No. 02-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING,
MMI GENERAL INSURANCE, LTD.,
Respondents.

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

PETITION FOR CERTIORARI

RICHARD K. HINES, V
TAYLOR TAPLEY DALY
NELSON, MULLINS, RILEY & SCARBOROUGH, LLP
First Union Plaza, Suite 1400
900 Peachtree Street, NE
Atlanta, Georgia 30309
(414) 817-6000

R. BRUCE RIDER
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510
(757) 629-2877

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
AMANDA L. TYLER
EAMON P. JOYCE
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

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* Counsel of Record

QUESTIONS PRESENTED

1. Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

2. Whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent corporation is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Norfolk Southern Railway Company ("Norfolk Southern") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 300 F.3d 1300 (11th Cir. 2002) and appears in the Appendix of this Petition ("Pet. App.") at 1a-20a. The court of appeals' unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 39a-40a. The district court's memorandum opinion and order granting partial summary judgment on behalf of Norfolk Southern is unpublished and appears at Pet. App. 27a-38a. The district court's order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b) appears at Pet. App. 21a-26a.

JURISDICTION

The court of appeals entered judgment on August 8, 2002, and denied a timely petition for rehearing on October 7, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF STATUTORY AND OTHER FEDERAL LAW

The Carriage of Goods by Sea Act, known as COGSA, ch. 229, 49 Stat. 1207 (1936), is codified at 46 U.S.C. app. §§ 1300-1315 and is reproduced at Pet. App. 41a-53a. Federal maritime law governs the contractual extension of liability limitations under COGSA in bills of lading. See *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993).

STATEMENT OF THE CASE

This case presents two important questions of federal maritime law that have divided the lower courts. First, the Eleventh Circuit, in conflict with precedents of multiple courts of appeals and of this Court, has ruled that a freight forwarder that contracts with a cargo owner as a carrier is not the agent of the owner in contracting with vessel carriers to provide the actual transportation of the goods. Thus, under the decision below, the cargo owner is not bound by the terms of the bill of lading that the vessel carrier issues to the freight forwarder. The remarkable and unprecedented holding that the vessel carrier's bill of lading is unenforceable against the cargo owner not only destroys predictability and settled expectations in international trade, but it also eviscerates the mandatory federal statutory definition of a vessel carrier's rights, duties, liabilities and immunities under COGSA, which are only operative as compulsory terms of the bill of lading.

Second, in construing relational terms like "independent contractors" in the "Himalaya clause" of a bill of lading that extends COGSA's liability limitations to other parties whose services are used to perform the contract of transportation, the Eleventh Circuit has joined the Second Circuit in holding that "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a. These circuits are in direct and acknowledged conflict with the Ninth Circuit, which "rejects the [cargo owner's] argument that privity of contract is required in order to benefit from a Himalaya Clause." *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998). Review is particularly critical because the bill of lading at issue here is the standard form used by freight forwarders worldwide for multimodal international transportation, which commonly involves downstream carriers and other independent contractors who lack the privity required by the court below.

Conflicts among the major maritime circuits on such critical issues are inherently untenable, and even more so when the decision below frustrates reliance interests of carriers in international trade. The very purpose of COGSA, and of the Himalaya clauses that are ubiquitous in the international transportation of goods, is to establish certainty as to the potential liability of carriers *ex ante*. In practice, carriers set their rates and transact business based on the assumption that their liability is strictly limited under COGSA. Rather than opt out of this limitation by declaring the actual value of the goods and paying a higher rate, shippers (like respondent James N. Kirby, Pty Ltd. ("Kirby")) almost universally accept the lower rate and turn to insurance to cover potential damage or loss of goods in transit. The insurer (like respondent MMI General Insurance Limited ("MMI")) in turn charges premiums to compensate it for the risk of full liability beyond the COGSA limit. Respondents have sought to undo the bargain that they struck. By ruling in favor of respondents, the Eleventh Circuit deviated from the carefully calibrated liability scheme of COGSA and gave those parties a wholly unwarranted windfall at the expense of carriers. This Court should grant review to resolve the conflicts of authority and to protect the reliance interests that have developed under the COGSA regime.[1]

Statutory Background

COGSA "is the central statute in commercial admiralty, governing over $200 billion worth of American foreign commerce annually." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part*

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[1] Conflicts on issues of maritime law are particularly problematic because "litigants can easily exploit them through forum shopping": a plaintiff may sue in rem wherever a vessel is located or in personam wherever process may be served on the defendant or the defendant's property may be attached. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1268 (1989) ("*Observations*"). *See infra* at 29.

I), 19 J. Mar. L. & Com. 1, 2 (1988). Congress enacted the statute in 1936 to supplement the 1893 Harter Act, ch. 105, 27 Stat. 445 (codified as amended at 46 U.S.C. app. § 190-196), which limited the liability of vessels and carriers in maritime commerce. Congress based COGSA in large part on the Hague Rules, born of an international convention, whose drafters "sought to allocate risks between carriers and cargo interests under clear, predictable rules that would be simple to apply in commerce." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157, 161 (1988) ("*Part II*"); accord *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959) (detailing history leading up to COGSA and noting that the Hague Rules were intended "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers . . . in international trade").

COGSA provides that "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade shall have effect subject to the provisions of this chapter." 46 U.S.C. app. § 1300. Sections 2 through 4 of COGSA, *id.* §§ 1302-1304, set forth the duties, rights, liabilities and immunities of the ship and the carrier as "compulsory terms" of the bill of lading. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975). In particular, section 4(5) of COGSA limits the liability of carriers operating in international shipping by providing that "[n]either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States." 46 U.S.C. app. § 1304(5). This rule applies "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* Section 4(5) thus protects shippers by setting a floor of $500 per package or unit below which carriers may not reduce their maximum

liability, but "cast[s] upon the shipper the burden of declaring the nature and value of the goods, and paying a higher tariff, if necessary, if he wishe[s] to impose a higher liability upon the carrier." *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts-Gelsellschaft*, 375 F.2d 943, 945 (2d Cir. 1967).

