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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MSC MEDITERRANEAN SHIPPING  
COMPANY S.A.,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Case No. 2:24-cv-01041-SPG-E

**ORDER GRANTING, IN PART,  
DEFENDANT’S MOTION TO  
DISMISS FIRST AND SECOND  
CAUSES OF ACTION [ECF NO. 16]  
AND GRANTING, IN PART,  
PLAINTIFF’S MOTION FOR LEAVE  
TO AMEND [ECF NO. 28]**

Before the Court are Defendant BNSF Railway Company’s (“Defendant” or “BNSF”) Motion to Dismiss the First and Second Causes of Action in Plaintiff MSC Mediterranean Shipping Company’s (“Plaintiff” or “MSC”) Complaint, (ECF No. 16 (“Mot.”)), and Plaintiff’s subsequent Motion for Leave to Amend, (ECF No. 28 (“Amend Mot.”)). Having considered the parties’ submissions, the relevant law, and the record in this case, the Court finds these matters suitable for resolution without oral argument. *See*

1 Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. For the reasons set forth below, the Court  
2 GRANTS, in part, Defendant’s Motion and GRANTS, in part, Plaintiff’s Motion.

3 **I. BACKGROUND**

4 **A. Factual Background**

5 The following facts are alleged in Plaintiff’s Complaint, (ECF No. 1 (“Compl.”)),  
6 and, for the purposes of ruling on this Motion, are taken as true:

7 Plaintiff MSC is a foreign corporation doing business as an ocean transportation  
8 common carrier in the United States. (*Id.* ¶ 5). Defendant BNSF is a corporation primarily  
9 engaged in the freight-rail transportation business as a common carrier of goods by rail for  
10 hire. (*Id.* ¶ 6). Epson America, Inc. (“Epson”) is the shipper and consignee that contracted  
11 with MSC to have its cargo transported from the Philippines to the State of Indiana. (*Id.* ¶  
12 22). Plaintiff alleges that incidents of pilferage affected several containers of Epson’s  
13 cargo that MSC transported using BNSF as its subcontractor. Three such pilferage  
14 incidents, as described below, form the basis of Plaintiff’s claims against MSC.

15 First, on or about February 16, 2022, MSC, acting as a vessel owning common  
16 carrier, issued MSC Sea Waybill No. MEDUPH107971 (“MSC Bill 1”) agreeing to  
17 transport a shipment of Epson projectors (“Cargo 1”), which was loaded in Container No.  
18 MSMU8623683 (“Container 1” and together with Cargo 1, “Shipment No. 1”), departing  
19 from the Port of Batangas, Philippines to Plainfield, Indiana, via the Port of Los Angeles.  
20 (*Id.* ¶ 7). MSC carried Shipment No. 1 via ocean vessel from the Philippines to the Port of  
21 Los Angeles and then, pursuant to its transportation contract with BNSF, tendered  
22 Shipment No. 1 to its subcontractor, BNSF, for the continued rail transportation of the  
23 shipment from Los Angeles, California to the BNSF Chicago Rail Ramp in Chicago,  
24 Illinois. (*Id.* ¶¶ 8, 10, 46). “[I]n consideration of certain agreed freight charges thereupon  
25 paid,” BNSF accepted Shipment No. 1 in Los Angeles and agreed to transport and carry  
26 Shipment No. 1 for delivery in “like good order and condition” at its Chicago Rail Ramp.  
27 (*Id.* ¶ 10). While in the custody and possession of BNSF at its Chicago Rail Ramp, Cargo  
28 1 was pilfered. (*Id.* ¶ 11).

1 Second, on or about February 16, 2022, MSC also issued MSC Sea Waybill No.  
2 MEDUPH110256 (“MSC Bill 2”) agreeing to transport a shipment of Epson projectors  
3 (“Cargo 2”), which was loaded in four containers (“Containers 2 through 5,” hereinafter  
4 referred together with Cargo 2 as “Shipment No. 2”), departing from the Port of Batangas,  
5 Philippines to Plainfield, Indiana, via the Port of Los Angeles. (*Id.* ¶ 12). MSC carried  
6 Shipment No. 2 via ocean vessel from the Port Batangas, Philippines to the Port of Los  
7 Angeles, and then, pursuant to its transportation contract with BNSF, tendered Shipment  
8 No. 2 to BNSF for the continued rail transportation of the shipment from Los Angeles to  
9 Chicago. (*Id.* ¶¶ 13, 46). “[I]n consideration of certain agreed freight charges thereupon  
10 paid,” BNSF accepted Shipment No. 2 in Los Angeles and agreed to transport and carry  
11 Shipment No. 2 for delivery in “like good order and condition” to its Chicago Rail Ramp.  
12 (*Id.* ¶ 15). While in the custody and possession of BNSF at its Chicago Rail Ramp, Cargo  
13 2 was pilfered. (*Id.* ¶ 16).

