Nos. 15-12095, 15-14399

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CSX TRANSPORTATION, INC., Plaintiff-Appellant,	)	On Appeal from the U.S. District Court for the Northern District of Georgia
v.	)	
GENERAL MILLS, INC., Defendant-Appellee.	)	No. 1:14-cv-00201-TWT

BRIEF FOR PLAINTIFF-APPELLANT
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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

CSX Transportation, Inc. v. General Mills, Inc.,
Nos. 15-12095 & 15-14399

Set forth below is a list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party, to the best of my knowledge:

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INTRODUCTION

For the past twenty-five years, plaintiff-appellant CSX Transportation, Inc. ("CSXT") has delivered railcars to a cereal-processing plant operated by defendant-appellee General Mills, Inc. ("General Mills") in Covington, Georgia. CSXT transports the railcars along its mainline railroad and then transfers them to General Mills's custody on a sidetrack that is controlled by General Mills.

In consideration for the right to perform railcar switching operations on its sidetrack, General Mills agreed to indemnify CSXT for "all risk of loss" arising from those operations.

This case is about who bears responsibility, under that contractual agreement, for a workplace injury sustained by a General Mills employee. Two General Mills employees—Douglas Burchfield and Rodney Turk—were engaged in railcar switching operations on General Mills's portion of the sidetrack when a railcar that they had parked on an incline rolled down the incline and struck Burchfield, who was working with an empty car at the time.

Burchfield sued CSXT, alleging that the railcar that rolled away had an "inefficient" hand brake. He received a substantial

judgment, which the parties compromised while an appeal was pending in this Court. CSXT then filed this indemnity action against General Mills.

The district court dismissed the complaint. It reasoned that, under the agreement between CSXT and General Mills, CSXT was entitled to indemnity only if General Mills bore at least some fault for the accident and that CSXT was collaterally estopped from arguing that General Mills was negligent because, in the underlying case, the court entered summary judgment against CSXT on its affirmative defense that General Mills bore some or all of the fault for the accident. The district court was wrong on both fronts.

The Supreme Court has definitively held that the preclusive effect of judgments in diversity cases like the underlying action here is governed by the preclusion law of "the State in which the federal diversity court sits." *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Under Georgia law, collateral estoppel applies only if the parties in the case in which estoppel is invoked are identical to the parties in the case that is claimed to have preclusive effect. Because General Mills was not a party to the *Burchfield* litigation, the rulings in that case can have no preclusive effect in this case.

Additionally, the district court erred in holding that CSXT even needed to prove that General Mills was negligent in order to have a right to indemnification. Under both the language of the parties' agreement and railroad industry custom and practice, CSXT's right to indemnification regardless of fault is clear.

For each of these reasons, the judgment of the district court should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Although the law regarding the collateral-estoppel issue could not be clearer and reversal with respect to that issue would be appropriate without oral argument, oral argument regarding the contract-interpretation issue would likely be beneficial to the Court. Accordingly, CSXT respectfully requests oral argument.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

CSXT filed its complaint against General Mills in the U.S. District Court for the Northern District of Georgia on January 23, 2014. R.1. Because CSXT and General Mills are citizens of different states and the amount in controversy exceeds $75,000

(*see id.* ¶¶ 1-3), the district court had diversity jurisdiction under 28 U.S.C. § 1332.

The district court entered judgment on February 4, 2015. R.37. After the district court issued an order denying CSXT's motion for reconsideration but granting it leave to amend its complaint (R.41), CSXT timely noticed an appeal (docketed as No. 15-12095) on May 13, 2015 (R.48). The district court subsequently entered an order granting General Mills's motion for clarification of the court's earlier order. R.53. Out of an abundance of caution, CSXT timely noticed a new appeal (docketed as No. 15-14399) on September 30, 2015 (R.55). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by giving preclusive effect to the judgment in the underlying litigation.

2. Whether the district court erred by interpreting the parties' agreement to permit indemnification only when General Mills is at least partially at fault.

STATEMENT OF THE CASE

A. Factual Background[1]

1. The Sidetrack Agreement.

When a railroad customer wishes to receive railcars at an industrial facility, a connecting track—known as a "sidetrack" or "spur track"—must be constructed between the railroad's main line and the facility.

On February 9, 1989, CSXT and General Mills entered into a Private Sidetrack Agreement. R.1, ¶ 7. The Sidetrack Agreement specified the terms for the construction, maintenance, and use of a private sidetrack for the tender and receipt of rail freight traffic for General Mills's facility in Covington. *Id.* ¶ 8.

Instead of using CSXT's equipment and highly trained personnel, General Mills wanted to conduct its own switching operations on its portion of the sidetrack, using its own locomotive

[1] Because the district court dismissed the complaint, all allegations in the complaint must be accepted as true for purposes of this appeal. *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 (11th Cir. 1998).

or trackmobile.[2] R.1, ¶¶ 11-12. By ceding control over the operations taking place on General Mills's portion of the sidetrack, CSXT would potentially expose itself to liability, so, in exchange for the right to conduct switching operations, General Mills agreed to indemnify CSXT for any losses that might arise from those operations:

> 15. INDUSTRY SWITCHING:
>
> 15.1 Industry[3] shall have the right to switch with its own trackmobile or locomotive power over Industry's Segment of the Sidetrack. In no event shall Industry perform any switching service or operate over Railroad's Segment of the Sidetrack. Further, in consideration therefor, Industry assumes all risk of loss, damage, cost, liability, judgment and expense, (including attorneys' fees) in connection with any personal injury to or death of any persons, or loss of or damage to any property, whether employees of either Industry or Railroad or third persons, or property of either Industry or Railroad or of other persons, that may be sustained or incurred in connection with, or arising from or growing out of, the operation of Industry's trackmobile or locomotive power upon said Sidetrack.

[2] A trackmobile is a "mobile railcar mover, capable of traveling on both roads and railroad tracks, fitted with couplers for moving small numbers of railcars." R.1, ¶ 16.

[3] "Industry" is defined in the Sidetrack Agreement to mean General Mills. R.1, Exh. A, preamble.

Id., Exh. A, § 15.

In addition to the switching-specific indemnity clause, the Sidetrack Agreement contains general indemnity provisions that specify that General Mills will "indemnify and hold [CSXT] harmless from [General Mills's] failure * * * to comply with [any] Governmental Requirement(s)" (R.1, Exh. A, § 3.1) and that, "[e]xcept as otherwise provided herein," "[t]he parties agree to jointly defend and bear equally between them all Losses arising from their joint or concurring negligence" (*id.* § 11.1(B)).