COGSA's liability limitations directly apply only to a ship or "carrier," defined as "the owner or the charterer who enters into a contract of carriage with a shipper," and only during the period from "when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. § 1301(a), (e). Nonetheless, COGSA specifically contemplates that shippers and carriers may make agreements governing responsibility and liability "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." *Id.* § 1307. Federal maritime law further permits "Himalaya clauses" extending COGSA liability limitations to persons other than the carrier. See *Robert C. Herd & Co.*, 359 U.S. at 302-03; *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1305 (3d Cir. 1992); *Generali* v. *D'Amico*, 766 F.2d 485, 487-88 (11th Cir. 1985); *Secrest Mach. Corp.* v. *S.S. Tiber*, 450 F.2d 285, 286-87 (5th Cir. 1971).[2]

Factual Background

Respondent Kirby, an Australian firm that manufactures machinery, wished to ship ten containers of machinery to the General Motors plant in Huntsville, Alabama. Kirby contracted with International Cargo Control Pty Ltd. ("ICC"), an Australian freight forwarder, which is "a company that arranges for, coordinates, and facilitates cargo transport," but does not actually transport the goods in question. Pet. App.

[2] As the court below noted, "Himalaya clauses take their name from an English case which involved a vessel called the HIMALAYA." Pet. App. 2a n.1.

3a. The parties memorialized their agreement in a bill of lading issued to Kirby by ICC.

The ICC bill of lading used the standard form developed by International Federation of Freight Forwarders Association ("FIATA"): the FIATA Multimodal Transport Bill of Lading, commonly referred to as the "FBL." Pet. App. 8a. The importance of the FBL to international shipping transactions of the kind here at issue cannot be overstated. The FBL is "the world's most frequently used combined transport document," Peter Jones, *FIATA Legal Handbook on Forwarding* 30 (2d ed. 1993), and has been declared "the most important document used in freight forwarding." Jan Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 5 (1993) (quoting FIATA's President).

The FBL for the shipment in issue identifies Kirby as the consignor of the goods, and designates the Queensland Star (operated by the carrier Hamburg Sudamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsink ("Hamburg Sud")) as the ocean vessel to carry the cargo from Sydney, Australia to Savannah, Georgia. Pet. App. 65a. This FBL is a through bill of lading that denominates Huntsville, Alabama (inland from Savannah) as the ultimate destination for the goods. See *id.* The FBL attaches and incorporates the standard FBL conditions. See *id.* at 54a-60a, 67a; cf. Ramberg, *supra*, at App. I, at 80-82. Under this bill of lading, ICC is the "Freight Forwarder," defined as the "Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a (ICC bill "Definitions"). The contract specifically contemplates that ICC may engage other carriers to perform the contract: "By issuance of the FBL the Freight Forwarder a) undertakes to perform *and/or . . . procure the performance of the entire transport,* from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the

place of delivery designated in this FBL [and] b) assumes liability as set out in these conditions." *Id.* at 54a-55a (ICC bill ¶ 2.1) (emphasis added). The FBL further provides that, subject to other conditions in the bill, the Freight Forwarder "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or *any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own" in any "period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." *Id.* at 55a, 56a (ICC bill ¶¶ 2.2, 6.1) (emphasis added).

The FBL contains a Clause Paramount, which (with exceptions) designates the defenses and limitations of liability set forth in COGSA to govern ICC's potential liability to Kirby should the goods become damaged during transport. Pet. App. 57a-59a (ICC bill ¶¶ 7.3, 8).[3] Pursuant to this clause, Kirby agreed that in the event of damage to the goods, ICC's liability would be limited to $500 per container unless Kirby declared a higher value for its machinery and paid a correspondingly higher freight rate. As most shippers do, Kirby elected not to designate a higher value for its goods and instead turned to an insurer, MMI, to cover the shipment.

The FBL also contains a Himalaya clause. The Himalaya clause extends the COGSA liability limitation to others used by ICC to perform any of its obligations, including independent contractors:

> These conditions apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose

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[3] A Clause Paramount, or "period of responsibility" clause, extends COGSA coverage beyond the "tackle to tackle" limitation embedded in the statute's definition of "carriage of goods." *See* 46 U.S.C. app. § 1301(e); *accord id.* § 1307 (authorizing extensions of COGSA).

> services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in [the Clause Paramount].

Pet. App. 59a (ICC bill ¶ 10.1).

The next clause of the FBL is equally significant in setting out the rights and responsibilities of those who would play a role in the shipment of Kirby's goods. That clause, 10.2, recognizes that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." Pet. App. 59a-60a (ICC bill ¶ 10.2); Ramberg, *supra*, at 67. Thus, by its very terms, the FBL purported to make all subcontractors "used in order to perform the contract" parties to the ICC contract of carriage. See Pet. App. 59a; Ramburg, *supra*, at 66.

Because it was not in the business of actually transporting goods, ICC subcontracted with Hamburg Sud, an ocean carrier based in Germany, for the carriage of the machinery from Sydney to Huntsville. As is typical in such transactions, Hamburg Sud issued it own bill of lading (the "Hamburg Sud bill") to ICC, which was named as the "shipper/exporter." Like the ICC FBL, the Hamburg Sud bill similarly identified the Queensland Star as the vessel, Sydney as the port of loading, Savannah as the port of delivery, and Huntsville as the destination of the machinery. Pet. App. 66a. The Hamburg Sud bill imposes numerous obligations (including liability for payment and performance) upon the "Merchant," defined broadly to include "the shipper, consignee, receiver, holder of this Bill of Lading, *owner of the cargo* or person entitled to the possession of the cargo and the servants and agents of any of these." *Id.* at 61a (Definitions (e)) (emphasis added). The bill obligates Hamburg Sud to provide through transportation to the inland destination, "which may well

involve transport by rail," and authorizes the carrier to "sub-contract on any terms the whole or any part of the carriage" of the goods. *Id.* at 61a, 62a (Hamburg Sud bill §§ 4, 5a).