14 Third and finally, on or about March 24, 2022, MSC issued MSC Sea Waybill No.  
15 MEDUI0504130 (“MSC Bill 3”), agreeing to transport a shipment of Epson scanners  
16 (“Cargo 3”), which was loaded in Container No. MSMU7778459 (“Container 6”  
17 hereinafter referred together with Cargo 3 as “Shipment No. 3”), departing from Jakarta,  
18 Indonesia to Plainfield, Indiana, via the Port of Los Angeles. (*Id.* ¶ 17). MSC carried  
19 Shipment No. 3 via ocean vessel from Jakarta, Indonesia to the Port of Los Angeles, and  
20 then, pursuant to its transportation contract with BNSF, tendered Shipment No. 3 to BNSF  
21 for the continued rail transportation of the shipment from Los Angeles to Chicago. (*Id.* ¶¶  
22 18, 46). “[I]n consideration of certain agreed freight charges thereupon paid,” BNSF  
23 accepted Shipment No. 3 in Los Angeles and agreed to transport and carry Shipment No.  
24 3 for delivery in “like good order and condition” at its Chicago Rail Ramp. (*Id.* ¶ 20).  
25 While in the custody and possession of BNSF at the Chicago Rail Ramp, the cargo located  
26 in Container 6 was pilfered. (*Id.* ¶ 21).

27 After its Cargo was pilfered, Epson, the shipper and consignee under MSC Bill 1,  
28 MSC Bill 2, and MSC Bill 3, asserted a claim for the pilfered Cargos 1, 2, and 3 to its

1 insurer, Tokio Marine America Insurance Company (“Tokio Marine”). (*Id.* ¶ 22). Tokio  
2 Marine paid these claims to Epson. (*Id.*). After its payment, Tokio Marine, as subrogee of  
3 Epson, filed an action in the United States District Court for the Southern District of New  
4 York against MSC for the amounts it paid to Epson for the pilfered cargo, plus interests  
5 and costs. (*Id.* ¶ 23). The Complaint alleges that, “[d]ue to BNSF’s failure to deliver [the  
6 cargo] in like good order and condition, MSC attracted liability under MSC Bill 1, MSC  
7 Bill 2, and MSC Bill 3 for Tokio Marine’s claim . . . .” (*Id.* ¶ 26). MSC ultimately settled  
8 and resolved Tokio Marine’s claim for \$269,869.09 and paid that sum on January 10, 2024.  
9 (*Id.*).

10 MSC then filed a claim for the pilfered Cargos 1, 2, and 3 with BNSF under MSC’s  
11 transportation contract with BNSF, which incorporated the Intermodal Rules and Policies  
12 that govern the transportation of freight. (*Id.* ¶ 27).<sup>1</sup> BNSF, however, declined or failed to  
13 respond to MSC’s claim. (*Id.* ¶ 28). Thus, to recuperate the losses MSC incurred from its  
14 settlement in the Tokio Marine action, MSC brings this instant suit against BNSF and  
15 asserts three causes of action: (1) equitable indemnification, *see (id.* ¶¶ 32–37), seeking  
16 total equitable indemnification from BNSF such that MSC can recoup from and be  
17 reimbursed by BNSF for all sums that MSC paid to Tokio Marine and/or its other damages;  
18 (2) contribution, *see (id.* ¶¶ 38–44), seeking any sum in excess of MSC’s proportionate  
19 share of the aforementioned liability payment to Tokio Marine; and (3) breach of contract  
20 for BNSF’s alleged breach of its transportation contract with MSC, *see (id.* ¶¶ 45–51).  
21 Serving as the factual basis for all three claims, the Complaint, in sum, alleges that  
22 Defendant’s “failure to deliver” the cargo violated its “obligations and duties of common  
23 carriers of merchandise . . . including [its] failure to perform services . . . in a careful,  
24 workmanlike matter . . . .” (*Id.* ¶ 25). Such failure, Plaintiff alleges, caused it to attract  
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28 <sup>1</sup> The Complaint provides a URL for BNSF’s website where these rules can be found.  
(Compl. ¶ 47).