2. General Mills Acquires A Trackmobile.

As contemplated by the Sidetrack Agreement, General Mills procured a trackmobile to conduct its own switching operations in or about 2003. R.1, ¶ 18. General Mills purchased the trackmobile from Barloworld, which was also retained to provide classroom-based and practical training on the safe and proper operation of a trackmobile. *Id.*

As relevant here, Barloworld instructed General Mills and its employees to utilize chocks—wedges placed on either side of a wheel to prevent movement—whenever a railcar was not coupled to the trackmobile or other locomotive power, particularly when cars

would be left unattended, unconnected, or uncoupled on an incline. R.1, ¶ 20. Barloworld also instructed General Mills only to permit employees who had received proper training to operate the trackmobile. *Id.*

3. The Accident And Ensuing Lawsuit.

On Friday, June 3, 2005, CSXT delivered railcar AEX 7136 to General Mills's Covington sidetrack. The railcar was owned by The Anderson's, Inc., which leased it to Star of the West Milling Co., which had sent the railcar, filled with wheat, from Michigan. R.1, ¶¶ 23-24.

Two days later, on Sunday, June 5, General Mills decided to move various railcars on its sidetrack. At the time, General Mills's sidetrack consisted of four parallel tracks—one of which entered the cereal processing facility, with the rest used for switching operations. R.1, ¶ 25. Two General Mills employees—Burchfield and Turk—were involved in the operations. Turk had received little, if any, training regarding the use of the trackmobile and switching operations and was not qualified by any measure to operate the trackmobile. But he nonetheless was put in charge of operating the trackmobile. *Id.* ¶ 26.

Burchfield and Turk first moved railcar AEX 7136 from one of the switching tracks to another. The track on which they left AEX 7136 was on an incline. After uncoupling the railcar from the trackmobile, Turk thought that he saw the railcar move, but he did not either chock the wheels or check that the handbrake had been properly engaged. R.1, ¶¶ 26-29.

When Burchfield and Turk went to work on another railcar downhill, AEX 7136 rolled down the track, crashing into two other railcars. All three railcars ran over Burchfield, whose legs had to be partially amputated as a result. R.1, ¶¶ 29-30.

With the assistance of two outside consultants, General Mills conducted an internal investigation of the accident. The investigation determined that (1) although the handbrake of railcar AEX 7136 was functional, it had not been set or applied; (2) no chocks had been applied to the wheels of railcar AEX 7136, even though it was unattended and uncoupled on an incline; (3) the manual derail device had not been applied by Burchfield or Turk; and (4) General Mills had failed to adequately train its employees and to enforce safety standards. R.1, ¶¶ 31-36.

Georgia law prohibited Burchfield from suing General Mills, so he sued only CSXT and The Andersons. R.1, ¶ 37.[4] CSXT tendered defense of the lawsuit to General Mills. *Id.* ¶ 39. But rather than assume the defense (as is contemplated by the parties' agreement), General Mills actively thwarted CSXT's defense—by, for example, refusing to afford CSXT access to the experts it had retained. *Id.* ¶¶ 41-42. During the run up to trial, the district court entered partial summary judgment in favor of Burchfield on CSXT's defense that General Mills bore some or all of the fault for the accident, which would have eliminated or reduced CSXT's liability to Burchfield. *Burchfield v. CSX Transp., Inc.*, 2009 WL 1405144, at *9-11 (N.D. Ga. May 15, 2009).

After a jury trial in which CSXT prevailed, this Court reversed and ordered a new trial on the ground that CSXT had failed to satisfy the criteria for admitting into evidence a video that showed the handbrake in question functioning properly post-accident. The video had been created by a General Mills "consulting expert" to whom CSXT had been denied access and who CSXT therefore could

[4] Georgia law also prohibited CSXT from impleading General Mills as a third-party defendant. *See Lamb v. McDonnell-Douglas Corp.*, 712 F.2d 466, 467-68 (11th Cir. 1983) (per curiam).

not call to testify about the circumstances under which the brake was tested. *Burchfield v. CSX Transp., Inc.*, 636 F.3d 1330 (11th Cir. 2011) (per curiam). At the retrial, CSXT introduced evidence that, after the accident, a General Mills employee ascertained that none of the handbrakes on any of the railcars that Burchfield had been switching had been applied—notwithstanding Burchfield's insistence that he had set all of them. Trial Tr. at 1300, Doc. No. 733, *Burchfield v. CSX Transp., Inc.*, No. 1:07-cv-01263-TWT (N.D. Ga. filed May 21, 2012). Nevertheless, hamstrung by its inability to call General Mills's expert to explain that his testing showed that the handbrake on the car that rolled away was functioning properly, CSXT was found solely at fault in the retrial. R.1, ¶ 45. The jury awarded Burchfield $20,559,004 in damages. *Id.* The district court acknowledged that "the greater weight of the evidence is that Mr. Burchfield probably did not apply the hand brake, and that's why the railcar rolled down the hill and collided with the empty railcar and the Trackmobile" (Hearing Tr. at 44, Doc. No. 755, *Burchfield v. CSX Transp., Inc.*, No. 1:07-cv-01263-TWT (N.D. Ga. filed Jan. 18, 2013)), but it nevertheless denied CSXT's motion for a new trial.

CSXT appealed. While the appeal was pending, CSXT settled the claim with Burchfield for $16 million. R.1, ¶ 50.

B. Proceedings Below

CSXT requested indemnification from General Mills on multiple occasions. General Mills denied each request. R.1, ¶¶ 39, 46, 48-49, 51-52 & Exhs. B, C, D, E, F, G, H. Accordingly, on January 23, 2014, CSXT filed suit. R.1. The complaint alleges that Burchfield's injuries resulted from General Mills's breaches of its duties (*id.* ¶ 34) and that General Mills was required to indemnify CSXT under the Sidetrack Agreement (*id.* ¶¶ 59, 73).

General Mills moved to dismiss, arguing that "the doctrine of collateral estoppel bars the railroad from re-litigating negligence or any issue related to fault for the accident" and that the Sidetrack Agreement "does not provide a right of indemnity against General Mills where CSX's sole negligence caused the losses." R.23-1, at 2-3.

