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OW BUNKER GROUP COLLAPSE: DEVELOPMENTS IN THE US CONCERNING THE MARITIME LIEN CLAIMS OF PHYSICAL SUPPLIERS AND ING BANK

The last several months have seen developments in certain US courts on the lien rights of parties related to the collapse of the OW Bunker Group. Your Managers attach a brief review of recent decisions on this subject.

Members are reminded that there is a dedicated space on the Club's website which contains a range of information, including answers to frequently asked questions on the subject, and general guidance on the OW Bunker Group collapse. It also provides links regarding the OW Bunker Group bankruptcy and can be accessed at:

http://www.american-club.com/page/OW_bankruptcy

Members are encouraged to refer to this section of the Club's website or to contact the Managers directly should they have questions about this matter.

Your Managers would like to thank Ms. Gina M. Venezia and Mr. Michael J. Dehart of Freehill, Hogan & Mahar LLP for their kind assistance in the review of, and for making contributions to, this document.

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OW BUNKER: SIGNIFICANT SUBSTANTIVE DEVELOPMENTS IN THE U.S. ON THE MARITIME LIEN CLAIMS OF PHYSICAL SUPPLIERS AND ING BANK.

INTRODUCTION

The demise of the OW Bunker Group in the Fall of 2014 has resulted in numerous legal proceedings throughout the world including a number of cases filed in the United States. There are now close to sixty (60) cases pending in the United States involving claims for payment arising out of OW's collapse. Of these sixty, approximately thirty (30) were commenced in New York as interpleader cases by vessel owners and/or time charterers. In addition, there are other cases pending throughout the United States including in New York and other districts in which interpleader was raised in response to vessel arrest actions commenced by physical suppliers. There are also a number of vessel arrest cases that were commenced by ING Bank as alleged assignee of certain OW entities which cases do not necessarily involve interpleader claims.

For the most part, all of these cases involve a typical OW scenario: an owner/charterer contracted with an OW entity to supply bunkers to a vessel, the supply was then subcontracted down the supply chain through one or more other OW entities, the last of which then contracted with a physical supplier who delivered the bunkers to the vessel. In most cases, OW filed for bankruptcy and the physical suppliers were left unpaid. The physical suppliers have thus trained their sights on the vessels supplied hoping to obtain payment by exercising a maritime lien for necessaries against the vessels under U.S. law. Similarly, in some instances, the OW entity which had contracted with the owner/charterer has not yet been paid. The OW entity (or more commonly ING Bank as the purported OW entity's assignee) is consequently pursuing payment by, among other things, asserting that they possess maritime lien rights against the vessels. Under the circumstances, while the various cases are in different procedural postures, they involve similar substantive issues of which party in the supply chain, if any, has a maritime lien against the vessels under U.S. law.

The cases in the United States were filed mostly in 2014 and throughout 2015 with a few still being filed in 2016. Until recently, the cases have been focused on various procedural matters including the conduct of discovery. As 2016 progressed, the cases turned their focus to the substantive issue of whether physical suppliers or OW/ING have maritime lien rights against the supplied vessels, or if neither does. This focus has continued into the early part of 2017 as well. The last several months have seen considerable and notable developments throughout the United States on the alleged lien rights of the parties. The material cases are summarized herein, but before turning to that summary, a brief review of the maritime lien available under U.S. law is useful to place in context the relevant decisions.

THE U.S. MARITIME LIEN FOR NECESSARIES

Unlike many jurisdictions throughout the world, U.S. law recognizes a lien in favor of certain suppliers who furnish necessaries to a vessel. The requirements for the assertion of the lien for necessaries are set forth in the Commercial Instruments and Maritime Lien Act ("CIMLA", the "Lien Act" or the "Act"), 46 U.S.C. §§ 31341-43. For a particular supplier to have a maritime lien

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under CIMLA, the supplier must demonstrate that it provided necessaries, to a vessel, on the "order of the owner or person authorized by the owner."

