel purchasing director Norbert Kock who stated that it was "not [Hapag's] business" to "care about what happened downstream of O.W. Germany in terms of dealing with subcontractors, physical suppliers" (Deposition of Norbert Kock at 138)—is belied by, *inter alia*, Kock's sworn declarations, twice pointing out the importance of fuel quality to a ship's performance (*see* Declaration of Norbert Kock dated June 15, 2016, ¶ 13; Declaration of Norbert Kock dated July 27, 2015, ¶ 5).

Third, the record contradicts the views that Hapag's selection of USOT as physical supplier was only "tacit[]," that there was "no evidence" of Hapag's directing O.W. Germany to use USOT as the physical supplier, and that there was "undisputed" evidence that Hapag did not so direct. To begin with, as shown in Part I.A. above quoting exhibits to Hapag's Interpleader Complaint, each of the Hapag purchase orders themselves

expressly listed USOT—and only USOT—as the "SUPPLIER." In addition, O.W. Germany, in its responding sales confirmations likewise listed USOT and only USOT as the physical supplier. While the sales confirmations standing alone would not suffice to permit a conclusion that the selection of **[**30]** USOT had been ordered or directed by Hapag, they provide support for a conclusion that the language in Hapag's purchase orders, listing USOT and only USOT, evinced an instruction.

Finally, USOT in its *Rule 56.1* Statement asserted that Hapag, in issuing purchase orders that listed USOT and only USOT as the supplier for the four Vessels, "expressly confirm[ed]" that USOT was to be the physical supplier. Hapag disputed the characterization, stating that it "denies **[*666]** its purchase order 'confirms' that USOT will act as the 'supplier'"; however, in each response, Hapag also said "Hapag admits that its purchase order lists the identity of USOT as the physical supplier." (Hapag's Response to USOT's *Rule 56.1* Statement ¶ 38 (re SANTA ROBERTA), ¶ 71 (re VIENNA EXPRESS), ¶ 102 (re SEASPAN HAMBURG), ¶ 133 (re SOFIA EXPRESS)). Without more, Hapag's listing of USOT in the purchase orders could perhaps have been viewed as merely suggestive. But in each of those same *Rule 56.1* responses as to the meaning of its purchase orders, Hapag went on to state that

> O.W. Germany was *permitted* . . . to find a substitute fuel of similar specifications and price ***if*** USOT was unable to act as the physical supplier.

(Emphases added.) The plain syntactical **[**31]** implication of this statement by Hapag is that unless USOT was unable to perform, O.W. Germany's use of a physical supplier other than USOT was not permitted.

We see nothing in the record to compel the conclusion that Hapag did not control the selection of the physical supplier; and Hapag's own admissions may permit a conclusion that it instructed O.W. Germany to use USOT as the physical supplier unless USOT could not perform.

CONCLUSION

We have considered all of the parties' arguments on these appeals and, except to the extent indicated above, have found them to be without merit. For the reasons stated, we affirm the district court judgment insofar as it concluded that USOT did not adduce evidence that it was ordered to provide the bunkers by Hapag or by an agent authorized by Hapag to order bunkers. We further affirm the district court's conclusion that maritime liens cannot properly be conferred on the basis of equitable principles such as unjust enrichment. We vacate and remand the district court judgment on the issue of whether Hapag directed that USOT be the physical supplier pursuant to the exception to the subcontractor rule.

Valero Mktg. & Supply Co. v. M/V Almi Sun

United States Court of Appeals for the Fifth Circuit

June 19, 2018, Filed

No. 16-30194

Reporter
893 F.3d 290 *; 2018 U.S. App. LEXIS 16525 **; 2018 AMC 1564; 2018 WL 3030066

VALERO MARKETING & SUPPLY COMPANY, Plaintiff - Appellant v. M/V ALMI SUN, IMO NO. 9579535, her engines, apparel, furniture, equipment, appurtenances, tackle, etc., in rem; VERNA MARINE COMPANY, LIMITED, appearing solely and restrictively as claimant of the M/V Almi Sun, Defendants — Appellees

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Louisiana.

Valero Mktg. & Supply Co. v. M/V Almi Sun, IMO No. 9579535, 160 F. Supp. 3d 973, 2016 U.S. Dist. LEXIS 15086 (E.D. La., Feb. 8, 2016)

Core Terms

vessel, subcontractor, bunkers, fuel, maritime lien, supplier, entity, line of cases, general contractor, cases, Coatings, ship, authority to bind, Stevedores, charterer, procure, involvement, contracted, tested, majority opinion, inspecting, trader, hire, perform work, delivery, summary judgment, vessel owner, presumed, supplies, genuine

Case Summary

Overview

HOLDINGS: [1]-Where an agent for the vessel's owner contracted with a fuel trader to procure bunkers, and the trader did not pay the supplier and later went bankrupt, denial of a maritime lien was proper because the supplier could not show that it provided necessaries "on the order of" the vessel's owner or a person authorized by the owner, within the meaning of *46 U.S.C.S. § 31342(a)*.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

***HN1*[] Entitlement as Matter of Law, Appropriateness**

An appellate court reviews the district court's grant of summary judgment de novo, applying the same standards as the district court. Summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. On summary judgment, the appellate court views the evidence in the light most favorable to the nonmovant, and draws all reasonable inferences in the nonmovant's favor.

