

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 14-10**

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**ECONOCARIBE CONSOLIDATORS, INC.**

**COMPLAINANT**

**v.**

**AMOY INTERNATIONAL, LLC.**

**RESPONDENT**

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**RESPONDENT AMOY INTERNATIONAL, LLC'S  
OPPOSITION BRIEF**

Respondent AMOY INTERNATIONAL, LLC (“Amoy”) hereby submits its Opposition Brief to ECONOCARIBE CONSOLIDATORS, INC. (“Econocaribe”) Brief.

**1. INTRODUCTION**

This matter involves the shipment of four sealed containers from Oakland, California, to Tianjin, China. Amoy was contacted by a shipper in California to provide transportation services of those containers and Amoy made the booking through Econocaribe which, in turn, booked the containers on a Maersk vessel. Pursuant to its regular practice, Amoy requested and received commercial documents and a photo confirming the cargo as auto parts. When the cargo landed in China, it was learned that the cargo was used tires, not new auto parts, and the cargo was rejected entry by Chinese Customs.

When the rhetoric of Econocaribe's arguments is peeled away, the facts reflect that Amoy immediately stepped up in an attempt to rectify the situation. As Maersk's customer and as requested by Econocaribe, Econocaribe was the conduit of communication between Amoy and Maersk. Between June 2013 and May 2014, the sequence of events and of omissions support a finding that Econocaribe failed in its job to accurately and fully communicate between the parties resulting in a seizure of the cargo by Chinese Customs and a detention bill for which Econocaribe now seeks reimbursement. Ultimately, this is a breach of contract case, not a sustainable Shipping Act violation matter, that could have been and should have been filed in a different forum.

## **2. STATEMENT OF FACTS PERTAINING TO THE SHIPMENT**

### **a. The booking by Amoy and delivery of the sealed containers by the shipper to the Maersk terminal.**

In May, 2013, Amoy, an NVOCC, shipped four sealed containers of what it believed to be auto parts to Tianjin, China. As part of its regular practice, Amoy shipped those containers only after receiving a commercial invoice, a packing list, a photo of the purported auto parts and Shipper's Letter of Instructions from the shipper; all documents confirming the cargo to be auto parts. It is a practice of Amoy to require these documents when booking cargo. Declaration of Melissa Chen, ¶9, AMOY 0157; Declaration of Krystal Lee Laczano, ¶4. The shipper also emailed Amoy the seal numbers on each of the containers into which it had loaded the cargo and Amoy entered those numbers into the AES ITN. ECONO PFF App. 00052.

Amoy shipped the cargo under a bill of lading issued by Econocaribe. Econocaribe arranged to have the cargo shipped to Tianjin on a Maersk ship. ECONO PFF App. 00058. Amoy did not collect the cargo from a waste recycler, as Econocaribe represents in its introduction. Rather, the shipper Kumquat delivered the sealed containers directly to the Maersk terminal in Oakland. ECONO PFF App. 00058; See Declaration of Melissa Chen, ¶7, AMOY 0156.

**b. Amoy learns that the cargo is used tires, notifies Econocaribe and thereafter engages in requests to re-export before cargo is seized by Chinese Customs. Econocaribe pursues abandonment option.**

Amoy had no idea that the cargo was other than auto parts until June 17, 2013, the day that the containers were arriving in Tianjin. Declaration of Krystal Lee Laczano, ¶4; Declaration of Melissa Chen, ¶8, AMOY 0156-0157. As Melissa Chen, owner of Amoy, diligently reported to Econocaribe, it had lost contact with the shipper, found out that the cargo was scrap items and was trying to get details of the exact commodity. She told Econocaribe that Amoy needed assistance on the issue. She asked Econocaribe to ask MSK, meaning Maersk, for extra time, at the port of destination, to abandon the cargo, to return the cargo to the US or to resell to other ports in China. ECONO PFF App. 00068; 00077; 00078. John Kamada of Econocaribe replied that he would be happy to assist. ECONO PFF App. 00067.

On June 18, 2013, Amoy notified Econocaribe that the cargo might be waste material or rubber bump and blocks made out of waste tires. On that same day, June 18, 2013, Amoy had reached a person that Amoy believed was the middleman of the shipment, and relayed to

Econocaribe that person's description of the cargo as possibly used tires. It asked Econocaribe to let Amoy know what it could do about this. ECONO PFF App. 00080-00081. Also on June 18, 2013, Ms. Chen of Amoy began efforts to re-export the container by instructing Krystal Lee, the Amoy employee who booked the cargo, to start looking for buyers around smaller third world countries around China, via internet trading sites, agents and US sellers. ECONO PFF App. 00116. Ms. Lee did as instructed by Ms. Chen<sup>1</sup>. Declaration of Krystal Lee Laczano, ¶8. Ms. Chen and Ms. Lee also began a long series of requests to Econocaribe to get costs from Maersk.

On June 19, 2013, Ms. Chen emailed Econocaribe to advise on the return option to the US because she was told by China office that the cargo was prohibited from importing into China. She asked Econocaribe to let her know her options. ECONO PFF App. 00083. Econocaribe's reply was that it was currently working on this with Maersk and would revert the outcome asap. ECONO PFF App. 00082.

One day later, on June 20, 2013, Amoy asked Econocaribe to confirm all charges for the shipment and all fees including the return to the US. Econocaribe did not reply. Declaration of Krystal Lee Laczano, ¶5. ECONO PFF App. 00121-00123. Amoy followed up the next day, June 21, 2013, asking Econocaribe if the carrier updated the fees. Amoy was trying to address the cargo problem as soon as possible. Econocaribe did not respond. Declaration of Krystal Lee Laczano, ¶5; ECONO PFF App. 00089. Later that same day, Amoy asked Econocaribe if it had heard anything from MSK. It stated that it wants to keep everything on good terms and to solve

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<sup>1</sup> Contrary to Econocaribe's assertions, Amoy is not a rubber seller. See Responses to Econocaribe's proposed Findings of Fact Nos. 171, 172, 174, 177, and 179. Even if it was, that status and the status of holding a Chinese maritime license would not have disclosed the true contents of the four containers. Moreover, if it had been such a seller, presumably Amoy would have been able to find a buyer for the tires.

the matter instead of dropping it. Amoy asked Econocaribe if issuing an abandon letter would push MSK for a faster response because Amoy wanted to solve the problem in the quickest possible. ECONO PFF App. 00094. Two days later, June 23, 2013, Econocaribe responded that it is still waiting on Maersk and suggested that Amoy prepare the abandonment letter. ECONO PFF App. 00093.

The next day, June 24, 2013, Econocaribe informed Amoy that Maersk is still working on pricing the return of the four containers. ECONO PFF App. 00095. Amoy asked what is the consequence once it submits the abandonment letter. ECONO PFF App. 00096. Econocaribe never replied to Amoy's request. Declaration of Melissa Chen, ¶14. The next day, Amoy sent Econocaribe its abandonment letter and asked if anything else was needed. ECONO PFF App. 00097. On June 26, 2013, Econocaribe responded that it forwarded the abandonment letter to Maersk and brought the issue up in an effort to expedite the process. ECONO PFF App. 00098. Amoy responded that day asking if any additional information was necessary. ECONO PFF App. 00100. Econocaribe did not respond. Declaration of Melissa Chen, ¶14, AMOY 0158-0159.

On July 1, 2013, two weeks after the containers landed in China, Amoy emailed Econocaribe stating that the process is taking a really long time. There is no word from anyone on how to resolve the issue. It asked if Econocaribe can still amend the original consignee on the BL. Econocaribe replied that this probably could be done and asked Amoy if it found another buyer. ECONO PFF App. 00101. Amoy responded that it did not find a buyer because the commodity is not permitted in China. What Amoy wanted to do was to list the buyer on the BL

that the shipper gave Amoy originally. ECONO PFF App. 00103. Amoy replied that it wanted to know what MSK would do in this case. ECONO PFF App. 00134-00135. Again, there was no reply from Econocaribe. Declaration of Melissa Chen, ¶14, AMOY 0158-0159.

On July 9, 2013, more than three weeks after the containers were landed, Econocaribe emailed Amoy, that on July 4th and on July 8th, Maersk contacted the consignee and found out from the consignee that this was not its shipment. Econocaribe informed Amoy that the detention charges were 18360 RMB. ECONO PFF App. 00133-00134. Amoy's response was that it would not be liable for container storage because it had been requesting assistance since June 17, 2013. ECONO PFF App. 00133. Econocaribe replied that Maersk would probably absorb some of the storage charges and that they weren't the issue. Abandoning doesn't relieve the shipper of potential charges. Since no other consignee can be located, Amoy had the option to return the cargo back to the US or have it sold towards the costs involved and to let Econocaribe know what to do. ECONO PFF App. 00132. As Amoy later learned, selling or auctioning the cargo was not an option. The cargo had to be allowed into China if it were to be auctioned. In this case, since the cargo was prohibited, there could be no auction. ECONO PFF App. 0127-0128.