1 liability, and the cost incurred to settle and satisfy its liability with Tokio Marine renders  
2 Plaintiff entitled to recover those damages from Defendant. (*Id.* ¶ 31).<sup>2</sup>

3 **B. Procedural Background**

4 Plaintiff filed its Complaint on February 7, 2024. Defendant then filed the instant  
5 Motion to Dismiss, attaching as exhibits copies of each Bill at issue, as well as the terms  
6 and conditions printed on the back of each Bill, and a copy of BNSF’s Intermodal Rules  
7 and Policies Guide. *See generally* (Mot.). Plaintiff timely opposed, *see* (ECF No. 19  
8 (“Opp.”)), and Defendant replied, *see* (ECF No. 20 (“Reply”)). While the Motion to  
9 Dismiss remained pending for this Court’s ruling, Plaintiff filed a Motion for Leave to  
10 Amend its Complaint, *see generally* (“Amend Mot.”), asserting that it has since discovered  
11 new facts that buttress its first and second causes of action for equitable indemnity and  
12 contribution, respectively. Defendant, in turn, opposed the Motion for Leave, *see* (ECF  
13 No. 32 (“Opp. to Amend Mot.”)), and Plaintiff has filed a reply, *see* (ECF No. 34 (“Reply  
14 for Amend Mot.”)).

15 **II. LEGAL STANDARD**

16 **A. Dismissal Under Rule 12(b)(6)**

17 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include  
18 “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.  
19 R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant  
20 to Federal Rule of Civil Procedure 12(b)(6). When resolving a motion to dismiss for failure  
21 to state a claim under Rule 12(b)(6), courts “must consider the complaint in its entirety, as  
22 well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to  
23 dismiss, in particular, documents incorporated into the complaint by reference, and matters  
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25 <sup>2</sup> Of note, the Complaint’s Prayer for Relief section outlines Plaintiff’s request for damages  
26 amounting to \$269,869.09 for each claim. (Compl. at 10). Thus, it remains unclear  
27 whether Plaintiff seeks a total recovery of \$269,869.09 for all three claims collectively, or  
28 alternatively, seeks \$269,869.09 for each of its three claims respectively—the sum,  
therefore, being \$809,607.27.

1 of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,  
2 551 U.S. 308, 322 (2007). “Dismissal under Rule 12(b)(6) is proper when the complaint  
3 either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a  
4 cognizable legal theory.” *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). To  
5 survive a Rule 12(b)(6) motion, the plaintiff must allege “enough facts to state a claim to  
6 relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547  
7 (2007). “A claim has facial plausibility when the pleaded factual content allows the court  
8 to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a  
10 probability requirement, but it asks for more than a sheer possibility that a defendant has  
11 acted unlawfully.” *Id.* (internal quotation marks and citation omitted).

12 When ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in  
13 the complaint as true and construe[s] the pleadings in the light most favorable to the  
14 nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031  
15 (9th Cir. 2008). Dismissal is appropriate only if it appears that the plaintiff can prove no  
16 set of facts in support of its claims which would entitle it to relief. *See City of Almaty v.*  
17 *Khrapunov*, 956 F.3d 1129, 1131 (9th Cir. 2020). However, the Court is “not required to  
18 accept as true allegations that contradict exhibits attached to the complaint or matters  
19 properly subject to judicial notice, or allegations that are merely conclusory, unwarranted  
20 deductions of fact, or unreasonable inferences.” *Seven Arts Filmed Ent., Ltd. v. Content*  
21 *Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (internal quotation marks omitted)  
22 (citing *Daniels–Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010)). The Court  
23 is further not required to accept as true “[t]hreadbare recitals of the elements of a cause of  
24 action.” *Iqbal*, 556 U.S. at 678.

#### 25 **B. Leave to Amend Under Rule 15(a)**

26 As a general rule, Federal Rule of Civil Procedure 15(a) provides that “[t]he court  
27 should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2).  
28 The Ninth Circuit mandates that Rule 15 be applied with “extreme liberality.” *Roth v.*

1 *Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991) (citation omitted). However, such  
2 “liberality does not apply when amendment would be futile.” *Ebner v. Fresh, Inc.*, 838  
3 F.3d 958, 968 (9th Cir. 2016). An amendment, therefore, is futile “when no set of facts  
4 can be proved under the amendment to the pleadings that would constitute a valid and  
5 sufficient claim or defense.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir.  
6 2017) (internal quotation marks omitted).

### 7 **III. DISCUSSION**

8 Defendant seeks to dismiss Plaintiff’s first and second causes of action for equitable  
9 indemnity and contribution, respectively, arguing that these causes of action seek to  
10 circumvent the liability limits that apply to the parties’ contractual relationship. According  
11 to Defendant, these causes of action arise out of Defendant’s alleged failure to deliver cargo  
12 in suitable condition. A claim for cargo loss, Defendant maintains, falls within the purview  
13 of the parties’ transportation contract and is, therefore, subject to the limited liability  
14 provision established in the BNSF Intermodal Rules that is a part of the parties’  
15 transportation contract. *See* (Mot. at 16–19). Defendant also argues that the Carriage of  
16 Goods Sea Act (“COGSA”), 46 U.S.C. § 30701 *et seq.*, and the Carmack Amendment, 49  
17 U.S.C. § 11706, preempt Plaintiff’s equitable indemnity and contribution causes of action.  
18 *See (id.* at 20–24). In sum, Defendant asserts that Plaintiff is limited to raising only a claim  
19 for breach of the transportation contract and cannot, as a matter of law, bring cognizable  
20 claims for indemnification and contribution.

