COMMENTS OF THE WORLD SHIPPING COUNCIL

The World Shipping Council ("WSC" or the "Council") files these comments in response to the Federal Maritime Commission's ("FMC" or "Commission") Notice of Inquiry ("NOI") issued on October 7, 2020. WSC is a non-profit trade association that represents the liner shipping industry, which is comprised of operators of containerships and roll-on/roll-off vessels (including vehicle carriers). Together, WSC's members operate approximately 90% of the world’s liner vessel services. WSC’s member companies operate more than 5,000 ocean-going liner vessels of which approximately 1,500 vessels make more than 27,000 calls at ports in the United States each year.¹ As the NOI is focused on policies of and practices engaged by vessel-

¹ A full description of the Council and a list of its members are available at www.worldshipping.org.
operating common carriers (“VOCCs”), WSC and its members have a direct interest in this proceeding.

The Commission issued the NOI to solicit public comments on how VOCCs define the term “Merchant” in their bills of lading, and whether VOCCs have in practice applied that term to cover entities that are “not themselves parties to the bills of lading, but who are nevertheless providing service as third parties on behalf of someone specifically identified on the bill of lading.” NOI at 2. According to the NOI, these third party entities could include “logistics providers, harbor truckers, stevedores, customs brokers and freight forwarders.” Id.

The NOI appears at this time to only be gathering facts as to actual practices within the industry. As a trade association, WSC does not have any specific information as to how its members have sought to enforce the terms of their bills of lading in particular cases. In this regard, other than viewing favorably the general proposition that “ocean carriers and marine terminal operator bills align[] with contractual responsibilities,” the NOI does not propose any specific change in the current law under the U.S. Shipping Act or the Commission’s regulations, or otherwise propose any new interpretation of existing law. NOI at 3. Rather, as noted in the NOI, the Commission has already recently found in a separate proceeding that it would not be appropriate for it “to prescribe specific billing practices, or to address the application of the merchant definition as it related to such practices,” but it would instead “address such issues in the context of particular facts, considering all relevant arguments.” Id. at 4. WSC agrees with this approach. Given the complex commercial nature of the subject matter involved, the
individual facts and circumstances are important, and a case-by-case analysis based upon particular facts is more appropriate than the adoption of any “one size fits all” regulatory approach.

This is particularly the case in an area that is not only highly fact-specific, but also one that to a large extent is already subject to a substantial body of law developed by the federal U.S. courts. To support the Commission’s fact gathering exercise, WSC therefore believes it would be useful to provide the Commission with a more detailed summary of some relevant U.S. court decisions that have addressed issues concerning “Merchant” definitions in carrier bills of lading, and the circumstances under which courts have indicated it would be permissible for carriers to enforce the terms of their bills of lading against entities that fall within such definitions, but who are not otherwise specifically named on those bills of lading.

The Commission frames the legal analysis in the NOI with a reference to “general contract law principles” that provide that one party cannot enforce a contract against another who did not consent to be bound by, or otherwise accept, the terms and conditions of the bill of lading. NOI at 1. While that overview of general contract principles is accurate as far as it goes, it is incomplete for purposes of the questions asked and assumptions made in the NOI. Federal case law, for example, does not require a third party to have a “connection to” or “beneficial interest in the cargo” in order to be bound to contract terms, as the NOI appears to suggest. Id. at 3. Rather, the law is well-settled that a non-signatory third party can be bound by the terms of a bill of lading between a carrier and a shipper/consignee, provided that the
third party demonstrates some form of acceptance. A third party can manifest its acceptance to be bound to a bill of lading in one of two ways: (1) by accepting the terms of the bill of lading by seeking to benefit from those terms, or (2) by having an agency relationship with one of the named parties to the bill of lading. Demonstrating an agency relationship requires a manifestation by the principal (in this case, the shipper) to the agent (in this case, the third party service provider) that the agent may act on his behalf, consent by the agent to so act, and the power by the principal to control the agent's conduct regarding the entrusted matters. See Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co., 696 F.3d 647, 655 (7th Cir. 2012).

Regarding the first manner of acceptance, it has long been the case that third party beneficiaries may, under certain circumstances, be bound by a contract to which they are not a party. For example, federal courts have specifically held that unnamed parties to a bill of lading that are otherwise included within its broad definitional terms can demonstrate their consent to be bound when they seek to enforce its terms. See All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu, 7 F.3d 1427, 1432 (9th Cir. 1993) (“At the very least, Plaintiffs' initiation of this suit constituted acceptance of the terms of the Hanjin bills of lading.”); Mitsui & Co. (USA), Inc. v. MIRA M/V, 111 F.3d 33, 36 (5th Cir. 1997) (“[T]he district court did not err in determining that, by filing a lawsuit for damages under the bill of lading, [the shipper] has accepted the terms of the bill of lading.”).