Amoy replied on July 9, 2013 that it had been requesting the return of the shipment soonest when it found out that it was abandoned cargo. It said that it didn't understand why the same topic kept coming back. Since June 19, Amoy had been requesting these options and waited for carrier's advice. The shipment has no choice but to be returned or abandoned. Please urgently advise. ECONO PFF App. 00132. Later that day, July 9, 2013, Amoy emailed

Econocaribe that it was “not familiar with MSK about abandonment procedures and costs involved because even returning to the origin, cannot find either the seller or the middlemen at the moment.” Amoy stated that it wanted “to have the problem solved soonest possible.” Amoy asked Econocaribe to help Amoy check with MSK to find the cheapest way to solve the problem. Amoy thought that “returning will be the fastest way, please let me know.” ECONO PFF App. 00131. Again there was no reply to that request. Declaration of Melissa Chen, ¶14, AMOY 0158-0159.

The next day, July 10, 2013, Econocaribe represented to Amoy that it had two options: Amoy could either abandon the cargo, “with the understanding that all charges (ocean freight, de-vanning, storage, etc. . . .) not covered by the sale of good will be to your account” or “You can return the shipment to US for an attempt to re-sell here but this is a more expensive alternative. Should you choose to abandon the cargo, we will begin the process immediately.” ECONO PFF App. 00129-00130. Amoy replied, “Please proceed with abandonment of the containers immediately.” ECONO PFF App. 000129. Econocaribe’s advice with regard to the first option turned out to be wrong. The cargo could not be abandoned in China. ECONO PFF App. 00127-00128.

On July 12, 2013, Amoy followed up asking Econocaribe for the status with MSK. ECONO PFF App. 00128-00129. Five days later, on July 17, 2013, Econocaribe sent an email to Amoy. The email began by stating that “per Maersk, the containers cannot be abandoned until after 90 days of arrival.” The email also stated that if the cargo was not picked up by the consignee within 90 days, it would be considered abandoned and could be disposed of by China

Customs. According to Econocaribe's representations, Amoy believed that there were three possible options for the cargo: order its return, if it is found to be prohibited; auction, if it is allowed to be imported into China; or destroyed, if it is not found in good condition for return and auction. ECONO PFF App. 00128. In view of this email, Amoy understood that "the shipment will need to be destroyed at the port of destination. Please advise the procedure asap" ECONO PFF App. 00127. Based on Econocaribe's representations, Amoy believed destruction was a possibility. However, Econocaribe never advised Amoy on destruction procedure [Declaration of Melissa Chen, ¶14, AMOY 0157-0158] and there is no evidence that Econocaribe inquired with Maersk about the destruction option following Amoy's inquiry. ECONO PFF App. 00127.

Later, on July 17, 2013, there were further email communications between Amoy and Econocaribe. Econocaribe emailed Amoy stating that China Customs would make its decision after 90 days. Amoy replied that it could not wait that long because the cost would go sky high and if "all waited for 90 days, there will be no possible way for anyone to pay these fees. Please let me know and I hope MSK can respond faster?" Econocaribe PFF App. 00125- 00127. At that time, Amoy believed that, after the 90 day period the cargo would be destroyed. ECONO PFF App. 00127. Following Amoy's July 17, 2013 email to Econocaribe, Econocaribe did not respond to Amoy's request to let it know if there was a way to reduce the 90 day waiting time. Declaration of Melissa Chen, ¶14, AMOY 0157-0158.

The next email communication between Amoy and Econocaribe was on August 20, 2013, when Amoy sent a photo of what it believed was a representative photo of the cargo. It

downloaded that photo from the Global Waste Management website which Amoy understood had loaded the used tires into the container. Amoy had requested photos of the cargo from Global Waste who replied that it did not take any such photos. ECONO PFF App. 0160-0162.

On September 8, 2013, nearly 2 months after its last communication, Amoy received an email from Econocaribe asking that a clause be added to the abandonment letter that Amoy sent earlier. The clause was a waiver by Amoy of all claims against the Carrier and to hold it harmless in the event of any third party claims to the cargo. Amoy asked if the clause meant that Amoy will have to pay for all costs to the terminal on the shipment. Econocaribe replied that “the shipper on the b/l is responsible for all charges regardless of how you word the letter. The goal is to minimize the charges. I’m not sure that Maersk will assist us until that clause is on the letter.” Amoy responded by sending the letter with the language provided. See Declaration of Melissa Chen, ¶25, AMOY 0164-0165. Ms. Chen believed, in light of Econocaribe’s instructions and request for a letter of abandonment, that it would be pursuing abandonment as another option, instead of waiting for the cargo to be destroyed. See Declaration of Melissa Chen, ¶25, AMOY 0164-0165.

On September 13, 2013, Econocaribe asked Amoy for the name and information of the actual shipper that booked the cargo with Amoy and Amoy responded that same day. ECONO PFF App. 00186. See Declaration of Melissa Chen, ¶26, AMOY 0165. On September 26, 2013, Mr. Kamada emailed Melissa in response to her inquiry if he could reduce the freight charges that Amoy was paying for the shipment. Mr. Kamada stated: “The ocean freight on the cargo needs to be paid as you normally would. The fact that **the cargo is abandoned** is a

separate issue. All parties to the b/l are held jointly and severally responsible for o/f and any charges **accrued until the container is emptied** and returned to the carrier. Please submit payment on it asap so as we start to deal with the abandonment, we wont have to worry about the ocean freight charges.” Declaration of Melissa Chen, ¶27; AMOY 174-175. This email was produced by Econocaribe in its initial disclosures [ECONO 000007] but not produced by it with its submission to the Commission. Mr. Kamada’s email confirmed the abandonment of the cargo as requested in Amoy’s letter of abandonment sent earlier in September 2013.

Almost two months later, on November 1, 2013, Amoy received an email from Econocaribe providing an update on its latest discussion with MSK China, stating that the “option of cargo owner re-exporting is a risk as Customs is very sensitive about this ‘restricted’ commodity (used cut-baled tires) . . . Only option now is for Custom to proceed with their process of inspection and disposition.” The email went on to state that there was still a chance the cargo might be ordered back to origin as returned goods, or auction or destruction. Maersk said that it is waiting to hear from Chinese Customs. ECONO PFF App. 00199. Amoy replied: “noted below message. thank you.” She did not believe that a further response was necessary. See Declaration of Melissa Chen, ¶6, AMOY 0155-0156.

**c. Econocaribe fails to inform Amoy of Maersk’s warnings, pre-seizure, to re-export the cargo.**

Econocaribe failed to inform Amoy of a series of critical email communications between Maersk and Econocaribe that occurred in September, 2013. On September 4, 2013, Maersk sent Econocaribe an email reminding Econocaribe that it was “going to put together a formal letter of

abandonment so we can ask our colleagues in China to present this to Customs and see if they're willing to speed up the 90 day timeline . . . your agent confirmed the 90 day waiting period. This cargo discharged 6/17/13 so the waiting period should be coming up within next couple of weeks." ECONO PFF App. 00149. Two days later, on September 6, 2013, Maersk again emailed Econocaribe stating that: "this situation with abandoned shipment in China does not look very promising. From everything we're being told, if this cargo is seized by Custom once the 90 days after discharge timeline hits, then it could take Chinese Customs an undetermined amount of time to decide cargo disposition . . . They [MSK China] continue to tell us best option is for our agent in country to see about re-export options before this is seized. We've already advised that you don't have commercial documents to present to China Customs. Latest communication from MSK China is telling us that if we go ahead and send them your formal letter of abandonment, they can try and find a local agency or CHB in the market to ask about this issue. Please send us a letter on Econocaribe letterhead and let's see if MSK China is able to make any progress." Declaration of Melissa Chen, ¶21, Amoy 0016; ECONO PFF App. 00148.

As noted above, Econocaribe sent 3 emails, one on September 8, one on September 13, and one on September 26, 2013, following Maersk's September 6, 2013 email from Maersk to Econocaribe warning Econocaribe that re-export was the best option. But in its September 2013 emails to Amoy, Econocaribe did not inform Amoy that it was MSK's opinion that the best option was to have the cargo re-exported before the cargo was seized. If it did, Amoy would have insisted on re-export. See Declarations of Melissa Chen, ¶22 and ¶24. Rather, the Econocaribe's September emails requested that a clause be added to the abandonment letter, Econocaribe's September 8 email, and that Amoy provide the name and address of the actual

shipper, the September 13 email, which Amoy provided. The final email, sent by Econocaribe on September 26, 2013, confirmed that the cargo had been abandoned but that the charges would accrue until the container was emptied and returned to the carrier. Declaration of Melissa Chen, ¶27, AMOY 0174-0175.

