CONFLICTING INTERPRETATIONS: THE FIFTH CIRCUIT'S DECISION IN *VALERO MARKETING & SUPPLY CO. V. M/V ALMI SUN* AND THE ROAD TO UNIFORMITY

*Kelicia D. Raya**

I. Introduction 1
II. Background on Maritime Liens 4
A. Maritime Liens in General 4
B. In Rem 5
C. Liens for Necessaries 6
III. Liens for Necessaries: Lax Interpretation v. Strict Interpretation 7
A. Jurisprudence Applying Lax Interpretations 7
1. General Contractor/Subcontractor Line of Cases 8
2. Principal/Agent Line of Cases 10
B. Circuit Decisions Strictly Construing CIMLA 11
IV. Summary of Valero Mktg. & Supply v. M/V ALMI SUN 15
A. Factual Background 15
B. The Decision 16
C. The Dissent 17
D. Implications of the Decision 17
V. A Proposal 18
VI. Alternative Actions Available to Suppliers 21
VII. Conclusion 22
III. Appendix 23

I. INTRODUCTION

Various transactions in admiralty jurisdiction give rise to maritime claims.[1] Maritime liens are a privileged claim upon maritime property. However, in recent years, the right to assert

*J.D. 2021, Loyola University New Orleans College of Law; B.A. 2014, Xavier University of Louisiana.[1]Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc., 346 F.3d 552 (5th Cir. 2003) (stating admiralty jurisdiction is a prerequisite for the existence of a maritime lien.)

these claims has changed.[2] Many maritime liens arise by operation of law, but some are created by statute.[3] One such statute is the Commercial Instruments and Maritime Lien Act (CIMLA).[4] Subtitle III of 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" that may be enforced *in rem*.[5] Over time, debates have transpired as to whether a local supplier of necessaries has the right to assert a maritime claim. The issue arises when courts, guided by subtitle III of CIMLA, apply different interpretations of who can assert a maritime lien. Specifically, courts today are conflicted on whether to apply CIMLA *stricti juris*[6] or to allow a lax interpretation of the statute that makes it easier for suppliers to assert *in rem* claims.

As business relationships become more complex, circumstances may arise that leave parties uncertain as to whether they can assert a maritime claim. There was a time when contracts for necessaries were strictly between the vessel owner and the supplier. The supplier had a right to assert a maritime lien against the vessel from the moment he supplied the necessaries. Today, vessel contracts for necessaries are more compounded. The vessel owner is not contracting directly with the supplier but instead with a trader. That trader contracts with a subsidiary, who then contracts directly with a supplier to obtain necessaries. In this context, it is unclear as to whether the supplier should have a right to assert a maritime lien under CIMLA. Older jurisprudence from the Fifth, Ninth, and Eleventh Circuits has established a more lax interpretation and application of CIMLA, which allowed the local supplier to assert a maritime lien against the vessel that it would not have otherwise had.[7] However, a string of recent decisions by the Second, Fifth, and Ninth Circuits have

---

[2] *Compare* Valero Mktg. & Supply Co. v. M/V ALMI SUN, 893 F.3d 290, 292 (5th Cir. 2018); *with* Lake Charles Stevedores, Inc. v. Professor Vladimir M/V POPOV M/V, 199 F.3d 220, 229 (5th Cir. 1999).

[3] Thomas Schoenbaum, Admiralty and Maritime Law § 9-1, at 770 (6th ed. 2018).

[4] 46 U.S.C. §§ 31301 to 31343.

[5] 46 U.S.C. § 31342.

[6] *Stricti Juris*, Black's Law Dictionary (10th ed. 2014). Latin meaning "of strict right or law." The rule of *stricti juris* requires the strict, narrow and close interpretation of the rights.

[7] Lake Charles Stevedores, Inc. v. Professor Vladimir M/V POPOV M/V, 199 F.3d 220, 229 (5th Cir. 1999); Marine Fuel Supply & Towing v. M/V KEN LUCKY, 869 F.2d 473 (9th Cir. 1988); Marine Coatings, Inc., of Alabama v. U.S., 932 F.2d 1370 (11th Cir. 1991).

moved away from that lax interpretation in favor of a more strict constructionist approach to CIMLA. This strict interpretation of CIMLA denies the local supplier a maritime lien in cases where the order for supplies did not come directly from the vessel owner or agent.[8]

The confusion surrounding whether to interpret CIMLA *stricti juris* or to allow a more lenient interpretation for local suppliers needs to be addressed, and a common application of CIMLA must be established. If this issue remains unaddressed, many federal circuit courts will continue to make inconsistent rulings that not only vary from their sister circuits, but also create circuit splits and apply different interpretations for one commonly read statute. It is critical to address this issue now, especially in the Fifth Circuit, as its recent decision in *Valero Mktg. & Supply Co. v. M/V ALMI SUN* brought this problem to the forefront when it departed from the Fifth Circuit's prior precedent established in *Lake Charles. v. Professor Vladimir M/V POPOV M/V*.[9]

In *Valero Mktg. & Supply Co. v. M/V ALMI SUN*, the United States Fifth Circuit Court of Appeals ultimately held that CIMLA should be strictly construed and that maritime liens "are not 'lightly extended by construction, analogy or inference.'"[10] In its departure from the precedential language established in *Lake Charles*, which applied a lax interpretation of CIMLA, the *Valero* court created an intercircuit conflict as to the application of CIMLA. This issue is extremely problematic as it will affect future court decisions in which district court judges will not have a clear precedent that CIMLA should be construed *stricti juris*. It is for this reason this comment proposes a solution. In essence, the Fifth Circuit should grant an *en banc* review and rule to completely jettison the application of a permissive interpretation of CIMLA, thus ruling to only apply CIMLA *stricti juris*. This course of action is appropriate as it will create uniformity within the Fifth Circuit moving forward regarding the appropriate interpretation of CIMLA.

---

[8] Valero Mktg. & Supply Co. v. M/V ALMI SUN, 893 F.3d 290, 292 (5th Cir. 2018); *Clearlake Shipping PTE. v. NuStar Energy Servs.*, 911 F.3d 646 (2nd Cir. 2018); Bunker Holdings Ltd. v. Yang Ming Liberia Corp., 906 F.3d 843 (9th Cir. 2018); Ing Bank N.V. v. Temara IMO, 2018 WL 2944306 (2nd Cir. 2018).

[9] *See* Matthieu Robert, *Somebody to Lien on: Subcontractor Maritime Liens as they relate to Valero Mktg. & Supply Co. v. M/V ALMI SUN and the O.W. Bunker Bankruptcy*, 93 Tul. L. Rev. Online 63 (May 2019).