There is no dispute in the OW cases that bunkers constitute necessaries as described in the Lien Act and that the bunkers were delivered to a vessel as opposed to another type of conveyance. The point of contention has been on whether the physical suppliers, who were contracted by an OW entity, can satisfy the authority requirement of the Lien Act. In other words, the analyses of the physical suppliers' lien claims have focused on whether the physical suppliers furnished the bunkers on the order of the owner or person authorized by the owner. To date, as explained herein, every U.S. court to have examined this issue has determined that the physical suppliers cannot satisfy this requirement and hence their lien claims have been rejected. These decisions have all been at the district court level; no appellate court has yet addressed the issues, but appeals are pending and appellate rulings are expected within 2017.

In contrast to the situation with physical suppliers' claims, the question of whether ING/OW possesses a maritime lien has not focused on the authority prong of the Act. Generally speaking, the OW entity for whom ING purports to be assignee contracted with and received its order for bunkers from the vessel owner or charterer both of which are presumed to have the requisite authority under the Act. As a result, the authority prong has not been in dispute in the OW decisions that have addressed ING's/OW's lien claims. The point of contention with respect to the lien rights of ING/OW is on whether OW furnished a necessary to the vessels in situations where OW was not the physical supplier of the bunkers and never paid for the bunkers. To date, there have been three separate district court decisions to have addressed ING's lien claims with two courts accepting that ING possesses a maritime lien and one court rejecting their claims. In the case of the latter, an appeal has been lodged with the appellate court with the initial round of briefing expected in the first quarter of 2017. A summary of the three cases follows as well.

RECENT KEY DECISIONS

Mention should also be made to the status of the interpleader cases pending in New York before District Judge Caproni. As previously reported, Judge Caproni issued a decision in 2015 determining that the use of the interpleader remedy by vessel owners and charterers was appropriate.[1] Her decision was affirmed by the Second Circuit in early 2016.[2] Following those developments, Judge Caproni identified four cases before her to stand as "test" cases on the substantive question of which entity, if any, possesses maritime liens against the vessels. Oral argument was held by Judge Caproni in the test cases on December 1, 2016. As will be set forth in the discussion below, Judge Caproni recently issued two substantial opinions in the test cases that dealt with a number of important issues within the nationwide O.W. litigation.

[1] *UPT Pool Ltd. v. Dynamic Oil Trading (Sing.) Pte. Ltd.*, 2015 U.S. Dist. LEXIS 85950 S.D.N.Y. July 1, 2015)

[2] *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146 (2d Cir. 2016)

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A. Lien Claims of Physical Suppliers Have Been Nearly Uniformly Rejected

The first case to address the substantive question of whether a physical supplier in the typical OW scenario possesses a maritime lien is a case that was filed in Louisiana federal court by supplier Valero Marketing.[3] Valero filed a vessel arrest action against the M/V ALMI SUN claiming to possess a lien for a supply of bunkers undertaken in Texas. The vessel owner appeared in the case as the claimant to the vessel defendant and disputed the asserted lien claim. The vessel owner did not invoke the interpleader remedy and the case proceeded as purely a vessel arrest action.

Valero subsequently moved for summary judgment asserting that the key facts were not in dispute and that Valero was entitled to judgment as a matter of law. The Louisiana district court rejected Valero's position in late December 2015. While the court agreed that the facts were not in dispute, the court concluded that Valero could not satisfy the authority requirement of the Lien Act. The district court explained:

> The Court finds, however, that Valero fails to allege that the factors that the Fifth Circuit has noted could lead a court to find that a subcontractor is entitled to a maritime lien apply in this case. It is undisputed that Almi entered into a sales agreement with O.W. Malta; had O.W. Malta failed to deliver the agreed-upon quantity of fuel, then, it would have been liable for breach of contract, a factor that the Fifth Circuit has stated weighs in favor of finding that O.W. Malta, rather than Valero, holds a maritime lien against the vessel. Valero contends that the owner knew from the outset that Valero would be the party actually supplying the bunkers to the vessel, as the O.W. Sales Order Confirmation sent to the owner at the time of the order expressly identified Valero as the "supplier." However, although Valero is listed as the supplier on the Sales Order Confirmation, Valero points to no evidence suggesting that the Vessel directed that O.W. Malta hire a particular subcontractor, and the Fifth Circuit has noted that the mere knowledge that a particular subcontractor would be used does not necessarily create a maritime lien. Valero does not contend that the Vessel owners specifically selected Valero or "nominated" that it supplies the bunkers, as was the case in Ken Lucky, and Verna contends that the Vessel entities never had any dealings with Valero aside from acknowledging the amount of fuel delivered to the Vessel.