In addition to the September 6 warning from Maersk to Econocaribe, there are indications that there was additional communications between Maersk and Econocaribe, prior to seizure of the cargo by Chinese Customs, warning Econocaribe to re-export the cargo. Declaration of Melissa Chen, ¶25; AMOY 164 and 170-171; ECONO PFF App. 00186. See for example, Maersk's May 12, 2014 email to Econocaribe in which it states that, before seizure, Maersk "made it known that best option was to find a new consignee or start re-export." ECONO PFF App. 00237; and Maersk's June 9, 2014, in which it notes that when the purported consignee confirmed to Maersk that the tires were not its shipment, presumably in June 2013, that Maersk "reverted back to Econocaribe to find a new buyer or re-export." ECONO PFF App. 00253. These early warnings from Maersk to Econocaribe to re-export, as referenced in Maersk's May 12 and June 9, 2014 emails, were not produced by Econocaribe in this case and were not forwarded to Amoy.

Econocaribe also failed to inform Amoy that neither Econocaribe nor Maersk had any idea that abandonment would work and that they would need to find a local agent or CHB [custom house broker] for guidance. Nor did Econocaribe inform Amoy that the abandonment letter was merely a ploy to see if Chinese Customs would decrease the 90 day waiting period. Amoy believed that following Chinese Customs' seizure of the cargo and declaration of

abandonment, that the cargo would be destroyed and that charges would only accrue until the containers were emptied. See ECONO PFF App. 00127; Declaration of Melissa Chen, ¶¶25 and 27, AMOY 174-175. It was Econocaribe and Maersk, not Amoy, who pursued the abandonment option in September, 2013, and represented that it was being acted upon in China.

**d. Amoy learns in April 2014 that the cargo was not deemed abandoned, that the cargo was seized by Chinese Customs, that re-export is necessary, and that costs have accrued over a nearly one-year period.**

The next communication that Amoy received from Econocaribe was an email dated April 15, 2014, more than 5 ½ months later. ECONO PFF App. 00208-00210. To put the chronology in perspective, since August 22, 2013 until April 15, 2014, a period of nine months, Amoy received only four emails from Econocaribe: a September 9, 2013 email requesting a revised abandonment letter with a clause protecting Maersk; a September 13, 2013 email requesting information about the shipper; a September 26, 2013, email requesting payment of the freight charges and noting representing that “the cargo is abandoned” but charges would accrue until Maersk “emptied the containers,” and; a November 1, 2013 email, which was an update essentially implying that the cargo had been seized by Chinese Customs.

Econocaribe’s April 15, 2014 email was a retransmission of an email from a Maersk entity that the costs through May 10, 2014, were \$13,456.00. The costs did not include a potential China Custom’s fine, return freight or Maersk’s demurrage cost. Maersk China recommended that the return cargo process be initiated right away to avoid possible fines down the road. ECONO PFF App. 00208-00210. This was the first time demand made on an Amoy

for those costs. See Declaration of Melissa Chen, ¶24; AMOY 0017-0019. Amoy replied that day asking for Econocaribe's help in renegotiating the costs. Ms. Chen stated that it had been a long time to hear from MSK about freight and wanted to solve the problem as soon as possible. She also said that the costs were really expensive and that Amoy could not afford to pay them. ECONO PFF App. 00212 and 00213.

She believed that the letter of abandonment, which Econocaribe had requested in September, 2013, had been effective in addressing the problem because she hadn't heard from Econocaribe since November, 2013, and Mr. Kamada's last substantive email to Ms. Chen, sent on September 26, 2013, had referred to the cargo as abandoned and noted that the containers would be emptied. See ECONO PFF App. 00234-00235; Declaration of Melissa Chen, ¶¶25 and 27, AMOY 0164-0165. As a result, on April 17, 2014, she sent the following email to John Kamada: "hi John Once abandonment letter was sign to carrier, they usually don't come back to ask to take container back. Can you please check again?" Five days later, on April 22, 2014, Mr. Kamada replied that, because the cargo was misdeclared, "this is their only option." ECONO PFF App. 00222. This was the first time that Econocaribe relayed that re-export was the only option and was information that should have been conveyed from the outset. Declaration of Melissa Chen, ¶24; AMOY 0018-0019. Amoy responded that day: "the problem is bringing it back to US, we don't have importer for this container. They took too long to get back to us. We have this company as original seller to the people who shipped with us, if MSK is to return. Can they list them as importer on MBL." ECONO PFF App. 00224.

Mr. Kamada replied: “Maersk is ok with showing this customer as the importer on the b/l. Just note that the charges need to be paid up from PRIOR to the cargo returning to Los Angeles. Will this customer be responsible for clearing the freight? Please let me know if you would like to proceed. Maersk is trying one more time to negotiate the charges.” ECON PFF App. 00227. On May 6, 2014, Mr. Kamada sent an email to Amoy with Maersk’s final demand of USD67203. ECONO PFF App. 00231-00232

What is shocking about the May 6, 2014 email is that the majority of the costs being claimed against Amoy, \$50,000 out of \$67,203 or 75% of the cost, was for detention. In other words, Maersk was profiting from its or its customer Econocaribe’s failure to respond to Amoy’s early and repeated requests for the cost of returning the cargo. Yet, on May 6, 2014, it was able to provide a cost that should have been provided in June, 2013, when the request was initially made by Amoy. Because Amoy’s communication was limited to Econocaribe, it cannot discern where the breakdown occurred, i.e., whether Econocaribe failed to pass on Amoy’s request to re-export and for the costs associated therewith or whether Econocaribe passed on Amoy’s requests and Maersk failed to reply.

Amoy’s reply to Mr. Kamada’s May 6, 2014 email was not surprising. On May 9, 2014, Ms. Chen sent the following email, stating in part: “We’ve tried everything we could in the very beginning when we suspected something wasn’t going right from tracing back to trucker to vender and hiring attorney after the shipper, but we weren’t able to get any help and we have completely lost contact with shipper. **When the abandonment letter was signed to Maersk last year, I was no longer expecting to receive email instructing taking back these**

**containers. Maersk has these containers since last year, they were aware of the situation before containers arrive to port, and it is to them for letting the containers sitting at port of solving this problem sooner.** Unfortunately, I'm unable to come up with the money to cover these storages, nor taking the containers back after all these time. Please kindly advise, if any other way we can work this through." ECONO PFF App. 00234-00235. (Emphasis added.) Basically, Ms. Chen was calling to Econocaribe's attention its failure to provide a cost of return and proper guidance early on to address the problem. Mr. Kamada forwarded Amoy's May 9, 2014 email to Maersk Line. ECONO PFF App. 00238.

On May 12, 2014, Maersk emailed Mr. Kamada and stated, in part: "Abandonment letter does not release shipper of liability. We requested the formal abandonment letter to see if we could put pressure on China Customs to order disposition... **At that time we made it known that best option was to find a new consignee or start re-export, which is what we're doing now.**" ECONO PFF App. 00237. (Emphasis added.)

Mr. Kamada sent Maersk's May 12, 2014 email to Amoy. ECONO PFF App. 00242-00243. This was the first time that return costs were forwarded by Econocaribe to Amoy, nearly one year after the shipment. Declaration of Melissa Chen ¶¶26; Amoy 006-007. Needless to say, Amoy was shocked to learn that Maersk had apparently advised Econocaribe early on to re-export the cargo while Econocaribe was advising Amoy that abandonment was the most cost-efficient and expeditious option. Amoy's email of May 13, 2014 expressed its reaction to Mr. Kamada's May, 12, 2014 email, and was blunt and direct. See ECONO PFF App. 00245-00246. Later that day, Melissa Chen apologized to Mr. Kamada if the email offended him Mr. Kamada

replied that it didn't and Ms. Chen responded, "Whatever information they need please let me know. thank you." AMOY 0110.

Mr. Kamada forwarded Amoy's blunt email to Maersk on May 13, 2014 with his comment that "Here is my customer's final response." ECONO PFF App. 00251. This was not Amoy's final response since Econocaribe did not include Amoy's offer to cooperate. An offer that Econocaribe never pursued. Declaration of Melissa Chen, ¶¶3, 17, 22; ECONO PFF App. 00212-00213. It should be noted that Mr. Kamada's May 13, 2014 email to Maersk was the first time that Econocaribe forwarded Amoy's communication and position directly to Maersk. During the previous year, Econocaribe had generally referred to Amoy as "our customer" and had apparently not relayed to Maersk Amoy's understanding, as a result of Econocaribe's advice, that abandonment was an available best option.