In opposition to General Mills's motion, CSXT argued that the district court "should not be precluded from assessing [General Mills's] and CSX's respective negligence" because "state law rules should apply" and, "under Georgia law, the finding that the

handbrake was inefficient would not have collateral estoppel effect because GM was not a party to the *Burchfield* litigation." R.33, at 23, 24 n.4. CSXT noted, however, that, in conflict with the First, Second, Third, Fourth, Seventh, and Eighth Circuits, "current Eleventh Circuit authority require[d] [the district court] to apply federal collateral estoppel rules to the findings from the *Burchfield* litigation." *Id.* at 24 n.4. CSXT further argued that whether or not General Mills shared responsibility for Burchfield's injuries was beside the point, because the Sidetrack Agreement entitled CSXT to indemnification even if CSXT bore the entirety of the fault.

The district court granted General Mills's motion and dismissed CSXT's complaint with prejudice. The court ruled that CSXT could recover under the Sidetrack Agreement only if General Mills was at least jointly negligent. R.36. Without addressing whether state or federal preclusion law applies, the court held that, because "the judgment against [CSXT in *Burchfield*] was based on its negligence, * * * [CSXT] may not seek indemnification for that judgment." *Id.* at 16.

Because the district court had failed to address the choice-of-law question, CSXT moved for reconsideration. As before, CSXT

argued that the preclusive effect of the *Burchfield* judgment should be governed by ***Georgia*** law, despite the contrary precedents from this Court. CSXT further explained that the district court was not required to follow this Court's precedents because "[t]he Supreme Court has squarely held that when a federal court sits in diversity jurisdiction, the preclusive effect of its judgment is governed by 'the law that would be applied by state courts in the State in which the federal diversity court [sits].'" R.38, at 5 (quoting *Semtek*, 531 U.S. at 508). Although General Mills "did not dispute that the already-dismissed Complaint alleged that General Mills' negligence caused the accident" (R.42, at 4), the motion for reconsideration requested leave to amend the complaint if the court deemed it necessary. R.38, at 7-10. The district court denied reconsideration of its dismissal of CSXT's complaint but granted CSXT leave to file an amended complaint. R.41.

General Mills moved for clarification or reconsideration of the order granting CSXT leave to amend its complaint. R.42. In response, the district court issued an opinion explaining that it had denied CSXT's motion for reconsideration because CSXT had acknowledged that Eleventh Circuit precedents called for the

application of federal preclusion law. The court recognized that CSXT had preserved its right to "request that the Eleventh Circuit revisit its precedent on this issue," but believed that CSXT had forfeited the opportunity to ask the district court to do so in the first instance. R.53, at 10-11. The court further indicated that, even if it were permitted to consider *Semtek*, it would find the case distinguishable because *Semtek* involved res judicata, rather than collateral estoppel. *Id.* at 11. Accordingly, the court ruled that any amendment to the complaint would be futile and therefore denied leave to amend.

C. Standard Of Review

This Court reviews *de novo* a district court's decision to grant a motion to dismiss, assuming that the allegations in the complaint are true and viewing those allegations in the light most favorable to the plaintiff. *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 (11th Cir. 1998).

The district court's decision about whether collateral estoppel applies is reviewed *de novo* (*Quinn v. Monroe Cty.*, 330 F.3d 1320, 1328 (11th Cir. 2003)), as is its interpretation of the Sidetrack

Agreement (*see Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004)).

SUMMARY OF THE ARGUMENT

I.

In *Semtek*, the Supreme Court held that the law of the forum state governs the claim-preclusive effect of a judgment of a federal court sitting in diversity jurisdiction. Although this case involves issue preclusion, rather than claim preclusion, the Supreme Court's analysis as to claim preclusion applies identically, as all nine federal courts of appeals to have considered the issue have determined.

Burchfield was decided by a federal court sitting in diversity jurisdiction in Georgia. Accordingly, Georgia law governs the preclusive effect of that judgment.

Under Georgia law, a judgment in one case may be given preclusive effect in another case only if the parties in the two cases are identical. General Mills was not a party to *Burchfield*—nor was it in privity with any party in *Burchfield*—so *Burchfield* has no preclusive effect on this litigation. The district court's contrary conclusion was in error.

CSXT preserved its right to argue that Georgia preclusion law applies. In the proceedings below, CSXT argued that "state law rules should apply" and cited cases from six federal appellate courts in support. Nothing further was required to preserve the arguments CSXT presses on appeal.

II.

The district court also erred in holding that the Sidetrack Agreement is not sufficiently clear to provide CSXT with indemnification for its own negligence.

This agreement is unambiguous. Section 15 speaks in the broadest possible terms, entitling CSXT to indemnification for "***all*** risk of loss, damage, cost, liability, judgment and expense, (including attorneys' fees) in connection with ***any*** personal injury to or death of ***any*** persons, or loss of or damage to ***any*** property." R.1, Exh. 1, § 15.1 (last two emphases added). And the condition that triggers CSXT's right to indemnity under Section 15—that the loss be "sustained or incurred in connection with, or arising from or growing out of, the operation of Industry's trackmobile or locomotive power upon said Sidetrack" (*id.*)—is equally expansive, covering circumstances in which General Mills's conduct was not

the proximate cause of the loss, which confirms that the parties understood that CSXT's negligence was covered.

The Georgia Court of Appeals has already ruled that language in a sidetrack agreement functionally identical to the language in Section 15 is sufficient to require indemnification of a railroad for its own negligence. It is reasonable to assume that the parties were aware of that decision when they chose the language they did.

Moreover, Section 15 is not the only indication in the Sidetrack Agreement that the parties intended for CSXT to be indemnified for any losses arising out of General Mills's use of its trackmobile—including when CSXT is entirely at fault. Section 11 of the Agreement, which addresses allocation of losses not arising from use of the trackmobile, expressly ***excludes*** CSXT's right to indemnification when CSXT is solely at fault, thus confirming that when the parties intended to limit the indemnification obligation, they knew how to do so. R.1, Exh. A, § 11. When Sections 11 and 15 are read *in pari materia*—as they must be—it is clear beyond peradventure that in Section 15 the parties intended to provide for indemnification of CSXT for all losses arising out of General Mills's use of the trackmobile—regardless of fault.

Industry custom and practice reinforce this interpretation. Sidetrack agreements containing indemnification provisions like this one are commonplace in the railroad industry, and there is a long tradition of interpreting similar provisions to cover the negligence of the railroad—for the very good reason that railroads would be reluctant to agree to allow customers to assume responsibility for switching railcars on property over which railroads have no control and with equipment and employees that they likewise cannot control without complete indemnification.