21 To begin, the Court outlines the relevant contractual terms.<sup>3</sup> As previously  
22 mentioned, *see supra* Section I.A, MSC issued its Seaway Bills for the carriage of cargo

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24 <sup>3</sup> As Defendant correctly notes and Plaintiff does not object to, the Court may consider  
25 extrinsic documents at the pleading stage, pursuant to the incorporation-by-reference  
26 doctrine. “[I]ncorporation-by-reference is a judicially created doctrine that treats certain  
27 documents as though they are part of the complaint itself. The doctrine prevents plaintiffs  
28 from selecting only portions of documents that support their claims, while omitting  
portions of those very documents that weaken—or doom—their claims.” *Khoja v.*  
*Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). This doctrine permits  
courts to “consider a document if the plaintiff refers extensively to the document or the

1 from the Philippines to Indiana via the Port of Los Angeles. *See generally* (ECF Nos. 16-  
2 1, 16-2, and 16-3). The Seaway Bills list Epsilon as both the shipper and consignee. MSC’s  
3 Seaway Bills incorporate MSC’s Conditions of Carriage. *See* (ECF No. 16-4 (“MSC  
4 Conditions”)). The MSC Conditions, in turn, contain a “Clause Paramount” expressly  
5 incorporating COGSA “throughout the entire time the Goods are in the Carrier’s custody,  
6 including before loading and after discharge as long as the Goods remain in the custody of  
7 the Carrier or its Subcontractors . . . .” (*Id.* at 7).<sup>4</sup> The MSC Conditions also contain a  
8 “Himalaya Clause” which provides that MSC’s subcontractors are third-party beneficiaries  
9 of the contractual terms set forth in MSC’s Conditions; in other words, the MSC Conditions  
10 extend to MSC’s subcontractors.<sup>5</sup> The parties do not contest that BNSF was a  
11 subcontractor of MSC under the Seaway Bills.

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14 document forms the basis of the plaintiff’s claim.” *Steinle v. City & Cnty. of San Francisco*,  
15 919 F.3d 1154, 1162–63 (9th Cir. 2019) (internal quotations omitted). As relevant to this  
16 instant Motion, the Complaint references the BNSF Intermodal Rules, which set forth  
17 “aspects of the transportation contract’s terms” (Compl. ¶ 47) and establish the parties’  
18 rights and liabilities. *See (id.* ¶¶ 27, 47) (providing a link to the BNSF Intermodal Rules).  
As such, the Court may consider the Intermodal Rules at the pleading stage, pursuant to  
the incorporation-by-reference doctrine.

19 <sup>4</sup> A clause paramount is a “commonly accepted device that identifies the law that will  
20 govern the rights and liabilities of all parties to the bill of lading.” *Federal Ins. Co. v.*  
*Union Pacific R. Co.*, 651 F.3d 1175, 1178 n.4 (9th Cir. 2011) (cleaned up).

21 <sup>5</sup> The Himalaya Clause states, in pertinent part: “The Merchant undertakes that no claim or  
22 allegation whether arising in contract, bailment, tort or otherwise shall be made against any  
23 servant, agent, or Subcontractor of the Carrier which imposes or attempts to impose upon  
24 any of them or any Vessel owned or chartered by any of them any liability whatsoever in  
25 connection with the Goods or the carriage of the Goods whether or not arising out of  
26 negligence on the part of such Person . . . . Without prejudice to the foregoing, every such  
27 servant, agent and Subcontractor shall have the benefit of all terms and conditions of  
28 whatsoever nature contained herein or otherwise benefiting the Carrier under this Sea  
Waybill, as if such terms and conditions were expressly for their benefit. In entering into  
this contract, the Carrier, to the extent of such terms and conditions, does so on its own  
behalf and also as agent and trustee for such servants, agents and Subcontractors.” (MSC  
Conditions at 5–6).