On May 14, 2014, Maersk reiterated to Econocaribe that "your customer is not a party to our B/L and shipper is ultimately liable for all charges under our Maersk Bill of Lading." ECONO PFF App. 0248. On June 9, 2014 Maersk sent another email to Econocaribe reminding Econocaribe that Maersk had warned it that the cargo needed to be re-exported after the purported consignee confirmed that the shipment did not belong to it. ECONO PFF App. 00253.

On June 11, 2014, Maersk followed up with another email to Econocaribe informing it that Maersk petitioned for disposal from China Customs in March, 2014, but did not explain why it waited 6 months after seizure by China Customs, in September, 2013 to do so. It advised Econocaribe that "you may want to also discuss with your agent in China to see if they can

mitigate these re-export charges which being told are outside of `our control.” ECONO PFF App. 0259.

During June through July, 2014, counsel for Amoy and Econocaribe attempted to resolve this matter but were unsuccessful. On August 11, 2014, Econocaribe filed the instant complaint.

On November 25, 2014, 3 ½ months after the filing of its FMC complaint, Econocaribe re-exported the 4 containers. Maersk Line issued its bill of lading for re-export of the cargo. ECONO PFF App. 00268. The Maersk re-export bill of lading is nearly identical to the original Maersk bill of lading [ECONO PFF App. 00058] except that the consignee Victory Maritime Services, is now listed as the shipper and the original shipper, Econocaribe, is now listed as the consignee (in other words, the shipper and consignee are just switched on the two bills of lading), and the transportation is from Xingang to Miami, Florida. The description of the cargo in the re-export bill of lading and on the corresponding Arrival Notice, is identical to that in the original Maersk bill of lading, i.e. “AUTO PARTS,” and curiously lists the each of the containers as being sealed with the same seal numbers as on the original Maersk bill of lading. A question certainly arises as to whether the containers had ever been opened in China. More importantly, no explanation was ever provided by Econocaribe as to why it could not have made these same return shipping arrangements in June 2013, as it did a year and a half later in November 2014.

### **3. ECONOCARIBE’S FMC COMPLAINT**

On August 11, 2014, Econocaribe filed its claim with the Federal Maritime Commission (“FMC”), alleging that Amoy violated four statutes of Title 46, namely 46 U.S.C. §41102(a)<sup>2</sup>, 46 U.S.C. §41104(1)<sup>3</sup>, 46 U.S.C. §41104(2)(A)<sup>4</sup>, 46 U.S.C. 41102(c), 46 U.S.C. §41104(2)(B)<sup>5</sup> and 46 C.F.R. §531.31(e). The gist of Econocaribe’s Complaint is its assertion that Amoy violated the Shipping Act of 1984, as amended, by knowingly and willfully misclassified used tires as auto parts. Econocaribe’s alleged violations fall short because neither the language of the statutes nor the facts that Econocaribe relies support its claims. The circumstances surrounding Econocaribe’s claims reflect that this is a contract dispute that is properly filed in a different forum.

### **4. AMOY DID NOT VIOLATE 46 U.S.C. §41104(2)(A), SECTION 10(B)(2)(A) OF THE SHIPPING ACT OF 1984, AS AMENDED, OR 46 U.S.C. APP. §1709(B)(2)(A)**

46 U.S.C. §41104(2)(A), Section 10(B)(2)(A) of the Shipping Act of 1984, as amended and 46 U.S.C. App. §1709(b)(2)(A) are the same law. Econocaribe has cited all three in its Brief. For the sake of brevity, Amoy will cite to 46 U.S.C. §41104(2)(A) and incorporate by reference its opposition to Econocaribe’s argument that Amoy violated the other two laws.

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<sup>2</sup> This statute is the same as Section 10(a)(1) of the Shipping Act of 1984, as amended, which is how the statute is cited by Econocaribe in its Brief. Amoy will cite the statute as 46 U.S.C. §41102(a).

<sup>3</sup> This statute is the same as Section 10(b)(1) of the Shipping Act of 1984, as amended, which is how the statute is cited by Econocaribe. Econocaribe also cites the statute as 46 U.S.C. App §1709(b)(1). Amoy will cite the statute as 46 U.S.C. §41104(1)

<sup>4</sup> This statute is the same as Section 10(b)(2)(A) of the Shipping Act of 1984, as amended, which is how the statute is cited by Econocaribe in its Brief. Econocaribe also cites the statute as 46 U.S.C. App. §1709(b)(2)(A). Amoy will cite the statute as 46 U.S.C. §41104(2)(A).

<sup>5</sup> This statute is the same as Section 10(b)(2)(B) of the Shipping Act of 1984, as amended, which is how the statute is cited by Econocaribe in its Brief. Econocaribe also cites the statute as 46 U.S.C. App. 1709(b)(2)(B). Amoy will cite the statute as 46 U.S.C. §41104(2)(B).

46 U.S.C. §41104(2)(A) states that “a common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is . . . (A) not in accordance with the rates charges, classifications, rules, and practices contained in a tariff published or service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title . . .” Amoy maintains, and the evidence supports a finding that, Amoy provided service to its shipper, Kumquat Tree Inc. (“Kumquat”) in accordance with Amoy’s tariff.

Econocaribe’s argument provides a tortured and oblique reading of 46 U.S.C. §41104(2)(A) that is unsupported by law. Econocaribe relies on the following of its proposed findings to support its claim that Amoy violated 46 U.S.C. §41104(2)(A):

proposed Finding of Fact No. 2, that Amoy is an NVOCC, which Amoy admits;

proposed Finding of Fact No. 159, a statement of Econocaribe’s Tariff Rule 2.4, which Amoy considers irrelevant; and

proposed Finding of Fact No. 180, that Econocaribe would not ship used tires to China, to which Amoy has made an objection, and also considers irrelevant.

Based upon those proposed Findings of Fact, Econocaribe argues that Amoy violated 46 U.S.C. §41104(2)(A). However, those proposed Findings of Fact fall far short of sustaining Econocaribe’s burden of proving a violation.

46 U.S.C. §41104(2)(A) prohibits a common carrier, such as Amoy, from providing service in the liner trade not in accordance with the rates, charges, classifications, rules and

practices in a published tariff.<sup>6</sup> Econocaribe argues that “Amoy provided, and surreptitiously caused Econocaribe to provide, service that was not in accordance with the applicable rates, charges, classifications, rules, and practices contained in Econocaribe’s tariff and presumably Amoy’s tariff. Both tariffs require the shipper to accurately have declared the cargo as used cut rubber tires, or waste.”

Econocaribe relies on its proposed Finding of Fact No. 159 to support that assertion. That proposed finding refers to Econocaribe’s Tariff Rule 2.4, which states that the description of commodities shall be uniform on all copies of Bill of Lading, trade names are not acceptable commodity descriptions, shippers are required to declare their commodity by its generally accepted generic or common name and articles not provided for in this tariff will be freighted at rates named in the commodity classification “Cargo, N.O.S.”

A reading of 46 U.S.C. §41104(2)(A) shows that its scope is directed to the conduct of a common carrier, in this case, Amoy which was a carrier as to its customer Kumquat, and whether it proved service in accordance with a tariff. In this case, that tariff would be Amoy’s tariff, since it could not access Econocaribe’s tariff. Neither Amoy nor Econocaribe are members of a conference, which would have permitted them to use a common tariff. See 46 U.S.C. §40102(7)(A). Thus, Econocaribe’s tariff is irrelevant to whether Amoy violated 46 U.S.C. §41104(2)(A). Econocaribe cites no authority, and Amoy believes that there is none, to support Econocaribe’s argument that surreptitiously causing it to provide service that was not in

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<sup>6</sup> 46 U.S.C. §41101(2)(A) also mentions a service contract. There was no service contract between Econocaribe and Amoy.

accordance with Econocaribe's tariff, which Amoy denies, is a violation of 46 U.S.C. §41104(2)(A).

Here, Amoy provided carrier service to its shipper, Kumquat, not to Econocaribe. There is no evidence that Amoy violated 46 U.S.C. §41104(2)(A) when it provided that service. Moreover, even if it did, Econocaribe would not have standing to address that issue since it incurred no loss as a result of any alleged violation of 46 U.S.C. §41104(2)(A). There has to be actual injury caused by a violation of the statute to establish standing [See 46 U.S.C. §41305(b)], and Econocaribe has offered no evidence in that regard.

The third proposed finding, that Econocaribe would not ship tires to China is irrelevant. There has been no showing that Econocaribe's published tariff addressed that issue or that Amoy used that tariff in providing its service to Kumquat. The fact is that Amoy correctly declared the cargo that the shipper represented it to be. Thus, there was no violation of 46 U.S.C. §41104(2)(A).