[10] Valero Mktg. & Supply Co. v. M/V ALMI SUN, 893 F.3d 290, 292 (5th Cir. 2018).

This comment will begin by exploring the historical background of maritime liens and the meaning of "necessaries" under CIMLA. Next, it will compare previous court decisions applying a lax interpretation of CIMLA with those recent decisions strictly construing CIMLA. Third, it will summarize *Valero Mktg. & Supply Co*. and identify the implications of the court's decision. Fourth, this comment will propose a solution to ease the confusion surrounding a local supplier's right to assert a maritime lien. Finally, this comment will explore alternative actions available for local suppliers who cannot assert a maritime lien.

II. BACKGROUND ON MARITIME LIENS

A. Maritime Liens in General

A maritime lien is a claim on maritime property. Generally, a maritime lien arises by operation of law for services rendered or injuries caused by that property.[11] A maritime lien is also considered a special property right.[12] CIMLA is produced within Title 46 of the U.S Code.[13] Currently, this title lists ten categories giving rise to maritime liens under U.S. law, one of which concerns liens for necessaries.[14] In the context of maritime liens, maritime property consists of things such as vessels, cargo, and freights.[15] Under CIMLA, a maritime lien attaches from the moment the service is rendered or injury occurs.[16] The lien is "non-consensual" and does not require recordation to be enforced.[17] Therefore, the creditor owns the right, from the moment the services are rendered, to seize the vessel and sell it to repay the debt owed.

Additionally, under CIMLA a maritime lien cannot be established through contract.[18] It is purely a creature of statute.[19] In a June 2018 decision, the Second Circuit held that "if a party does not comply with the express provisions of CIMLA, it is not

---

[11] Thomas Schoenbaum, Admiralty and Maritime Law § 9-1, at 767 (6th ed. 2018).

[12] *In re* Container Applications Int'l, Inc., 233 F.3d 1361, 1362 (11th Cir. 2000).

[13] 46 U.S.C.

[14] SCHOENBAUM, *supra* note 11, at 771-75.

[15] *See* Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., 306 F.2d 188 (9th Cir. 1962).

[16] *See* Riffe Petroleum Co. v. Cibro Sales Corp., 601 F.2d 1385 (10th Cir. 1979).

[17] SCHOENBAUM, *supra* note 11, at 783.

[18] *See* Ing Bank N.V. v. Temara IMO, 2018 WL 2944306 (2nd Cir. 2018).

[19] *Id*.

entitled to a maritime lien,"[20] thereby reiterating that principles of contract law cannot be used to work around CIMLA provisions.[21] Thus, a local supplier cannot assert a maritime lien on a vessel by contract.

B. In Rem

Maritime liens attach to a vessel as an *in rem* right or a right against the property. An *in rem* right differs from an *in personam* right against the vessel owner.[22] "The theoretical basis of the maritime lien …is…the legal fiction that the ship is the wrongdoer."[23] A maritime lien is "a right in the maritime property (*jus in re*) and a right against the property (*jus in rem*)."[24] In other words, the creditor asserting the maritime lien can choose to ignore the owner and have a right of action directly against the vessel.[25]

Maritime liens were created as a security device to protect vessel service providers.[26] This security device helps keep vessels moving in commerce and also prevents them from escaping the debts owed to suppliers and vendors.[27] Maritime liens can also be understood to function as a credit system.[28] Under this system, a vessel need not bring large sums of money on voyages to purchase necessaries such as bunkers, insurance, and supplies. Instead, the vessel can request the necessaries required on credit and pay the debt at a later date.[29] Thus, the vessel stays in commerce by receiving the required necessaries, and the supplier gains a security interest or maritime lien in the vessel. Once a maritime lien is established, the vessel can be arrested, and the owner must then furnish security to cover a potential judgment.[30]

---

[20] *Id*. at 522.

[21] *Id.* at 522 (citing Intel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 982 F.2d 765, 768 (2d Cir. 1992)).

[22] *See* SCHOENBAUM, *supra* note 11, § 9-1.

[23] *See* SCHOENBAUM, *supra* note 11, at 767-68.

[24] SCHOENBAUM, *supra* note 11, at 767-68.

[25] See 2 Robert Force & Martin J. Norris, The Law of Seamen § 20:3 (5th ed. 2003).

[26] *See* SCHOENBAUM, *supra* note 11, 770.

[27] *See* Riffe Petroleum Co. v. Cibro Sales Corp., 601 F.2d 1385 (10th Cir. 1979).

[28] Eric Mayer, 55 C.J.S. Maritime Liens § 2 (2016).

[29] *Id.*; *See* SCHOENBAUM, *supra* note 11, § 9-1.

[30] *See* Gabarick v. Laurin Maritime (America), Inc., 54 F.Supp.3d 602 (E.D. La. 2014) (expanding on the opportunity of the vessel owner to furnish security in lieu of the lien attaching to the vessel itself.)

C. Liens for Necessaries

Generally, any goods or services that are useful to the vessel to keep it in commerce encompass the term "necessaries."[31] This includes money, skill, bunkers, pilotage services, or wharfage.[32] Additionally, courts have held that unpaid insurance premiums may give rise to maritime liens.[33] In *Equilease Corp. v. M/V SAMPSON*, the Fifth Circuit Court of Appeals held that vessel insurance is a necessary as a vessel needs insurance to remain in commerce.[34]

Under Title 46 U.S.C. Section 31301, CIMLA provides the authority for what is considered a necessary.[35] This provision explains that "necessaries" include repairs, towage, bunkers, and the use of drydocks and marine railways.[36] Many scholars agree that the purpose of CIMLA was to make private interests in the shipping industry more attractive by balancing competing interests of suppliers and vessel owners.[37] The suppliers wanted a clear bright-line rule that would allow for a maritime lien to attach to a vessel once the vessel defaulted.[38] Conversely, the vessel owners sought to avoid lien attachments because such attachments would lead to the seizure of vessels.[39] "The Lien Act, first enacted in 1910, conferred a maritime lien on those who furnished 'repairs, supplies, or other necessaries, including the use of drydock or marine railway.'"[40] However, the Act now 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; may bring a civil action in rem to enforce the lien; and is not required to allege or prove in the action that credit was given to the vessel.[41]

---

[31] Equilease Corp. v. M/V SAMPSON, 793 F.2d 598 (5th Cir. 1986); Margaret Braum, *Meaning and Construction of 'Furnishing' and 'Necessaries' Under the Federal Maritime Lien Act*, 12 Tul. Mar. L.J. 337 (1988).

[32] SCHOENBAUM, *supra* note 11, at 788-89.