Regarding the second manner of acceptance, whether an agency relationship exists between an expressly identified contracting party to a bill of lading and a third party service
provider is a question of fact. See Polo Ralph Lauren, L.P. v. Tropical Shipping & Const. Co., Ltd., 215 F.3d 1217, 1224 (11th Cir. 2000) (“[D]etermination of the existence of an agency relationship is a factual question.”); In re M/V Rickmers Genoa Litigation, 622 F.Supp.2d 56, 74 (S.D.N.Y 2009) (“[B]ecause agency is determined according to extant factual circumstances, a contractual disclaimer or acknowledgement of agency is not dispositive for purposes of determining whether an agency relationship exists as a matter of law.”). In this regard, courts have applied traditional agency law to different factual circumstances in order to determine whether an unnamed third party that otherwise is covered by a bill of lading’s definition of “Merchant” should be held responsible for service obligations, liabilities, and costs under the bill of lading. See, e.g., Rickmers, 622 F.Supp. at 74; APL Co. Pte. Ltd. v. UK Aerosols Ltd., 452 F.Supp.2d 939 (N.D. Cal. 2012); Laufer Group Int’l v. Tamarack Indus., LLC, 599 F. Supp. 2d 528, 531 (S.D.N.Y. 2009).

Broadly speaking, a third party entity like a motor carrier either: (1) has a direct contractual relationship with the ocean carrier in a carrier haulage move (as a subcontractor), or (2) acts as an agent of the shipper authorized to pick up and return the container at the port of discharge in a merchant haulage move. In either case, well-settled law says their actions either expressly or by virtue of an agency relationship are covered by the bill of lading. As such, a carrier defining “Merchant” in its bill of lading to include these entities, and thereafter enforcing the terms of their bill of lading before release of the goods to such entities, is entirely consistent with the law.
Any rule to the contrary could create serious and entirely unexpected disruptions to commercial relationships between contracting parties and, more generally, disrupt the normal functioning of the supply chain. In this regard, the U.S. Supreme Court’s holding in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004) is instructive because it discusses in a similar context the interconnected relationships among various supply chain participants, and describes the underlying policy reasons that support an ocean carrier’s ability to enforce the terms of bills of lading broadly in order to facilitate U.S. commerce.

In *Kirby*, a cargo owner sued a railroad for damage to equipment sustained in a derailment that took place in the U.S. during an inland leg of an international intermodal movement that began with an ocean voyage. The railroad asserted that its liability should be limited under the limitation of liability clauses (“Himalaya Clause”) in the respective bills of lading issued by the intermediary and the ocean carrier, which clauses limited liability for claims relating to the performance of the contract made against “any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract.” *Id.* at 30. Thus, *Kirby* dealt with whether bills of lading cover non-maritime portions of a shipment, and also the extent to which Himalaya Clauses should apply to downstream carriers acting as agents or subcontractors, even if they are not expressly named on the bills of lading.

The Supreme Court held that the railroad was entitled to rely on the Himalaya Clauses in the bills of lading because, while the intermediary might not be the agent of the cargo interest
for all purposes, it must be treated as an agent for the cargo interest for limitation of liability purposes. See id. at 30. The Court explained its reasoning as follows:

In holding that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers, we do not infringe on traditional agency principles. We merely ensure the reliability of downstream contracts for liability limitations. In Great Northern, because the intermediary had been “entrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that [the intermediary] could agree upon the terms of the shipment.” Likewise, here we hold that intermediaries, entrusted with goods, are “agents” only in their ability to contract for liability limitations with carriers downstream.

Id. at 34 (internal citations omitted).

Noting its decision “tracks industry practices,” the Court further explained the public policy reasoning behind allowing the railroad to rely on the Himalaya clauses in the bills of lading:

In intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather than with a cargo owner. Even if knowingly dealing with an intermediary, they may not know how many other intermediaries came before, or what obligations may be outstanding among them. If the Eleventh Circuit’s rule were the law, carriers would have to seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection. That task of information gathering might be very costly or even impossible, given that goods often change hands many times in the course of intermodal transportation.

Id. at 34-35.