1           Moreover, as the Complaint states, MSC subsequently subcontracted a portion of  
2 the cargo shipment to BNSF, and the “[r]elevant aspects of” MSC and BNSF’s  
3 “transportation contract’s terms are set forth in the BNSF Intermodal Rules and Policies  
4 Guide.” (Compl. ¶ 47); *see also* (ECF No. 16-5 (“Intermodal Rules”)). The Intermodal  
5 Rules, in essence, govern Plaintiff and Defendant’s rights and liabilities involving any  
6 cargo loss for the subcontracted portion of the shipment (i.e. from Los Angeles to Chicago).  
7 Specifically, the “Cargo Liability and Claims” section establishes, in pertinent part, that  
8 “[i]n no event will BNSF’s total liability for cargo loss or damage exceed \$200,000 per  
9 shipment, unless the cargo is shipped as part of BNSF’s Shipment Protection Program.”  
10 (*Id.* at 39). The section continues, “[i]f a shipment moves under the terms of a through bill  
11 of lading issued by . . . [an] ocean carrier” with “limited liability terms,” then “the cargo  
12 liability of BNSF will be no greater than the limitation of liability as stated on that bill of  
13 lading.” (*Id.* at 40).<sup>6</sup>

14           Because Defendant raises a preemption argument, the Court finds it appropriate to  
15 address this threshold issue first.<sup>7</sup> COGSA, as noted by the Ninth Circuit, “governs the  
16 liabilities of parties to a bill of lading for the carriage of goods by the sea.” *Akiyama Corp.*  
17 *of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 572 (9th Cir. 1998).<sup>8</sup> Further, a “bill of  
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19 <sup>6</sup> This section, the Court notes, ends with the following statement in capitalization font:  
20 “BY ACCEPTING THIS TRANSPORTATION OFFER WITHOUT FOLLOWING THE  
21 PROCEDURES FOR LIABILITY TERMS SET FORTH IN ITEM 30: 49 USC 11706  
22 LIABILITY TERMS, THE SHIPPER ACKNOWLEDGES THAT IT HAS CHOSEN TO  
23 ACCEPT THE PRICE AUTHORITY RATE LEVELS AND TERMS AS DEFINED IN  
24 THIS BNSF INTERMODAL RULES AND POLICIES GUIDE, INCLUDING, BUT NOT  
25 LIMITED TO, LIMITED BNSF VALUE AND LIABILITY TERMS AS STATED IN  
26 ITEM 25: SHIPPER GENERAL LIABILITY, ITEM 26: BNSF GENERAL LIABILITY,  
27 ITEM 27: GENERAL CARGO AND EQUIPMENT LIABILITY, ITEM 28: CARGO  
28 LIABILITY AND CLAIMS, AND ITEM 29: EQUIPMENT LIABILITY AND  
CLAIMS.” (Intermodal Rules at 40–41).

<sup>7</sup> Defendant did not elaborate or offer any substantive argument regarding Carmack preemption. Thus, the Court will not address that issue.

<sup>8</sup> For example, a “carrier may limit its liability under COGSA only if the shipper is given a fair opportunity to opt for a higher liability by paying a correspondingly greater charge.”

1 lading may contractually expand COGSA coverage to third parties with a Himalaya  
2 Clause.” *Id.*; *see also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 36 (2004). Plaintiff’s bill  
3 of lading with Epson, as the shipper and consignee, extends COGSA coverage to  
4 Defendant, as Plaintiff’s subcontractor. *See supra* note 5. Indeed, the Himalaya Clause  
5 establishes that Plaintiff’s subcontractor shall enjoy the terms and conditions of the MSC  
6 Conditions, thereby rendering Defendant as a third-party beneficiary of the terms and  
7 conditions set forth therein. In effect, the Himalaya Clause prohibits Epson from bringing  
8 a claim “arising in contract, bailment, tort, or otherwise . . . against . . . Subcontractor of  
9 the Carrier.” (MSC Conditions at 4).<sup>9</sup>

10 The parties do not provide, and the Court did not find, much authority directly  
11 addressing whether COGSA preempts a carrier’s federal maritime indemnification and  
12 contribution claims arising out of a subcontractor’s purported breach of duty to deliver  
13 goods in suitable condition. In fact, whether COGSA completely preempts other sources  
14 of law, such as state law, appears to be an unresolved question. *See Cont’l Ins. Co. v.*  
15 *Kawasaki Kisen Kasha, Ltd.*, 542 F. Supp. 2d 1031, 1034 (N.D. Cal. 2008) (“Neither the  
16 Supreme Court nor the Ninth Circuit has spoken directly to the question of whether  
17 COGSA completely preempts state law. The courts that have reached the question have  
18 come to differing conclusions.”) (collecting cases). Plaintiff relies on one Ninth Circuit  
19 case to assert that COGSA does not preempt indemnification and contribution claims. *See*  
20 *States S. S. Co. v. Am. Smelting & Ref. Co.*, 339 F.2d 66 (9th Cir. 1964). Specifically,  
21 Plaintiff extracts the following statements from the *States S. S.* opinion: “We conclude that  
22 a distinction between the cause of action presented here and those that have been held to

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24 *Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY*, 408 F.3d 1250, 1255 (9th Cir. 2005)  
(internal quotation marks omitted).