[33] *Equilease Corp*., 793 F.2d at 604.

[34] *Id.*

[35] 46 U.S.C. 31301(4) (2012); Braum, *supra* note 31, at 339-40.

[36] 46 U.S.C. 31301(4) (2012).

[37] Braum, *supra* note 31, at 337.

[38] Braum, *supra* note 31, at 337.

[39] Braum, *supra* note 31, at 337.

[40] Braum, *supra* note 31, at 338 (internal quotations omitted).

[41] 46 U.S.C § 31342 (2012).

Therefore, to assert a lien under this section a person must (1) furnish a necessary; (2) to a vessel; (3) on the order of the owner or a person authorized by the owner.[42]

III. LIENS FOR NECESSARIES: LAX INTERPRETATION V. STRICT INTERPRETATION

Despite even the seemingly comprehensive nature of CIMLA, the Fifth, Ninth, and Eleventh Circuits seemingly apply a more permissive interpretation to its provisions. However, more recent jurisprudence from the Second, Fifth, and Eleventh Circuits has ruled to strictly construe CIMLA and deny local suppliers a maritime lien. As a result, the question remains whether courts should completely jettison the application of lax interpretations of CIMLA in favor of a bright line rule to strictly interpret CIMLA, thereby ruling to deny the local supplier a maritime lien. Accordingly, this section first examines the application of these permissive interpretations of CIMLA established in certain jurisdictions. Lastly, this section will discuss recent jurisprudence interpreting CIMLA *stricti juris*.

A. Jurisprudence Applying Lax Interpretations

Older jurisprudence from the Fifth, Ninth, and Eleventh Circuits established a precedent of applying a more permissive interpretation of CIMLA in order to allow the local supplies to assert a maritime lien. These circuits are guided by the Fifth Circuit's decision in *Lake Charles Stevedores, Inc. v. Professor Vladimir M/V POPOV*. The rule from *Lake Charles* states 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 directly controlled the selection of the subcontractor and/or its performance."[43]

In *Lake Charles*, the Fifth Circuit reasoned that whether a local supplier has a lien is determined not by the expressed language of the statute, but rather by the nature of the relationship between the owner, the intermediary, and the local supplier.[44] In so reasoning, the court distinguished between two categories of cases to help courts determine the nature of the relationships: the general contractor/subcontractor line of cases,

---

[42] *Id.*

[43] *See* Lake Charles Stevedores, Inc. v. Professor Vladimir M/V POPOV M/V, 199 F.3d 220, 229 (5th Cir. 1999).

[44] *Id.* at 230.

typified by this decision,[45] and the principal/agent line of cases, typified by the Ninth Circuit case *Marine Fuel Supply & Towing v. M/V KEN LUCKY*, *infra*.[46]

1. General Contractor/Subcontractor Line of Cases

In *Lake Charles*, the Fifth Circuit considered a claim for a maritime lien brought by stevedores[47] who had loaded cargo onto a vessel.[48] ED&F Man Sugar, Inc. ("Man Sugar") purchased rice from Broussard Rice Mill ("Broussard").[49] Broussard was responsible for providing the stevedoring services to get the rice loaded onto the vessel, sub-chartered by Man Sugar, which would then delivered the rice to Man Sugar.[50] Freight forwarder Reid & Company asked Lake Charles Stevedores to submit a bid for loading the rice.[51] Lake Charles Stevedores was told it would be working for Broussard.[52] Ultimately, Lake Charles Stevedores was awarded the contract and subsequently loaded the vessel.[53] The vessel's master signed Lake Charles Stevedore's activity sheets and a receipt, which confirmed reception of the rice.[54] Man Sugar made its final payment to Broussard, and Lake Charles Stevedores sent its invoice to Broussard.[55] The issue in this matter arose when Broussard failed to pay Lake Charles Stevedores, which caused Lake Charles Stevedores to file suit seeking to assert a maritime lien.[56] In the initial suit, the district court denied Lake Charles Stevedores a lien, and Lake Charles Stevedores appealed.[57] Upon review, the Fifth Circuit distinguished different standards for two lines of cases regarding maritime liens.[58] In the general contractor/subcontractor line of cases, the general contractor supplying necessaries on the order of the owner or agent

---

45 *See Lake Charles*, 199 F.3d at 229.

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

47 A person or company that hires longshore and harbor workers to load and unload ships.

48 *Lake Charles*, 199 F.3d at 221.

49 *Id*. at 222.

50 *Id*.

51 *Id*.

52 *Id*.

53 *Lake Charles*, 199 F.3d at 222-23.

54 *Id.* at 223.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Lake Charles*, 199 F.3d at 220.

with authority to bind the vessel has a lien, but generally, subcontractors do not unless it can be shown that an entity authorized to bind the ship controlled the selection of the supplier and/or its performance.[59] In the principal/agent or middle-man line of cases, however, the local supplier may obtain a maritime lien but only under certain circumstances.[60]

The court concluded that the situation presented was not similar to the middle-man line of cases as represented by *Ken Lucky*, *infra*, but was more like the general contractor/subcontractor relationship.[61] Thus, in order to obtain a maritime lien, Lake Charles Stevedores needed to show that the vessel owner retained control over its selection and/or performance.[62] Because the facts showed that Broussard, not Man Sugar, selected Lake Charles Stevedores, the court affirmed the district court's denial of the maritime lien.[63]

The precedential language in *Lake Charles* informs a court's decision regarding whether a subcontractor or supplier is entitled to a maritime lien. Clearly, the Fifth Circuit in this decision did not apply a strict interpretation of CIMLA as it distinguished different standards under which a local supplier or subcontractor may assert a maritime lien against a vessel although the supplier was not authorized by the owner or agent. Under *Lake Charles*, this lax interpretation of CIMLA will make it more challenging for district court judges to determine whether a local supplier has a maritime lien on a vessel. Not only will judges have to depart from the expressed language of the statute, but they will also need to apply multiple tests dissecting the relationships between each entity involved in the transaction instead of focusing on the one relationship between the two parties before the court. For example, the court in *Lake Charles* could have easily arrived at the same conclusion and taken the least amount of time if it would have applied a strict interpretation of CIMLA. As discussed *supra*, to assert a lien a person must (1) furnish a necessary; (2) to a vessel; (3) on the order of the owner or a person authorized by the owner.

---

59 *Id.* at 228.
60 *Id.* at 229.
61 *Id.* at 230.
62 *Id.* at 223-25.
63 *Lake Charles*, 199 F.3d at 231-33.