Econocaribe cites Oceanic Bride Int'l, Inc. Possible Violations of Section 10(A)(1) of the Shipping Act of 1984, 2014 WL 545231 (FMC 2014), that acting knowingly and willfully is not an element of 46 U.S.C. §41101(2)(A) case. Oceanic Bridge is not a section (10)(b)(2)(A) or 46 U.S.C. §41104(2)(A) case and thus is not relevant.

**5. AMOY DID NOT VIOLATE 46 U.S.C. §41102(a) OR SECTION 10(A)(1) OF THE SHIPPING ACT OF 1984, AS AMENDED**

46 U.S.C. §41102(a), which Econocaribe also cites as Section (10)(a)(1) of the Shipping Act of 1984, states that “A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.”<sup>7</sup> The fundamental basis for a §41102(a) violation are knowing and willful acts through unjust or unfair means or devices used to obtain ocean transportation at rates that would otherwise not apply. This is a fundamental basis that is missing in this case and for which Econocaribe has not established its burden.

Econocaribe claims that Amoy’s violation of 46 U.S.C. §41102(a) is twofold: first, that it knowingly and willfully by means of false classification obtained ocean transportation for property at less than rates or charges that would otherwise apply, and second, that Amoy’s refusal to pay for demurrage, return freight and subsequent costs constitutes knowingly and willfully, by other unjust or unfair device or means, to obtain transportation of property at less than the rates or charge that would otherwise apply. For Econocaribe to prevail, it must prove each of those claims and that each of those claims are related, meaning that the false classification resulted in a person obtaining transportation rates at less than what the carrier

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<sup>7</sup> 46 U.S.C. §41102(a) is similar to 46 U.S.C. §41104(1), which will be addressed in the next section. §41102(a) applies to a person not obtaining preferential rates or charges through false, unjust or unfair pretenses or devices or means, while §41104(1) applies to a common carrier not allowing a person to obtain preferential rates or charges through false, unjust or unfair pretenses or devices or means.

charges in its tariff or service contract. There are no facts to support these claims or that there was a violation of §41102(a).

**a. Amoy did not knowingly and willfully obtain a lower ocean transportation rate by means of false classification.**

Preliminarily, Econocaribe fails to identify the lower ocean rate, as compared to the purported correct rate, that was obtained by Amoy. Rather, Econocaribe relies on its proposed findings that are disputed by Amoy, undermined by a review of the evidence and skirt the issue of purported lower rates. Those proposed findings proffered by Econocaribe on this issue include the following:

proposed Finding of Fact No. 165 that Krystal Lee knew that cargo was in fact baled used tires when she booked cargo space with Econocaribe and made the misdeclaration, which is disputed by Krystal and Melissa Chen and undermined by the commercial documents and Shipper's Letter of Instruction provided by the shipper to Amoy pre-booking;

proposed Finding of Fact No. 167, that if Krystal Lee had been acting truthfully and diligently in ascertaining the nature of the cargo, as claimed by Amoy in its Opposition to Motion for Partial Summary Judgment, such booking would not be characterized as "unauthorized," which Amoy maintains is a distortion of Melissa Chen's email in which she acknowledges, after the character of the cargo was determined, that the shipment was not authorized by China Customs;

proposed Finding of Fact No. 170, that besides Krystal Lee's direct and actual knowledge of cargo, it is reasonable to assume that Amoy knew that the cargo was used tires because Amoy's business was related to used rubber and plastic industry and it specifically dealt in tire

scrap, which is disputed by Amoy since its “business” in the rubber and plastic industry is limited to trying, in good faith, to find a buyer for the tires at issue; and

proposed Findings of Fact Nos. 187-194, that Krystal Lee was involved in a previous situation in 2012, where ZIM American Integrated Shipping Services Company, LLC and MSC, Mediterranean Shipping Co. made claims against Amoy a shipment of wood pulp, turned out to be reusable paper and wet waste paper.

Amoy disputes the foregoing proposed Findings of Fact and believes that a review of the proffered supporting documents undermines Econocaribe’s proposed “finding.” In regards to Finding of Fact No. 165, that finding is based on paragraph 9 of the Affidavit of John Kamada, the manager of the Econocaribe office that Amoy dealt with. Melissa Chen of Amoy disputes that she told Mr. Kamada that Krystal Lee knew that the cargo was baled used tires and that she had misdeclared the cargo. Although she recalls a telephone conversation with Mr. Kamada, on or about May 18, 2014, she denies that the conversation was as he testified. Mr. Kamada states in his Affidavit that “In the conversation, Melissa stated that this was not the first time Amoy had shipped used tires by providing false information to the NVOCC; that the previous misdeclaration was also done by the same employee, Krystal Lee; that as a result of Krystal Lee’s misconduct, Amoy had paid other NVOCC damages Amoy caused; that Krystal Lee did this and the previous misdeclaration willfully . . .”

Ms. Chen and Krystal Lee Lazcano dispute those statements as being factually wrong. In her January 19, 2015 declaration, Ms. Chen stated that: “Krystal Lee was involved in another incident, where she was contacted by Clare Anderson of Sea Consulting, LLC to book 16

containers of wood pulp to Greece in October, 2012. 5 Containers were shipped on an MSC vessel and 11 containers were shipped on a ZIM vessel. It turned out that the containers contained reusable paper and wet waste paper instead of wood pulp. Because of the discrepancy, MSC and ZIM made claims against Amoy, which it settled with these carriers. Mr. Anderson was found guilty of wire fraud in connection with this and other shipments that he made and was sentenced for that crime. See Exhibit 31; Request for Judicial Notice. Krystal was not charged with a crime. She committed no misconduct. The previous incident did not involve an NVOCC, but ocean carriers; it did not involve used tires, but reusable paper and wet waste paper. There were no other incidents involving Krystal and other NVOCCs or misdeclarations or baled tires.” See Declaration of Melissa Chen, ¶29; AMOY 022-0024; Declaration of Krystal Lee Lazcano, ¶18.

Ms. Chen also disputes the remaining statements in paragraph 9 of Mr. Kamada’s Affidavit. Specifically, she stated in her Declaration of January 19, 2015, the following: “Kamada is also wrong in his recollection that I told him ‘Krystal Lee did this [meaning the Econocaribe transaction] . . . willfully’ or ‘that Krystal Lee colluded with the shipper of the cargo; that Krystal Lee was terminated because of this misconduct.’ I did not tell him that. I know of no facts that Krystal either willfully misdeclared the cargo or the she colluded with the shipper John Chen to misdeclare the cargo. Krystal handled the booking as she would have for other bookings. She received a packing list and commercial invoice from the shipper, see Exhibits “4” and “5” and Declaration of Krystal Lee Laczano. He sent her a completed Amoy Shipper’s Letter of Instruction, Exhibit “6”. He also sent her a photograph of the cargo that she

requested, which is found in Exhibit “32”. Amoy believed that this was a photograph of the cargo.” Declaration of Melissa Chen, ¶¶30, Amoy 0024, 0034-0040, 0139-0140.

Mr. Kamada’s recollection in reporting that conversation should be viewed in light of his reporting other parts of that conversation, which have been objectively discredited. His Affidavit is simply not credible. The majority of paragraph 9 of his Affidavit has been objectively discredited. There were no other shipments of baled tires; there were no other NVOCCs involved in other shipments, where cargo had been declared to be other than was discovered in the containers; there were no damage payments made to other NVOCCs; there was no false information that Krystal provided to other NVOCCs or other carriers; Krystal Lee was not terminated because of some misconduct. The remainder of paragraph 9 of his Affidavit has been directly disputed by Ms. Chen.

Moreover, Mr. Kamada is a biased witness, whose recommendations to Amoy, on how to address the problem cargo, were wrong. He is also the person who withheld from Amoy the warning of Maersk Line, that the best option was to re-export the cargo, before the cargo was seized by Chinese Customs. Declaration of Melissa Chen, ¶¶21, 22, 24; Amoy 0016-0019. Declaration of Melissa Chen, ¶¶5 and 20. Rather, after instructing Amoy very precisely as to language for an abandonment letter, he represented to Amoy that the cargo was abandoned and that charges would accrue until the containers were emptied. Declaration of Melissa Chen, ¶27. These representations were made by Mr. Kamada less than 3 weeks after Maersk reiterated to him that the cargo should be re-exported. Lastly, neither Krystal Lee nor Amoy gained any benefit from the purported misclassification, a factor to be considered.

Amoy has objected to proposed Findings of Fact Nos. 167, 170 and 187-194 on the basis that they lack foundation and are misleading, argumentative, speculative and irrelevant. Rather than recite the basis for objections in this Opposition, Amoy incorporates them herein by reference.