Valero's summary application was thus denied. Following that ruling, the vessel owner moved for summary judgment in its favor and sought a dismissal of Valero's lien claims. Consistent with its earlier ruling, the district court granted summary judgment to the owner in February 2016.[4]

[3] *Valero Mktg. & Supply Co. v. M/V Almi Sun ("Valero I")*, No. 14-2712, 2015 U.S. Dist. LEXIS 172258 (E.D. La. Dec. 28, 2015); *Valero Mktg. & Supply Co. v. M/V Almi Sun ("Valero II")*, No. 14-2712, 160 F.3d 973 (E.D. La. Feb. 8, 2016).

[4] *Valero Mktg. & Supply Co. v. M/V ALMI SUN*, No. 14-2712, 2015 U.S. Dist. LEXIS 172258 (E.D. La. Dec. 28, 2015), *reh'g denied*, 160 F. Supp. 3d 973 (E.D. La. 2016), *appeal docketed*, No. 16-30194 (5th Cir. Mar. 16, 2016).

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Valero has appealed the district court's rulings to the Fifth Circuit Court of Appeals which is the controlling appellate court for Texas, Louisiana and Mississippi. Briefing has been completed and oral argument is scheduled before the Fifth Circuit in New Orleans for January 4, 2017. While there is no set time frame for the Fifth Circuit to act following oral argument, it is anticipated that the Fifth Circuit will issue its opinion in 2017.

Following the *Valero* case, New York District Judge Scheindlin was the next district judge to address the lien claims of the physical suppliers.[5] In this case, supplier O'Rourke Marine Services initiated a vessel arrest action against two Cosco vessels seeking payment for a supply of gasoil at Houston to each vessel. Cosco initiated an interpleader proceeding in response to the vessel arrest action. ING, as assignee of OW Far East, appeared in response to the interpleader and asserted, among other things, lien rights against the vessels. Similar to the *Valero* Court, Judge Scheindlin rejected O'Rourke's claims because it cannot satisfy the authority requirement of the Lien Act. Judge Scheindlin explained:

> In order for a physical supplier in O'Rourke's position to demonstrate that it provided necessaries to a vessel on the order of a person authorized by the owner, it must demonstrate that the intermediary entities that procured the necessaries — in this case, O.W. Far East and O.W. USA — were in an agency relationship with the vessel or owner of the vessel in question. If such an agency relationship exists, and if the intermediary parties are therefore authorized to bind the vessels to contracts, then the *Marine Fuel Supply* line of cases controls (and O'Rourke prevails). If no such agency relationship exists, then the *Lake Charles* line of cases controls (and O'Rourke loses).
>
> The record is clear: COSCO did not authorize O.W. Far East to bind the COSCO vessels or COSCO itself, but instead contracted with O.W. Far East, which subcontracted with O.W. USA, which subcontracted with O'Rourke. Each step in this supply chain involved a separate contract of purchase and sale; each step was carried out independent of COSCO and the COSCO vessels. O.W. Far East even invoiced COSCO for a greater amount than O'Rourke invoiced O.W. USA, further demonstrating that O.W. Far East was operating as a contractor, not an agent. The parties in the supply chain below COSCO's corporate affiliate, Chimbusco, are not agents of the vessel Owners.
>
> *O'Rourke*, 179 F. Supp. 3d 333.[6]

Judge Scheindlin's opinion was issued shortly before she retired from the bench. After her departure, the case was reassigned to District Judge Forrest. Judge Forrest is notable because she has issued more opinions in the OW context than any other district judge in the U.S. She

[5] *O'Rourke Marine Servs. L.P., L.L.P. v. M/V COSCO HAIFA*, 179 F. Supp. 3d 333 (S.D.N.Y. 2016), *aff'd on reh'g, in part, vacated in part, O'Rourke Marine Servs. L.P., L.L.P. v. MV Cosco Haifa*, No. 15-cv-2992 (KBF), Dkt. 103, *appeal docketed*, No. 16-4067 (2d Cir. Dec. 5, 2016).