Admiralty & Maritime Law > ... > Priority & Sources > Contracts > Authority to Encumber

HN2[] **Contracts, Authority to Encumber**

The Commercial Instruments and Maritime Liens Act states that a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner is entitled to a maritime lien on the vessel. *46 U.S.C.S. § 31342(a)*. *46 U.S.C.S. § 31341(a)* lists persons presumed to have authority to procure necessaries for a vessel: (1) the owner; (2) the master; (3) a person entrusted with the management of the vessel at the port of supply; or (4) an officer or agent appointed by—(a) the owner; (b) a charterer; (c) an owner pro hac vice; or (d) an agreed buyer in possession of the vessel.

Admiralty & Maritime Law > ... > Priority & Sources > Contracts > Authority to Encumber

HN3[] **Contracts, Authority to Encumber**

A court applies the provisions of the Commercial Instruments and Maritime Liens Act stricti juris to ensure that maritime liens are not lightly extended by construction, analogy, or inference.

Admiralty & Maritime Law > ... > Priority & Sources > Contracts > Authority to Encumber

HN4[] **Contracts, Authority to Encumber**

Under the Commercial Instruments and Maritime Liens Act, it is not whether an intermediary can be expected to supply the necessaries itself that distinguishes instances in which the actual suppliers have liens, but it is rather the nature of the relationship between each pair of entities that are involved in the transaction at issue.

Admiralty & Maritime Law > ... > Priority & Sources > Contracts > Authority to Encumber

HN5[] **Contracts, Authority to Encumber**

Mere awareness by the owner of the supplier does not constitute authorization under the Commercial Instruments and Maritime Liens Act.

Admiralty & Maritime Law > ... > Priority & Sources > Contracts > Authority to Encumber

HN6[] **Contracts, Authority to Encumber**

The Commercial Instruments and Maritime Liens Act's authority requirement would be rendered meaningless if awareness that necessaries are being supplied was sufficient, even though those necessaries were procured by an entity without authority to bind the vessel.

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Judges: Before HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

Opinion by: PATRICK E. HIGGINBOTHAM

Opinion

[*291] PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case asks whether a bunker supplier, having entered into a contract with a bunker trader that later went bankrupt, is entitled to assert a maritime lien against the vessel that physically received its fuel. Because that supplier cannot show that it provided necessaries "on the order of the owner or **[**2]** a person authorized by the owner," we affirm the district court's denial of a maritime lien.

I.

While in Corpus Christi, Texas, the Almi Sun (the "Vessel") needed refueling. Almi Tankers S.A., an agent for the Vessel's owner Verna Marine Co. Ltd., contracted with O.W. Bunker Malta, Ltd., a fuel trader, to procure bunkers. During negotiations, Almi Tankers requested the name of the physical supplier, and O.W. Malta named Valero Marketing & Supply Company. O.W. Malta issued a final sales order confirming Valero as the supplier and listing itself as the seller. Another O.W. Bunker entity, O.W. Bunker USA, Inc., then contracted with Valero to purchase the fuel. O.W.'s involvement ended there. Valero coordinated delivery directly with the Vessel, and Vessel agents tested and **[*292]** verified the bunkers' quality. After delivery was completed, an authorized officer of the Vessel signed the bunkering certificate, and Valero submitted an invoice to O.W. USA.

In early November 2014, Almi Tankers learned that the O.W. Bunker group of companies faced significant financial problems and might be unable to pay Valero. Almi Tankers requested "written confirmation and evidence of payment," and "reserve[d] the **[**3]** right to make remittance directly to the physical supplier and . . . hold any balance due . . . for payment." O.W. Bunker and other related entities filed for bankruptcy shortly thereafter.

Valero then brought this *in rem* action seeking a maritime lien for the amount owed for the bunkering plus interest and fees. Verna appears as the *in rem* claimant of the Vessel defending the action on the Vessel's behalf. Both Valero and Verna moved for summary judgment, and the district court granted summary judgment in favor of Verna. Valero timely appeals.

II.

HN1[↑] We review the "'district court's grant of summary judgment de novo, applying the same standards as the district court.'"[1] Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[2] On summary judgment, we view the evidence in the light most favorable to the nonmovant, and draw all reasonable inferences in the nonmovant's favor.[3]

III.