There is thus no reason for parting company with the Georgia courts that have construed language like that in Section 15 to provide indemnification even when the railroad is solely at fault, particularly given the railroad-specific public-policy considerations that give even further clarity to the plain language of that provision.

ARGUMENT

The district court held that CSXT is not entitled to indemnification unless General Mills was at least partly at fault for the accident, but that CSXT is precluded from proving any fault on the part of General Mills by the judgment in the underlying *Burchfield* litigation. We explain in Part II why the district court

was mistaken in holding that CSXT must establish that General Mills was partly at fault. But because the court's error in holding that CSXT is precluded from proving that General Mills was partly at fault is so patent, we address that first in Part I.

I. THE DISTRICT COURT ERRED IN HOLDING THAT CSXT WAS PRECLUDED FROM ARGUING THAT BURCHFIELD'S INJURIES RESULTED, AT LEAST IN PART, FROM GENERAL MILLS'S NEGLIGENCE.

A. The Preclusive Effect Of The *Burchfield* Litigation Is Governed By Georgia Law.

The Supreme Court has squarely held that, when a federal court sits in diversity jurisdiction, the preclusive effect of its judgment is governed by "the law that would be applied by state courts in the State in which the federal diversity court sits." *Semtek*, 531 U.S. at 508. That holding applies here and requires the application of Georgia's collateral-estoppel law.

1. The petitioner in *Semtek* filed suit against the respondent in California state court. The respondent removed the case to federal court on diversity grounds and then successfully moved to dismiss the case under California's statute of limitations. Meanwhile, the petitioner filed suit in Maryland state court raising the same claims. The Maryland courts, applying federal preclusion

principles, dismissed the case. The Supreme Court granted certiorari to decide whether state or federal law governs the preclusive effects of a judgment in a federal diversity case. *Semtek,* 531 U.S. at 499-500.

The Court held that the preclusive effect of a federal court's judgment is a matter of federal common law and that this was "a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits." *Semtek,* 531 U.S. at 508. The Court reasoned that such a rule would promote uniformity "[s]ince state, rather than federal, substantive law is at issue" under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) and that any other rule would "produce the sort of 'forum-shopping … and … inequitable administration of the laws' that *Erie* seeks to avoid." *Semtek,* 531 U.S. at 508-09 (quoting *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965)).

2. Despite the clarity of the Supreme Court's decision in *Semtek*, this Court's post-*Semtek* rulings have been mixed. On several occasions, the Court has applied *Semtek* and consulted state law to determine the preclusive effect of prior judgments in

federal diversity cases.[5] But in other cases—where the issue appears not to have been briefed by the parties—the Court has relied on federal preclusion law to gauge the effect of prior judgments in federal diversity cases.[6]

For present purposes, however, there can be little doubt that the rule from *Semtek* governs. "Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court." *Motorcity of Jacksonville, Ltd. v. Se. Bank N.A.*, 120 F.3d 1140, 1143 (11th Cir. 1997) (en banc) (internal quotation marks omitted); *cf. James v. City of Boise*, 577 U.S. ___, 2016 WL 280883, at *1 (U.S. Jan. 25, 2016) (per curiam) ("It is this Court's

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[5] *E.g.*, *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 764 F.3d 1327, 1336 (11th Cir. 2014) ("Under *Semtek*, federal common law generally incorporates state law to determine the preclusive effect of a federal diversity judgment."); *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1310 (11th Cir. 2005) ("[F]ederal common law determines the scope of judgments rendered by federal courts sitting in diversity. Under federal common law, an enforcing court should apply the law of the state courts in the state where the rendering federal court sits, unless the state's law conflicts with federal interests.").

[6] *E.g.*, *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F.3d 1309, 1316 (11th Cir. 2003) ("[F]ederal preclusion principles apply to prior federal decisions, whether previously decided in diversity or federal question jurisdiction."); *Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171, 1179 (11th Cir. 2013) (same).

responsibility to say what a federal statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.") (internal quotation marks and alterations omitted). This Court "may decline to follow a decision of a prior panel if necessary to give full effect to a United States Supreme Court decision." *Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992). Accordingly, there is no need to convene the Court en banc to resolve the intra-Circuit conflict—the Supreme Court's decision is controlling.

3. Under *Semtek*, Georgia preclusion rules apply if *Burchfield* was a federal diversity case. It indisputably was. *See Burchfield*, 2009 WL 1405144, at *9 n.1 (describing the action as a "diversity suit"); Compl. ¶ 5, Doc. No. 1, *Burchfield v. CSX Transp., Inc.*, No. 1:07-cv-01263-TWT (N.D. Ga. filed June 1, 2007) (alleging that "[j]urisdiction is proper in this Court under 28 U.S.C. § 1332 because there is diversity of citizenship of the parties and the amount in controversy is greater than $75,000").

4. The district court and General Mills each offered a (different) reason why *Semtek* should not apply. But neither of those reasons has merit.

a. The district court stated that it was not bound by *Semtek* because that case involved res judicata, whereas this case involves collateral estoppel. R.53, at 11. But there is no principled basis for adopting different choice-of-law rules for these two variants of preclusion, which are generally regarded to be branches of the same tree. *See Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011) (describing the "two forms" of res judicata as "traditional 'res judicata'" and "'collateral estoppel'"). To the contrary, the Supreme Court's reasons for applying state law on questions of claim preclusion—the importance of maintaining uniformity in the application of state substantive law and the need to avoid forum shopping—apply with identical force to questions of issue preclusion. Nothing in this Court's precedents suggests otherwise. And consistent with *Semtek*'s reasoning, other federal appellate courts have uniformly required the application of state law to determine the collateral estoppel effects of judgments in diversity cases.[7]

[7] *See, e.g.*, *Ananta Grp., Ltd. v. Jones Apparel Grp., Inc.*, 230 F. App'x 39, 40 (2d Cir. 2007); *Houbigant, Inc. v. Fed. Ins. Co.*, 374 F.3d 192, 204 (3d Cir. 2004); *Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 273 F. App'x 256, 261 (4th Cir. 2008) (per curiam); *In*

b. In an argument not adopted by the district court, General Mills contended below that Georgia preclusion law should not apply because federal interests trump Georgia law. R.39, at 8.

Although the Supreme Court indicated in *Semtek* that state substantive law must yield when it is "incompatible with federal interests" (531 U.S. at 509), General Mills misunderstands that exception. *Semtek* is an application of *Erie* and its progeny. Thus, if state law would not give preclusive effect to a federal court's "dismissal[] for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify" application of federal collateral estoppel principles. *Id.* But when whatever federal interest may exist has been satisfied in the underlying litigation, a court in a subsequent case must apply the collateral estoppel doctrine of the state in which the federal court that conducted the underlying litigation is located.