Econocaribe asserts that as an experienced dealer in used tire and rubber which collected the goods from a waste recycler, Amoy had full reason to know the cargo it was about to ship had a substantial risk of being cut used tires or other used rubber waste products. There is absolutely no support for that assertion. As shown in Responses to Findings of Fact Nos. 170, 171, 172, 173 and 174, Amoy was not a used tire dealer. It advertised on the internet, after the tires landed in China, in a diligent attempt to sell those tires in the most expeditious manner. There are absolutely no facts that Amoy did any advertising to sell any tires except for the tire in the four containers that landed in China. Moreover, Amoy did not collect the good from the recycler. The shipper arranged for the delivery of the sealed containers to the Maersk terminal in Oakland, California. See Declaration of Melissa Chen, ¶ 7. Amoy also disputes Econocaribe's assertion that it should have at least asked the shipper for a certificate of origin. Amoy used due diligence when it followed its usual practice of requesting and receiving a commercial invoice, a packing list, a Shipper's Letter of Instruction and a photo of the shipment. These turned out to be false. A certificate of origin could have been falsified as well.

Econocaribe's assertion that "Amoy's reckless disregard for a substantial risk satisfies the knowledge and willfulness requirement for a finding of the violation of Section 10(a)(1)" is

baseless and unsupported by fact or law. First, there has been no showing that Amoy's booking of the cargo as auto parts was a "substantial risk." The corollary to that argument is that every booking is a substantial risk, which is unfounded. Moreover, the reckless disregard addressed in Rose International, Inc. v. Overseas Moving Network International, Ltd., 2001 WL 865708, (FMC 2001) at \*47, is that disregard which purposeful or obstinate behavior akin to gross negligence. There are no facts to support that type of conduct. Here, Ms. Lee asked for and received a commercial invoice, packing list, a shipper letter of instruction and a picture to confirm the cargo. It has been held that requiring a commercial invoice prior to departure is an appropriate practice. La Torre's Enterprises, et al. v. Natural Freight Ltd./Skytruck, et al., 2011 WL 7144018 (F.M.C.) at \*12.

A crucial element in proving a violation of 46 U.S.C. §41102(a) is that a false misclassification must be done knowingly and willfully. The proposed findings relied on by Econocaribe fail to provide any support for that element.

**b. Amoy's refusal to pay for demurrage, return freight and subsequent costs is not a violation of 46 U.S.C. §41102(a).**

Econocaribe's second claim, that Amoy's refusal to pay for demurrage, return freight and subsequent costs is a violation of 46 U.S.C. §41102(a), is based on Capitol Transportation, Inc. v. United States, 612 F.2d 1312 (1<sup>st</sup> Cir. 1979). It argues that Capitol's refusal to pay demurrage without a good faith legal defense constitutes knowingly and willfully obtaining ocean transportation of property at less than the rates or charges that would otherwise apply the requirements for false description/classification also apply to the requirements for unjust or

unfair means. However, after Capitol Transportation, Inc. was decided, the Commission promulgated 46 CFR §545.2, which provided an interpretation of Section 10(a)(1) of the Shipping act of 1984. That CFR states as follows: “An essential element of the offense [46 U.S.C. 41102(a)] is use of an ‘unjust or unfair device or means.’ In the absence of bad faith or deceit, the Federal Maritime Commission will not infer an “unjust or unfair device or means” from the failure of a shipper to pay ocean freight. . .” That has been interpreted to mean “whether there is evidence of bad faith or deceit that would support a finding that . . . used an unjust or unfair device or means to obtain transportation at less than applicable rates.” Ocean Bridge International, Inc. Possible Violations of Section 10(A)(1) of the Shipping Act of 1984, 2014 WL 5454231 (F.M.C.) at \*13.

Econocaribe relies on the following of its proposed findings to support its claim that Amoy knowingly and willfully obtained lower ocean transportation rates by means of false classification:

proposed Finding of Fact No. 160, described by Econocaribe as Paragraph 15 of Econocaribe’s Terms and Conditions of Service;

proposed Finding of Fact No. 161, described by Econocaribe as Paragraph 14 of Econocaribe’s Terms and Conditions of Service; and

proposed Finding of Fact No. 156, that Econocaribe’s Tariff was incorporated into the Bill of Lading.

Amoy objected to each of these proposed Findings of Fact and its Responses to those proposed findings are incorporated herein by reference for brevity’s sake.

Econocaribe's argument that Amoy knowingly and willfully refuses to pay demurrage without a valid legal defense is basically that. It states, without factual support, that Amoy's defense of Econocaribe's failure to mitigate is invalid and not raised in good faith. It argues that if Amoy had acted in good faith it would have paid the "undisputed portions" of the bills. However, Amoy did pay the freight bill of China. ECONO PFF App. 00188-00189.

There is ample factual support for Econocaribe's failure to mitigate. The facts show that on September 6, 2013, before the cargo was seized by Chinese Customs, Maersk Line put Econocaribe on notice that the best option was to re-export the cargo before it was seized. ECONO PFF App. 00148. Econocaribe did not convey Maersk's warning to Amoy. See Declaration of Melissa Chen, ¶¶21, 22, 24; Amoy 0016-0019; Declaration of Melissa Chen, ¶20. In fact, Econocaribe did nothing for 9 months after receiving Marks' notice to re-export. Consequently, the cargo was seized by Chinese Customs. More than nine months after giving its initial warning. Maersk reminded Econocaribe in a May 12, 2014 email it had warned Econocaribe that the best option was to find a new consignee to re-export. ECONO PFF App. 00237. If Maersk and Econocaribe could re-export in May, 2014 after the cargo was seized, they could have done it as well in September, 2013, when the demurrage and other costs were a lot lower. Clearly, Econocaribe should have returned the cargo in September, 2013 when it received Maersk's warning. Its re-export in November 2014 reflects the ease with which such re-export could have been done a year earlier. Failure to do so was a failure to mitigate. Amoy's refusal to pay was in good faith.

Moreover, the first time that a demand was made on Amoy to pay was when it received an email from Econocaribe on April 22, 2014, 10 months after the cargo landed in China. Amoy warned Econocaribe early on that it was relying on Econocaribe to solve the problem as quickly as possible, or else, costs would go sky high. The majority of the costs ultimately claimed by Econocaribe, or 70%, were Maersk's detention costs. Econocaribe's failure to address the cargo problems caused the detention costs to accrue. Amoy was understandably outraged by the fact that it was being asked to pay for costs that could have been avoided by Econocaribe. Declaration of Melissa Chen, ¶¶ 22, 23. The extent to which Maersk contributed to this lack of action is a matter between Econocaribe and Maersk, particularly since it appears that Amoy was not advised of or a party to early communications between Econocaribe and Maersk.

When the unsupported allegations are stripped away, Econocaribe's argument is basically an argument for a breach of contract. It asserts that Amoy is liable to Econocaribe for all expenses. It cites Econocaribe's Bill of Lading and Tariff in support of Amoy's alleged breach and Econocaribe's entitlement to its damages. However, "it has been held that the Commission is not a collection agency but rather an agency that administers the Shipping Act of 1984." Transportation Services, Inc. v. Coex Coffee International, Inc., 1992 WL 366157 (F.M.C.) at \*3.

**6. AMOY DID NOT VIOLATE 46 U.S.C. §41104(1), SECTION 10(B)(1) OF THE SHIPPING ACT OF 1984, AS AMENDED, OR 46 U.S.C. APP §1709(B)(1)**

46 U.S.C. §41104(1), which Econocaribe also cites as Section (10)(b)(1) of the Shipping Act of 1984 and 46 U.S.C. App §1709(b)(1), states that "A common carrier, either alone or in

conjunction with any other person, directly or indirectly, may not (1) allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means . . .”

A common carrier violates this statute if it:

1. allows a person to obtain property transportation rates less than those **charged by the carrier in its tariff** or service contract (emphasis added), and
2. uses a false billing, false classification, false weighing, false measurement, or any other unfair or unjust means of device to do so.

Econocaribe relies on the following of its proposed findings to support its claim that Amoy violated 46 U.S.C. §41104(1):

proposed Finding of Fact No. 165, which Krystal Lee knew that cargo was in fact baled, used tires when she booked cargo space with Econocaribe and made the misdeclaration;

proposed Finding of Fact No. 166, which Melissa Chen now disputes that she had ever told John Kamada that Krystal Lee colluded with the shipper of this cargo. Nevertheless, she admitted in her email that Krystal made the “unauthorized booking”;

proposed Finding of Fact No. 167, that if Krystal Lee had been acting truthfully and diligently in ascertaining the nature of the cargo, as claimed by Amoy in its Opposition to Motion for Partial Summary Judgment, such booking would not be characterized as “unauthorized”; and

proposed Finding of Fact No. 170, that besides Krystal Lee’s direct and actual knowledge of cargo, it is reasonable to assume that Amoy knew that the cargo was used tires because

Amoy's business was related to used rubber and plastic industry and it specifically dealt in tire scrap.