25 <sup>9</sup> Defendant merely mentions the parties’ Himalaya Clause without providing a substantive  
26 argument and supporting caselaw establishing that COGSA does preempt equitable  
27 indemnification and contribution claims brought under federal maritime law. Because  
28 Defendant has not shown that COGSA expressly precludes Plaintiff from alleging an  
equitable indemnification and contribution claim, the Court declines to rule otherwise.

1 be governed by Section 3(6) [of COGSA] is clearly drawn. The instant action is in reality  
2 one for indemnification, the right to which arises from the carrier’s alleged violation of the  
3 duty of due diligence imposed upon him by law.” *Id.* at 69. Plaintiff reads this language  
4 to support its broad proposition that COGSA neither preempts nor applies to  
5 indemnification and contribution causes of action brought under federal maritime law.

6 That case, however, considered the narrow question of whether COGSA’s one-year  
7 statute of limitations provision time-barred the plaintiff’s suit seeking indemnification and  
8 contribution. Specifically, the plaintiff in that case sought indemnity for “salvage services  
9 which were rendered and which enabled the vessel to continue the voyage.” *Id.* at 67.  
10 Ultimately, the Ninth Circuit found that the statute of limitations did not bar such action.  
11 In so holding, the court interpreted the following language in COGSA’s statute of  
12 limitation provision: “In any event the carrier and the ship shall be discharged from all  
13 liability in respect of loss or damage unless suit is brought within one year after delivery  
14 of the goods or the date when the goods should have been delivered . . . .” *Id.* at 68 (quoting  
15 46 U.S.C. § 1303(6)). The court concluded that the term—cargo “loss or damage”—was  
16 applicable to “claims which relate directly to a breach of a carrier’s duty to make timely  
17 delivery of the goods in good order and condition.” *Id.* The court reasoned, COGSA’s  
18 statute of limitation provision applied to “instances involving damage direct to the cargo .  
19 . . . where there has been delay in, or failure of, delivery or departure.” *Id.* at 68–69  
20 (collecting cases). In terms of its relevance here, the opinion did not rule that COGSA  
21 preempts indemnity and contribution claims brought under federal maritime law.

22 Absent authority directly on point, the Court declines to rule at this time and based  
23 on the briefs that were submitted on this thorny and weighty preemption issue because the  
24 parties have not clearly framed the issue on the Motion to Dismiss as involving whether  
25 Plaintiff may bring its indemnification or contribution causes of action against Defendant.  
26 Instead, the parties’ briefs present a dispute of whether Plaintiff may recover an amount of  
27 damages exceeding the limited liability provision established in their transportation  
28 contract by way of the incorporated BNSF Intermodal Rules. *See* (Mot. at 15) (“BNSF is

1 entitled as a matter of law to rely upon and enforce the terms of transportation to which  
2 MSC specifically agreed—even as to tort claims.”). Thus, the Court finds it appropriate to  
3 render a ruling on narrow grounds—to which it now turns.

4 The Intermodal Rules limit Plaintiff’s available amount of recovery, such that  
5 Plaintiff cannot, as a matter of law, recover an amount exceeding the limited liability  
6 maximum established in the parties’ transportation contract. In other words, whether  
7 Plaintiff styles its claim as one for indemnity, contribution, or breach of contract is of no  
8 consequence here. The Intermodal Rules, in the end, limit the amount of damages that  
9 Plaintiff may ultimately recover for Defendant’s alleged failure to satisfactorily perform  
10 its duties and deliver the cargo in good condition.

11 The Court notes that authoritative caselaw on this issue—namely whether a limited  
12 liability clause in a transportation contract between an upstream carrier and its  
13 subcontractor encompasses the upstream carrier’s indemnity and contribution claims—is  
14 also quite scarce. To support its position, however, Plaintiff cites three Ninth Circuit  
15 cases—all of which neither discussed nor interpreted the effects of a contractual limited  
16 liability provision like the one before this Court. For example, Plaintiff again relies on  
17 *States S. S. Co.*, 339 F.2d at 66, for the general proposition that indemnity actions—and  
18 the corresponding legal duty imposed upon an indemnitor—are independent of and distinct  
19 from the indemnitor’s contractual duty to deliver cargo in suitable condition. Read in its  
20 proper context, the *States S. S. Co.* opinion neither discussed nor involved a contractual  
21 provision limiting a subcontractor’s liability amount owed to a carrier for the  
22 subcontractor’s failure to deliver goods. In short, the opinion does not direct this Court to  
23 simply disregard contractual terms governing the rights and liabilities to which the parties  
24 in this present action assented.