The Kirby case was decided in the cargo liability context, but the underlying policies behind the Court’s decision are nonetheless broadly relevant to the Commission’s inquiries in the NOI. Specifically, the Supreme Court held that allowing the railroad to rely on the terms of
a bill of lading between other supply chain participants, even though it was not itself named on those bills of lading, would facilitate commerce by ensuring the reliability of downstream contracts and preventing ocean carriers from having to enter into separate contracts with each entity on the supply chain, which would very likely disrupt the free flow of cargo from origin to destination. See, e.g., *A.P. Moller-Maersk A/S v. Ocean Express Miami*, 550 F. Supp.2d 454, 465 (S.D.N.Y. 2008) (“The very costly or even impossible task of tracking down information about the cargo owner, intermediaries, and the obligations between them does not vary between clauses in the bill of lading.”) (internal citations omitted); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 901 (9th Cir. 1989) (“Parties who do not deal with the carrier directly have a responsibility to obtain a copy of the bill of lading if they have an interest in knowing its terms. We decline to place on the carrier the burden of tracking down these remote parties and advising them of the terms of the bill of lading.”).

Turning back to the NOI, the reason an ocean carrier might therefore define the term “Merchant” broadly in its bill of lading is because a number of known and unknown parties could take possession of the goods in the chain of custody that are neither the shipper nor consignee. See, e.g., *G.I.C. Servs, L.L.C. v. Freightplus U.S.A., Inc.*, 866 F.3d 649, 657 (5th Cir. 2017) (“In the modern shipping industry, the shipment of goods by vessel from the United States often involves a chain of multiple entities, each with defined roles.”). If an ocean carrier was prevented from enforcing the terms of its bill of lading against a third party that sought to take possession of the cargo after discharge at the terminal, and that third party was acting as
an agent of the shipper or consignee when doing so, the ability of all parties individually and collectively to ensure that the goods reached their destination would be thwarted, and the supply chain would be disrupted.

Even outside of the agency context, it bears noting there might also be circumstances in which it would be appropriate for an ocean carrier to hold an unnamed entity on the bill of lading responsible for payment of freight and charges. For example, if a bill of lading is consigned “To Order” or to order of a bank, the goods will be delivered pursuant to the instructions of the holder of the bill of lading or of the bank. The consignee to whom the carrier is instructed to deliver the goods is not named on the bill of lading, but it certainly would not be unreasonable in this circumstance for the ocean carrier to look to that consignee for payment before releasing the cargo. See, e.g., 49 U.S.C. § 80110(a)(1) (carrier required to deliver goods to holder of a negotiable bill for the goods only when the consignee or holder offers in good faith to satisfy the lien of the carrier on the goods).

Further, while it is not clear from the NOI precisely what circumstances prompted the Commission’s inquiry, the Commission should also not assume that charges are always imposed pursuant to the terms of the ocean carrier’s bill of lading. In some instances, the ocean carrier’s tariff might specify that certain charges are payable by a third party acting on behalf of a shipper or consignee. In other instances, the basis for collection of the charge or the recovery of damage to equipment or cargo may be a direct contractual arrangement between the ocean carrier and the third party (e.g., a trucking contract between the ocean carrier and a motor
carrier, such as the Uniform Intermodal Interchange and Facilities Access Agreement). These circumstances illustrate that each commercial situation is unique, and a case-by-case analysis, “considering all arguments,” is the only sensible way to evaluate the legality of a particular set of facts.

The Commission has not proposed in the NOI any changes to current maritime common law or regulatory law. It has nonetheless indicated that “responses to the NOI will help the Commission ascertain more precisely the practices of VOCCs, including whether they may be imposing liability on entities who may not have assented to be bound to the terms and conditions of a VOCC’s bill of lading, and in determining whether additional analyses or action by the Commission may be necessary.” NOI at 5. As is evident from the discussion above, the Commission’s premise is incorrect. There are many cases in which service providers may be found responsible for service obligations, liabilities, and costs based on agreements with other participants in the intermodal chain and agency functions, among others. For the Commission to involve itself in redefining longstanding commercial and liability relationships in U.S. and international commerce is an enormously complex exercise fraught with the risk of unintended consequences. The courts have dealt with these issues in the past pursuant to maritime common law, contract law, statutory provisions, and international agreements. There is no reason for the Commission to intrude into this highly commercial, dynamic, free market activity.
To the extent that the Commission nonetheless believes, after review of the comments received, that any additional regulatory action may be warranted, WSC urges the Commission to proceed in a manner that is consistent with how this issue has already been addressed by the U.S. courts. If that is the case, WSC also strongly encourages the Commission to describe with particularity all of the bases upon which it believes it has jurisdiction over the subject matter in question, as well as to thoroughly outline the factual, legal, and policy bases that would support any change to existing law or any new interpretation of existing law so that all interested parties are afforded an opportunity to review and respond to such proposals.

Respectfully submitted,

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