The Hamburg Sud bill of lading likewise contained a Clause Paramount, limiting Hamburg Sud's liability under the agreement to $500 per container, absent declaration by ICC of a greater value for the goods (a declaration that ICC, following the course chosen by Kirby, did not make). Finally, the Hamburg Sud bill of lading included its own Himalaya clause, which extended the liability limitations to additional parties that would be used to carry out the contract of carriage:

> [A]ll exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever . . . .

Pet. App. 63a (Hamburg Sud bill ¶ 5(b)).

Hamburg Sud transported the machinery from Sydney to Savannah, Georgia on one of its ships. At Savannah, the containers were transferred to petitioner Norfolk Southern, which had been hired by the American arm of Hamburg Sud to transport the goods via train to their final destination in Huntsville, Alabama. The train carrying the containers derailed, allegedly causing $1.5 million in damage to the machinery. Kirby was thereafter reimbursed for its loss by its insurer, MMI.

Kirby and MMI filed suit against Norfolk Southern in the United States District Court for the Northern District of Georgia, bringing claims sounding in negligence and breach of contract for the full amount of the damage caused to its machinery by the derailment. Norfolk Southern moved for

partial summary judgment on the basis that its liability, if any, was no greater than the $500 per package COGSA limitation. The district court granted the motion, concluding that the Himalaya clause in the Hamburg Sud bill of lading, which by its terms encompassed "inland carriers," covered Norfolk Southern and limited the railroad's potential liability to Kirby to $500 per container. See Pet. App. 36a-37a. The district court rejected the plaintiffs' argument that Kirby could not be bound to the agreement entered into by ICC with Hamburg Sud: "One who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf." *Id.* at 37a (citing *Great No. Ry.* v. *O'Connor*, 232 U.S. 508 (1914)). In reaching its holding, the district court emphasized that the Hamburg Sud bill was a "'through bill'" covering transport of Kirby's goods through to Huntsville. See *id.* at 35a. Further, the court rejected plaintiffs' argument that Norfolk Southern was too far removed contractually from the shipper to enjoy the protections set forth in the Hamburg Sud bill of lading. See *id.* at 34a-35a. Finally, as part of its holding, the district court also found plaintiffs' state law claims to be preempted by the COGSA regime. See *id.* at 37a.

The parties jointly requested that the case be certified for interlocutory appeal because of the existence of a conflict among the circuits on the question whether a subcontractor must be in privity with the issuer of the relevant bill of lading in order to enjoy its liability protections. The district court granted their request and certified the case to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b), and that court granted review. Pet. App. 25a, 6a.

Decision of the Court of Appeals

A divided panel of the Eleventh Circuit reversed. Pet. App. 2a. The court first addressed the question whether Kirby was bound by the Hamburg Sud bill of lading, which extended the COGSA liability limitation in its Himalaya clause to "inland carriers" used to transport Kirby's machinery. The court did

not dispute that Norfolk Southern was covered by the plain terms of the Hamburg Sud bill's Himalaya clause. See *id.* at 6a. The court of appeals held, however, that Kirby would only be bound by the Hamburg Sud bill if ICC was acting as Kirby's agent when it received the bill. See *id.* at 7a. Noting that "freight forwarders 'may act as agents or as principals, depending on the facts,'" *id.*, the court drew a distinction between situations in which the forwarder merely arranges for a contract between the cargo owner and ocean carrier, but does not enter into any contract of carriage itself, and those in which the forwarder issues its own bill of lading to the cargo owner and collects payment on the same. In the latter case, where the forwarder contracts on its own for transport of the cargo, it held, the forwarder acts not as an agent of the cargo owner, but as its own principal. In the Eleventh Circuit's view, "[i]f ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg Sud to Kirby and listing Kirby as the shipper." *Id.* at 7a-8a.

The court of appeals next held that Norfolk Southern was not protected by the Himalaya clause in the ICC FBL because "the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 14a. The court held that in the absence of such privity, as here (Norfolk Southern having not contracted directly with ICC), the downstream carrier may not enjoy the protections of the Himalaya clause See *id.* at 13a. The Eleventh Circuit expressly recognized that on this question it was parting company with the Ninth Circuit, which has rejected the contention that privity of contract is required in order to benefit from a Himalaya clause. See *id*. The Ninth Circuit test instead focuses on "'the nature of the services performed [by the defendant who seeks to invoke the clause] compared to the carrier's responsibility under the carriage contract,'" *id.* (quoting *Akiyama Corp.*, 162 F.3d at 574 (alterations in original)), a test that would dictate a different outcome here.

Judge Siler dissented on both issues. First, he noted that the "bill of lading between Kirby and ICC put Kirby on notice that ICC would have to employ other entities to transport the freight." Pet. App. 19a. It was of no moment, Judge Siler observed, that two different bills of lading governed the relevant cargo, for Kirby had "declined the opportunity to obtain full liability coverage" in its contract with ICC and elected instead to agree to the COGSA limitation incorporated therein and insure its cargo elsewhere. *Id.* Judge Siler ultimately concluded that because Kirby fully expected and knew that ICC would contract with other carriers to ship the cargo, ICC could only have been acting as agent for Kirby in making those arrangements. See *id*.

Second, Judge Siler concluded that Norfolk Southern should in any event enjoy the protections of the Himalaya clause in the ICC bill of lading, which covers "independent contractors" without qualification. Noting again that "Kirby knew that an inland carrier would have to be used" in order to transport the goods to Huntsville, the dissent opined that Kirby must have "agreed to a limitation of liability for the carrier" that would accomplish the last leg of the journey. Pet. App. 19a. That sufficed to bring Norfolk Southern within the scope of the clause. Embracing what he viewed as the better rule of the Ninth Circuit, Judge Siler saw the majority's holding as giving a "windfall" to Kirby's insurer based on a "technicality," all the while ignoring both that "Kirby knew from the start that the ultimate destination would have to be through an inland carrier" and it "agreed to the limitation of liability on the part of ICC and all of its sub-contractors." *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision of the Eleventh Circuit is necessary to ensure the proper and uniform resolution of two important questions regarding carrier liability in international shipping transactions. In conflict with the

precedents of multiple courts of appeals and of this Court, and with what is understood as the "commercial norm" in this context, the Eleventh Circuit below held that a freight forwarder does not act as agent on behalf of a cargo owner when it arranges transport of the cargo. Its decision disrupts the carefully calibrated liability regime set forth in COGSA and will create extraordinary inefficiencies by placing upon carriers the burden of contracting for COGSA's liability limitations with every party holding a conceivable interest in the goods being transported.