In this matter, applying the unambiguous language from the statute, it clear that Lake Charles Stevedores met the first two elements of the test, but failed to satisfy the third element. First, Lake Charles Stevedores properly furnished a necessary when it provided stevedoring services. Second, Lake Charles Stevedores properly provided the services to the vessel. However, regarding the third prong, Lake Charles Stevedores did not furnish the stevedoring services on the order of the owner of the vessel or an agent with authority to bind it. Therefore, Lake Charles Stevedores was properly denied a maritime lien. Given the above analysis, the lax interpretation is not only more time consuming, requiring more analysis, but one could come to the exact conclusion by applying CIMLA *stricti juris*.

2. Principal/Agent Line of Cases

Likewise, the lax interpretation of CIMLA allowing for an analysis of a principal/agent relationship can also be discarded in favor of strict interpretation. The agency, or middle-man, line of cases is defined by the court's decision in *Ken Lucky*. Bulkferts, Inc. subchartered M/V KEN LUCKY.[64] During its voyage, M/V KEN LUCKY needed bunker fuel, and the charterer, Bulkerts, reached out to its managing agent, Eurostem.[65] Through Eurostem, Bulkferts placed an order for fuel.[66] Eurostem then subcontracted out to Brook Oil, who in turn contracted out to Gray Bunkering Services to place an order for the fuel with Marine Fuel.[67] The vessel's local agent arranged for delivery of the supplies, and the vessel's chief engineer accepted the supplies with the approval of the master of the vessel.[68] Marine Fuel then billed Gray Bunkering Services for the supplies, but before either Gray or Marine Fuel was paid, Brook Oil filed for bankruptcy.[69]

The district court refused to grant Marine Fuel a maritime lien because Brook Oil had no authority, presumed or implied, to subject M/V KEN LUCKY to a lien.[70] Further, Brook Oil acted independently of Bulkferts in supplying the vessel.[71]

---

64 *Marine Fuel Supply*, 869 F.2d at 475.
65 *Id*.
66 *Id*.
67 *Id*.
68 *Id.*
69 *Marine Fuel Supply*, 869 F.2d at 475.
70 *Id.*
71 *Id.* at n.1.

On appeal, the Ninth Circuit found that an agency relationship existed between Brook Oil and Bulkferts "because appellees have already proven that the fuel and bunkers were sold to Bulkferts" rather than a subcontractor.[72] Therefore, the court concluded "Marine Fuel need not establish agency between Brook and Bulkferts to fall within the scope of one entitled to a maritime lien under the Act."[73] Instead, the court focused on the following sequence of events: (1) that Bulkferts was authorized to bind the vessel, (2) Eurostem (Bulkferts' agent) ordered the fuel, and (3) Marine Fuel delivered the fuel to the vessel.[74] Therefore, the court found that Bulkferts had presumed authority under CIMLA to order the bunkers and bind the vessel and.[75] Thus, in applying a permissive interpretation in construing CIMLA, the court concluded that Marine Fuel was entitled to a maritime lien.[76]

The Court correctly concluded that Eurostem, as Bulkferts' agent, had authority to bind the vessel; however, Brook Oil did not. This is another case where applying a lax interpretation of CIMLA can lead to courts granting maritime liens to those who do not have a right to assert it under the plain language of the statute. Clearly, Eurostem had authority to bind the vessel but it subcontracted out to Brook Oil to fulfil the order. Had Brook Oil furnished the bunkers, applying the plain language of the statute, Brook Oil would have been able to assert a maritime lien on the vessel. As it stands, Brook Oil did not fulfil the order but instead contracted out to Gray Bunkering Services, who then contracted with Marine Fuel. Marine Fuel did not furnish necessaries on the order of Bulkferts or Bulkferts' agent, Eurostem, but rather on the order of Gray Bunkering Services who was not authorized to bind the vessel. Therefore, Marine Fuel was not the correct entity the statute sought to protect by awarding a maritime lien because the three-prong test derived from the statute was not met.

B. Circuit Decisions Strictly Construing CIMLA

In *Galehead, Inc. v. M/V ANGLIA*, the Eleventh Circuit Court of Appeals took an approach similar to *Valero*, *infra*, and applied a strict interpretation of CIMLA but referenced circumstances in which Courts may choose to apply more

---

72 *Id.* at 477.

73 *Id.*

74 *Marine Fuel* Supply, 869 F.2d at 477.

75 *Id.*

76 *Marine Fuel Supply*, 869 F.2d at 473.

permissive interpretations.[77] The background of this case is extremely complex. Therefore, a roadmap provided in the appendix details the parties and their relationship to each other.

In *Galehead*, the court considered three purported liens on M/V ANGLIA arising from three occasions when fuel was supplied to the vessel.[78] In August 1995, Genesis, the charterer, contacted Polygon to obtain bunkers.[79] Subsequently, Polygon subcontracted with Asamar. Asamar found a supplier who supplied and delivered the fuel to the ship.[80] Asamar paid the local supplier but never received payment from Genesis.[81] Ultimately, Asamar assigned its claim to Galehead, a collection agency.[82]

The same sequence of events occurred again in September 1995, and once again, Asamar assigned its claim against M/V ANGLIA to Galehead.[83] In October 1995, Genesis again sought fuel for M/V ANGLIA.[84] However, this time Polygon bypassed Asamar to contract directly with the local supplier.[85] Once again, Genesis did not pay, and Polygon assigned its claim to Galehead.[86]

Galehead brought suit seeking payment and asserted three liens on the ship, the first two assigned by Asamar and the third by Polygon.[87] In a majority opinion, the court held Asamar had no liens to assign to Galehead because it did not act "on the order of the owner."[88] Rather, Asamar acted at Polygon's request.[89] Polygon, however, was in direct privity with Genesis and clearly acted on Genesis's orders.[90] Although Polygon subcontracted to a third party when it contracted directly with the supplier for bunkers, it nevertheless satisfied all three elements of the maritime lien statute: (1) Polygon provided necessaries; (2) to the vessel (M/V ANGLIA); (3) on the order of the owner (Genesis).[91]

---

77 Galehead, Inc. v. M/V ANGLIA, 183 F.3d 1242 (11th Cir. 1999).
78 *Id.* at 1242.
79 *Id.* at 1244.
80 *Id.*
81 *Id.*
82 *Galehead*, 183 F.3d at 1244.
83 *Id.*
84 *Id.* at 1244-45.
85 *Id.*
86 *Id.*
87 *Galehead*, 183 F.3d at 1245.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.* at 1244-45.