25 Likewise, Plaintiff’s reliance on *All Alaskan Seafoods, Inc. v. M/V Sea Producer*,  
26 882 F.2d 425 (9th Cir. 1989) and *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150 (9th Cir.  
27 1998) does not support its position. In *All Alaskan Seafoods*, a shipper alleged that a vessel  
28 operator’s negligence resulted in damage to the shipper’s cargo and therefore, argued that

1 its tort-based lien deserved priority status over a competing mortgage lien in the vessel.  
2 882 F.2d at 426–27. On appeal, the Ninth Circuit rejected the view that the shipper’s claim  
3 for cargo damage could sound only in contract law, as opposed to tort law. *See id.* at 428–  
4 30. Ultimately, a claim for cargo damage may sound in tort law, and thus the shipper’s  
5 tort-based lien warranted priority over the competing mortgage lien. *See id.* Arriving at  
6 this conclusion, the court explained that an existing contractual relationship between the  
7 shipper and the vessel operator did not necessarily preclude the shipper from bringing a  
8 tort-based claim for its cargo damage. *See id.* In another context, in *Galt G/S*, the Ninth  
9 Circuit held that a shipment contract between two parties did not preclude another entity,  
10 which was not a party to the contract, from raising an equitable indemnity claim under  
11 California law. *See* 142 F.3d at 1156. Those facts are, as Defendant notes, distinguishable  
12 from the present facts here because, again, Plaintiff and Defendant have a shipment  
13 contract with a limited liability provision controlling the underlying factual allegations that  
14 give rise to Plaintiff’s claims.

15 Taken together, these opinions appear to stand for the mere proposition that a party  
16 suffering harm from cargo damage or loss *may* raise a tort-based claim and is not limited  
17 to only raising a contractual-based claim. With that said, however, these opinions, contrary  
18 to Plaintiff’s assertion, do not suggest that courts may simply disregard or render any  
19 contractual limited liability provision void or unenforceable.<sup>10</sup> Indeed, the cases do not  
20 mention whether those relevant contracts included limited liability provisions and  
21 therefore, did not conclude, as a matter of law, that such provisions cannot cap the amount  
22 of potential damages arising out of a subcontractor’s failure to deliver cargo in suitable  
23 condition.<sup>11</sup> In effect, a party may raise a tort-based claim against a carrier for cargo loss,  
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25 <sup>10</sup> The Court further notes that Plaintiff does not challenge the validity or enforcement of  
26 the contractual terms premised on separate grounds, such as unconscionability.

27 <sup>11</sup> Several courts have not only upheld the validity of limited liability provisions in carrier’s  
28 agreements but also applied such provisions to theories of liability beyond a breach of  
contract—such as liability for negligence, bailment, and conversion. *See Nippon Fire &*  
*Marine Ins. Co. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 60 (2d Cir. 2000) (“A valid

1 but the option to do so does not negate or invalidate enforcement of the parties’ contractual  
2 terms limiting the amount of damages a plaintiff may ultimately recover for a defendant’s  
3 actions causing cargo loss. Plaintiff does not cite, and the Court did not discover, any  
4 authority that voids a limited liability provision or otherwise finds it unenforceable under  
5 these given circumstances. As such, the provision is enforceable.

6 Furthermore, Plaintiff’s argument that the limited liability language does not  
7 encompass indemnification or contribution claims ignores the language of the provision.  
8 Again, the BNSF Rules explicitly state that “[i]n no event will BNSF’s *total liability* for  
9 cargo loss or damage exceed \$200,000 per shipment . . . .” (Intermodal Rules at 39)  
10 (emphasis added). First, Plaintiff does not argue the Rules are ambiguous, and the phrase  
11 “in no event” is absolute and unambiguous. As such, interpreting the limited liability  
12 provision to be inapplicable to certain types of claims (i.e. indemnification, negligence, or  
13 conversion) solely arising out of Defendant’s alleged actions causing cargo loss or damage  
14 would not be reasonable.<sup>12</sup>

15 \_\_\_\_\_  
16 limitation of liability clause governs not only the nature and extent of [the carrier’s]  
17 liability, but also the nature and extent of the shipper’s right of recovery. Such clauses,  
18 therefore, limit recovery not only for breach of contract, but also based on other legal  
19 theories, including negligence, bailment, or conversion.” (internal quotation marks and  
20 citation omitted) (alteration in original)) (collecting cases and a secondary source); *see also*  
21 *Am. Home Assur. Co. v. Hapag Lloyd Container Linie GmbH*, No. 03 CV 5462, 2004 WL  
22 1616379, at \*4 (S.D.N.Y. July 19, 2004) (holding that subcontractor BNSF’s contractual  
23 limitation of liability clause bound the shipper and its insurer, although the shipper and  
24 insurer were not parties to BNSF’s contract), *aff’d on other grounds*, 446 F.3d 313, 317–  
19 (2d Cir. 2006) (affirming the district court’s judgment of \$500 per package against  
subcontractor BNSF, pursuant to a limited liability provision established in a Himalaya  
Clause).

