No. 11-948

In The

Supreme Court of the United States

TITAN MARITIME, LLC,
a Crowley Company, dba TITAN SALVAGE,

Petitioner,

vs.

CAPE FLATTERY LIMITED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit's opinion applying the federal substantive law of arbitrability to determine which disputes the parties agreed to arbitrate, absent a provision in the parties' agreement on the law governing the construction and interpretation of the agreement as a whole, and absent a request to have such law determined by conflict-of-laws rules, does not conflict with an opinion of this Court or another Court of Appeals.

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit's opinion holding that a claim for damages caused exclusively by gross negligence, which arose independently of the agreement between the parties, and does not involve interpretation or performance of the agreement, is not arbitrable under a clause requiring arbitration of disputes "arising under" the agreement, does not conflict with an opinion of this Court or another Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Respondent CAPE FLATTERY LIMITED is a Hong Kong corporation, and no publicly held corporation owns ten percent (10%) or more of its stock; however, Pacific Basin Shipping Limited, a Bermuda corporation publicly-listed on the Hong Kong Stock Exchange, indirectly owns 100% of CAPE FLATTERY LIMITED.

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INTRODUCTION

This case involves a contract (the "Agreement") within the coverage of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*.

Petitioner Titan Maritime Ltd. ("Titan") drafted the Agreement. The Agreement does not have a choice of law provision governing its interpretation and construction. It has an arbitration clause requiring that any dispute "arising under" the Agreement be arbitrated in London "in accordance with the English Arbitration Act 1996 and any amendments thereto, English law and practice to apply."

Respondent Cape Flattery Limited ("CFL") asserted a claim, statutorily limited to gross negligence, against Titan. In this action, both courts below have concluded that CFL's claim exists regardless of the Agreement, can be maintained independently without reference to the Agreement, and does not involve interpretation or performance of the Agreement.

Titan filed a motion to compel arbitration, asking the District Court to rule, under the federal substantive law of arbitrability, that CFL's claim "arises under" the Agreement.

After seeing CFL's opposition to its moving papers, Titan switched its position, and in its reply memorandum asked the District Court to apply English substantive law of arbitrability, and hold that CFL's claim was arbitrable notwithstanding the "arising under" clause.

Titan did not ask the District Court to determine the law governing the interpretation and construction of the Agreement by the applicable conflict-of-laws rules.

The District Court held that, absent the parties' choice of non-federal law governing the interpretation and construction of the Agreement as a whole, there was no reason not to apply the federal substantive law of arbitrability, and under that law, CFL's claim did not "arise under" the Agreement.

On appeal, Titan did not challenge the District Court's holding that the parties failed to choose a non-federal law governing the Agreement as a whole. Instead, Titan switched its position again and argued that the specific reference to the English Arbitration Act in its arbitration clause means arbitrability must be decided by an arbitrator, and that this specific reference excluded the application of the FAA as the law governing arbitrability.

The Ninth Circuit held that parties are free to choose a non-federal law of arbitrability, but the arbitration clause in the Agreement was ambiguous and failed clearly and unmistakably to exclude the FAA. The Ninth Circuit also held that CFL's claim does not "arise under" the Agreement.

In its Petition, Titan, switching its position for the third time, argues that the Ninth Circuit improperly applied a heightened standard requiring that a choice of a non-federal law of arbitrability be clear and unmistakable. This is a red herring. Titan's

argument disregards the District Court's conclusion that the parties failed to choose a law governing the interpretation and construction of the Agreement as a whole, and Titan's own tactical choice not to contest this conclusion. Titan did not ask the Ninth Circuit to hold that English law was chosen to govern the Agreement as a whole. Instead, Titan argued that its specific reference to the English Arbitration Act excluded the FAA and committed the determination of arbitrability to the arbitrator. The Ninth Circuit, absent the parties' choice of a non-federal law governing the Agreement, held that the reference to the English Arbitration Act failed clearly and unmistakably to exclude the application of the FAA.

Titan now contends the decision of the Ninth Circuit below conflicts with opinions of other Circuits that have applied non-federal law chosen by the parties to determine arbitrability. The posited conflict does not exist. In each case cited by Titan, the parties had designated the law governing the interpretation and construction of their contract as a whole. Here, the Agreement did not do so.

The judgment below also could be affirmed on multiple alternative grounds.

First, absent a choice of a non-federal law governing the entire Agreement, and a request to determine such law by the applicable conflict-of-laws rules, the Ninth Circuit properly defaulted to federal substantive law of arbitrability.

Second, the applicable conflict-of-laws rules point to Hawaii law, not English law.

Third, the rule of construction against the drafter under Hawaii law and under general contract law is plainly fatal to Petitioner's argument, given that the Ninth Circuit has found the arbitration clause to be ambiguous.

Fourth, Titan provided the strongest evidence of the meaning of the arbitration clause when it filed its motion to compel arbitration and asked the District Court to hold, under the federal substantive law of arbitrability, that CFL's claim arose under the Agreement. Conversely, if Titan, which drafted the arbitration clause, was mistaken as to the meaning of the clause when it asked the District Court to do so, the arbitration clause does not clearly and unmistakably exclude the FAA.

Titan also contends that the Ninth Circuit's decision that CFL's claim is not arbitrable because it does not "arise under" the Agreement is contrary to the law in other Circuits. With a remarkable lack of candor, Titan supports its argument by citing cases dealing with arbitrability of claims for fraudulent inducement, reformation, rescission, and voidance of contracts. Titan fails to acknowledge an abundance of case law in all Circuits holding that a claim that exists without reference to a contract and does not involve interpretation of the contract is not arbitrable even under a broad arbitration clause in the contract.

Finally, Titan contends that the Court should disregard the actual language of the Agreement to give effect to the federal policy in favor of arbitration. This argument is frivolous.

In sum, the decision below is based, and also could be alternatively affirmed, on the specific facts of this case. These include Titan's peculiar choices in drafting of the Agreement and in litigating this action, and the nature of CFL's claim, which exists regardless of the Agreement. The Petition does not present a substantial question, let alone a compelling question, for this Court to decide.