Thus, the court ruled that Galehead was entitled to the lien assigned by the general contractor, Polygon, but it was not entitled to the liens assigned by the subcontractor, Asamar.[92]

Although the court correctly applied a strict interpretation of CIMLA to allow Galehead to assert the maritime lien assigned by Polygon, it also went further and discussed a circumstance in which the supplier may be able to assert a maritime lien even if the owner or agent does not place the order.[93] The court described this circumstance as an exception called the significant-and-ongoing involvement exception. Essentially, 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, the owner still may have "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."[94] Specifically, the court held that "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) is owed a maritime lien.[95] Ultimately, *Galehead* arrived at the significant-and-ongoing involvement exception by looking to prior Eleventh Circuit cases on the subject. [96]

The Eleventh Circuit cases on which *Galehead* relied were the *Marine Coatings, Inc., of Alabama v. United States*;[97] *Stevens Technical Services, Inc. v. United States*;[98] and *Bonnanni Ship*

---

92 *Galehead*, 183 F.3d at 1245.

93 *Id.*

94 *Id.* at 1245-46.

95 *Id.* at 1245.

96 *See* Marine Coatings, Inc., of Alabama v. U.S., 932 F.2d 1370 (11th Cir. 1991) (holding that the plaintiff, a subcontractor, who made repairs on a couple of vessels at the request of the contractor could assert a maritime lien. The following facts were dispositive: (1) the owner of the vessel was aware of the subcontractor's performance before and during the performance; (2) the subcontractor performed between 35% and 50% of the work performed on the vessels; (3) and the owner inspected the subcontractor's work.); *see also* Stevens Technical Services, Inc. v. U.S., 913 F.2d 1521 (11th Cir. 1990) (reasoning that the repairer was entitled to a maritime lien because the owner was aware beforehand of the repairer's role and the repairer was listed on the contract with the owner).

97 *See* Marine Coatings, Inc., of Alabama v. U.S., 932 F.2d 1370 (11th Cir. 1991).

98 *See* Stevens Technical Services, Inc. v. U.S., 913 F.2d 1521 (11th Cir. 1990).

Supply, Inc. v. United States.[99] Each of these decisions enforced the application of the significant-and-ongoing involvement exception to CIMLA. In both *Marine Coatings*, *supra*, and *Stevens Technical*, the court ruled that "where the level of involvement between the owner and the third party provider was significant and ongoing during the pertinent transaction, there is an issue of fact as to whether or not the third-party was entitled to a lien."[100] Similarly, in the *Bonnanni Ship Supply* decision, the court held that a third-party provider is not entitled to a lien where the degree of involvement with the owner is minimal or nonexistent.[101]

Another recent decision which applied CIMLA *stricti juris* is the Ninth Circuit's decision in *Bunker Holdings v. Yang Ming Liberia*.[102] Decided October 2018, the Ninth Circuit ruled that CIMLA is to be construed *stricti juris*, thus denying the local supplier, Bunker Holdings, a maritime lien.[103] Here, the owner of M/V YM SUCCESS, Yang Ming Liberia Corp., ordered bunkers from O.W. Bunker Far East.[104] Next, O.W. Bunker Far East contracted with Bunker Holdings to purchase the bunkers.[105] Finally, Bunker Holdings supplied bunkers to M/V YM SUCCESS while the ship was docked in Nakhodka, Russia.[106]

Strictly construing CIMLA, the court held that Bunker Holdings is entitled to a maritime lien only if "it provided necessaries to a vessel on order of the owner or a person authorized by the owner."[107] Because Bunker Holdings did not supply the bunkers on the order of the vessel's owner, it had the burden of proving that O.W. Bunker Far East was "a person authorized by the owner" to bind the vessel.[108] Ultimately, Bunker Holdings could not meet its burden of proof as O.W. Far East does

---

[99] *See* Bonnanni Ship Supply, Inc. v. U.S.., 959 F.2d 1558, 1559 (11th Cir. 1992).

[100] *See Marine Coatings*, 932 F.2d at 1370; *See also Stevens Technical Services*, 913 F.2d at 1521.

[101] *See Bonnanni Ship Supply*, 959 F.2d at 1558.

[102] Bunker Holdings Ltd. v. Yang Ming Liberia Corp., 906 F.3d 843 (9th Cir. 2018).

[103] *Id.* at 845.

[104] *Id.*

[105] *Id.*

[106] *Id.*; As this is a conflict of laws issue, and the vessel was seized in the United States, the Ninth Circuit assumed that United States law applied; *See* Appendix (Roadmap showing complex subsidiary relationships starting at the vessel through the local supplier.)

[107] *Bunker Holdings Ltd.*, 906 F.3d at 845 (quoting 46 U.S.C. § 31342(a)).

[108] *Id.*

not fall into any of the categories described in 46 U.S.C. § 31341(a)(1)-(3).[109] Thus, the court held that Bunker Holdings was not entitled to the lien.[110]

IV. SUMMARY OF VALERO MKTG. & SUPPLY V. M/V ALMI SUN

A. Factual Background

In *Valero*, the Fifth Circuit Court of Appeals sought to answer the question of whether a bunker supplier, having entered into a contract with a bunker trader that subsequently went bankrupt, is entitled to assert a maritime lien *in rem*.[111] While in Corpus Christi, Texas, M/V ALMI SUN's agent, Almi Tankers S.A., contracted with O.W. Bunker Malta, Ltd., a fuel trader, to supply bunkers for the vessel's refueling.[112] Next, a subsidiary of O.W. Bunker, O.W. Bunker USA, Inc. contracted with Valero Marketing and Supply to purchase the fuel. During the course of negotiations, Almi Tankers contacted O.W. Malta and requested the name of the local supplier.[113] Upon receiving the request, O.W. Malta named Valero.[114] In early November 2014, Almi Tankers learned of the Bunker Group's financial problems and requested confirmation of payment to Valero.[115] Subsequently, the Bunker Group declared bankruptcy.[116]

As Valero was never paid for services rendered, it arrested M/V ALMI SUN in New Orleans in an *in rem* proceeding.[117] Both parties filed motions for summary judgment.[118] However, the district court only granted summary judgment in favor of the vessel and held that Valero had no maritime lien.[119]

---

109 *Id.*; 46 U.S.C. § 31341(a)(1)-(3) (listing persons who are "presumed to have authority to procure necessaries for a vessel" on the ship's credit).

110 *Bunker Holdings Ltd.*, 906 F.3d at 846 (quoting Port of Portland v. M/V PARALLA, 892 F.2d 825 (9th Cir. 1989)); *See* Appendix (Roadmap showing complex subsidiary relationships starting at the vessel through the local supplier.)

111 *See Valero*, 893 F.3d at 290.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Valero*, 893 F.3d at 291.

117 *Id.* at 292.