The *Commercial Instruments and Maritime Liens Act ("CIMLA")* governs the circumstances under which a party is entitled to a maritime lien. In relevant part, ***HN2***[↑] CIMLA states that a person providing necessaries to a vessel "on the **[**4]** order of the owner or a person authorized by the owner" is entitled to a maritime lien on the vessel.[4] *Section 31341(a)* lists "persons . . . presumed to have authority to procure necessaries for a vessel:"

> (1) the owner; (2) the master; (3) a person entrusted with the management of the vessel at the port of supply; or (4) an officer or agent appointed by—(a) the owner; (b) a charterer; (c) an owner pro hac vice; or (d) an agreed buyer in possession of the vessel.[5]

HN3[↑] We apply the provisions of CIMLA *stricti juris* to ensure that maritime liens are not "lightly extended by construction, analogy, or inference."[6]

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[1] *Green v. Life Ins. Co. of N. Am., 754 F.3d 324, 329 (5th Cir. 2014)* (quoting *Cooper v. Hewlett-Packard Co., 592 F.3d 645, 651 (5th Cir. 2009)*).

[2] *Fed. R. Civ. P. 56(a)*.

[3] *Cox v. Wal-Mart Stores East, L.P., 755 F.3d 231, 233 (5th Cir. 2014)*.

[4] *46 U.S.C. § 31342(a)*.

[5] *46 U.S.C. § 31341(a)*.

[6] ***Atlantic & Gulf Stevedores, Inc. v. M/V GRAND LOYALTY, 608 F.2d 197, 200-01 (5th Cir. 1979)***. In *Atlantic & Gulf Stevedores*, we ruled that a vessel's chief officer is a "person to whom management of the vessel at the port of supply is intrusted" for purposes of section 972 of the *Federal Maritime Lien Act*—the predecessor to CIMLA. ***Id. at 200-03***. In so holding, we acknowledged the doctrine of *stricti juris* but opined that the Federal Maritime Lien Act "is not to be viewed through the constricting glass of [s]tricti juris" as its "legislative

[*293] It is not unusual for an entity supplying necessaries to a vessel to lack privity of contract with the owner of that vessel, and to instead contract with an intermediary. In *Lake Charles*, we recognized two lines of cases that deal with such circumstances: the general/subcontractor line of cases and the principal/agent, or "middle-man," line of cases.[7] To determine which line of cases applies, *Lake Charles* instructs that *HN4*[↑] "it is not whether an intermediary can be expected to supply **[**5]** the necessaries itself that distinguishes instances in which the actual suppliers have liens, but it is rather the nature of the relationship between each pair of entities that are involved in the transaction at issue."[8]

As it happened in *Lake Charles*, ED&F Man Sugar, Inc. entered into an agreement to purchase rice from Broussard Rice Mill, Inc. In that agreement, the parties assigned the responsibility of providing stevedoring services to Broussard. Broussard, working through an agent, awarded Lake Charles Stevedores ("LCS") the bid to load the rice onto the vessel. LCS loaded the rice, and the vessel's agents signed activity sheets and receipts. When Broussard failed to pay, LCS asserted a maritime lien for its services.[9]

We found those facts to be "more akin to those in which general contractors have been engaged to supply a service and have called upon other firms to assist them in meeting their contractual obligations."[10] Typically, "the general contractor supplying necessaries on the order of an entity with authority to bind the vessel has a maritime lien"; however, "subcontractors hired by those general contractors are generally not entitled to assert a lien on their own behalf, unless **[**6]** it can be shown that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance."[11] Because Man Sugar "retained no control over the selection of a stevedoring concern, and Broussard accepted all the risk associated," we held that LCS was not entitled to a maritime lien.[12]

Ken Lucky typifies the middle-man line of cases.[13] In that case, the following sequence of events occurred: Bulkferts, Inc., the vessel's subcharterer, placed an order for fuel with its managing agent, Eurostem Maritime Limited; Eurostem contacted Brook Oil Ltd., a fuel trader; Brook Oil then instructed Gray Bunkering Services to place an order for fuel with Marine Fuel, the physical supplier; Marine Fuel, in turn, asked Gray for assurances about payment before delivery of the bunkers; Gray notified Marine Fuel that it had been "nominated by the owner" of the vessel to supply the fuel; Marine Fuel delivered the **[*294]** fuel; and the vessel's chief engineer accepted the fuel with the approval of the vessel's master.[14] After having unsuccessfully sought payment, Marine Fuel asserted a maritime lien on the vessel.[15]