[6] Judge Scheindlin also held that the only party who could have a lien arising out of the supply is ING as OW Far East's assignee. This aspect of the decision is discussed below.

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features prominently in the key decisions. O'Rourke moved for reconsideration before Judge Forrest, arguing that Judge Scheindlin had reached the wrong result. In August 2016, Judge Forrest denied O'Rourke's reconsideration application and upheld Judge Scheindlin's finding that O'Rourke does not possess a lien against the vessels.[7] On the same day, Judge Forrest issued similar opinions in two other OW matters declaring that the physical suppliers in those cases also have no liens for the same reasons, i.e., the inability of the suppliers to establish the authority requirement of the Act.[8] The physical supplier in each of these cases has filed an appeal to the Second Circuit which is the controlling appellate court for New York, Connecticut, and Vermont. The Second Circuit has ordered that all of these cases will be heard in tandem, and briefing is now complete in several of these appeals and underway in others. It is anticipated that the Court will set oral argument for sometime in late 2017.

Furthermore, Judge Caproni recently became the third judge within the Southern District of New York to hold that the physical suppliers are not entitled to maritime liens.[9] This opinion arose in the context of over twenty interpleader actions pending before Judge Caproni and was issued in four "test cases" previously selected by the court. Judge Caproni's opinion regarding the physical suppliers' entitlement to maritime liens more or less tracked the rationale previously employed by Judge Forrest. Notably, Judge Caproni held that the physical suppliers did not possess maritime liens because they provide bunkers "on the order of" an authorized party as required by the Act.[10] The physical suppliers in these cases have appealed Judge Caproni's ruling to the Second Circuit, with briefing scheduled to begin in July.

Apart from these decisions, similar decisions have been issued by the district courts in Washington, Alabama and Texas. *See Bunker Holdings Ltd. v. M/V YM Success*, No. C14-6002 BHS, 2016 U.S. Dist. LEXIS 73499*, 2016 AMC 1723* (W.D. Wash. June 6, 2016), *appeal docketed*, No. 16-35539 (9th Cir. July 1, 2016); *Barcliff, LLC v. M/V Deep Blue*, 2016 U.S. Dist. LEXIS 133253 (S.D. Ala. Sept. 28, 2016), *appeal docketed*, No. 16-17755 (11th Cir. Jan. 18, 2017); *NuStar Energy Services, Inc. v. M/V Cosco Auckland* No. 4:14-CV-3648, 2016 U.S. Dist. LEXIS 181539 (S.D. Tex. Dec. 1, 2016), *appeal docketed*, No. 17-20246 (5th Cir. May 5, 2017). The supplier in the *Bunker Holdings* case has appealed the decision to the Ninth Circuit which is the controlling circuit for California, Oregon, Washington, Alaska, Arizona and Hawaii. Briefing is

[7] Memorandum Decision & Order, Dkt. 103, in *O'Rourke Marine Servs. L.P., L.L.P. v. M/V Cosco Haifa*, No. 15-cv-02992-KBF (S.D.N.Y. August 24, 2016). Judge Forrest did vacate the portion of Judge Scheindlin's ruling in which she stated that ING has a maritime lien. That issue became the subject of separate briefing in the O'Rourke case and the other cases before Judge Forrest. As explained herein, in October 2016, Judge Forrest issued her opinion on ING's lien rights, determining that it does not possess a maritime lien.

