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**INTRODUCTION**

The Commission's Order affirming an award of reparations became final on July 5, 2016. Complainants' have previously filed a petition for attorney's fees on November 16, 2015. The Commission has requested that the parties file supplemental briefs to address the following issues:

1. The applicability of the new statute (Coble Act enacted on December 18, 2014) to the case at hand, and whether applying §41305(e) would result in retroactive effect; and
2. If §41305(e) does apply, whether the Commission should award the requested attorney's fees and, if so, the amount.

Complainants respond affirmatively to both questions and request that the attorney's fees set forth in their petition be granted for the reasons discussed below.

## II.

**BACKGROUND FACTS**

On July 6, 2010 Complainants filed a complaint against Respondents Hapag-Lloyd, Limco Logistics, Inc. (hereinafter referred to as "Limco") and International TLC, Inc. (hereinafter referred to ITLC) alleging violations of §10(d)(1) as well as other violations of the Shipping Act of 1984. A four day evidentiary hearing was held in August, 2011. The Initial Decision was served on February 14, 2012. This Initial Decision dismissed all claims against all three Respondents.

Complainants then filed Exceptions to the Initial Decision. After oral argument before the Commission in October, 2012, the Commission vacated the Initial Decision and remanded the case for further proceedings as to Respondents Limco and ITLC on July 12, 2013. All claims against Hapag-Lloyd were dismissed. After filing remand briefs by the remaining parties, the Remand Initial Decision was served on July 30, 2014 awarding Complainants reparations against Limco and ITLC. Limco and ITLC then filed Exceptions to Remand

1 Initial Decision with the Commission and Complainants filed a Reply Brief to Respondents'  
2 Exceptions on October 13, 2014.

3 The Commission affirmed the Remand Initial Decision by Order dated May 26, 2015.  
4 Limco then filed a Petition for Reconsideration on June 24, 2015. The Commission denied  
5 Limco's Petition for Reconsideration on May 5, 2016.

6 Complainants filed a Petition for Attorney's Fees on November 6, 2015 after ITLC's  
7 appeal was dismissed by the Federal Court of Appeals for the District of Columbia.

8 At the time of the enactment of the Coble Act, (December 18, 2014) only the  
9 Commission's decision on Respondents' Exceptions to the Remand Initial Decision was  
10 pending. As stated above, the Remand Initial Decision was affirmed and Limco's Petition for  
11 Reconsideration was denied after the enactment of the Coble Act.

### 12 III.

#### 13 STATUTORY AUTHORITY FOR ATTORNEY'S FEES

14 At the commencement of these proceedings on July 6, 2010, the law then in effect  
15 provided for mandatory attorney's fees for complainants who prevailed on a claim for  
16 reparations under the Shipping Act of 1984 and its 2006 reenactment in 46 U.S.C. §41301(a).  
17 The Shipping Act, then in effect, provided for attorney's fees under 46 U.S.C. §41305(b) as  
18 follows:

19 "If the complaint was filed within a period specified in  
20 §41305(a) of this title, the Federal Maritime Commission shall  
21 direct payment of reparations to the complainant for actual  
injury caused by the violation of this part plus attorney's fees."  
(Emphasis added) 46 U.S.C. §41305(b).

22 On December 18, 2014, the Howard Coble Coast Guard and Maritime Transportation  
23 Act of 2014, Pub.L.law 113-281, §402 (Coble Act) amended 46 U.S.C. §41305(b) to delete the  
24 phrase ". . . plus attorney's fees" and further added a new subsection, 46 U.S.C. §41305(e)  
25 which provides:

26 ///

1 “(e) Attorney’s Fees. In any action brought under §41305, the  
2 prevailing party may be awarded reasonable attorney’s fees.”  
(Emphasis added.)