25 <sup>12</sup> At the pleading stage, if an “agreement is ambiguous, then interpretation of the  
26 agreement presents a fact issue that cannot be resolved on a motion to dismiss.” *ASARCO,*  
27 *LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1008–09 (9th Cir. 2014). Contractual “language  
28 will be deemed ambiguous when it is reasonably susceptible to more than one  
interpretation.” *Id.* at 1009 (internal quotation marks omitted) (quoting 11 Williston §  
32:2). For the reasons discussed, the limited liability language here is not reasonably  
susceptible to more than one interpretation, and as such, the Court may apply the contract’s

1 Second, read as a whole, the BNSF Intermodal Rules contemplate the exact  
2 circumstances that Plaintiff finds itself in now. Again, the MSC Conditions and the “Cargo  
3 Claims Requirement” section in the Intermodal Rules establish that Tokio Marine cannot  
4 directly sue Defendant for freight loss. Instead, Plaintiff had the sole authority to directly  
5 sue Defendant for freight loss, which Plaintiff has done in this instant suit. *See* (MSC  
6 Conditions at 5–6); (Intermodal Rules at 41). Thus, prohibited from directly suing  
7 Defendant, Tokio Marine foreseeably could, and indeed did, sue Plaintiff for the cargo loss,  
8 thereby triggering Plaintiff’s present indemnification and contribution claims against  
9 Defendant. With this in mind, Plaintiff, as a sophisticated party to the contract, cannot now  
10 argue that the limited liability terms do not apply to its indemnification and contribution  
11 claims. *MSC Mediterranean Shipping Co. S.A. v. BNSF Ry. Co.*, 735 F. Supp. 3d 1203,  
12 1208 (C.D. Cal. 2024) (“Because MSC’s claims seek to impose ‘liability for cargo loss or  
13 damage’ and the direct-suit limitation makes an indemnification or contribution action  
14 highly likely, MSC’s claims are contemplated by the Intermodal Rules’ limitation of  
15 liability.”). Accordingly, to the extent Plaintiff is seeking to recover on each of its causes  
16 of action, Plaintiff cannot recover, as the Complaint alleges, \$269,869.09 for indemnity,  
17 another \$269,869.09 for contribution, and another \$269,869.09 for breach of contract  
18 because the BNSF Rules limit the total liability amount for Defendant’s alleged failure to  
19 deliver the cargo. *See* (Compl. at 10).

20 Finally, Plaintiff’s proposed amended complaint seeks to include additional facts to  
21 “further support [its] claims for equitable indemnity and contribution.” (Amend Mot. at  
22 4). The Court reiterates its holding here. Plaintiff may allege its breach of contract,  
23 indemnification, or contribution claims. However, pursuant to the limited liability  
24 provision applicable to all claims arising out of cargo loss, Plaintiff cannot, as a matter of  
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26 terms at the dismissal stage. *See Alta Devices, Inc. v. LG Elecs., Inc.*, 343 F. Supp. 3d 868,  
27 887 (N.D. Cal. 2018) (“Resolution of contractual claims on a motion to dismiss is proper  
28 if the terms of the contract are unambiguous.”) (quoting *Bedrosian v. Tenet Healthcare Corp.*, 208 F.3d 220, 220 (9th Cir. 2000)).

1 law, assert such claims to circumvent the limited liability amount established in the BNSF  
2 Rules. Thus, Plaintiff may amend its complaint but with the understanding that its potential  
3 maximum recovery is limited by the parties' shipment contract.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court hereby GRANTS, in part, Defendant's Motion  
6 to Dismiss. The Court also GRANTS, in part, Plaintiff's Motion for Leave to Amend.  
7 However, any such amendment should be in accordance with the Court's ruling regarding  
8 the limited liability and maximum potential recovery available in this action.

9 Further, the Court notes that this instant action, Case No. 2:24-cv-01041-SPG-E,  
10 appears to involve common questions of law and fact presented in MSC Mediterranean  
11 Shipping Company S.A. v. BNSF Railway Company, Case No. 2:24-cv-01038-SPG-KES.  
12 *See* Fed. R. Civ. P. 42(a). Although the Court has authority to consolidate the cases *sua*  
13 *sponte*, *see In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987), the Court will  
14 provide the parties an opportunity to state whether consolidation is appropriate here.  
15 Accordingly, the Court hereby orders to show cause why the two actions should not be  
16 consolidated. The parties shall file within fourteen (14) calendar days from the date of this  
17 Order, a joint brief no more than five (5) pages, addressing whether consolidation is proper.  
18 After consideration of the joint brief, the Court will notify the parties of its consolidation  
19 ruling.

20 **IT IS SO ORDERED.**

21  
22 DATED: March 31, 2025

23   
24 HON. SHERILYN PEACE GARNETT  
25 UNITED STATES DISTRICT JUDGE  
26  
27  
28