COUNTERSTATEMENT OF THE CASE

On February 2, 2005, M/V CAPE FLATTERY (the "Vessel"), owned and operated by CFL,[1] grounded on a submerged coral reef off Barbers Point, Oahu, Hawaii. Pet. App. 2a, 23a. The U.S. Coast Guard activated Unified Command to remove the threat of oil discharge (the "Removal").[2] Pet. App 2a, 23a. Under federal law, CFL was required to remove the Vessel

[1] CFL is a corporation organized under the laws of Hong Kong, with its principal place of business in Hong Kong. E.R. 1-2.

[2] 33 U.S.C. § 2701(30) states: "'remove' or 'removal' means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches[.]"

from the reef to eliminate the threat of an oil spill, and is strictly liable for damages to natural resources caused by the Removal. *See* 33 U.S.C. §§ 2701(30), 2701(32)(A), 2702(a) & (b)(2)(A); Pet. App. 2a-3a, 4a.

On February 4, 2005, CFL entered into a Salvage Agreement (the "Agreement") with Titan.[3] Pet. App. 3a, 23a-24a. The Agreement was drafted by Titan and came on Titan's pre-printed form, displaying Titan's logo.[4] E.R. 6-6-1 to 6-6-5. In the Agreement, Titan promised to "use its best endeavors to salve" the Vessel and "deliver [her] to a Place of Safety[.]" Pet. App. 3a, 23a-24a. The Agreement also contains the following arbitration clause:

> [17.] Arbitration:
> Any dispute arising under this Agreement shall be settled by arbitration in London, England, in accordance with the English

[3] Titan is a corporation organized under the laws of Florida, with its principal place of business in Florida. E.R. 1-2.

[4] An employee of Titan based in England emailed Titan's standard salvage agreement form, with blanks for the description and location of the vessel and her owners and contract price, to representatives of CFL's affiliate, Pacific Basin Shipping (HK) Ltd. in Hong Kong, who acted on behalf of CFL. E.R. 31-2-2, 31-2-3, 31-2-5 to 31-2-11. In the signed version of the Agreement, these blanks are filled in, section 7 of the form that addresses personnel charge rates is deleted, and some other minor adjustments were made. E.R. 6-6-1 to 6-6-5. No terms of Titan's standard form of any relevance here were changed. *Id*. The Agreement recites that it is "deemed to be made" at "Newhaven, UK." E.R. 6-6-1.

> Arbitration Act 1996 and any amendments thereto, English law and practice to apply.

Pet. App. 24a, 3a.

Titan ultimately removed the Vessel and eliminated the threat of oil discharge. Pet. App. 3a, 24a. However, during Removal, Titan shredded coral on the reef by using tugs with submerged heavy tow lines. Pet. App. 24a. Titan knew that only floating tow lines should be used to salvage vessels aground on coral reefs, and the use of submerged tow lines was grossly negligent. Pet. App. 24a, 39a-40a. Under the Federal Water Pollution Control Act, 33 U.S.C. § 1321(c)(4)(A) and (B)(iv),[5] Titan, as a "responder" to a threatened oil spill, enjoys qualified immunity, but remains liable in tort for damages caused by its gross negligence. Pet. App. 4a.

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[5] These sections read as follows:

> (4) Exemption from liability
>
> (A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President relating to a discharge or a substantial threat of a discharge of oil or a hazardous substance.
>
> (B) Subparagraph (A) does not apply –
>
> * * *
>
> (iv) if the person is grossly negligent or engages in willful misconduct.

The Coast Guard named CFL the Responsible Party strictly liable for costs and damages arising from the Removal, including damage to natural resources. Pet. App. 24a-25a. The Federal and State trustees later assessed damages in an amount exceeding $15 million. Pet. App. 4a, 25a.

CFL commenced this action to obtain indemnity or contribution from Titan for injury to the coral caused by Titan's gross negligence during the Removal, as allowed by 33 U.S.C. § 2709 and general maritime law. Pet. App. 4a.[6]

In response, Titan filed its Motion to Compel Arbitration, Pet. App. 4a, 25a, arguing: (1) under the federal substantive law of arbitrability in the Ninth Circuit, CFL's claim "arose under" the Agreement, Supp. E.R. 46-51;[7] and (2) the federal policy in favor of arbitration overrides a narrow interpretation of the "arising under" clause, Supp. E.R. 42-46, 49-51. Titan's moving papers did not cite any English law authorities or otherwise meaningfully invoke English law. E.R. T-3, T-4; Supp. E.R. 35-81.

CFL, in its memorandum in opposition to Titan's motion, rebutted Titan's arguments that, under the

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[6] 33 U.S.C. § 2709 provides: "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law."

[7] Specifically, Titan relied on *Tracer Res. Corp. v. Nat'l Env'l Servs. Co.*, 42 F.3d 1292 (9th Cir. 1994) ("*Tracer*"), and *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) ("*Simula*"). *Id*.

federal substantive law of arbitrability, CFL's claim "arose under" the Agreement. Supp. E.R. 11-33. In its reply memorandum, Titan argued for the first time that English substantive law of arbitrability applied, and that CFL's claim was arbitrable under that law. Pet. App. 25a.[8] The District Court directed further briefing. Pet. App. 25a-26a. Both Titan and CFL submitted Fed. R. Civ. P. 44.1 opinions of English lawyers on whether CFL's claim was arbitrable under English substantive law of arbitrability.[9] CFL noted in its supplemental memorandum that the Agreement was drafted by Titan and must be interpreted against Titan. E.R. D-7, Doc. 32 at 8-9.

The District Court's Order denying Titan's motion to compel arbitration concluded that the Agreement "does not actually contain a choice-of-law provision governing *interpretation* of . . . the Agreement as a whole[,]" but instead "provides only that disputes arising under the Agreement are subject to arbitration, which will occur in England pursuant to English law." Pet. App. 32a-33a. Because the Agreement "is

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[8] Specifically, Titan argued that in *Fiona Trust & Holding Co. v. Privalov*, 2007 UKHL 40 ("*Fiona Trust*"), the House of Lords held that tort claims are arbitrable under an "arising under" clause. E.R. D-6, Doc. 27 at 7-9 of 17.