3 On March 1, 2016, the Federal Maritime Commission amended its rules of practice  
4 and procedures governing award of attorney’s fees under Rule 254 to comply with the Coble  
5 Act. (46 C. F.R. §502.524)

6 IV

7 **APPLYING 46 U.S.C. §41305(e) IN THE INSTANT CASE WOULD RESULT IN A**  
8 **RETROACTIVE EFFECT.**

9 In the Commission’s comments, on adoption of the Final Rule (Rule 254), dated  
10 March 1, 2016, the Commission stated:

11 “. . .in determining the applicability of a newly enacted statute  
12 to pending cases, the courts first look to “whether Congress has  
13 expressly prescribed the statute’s proper reach” *Fernandez-*  
14 *Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf*,  
15 511 U.S. at 280 (internal quotation marks omitted). If the  
16 statute’s reach cannot be determined from the text and the  
17 application of the normal rules of statutory construction, the  
18 court must “determine whether the application of the statute to  
the conduct at issue would result in a retroactive effect”, *Martin*  
*v. Hadix*, 527 U.S. 343, 352 (1999), i.e., “whether it would  
impair rights a party possessed when he acted, increase a party’s  
liability for past conduct or impose new duties with respect to  
the transactions already completed”. *Landgraf*, 511 U.S. at 280  
and *Fernandez-Vargas* at 548 U.S. at 37.  
(81 Fed. Reg. 10, 508, 516)

19 If the statute would have a retroactive effect, the court must apply the presumption  
20 against retroactivity by construing the statute as inapplicable to the event or action in question  
21 owing to an absence of clear indication from Congress that it intended such result.  
22 *Fernandez-Vargas*, 548 U.S. at 37-38. See also *Landgraf*, 511 U.S. 280.

23 The Supreme Court in *Landgraf v. USI Film Products et al*, 511 U.S. 244, 265 (1994)  
24 stated:

25 “As Justice Scalia has demonstrated, the presumption against  
26 retroactive legislation is deeply rooted within our jurisprudence,  
and embodies a legal doctrine centuries older than our republic.  
Elementary considerations dictate that individuals should have

1 an opportunity to know what the law is and to conform their  
2 conduct accordingly; settled expectations should not be lightly  
3 disrupted. For that reason the “principle that the legal effect of  
the conduct should be ordinarily assessed under the law that  
existed when the conduct took place as timeless and universal”.

4 While a change in procedural law may often be applied to suits arising before their  
5 enactment without raising concerns of retroactivity, the court did not intend to displace  
6 traditional presumption against applying statutes affecting substantive rights, liabilities or  
7 duties to conducts arising before their enactment.” *Landraf* supra pgs. 275, 278

8 The Supreme Court in *Fernandez-Vargas v. Gonzalez* further stated that

9 “. . . we ask whether applying the statute to the person objecting  
10 would have a retroactive consequence in the disfavored sense of  
“affecting substantive rights, liabilities or duties on the basis of  
11 conduct arising before its’ enactment”. *Landgraf* supra at 278.  
12 \*\*\* If the answer is yes we then apply the presumption against  
retroactivity by construing the statute as inapplicable to the  
13 event or act in question owing to the absence of a clear  
indication from Congress that it intended such result.”  
*Fernandez-Vargas v. Gonzalez* supra p. 37

14 In this case, Complainants had a statutory right to mandatory attorney’s fees and a  
15 change in the law regarding attorney’s fees under the Coble Act affected a substantive right of  
16 the Complainants and the reasonable expectation of attorney’s fees if they prevailed.  
17 Complainants attorney had completed virtually all of the legal services and the Remand  
18 Decision awarding reparations had been issued before the enactment of the Coble Act.  
19 Applying the Coble Act and §41305(e) would frustrate the fairness and settled expectation  
20 which is the basis of presumption against retroactive legislation in this particular case.

21 Furthermore, in *Martin v. Hadix* 527 U.S. 343, 352 (1999) the court considered the  
22 Prison Litigation Reform Act (PLRA) which placed limitations on the schedule for attorney’s  
23 fees which may be awarded in prison litigation. The attorneys’ in *Martin v. Hadix* had  
24 reasonable expectations that work performed prior to the enactment of PLRA would be  
25 compensated at the pre-PLRA amount and reliance upon the fee schedule prior to the PLRA.  
26 *Martin v. Hadix* supra p 358. The court held that, to impose new fee standards after work was

1 performed, before the enactment of the PLRA, would upset reasonable expectations of the  
2 parties.

3 The court in *Martin v. Hadix* further stated that even though the question of attorney's  
4 fees are "collateral to the main cause of action", they do not change the substantive  
5 obligations between the parties and do not end the inquiry regarding retroactivity. *Martin v.*  
6 *Hadix* supra p 359.