[8] *ING Bank N.V. v. M/V Temara*, 203 F. Supp. 3d 355, 361 (S.D.N.Y. 2016), *appeal docketed*, No. 16-3923 (2d Cir. Nov. 17, 2016); *Aegean Bunkering (USA) LLC v. M/T Amazon*, 14-cv-9447 (KBF), 2016 U.S. Dist. LEXIS 113623 (S.D.N.Y. Aug. 24, 2016), *appeal docketed*, No. 16-4065 (2d Cir. Dec. 5, 2016).

[9] *Clearlake Shipping Pte Ltd. v. O.W. Bunker (Switz.) SA*, No. 14-CV-9287 (VEC), 2017 U.S. Dist. LEXIS 2888 (S.D.N.Y. Jan. 9, 2017), *appeal docketed*, No. 17-1458 (2d Cir. May 3, 2017). As will be discussed below, Judge Caproni's opinion also addressed OW/ING's lien rights.

[10] *Id*. at *20.

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scheduled to close in January 2017, after which the Ninth Circuit may hold oral argument. The supplier in the *Barcliff* case filed post-trial motions seeking relief from the rulings, which were denied, and the supplier has now filed an appeal with the Eleventh Circuit, which includes Alabama, Florida, and Georgia. Briefing has commenced but is not yet complete in that appeal. Likewise, the supplier in the decision from Texas has also filed an appeal to the Fifth Circuit. The Fifth Circuit is the controlling circuit for Texas, Louisiana and Mississippi. Briefing has yet to begin in that appeal.

The only outlier in is a decision issued by District Judge Hinkle of the Northern District of Florida in *Martin Energy Services, LLC v. M/V Bravante IX*.[11] In *M/V Bravante IX*, Judge Hinkle held that the physical supplier was entitled to a maritime lien for several reasons. Notably, the court held that under a literal reading of the Act it was clear the physical supplier satisfied the authority prong because it provided the bunkers on the order of the captain, the chief engineer, and the vessel's local port agent.[12] These arguments were previously uniformly rejected by the other district courts that have addressed the issue as discussed above, although Judge Hinkle did not find their reasoning to be persuasive. ING has appealed this decision to the Eleventh Circuit.

As these decisions demonstrate, physical suppliers in the typical OW scenario have had little success in establishing their rights to assert maritime liens against the vessels supplied. As noted above, these issues are currently being addressed at the appellate level. Ultimately, they may reach the U.S. Supreme Court if there is any split within the Circuits.

B. Lien Claims of OW/ING Have Been Met with Mixed Results

In addition to physical suppliers, ING is a party to most of the cases pending in the United States.[13] ING claims that it holds an assignment of the rights of certain OW entities, and as such, ING has whatever rights, including lien rights, held by OW. While the key decisions have primarily focused on the lien rights of the suppliers, there have been a few decisions addressing ING's rights.

The first U.S. judge to address ING's lien claims was Judge Scheindlin in the O'Rourke case. As mentioned, Judge Scheindlin denied the lien claims of O'Rourke in April 2016 before she departed the bench. In that same ruling, Judge Scheindlin determined that ING, as assignee of OW Far East, was the only party in the contractual chain entitled to a lien under the Lien Act. Judge Scheindlin reasoned:

> [O]nly O.W. Far East took the order for bunkers from the COSCO vessels. Only O.W. Far East, therefore, contracted to supply necessaries to a vessel with an entity authorized to bind the vessel (Chimbusco). The fact that O.W. Far East did

[11] *Martin Energy Servs., LLC v. M/V Bravante IX*, No. 5:14cv322-RH/GRJ, 2017 U.S. Dist. LEXIS 11833, at *1 (N.D. Fla. Jan. 26, 2017).

[12] *Id*. at *13-16.

[13] In very few of the U.S.-based cases, the OW entity has appeared as well alongside ING.

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> not itself deliver the fuel bunkers is immaterial; the party contractually obligated to supply fuel to a vessel is entitled to a maritime lien, despite the fact that it caused another supplier to actually deliver the ordered fuel to the vessel.