[9] The opinion by CFL's English lawyers noted that *Fiona Trust* dealt with claims for rescission of charterparties on the basis of fraudulent inducement, and that under English law there remains an open question whether its holding would apply to arbitration of torts that arise without reference to a contract. E.R. D-7, Doc. 32-33.

silent as to what law should apply to determining the scope of the arbitration clause," the District Court saw "no reason not to" apply the federal substantive law of arbitrability. Pet. App. 33a.[10]

The District Court further concluded that CFL's claim does not "arise under" the Agreement because: (1) the duty element of CFL's gross negligence claim, *i.e.*, Titan's "duty to prevent foreseeable harm to the coral reef exists regardless of" the Agreement, and CFL's claim does not involve interpretation or performance of the Agreement,[11] Pet. App. 42a-45a; and (2) as a matter of law, Titan's liability for gross negligence cannot be changed by the Agreement, Pet. App. 44a n.12 (citing *Royal Ins. Co. of Am. v. Southwest Marine* ("*Royal*"), 194 F.3d 1009, 1016 (9th Cir. 1999)).[12]

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[10] The District Court never reached the question of whether CFL's claim is arbitrable under English substantive law. Titan's contention that "[t]here is no doubt that English arbitration law would have sent the parties to arbitration[,]" Pet. 4, misstates the record.

[11] Titan conceded before the District Court that CFL's claim does not require interpretation of the Agreement. Pet. App. 43a-44a & n.11.

[12] The District Court also specifically concluded that CFL does not allege that Titan breached the Agreement in any respect and that performance of the Agreement is not at issue. Pet. App. 46a. Titan's contention that CFL sued Titan "on a $15 million claim based on its performance of the contract[,]" Pet. 4, misstates the record.

On appeal to the Ninth Circuit, Titan did not challenge the District Court's conclusion, Pet. App. 32a-33a, that the Agreement did not "contain a choice-of-law provision governing *interpretation* of . . . the Agreement as a whole." Likewise, Titan never sought to have such law determined by conflict-of-laws rules. Instead, Titan raised only one issue:

> 1. Should English law and, specifically, the English Arbitration Act of 1996 govern the interpretation of the arbitration agreement, including the scope of the arbitration agreement?

Titan's Opening Br. 4.

Titan's appellate briefs argued, for the first time, that the intent of its reference to the English Arbitration Act in the Agreement was to have the arbitrator decide arbitrability:

> By incorporating the English Arbitration Act, the parties agreed that the Lloyd Salvage Arbitrator selected by them would decide the scope of their arbitration agreement and whether their dispute over the use of submerged tow lines fell within that arbitration agreement.

Titan's Opening Br. 20.

> [I]t is the parties' specific citation to and incorporation of the English Arbitration Act of 1996 which clearly and unequivocally

> displaces the FAA and U.S. law on the issue of arbitrability.

Titan's Reply Br. 14.[13]

Titan also argued on appeal that under the federal substantive law of arbitrability, its "arising under" clause should be interpreted to include CFL's claims. Titan's Opening Br. 27-46.

In affirming the District Court, the Ninth Circuit rejected an older line of cases holding that the parties cannot validly exclude the FAA as the law of arbitrability, finding the reasoning of these cases to be contrary to *Volt Info. Sciences., Inc. v. Board of Trustees*, 489 U.S. 468 (1989) ("*Volt*"), Pet. App. 7a-10a, and held that "courts should enforce contracting

[13] Titan's Opening Brief argued that CFL's claim is arbitrable under English law. *Id*. at 25-27. However, Titan did not explain why, and under what legal authority, English law should be applicable to interpret the Agreement ***as a whole***. Instead, Titan argued that, under the English Arbitration Act, arbitrability would be decided by the arbitrator. *Id*. at 19-20. Titan then postulated that the ***arbitrator*** would apply English law. *Id*. at 24. This postulate is irrelevant. If the court agreed with Titan that the procedure specified in the English Arbitration Act applied, the court would not reach the issue of arbitrability. Rule 28 of the Federal Rules of Appellate Procedure required Titan to "clearly articulate" the issue whether the Agreement includes a choice of law applicable to the Agreement as a whole, both in the statement of issues presented for review, and in the argument section itself. *Christian Legal Soc. Chapter of University of California v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010). Titan failed to do either, and thus failed to raise this argument on appeal. *Id.*

parties' agreement to have arbitrability governed by non-federal arbitrability law," Pet. App. 10a.

However, the Ninth Circuit also concluded: "In this case, there is no clear and unmistakable evidence that the parties agreed to apply English arbitrability law." Pet. App. 14a. The Ninth Circuit further concluded that "the agreement is ambiguous concerning whether English law also applies to determine whether a given dispute is arbitrable in the first place." Pet. App. 15a. "Faced with such ambiguity," the Ninth Circuit "conclude[d] that federal law applies to determine arbitrability." *Id*.

Turning to the issue of arbitrability, the Ninth Circuit concluded:

> The present dispute does not turn on an interpretation of any clause in the contract. As the district court noted, "[t]he parties point to no Agreement provision that Defendant allegedly breached – the Agreement is silent regarding what tow lines Defendant must use, how precisely Defendant must salve the Vessel, and whether Defendant must take precautions to prevent harm to the coral reef." *Cape Flattery*, 607 F. Supp. 2d at 1190 (footnote omitted). Nor does the dispute turn on Titan's performance under the contract. Instead the dispute involves a tort claim based on Hawaii and maritime tort law, incorporated as part of [OPA 90], and limited by that federal statute to grossly negligent acts.

Pet. App. 20a-21a.

Accordingly, the Ninth Circuit held that CFL's claim did not "arise under" the Agreement, and is not arbitrable. Pet. App. 15a-21a. Subsequently, the Ninth Circuit denied Titan's petition for rehearing *en banc*. Pet. App. 49a.