118 *Id.*

119 *Id.*

B. The Decision

In a majority opinion, the court reaffirmed the rule that CIMLA should be strictly construed and that maritime liens are not "lightly extended by construction, analogy or inference."[120] Here, the majority took a textualist approach towards CIMLA and pointed out that that the sole inquiry "is whether Valero furnished the necessaries to the vessel 'on the order of the owner or a person authorized by the owner.'"[121] Given the facts presented in the record, the court held that Valero did not furnish bunkers to the vessel on the order of the owner or a person authorized by the owner.[122] Valero provided the bunkers at O.W.'s request, and because O.W. was a subcontractor, it was not an entity with authority to order necessaries or bind M/V ALMI SUN.[123] Thus, Valero was not entitled to a maritime lien.

Still, however, the court referenced the precedent it established in *Lake Charles* allowing for situations in which necessaries purchased through intermediaries can create a third-party entitlement to maritime liens, depending on whether the third party acts in the scope of a general/subcontractor relationship or a principal/agent relationship.[124] In fact, the judges began their reasoning by finding the facts presented here were "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."[125] Thus, Valero had the burden of proving that an entity authorized to bind the ship "controlled its selection . . . and/or its performance."[126] The record, however, illustrated only the vessel's awareness of Valero being named as the local supplier and not that the vessel selected Valero.[127] In affirming the lower court's judgment, the majority declared that a vessel's "mere awareness" of the local supplier is not enough to constitute authorization under the CIMLA.[128] Through its analysis, the court decided that Valero

---

120 *Id.*
121 *Valero*, 893 F.3d at 294.
122 *Id.*
123 *Id.*
124 *Id.* at 293.
125 *Id.*
126 *Valero*, 893 F.3d at 294.
127 *Id.*
128 *See Id.* at 298.

acted in the capacity of a subcontractor and, therefore, did not act under direct order of the vessel.

C. The Dissent

In his dissent, Judge Haynes agreed that Valero was a subcontractor under the "general contractor/subcontractor" line of cases explained in *Lake Charles*. However, he stated the exception to these cases are not as narrow as the majority opinion made it seem.[129] Judge Haynes stressed that in *Lake Charles*, the court made it clear that the "subcontractor line of cases is itself divided into two lines of cases."[130] They are: "(1) cases requiring 'an entity with authority to bind the vessel' to 'direct the general contractor hires a particular subcontractor in order for that subcontractor to be able to assert a maritime lien'; and (2) cases requiring the subcontractor to be 'identified and accepted by the vessel's owner or charterer prior to performance.'"[131] Here, the dissent adopted the exception noted in *Galehead*.[132] This exception is dependent on the level of interaction and involvement between the vessel owner and the third-party supplier.[133]

Judge Haynes further stated that the vessel owner "made it a point to discover" the identity of the fuel supplier and voiced no objection to the selection of Valero.[134] Thus, the owner impliedly approved the sub-contractor's selection of Valero.[135] Applying the exception established in *Galehead*, the dissent argued Valero should be entitled to a maritime lien because the vessel owner was notified that Valero would be the physical supplier. The dissent further argued that because the vessel's master and engineer dealt directly with Valero, signing the activity logs confirmed performance.[136]

D. Implications of the Decision

There is one major flaw in the Valero decision. The court failed to completely depart from application of lax interpretations of CIMLA. Instead, the majority acknowledged the permissive

---

129 *See Id.*
130 *Valero*, 893 F.3d at 298.
131 *Id.*
132 *See Galehead*, 183 F.3d at 1242.
133 *Valero*, 893 F.3d at 299.
134 *Id.*
135 *Id.*
136 *Id.*

interpretation expounded in *Lake Charles*. Some argue that this decision was the Fifth Circuit stating that CIMLA should be strictly construed, and thus, ruling against the application of a more permissive interpretation. Still, the court did not completely jettison this faulty interpretation, nor did it imply that the dissent was incorrect in applying the exceptions mentioned in *Galehead*, *supra*. Rather, the majority stated that it did not interpret the *Lake Charles* decision as the dissent did.[137] The dissent reasoned that two lines of cases branched from the subcontractor line of cases, essentially agreeing with the Eleventh Circuit's interpretation on the two lines of cases.[138] Furthermore, Judge Haynes correctly reasoned that this majority opinion would "create an unnecessary circuit split."[139]

In analyzing the possibility of applying a lax interpretation, the court essentially held that in some circumstances, such applications mentioned by the dissent may be applicable and provide a local supplier a maritime lien. This is problematic as it will affect future court decisions. District court judges do not have clear precedent that CIMLA should be construed *stricti juris*. Thus, to maintain a clear precedent and uniformity among the circuits for future decisions, an *en banc*[140] review should be ordered.

V. A PROPOSAL

The question of whether the Fifth Circuit should continue to allow a more permissive application of CIMLA is one of exceptional importance. Therefore, all eligible, active, and participating judges of the Fifth Circuit court should grant an *en banc* review of *Valero* in order to create uniformity in how CIMLA should be applied. The U.S. Courts of Appeals have decided the vast majority of cases by way of *en banc* review. An *en banc* review is initiated at the request of a judge or a party and with the concurrence of a majority of the circuit's active membership. All active members of the court, as well as any senior judge from the circuit who was a member of the original panel, will sit to decide an appeal *en*

---

137 *Id.* at 295.

138 *Valero*, 893 F.3d at 298.

139 *Id.* at 298.

140 Fed R. App. P. 35(a) (Hearings and rehearing's en banc are not favored and ordinarily will not be ordered unless: en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or the proceeding involves a question of exceptional importance.)

banc.[141] The *en banc* court's ruling becomes the circuit's decision in the case, and the court vacates any earlier panel decision. Circuit courts rarely invoke the *en banc* procedure.[142] Little is known about why circuit courts select certain cases for *en banc* rehearing. However, understanding a judge's decision to initiate the *en banc* review process is essential because *en banc* cases are the most pivotal cases decided by the U.S. courts of appeals.

In this case, the Fifth Circuit should grant an *en banc* review and rule to completely jettison the application of a lax interpretation of CIMLA, thus holding that CIMLA is always applied *stricti juris*. Supporting this conclusion, the Second and Fifth Circuits have recently ruled to apply CIMLA *stricti juris*.[143] It is well known that both the Second Circuit and the Fifth Circuit are the most consequential circuits with reference to this area of maritime law.