This case also squarely presents the controversy whether privity of contract is necessary to enjoy the protections of a Himalaya clause in a bill of lading that otherwise purports to extend liability limitations to downstream carriers or other subcontractors. On this question, the Eleventh Circuit's decision deepens a split among the maritime circuits and, if permitted to stand, will allow a cargo owner, who agreed to the liability limitation in question and whose expectations did not turn on the identity of those carriers that actually transport its cargo, to obtain a windfall at the hands of a carrier that believed itself to be secure against just such a judgment.

In short, if left unreviewed, the decision below will have a dramatic effect on international shipping agreements and import considerable uncertainty into the allocation of risk in such agreements. The result – checkerboard liability schemes that COGSA and Himalaya clauses are supposed to obviate – will likewise lead to forum shopping and over-insurance by parties to shipping transactions. The Court should grant certiorari to resolve these conflicts among the circuits and reject the Eleventh Circuit's position on each question.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER A FREIGHT FORWARDER THAT CONTRACTS WITH A CARGO OWNER TO TRANSPORT GOODS IS THE OWNER'S AGENT IN CONTRACTING WITH VESSEL CARRIERS.

The decision of the court of appeals creates a conflict of authority among three of the primary circuits with maritime jurisdiction on the recurring issue of whether a freight forwarder, hired to provide international transportation of cargo, acts as an agent on behalf of the cargo owner when it enters into contracts of carriage with vessel carriers, thereby binding the cargo owner to the terms of that contract. The Eleventh Circuit's decision disrupts the settled expectations of carriers and strips them of the very protections COGSA and Himalaya clauses were designed to give them.

a. On one side of the legal divide are those courts of appeals that, in conflict with the Eleventh Circuit, hold the forwarder to be acting in the role of agent on behalf of the cargo owner when it deals with the carrier that will actually transport the cargo. These courts recognize the "commercial norm" that forwarders behave as agents in this role and note that any other conclusion would be at odds with the purpose of COGSA, which was intended to give carrier parties to international shipping transactions predictable and limited liability exposure.

In *Kukje Hwajae Insurance Co.* v. *M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), the Ninth Circuit held that the cargo owner was bound by the forum selection clause included in a bill of lading issued by the vessel carrier to a freight forwarder that (like ICC here) is a "non-vessel operating common carrier" ("NVOCC"),[4] even though the

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[4] NVOCC is a term of art in maritime commerce referring to a freight forwarder that offers transportation for hire and assumes liability for the safe transportation of the goods as a carrier. It does not operate vessels,

cargo owner was not a party to that bill of lading, and even though the freight forwarder had issued separate bills of lading to the cargo owner. The Ninth Circuit held that the freight forwarder was "acting as [the cargo owner's] agent when it accepted the [vessel carrier's] bill of lading." *Id.* at 1175. The Ninth Circuit observed that it is the "commercial norm" for parties to maritime shipping arrangements to treat the middleman "as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Id.* at 1176 ("[b]oth commentators and courts have recognized" this principle); *accord Morrow Crane Co.* v. *Affiliated FM Ins. Co.*, 885 F.2d 612, 614-15 (9th Cir. 1989). Thus, the cargo owner would be bound by the terms of the bill of lading issued by the carrier to the freight forwarder. See *Kukje*, 294 F.3d at 1177.

In an earlier decision, the Ninth Circuit similarly recognized the liability limitation enjoyed by carriers under COGSA should not be applied only against parties with which the carriers directly contract. See *Carman Tool & Abrasives, Inc.* v. *Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989). Adopting a different rule would "place far too heavy a burden on the carriers," for a carrier "would not only be required to bring the liability limitation to the attention of the party it actually deals with, but also to other parties that it knows, or should know, have an economic interest in the goods being shipped." *Id.* at 900. This, the court held, is "precisely the type[] of problem[] that COGSA was designed to prevent." *Id.* at 901 (citing Sturley, *Part II*, at 161 & nn. 208-211). Thus, where a shipper who declines to declare a

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but instead consolidates small shipments and arranges transportation in its own name with vessel carriers. *Kukje*, 294 F.3d at 1175-76; *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 & n.2 (2d Cir. 1984); 46 U.S.C. app. § 1702(17)(B) (Shipping Act) (so defining NVOCC and using "ocean freight forwarder" in the narrow sense of an intermediary that merely dispatches shipments for others). ICC, like any freight forwarder issuing an FBL and assuming liability as a carrier, is an NVOCC.

greater value for its goods at the time of arranging for shipment and chooses to insure them instead against damage or loss, it will be bound by that choice, even against parties with whom it did not contract directly. See *id.* Indeed, the Ninth Circuit recognized that the shipper's insurer in that case, as here, was suing "in an attempt to shift . . . the burden of a loss it was paid to insure." *Id.* at 901 n.10.