REASONS FOR DENYING THE PETITION

I. THE PETITION DOES NOT RAISE A COMPELLING QUESTION REGARDING CHOICE OF THE LAW OF ARBITRABILITY

A. The Ninth Circuit Did Not Impose A Heightened Standard For Choice Of Law Of Arbitrability

Titan contends in the Petition that the Ninth Circuit's opinion imposed a heightened standard for the parties' choice of the law governing arbitrability that conflicts with this Court's precedents. Pet. 30-33. This is false. There is no question regarding the purported "standard."

This Court has established that the state (or non-federal) law governing the interpretation and validity of the contract between the parties as a whole ***is*** the law that should govern determination of what disputes the parties have agreed to arbitrate. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("*Kaplan*") ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of

contracts."); *Volt*, 489 U.S. at 479 ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.") (citations omitted). Thus, the point of law that Titan purportedly seeks to have this Court decide has long been settled. The District Court concluded that the Agreement failed to choose the law governing its interpretation as a whole, and on appeal Titan did not argue to the contrary. See pages 10-11 and footnote 13 above.

Instead, Titan argued on appeal that its specific reference to the English Arbitration Act in the Arbitration clause ***excluded*** the application of the FAA. *Id*. This issue that Titan actually raised on appeal is entirely different from the question of whether the Agreement includes a choice of law governing the interpretation of the Agreement as a whole. The English Arbitration Act is not the law applicable to the interpretation and construction of the Agreement as a whole. Titan's appellate briefs emphasized that the reference to the English Arbitration Act was intended to commit the determination of arbitrability to the arbitrator, *i.e*., Titan construed the meaning of the reference as procedural, rather than substantive. *Id.*

In sum, the Ninth Circuit did not impose any heightened standard on the parties' choice of the law governing arbitrability, *i.e.*, the law governing the interpretation and construction of the Agreement as a whole. Instead, it held, ***in the absence of such a choice,*** that an ambiguous arbitration clause referring to a foreign arbitration statute does not clearly

and unmistakably exclude the application of the FAA. Titan has not asked this Court to review this actual holding of the Ninth Circuit, presumably for the reasons discussed later in this brief.

B. A Circuit Split Does Not Exist

In its Petition, Titan contends that the Ninth Circuit in this case refused to determine arbitrability under the law chosen by the parties to govern the interpretation and construction of the Agreement. According to Titan, the Ninth Circuit's opinion in this case conflicts with opinions of the First, Second, and Seventh Circuits in *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863 (1st Cir. 1981) ("*Raytheon*"); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004) ("*Uzan*"); and *In re Oil Spill by the "Amoco Cadiz" Off the Coast of France March 16, 1978*, 659 F.2d 789 (7th Cir. 1981) ("*Amoco Cadiz*"). Pet. 13-15.

Titan contends the opinions are in conflict because *Raytheon*, *Uzan*, and *Amoco Cadiz* applied non-federal law expressly chosen by the parties to govern the construction and interpretation of the contract to determine arbitrability, while the Ninth Circuit in this case applied federal substantive law of arbitrability. *Id*. Titan further contends that *Raytheon*, *Uzan*, and *Amoco Cadiz* are in conflict with Third Circuit's opinions in *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39 (3d Cir. 1978) ("*Becker*"), and *Rhone Mediterranee Compagnia*

Francese Di Assicurazioni E Riassicurazioni v. Lauro, 555 F. Supp. 481 (D.V.I. 1982), *aff'd,* 712 F.2d 50 (3d Cir. 1983) ("*Lauro*"), which held that the federal law of arbitrability must always be applied to the exclusion of any other law. Pet. 15-16.

The posited conflict does not exist.

While *Raytheon* and *Uzan* did apply non-federal law to determine arbitrability, and *Amoco Cadiz* applied it in the first part of its analysis of arbitrability, this was because the contracts involved in these cases had specific clauses choosing non-federal law to govern the construction and interpretation of the entire contract, in addition to the clause providing for arbitration and arbitration procedure. In contrast, as the District Court below concluded, Pet. App. 32a-33a, such a clause is absent in Titan's Agreement.

For example, in *Raytheon*, the court noted that "Article 16 provides that the Basic Contract will be 'construed and interpreted in accordance with the law of the Republic of France.'" 643 F.2d at 865. Separately, "Article 17.2 provides that 'all disputes . . . arising in connection with' the Basic Contract 'shall be finally settled by arbitration' under the rules of the International Chamber of Commerce in Lausanne, Switzerland." *Id*. (ellipses original). The issue before the Court was whether or not Change Order No. 8 was a part of the Basic Contract, and therefore subject to the arbitration clause in the Basic Contract. *Id*. at 868. The court applied French law and answered the question in the affirmative. *Id*. This

holding was based squarely on Article 16, *i.e.*, the choice of French law to govern the interpretation and construction of the Basic Contract. *Id*. In contrast, Titan's Agreement manifestly lacks such a provision.

In *Uzan*, "[e]ach of Motorola's relevant agreements . . . provides that it 'shall be governed by and interpreted in accordance with the internal laws (without regard to the laws of conflicts) of Switzerland[.]'" 388 F.3d at 43. Also, the parties agreed "to arbitrate any dispute that 'arises hereunder, or under any document or agreement delivered in connection herewith,' before a three-person arbitration panel in Switzerland in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce." *Id*. Like provisions appeared in the Nokia agreements. *Id*. The court held that Swiss law chosen under the choice of law clause governed the question whether a non-signatory could compel arbitration under the agreements. *Id*. at 50-52. The decision was based on the court's finding that the "agreements at issue here recite that they will be governed by Swiss law." *Id*. at 50. Again, Titan's Agreement does not have such a choice of law clause.