O'Rourke Marine Servs. L.P., L.L.P. v. M/V COSCO HAIFA, 179 F. Supp. 3d 333 (S.D.N.Y. 2016), *aff'd on reh'g, in part, vacated in part, O'Rourke Marine Servs. L.P., L.L.P. v. MV Cosco Haifa*, No. 15-cv-2992 (KBF), Dkt. 103, *appeal docketed*, No. 16-4067 (2d Cir. Dec. 5, 2016). This aspect of the decision was vacated by Judge Forrest when she considered the reconsideration application of O'Rourke. Judge Forrest tabled further consideration of these issues pending briefing in other OW cases pending before her.

On October 21, 2016, Judge Forrest issued a detailed opinion addressing ING's lien rights in a number of cases pending before her, all of which involve the typical OW scenario.[14] Two primary issues were placed before her, including whether the assignment provided by OW to ING encompassed maritime lien rights, and if so, whether OW had any such lien rights. The issues surrounding the scope of the assignment were not addressed as consideration of those issues was rendered moot since she determined that OW has no maritime lien rights.

Judge Forrest held that OW does not possess maritime liens against the vessels for the supplied bunkers because it cannot satisfy the "provided" requirement of the Act. She reasoned that the "key issue in determining whether O.W. Bunker has a maritime lien is what the term 'provided' means under CIMLA." She framed the question as whether OW Bunker, "steps removed from the physical provision of bunkers and never having had a tangible financial risk with regard to them," can be deemed to have "provided" them. The word "provided" is not defined in the Act, but she determined that it "clearly embodies a concept of payment protection for an entity that has put itself at financial or other risk in providing necessaries to vessels. She found that OW had not placed itself at the type of risk embodied within the Act. She added that the maritime lien embodied in the Act was "created to provide protection, not enable a windfall." ING has since filed notices of appeal to the Second Circuit, and briefing has commenced in those actions at the appellate level.

The *Temara* decision is contrary to other cases in which the courts have determined that ING is entitled to a lien. In the *Barcliff* case pending in Alabama (discussed above), the district court determined after a full trial on the merits that OW does in fact possess a maritime lien.[15] The

[14] *See ING Bank N.V. v. M/V Temara*, No. 16-cv-95, 2016 U.S. Dist. LEXIS 146251 (S.D.N.Y. Oct. 21, 2016). The same decision was issued in the related cases of ING Bank v. M/V Voge Fiesta, 16-cv-2051, ING Bank v. M/V Ocean Harmony, 16-cv-2923, ING Bank v. M/V Maritime King, 16-cv-3456, and ING Bank v. M/V Jawor, 16-cv-6453. In line with this decision, Judge Forrest determined in the O'Rourke and Aegean Bunkering cases that ING has no lien in those cases either. The ruling did not however impact he contract claims that ING had asserted in those cases against the vessel owners. Unlike the Temara and related cases, the entity with whom OW had contracted to supply the bunkers was a party to the litigation and hence ING asserted contract-based and lien-based theories of recovery. The October 21, 2016, decision was with respect to ING's lien theories.

[15] *Barcliff, LLC v. M/V Deep Blue*, 2016 U.S. Dist. LEXIS 133253 (S.D. Ala. Sept. 28, 2016), *appeal docketed*, No. 16-17755 (11th Cir. Jan. 18, 2017).

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district court concluded that OW Bunker UK has a maritime lien because it took the order for the bunkers from the vessel's owner and necessaries (i.e., bunkers) were furnished to the vessel. The district court rejected the suggestion the physical supplier needed to be paid before OW is entitled to a lien. The district court then concluded that the assignment given by OW to ING encompassed maritime lien rights. Accordingly, ING was determined to possess an enforceable maritime lien against the vessel.

Similarly, on December 1, 2016, the Texas district court in the NuStar/Cosco Auckland case determined that ING is entitled to a maritime lien.[16] In analyzing ING's claims, the court explained that it is "clear that the last two requirements of the [Lien Act] are satisfied—necessaries were supplied to the vessels on the order of an entity authorized to bind the vessels [i.e., the vessel owner's agent]." The court then analyzed whether the "provided" aspect of the Act was satisfied, explaining that "a party need not be the physical supplier or deliverer to have 'provided' necessaries under the statute." The court concluded that the "party contractually obligated to deliver the supplies is entitled to the lien," and since this was OW Far East, ING's assignor, ING was entitled to a maritime lien.