7 Similarly, in this case, the fact that the Coble Act changes attorney's fees from  
8 mandatory to discretionary by the Commission did not change the substantive obligation and  
9 the reasonable expectations of the parties that attorney's fees would be mandatory if they were  
10 the prevailing party.

11 The Commission's comments on March 1, 2016 indicate that it has determined that  
12 the applicability of §41305(e) to pending cases should be examined on a case by case basis  
13 rather than through a bright line rule. 81 Fed. Reg. 10, 516

14 The Commission discussed for guidance two scenarios. The first scenario applicable  
15 in the instant case was: "(1) pending proceedings in which the complainant prevails and is  
16 awarded reparations, after the Coble Act went into effect. (Scenario 1)." (Emphasis added)  
17 However, the Commission qualified its analysis by stating that "any such discussion will  
18 assume that the proceedings in each scenario, one and two, were in their early stages when the  
19 Coble Act went into effect". (Emphasis added) 81 Fed. Reg. 10, 516

20 In the instant case, at the time the Coble Act was enacted on December 18, 2014,  
21 Complainants had performed all legal services described in their petition for attorney's fees  
22 with the except for filing a Reply to Respondent Limco Logistics' Motion for Reconsideration  
23 filed on June 24, 2015. At the time the Coble Act was enacted a Remand Initial Decision  
24 awarding to Complainants a total reparation award of \$129,000 had been issued and  
25 Exceptions had been filed and briefed. The parties were awaiting the decision from the  
26 Commission.

1 In short, this case was in the final stages of the proceedings and not at the early stages  
2 as contemplated in the Commissions comments to the rule on March 1, 2016.

3 Applying the applicability of §43105(e) on a case by case basis, it would seem that the  
4 Complainants should be awarded all attorney's fees for services performed prior to the  
5 enactment of the Coble Act. Applying this statute depends on common sense and functional  
6 judgment about whether it attached new consequences. A judgment should be guided by  
7 considerations of fair notice, reasonable reliance and settled expectations. *Martin v. Hadix*  
8 527 U.S. at 537-538 quoting *Landgraf*, 511 U.S. at 270. Here, the Complainants had  
9 reasonably relied upon and had the reasonable expectation of attorney's fees award to them  
10 assuming they prevailed on their claims under the then existing statute 46 U.S.C. §41305(b)  
11 Complainants had a mandatory right to attorney's fees as prevailing parties if their claim was  
12 proved. Applying a different standard late in these proceedings would upset the expectations  
13 of the parties, particularly Complainants, without reasonable advanced notice. Complainants  
14 had expended virtually all services necessary to enforce their claim which was ultimately  
15 affirmed by the Commission in May, 2015.

16 The Commission has emphasized that retroactivity determination in individual  
17 proceedings will depend on the specific facts in each case, including the status of the  
18 proceedings on December 18, 2014. Considering the specific facts of the instant case, and in  
19 particularly the status of the proceeding in their final stages on December 18, 2014, and  
20 Complainants had already completed virtually all service to prosecute this claim except for  
21 the Reply to the Motion for Reconsideration, the new standard of discretionary attorney's fees  
22 should not be applied. The Commission should instead award mandatory attorney's fees  
23 based upon the prior precedent under 46 U.S.C. §41305(b) in effect prior to the Coble Act in a  
24 reasonable amount as discussed below in Section VI.

25 Complainants should not be denied their attorney's fees for efforts in pursuing and  
26 enforcing the Shipping Act for violations of §10(d)(1) for a proceeding covering over four and

1 one-half years from the commencement of this case until the enactment of the Coble Act. To  
2 impose new standards for awarding attorney's fees now, for services performed before the  
3 Coble Act would upset the reasonable expectations of the parties and would have retroactive  
4 effect. See *Martin v. Hadix* supra at 360.

5 V.

6 **APPLICATION OF ATTORNEY'S FEES TO THE PREVAILING PARTY**  
7 **UNDER 46 U.S.C. §41305(e)**

8 Even if the Commission finds that 46 U.S.C. §41305(e) does not have a retroactive  
9 effect on a pending case, the Commission should nevertheless grant Complainants' attorney's  
10 fees as prevailing party.