In a decision rendered on January 14, 2019, *NuStar Energy Serv. v. M/V COSCO AUCKLAND*,[144] the Fifth Circuit affirmed the rule that a subcontractor does not possess liens on the vessels it supplies when it is not acting on the orders of the vessel's owner or its agent, thereby applying a strict interpretation.[145] The federal courts experienced a massive influx of maritime litigation with the collapse of fuel broker conglomerate O.W. Bunker.[146] In fact, this suit resulted from the collapse of O.W. Bunker and is factually similar to the cases discussed *supra*. *NuStar* deals with complex business relationships regarding vessel owners seeking to purchase bunkers from subcontractors or subsidiaries.[147] Here, M/V COSCO ordered fuel bunkers from COSCO Petroleum.[148] Next, COSCO Petroleum subcontracted out to Chimbusco

---

141 28 U.S.C. § 46(c) (1994); Fed. R. App. P. 35.(b).

142 The extremely low relative number of en banc decisions has been observed in studies focusing on different periods spanning the life of the intermediate appellate system. Tracey E. George, *The Dynamics and Determination of the Decision to Grant En Banc Review*, 74 Wash. L. Rev. 213, 214 (1999); *See, e.g.,* Sheldon Goldman & Tom Jahnige, *The Federal Courts as a Political System,* 23 (3d ed. 1985) (observing that use of en banc procedure is "rare").

143 NuStar Energy Serv. v. M/V COSCO AUCKLAND, 760 Fed. Appx. 245 (5th Cir. 2019); Clearlake Shipping PTE. v. NuStar Energy Servs., 911 F.3d 646 (2nd Cir. 2018).

144 *NuStar Energy Serv*., 760 Fed. Appx. at 245.

145 *Id.* at 246.

146 *Id.*

147 *Id.*

148 *Id.*

Americas.[149] Chimbusco then subcontracted out to O.W. Far East to supply the bunkers.[150] Next, O.W. Far East subcontracted to O.W. USA.[151] Finally, O.W. USA subcontracted to NuStar, the local supplier, to furnish the bunkers.[152] Nustar, as the plaintiff, attempted to assert a maritime lien on the COSCO vessels that received the bunkers.[153]

The majority affirmed the district court's ruling that NuStar did not hold a lien under CIMLA because it had delivered bunkers on the order of O.W. USA, and not "on the order of the vessel owner or a person authorized by the owner."[154] This is shown by the court's references to the majority opinion in *Valero*. Similar to *Valero*, this case also addressed the lax interpretation previously applied in *Lake Charles* but ultimately decided to apply a strict interpretation.

Likewise, in *Clearlake Shipping PTE. v. NuStar Energy Servs.*,[155] the Second Circuit affirmed the rule that a third-party supplier lacked direct contractual connection to the vessel owners.[156] Thus, it could not assert a maritime lien.[157] NuStar sought to assert a maritime lien on vessels it provided fuel.[158] Clearlake, a charterer of vessels, contacted its agent, AS Tarcona, to place orders for fuel bunkers, who in turn placed the order for fuel with O.W. Bunker Switzerland.[159] O.W. Bunker Switzerland subcontracted to O.W. Bunker USA.[160] Finally, O.W. Bunker USA subcontracted out to NuStar, the local supplier, to furnish the fuel.[161]

The circuit court affirmed the district court's ruling denying NuStar maritime liens, reasoning that CIMLA should be construed

---

149 *NuStar Energy Serv*., 760 Fed. Appx. at 246.

150 *Id.*

151 *Id.*

152 *Id.*

153 *See* Appendix (Roadmap showing complex subsidiary relationships starting at the vessel through the local supplier.)

154 *NuStar Energy Serv*., 760 Fed. Appx. at 248; 46 U.S.C. § 31342(a) (Westlaw through Pub. L. No. 116-56).

155 *Clearlake Shipping*, 911 F.3d at 646.

156 *See Id.* at 650.

157 *Id.*

158 *Id.* at 648.

159 *Id.*

160 *Clearlake Shipping*, 911 F.3d at 649.

161 *Id.*; *See* Appendix (Roadmap showing complex subsidiary relationships starting at the vessel through the local supplier.)

narrowly.[162] The court ultimately determined that Nustar performed as a subcontractor that lacked authority to bind the vessel. Thus, NuStar could not assert a maritime lien. Given the application of *stricti juris* evidenced in both the Second and Fifth Circuits' recent decisions, it is clear that CIMLA should be construed narrowly. Thus, the Fifth Circuit should grant an *en banc* review of the *Valero* decision and rule that CIMLA should only be applied *stricti juris* as it is required to maintain uniformity within the circuit.

Some may be concerned that completely jettisoning the application of lax interpretations leaves the local supplier without an equitable remedy, and thus, CIMLA should be revised to solidify the exceptions. However, CIMLA was enacted to protect the local supplier and the vessel owner. Under CIMLA, the local supplier is protected through a security right established from the moment the necessaries are furnished. Likewise, the vessel owner is also protected under CIMLA because it does not allow unauthorized suppliers to gain a security interest and seize the vessel without the owner's knowledge. Departing from the plain language interpretation of CIMLA to allow more permissive interpretations to protect local suppliers, would also lessen the protection provided to vessel owners. For example, in the *NuStar Energy* case, if CIMLA was revised to allow the lax interpretation for local suppliers, NuStar would have been awarded a maritime lien even though neither the owner nor an authorized agent requested the fuel and contracted with NuStar.

VI. ALTERNATIVE ACTIONS AVAILABLE TO SUPPLIERS

Abandoning more permissive interpretations will not leave the supplier without an equitable remedy. Specifically, the plaintiff in these cases has the option of bringing an *in personam* action against any party – including the shipowner – that is directly liable in contract, tort, or some other substantive law.[163] The maritime lien is a special security device that ordinarily accompanies *in personam* liability.[164] Thus, a local supplier may

---

[162] *Clearlake Shipping*, 911 F.3d at 649.

[163] *See* Fed. R. Civ. Pro., Supp. Admiralty and Mar. Claims, 28 U.S.C. Rule B. *See also* Dowell Div. of the Dow Chem. Co. v. Franconia Sea Transp., Ltd., 504 F.Supp. 579, 581 (S.D.N.Y. 1980).

[164] *See* Port Ship Serv., Inc. v. Int'l Ship Mgmt. and Agencies Serv. Inc., 800 F.2d 1418, 1421 (5th Cir. 1986) (*per curiam*).

seek equitable relief by bringing an *in personam* claim against the liable vessel owner.

Additionally, the local supplier may demand pre-payment for services or request a deposit before rendering services to a vessel. Given the growing complexity in maritime business relationships, the technological advances of today (i.e. Internet and readily available applications to transfer money) allow the local supplier to easily request such a form of payment. In implementing this pre-payment system or deposit requirement, the vessel will be able to receive necessaries, remain in commerce, and not need to bring large sums of money on a voyage as the payment will be transferred remotely to the supplier.