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re Miller, 307 F. App'x 785, 790 (5th Cir. 2008) (per curiam); *Quality Measurement Co. v. IPSOS S.A.*, 56 F. App'x 639, 644 (6th Cir. 2003); *Extra Equipamentos e Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 363 (7th Cir. 2004); *In re Baycol Prods. Litig.*, 593 F.3d 716, 721 (8th Cir. 2010), *rev'd on other grounds sub nom. Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *Taco Bell Corp. v. TBWA Chiat/Day Inc.*, 552 F.3d 1137, 1144 (9th Cir. 2009); *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297 (10th Cir. 2014).

Before the district court, General Mills argued that the federal court's interests in "finality" and "the Burchfield jury's findings" necessitated the application of federal law. R.39, at 8. But there will always be some federal interest in finality when the question is the preclusive effect that should be accorded to an earlier federal judgment. The Supreme Court nevertheless held in *Semtek* that this was a substantive question as to which state law must govern.

The Court gave no hint that the effort expended in a lengthy jury trial that preceded entry of the judgment could create a federal "finality" interest that would override application of state preclusion principles. *See, e.g.*, *Taco Bell Corp. v. TBWA Chiat/Day Inc.*, 552 F.3d 1137, 1144 (9th Cir. 2009) (holding that preclusive effect of judgment rendered after jury trial by federal court sitting in diversity is governed by state law). To the contrary, the Court's reasoning in *Semtek* reinforces the appropriateness of applying Georgia law here. As in *Semtek*, applying Georgia preclusion law is necessary to promote uniformity among decisions applying state substantive law. After all, it was Georgia substantive law that created the need for multiple lawsuits by prohibiting the joinder of General Mills as a third-party defendant in an action brought by an

injured General Mills employee. *See Lamb v. McDonnell-Douglas Corp.*, 712 F.2d 466, 467-68 (11th Cir. 1983) (per curiam). It would create a serious disparity between state-court and federal-court proceedings if the tort-defendant/indemnity-plaintiff is bound by rulings in the tort lawsuit when prosecuting its indemnity action if the underlying tort lawsuit was adjudicated in federal court, but not if it was adjudicated in state court. Indeed, a tort defendant that is sued in Georgia state court and faces that conundrum would almost certainly feel obliged to forgo its right to remove the case to federal court.

Thus, *Semtek* requires the application here of Georgia law.

B. Under Georgia Law, The *Burchfield* Litigation Has No Preclusive Effect.

Under Georgia law, the *Burchfield* litigation has no collateral estoppel effect in this case.

> A party seeking to assert collateral estoppel under Georgia law must demonstrate that (1) an identical issue, (2) ***between identical parties***, (3) was actually litigated and (4) necessarily decided, (5) on the merits, (6) in a final judgment, (7) by a court of competent jurisdiction.

Cmty. State Bank, 651 F.3d at 1264 (emphasis added); *see Body of Christ Overcoming Church of God, Inc. v. Brinson,* 696 S.E.2d 667, 669 (Ga. 2010) (requiring for collateral estoppel "identity of the parties or their privies between the two actions"); *Waldroup v. Greene Cty. Hosp. Auth.*, 463 S.E.2d 5, 7 (Ga. 1995) (per curiam) (limiting collateral estoppel to actions "between the same parties or their privies").

In the *Burchfield* litigation, the plaintiff was Burchfield and the defendants were CSXT and The Andersons. General Mills was not a party. In fact, Georgia law ***prohibited*** General Mills from being joined.

Nor, for that matter, was General Mills in privity with Burchfield. A privy is "one who is represented at trial and who is in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." *Butler v. Turner*, 555 S.E.2d 427, 430 (Ga. 2001). "Privity does not mean those who might be affected and whose liability might be fixed by the same set of facts." *Smith v. Wood*, 154 S.E.2d 646, 650 (Ga. Ct. App. 1967) (internal quotation marks omitted). For purposes of preclusion, "a privy is one who, after the

commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment." *Smith v. Nasserazad*, 544 S.E.2d 186, 188 (Ga. Ct. App. 2001) (internal quotation marks omitted); *see also Wood*, 154 S.E.2d at 649 ("[O]ne party is a privy of another where there is a mutual or successive relationship to the same right.").

In the district court, General Mills contended that it was in privity with Burchfield because they "had an identical interest in the Court's ruling that there was no basis upon which to assign fault to General Mills." R.39, at 10. But as this Court has held, parties "are not in privity merely because [a mutual adversary] makes identical claims against them." *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986). Moreover, even if privity could be established merely by the alignment of the parties' interests—which plainly is not the standard—General Mills could not satisfy even that test. After all, General Mills's liability to Mr. Burchfield was capped by its workers' compensation insurance policy. So the best litigation outcome for General Mills in *Burchfield* would have been a finding that General Mills was exclusively

responsible, because such a verdict would have meant that there was no damages award for which CSXT could seek indemnification. It is only because liability was ultimately placed on CSXT in *Burchfield* that General Mills finds itself a defendant in the instant action.

C. CSXT Preserved Its Right To Argue That Georgia Preclusion Law Applies.

The district court also indicated that CSXT "waived its right to insist that [the district court] apply Georgia's collateral estoppel rule to determinations made in the *Burchfield* litigation" when it "'acknowledge[d] that current Eleventh Circuit authority require[d] [the district court] to apply federal collateral estoppel rules to the findings from the *Burchfield* litigation.'" R.53, at 8 (quoting R.33, at 24 n.4) (emphasis omitted).

The district court later stated that "on appeal" CSXT could "obviously request that the Eleventh Circuit revisit its precedent" on the question whether state preclusion principles apply. R.53, at 11. So it is not clear whether the district court believed that CSXT's acknowledgment of the erroneous Eleventh Circuit precedents meant only that it had waived its right to ask the *district court* to

apply *Semtek*, or whether the district court had something broader in mind.

In either case, it should be clear that CSXT preserved the argument that Georgia law should govern the question of issue preclusion. In opposing the motion to dismiss, CSXT argued that the district court "should not be precluded from assessing [General Mills's] and CSX's respective negligence," because, in determining the preclusive effect of the prior judgment in *Burchfield*, "state law rules should apply." R.33, at 23, 24 n.4.