As pointed out in Amoy's Responses to Econocaribe's Proposed Findings of Fact, which are incorporated herein by reference, the evidence reflect that despite exercising its reasonable practices, Krystal Lee and Amoy were duped by a savvy, illicit shipper. While certainly regrettable, the facts do not support a finding of a willful pattern of knowing violation of the Shipping Act. Econocaribe relies on Martyn Merritt, AMG Series, Inc. et al. - Possible Violations of Section 10(A)(1) and 10(B)(1) of the Shipping Act of 1984, 1995 WL 215656 at \*3 in support of an argument that it is not necessary to find that the person acted willfully to violate Section (B)(1) because that section could be violated merely by the act of charging rates other than those specified in tariffs. However, Econocaribe's reliance on Martyn Merritt is misplaced. "Referring to section 16 Second of the Shipping Act, 1916 ("1916 Act") (46 USC §815 Second), the predecessor to section 10(b)(4), the Commission ruled that an 'essential element' for proving a violation of section 16 Second is 'the unfair device or means' and that such proof requires a showing that 'one did something or attempted to do something which *he knew or should have known* was unlawful. (Emphasis added). (Citations.)" Sea-Land Service, Inc. - Possible Violations of Sections 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984, 30 SRR 872 at 882, (F.M.C. 2006). Thus, to establish a violation of 46 U.S.C. §41104(1), Econocaribe must show that Amoy knew or should have known that there was a false classification of used, baled tires. There is no evidence to sustain Econocaribe's burden.

Proposed Findings of Fact Nos. 165-167 and 170 do not support that conclusion. Amoy has disputed and/or objected to each of those proposed findings and incorporates by reference its Responses to those proposed Findings. Proposed Finding of Fact No. 165 is based on an Affidavit of John Kamada, which Amoy disputes as not being objectively credible, because it is not factually correct. It was also disputed by Melissa Chen and Krystal Lee Lazcano. See Declaration of Melissa Chen, ¶¶29, 30; Amoy 0022-0024; Declaration of Krystal Lee Lazcano, ¶8. Proposed Finding of Fact No. 166 is argument and relies on Ms. Chen’s use of the term “unauthorized booking,” which she addresses in her Declaration. She explains that she used this term to show that the cargo was unauthorized by Chinese Regulations, which she learned after the cargo landed in China. At the time the booking was made, the shipment was believed to be authorized because it was declared to be auto parts. Declaration of Melissa Chen, ¶8; Declaration of Krystal Lee Laczano, ¶2-4 and 8. Proposed Finding of Fact No. 167 is also argument and also relies on a distortion of Ms. Chen’s use of the “unauthorized” term for booking. Proposed Finding of Fact No. 170 is also argument, speculation and lacks foundation. It relies on the unfounded argument that Amoy dealt in tire scrap and is assumed to have known that the cargo was used tires. None of these proposed Findings are based on fact or have merit.

Econocaribe also asserts that Amoy provided Econocaribe, after the fact with photographs of the containerized baled tires, arguing that Amoy cannot claim that it did not know what the cargo was. The implication is that Amoy knew what the cargo was baled tires before they were shipped to China. This is a false implication. Beginning on or about August 15, 2013, Amoy asked Daniel Ahkromtsev Global Waste Management, who Amoy believed loaded the containers of use tires, for pictures of the load. ECONO PFF App. 00160-00184.

Although Daniel claimed that he didn't take pictures when the containers were loaded, AECONO PFF App. 00166 to 00167, he sent Amoy a photo of used baled tires. This is the photo that Ms. Chen sent to Econocaribe. See Declaration of Melissa Chen, ¶ 24, AMOY 0164.

Neither Econocaribe's proposed Findings of Fact Nos. 165, 166, 167 and 170 nor its argument support a finding that Amoy violated 46 U.S.C. §41104(1). Econocaribe has produced no proof that Amoy knew or should have known that the cargo that was loaded into the 4 containers was baled, used tires. Moreover, Econocaribe has provided no support that Amoy allowed a person to obtain property transportation rates less than those charged by Amoy in its tariff. Even if it did, Econocaribe incurred no injury and therefore has no standing to assert such a violation.

**7. AMOY DID NOT VIOLATE 46 C.F.R §515.31(e)**

46 C.F.R. §515.31(e) states that "No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning an ocean transportation intermediary transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, shipper, common carrier or other person, false information relative to any ocean transportation intermediary transaction."

To establish a violation of 46 C.F.R. §515.31(e), Econocaribe must show that Amoy prepared a document, which it had reason to believe was false or fraudulent, or knowingly

imparted false information to Econocaribe. It relies on the following of its proposed findings to support its claim that Amoy violated 46 C.F.R. §515.31(e):

proposed Finding of Fact No. 165, which Krystal Lee knew that cargo was in fact baled, used tires when she booked cargo space with Econocaribe and made the misdeclaration;

proposed Finding of Fact No. 166, which Melissa Chen now disputes that she had ever told John Kamada that Krystal Lee colluded with the shipper of this cargo. Nevertheless, she admitted in her email that Krystal made the “unauthorized booking; and

proposed Finding of Fact No. 167, that if Krystal Lee had been acting truthfully and diligently in ascertaining the nature of the cargo, as claimed by Amoy in its Opposition to Motion for Partial Summary Judgment, such booking would not be characterized as “unauthorized.”

Proposed Findings of Fact Nos. 165, 166 and 167 do not establish that Amoy violated 46 C.F.R. §515.31(e). Amoy has disputed and/or objected to each of those proposed findings and incorporates by reference its Responses to those proposed Findings. Proposed Finding of Fact No. 165 is based on an Affidavit of John Kamada, which Amoy disputes as not being objectively credible, because it is not factually correct. It was also disputed by Melissa Chen. See Declaration of Melissa Chen, ¶8 and Declaration of Krystal Lee Lazcano, ¶8. Proposed Finding of Fact No. 166 is argument and relies on Ms. Chen’s use of the term “unauthorized booking,” which she addresses in her Declaration. She explains that she used this term to show that the cargo was unauthorized by Chinese Regulations, which she learned after the cargo landed in China. See Declaration of Melissa Chen, ¶8. Proposed Finding of Fact No. 167 is also argument and also relies on Ms. Chen’s use of the “unauthorized” term for booking. None of these

proposed Findings are based on fact or have merit. Amoy had no reason to believe that the documents that it prepared were false or fraudulent. It had no knowledge that the contents of the 4 containers were baled used tires rather than auto parts. Econocaribe has established no evidence that Amoy violated 46 C.F.R. §515.31(e).

**8. AMOY DID NOT VIOLATE 46 U.S.C. §41102(c).**

46 U.S.C. §41102(c) states that “A common carrier, marine terminal operator, or ocean transportation intermediately may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”

Econocaribe relies on the following of its proposed findings to support its claim that Amoy violated 46 U.S.C. §41102(c):

proposed Finding of Fact No. 45, a finding based on an email from Melissa Chen to John Kamada of Econocaribe that she wants “to solve this matter instead of dropping it” and “to solve this matter the quickest possible”;

proposed Finding of Fact No. 44, that Amoy never answered an email sent by Ariel Martinez on June 21, 2013;

proposed Finding of Fact No, 121, a finding based on an email from Melissa Chen to John Kamada, dated May 14, 2014, where Ms. Chen states her attempts to solve the baled, used tire problem, Amoy’s struggles arising from the MSC and ZIM cargo problems and the fact that she has a money problem. She asked Econocaribe “if any other way we can work this through;

proposed Finding of Fact No. 125, a finding based on an email from Melissa Chen to John Kamada, dated May 13, 2014, in which she states her shock at learning for the first time that Maersk advises re-export and she learns of the costs incurred thus far;

proposed Finding of Fact Nos. 114, 169 and 194, emails from Melissa Chen to John Kamada dated April 15, 2014, in which Ms. Chen notes what she thought was a lack of response from Maersk and reports that Amoy has suffered other losses that have impaired its available finances;

proposed Finding of Fact No. 147, Amoy is on the FMC OTI/NVOCC list and publishes a tariff that is available on line.

proposed Finding of Fact No. 149 and 152, Amoy's Bill of Lading stated that the "terms and conditions of the order bill of lading under which this shipment is accepted are printed on the back hereof" and purportedly incorporates paragraph 7(5) of Amoy's Tariff Bill of Lading.