The decisions from Alabama and Texas were also recently echoed by Judge Caproni in the Southern District of New York.[17] In this regard, although at first blush Judge Caproni's decision in *Clearlake* appears to conflict with Judge Forrest's decision in *Temara*, the decision explains that the two opinions are in fact consistent. Specifically, the court noted that unlike the record in *Temara* that was "devoid of information regarding O.W. Bunker's arrangements down the chain," the record in the test cases contained "sales confirmations documenting each discrete transaction." The court further remarked that "the parties to these cases agree that O.W. bore financial risk in the transactions and O.W. was liable to the Vessel Interests in the event [the physical suppliers] failed to deliver." Taken together, these facts established that O.W. had "provided" bunkers as required by the Act, thereby entitling it to maritime liens.

C. Vessel Interests are Entitled to Discharge

In a related ruling, Judge Caproni of the Southern District of New York also ruled that vessel interests that commenced interpleader actions at the outset of the O.W. fiasco was entitled to discharge from those proceedings provided they complied with all requirements of the Federal Interpleader Act (the "Interpleader Act"). Briefly speaking, a stakeholder is entitled to a discharge under the Interpleader Act provided it: 1) is disinterested; 2) has deposited cash or a bond equaling the total of its potential liability; and 3) has sought a discharge. To begin, Judge Caproni held that the *in personam* counterclaims advanced by OW/ING were not "independent" of the interpleader proceedings and thus were not an impediment to discharge. This was a significant finding as OW/ING argued that their *in personam* contractual counterclaims could effectively require the vessel interests to pay twice for each subject supply. The court next found that the vessel interests were "disinterested" because they did not make any claim to the stake

[16] *NuStar Energy Services, Inc. v. M/V Cosco Auckland* No. 4:14-CV-3648, 2016 U.S. Dist. LEXIS 181539 (S.D. Tex. Dec. 1, 2016), *appeal docketed*, No. 17-20246 (5th Cir. May 5, 2017).

[17] *Clearlake Shipping Pte Ltd. v. O.W. Bunker (Switz.) SA*, No. 14-CV-9287 (VEC), 2017 U.S. Dist. LEXIS 2888 (S.D.N.Y. Jan. 9, 2017), *appeal docketed*, No. 17-1458 (2d Cir. May 3, 2017).

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(*i.e.* the funds representing the value of the bunkers). The court also held that the vessel interests that deposited cash equaling the value of the subject bunkers plus 6% interest had deposited an adequate stake entitling them to discharge.[18] Furthermore, the court also noted that the vessel interests entitled to discharge should be awarded an award of "reasonable" attorneys' fees associated with their involvement in the interpleader proceedings. At this time Judge Caproni has ordered the parties to submit proposals as to how the cases should proceed forward in light of her recent decisions, and there is a possibility her recent decision on the discharge issue could also be appealed.

CONCLUSION

As the above discussion demonstrates, the litigation fallout in the United States from OW's demise continues to develop and move toward conclusion. The U.S. district courts are issuing decisions on a regular basis on the key substantive issues relevant to the Lien Act, and decisions at the appellate level are anticipated in the upcoming year. These decisions will influence the various OW cases pending in the U.S. as well as throughout the world and perhaps the lien rights of future litigants in unrelated matters. Based on the decisions to date, it seems relatively clear that the physical suppliers who were contracted by OW, a trader, will find themselves without the ability to enforce liens against the vessels. ING's lien rights are less settled. In either event, the anticipated rulings from the appellate courts will provide further certainty on the respective rights of the parties. Until then, vessel owners faced with lien claims from either physical suppliers and/or ING may find some assistance in the recent substantive rulings.

[18] The court denied without prejudice the motion for discharge of the third vessel interest pending further briefing on issues regarding foreign law solely applicable in that case.