The Ninth Circuit found that Marine Fuel was entitled to a lien because **[**7]** the parties agreed that the order originated from Bulkferts, the subcharterer, an entity with authority to bind the ship.[16] Due to that concession, the Ninth Circuit did not "reach . . . the district court's conclusion that Brook was *not* Bulkfert's agent," concluding that Marine Fuel did not need to "establish agency between Brook and Bulkferts to fall within the

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history" required "a more liberal application than that which existed prior to the 1971 amendments to the Maritime Lien Act." ***Id. at 201***. We further explained that Congress intended to "make it easier and more certain for stevedores and others to protect their interests by making maritime liens available where traditional services are routinely rendered." *Id.*

In subsequent decisions, however, we have clarified our "respect for the principle of *stricti juris*," counseling against application of the sweeping language set forth in *Atlantic & Gulf Stevedores* to the present case. *See Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR POPOV MV, 199 F.3d 220, 231 (5th Cir. 1999)*. As we discuss *infra, Lake Charles* stands for the rule in our circuit that a subcontractor is generally not entitled to assert a maritime lien "unless it can be shown that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance." *Id. at 229*. Because *Lake Charles* is on point, we are guided by its application of *stricti juris* here.

[7] ***Id. at 228-29***.

[8] ***Id. at 230***.

[9] ***Id. at 222-23***.

[10] ***Id. at 230***.

[11] ***Id. at 229***.

[12] ***Id. at 230***.

[13] *Marine Fuel Supply & Towing, Inc. v. M/V KEN LUCKY, 869 F.2d 473 (9th Cir. 1988)*.

[14] *Id. at 475*.

[15] *Id.*

[16] *Id. at 477*.

scope of one entitled to a maritime lien under [CIMLA]."[17]

IV.

In this case, there is no dispute that bunkers qualify as necessaries and that Valero provided those necessaries to the Vessel. The sole inquiry before us is whether Valero furnished the necessaries to the Vessel "on the order of the owner or a person authorized by the owner." We conclude that it did not.

The record shows that Verna, through its agent Almi Tankers, contacted OW Malta because it was a "reputable bunker trader[]";that during negotiations, Almi Tankers asked who would be the bunker fuel supplier, and it did not object to Valero's selection; that the sales order confirmation listed Valero as the supplier; that Valero provided the entire bunkering service that Almi Tankers contracted for, with no assistance from O.W. or its affiliates; that the **[**8]** Vessel's agents monitored and tested Valero's performance; and that Almi Tankers expressed concern about O.W.'s ability to pay Valero.

These facts do not demonstrate that Valero provided the bunkers to the Vessel "on the order of the owner or a person authorized by the owner." Valero provided the bunkers at O.W.'s request, and O.W. is not a "person [] presumed to have authority to procure necessaries[.]"[18] These facts are "more akin to those in which general contractors have been engaged to supply a service and have called upon other firms to assist them in meeting their contractual obligations."[19] Thus, Valero must show that an entity authorized to bind the ship "controlled [its] selection . . . and/or its performance."[20] The record, **[*295]** however, proves no more than the Vessel's awareness of Valero, not that the Vessel "controlled" the selection or performance of Valero. *HN5*[↑] Mere awareness does not constitute authorization under CIMLA.[21]

Despite Valero's urging, we decline to apply *Ken Lucky*. As mentioned *supra*, the Ninth Circuit's holding—that the physical supplier could assert a lien—turns on the parties' concession that the physical supplier sold the bunkers to an entity with authority **[**9]** to bind the vessel.[22] Here, Valero dealt with O.W., not with Verna or Almi Tankers, and the record does not establish that O.W. served as Verna's or Almi Tankers' agent.[23] Thus, *Ken Lucky* is inapplicable.

V.

The dissent says that we fail to follow *Lake Charles* because in that case, "we made clear that the 'subcontractor' line of cases is itself divided into two lines of cases: (1) cases requiring 'an entity with authority to bind the vessel' to *'direct* that the general contractor hire a particular subcontractor in order for that subcontractor to be entitled to a lien'; and (2) cases requiring the subcontractor to be 'identified and accepted by the vessel's owner or charterer prior to performance.'" The dissent's view likely emerges from the following passage in *Lake Charles*:

> In keeping with the notion that subcontractors may acquire liens where the vessel's owners retain control over their selection and/or performance, the Ninth and Second Circuits require that an entity with authority to bind the vessel direct that the general contractor hire a particular subcontractor in

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[17] *Id.* The Ninth Circuit separately examined the master's implied authority to incur a lien against the vessel upon accepting the supplies that Marine Fuel delivered, and determined that the master had such authority because a ship's master has *presumed* authority to incur a lien under CIMLA. *Id. at 477-78*.