11 The Commission, in its comments to Rule 254 (March 1, 2016), has elected not to  
12 codify a list of factors for consideration in exercising its discretion to award attorney's fees.  
13 81 Fed. Reg. 10, 515. However, the Commission stated ". . . the Commission has identified  
14 one specific factor for consideration with respect to pending cases: the status of the  
15 proceedings on the Coble Act's effective date." Comment to Rule 254, footnote 15 (March 1,  
16 2016) 81 Fed. Reg. 10, 515. The degree of success obtained was also cited by the  
17 Commission as a factor in determining an award of attorney's fees. Comments to Rule 254  
18 (March 1, 2016) 81 Fed. Reg. 10, 515 and *Hensley v. Eckerhart*, 461 U.S. 424, 434-436  
19 (1983). Also determining the entitlement to attorney's fees should be consistent with the  
20 purposes of the Shipping Act. Comments to Rule 254 March 1, 2016, 81 Fed. Reg. 10, 515.  
21 In this case, the Commission should find that Complainants are entitled to attorney's fees as  
22 the prevailing party for the following reasons:

23 First, the case was in the late stages when the Coble Act became effective  
24 (12/18/2014). Virtually all of the legals services to prosecute this claim had been expended  
25 prior to the effective date of the Coble Act. The Remand Initial Decision had already awarded  
26 reparations to Complainants on July 30, 2014.

1 Second, Complainants' degree of success in obtaining an award for reparations in the  
2 total sum of \$126,072 plus interest, considering the result attained and especially the  
3 complexity and breadth of the issues and defenses raised by Respondents.

4 Third, this case clarified and established precedent for future cases involving  
5 violations of Section 10(d)(1) of the Shipping Act.

6 Fourth, Complainants efforts to enforce violations of the Shipping Act are consistent  
7 with the purposes of the Shipping Act, namely to encourage parties to litigate meritorious  
8 claims.

9 Fifth, by enforcing the violations of Section 10(d)(1) of the Shipping Act, this case  
10 serves as a deterrent not only to the Respondents in this case but other NVOCCs/Freight  
11 Forwarders who fail to employ and observe just and reasonable practices under the Shipping  
12 Act.

13 Sixth, the disparity of resources between Complainants, (shipper) who have little  
14 experience in shipping and were essentially "consumers" and commercial entities, namely  
15 NVOCCs (Limco) and Freight Forwarder (ITLC).

16 VI.

17 **THE AMOUNT OF ATTORNEY'S FEES REQUESTED IS REASONABLE**  
18 **UNDER THE SPECIFIC FACTS OF THIS CASE.**

19 The Coble Act did not change the Commission's standard for determining the amount  
20 of attorney's fees to be awarded. Comments to Rule 254 (March 1, 2016). 81 Fed. Reg. 10,  
21 515. The Commission did indicate that the degree of success is a relevant factor in  
22 determining the amount of attorney's fees. Comments to Rule 254 (March 1, 2016) 81 Fed.  
23 Reg. 10, 515 and *Hensley v. Eckerhart* 461 U.S. 424, 434-436 (1983).

24 The Commission has adopted the lodestar method of computing attorney's fees in  
25 Shipping Act cases. Attorney's fees in Reparation Proceedings 23 S.R.R. 1698 (FMC, 1987);  
26 *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency* p. 3 (ALJ 2011). The most helpful

1 starting point in determining reasonable attorney's fees is the number of hour reasonably  
2 expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart* 461  
3 U.S. 424, 433 (1983) and *Tienshan, Inc.* supra pg 4.

4 Courts do not limit the size of attorney's fees because basic money damages awarded  
5 are relatively small. *City of Riverside v. Rivera* 477 U.S. 561 (1961). The court in that case  
6 awarded \$245,000 in attorney's fees for a money damage award of only \$33,350. *Bernard &*  
7 *Weldcraft Welding Equipment v. Supertrans Int'l, Inc.* 29 S.R.R. 1348, 1359 (ALJ, 2003)  
8 (Reparations awarded of \$310.98, attorney's fees awarded of \$12,587.) Likewise, *Tienshan*  
9 supra awarded \$50,000 in attorney's fees for reparations award of only \$17,000.