Amoco Cadiz involved a salvage agreement. The court noted that the salvage agreement contained "a stipulation of the applicability of English salvage law[,]" in addition to the provision that "any difference arising out of this Agreement or the operations thereunder shall be referred to arbitration" in London. 659 F.2d at 791-92. The court considered English case law of salvage in interpreting the salvage

agreement. *Id*. at 793-94. In contrast, Titan's Agreement does not have a "stipulation of the applicability of English salvage law."[14]

In this case, the Ninth Circuit held that, "based on *Volt*, contracting parties have the power to agree to apply non-federal arbitrability law." Pet. App. 9a-10a. By doing so, the Ninth Circuit rejected the reasoning of the *Becker – Lauro* line of cases that the federal law of arbitrability must be applied to the exclusion of any other law.[15] Thus, this legal principle established by this Court more than a decade ago clearly was recognized by the Ninth Circuit in this case. However, here, as opposed to *Raytheon*, *Uzan*, and *Amoco Cadiz*, the parties never agreed to apply a non-federal law of arbitrability. As the District Court concluded, and Titan chose not to contest on appeal,

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[14] The *Amoco Cadiz* court made the ultimate decision that tort claims were arbitrable based on the federal substantive law of arbitrability, specifically *Altshul Stern & Co. v. Mitsui Bussan Kaisha, Ltd*., 385 F.2d 158 (2d Cir. 1967) (holding that tort claims were arbitrable where the contract called for arbitration of "any dispute or difference arising out of or relating to this contract"), 659 F.2d at 794, and on the specific language of the arbitration clause which called for arbitration of "difference(s) arising out of this Agreement or the operations thereunder[,]" *id*. Here, Titan's arbitration clause is limited to disputes "arising under" the Agreement and does not include "the operations thereunder" or "[disputes] relating to [the agreement]."

[15] *Becker* and *Lauro* were decided before this Court clarified in *Volt* that the FAA does not preempt contractual choice of non-federal law. Titan cannot establish a conflict among Circuits based on opinions that predate the landmark decisions of this Court that established the law now being followed by all courts.

Titan's Agreement does not specify the law that governs its interpretation, construction, and validity as a whole.

This point is further confirmed and emphasized by review of the sample contract forms that Titan contends are potentially affected by the Ninth Circuit's decision below. Pet. 23. In fact, none of them can be so affected. Each contract form contains an express choice of law governing the interpretation and construction of the contract as a whole, in addition to a clause providing for arbitration and arbitration procedure.

Thus WRECKHIRE 99, Clause 18.1 provides: "This Agreement shall be governed by and construed in accordance with English law"; and JSE 2007, Salvage Agreement (Part I) Clause 19 provides: "(Governing Law) This agreement shall be governed by and construed in accordance with Japanese law." The two charterparty forms, NYPE 93 and AMWELSH 93, are even more specific as they include Clause Paramount, NYPE 93 Clause 31(a), AMWELSH 93 Clause 24(a), providing that the Charterparties and any Bills of Lading issued thereunder "shall have effect subject to the provisions of the Carriage of Goods by the Sea Act of the United States" or similar Hague Rules type legislation "as may mandatorily apply by virtue of origin or destination of the bills of lading."

The Petition fails to cite the best example, which has Titan's own signature on it. The following clause

appeared in a contract Titan entered into exactly three months before the Agreement in this case:

> 18. ***Governing Law and*** Arbitration
>
> 18.1 ***This agreement shall be governed by and construed in accordance with English law and*** any dispute arising out of this Agreement shall be referred to Arbitration in London in accordance with the Arbitration Act of 1996 or any statutory modification or re-enactment thereof for the time being in force.

Ensco Offshore Co. v. Titan Marine LLC, 370 F. Supp. 2d 594, 595 (S.D. Tex. 2005) (bold italics added).[16] Yet, the bolded and italicized words are omitted in Titan's Agreement in question in this case. Instead, there is only an Arbitration clause, not a "***Governing Law and***" Arbitration clause, and the Agreement does not say that it "***shall be governed by and construed in accordance with***" English law.

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[16] A review of the case records available online via PACER shows that the actual contracting party was "Titan Maritime LLC, 410 SW 4th Terrace, Dania, FL 33335," *i.e.*, the same company shown on the logo of Titan's pre-printed Salvage Agreement here. *See* Document 1-3 at 1 of 18, *Ensco Offshore Co. v. Titan Marine LLC*, 370 F. Supp. 2d 594 (S.D. Tex. 2005) (the first page of Titan's WRECKHIRE 99 contract with Ensco dated November 4, 1994); Document 1, *Ensco Offshore Co. v. Titan Marine LLC*, 370 F. Supp. 2d 594 (S.D. Tex. 2005) (Ensco's Complaint naming Titan Maritime LLC as Defendant).

In sum, the contracts construed in *Raytheon*, *Uzan*, and *Amoco Cadiz* contained choice of law clauses that, by Titan's own submission, Pet. 23, appear to be standard, but which Titan omitted in the Agreement at issue here. The choice of law decisions in those cases followed from these specific contractual provisions, and not from any view of the law different from that of the Ninth Circuit. The posited inter-Circuit split does not exist.

C. There Are Multiple Alternative Grounds For Affirmance

1. The Court Of Appeals Properly Defaulted To Federal Substantive Law Of Arbitrability

The District Court held, and Titan did not contest on appeal, that the Agreement does not contain a clause specifying a non-federal law to govern the interpretation and construction of the Agreement as a whole. See pages 10-11 and footnote 13 above.

The parties are not required to make such an explicit choice. *Volt*, 489 U.S. at 479 ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). If parties fail to specify the law governing the construction, interpretation and validity of the contract, then there are two successive default rules. First, if either party so requests, the court will determine such law through conflict-of-law rules applicable to contracts

in general. *See Mastrobuono v. Shearson Lehman Hutton*, *Inc.,* 514 U.S. 52, 59 (1995) ("*Mastrobuono*") ("The choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship.").

Second, if neither party requests that the non-federal law governing interpretation of the contract be determined by the application of conflict-of-laws rules, then the court always can determine arbitrability by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act[,]" *i.e.*, the case law developed under the FAA. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted).