[18] *46 U.S.C. § 31341(a)*; *see also* ***ING Bank N.V. v. M/V TEMARA, 2018 U.S. App. LEXIS 15895, 2018 WL 2944306, 892 F.3d 511, 521, at *6 (2d Cir. 2018)*** (finding that physical supplier was not entitled to a maritime lien when it provided necessaries at the direction of an O.W. Bunker entity acting as an intermediary "rather than at the direction of the owner or the charterer of the Vessel, or any other statutorily-authorized person"); ***Barcliff, LLC v. M/V DEEP BLUE, 876 F.3d 1063, 1071 (11th Cir. 2017)*** (same); *Galehead, Inc. v. M/V ANGLIA, 183 F.3d 1242, 1245 (11th Cir. 1999)* (finding that supplier provided the bunkers at the trader's request, and that the trader is not a "person [] . . . presumed to have authority to procure necessaries"); ***Port of Portland v. M/V PARALLA, 892 F.2d 825, 828 (9th Cir. 1989)*** (denying maritime lien when supplier dealt with general contractor, not vessel owner or vessel owner's agent).

[19] ***Lake Charles, 199 F.3d at 230***.

[20] ***Id. at 229***.

[21] ***Id. at 232*** (explaining that *HN6*[↑] CIMLA's authority requirement would be rendered meaningless if "awareness that necessaries are being supplied was sufficient, even though those necessaries were procured by an entity without authority to bind the vessel").

[22] *Ken Lucky, 869 F.2d at 477*.

[23] *Id.*

order for that subcontractor to be entitled to a lien. *See Port of Portland, 892 F.2d at 828*; Farwest, 828 F.2d at 526; *Integral Control Sys., 990 F. Supp. at 301*. In other cases in which subcontractors have been **[**10]** found to be entitled to a lien, those subcontractors were identified and accepted by the vessel's owner or charterer prior to performance. *See Stevens, 913 F.2d at 1525, 1534*; Turecamo of Savannah, Inc. v. United States, 824 F. Supp. 1069, 1072 (S.D. Ga. 1993). Owner involvement in directing, testing, and/or inspecting subcontractor performance has also been cited in support of finding a lien in favor of a subcontractor. *See Stevens, 913 F.2d at 1535*; *cf. Marine Coatings, 932 F.2d at 1375 n.9* (listing operator's inspecting subcontractor work and giving provisional and final acceptance to work performed by the subcontractor among evidence that supported court's conclusion that a genuine issue of fact existed regarding general contractor's authority to bind the vessel). Based on these cases, we agree with the district court that LCS has not shown it was entitled to a lien under the circumstances presented here.[24]

We do not read *Lake Charles* as the dissent does. To these eyes, the above specifies three factual scenarios that color the general proposition that a subcontractor is not entitled to a lien, "unless it can be shown that an entity authorized to bind **[*296]** the ship controlled the selection of the subcontractor and/or its performance."[25] We see no adoption, let alone a clear one, of "two lines of cases" branching from the subcontractor line of cases.

Even assuming **[**11]** that *Lake Charles* divided the subcontractor line of cases into "two lines of cases" *sub silentio*, Valero cannot establish that it falls in either one. Verna, through Almi Tankers, neither "direct[ed] that the general contractor hire a particular subcontractor" nor "identified and accepted" Valero "prior to performance." The record merely shows that Verna, through Almi Tankers, was aware that Valero would physically supply the bunkers.

The dissent also says that the majority opinion "creates an unnecessary circuit split with the Eleventh Circuit," citing *Galehead* and likening this case to *Marine Coatings* and *Stevens*.[26] Specifically, the dissent states that *Marine Coatings* and *Stevens* reflect the Eleventh Circuit's embrace of the "second line of cases" of the subcontractor line of cases—*i.e.*, cases requiring the subcontractor to be identified and accepted by the vessel's owner or charterer prior to performance. The dissent, however, overlooks *Barcliff*, in which the Eleventh Circuit held that a subcontractor in the same contractual scenario as here was not entitled to a maritime lien.[27] In so holding, the Eleventh Circuit reviewed *Galehead, Marine Coatings*, and *Stevens*.[28] In determining the **[**12]** law of the Eleventh Circuit, we prefer its own statement of its law.