To be sure, although CSXT cited six authorities for the proposition that state preclusion law should apply, it did not cite *Semtek*. As the Supreme Court has explained, however, "[o]nce a * * * claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008) ("Although new claims or issues may not be raised, new *arguments* relating to preserved claims may be reviewed on appeal."). *A fortiori*, there is no waiver when—as here—the argument has been raised, and only the supporting authority is

new. *See, e.g.*, *United States v. Rashad*, 396 F.3d 398, 401 (D.C. Cir. 2005) (to preserve an issue, a party need only "inform the court and opposing counsel of the ruling [it] wants the court to make and the ground for so doing; [it] need not cite the particular case that supports [its] position").[8]

Accordingly, there is no procedural obstacle to this Court's application of binding Supreme Court precedent.[9]

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[8] In support of its contrary conclusion, the district court cited *Stone v. Wall*, 135 F.3d 1438, 1441 (11th Cir. 1998) (per curiam). R.53, at 8-10. In *Stone*, this Court held that a district court sitting in Florida did not abuse its discretion by consulting Florida law to resolve the motion to dismiss, despite the plaintiff's later argument that Virginia law should apply, because "as far as the record shows, possible application of Virginia law was not specifically raised until the Rule 59 motion was filed." 135 F.3d at 1442. The difference here is that CSXT ***did*** urge the application of Georgia law from the outset.

[9] Even if this Court were to conclude that CSXT had not presented the issue of whether state preclusion law should apply, it should nevertheless decide the issue now. "[W]here the party seeking consideration of an argument not raised in the district court 'has raised no new factual questions' and the record 'supports its legal argument,'" this Court has "held that 'refusal to consider that argument could result in a miscarriage of justice.'" *Ramirez v. Sec'y, U.S. Dep't of Transp.*, 686 F.3d 1239, 1250 (11th Cir. 2012) (quoting *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.,* 689 F.2d 982, 990 (11th Cir. 1982)).

II. THE DISTRICT COURT ERRED IN HOLDING THAT CSXT IS NOT ENTITLED TO INDEMNIFICATION FOR LOSSES CAUSED SOLELY BY ITS OWN NEGLIGENCE.

Beyond mistakenly holding that CSXT is precluded from establishing that General Mills bore part of the fault for the accident, the district court's premise that CSXT is required to make such a showing in the first place is also mistaken.

Section 15 unambiguously entitles CSXT to indemnification for losses arising from General Mills's use of the trackmobile, irrespective of who is at fault for the loss. The district court nevertheless disregarded the text of Section 15, invoking Georgia's rule that a contract of indemnity should not be interpreted to cover the indemnitee's sole negligence unless the parties' agreement "'expressly, plainly, clearly, and unequivocally state[s] that [the Defendant must] indemnify the [Plaintiff] from the [Plaintiff's] own negligence.'" R.36, at 8-9 (quoting *Park Pride Atlanta, Inc. v. City of Atlanta*, 541 S.E.2d 687, 689 (Ga. Ct. App. 2000)) (alterations in original).

But the language of Section 15 of the Sidetrack Agreement—both on its face and when read *in pari materia* with Section 11.1 of the Agreement—***does*** make crystal clear the parties' intent to

provide CSXT complete indemnification even for its own negligence whenever the loss arises out of General Mills's use of its trackmobile. And the commercial context of this agreement further cements that conclusion.

A. By Its Plain Text, Section 15 Covers CSXT's Sole Negligence.

Section 15 was written with expansive language to reflect the parties' intent to grant CSXT the broadest possible indemnification protection for losses arising from General Mills's use of its trackmobile.

The provision states:

> Industry [*i.e.*, General Mills] assumes ***all*** risk of loss, damage, cost, liability, judgment and expense, (including attorneys' fees) in connection with ***any*** personal injury to or death of ***any*** persons, or loss of or damage to ***any*** property, whether employees of either Industry or Railroad or third persons, or property of either Industry or Railroad or of other persons, that may be sustained or incurred in connection with, or arising from or growing out of, the operation of Industry's trackmobile or locomotive power upon said Sidetrack.

R.1, Exh. A, § 15 (last two emphases added).

As the district court recognized, "Section 15 uses broad terms to describe the risk assumed by the Defendant." R.36, at 9-10. The terms "any" and "all" unambiguously convey an intent to provide the broadest indemnification possible. *See, e.g.*, *Anderson v. Anderson*, 552 S.E.2d 801, 803 (Ga. 2001) ("Phrases like 'any and all' * * * are 'calculated to give the most expansive application possible.'"). The district court nevertheless held that Section 15's "broad terms are not, in themselves, sufficient." R.36, at 10. But the broad terms "any" and "all" are far from the only indicia of the parties' intent to provide CSXT with indemnification even when it is solely at fault.

1. Under Georgia law, "no talismanic language is necessary to precipitate the indemnification of a negligent indemnitee." *Brown v. Seaboard Coast Line R.R.*, 554 F.2d 1299, 1302 (5th Cir. 1977); *see Ga. Ports Auth. v. Cent. of Ga. Ry.*, 219 S.E.2d 467, 469-71 (Ga. Ct. App. 1975); *see also United States v. Seckinger*, 397 U.S. 203, 212 n.17 (1970) ("We specifically decline to hold that a clause that is intended to encompass indemnification for the indemnitee's negligence * * * must explicitly state that indemnification extends to injuries occasioned by the indemnitee's negligence."). Rather, the

question is whether the parties have unambiguously manifested their intent to indemnify the indemnitee for its sole negligence. Here, even beyond the use of expansive terms like "any" and "all," the text of Section 15 shows that the parties unmistakably intended for CSXT to be indemnified even when it is solely at fault.

In particular, the phrasing of the condition precedent to indemnity in Section 15—that the loss be "sustained or incurred in connection with, or arising from or growing out of, the operation of Industry's trackmobile or locomotive power upon said Sidetrack"—demonstrates that the parties intended to cover CSXT's negligence.

In the indemnity context, the term "'arising out of'" means "'had its origins in,' 'grew out of,' or 'flowed from.'" *JNJ Found. Specialists, Inc. v. D.R. Horton, Inc.*, 717 S.E.2d 219, 222 (Ga. Ct. App. 2011). It "does not mean proximate cause in the strict legal sense" and does not "require a finding that the injury was directly and proximately caused by the insured's actions." *Id.* (internal quotation marks omitted).