Like the Ninth Circuit, the Second Circuit has squarely adopted a position on the agency question that is in conflict with the Eleventh Circuit. In *Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992), the Second Circuit held that the owner of damaged containers was subject to the liability limitations contained in a bill of lading issued by the carrier to an intermediary without reference to the owner. See *id.* at 279-80. The court of appeals rejected the owner's argument that it could not be bound by a contract to which it was not a party. Instead, "where a party is aware that another is shipping its packages aboard a vessel and has at least constructive notice that liability limitations might apply, that party is bound by the liability limitations agreed to by the shipper." *Id.* at 280. That court observed that "[a] contrary interpretation would defeat COGSA's intended purposes of allocating risk of loss and creating predictable liability rules on which not only carriers but others can rely." *Id.* at 279. In the Second Circuit's view, the Eleventh Circuit's rule would mean that "a carrier, to avoid expanded liability, would have to contract to limit liability not only with the party with whom it actually dealt, but also with all others who might possess an interest in the shipped goods." *Id.*

Other decisions of the Second Circuit are in accord. *Insurance Co. of North America* v. *S/S American Argosy*, 732 F.2d 299 (2d Cir. 1984), similarly involved a freight forwarder that (like ICC) was an NVOCC. Deeming the freight forwarder "a hybrid," the Second Circuit noted that with respect to the cargo owner, the forwarder acts as a

carrier, but "[w]ith respect to the vessel and her owner" it acts as "an agent of the shipper." *Id.* at 301. The *Argosy* court held that the vessel carrier's liabilities to the cargo owner would be determined based upon the terms of its bill of lading issued to the freight forwarder, and not the separate bill of lading issued by that party to the cargo owner (which, in *Argosy*, set forth a higher cap on the carrier's potential liability). In doing so, the Second Circuit recognized that viewing the forwarder as anything other than an agent for the cargo owner would require carriers to undertake greater measures to protect themselves in contracts of carriage – an outcome that would "increase the cost of shipping substantially" and stand at odds with Congress's intentions in passing COGSA. *Id.* at 304.[5]

The Third and First Circuits recognize the same rule as the Ninth and Second Circuits. The Third Circuit, for example, has noted that under COGSA, the carrier treats the forwarder as the agent of the cargo owner (or true customer), although the cargo owner treats the forwarder as a carrier. See *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 527 (3d Cir. 1994). Indeed, in a COGSA case, the Third Circuit relied on the Second Circuit's decision in *Argosy* for the proposition that a

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[5] More recently, in *Nippon Fire & Marine Insurance Co.* v. *Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), the Second Circuit reaffirmed the background federal common law principles that inform its reading of COGSA. In *Nippon Fire*, the cargo owner did not sue the primary air carrier with whom it contracted (and which had gone bankrupt) in order to bring tort claims against two secondary air carriers. The court of appeals held that (a) the cargo owner could not bring tort claims against the secondary carriers, but instead only claims for breach of contract, and (b) the cargo owner would be bound by the terms of the contracts entered into between the primary and secondary carriers, including liability limitations contained therein. "[C]ommon carriers," it held, "are entitled to assume 'that one presenting goods for shipment either owns them or has authority to ship them,'" and therefore the primary carrier is the "agent" of the shipper in contracting with secondary carriers. *Id.* at 61.

shipper will be bound by the liability limitation in a bill of lading issued by a downstream carrier to a carrier directly engaged by the shipper, because in contracting with the downstream carrier, the primary carrier "was acting as an agent for . . . the shipper." *SPM Corp.*, 965 F.2d at 1305 n.9.

In *Puerto Rico Maritime Shipping Authority* v. *Crowley Towing & Transportation Co.*, 747 F.2d 803 (1st Cir. 1984), the First Circuit was faced with determining whether a carrier would be protected by the terms of a contract of carriage into which it entered with a lessee of goods, or instead could be sued by the owner of the goods for full damages. That court determined that it would be improper to penalize the carrier for following the instructions of the lessee, because "[a] carrier ordinarily need not investigate the ownership of the goods that it ships." *Id.* at 804. Instead, in the First Circuit's view, carriers, whether common or private, "can assume that one presenting goods for shipment either owns them or has authority to ship them." *Id.* at 804-05. Although the case did not involve COGSA, the First Circuit's reasoning is equally pertinent here: Hamburg Sud was within its rights to assume that ICC had authority to deal on behalf of Kirby, and Kirby should not be permitted to run from the bargain struck by what was effectively its agent in dealing with Hamburg Sud – particularly where the terms of the agreements were, with respect to the liability limitations of carriers, identical.[6]

Taken together, these cases establish that the majority of the courts of appeals to have addressed the issue recognize the "commercial norm" that forwarders, like ICC, act as agents on behalf of the cargo owners who engage them. Correspondingly, carriers are within their rights under COGSA to rely upon the liability protections that they include

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[6] District court decisions are in accord. *See*, *e.g.*, *Pearson* v. *Black King Shipping Co.*, 769 F. Supp. 940, 946 (E.D. Va. 1991); *Jockey Int'l* v. *M/V "Leverkesen Express"*, 217 F. Supp. 2d 447, 456-57 (S.D.N.Y. 2002).

when issuing bills of lading not just to cargo owners directly, but to forwarders as well. Under these decisions, Kirby would be bound by the terms of the Hamburg Sud bill of lading to which its agent, ICC, agreed. Norfolk Southern, in turn, would enjoy the protections extended to it in the that bill of lading, including COGSA's $500 per package liability limitation. Pet. App. 63a-64a (Hamburg Sud bill).

b. In conflict with these decisions, the Eleventh Circuit's decision below stands alone. The other courts of appeals directly reject the Eleventh Circuit's holding that when a freight forwarder acts as a carrier and issues its own bill of lading to the cargo owner, the freight forwarder is not the agent of the cargo owner in contracting with vessel carriers to transport the goods. Pet. App. 10a.

The decision below is also in square conflict with this Court's decision in *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848). In that case, one William Harnden "was engaged in the business of carrying for hire small packages of goods . . . for any persons choosing to employ him" between Boston and New York. *Id.* at 379. He contracted in his own name with the owner of steam vessels to carry a crate containing his shipments at a monthly rate, and that contract provided that the crate was carried at Harnden's risk and that the vessel owners assumed no risk of loss of the goods. See *id.* Harden separately contracted with certain banks to transport specie from New York to Boston. See *id.* The vessel sank, and the banks brought a libel *in personam* against the vessel owners.