To begin, a review of the facts and holding in *Barcliff* dispel any notion that we create a circuit split.[29] Technip UK Limited, the vessel owner, sent a request to O.W. Bunkers (UK) Limited and two other suppliers seeking bunker fuel. Technip awarded the contract to O.W. UK. Thereafter, O.W. UK entered into a contract with O.W. Bunker USA, Inc., who then contracted with Radcliff, the physical supplier of the bunkers. Like the present case, Radcliff coordinated delivery with the vessel, and upon delivery, the vessel's chief engineer signed a delivery certificate. After O.W. filed for bankruptcy, Radcliff, having gone unpaid and thus finding itself in the same situation as Valero, asserted a maritime lien against the vessel. The Eleventh Circuit ruled that Radcliff was not entitled to a lien because "Radcliff acted on the order of O.W. USA, not Technip."[30]

To reach that holding, the *Barcliff* court reviewed its jurisprudence on maritime liens. It began with the circuit's general rule, as set forth in *Galehead*, which provides: "Where the owner directs a general contractor to provide necessaries to its vessel, a subcontractor **[**13]** retained by the general contractor to perform the work or provide the supplies is generally not entitled to a maritime lien."[31] The *Barcliff* court then

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[24] ***Lake Charles, 199 F.3d at 231*** (footnote omitted).

[25] ***Id. at 229***.

[26] *See* ***Marine Coatings of Ala., Inc. v. United States, 932 F.2d 1370 (11th Cir. 1991)***; ***Stevens Tech. Servs., Inc. v. United States, 913 F.2d 1521 (11th Cir. 1990)***.

[27] ***Barcliff, 876 F.3d at 1071-73***.

[28] *Id.*

[29] ***Id. at 1065-67***; ***1071-73***.

[30] ***Id. at 1071***.

[31] *Id.* In *Galehead*, Genesis Container Line, a charterer, contacted Polygon Energy Services, Inc. to obtain fuel bunkers for its vessel, and Polygon contacted Establissment

noted that *Galehead* recognizes an exception to the general rule. That is, **[*297]** "where the general contractor is not an agent of the owner, and the owner does not initially order the subcontractor to perform the work, it might still be said that the owner 'somehow authorized' the work if it 'was sufficiently aware of, and involved in, [the] work that it might be said that [the subcontractor] was working for [the owner].'"[32]

This "significant-and-ongoing-involvement exception" emerged from *Marine Coatings* and *Stevens*. The *Barcliff* court proceeded to review these cases, explaining that *Marine Coatings* "involved extensive maintenance, such as painting, coating, and cleaning" and that *Stevens* involved "repair work."[33] In addition, those cases, the *Barcliff* court observed, involved an owner and a subcontractor that "developed a relationship over an extended period of time as the work progressed."[34] The *Barcliff* court then turned specifically to *Stevens*, noting that "the owner was in contact almost exclusively with the subcontractor because **[**14]** the general contractor did not have the capability to perform the work," and "the owner dealt directly with the subcontractor and its employees directed, inspected, tested, and approved the subcontractor's work on a continuing basis."[35] In short, "the owner's participation with the subcontractor was so substantial that it could not seriously be argued the work was not done on the owner's orders."[36] The *Barcliff* court concluded by acknowledging that "[t]he *Galehead* panel juxtaposed *Marine Coatings* and *Stevens* with cases involving a one-off transaction, 'where the degree of involvement with the owner is minimal or non-existent;'"[37] and that "[o]ne of those cases involved fuel provision."[38]

Against this background, *Marine Coatings* and *Stevens* are inapplicable in light of *Barcliff* and Galehead. Though *Barcliff* determined that the physical supplier had waived its argument concerning the *Galehead* exception, no circuit split results by following the holding in *Barcliff*. We are unaware of a case in the Eleventh Circuit, and the dissent proffers none, that applies *Marine Coatings* and *Stevens* to find that a subcontractor may acquire a lien for a one-off transaction in which the vessel **[**15]** owner was merely aware of the subcontractor's identity.[39] The circuits to have addressed the sequence of contracts before us agree that such physical suppliers are not entitled to a maritime lien.[40]

VI.

We affirm the district court's grant of summary judgment for Verna.

Dissent by: HAYNES

Dissent

[*298] HAYNES, Circuit Judge, dissenting:

The majority opinion fails to follow our prior precedent in *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV, 199 F.3d 220, 231 (5th Cir. 1999)* and creates an unnecessary circuit split with the Eleventh Circuit. *See* Galehead, Inc. v. M/V Anglia, 183 F.3d 1242, 1245-46 (11th Cir. 1999) (per curiam); *see also* Noramco Shipping Corp. v. Bunkers Int'l Corp., No. 6:02CV515-ORL-22DAB, 2003 U.S. Dist. LEXIS 20169, 2003 WL 22594419, at *7 (M.D. Fla. Apr. 30, 2003)

Asamar, Ltd. to supply the fuel. Asamar then engaged the physical supplier. This arrangement occurred twice, and Genesis failed to pay Asamar both times. Asamar thereafter assigned its rights to a collection agency, Galehead, who brought suit. 183 F.3d at 1244. The Eleventh Circuit ruled that Galehead was not entitled to a lien, reasoning that "Asamar did not provide the bunkers on order of the owner or an authorized agent." *Id. at 1245*. Rather, the Eleventh Circuit determined that "Asamar provided the bunkers at Polygon's request, and Polygon is not a "'person [] . . . presumed to have authority to procure necessaries[.]'" *Id.* (quoting 46 U.S.C. § 31341(a)).