Upon the record before the Ninth Circuit, there was no express choice of law clause that governs the interpretation and construction of the Agreement as a whole, and there was no request by Titan to determine such law by the applicable conflict-of-laws rules. Absent a proper choice of law clause, and absent a request by Titan to determine the law governing the interpretation and construction of the Agreement by application of conflict-of-laws analysis, the Ninth Circuit properly defaulted to the federal substantive law of arbitrability.

2. Conflict-of-Laws Analysis Points To Hawaii Law

This action was brought under the admiralty jurisdiction, 28 U.S.C. § 1333, among others, ER 1-2, and it is governed by maritime law. The Ninth Circuit has articulated conflict-of-laws rules applicable to maritime cases which seek to identify "the state . . . which has the most significant relationship to the transaction and the parties" by considering the factors listed in the Restatement (Second) of Conflicts of Laws § 188(1) (1971), *i.e.*, (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 673-74 (9th Cir. 1997). Those contacts are to be evaluated according to their relative importance with respect to the particular issue. *Id*. at 674 & n.7.[17]

In *Aqua-Marine*, the court held that Oregon law governed interpretation of a performance bond issued in Costa Rica by a Costa Rica resident and covering the obligation of a California resident owed to an Oregon corporation to redeliver a barge in Everett, Washington. *Id*. at 674-75. The court held that

[17] The Second Circuit applies substantially the same conflict-of-laws rules. *See, e.g., Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 162 (2d Cir. 1998).

Oregon had "the greatest interest" in the action to enforce the performance bond, and therefore it applied Oregon law. *Id*. at 675.

In this case, the place of performance and the place where the subject of the Agreement, *i.e.*, the grounded vessel, was located, are both Hawaii. Hawaii has an obvious substantial interest in how salvage of vessels grounded on Hawaii's coral reefs is performed. In contrast, England has no conceivable interest in salvage of a Hong Kong vessel in Hawaii by a Florida salvor. Clearly, the application of conflict-of-laws rules would result in the application of Hawaii law, not English law, as the law governing the interpretation and construction of the Salvage Agreement as a whole.[18]

3. Hawaii Law Requires That The Arbitration Clause Be Construed Against Drafter

In interpreting a contract, Hawaii courts apply a strict rule of construction against the drafter. This rule has been applied consistently ever since *Coney v. Dowsett*, 3 Haw. 685, 686 (Haw. Kingdom 1876), and it applies to any contract. *See, e.g., Arakawa v. Limco*,

[18] The same result would follow by application of the conflict-of-laws rules of Hawaii, the forum state. *See, e.g., Del Monte Fresh Produce (Hawaii) Inc. v. Fireman's Fund Ins. Co.*, 117 Haw. 357, 364, 183 P.3d 734, 741 (2007) (the court should apply law of the state with "strongest interest in seeing its laws applied to the particular case").

Ltd., 60 Haw. 154, 158, 587 P.2d 1216, 1219 (1978) (subscription and purchase agreements for condominium apartments); *Gushiken v. Shell Oil Co*., 35 Haw. 402, 416 (1940) (contract between an oil company and service station proprietor); *Pancakes of Hawaii, Inc. v. Pomare Properties Corp*., 85 Haw. 300, 304-05, 944 P.2d 97, 101-02 (App. 1997) (shopping center lease). This rule also applies to arbitration clauses. *See, e.g., Luke v. Gentry Realty, Ltd.*, 105 Haw. 241, 249, 96 P.3d 261, 269 (2004), (holding that construing an ambiguous arbitration clause against the drafter does not violate the overwhelming policy in favor of arbitration); *Yogi v. Hawaii Med. Serv. Ass'n*, 124 Haw. 172, 176, 238 P.3d 699, 703 (App. 2010) (same).

Given that the Ninth Circuit specifically found Titan's arbitration clause to be ambiguous, Pet. App. 14a-15a, the result under Hawaii law would have been the same as the one reached by the Ninth Circuit. That is, Titan's arbitration clause would have been construed against Titan, and English law would not have been applied to determine whether CFL's claims are arbitrable. *See also Mastrobuono,* 514 U.S. at 62-63 & n.10 (the common law rule of construction against drafter applies to arbitration clauses).

There is also no conflict in this instance between the rule of construction against the drafter, recognized and enforced in *Mastrobuono*, and federal policy in favor of arbitration. A choice between federal and non-federal law of arbitrability is at least as arbitration-neutral as the choice between arbitrability being decided by a court or an arbitrator,

which was considered in *Kaplan*. Sometimes the application of federal law will be more favorable to arbitration than non-federal law, at other times non-federal law will be more favorable. In contrast, an arbitrator has a vested interest in finding a dispute arbitrable, or else his or her employment and income from the case would terminate early. Yet this Court held that the general presumption in favor of arbitrability does not require a further presumption in favor of arbitrability being decided by an arbitrator. *Kaplan*, 514 U.S. at 944-46.

4. Titan's Arbitration Clause Is Not Clear And Unmistakable

In its Petition, Titan carefully refrains from raising the issue, or arguing, that the arbitration clause in its Salvage Agreement, by its reference to the English Arbitration Act, "clearly and unmistakably" refers determination of arbitrability to an arbitrator instead of court. *Kaplan*, 514 U.S. at 944-46. Instead, Titan obfuscates this issue by phrasing its Petition as presenting a choice of law question.

The reasons for Titan's reluctance to raise this issue openly are clear from the record. Titan, who drafted the arbitration clause, has most forcefully argued three different and mutually inconsistent meanings of that clause below. Titan initially moved to compel arbitration solely under the federal substantive law of arbitrability. Titan's motion asked the District Court to hold that CFL's claims are arbitrable,

both under the case law of the Ninth Circuit, specifically, *Tracer* and *Simula,* Supp. E.R. 46-51, and under the theory that a narrow interpretation of its "arising under" arbitration clause is contrary to the strong federal policy in favor of arbitration, Supp. E.R. 45-50. Titan's motion did not argue that arbitrability should be decided by the arbitrator.