10 According to Rule 254, the contents of a petition for attorney's fees must specify the  
11 number of hours claimed by the attorney representing Complainants supported by reasonable  
12 proof and customary fees charged by attorneys in a community where a petitioner practices  
13 (Rule 254(b)).

14 In the instant case, Complainants have filed a petition for attorney's fees consistent  
15 with the lodestar method approved by the Commission and Rule 254. Complainants have  
16 submitted and document 624.8 hours of time expended in this case over a period of five years.

17 Complainants assert that all of the hours were reasonably and necessarily expended to  
18 prosecute these §10(d)(1) violations against the three respondents. These hours include  
19 preparation and amending the complaint, defending motions to dismiss and motions for  
20 summary judgment filed by Respondents, discovery issues, including four depositions (two  
21 taken in Seattle, WA), preparation of Rule 95 pre-hearing statement. These hours also include  
22 preparation for a four day evidentiary hearing as well as post-hearing memoranda and reply  
23 memoranda. Complainants filed Exceptions to the Initial Decision and presented oral  
24 argument before the Commission in Washington D.C. There was also post oral argument  
25 briefing on issues requested by the Commission as well as a briefs on Remand and Replies to  
26 Exceptions to Remand Initial Decision and Motion for Reconsideration.

1 Complainants attorney's services involved prosecuting the claim against all three  
2 Respondents up to the Order Vacating the Initial Decision and Remand. Since that time,  
3 services have been expended only as to Respondent Limco and ITLC, except that the Motion  
4 for Reconsideration involved only Limco.

5 Although Complainants did not prevail on their claim against Hapag-Lloyd for  
6 §10(d)(1) violations, Complainants should nevertheless be fully compensated based upon the  
7 degree of success in this case. *Hensley v. Eckerhart* supra pg. 434-435. The Supreme Court  
8 in *Hensley* stated:

9 "It may well be that cases involving such unrelated claims are  
10 unlikely to arise with great frequency. Many civil right cases  
11 will present only a single claim. In other cases, Plaintiff's  
12 claims for relief will involve a common core of facts or will be  
13 based on related legal theories. Much of counsel's time will be  
14 devoted generally to the litigation as a whole, making it difficult  
15 to divide the hours expended on a claim by claim basis. Such a  
16 lawsuit cannot be viewed as a series of discrete claims. Instead,  
17 the district court should focus on the significance of the overall  
18 relief of obtained by Plaintiff in relation to the hours reasonably  
19 expended on the litigation.

20 Where Plaintiff has obtained excellent results, his attorney  
21 should recover a fully compensatory fee. Normally, this would  
22 encompass all hours reasonably expended on the litigation, and,  
23 in deed, in some cases of exceptional success, an enhanced  
24 award may be justified. In these circumstances a fee award  
25 should not be reduced simply because a plaintiff failed to  
26 prevail on every contention raised in the lawsuit. See *Davis v.*  
*County of Los Angeles* supra at 5049. Litigants in good faith  
may raise alternative legal grounds for desired outcome and the  
court's rejection or failure of a certain grounds is not sufficient  
reason for reducing a fee. The result it what matters." *Hensley*  
*v. Eckerhart* supra at 436. (Emphasis added)

21 In this case the claims involved the shipment of a damaged container and ultimately  
22 liquidation of the damaged container and two other containers shipped by Complainants and  
23 transported by Hapag-Lloyd, the NVOCC Limco and ITLC as a freight forwarder. The facts  
24 and claims against the Respondents were all interrelated. The Commission should focus on  
25 the award relief obtained rather than discrete claims against each Respondent. Consequently,  
26 Complainants maintain they should be awarded a fully compensatory fee without any

1 reduction for failing to prevail every claim against each Respondent.

2 Complainants' attorney has requested an hourly rate of \$300 for representation in this  
3 case. Complainants have provided support for the reasonableness of these charges for  
4 Portland, Oregon for civil litigation for a lawyer with over 30 years of practice based upon a  
5 2012 Oregon State Bar economic survey. (Exhibit B to Petition for Attorney's Fees.) The  
6 median hourly fee in the Portland, Oregon for 2012 was \$350 per hour and the average was  
7 \$340 per hour.