[32] ***876 F.3d at 1071*** (quoting Galehead, 183 F.3d at 1245).

[33] ***Id. at 1072***.

[34] *Id.*

[35] *Id.* (citing ***Stevens, 913 F.2d at 1525-26, 1535)***.

[36] *Id.* (citing ***Stevens, 913 F.2d at 1525-26, 1535)***.

[37] *Id.* (quoting Galehead, 183 F.3d at 1246).

[38] *Id.*

[39] *See* Galehead, 183 F.3d at 1246 ("That a charterer of a vessel becomes aware that some work performed was by a party somewhere down the chain of contracting and re-contracting does not give rise to a maritime lien.").

[40] *See* ING Bank, 2018 U.S. App. LEXIS 15895, 2018 WL 2944306, at *6-8; ***Barcliff, 876 F.3d at 1071-73***.

("Under Eleventh Circuit jurisprudence, the right of a subcontractor to assert a maritime lien against a vessel for necessaries is not restricted by a rigid rule but instead depends on the degree of involvement between the owner and the subcontractor."). Accordingly, I respectfully dissent.

I agree that Valero is a subcontractor under the "general contractor/subcontractor" line of cases. *Lake Charles* explains the general proposition that "subcontractors hired by those general contractors are generally not entitled to assert a lien on their own behalf, unless it can be shown that an entity authorized to bind the ship controlled the selection of the subcontractor **[**16]** and/or its performance." *199 F.3d at 229*. However, this exception is not as narrow as the majority opinion makes it seem. Unmentioned by the majority opinion, in *Lake Charles* we made clear that the "subcontractor" line of cases is itself divided into two lines of cases: (1) cases requiring "an entity with authority to bind the vessel" to "*direct* that the general contractor hire a particular subcontractor in order for that subcontractor to be entitled to a lien"; and (2) cases requiring the subcontractor to be "identified and accepted by the vessel's owner or charterer prior to performance." *Id. at 231*. In the second line of cases, "[o]wner involvement in directing, testing, and/or inspecting subcontractor performance has also been cited in support of finding a lien in favor of a subcontractor."[1] *Id.* We clearly adopted both lines of cases but found that the subcontractor in *Lake* Charles did not meet either one. *See id.*

The Eleventh Circuit has embraced the second line of cases. In *Marine Coatings of Alabama v. United States*, the Eleventh Circuit addressed the question of the availability of a subcontractor lien in a repair services contract. *932 F.2d 1370, 1375-76 (11th Cir. 1991)*. There, **[**17]** the United States Navy entered into Master Ship Repair Contracts with Braswell Shipyards, Inc., that permitted Braswell to hire subcontractors, although "the contracts did not purport to make Braswell an agent of the government." *Id. at 1372*. Braswell subcontracted with Marine Coatings of Alabama, Inc. ("MCI"), for the painting, cleaning, and coating of three vessels, and the United States inspected and approved MCI's work. *Id. at 1373*. The United States paid Braswell, but Braswell filed for Chapter 11 **[*299]** without paying MCI. *Id.* Despite being a subcontractor, MCI asserted a maritime lien against the three vessels, and the Eleventh Circuit found "a genuine issue as to whether the government procured MCI's work, authorized the work, or ratified the procurement of MCI's work. Alternatively, there is a genuine issue as to whether Braswell was authorized by the government to procure MCI's work." *Id. at 1376*.

Likewise, in *Stevens Technical Services., Inc. v. United States*, the Sealift Antarctic needed a "major overhaul." *913 F.2d 1521, 1525 (11th Cir. 1990)*. Marine Transport Lines, Inc. ("MTL"), on behalf of the United States government, solicited bids, and Atlantic submitted a bid that identified Stevens as a subcontractor. *Id.* Atlantic then entered into a memorandum **[**18]** of understanding with Stevens, dividing the work between the two of them. *Id.* Subsequently, Atlantic's bid was accepted and MTL awarded it the contract. *Id.* During the course of the work, government representatives inspected, tested, and approved the work performed by both Atlantic and Stevens. *Id. at 1525-26*. Once work was completed, MTL paid Atlantic, but Atlantic failed to pay Stevens. *Id. at 1526*. Stevens subsequently filed actions against Atlantic *in personam* and against the Sealift Antarctic *in rem. Id.* In vacating and remanding for further reconsideration, the Eleventh Circuit pointed to several factors that might have indicated Stevens was entitled to a maritime lien: (1) that the government's representatives were aware of Steven's performance and the principal contract showed Stevens as a subcontractor having more than 15 percent of the contract's value; (2) that the government's representatives knew that Atlantic was not capable of full performance on its own; (3) that the contract covering the work was fully authorized by the government's representatives; (4) that the government's representatives worked directly with Stephens in discussing, testing, and inspecting Stephen's work; and (5) that all **[**19]** of the work was accepted and fully compensated to Atlantic. *Id. at 1534-35*.