Here, the indemnity provision's use of the term "arising from" is important because it shows that the parties intended for CSXT to have a right to indemnity for losses that were ***not*** proximately

caused by General Mills's operation of the trackmobile, which makes sense only if General Mills must indemnify CSXT for CSXT's negligence, as well. *See Miss. Power Co. v. Roubicek*, 462 F.2d 412, 417 (5th Cir. 1972) (holding that indemnification against loss from all claims "arising out of or in anywise connected with the subcontract work" was "broad enough to indemnify [the indemnitee] against his own negligent acts") (internal quotation marks omitted); *see also Brown*, 554 F.2d at 1303 ("[T]he employment of the phrase 'use of the tracks' as an activity from which the railroad will be indemnified is a compelling indication that the indemnitee will be protected against its own negligence.").

2. Significantly, the Georgia Court of Appeals has held that an indemnification provision of one of CSXT's predecessor railroads that included both the terms "any" and "all" ***and*** language similar to the "arising from or growing out of" language in Section 15 "unambiguous[ly]" covered the indemnitee's sole negligence. *See Louisville & Nashville R.R. v. Atlantic Co.*, 19 S.E.2d 364 (Ga. Ct. App. 1942).

In *Louisville & Nashville Railroad*, the court considered the following provision:

> The lessee does hereby further agree to release, indemnify, and hold harmless the lessor and Georgia Railroad & Banking Company from and against ***all claims*** for damages on the part of any person whomsoever for fatal or personal injuries to the lessee, or the lessee's officers, agents, employees, or others, except the agents and employees of the lessor, when said enumerated persons were, at the time so injured, upon or adjacent to said new track in connection with the transaction of or having business with the lessee, and ***which injuries grow out of*** the construction or maintenance of said new track, or the operation of locomotives or cars thereover, or over tracks adjacent thereto, when said operation is in or about the business of the lessee.

19 S.E.2d at 368-69 (internal quotation marks and alterations omitted; emphases added). In response to the question "[d]id the contract contemplate indemnity for the [railroad's] negligence?," the court held that "the answer must be made in the affirmative," explaining:

> The indemnity provision is without ambiguity. It plainly provides for indemnity against any claim for personal injuries to certain persons when upon or adjacent to the new track or spur track in connection with the transaction of or having business with the lessee where the injury grows out of the operation of locomotives or cars thereover, or over tracks adjacent thereto, when said business is in or about the business of the lessee.

Id. at 370.

Section 15 employs language that is functionally identical to the language in the *Louisville & Nashville Railroad* agreement: It requires General Mills to indemnify CSXT for "all risk of loss, damage, cost, liability, judgment and expense" (similar to "all claims for damages" in the *Louisville & Nashville Railroad* agreement) that "aris[e] from or grow[] out of, the operation of Industry's trackmobile or locomotive power upon said Sidetrack" (similar to "which injuries grow out of the construction or maintenance of said new track, or the operation of locomotives or cars thereover, or over tracks adjacent thereto, when said operation is in or about the business of the lessee" in the *Louisville & Nashville* agreement).

Just as in *Louisville & Nashville Railroad*, the indemnity provision here is "without ambiguity" and "plainly" provides for indemnity for all losses arising from General Mills's use of its trackmobile, regardless of whether CSXT is partially or exclusively at fault—or entirely blameless. Indeed, in determining whether the parties intended to provide indemnification regardless of fault for losses arising from use of the trackmobile, it is reasonable to assume that they were aware of the *Louisville & Nashville Railroad*

decision and, in choosing similar terms, intended those terms to carry the same meaning. *Cf., e.g., Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944) ("[A]doption of the wording of a statute from another legislative jurisdiction, carries with it the previous judicial interpretations of the wording.").

3. Moreover, the use of terms that already had been determined by the Georgia Court of Appeals to be unambiguous is not the only indication that the parties intended Section 15 to provide indemnification without regard to fault. The same conclusion is compelled by reading Section 15 *in pari materia* with Section 11.1. The former provides that General Mills must indemnify CSXT for "all risk of loss * * * in connection with any personal injury to * * * any persons," so long as the loss arose from General Mills's operation of the trackmobile. R.1, Exh. A, § 15.1. Section 11.1 applies beyond situations involving the trackmobile, requiring each party to "hold the other party harmless from all losses arising from the indemnifying party's willful or gross negligence, its sole negligence, and/or its joint or concurring negligence with a third party" and to "jointly defend and bear

equally between them all losses arising from their joint or concurring negligence." *Id.* § 11.1.

In other words, in the general indemnification provision (Section 11.1) the parties drew distinctions based on whether a party was solely negligent, but in the specific context of losses arising out of use of the trackmobile (Section 15), they drew no such distinctions. The upshot is that, for this one category of losses, the parties intended for CSXT to receive unqualified indemnification, while for all other losses, indemnification would turn on fault. There is no other way to harmonize these two provisions. It is, of course, an accepted canon of interpretation that courts must construe contractual provisions in a way that harmonizes them and must select the interpretation that does not render words or entire provisions superfluous. *Chaudhuri v. Fannin Reg'l Hosp.*, 730 S.E.2d 425, 430 (Ga. Ct. App. 2012).

Given Section 11.1, this is not a case in which the parties failed to consider, at the time of drafting, the possibility of indemnity for the indemnitee's negligence. Under standard rules of construction, the omission of categories of negligence in Section 15 must be deemed to have been intentional. *See, e.g.*, *Rodgers v. Gen.*

Motors Corp., 627 S.E.2d 151, 153 (Ga. Ct. App. 2006); *see also E. Air Lines, Inc. v. C.R.A. Transp. Co.*, 306 S.E.2d 27, 28 (Ga. Ct. App. 1983) (concluding that it was "readily apparent" that indemnity provision covered all claims not arising out of gross negligence or willful misconduct in light of a provision excluding gross negligence and willful misconduct); *Capozziello v. Brasileiro*, 443 F.2d 1155, 1158-59 (2d Cir. 1971) (crediting "omission of * * * limiting language" in indemnity provision).[10]

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[10] This comparison between Sections 11.1 and 15 also demonstrates why the district court's reliance on *Southern Railway v. Union Camp Corp.*, 353 S.E.2d 519 (Ga. Ct. App. 1987), was misplaced. The agreement in *Southern Railway* required the customer to indemnify the railroad for:

> all risk of, and liability for, loss or damage to any property or injury or death of any person, caused directly or indirectly, or contributed to, by the acts, defaults, or negligence of Union Camp, or any agent, employee or representative in its service or under its control.