This Court held that even though Harnden was a carrier in relation to the banks, and even though the banks were not a party to Harnden's contract with the vessel owners, the banks would still be an undisclosed principal to that contract. See *id.* at 380. The Court noted that the banks were the real owners of the property, and that a carrier has a lien against the property but no right of possession against the owner. *"[T]he carrier . . . is considered in law the agent or servant of the*

owner, and the possession of the agent is the possession of the owner." *Id.* at 380 (emphasis added). Accordingly, "the contract between Harnden and the [vessel owners] for the transportation of the specie was, in contemplation of law, a contract between them and the [banks]; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their own names." *Id.* This Court went on to hold that the contractual limitation of the vessel owner's liability was binding on the cargo owners. See *id*. at 382-84; see also *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 488 n.27 (1949) (applying *New Jersey Steam* rule to declare that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier").

Other decisions of this Court embrace the same principles. In *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), for example, this Court held that a cargo owner was bound to the terms of an agreement entered into by her forwarder without her knowledge with the railroad that transported her personal effects. See *id.* at 514-15; see also *id.* ("If there was any undervaluation, wrongful classification or violation of her instructions, resulting in damage, the plaintiff has her remedy against that [forwarding] Company.").[7] The Eleventh Circuit's decision is, in short, irreconcilable not only with the decisions of other courts of appeals, but also with longstanding precedent of this Court.

c. The ramifications of the decision below are breathtaking. In the age of containerization, it is standard practice for a forwarder to issue a bill of lading to its

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[7] In its most recent treatment of a COGSA case, moreover, this Court enforced a forum selection clause in a bill of lading against a subrogee of the cargo owner, who was not a named party of the bill of lading in question. *See Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 530-32, 538 (1995).

customers in its own name, consolidate shipments to gain a full container rate, and then contract separately with a vessel carrier to transport the cargo under the vessel carrier's bill of lading. Under the Eleventh Circuit's view, no vessel carrier will be able to enforce its own bill of lading (including Himalaya clauses) against the owner of the goods. The vessel carrier (and any downstream carriers, agents, or contractors entitled to rely on its bill) will be deprived of the necessary certainty as to its rights, immunities, and duties under the bill of lading vis-à-vis the owners of the goods it carries. There is, moreover, no way for the vessel carrier to protect itself; in international shipping transactions, "the ocean carrier may have no idea that the party to whom it issues its bill is in fact an NVOCC that has issued bills of lading itself." Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337, 396 (2000). The decision below upsets settled expectations and business practices. Indeed, consistent with the authorities outlined above, and as reflected in the Hamburg Sud bill of lading that expressly binds the cargo owner, *supra* at 8-9, it has long been commonly understood that the freight forwarder "contracts with the ocean carrier as agent for the owners of the goods," Davies, *supra*, at 396.

The decision below does more than nullify the force of the vessel carrier's bill of lading against the owner of the goods; it undermines COGSA itself. As noted above, *supra* at 3-5, COGSA, like the Harter Act before it, "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading," Gilmore & Black, *supra*, § 3-25, at 145. If the ocean bill of lading issued to a freight forwarder is unenforceable against the cargo owner, the real party-in-interest, all of the mandatory rules of COGSA (including the liability limitations) are negated. Here, the transaction was structured so that ICC would be a "carrier" entitled to invoke the protections of COGSA. See 46 U.S.C. app. §§ 1301, 1304(5); *Sabah Shipyard Sdn. Bhd.*

v. *M/V Harbel Tapper*, 178 F.3d 400, 404-05 (5th Cir. 1999) ("COGSA's liability limit applies only to 'carriers'" and where forwarder does not enter into contract of carriage with shipper, it does not fall within COGSA's ambit). To hold that ICC's designation as a carrier deprives the true vessel carriers of COGSA's protections is to turn the statute on its head. COGSA is expressly drafted to cap the liability of the carrier and ship against all claimants, regardless of which entity is named in the bill of lading. See 46 U.S.C. app. § 1304(5) ("Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . .").

Finally, the Eleventh Circuit's ruling grants a windfall to a shipper and its insurer, each of which accounted for the liability limitation in setting their expectations. As one commentator has written of this situation:

> The underwriter has already reimbursed the shipper for the loss pursuant to their insurance agreement. This is exactly what they contemplated when the shipper chose to insure the goods rather than to declare their value, and when the underwriter collected its premium to compensate it for bearing the risk that the goods would be lost or damaged. After the loss, the insurer, who collected a premium, seeks to recover from the carrier, who did not collect a premium, and who thought it was entitled to treat the goods as though they were worth only $500 per package.

Sturley, *Part II*, at 180-81 (footnote omitted).

As the district court ruled, the Himalaya clause of the Hamburg Sud bill, which expressly protects inland carriers as well as "all independent contractors whatsoever," Pet. App. 63a, clearly covers Norfolk Southern. By concluding that ICC was not acting as Kirby's agent when it contracted with Hamburg Sud to transport Kirby's goods, the Eleventh Circuit

adopted a position that cannot be reconciled with general maritime practices, settled common law rules, and the logic behind COGSA, which was intended foremost to give carriers predictable and limited liability exposure. The decision below squarely presents this conflict over the role of forwarders in international shipping transactions, and it provides an ideal vehicle for resolving this dispute.

II. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER PRIVITY OF CONTRACT IS REQUIRED FOR A PARTY TO BENEFIT FROM A "HIMALAYA CLAUSE" USED IN A CARRIER'S BILL OF LADING.