8 In contrast, the updated Laffey Matrix has been upheld as a valid method of  
9 determining reasonable attorney's fees. *Petra Pet, Inc. v. Panda et al* Docket 11-14, Order  
10 granting petition for attorney's fees, (ALJ April 17, 2014). In this case, according to the  
11 Laffey Matrix, Exhibit C of the Petition for Attorney's Fees, for a lawyer with more than 30  
12 years of experience, the range is \$475 in 2010/2011 to \$520 in 2014/2015. Thus,  
13 Complainants' attorney's fees of \$300 per hour are substantially less than the hours fees under  
14 the Laffey Matrix.

15 Based upon the foregoing reasons and the Verified Statement and Declaration of  
16 Complainants' attorney, Complainants maintain that the hours expended were reasonable and  
17 necessary and the hourly charge was reasonable charges in the community where petitioner  
18 practices (Portland, Oregon) to support an award of attorney's fees of \$187,440.

19 Moreover, although the petition for attorney's fees exceeds the amount of the  
20 reparation award (\$129,00 awarded versus \$187,440 attorney's fees) the Commission has  
21 precedent in other cases where the Commission has awarded attorney's fees far greater than  
22 the amount of the reparations awarded. These cases did not involve the extent of litigation as  
23 in this case, including four days of evidentiary hearings and oral argument before the  
24 Commission. For these reasons Complainants maintain that the petition for attorney's fees  
25 should be affirmed.

26 ///

1 VII.

2 **WITHDRAWAL OF COSTS AND EXPENSES.**

3 Complainants withdraw their request for litigation costs and expenses expended as set  
4 forth in the verified petition in the amount of \$10,454.19. Costs and expenses are not  
5 awardable under the Shipping Act for claims adjudicated by the Commission. *Petra Pet, Inc.*  
6 *v. Panda et al* Docket 11-14, Commission granting order for attorney's fees (April 17, 2014,  
7 p. 4) and *Tienshan, Inc.* supra at 67.

8 VIII.

9 **CONCLUSION**

10 Based upon the foregoing reasons, Complainants petition for attorney's fees as stated  
11 in the Petition should be granted.

12 Dated this 16<sup>th</sup> day of September, 2016

13 

14 Donald P. Roach, OSB 75317  
15 Attorney for Complainants

FEDERAL MARITIME COMMISSION

YAKOV KOBEL and VICTOR BERKOVICH,

Complainants,

v.

HAPAG-LLOYD AMERICA, INC., LIMCO  
LOGISTICS, INC., INTERNATIONAL TLC,  
INC.,

Respondents.

Docket No. 10-06

CERTIFICATE OF MAILING

On the 16<sup>th</sup> day of September, 2016, I mailed true and correct copies of the foregoing  
COMPLAINANTS' SUPPLEMENTAL BRIEF REGARDING THE APPLICABILITY OF  
§41305(e) ON COMPLAINANTS' PETITION FOR ATTORNEY'S FEES, to the following  
addresses via email and first class mail as follows:

Limco Logistics, Inc. and International TLC at the following addresses:

International TLC  
Alena Tokar  
500 Valley Ave. NE  
Puyallup WA 98372  
Email: [www.itlelogistics.com](http://www.itlelogistics.com)

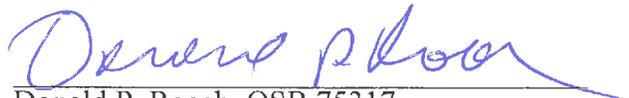
Michael Lyamport  
Limco Logistics  
12550 Biscayne Blvd., Suite 606  
Miami FL 33181  
Email: [mike@limcologistics.com](mailto:mike@limcologistics.com)

David K. Monroe  
Edward Greenburg  
GKG Law, PC  
Canal Square, Suite 200  
1054 Thirty-First St., NW  
Washington DC 20007  
[egreenberg@gkglaw.com](mailto:egreenberg@gkglaw.com)

Wayne R. Rohde, Esq.  
Hapag-Lloyd  
Cozen O'Connor  
1627 I St., NW, Suite 1100  
Washington DC 20006  
[wrohde@cozen.com](mailto:wrohde@cozen.com)

Dated this 16 day of September, 2015.

Respectfully submitted:



Donald P. Roach, OSB 75317  
Attorney for Complainants  
FAX: 503-228-8676  
Email: [donroachlaw@yahoo.com](mailto:donroachlaw@yahoo.com)