Id. at 520 (internal quotation marks and emphasis omitted). In other words, while expressly addressing the negligence of the customer, the agreement is silent regarding the railroad's fault. It is thus hardly surprising that the Georgia Court of Appeals held that this provision could not be read to cover situations in which only the railroad was at fault. The agreement in *Southern Railway* is like Section 11.1 of the Sidetrack Agreement, so if Section 11.1 were the only provision in the agreement, CSXT would not be entitled to indemnification when it is solely at fault. But the

B. Industry Practice Supports The Plain-Language Interpretation.

As just discussed, when interpreted solely within the four corners of the Sidetrack Agreement, Section 15 reflects the parties' intent that General Mills indemnify CSXT for any losses arising from General Mills's use of the trackmobile.

That interpretation is reinforced when the agreement is considered against the backdrop of railroad industry custom and practice. As the Fifth Circuit recognized in the labor context, special treatment must be accorded "'if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.'" *United Indus. Workers of Seafarers Int'l Union of N. Am., AFL-CIO v. Bd. of Trs. of Galveston Wharves*, 351 F.2d 183, 189 n.25 (5th Cir. 1965) (quoting *Rutland Ry. Corp. v. Bhd. of Locomotive Eng'rs*, 307 F.2d 21, 34 (2d Cir. 1962)). Here, the interpretation of the indemnification provision advanced by CSXT ***is*** "supported by customary and ordinary interpretations" of

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agreement in *Southern Railway* had no provision equivalent to Section 15 of the Sidetrack Agreement, which is functionally identical to the agreement in *Louisville & Nashville Railroad* and unambiguously provides for indemnification for losses arising from use of the trackmobile without regard to fault.

similar language in other sidetrack agreements. It follows that Section 15 satisfies the standards of clarity imposed by Georgia law, or, at a minimum, that no public policy precludes enforcement of the agreement as written.

1. Sidetrack agreements are commonplace in the railroad industry. As the most comprehensive discussion of such agreements explains, sidetrack agreements "frequently provide that the railroad is exempted from, or will be indemnified for, loss to persons or property connected with the industry or business to be served." C.T. Drechsler, *Construction and Effect of Liability Exemption or Indemnity Clause in Spur Track Agreement*, § 1, 20 A.L.R.2d 711 (1952).

There is good reason for a railroad to require full indemnification when a sidetrack is constructed. Railroads are sophisticated operations with highly trained employees who operate complex equipment. They rely upon their professional staff to maintain their equipment and to fix any problems that may arise. They also are more likely to conduct their operations to minimize the risk of injury even when there is an equipment failure—*e.g.*, by chocking railcars that are parked on inclines or conducting tests to

ensure that the parking brakes are engaged and holding the parked cars. In a sidetrack agreement, however, the railroad will often cede control to a customer. That customer will not likely have the risk-avoidance tools that the railroad has as its disposal.

That is why, in consideration for ceding control of the sidetrack, "[s]pur track agreements * * * often provide for indemnification of the negligent acts of the indemnitee even in the absence of specific language mentioning such negligence." *S. Ry. Co. v. Springs Mills, Inc.*, 625 F.2d 496, 498 (4th Cir. 1980).[11]

There is, indeed, a capacious body of law dedicated to indemnification under sidetrack agreements. Under that body of law, it has long been recognized that, in view of the attendant risks, railroads are entitled to indemnity for their own negligence:

> In a number of cases the question has arisen whether the indemnity clause of a spur track agreement applies in case of damages caused

[11] The practical consequence of provisions of this sort is not merely to provide for indemnification of railroads for their own negligence. More importantly, provisions like this eliminate the need for an expensive and contentious trial to determine whether the indemnitor bears any fault for the loss. Because fault is irrelevant under indemnification provisions like the one in the CSXT/General Mills agreement, the principal virtues of such provisions are to streamline litigation and to reduce adversity between parties to an ongoing commercial relationship.

> by the railroad's negligence. ***In all the cases in which this question was discussed the language used in the indemnity clause was held to show an intention on the part of the contracting parties to include the railroad's negligence.***

Drechsler, *supra*, § 4 (emphasis added).

Courts across the country—including in Georgia (*see Louisville & Nashville R.R.*, 19 S.E.2d 364; *Davis v. A.F. Gossett & Sons*, 118 S.E. 773 (Ga. Ct. App. 1923), *aff'd per curiam*, 124 S.E. 529 (Ga. 1924))—have held that language similar to the contractual language here unambiguously entitles the railroad to indemnity, even when the railroad's sole negligence caused the loss. *See, e.g.*, *S. Ry.*, 625 F.2d at 497; *Seaboldt v. Pa. R.R.*, 290 F.2d 296, 297 (3d Cir. 1961); *Atl. Coast Line R.R. v. Robertson*, 214 F.2d 746, 752 (4th Cir. 1954); *Buckeye Cotton Oil Co. v. Louisville & Nashville R.R.*, 24 F.2d 347, 348 (6th Cir. 1928); Drechsler, *supra*, § 4 (collecting cases).

Accordingly, the same language in the Sidetrack Agreement should be interpreted to have the same effect.

2. In a similar fashion, the public-policy considerations that arise in the context of railroad sidetracks belie the application of a supposedly contrary public policy here.

In many areas of law, railroads are subject to special legal rules that reflect the uniqueness of their circumstances. Indemnity is no different. Public policy dictates that a railroad may not be indemnified against its negligence when rendering service as a common carrier but that it may freely be indemnified when providing a concession over private tracks—as is the case here. *See Louisville & Nashville R.R.*, 19 S.E.2d at 371; *see also Santa Fe, Prescott, & Phoenix Ry. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 185 (1913).

Given the long history of and policy reasons underlying indemnity provisions in sidetrack agreements, it would be perverse to hold—as the district court did—that public policy mandates relieving General Mills of the bargain it made in order to obtain the right to switch railcars on the sidetrack. Given that the indemnity was CSXT's consideration for permitting General Mills to conduct its own track-switching operations—and those track-switching operations created a loss that would not have occurred but for CSXT's concession—there is no equitable interest favoring a limitation of CSXT's rights. Such a narrow reading would deter railroads from entering into the sorts of arrangements at issue here.

Where contractual language has routinely been interpreted the same way for decades, there is no public-policy basis for unexpectedly changing course, and providing General Mills with an undeserved windfall in the process.

CONCLUSION

The judgment of the district court should be reversed.

Dated: January 29, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 9,454 words.

s/ Brian D. Netter

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will electronically serve all registered counsel of record.

s/ Brian D. Netter