The Eleventh Circuit also held that Norfolk Southern could not invoke the protections of the Himalaya clause of the ICC bill, which extends the COGSA liability limitations to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a. The court of appeals ruled that, in construing relational terms like "independent contractors" in the Himalaya clause, "the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." *Id.* at 13a, 14a. As the court below recognized, see *id*. at 13a, its decision departs from the rule stated by the Ninth Circuit, which "reject[s] [the cargo owner's] argument that privity of contract is required in order to benefit from a Himalaya clause," *Akiyama Corp.*, 162 F.3d at 574. By subscribing to the contractual privity rule, the Eleventh Circuit joined the Second Circuit, see *Mikinberg* v. *Baltic S.S. Co.*, 988 F.2d 327, 333 (2d Cir. 1993), thereby exacerbating the already existing conflict of authority between the courts of appeals that had been recognized by the district court and both parties below, Pet. App. 24a; see Appellants' Principal Br. at 40-44, *Kirby* v. *Norfolk S. Ry.*, 300 F.3d 1300 (11th Cir. filed Aug. 27, 2001) (No. 01-13776); Brief for Appellee at 40-42, *id*.

a. In *Akiyama*, the relevant Himalaya clause extended the COGSA $500 liability limitation to "'[e]very servant, agent,

and sub-contractor,'" and further defined the term "Subcontractor" to include stevedores and terminal operators. 162 F.3d at 573 (alteration in original). When goods were damaged during stevedoring operations, the cargo owner and its insurer sued, among others, a stevedoring company. The stevedoring company was not in privity of contract with the carrier that issued the bill of lading, but was instead the sub-sub-contractor of the carrier (just as Norfolk Southern was the sub-sub-contractor of ICC in this case). See *id.* at 573-574. Acknowledging that in a previous decision it had looked to the contractual relation of the defendant and the carrier as one of the factors in interpreting Himalaya clauses, see *Mori Seiki USA, Inc.* v. *M.V. Alligator Triumph*, 990 F.2d 444, 450 (9th Cir. 1993), the Ninth Circuit nonetheless squarely rejected the contention that a subcontractor must be in contractual privity with the carrier that issues the relevant bill of lading to receive the benefit of the bill's Himalaya clause. *Akiyama*, 162 F.3d at 574. Instead, the court of appeals concluded, "the proper test is to consider 'the nature of the services performed [by the party seeking protection of the Himalaya clause] compared to the carrier's responsibility under the carriage contract.'" *Id.* at 574 (quoting *Taisho Marine & Fire Ins. Co.* v. *Vessel Gladiolus*, 762 F.2d 1364, 1367 (9th Cir. 1985)). Because stevedoring services were within the scope of the carrier's responsibility, the Ninth Circuit deemed the stevedore a beneficiary of the contract's protections. See *id.* at 573. That court reasoned that if the terminal operator and stevedore were excluded from coverage, "'the Himalaya Clause would be rendered extraordinarily empty.'" *Id.* at 574 (quoting *Institute of London Underwriters* v. *Sea-Land Servs., Inc.*, 881 F.2d 761, 767 (9th Cir. 1989)). Under the Ninth Circuit's comparison-of-services test, there is no question that Norfolk Southern would be protected by the ICC bill's Himalaya clause. ICC assumed responsibility to transport Kirby's goods from Sydney to Huntsville, *supra* at 6-7, and the inland carriage services from Savannah to Huntsville

performed by Norfolk Southern clearly "are services that are [ICC's] responsibility." *Akiyama*, 162 F.3d at 574.

b. In square conflict with the Ninth Circuit, the Second and Eleventh Circuits have held that privity of contract is a requirement for third parties to benefit from Himalaya clauses of this kind. The court below rejected *Akiyama*'s analysis and the Ninth Circuit's position. Pet. App. at 13a. ("We recognize that the Ninth Circuit has arguably taken a different view."). Whereas the Ninth Circuit held that the applicability of a Himalaya clause referring to a "subcontractor" of the carrier would be resolved by the comparison-of-services test without regard to privity of contract, see *Akiyama*, 162 F.3d at 574, the Eleventh Circuit expressly stated that the "Ninth Circuit comparison-of-services rule" could not be applied to an independent contractor of the carrier unless there was privity of contract, Pet. App. 13a n.10.[8] The Second Circuit, in a

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[8] The Eleventh Circuit characterized the Ninth Circuit's rule as "arguably" different from its own based on how the Eleventh Circuit would handle a reference in a Himalaya clause to "stevedores." The Eleventh Circuit clarified the scope of its privity rule: "Privity is required where, as here . . . , the category term being interpreted in the clause is relational, such as 'agent,' 'servant,' or 'independent contractor.' Where, on the other hand, the term [used in the Himalaya clause] is descriptive such as 'stevedore,' 'terminal operator,' etc., privity of contract is not required." Pet. App. 14a n.11. According to the Eleventh Circuit, "the result, though not the language, of *Akiyama* conforms to this rule." *Id.*

The Eleventh Circuit's discussion misconceives both the facts and analysis of *Akiyama*. First, the Himalaya clause in *Akiyama* referred only to "subcontractors," and then in a separate definitional clause defined that term to include "stevedores." *See* 162 F.3d at 573. On the facts of *Akiyama*, a court would still have to resolve whether the term "subcontractors" in the Himalaya Clause referred only to subcontractors in privity with the carrier that issued the bill of lading, or all subcontractors performing carriage services. Second, the Eleventh Circuit mischar-acterized the *Akiyama* court's express rejection of the privity requirement as "dicta" because it contradicts the rule established in the Ninth Circuit's earlier decision in *Mori Seiki*. Pet. App. 14a-15a. The Eleventh Circuit failed to heed that the *Akiyama* court expressly analyzed *Mori Seiki* before

series of cases involving Himalaya clauses extending liability limitations to "independent contractors," has likewise enforced the privity-of-contract rule. See *Mikinberg*, 988 F.2d at 333 (discussing cases).[9]

Given the common usage of Himalaya clauses extending COGSA liability to "independent contractors" and "subcontractors," it is vital that this Court resolve the conflict of authority and establish a uniform rule to apply to Himalaya clauses. This Court's intervention is all the more critical now that the Eleventh Circuit has applied the privity-of-contract rule to the standard Himalaya clause in the FBL, the most widely used shipping document in international multimodal transport. See *supra* at 6. Incredibly, under the Eleventh Circuit's rule, only a person in privity of contract with the freight forwarder who issues the FBL is protected by the Himalaya clause. Commonly, the freight forwarder will, as here, be in privity only with the initial carrier. The Eleventh Circuit's rule means that the Himalaya clause will not cover

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it stated the rule of decision (not dictum) that privity of contract was not required. *See Akiyama*, 162 F.3d at 573-74. Regardless, the Eleventh Circuit acknowledges that it applies a different rule than does the Ninth Circuit, and those conflicting rules would yield a different result on the facts of this case.