VII. CONCLUSION

Although *Valero* held that CIMLA is to be construed *stricti juris*, this does not mean that other subsequent decisions will be decided the same way. The court analyzed the possibility of applying the lax interpretation expounded in *Lake Charles* and, held that in some circumstances, the analysis mentioned in the dissent may be applicable and provide a local supplier a maritime lien. Had *Valero* clearly jettisoned the allowance of these lax interpretations in favor of local suppliers, the rule would have removed the guesswork out of determining whether to award a local supplier with a maritime lien.

Furthermore, there are other avenues by which a local supplier may seek equitable relief. One such avenue, discussed *supra*, is to bring an *in personam* claim against the vessel owner. Because there is another avenue by which a local supplier may bring an action for relief, the supplier is in no way left unprotected by the strict interpretation of CIMLA. Additionally, given the state of the world today and the development of the internet, applications, and other means of transferring money in the blink of an eye, local suppliers also have the option of requiring pre-payment for services or a deposit prior to rendering services. Therefore, the Fifth Circuit will not be met with backlash from local suppliers if it completely jettisons lenient interpretations of CIMLA. Thus, the Fifth Circuit should grant an *en banc* review of the *Valero* decision and rule that CIMLA should only be applied *stricti juris* as it is required to maintain uniformity within the circuit.

III. APPENDIX

***Galehead Inc. v. M/V Anglia* Roadmap**

First Refueling:

Genesis (charter)



Polygon Energy Services → Asamar Coastal → Refining and Marketing (Physical Supplier)

Second Refueling:

Genesis (charter)



Polygon Energy Services → Asamar Chem → Oil and Marsh (Physical Supplier)

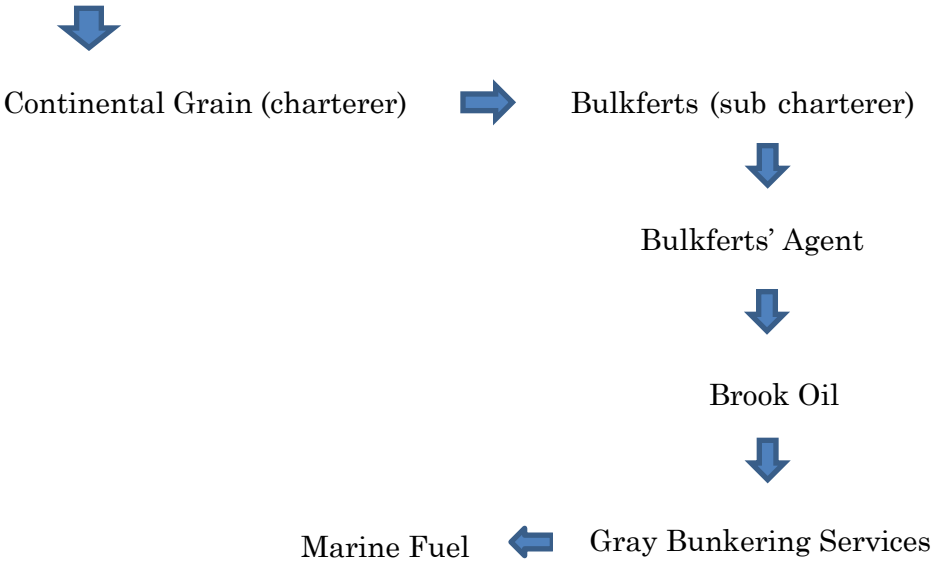
Third Refueling:

Genesis (charter)

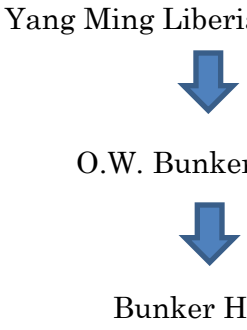


Polygon Energy Services → Chem Oil and Tesoro (Physical Supplier)

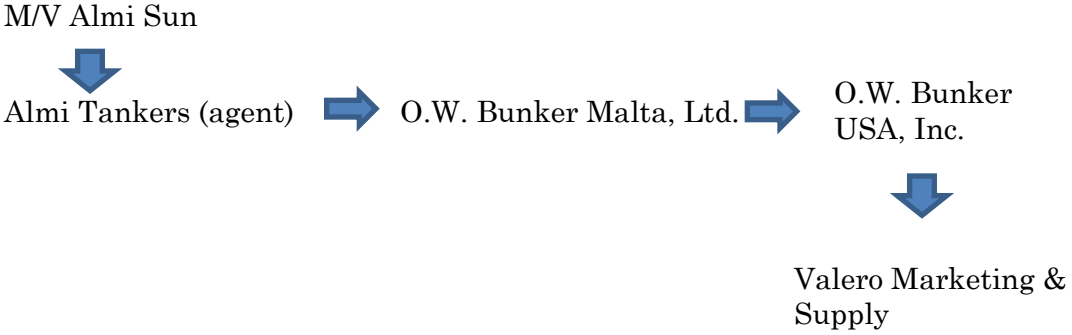
***Marine Fuel Supply & Towing v. M/V KEN LUCKY* Roadmap**



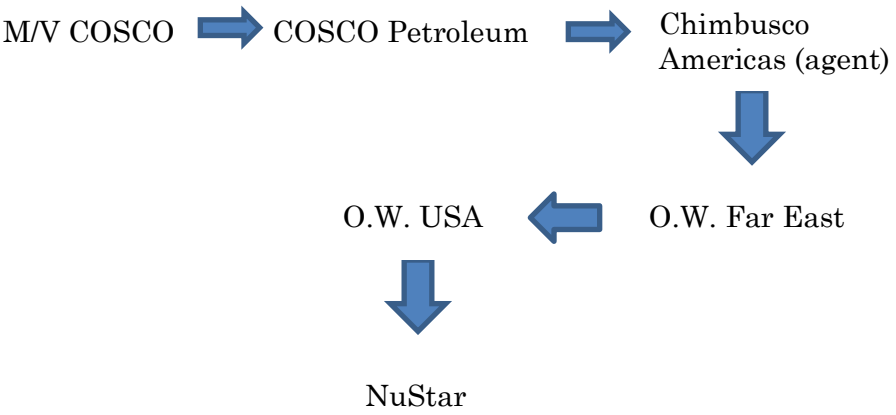
***Bunker Holdings v. Yang Ming Liberia Corp.* Roadmap**



***Valero Mktg. & Supply v. M/V Almi Sun* Roadmap**



***NuStar Energy Serv. v. M/V COSCO AUCKLAND* Roadmap**



***Clearlake Shipping PTE. v. NuStar Energy Servs.* Roadmap**