Titan's reply memorandum and supplemental memorandum in support of its motion to compel arbitration argued that English law should be applied as the substantive law of arbitrability, and that English law, specifically *Fiona Trust*, holds that Titan's "arising under" arbitration clause requires arbitration of CFL's claims. Pet. 9, Pet. App. 25a, E.R. D-6, Doc. 27 at 7-9. Again, Titan did not argue that arbitrability should be decided by the arbitrator.

The argument that the reference to the English Arbitration Act in Titan's arbitration clause was intended to mean that arbitrability should be decided by an arbitrator surfaced for the first time on appeal in Titan's Opening Brief. Titan's Opening Br. 20. However, by then this argument was hopelessly contradicted by the record.

When Titan moved the District Court to determine arbitrability under the federal substantive law of arbitrability, Titan provided the "strongest evidence" of the contractual intent. "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." Restatement (Second) of Contracts § 202

cmt. g (1981). This evidence is irrefutable because Titan drafted the Salvage Agreement, including its arbitration clause.

At best, Titan could argue that it twice misinterpreted the arbitration clause which it wrote before finally understanding it on the third try, after five months of additional contemplation. But in that case, the clause is not and cannot be "clear and unmistakable." Ambiguous and obscure is the only description for a clause that trips up its own drafter twice in two different ways before the drafter can decipher what it allegedly meant to say.

II. THE PETITION DOES NOT RAISE A COMPELLING QUESTION REGARDING ARBITRABILITY OF TORT CLAIMS

A. Other Circuits Apply Similar Standards For Determining Arbitrability Of Tort Claims

The standard for arbitrability of tort claims under the federal substantive law of arbitrability that the Ninth Circuit applied in this case considers: (1) whether the arbitration clause is narrow or broad; and (2) whether the tort claim exists regardless of the contract between the parties, and involves interpretation or performance of the contract. *Mediterranean Enters., Inc. v. Ssangyong Corp.,* 708 F.2d 1458, 1464-65 (9th Cir. 1983); *Tracer*, 42 F.3d at 1295. This is consistent with the approach of other Circuits.

Tracer cited and followed *Texaco, Inc. v. American Trading Transp. Co.*, 644 F.2d 1152 (5th Cir. 1981) ("*Texaco*"). In *Texaco*, American Trading time-chartered[19] a vessel to Texaco. *Id.* at 1153. While under charter, the vessel collided with another and caused her to strike Texaco's dock. *Id.* Texaco sued American Trading for damage caused to its dock by the collision. *Id.* American Trading moved to compel arbitration. *Id.* at 1154. The Fifth Circuit held:

> The Charter provides for arbitration of "(a)ny and all differences and disputes . . . arising out of this Charter." The complaint at bar is not the result of a difference or dispute arising out of the Charter. Texaco asserts a delictual claim for damages to its dock. Texaco alleges that the collisions between the vessels and its dock were caused by the fault and negligence of defendants and unseaworthiness of the vessels[.] ***The existence vel non of the Charter is not dispositive of this claim for delictual damages; the claim as alleged neither arises out of nor depends upon the Charter.***

Id. (emphasis added).

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[19] Under a time charter, "the owner's people continue to navigate and manage the vessel, but . . . [s]he is . . . under the charterer's orders as to ports touched, cargo loaded, and other business matters." G. Gilmore, Jr. & C. L. Black, *The Law of Admiralty* 194 (2nd ed. 1975).

The Fifth Circuit approvingly cited *Texaco* in *United Offshore Co. v. Southern Deepwater Pipeline Co*., 899 F.2d 405, 409 (5th Cir. 1990), explaining the result reached in *Texaco*:

> The parties chose, however, to arbitrate only disputes arising out of the charter agreement. Since the contract did not govern the tort, the dispute was not arbitrable.

In *The Rice Co. (Suisse), S.A. v. Precious Flowers Ltd*., 523 F.3d 528, 536 & n.19 (5th Cir. 2008),[20] the Fifth Circuit cited *Texaco* for this proposition:

> Even where an arbitration provision is broad, . . . [but] a complaint "is not the result of a difference or dispute arising out of the Charter," the parties cannot be compelled to arbitrate.

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[20] Titan erroneously contends that CFL's claims here would be arbitrable under the Fifth Circuit's opinion in *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., (PEMEX)*, 767 F.2d 1140 (5th Cir. 1985), which also involved an "arising under" arbitration clause. In *Sedco*, the Fifth Circuit distinguished *Texaco* on the facts because Sedco's Charter to Permargo expressly anticipated the claims upon which arbitration was sought. 767 F.2d at 1145 n.11. Sedco alleged that Permargo breached its obligation to defend and indemnify Sedco against third-party claims for oil spill damages. *Id*. at 1143-44. However, the Charter had specific defense, indemnity, and hold harmless provisions for oil spill damages. *Id*. Because of such explicit contract provisions, ***which were absent in Texaco and were found by two courts below to be absent in Titan's Salvage Agreement at issue here***, *see* Pet. App. 20a-21a, 44a, the court distinguished *Texaco* and held that defense and indemnity claims "arose under" Sedco's Charter, *id*. at 1145 n.11.

The Eleventh Circuit followed *Texaco* in *Armada Coal Export, Inc. v. Interbulk, Ltd.*, 726 F.2d 1566, 1567-68 (11th Cir. 1984), holding that claims for conversion and wrongful attachment were not arbitrable under a charter party, notwithstanding that the demurrage charges the owner attempted to recover through attachment and alleged conversion were owed under the charter.

More recently, the Eleventh Circuit explained its approach as follows:

> if the defendant could have been engaged in . . . allegedly tortious actions even if it had no contractual relationship with the plaintiff, then the dispute is not . . . within the scope of an arbitration clause within that contract.

Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs., 553 F.3d 1351, 1367 (11th Cir. 2008) (internal quotations omitted). That is exactly what *Mediterranean* held: the alleged tort "could have been accomplished even if the Agreement did not exist." *Mediterranean*, 708 F.2d at 1464. And here, the District Court found: "Plaintiff would have the same claims regardless of whether the Agreement existed." Pet. App. 44a.

The Second Circuit has articulated the following rule:

> First, . . . a court should classify the particular clause as either broad or narrow. . . . Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond

> its purview. Where the arbitration clause is broad, . . . arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.

Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001) ("*Dreyfus*") (citations and punctuation omitted). *Dreyfus* also is currently followed in the Tenth Circuit. *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1261-62 (10th Cir. 2005).

The Sixth Circuit holds:

> [W]hile we must bear in mind the presumption of arbitrability, the cornerstone of our inquiry rests upon whether we can resolve the instant case without reference to the agreement containing the arbitration clause. If such a reference is not necessary to the resolution of a particular claim, then compelled arbitration is inappropriate[.]

NCR Corp. v. Korala Associates, Ltd., 512 F.3d 807, 814 (6th Cir. 2008) (internal quotations omitted).

In sum, at least five Circuits currently use standards for arbitrability of tort claims consistent with the standard applied by the Ninth Circuit in this case.[21] Those standards would have led to the same

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[21] Titan cites *Amoco Cadiz* for the proposition that the Seventh Circuit employs a different rule. Titan is wrong. All claims in *Amoco Cadiz* related to the salvor's failure to salvage the

(Continued on following page)

result here, given that CFL's gross negligence claim arose regardless of the Salvage Agreement, and can (and under *Royal*, can *only*) be maintained without reference to the Salvage Agreement.

Moreover, in those five Circuits, a tort claim that can be maintained without reference to the contract is not arbitrable, even if the contract includes a broad arbitration clause. Titan's argument, which focuses only on the relatively narrow interpretation of "arising under" by the Ninth Circuit, therefore misses the point. The broad-narrow clause distinction matters only if the clause is broad. In such case, only the Ninth Circuit, on the face of the *Mediterranean-Tracer* rule, might hold a tort claim arbitrable even if it does not involve interpretation or performance of the contract. Hence, the Ninth Circuit apparently employs a *stronger* presumption in favor of arbitrability than others, and certainly not a weaker one, as Titan suggests.

Amoco Cadiz, which was the subject of the salvage contract. 659 F.2d at 792. In contrast, it is undisputed here that Titan successfully salvaged the vessel, and there is no dispute over any matters addressed in the Salvage Agreement. As the District Court concluded: "Simply put, finding a breach of [Titan's] duty to prevent foreseeable harm to the reef will not require determining whether [Titan] performed under the Agreement." Pet. App. 44a. Thus *Amoco Cadiz* is consistent with the Ninth Circuit's decision in this matter, but inapposite.

B. Titan's Petition Misrepresents The State of The Law In Other Circuits

Based on the preceding discussion, Titan's contention that the rule in *Mediterranean* and *Tracer* has been rejected by all other Circuits is disingenuous. Titan relies on cases[22] that hold that claims for ***fraudulent inducement of a contract, reformation, rescission, or voidance of a contract*** are arbitrable under a variety of arbitration clauses, including "arising under," and reject the contrary view expressed in *In re Kinoshita & Co.*, 297 F.2d 951, 953 (2d Cir. 1961). Pet. 19-22. The holding in the cases cited by Titan is fully consistent with general arbitrability rules for torts applied by the same courts and discussed above. Claims for fraudulent inducement, reformation, rescission, or voidance of a contract cannot exist or be maintained without reference

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[22] *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985) (reformation or voidance because of duress); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 813 (4th Cir. 1989) ("The gravamen of the plaintiff's complaint is that the entire Settlement Agreement was procured by fraud."); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 385 (11th Cir. 1996) ("[T]he alleged misrepresentations relate to what the EMC would do under the purchase contract. The omissions counts allege largely that EMC failed to disclose that it did not intend to comply with the contract."); *Dialysis Access Cntr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 370 (1st Cir. 2011) (fraud in inducement); *Battaglia v. McKendry*, 233 F.3d 720, 724-25 (3d Cir. 2000) (voidance on the basis of duress); *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6th Cir. 2003) (fraudulent inducement).

to the contract. Such claims will be arbitrable under virtually any form of arbitration clause, at least unless specifically excluded.

Titan relies on a comment in *Gregory*, a fraudulent inducement case, where the Eleventh Circuit stated: "Only the Ninth Circuit seems to have followed the decision in *Kinoshita*." 83 F.3d at 385; *see also* Pet. 21 (paraphrasing same with substantial license). However, *Mediterranean* and *Tracer* cited to *Kinoshita* for the proposition that "arising under" is a "relatively narrow" arbitration clause. *Mediterranean*, 708 F.2d at 1464; *Tracer*, 42 F.3d at 1295. Neither *Mediterranean* nor *Tracer* dealt with fraudulent inducement, and no such claim has been made in this case. Thus, the comment in *Gregory* is both wrong and irrelevant.

C. The Petition Quarrels With This Court's Decisions

This Court noted recently that an "arising under" clause is a "relatively narrow" arbitration clause. *Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2862 (2010). *Granite Rock* also rejected the argument, which Titan makes throughout its Petition, that the federal policy favoring of arbitration requires courts to ignore or subvert the actual language of the arbitration clause in order to compel arbitration:

> [W]e have never held that this policy overrides the principle that a court may submit

> to arbitration "only those disputes. . . . that the parties have agreed to submit". . . . Nor have we held that courts may use policy considerations as a substitute for party agreement.

Id. at 2859.[23]

In sum, Titan's arguments are frivolous. No substantial, let alone compelling, question regarding the interpretation of the "arising under" clause is raised in its Petition.

CONCLUSION

In drafting the Agreement, Titan omitted choice of law terms which, by its own submission, are standard in the maritime industry worldwide, and which Titan had used in its other contemporaneous contracts. Titan also drafted a hopelessly ambiguous arbitration clause, and then *seriatim* argued three different and inconsistent meanings of this clause in the two courts below. The Petition seeks to relieve Titan of the consequences of its own intentional or sloppy drafting. The Petition does not present any

[23] *See also Lambert v. Austin Ind*., 544 F.3d 1192, 1197 (11th Cir. 2008) ("[C]ourts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.").

compelling question of law for this Court to decide, and should be denied.

Respectfully submitted,

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