[9] Other circuits have weighed in on this issue, albeit without exploring it in any great detail. The Fifth Circuit, for example, has stated that it "requires privity of contract of carriage before liability under COGSA arises." *Thyssen Steel Co.* v. *M/V Kavo Yerakas*, 50 F.3d 1349, 1353 (5th Cir. 1995); *accord Gebr. Bellmer Kg.* v. *Terminal Servs. Houston, Inc.*, 711 F.2d 622, 625 (5th Cir. 1983) (including stevedores hired as independent contractors by the carrier's agent within reach of Himalaya clause). Discussion in the caselaw of the Third and First Circuits also highlights the confusion in the lower courts on this issue. *See*, *e.g.*, *SPM Corp.*, 965 F.2d at 1305 n.9 (suggesting that contractual privity alone is insufficient for a Himalaya clause to extend protection to third party); *EAC Timberlane* v. *Pisces*, *Ltd.*, 745 F.2d 715, 719 (1st Cir. 1984) (opining that COGSA applies only to carriers or other parties who have "entered into a contract of carriage with the shipper or ha[ve] some privity of contract with the shipper").

any of the other carriers and other contractors who will perform the actual transportation of the goods to their ultimate destination, including subcontracting ocean carriers,[10] stevedores, terminal operators, and inland carriers of any kind (by air, water, road or rail). This is simply an untenable construction of a through bill of lading for multimodal transport to overseas inland destinations.

The plain language of the FBL refutes the Eleventh Circuit's implausible construction of the Himalaya clause, and underscores the impropriety of its privity-of-contract rule. First, the Himalaya clause in Clause 10.1 of the ICC bill by its terms extends liability to "any servant, agent *or other person (including any independent contractor) whose services have been used in order to perform the contract*." Pet. App. 59a (ICC ¶ 10.1). Because independent contractors are a subset of persons whose services are used to perform the contract, it makes no sense to restrict the term "independent contractors" further to cover only those contractors in privity with the freight forwarder. Further, Clause 10.2, referring to the "persons" identified in section 10.1, provides that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." *Id.* at 59a-60a (ICC bill ¶ 10.2). This clause "is primarily intended for systems of law which require a contract to give other persons than the carrier himself the

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[10] For example, it is increasingly prevalent for large vessel operators to share space on one another's vessels, yet each operator continues its own marketing operations and books cargo in its own name, servicing its own customers even though only one party will handle the physical carriage. The party handling actual carriage will then engage the additional subcontractors needed to complete all of the carriage operations. Thus, many of the operators who benefit from the shared space arrangement will have no privity of contract to the subcontractors who complete the carriage. *See generally* Mary T. Reilly, *Identity of the Carrier: Issues under Slot Charters*, 25 Tul. Mar. L.J. 505, 513-16 (2001).

benefit of limitation of and exemption from liability (the so-called doctrine of privity of contract)." Ramberg, *supra*, at 67. It would be passing strange if the FBL, having eliminated the requirement of privity with the shipper in 10.2, had required privity with the carrier in 10.1. Finally, Clause 10.1 uses parallel language to Clause 2.1's definition of the persons for whose acts the freight forwarder assumes liability, Pet. App. 55a, 59a, and it is indisputable that such liability extends to the acts of all service providers, not just those in privity with the freight forwarder, see Ramberg, *supra*, at 51 (freight forwarder "cannot avoid a liability for such other persons by referring to his status as an intermediary"). The Eleventh Circuit's wooden privity-of-contract rule is irreconcilable with the plain meaning of the FBL.

The decision below undermines the economic basis of international shipping transactions under the FBL and destroys reliance interests. Under the FBL, the cargo owner knows the extent of the liability of those performing services under the contract of carriage, and it can obtain favorable shipping rates by accepting those limitations, insuring for the balance. Pet. App. 59a (FBL ¶ 10.1) (the "aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8"). On the other end of the transaction, carriers and others can undertake to provide services connected to the transportation of goods under the bill of lading without risk of indeterminate liability. There is no sound economic basis for a privity-of-contract rule; the cargo owner's expectations and decisions do not in any sense depend on whether the freight forwarder performs its contract of carriage by subcontractors or sub-subcontractors. The Eleventh Circuit simply gives cargo owners and insurers a "windfall" by allowing them to prevail on a "technicality" of an implied-in-law privity rule that undercuts the force of the agreement under which all the relevant carriers reasonably assumed they were protected. *Id.* at 20a (Siler, J., dissenting).

The Eleventh Circuit therefore has struck a double blow against carriers and other service providers in international commerce. In conflict with the precedents of other courts of appeals and of this Court, it has wrongly held that a vessel carrier's bill of lading issued to a freight forwarder in its own name (including its Himalaya clause) is unenforceable against the cargo owner, and then invoked a privity-of-contract rule to deny such entities the protections of FBL Himalaya Clauses to which they are clearly entitled. Such conflicts "are precisely the type most likely to be intolerable, because litigants can easily exploit them through forum shopping." Sturley, *Observations*, at 1268 (discussing COGSA); see *id.* at 1270-71 (noting also that lack of uniformity causes parties to shipping arrangements to over-insure). This case squarely presents two critical and independent issues on which the courts of appeals are divided in an area of law where consistency is vital. Indeed, "[t]he need for uniformity is so great that it would generally be better for the [Supreme] Court to resolve a conflict incorrectly . . . than to allow the conflict to stand." *Id.* at 1275. Review by this Court of this case is therefore imperative.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
AMANDA L. TYLER
EAMON P. JOYCE
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RICHARD K. HINES, V
TAYLOR TAPLEY DALY
NELSON, MULLINS, RILEY & SCARBOROUGH, LLP
First Union Plaza, Suite 1400
900 Peachtree Street, NE
Atlanta, Georgia 30309
(414) 817-6000

R. BRUCE RIDER
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510-9242
(757) 629-2877

Counsel for Petitioner

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* Counsel of Record