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[1] *Compare* Galehead, 183 F.3d at 1245 ("Where the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transaction, the courts have found a triable issue of fact about whether the third-party deserved a lien."), *with* ***Cianbro Corp. v. George H. Dean, Inc., 596 F.3d 10, 17-18 (1st Cir. 2010)*** (holding that subcontractor was not entitled to a lien where "the record establishes that [the vessel's owners] did not have any participation in the subcontracting of this work or control over its performance"), *and* ***Bonanni Ship Supply, Inc. v. United States, 959 F.2d 1558, 1565 (11th Cir. 1992)*** ("[T]he mere fact of acceptance and full compensation to the prime contractor, absent any allegation that the [vessel's owner] had any knowledge of *performance by the subcontractor plaintiff*, is insufficient to create a genuine issue of material fact regarding whether the plaintiff was a maritime lienor under the MCILA.").

Here, the majority opinion significantly understates Almi's involvement in the bunkering transaction when it describes it as a "one-off transaction in which the vessel owner was merely aware of the subcontractor's identity." To the contrary, the parallels to *Stevens*, in light of the standards adopted in *Lake Charles*, are clear: (1) during negotiations with O.W., Almi made a point to discover who would perform the bunkering; it did not object to Valero's selection and thus impliedly approved Valero prior to finalizing the bunkering agreement; (2) Almi knew that O.W., as a "reputable bunker trader," could not bunker the vessel itself but would purchase bunkers from a physical supplier; (3) the contract with O.W., which designated Valero as the supplier, was fully authorized by a party with authority to bind the vessel; (4) the vessel's agents engaged directly with Valero and tested and approved of Valero's bunkers; and (5) the vessel's agents approved of the bunkers and signed a certificate confirming performance.

The majority opinion's reliance on *Barcliff, LLC v. M/V DEEP BLUE, IMO No. 9215359* is misplaced. *See 876 F.3d 1063, 1071-73 (11th Cir. 2017)*. As an initial **[**20]** matter, *Barcliff* determined that the central issue here was not properly before it, thus the commentary relied on by the majority opinion is mere dicta. *See id. at 1073*. Even if it were not dicta, *Barcliff* does not mandate the result reached by the majority opinion. As already shown, similar to *Stevens*, Almi "was sufficiently aware of, and involved in, [Valero's services] that it might be said that [Valero] was working for [it]." *See id. at 1071* (quoting *Galehead, **[*300]** 183 F.3d at 1245*). Moreover, *Barcliff* does not exclude one-off bunkering services that satisfy this rule. *Barcliff* indicated that the exception has not been applied where the owner's involvement was "minimal or non-existent," and then it observed that "[o]ne of those cases involved fuel provision." *Id. at 1072* (citing *Tramp Oil & Marine, Ltd. v. M/V "Mermaid I", 805 F.2d 42, 45 (1st Cir. 1986)*). In *Tramp Oil*, however, no relationship existed between the vessel's owner and the fuel broker seeking the lien, and the vessel's owner did not know about the fuel broker (who was retained by an intermediary) until after its work was completed. *See Tramp Oil, 805 F.2d at 45* ("In this case, however, no relationship existed between Tramp and the vessel, and neither the vessel owner nor the charterer even knew of Tramp until after Tramp had made the payment to Exxon.").

Although a subcontractor, **[**21]** the interactions between the vessel and Valero are such that Valero is entitled to assert a maritime lien. That O.W. was expected to pay Valero is not the point; "[e]xpectations that payment for the services would be made by some party other than the vessel does not vitiate a lien by one who, as permitted under [the Act], is not required to prove reliance on the credit of the vessel."[2] *Stevens, 913 F.2d at 1536*.

For these reasons, I conclude Valero is entitled to relief. From the majority opinion's decision to the contrary, I therefore respectfully dissent.

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[2] Verna argued in its brief and at oral argument that it has already paid OW Malta for the fuel in order to settle a contractual arbitration dispute in the United Kingdom; that this decision will result in Verna being forced to pay twice for the same fuel. That reality is one of Verna's own making—an attempt to extinguish O.W.'s claims while this action was pending. I note that Almi Tankers expressed concern to O.W. regarding the conglomerate's financial situation and reserved the right to pay Valero directly, ultimately deciding to pay O.W. Verna's unilateral decision does not control the outcome here.