Amoy has objected to each of those proposed Findings of Fact and its Response to those proposed findings are incorporated herein by reference. None of these findings is relevant to showing that Amoy violated 46 U.S.C. §41102(c).

Econocaribe makes four arguments that Amoy violated 46 U.S.C. §41102(c): first, that Amoy refused to assist in repatriating the cargo back to the U.S.; second, that Amoy retained Krystal Lee when she made similar misdeclarations within a short period of time; third, that it is undisputed that Amoy had a practice of misdeclaring cargo and allowing huge bills to accrue overseas, which it never paid; and fourth, that since Amoy has a bill of lading which holds its shippers responsible for all costs, "it is only a just and reasonable practice that Amoy

acknowledge that Econocaribe has the right to expect that the industry practice, and binding terms, which Amoy seeks to enforce against its shippers is something Econocaribe should be able to enforce against Amoy, without having to resort to this agency and Court.” Each of those arguments is founded.

The first argument is unfounded because from the inception of this problem, June 19, 2013, Amoy had been pleading with Econocaribe to address the problem, specifically to re-export the cargo back to the U.S. It wasn't until May, 2014, that Econocaribe informed Amoy the amount of the return costs. Almost 75% of those costs were for container demurrage, which had accumulated because of the Econocaribe and Maersk's failure to inform Amoy of the return cost. Amoy warned Econocaribe repeatedly about the consequences of not acting promptly. Amoy had been asking since June 20, 2013 for the amount of those costs. ECONO PFF App. 00084-00086. There was no excuse for the delay. What Maersk and Econocaribe did in June, 2014 to re-export the cargo, could have been and should have been done in June 2013, before the cargo was seized by the Chinese authorities. Econocaribe relies on proposed Findings of Fact Nos. 44, 45, 121 and 125 to support this argument.

Proposed Finding of Fact No. 45 is a finding based on an email sent on June 21, 2013, confirming Amoy's intent to solve the problem, instead of dropping it and to do so the quickest possible. What Econocaribe didn't include in its argument were the emails that Amoy sent before the June 21, 2013 email, proposing re-export an option, ECONO PFF App. 00067, alternative and asking for the costs of re-exporting the cargo. ECONO PFF App. 00084-00086, 00089. The language of the June 21, 2013 email shows that it was sent, in part, to find a way to

push MSK for a faster response. There were other emails that Amoy sent to Econocaribe asking for the cost of returning the cargo or pushing Econocaribe to get an answer from Maersk. ECONO PFF App. 00095, 00096, 00101, 00103, 00133. It began looking for buyers in other countries. ECONO PFF App. 00116. It posted ads on websites, such as TradeKey, to find a buyer. See Declaration of Krystal Lee Laczano, ¶8, AMOY 0151-0152. This confirms Amoy's sincere effort to repatriate the cargo and to minimize damages.

Econocaribe argues that Amoy did not need to look to Econocaribe for instructions and that it stalled and avoided questions. What Econocaribe refuses to acknowledge is that the first step in deciding to re-export is to ask for its cost. Moreover, Amoy was seeking guidance in this unusual situation, asking for example, what would MSK do? ECON PFF App. 00134-00135. . It relies on proposed Finding of Fact No. 44 for support that Amoy stalled and avoided questions. That finding is based on an email sent to Krystal Lee asking if all four containers are to be returned and have any custom's formalities been done in China. There was an email that was sent to Econocaribe two minutes later, ECONOO PFF APP. 00094, while not addressing the earlier email, show Amoy's concern for addressing the problem as quick as possible. Subsequent emails also confirm Amoy's desire to re-export the cargo. ECONO PFF App. 00095, 00096, 00101, 00103, 00133. If a response to the questions in the June 21, 2013 were crucial, why wasn't there a follow-up email?

Proposed Findings of Fact Nos. 121 and 125 are finding based on emails that Ms. Chen sent to Mr. Kamada. They show Amoy's attempts to solve the cargo problem, Amoy's problems with MSC and ZIM the previous year. These emails are basically Amoy's dialogue with

Econocaribe on to negotiate with Maersk. Econocaribe characterizes these findings as Amoy ultimately saying that it would neither pay nor take the cargo back. However, the email that Econocaribe cites for Finding of Fact No. 125 was edited. What was deleted from that email was “And we just have to find our best negotiation key to play forward.” With that sentence deleted from the email, it could be viewed as an ultimatum, as perhaps Econocaribe intended it to be viewed. However, when that sentence is replaced, it is clear that the emails were an attempt to maintain negotiations with Maersk.

The second argument is also unfounded. Econocaribe’s argument is that Amoy should have terminated Krystal Lee or removed her from customer contact because she repeatedly misdeclared cargo tendered to other carriers and her misdeclarations in those other incident and in the baled tire incident constitute a practice. Econocaribe relies on proposed Findings of Fact Nos. 114, 121 and 169 to support its argument. The previous incident, which involved ZIM and MSC was the result of a fraud perpetrated on Amoy by a third party. The perpetrator was convicted of wire fraud and sentenced in federal court. Ms. Lee was not accused of any crime. See Declaration of Melissa Chen, ¶¶10 and 29; AMOY 0022-0024. Amoy had no reason to either terminate her or to reassign her.

Econocaribe’s third argument is that it is undisputed that Amoy had a practice of misdeclaring cargo and allowing huge bills to accrue, which it never paid. Econocaribe relies on proposed Findings of Fact Nos. 114, 121, 169 and 194 to support its argument. None of those findings support the argument. The findings show that the argument is based on the ZIM and MSC incidents the previous year. There was no misdeclaration of cargo. Amoy booked the

cargo based upon the representations of the shipper, which turned out to be false and for which the shipper was convicted of wire fraud. ZIM filed a lawsuit against Amoy and MSC made a claim against Amoy. Both claims were settled by Amoy. It paid ZIM and MSC their demands. See Declaration of Melissa Chen, ¶10, AMOY 0157. The argument is sham.

Econocaribe's fourth argument is hard to understand. It appears to mean that Amoy should be able to enforce the terms and conditions of its bill of lading against Amoy without resort to the F.M.C. or the courts and Amoy's failure to agree to this is an unreasonable practice. It relies on proposed Findings of Fact Nos. 147, 149 and 152 and the terms and conditions of Amoy's Bill of Lading, ECONO PFF App. 00371 for support. Econocaribe cites no authority to support this argument and Amoy believes that none exists.

A reading of 46 U.S.C. §41102(c) shows that it is intended to address those common carriers who fail to establish, observe and enforce just and reasonable practices related to receiving, handling, storing or delivering property. Amoy's practice with regard to cargo is to have a shipper provide a commercial invoice, a packing list and complete Amoy's Shipper's Letter of Instructions. It followed those practices in this instance and also requested the shipper to provide a photo of the cargo. See Declaration of Krystal Lee Lacazno, ¶¶3-4. AMOY 0149. Practices such as this have been found held to be an appropriate policy. La Torre's Enterprises, et al. v. Natural Freight Ltd./Skytruck, et al., 2011 WL 7144018 (F.M.C.) at \*12. There was no violation of 46 U.S.C. §41102(c).

**9. AMOY DID NOT VIOLATE 46 U.S.C. §41104(2)(B), SECTION 10(B)(2)(B) OF THE SHIPPING ACT OF 1984, AS AMENDED, OR 46 U.S.C. APP. §1709(b)(2)(B)**

46 U.S.C. §41104(2)(B) states: “A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is . . . (B) under a tariff or service contract that has been suspended or prohibited by the Federal Maritime Commission under chapter 407 or 423 of this title . . .”

Econocaribe relies on proposed Findings of Fact Nos. 162, 163, 166-168 and 170 to support the argument that Amoy violated 46 U.S.C. §41104(2)(B). None of these proposed findings shows that Amoy provided service under a prohibited tariff or service contract nor do any of Econocaribe’s proposed findings set forth any prohibited tariff or service contract. In its motion for partial summary judgment, Econocaribe conceded that it did not have a service contract with Amoy. Consequently, there is no need to address these proposed findings or Econocaribe’s argument, which is irrelevant. There has been no showing whatsoever that Amoy violated 46 U.S.C. §41104(2)(B).

**10. ECONOCARIBE FAILED TO TIMELY PURSUE MAERSK’S REQUESTS REGARDING RE-EXPORTING THE CARGO AND ITS OMISSION WAS EXACERBATED BY ITS FAILURE TO ADVISE AMOY OF SUCH INSTRUCTIONS.**

In regards to the shipment at issue, Econocaribe wore two hats, one as the carrier for Amoy’s shipments and the other as a shipper for the Maersk shipment. Consequently the same law that it cites for Amoy’s obligations to it, can be cited for its obligations to Maersk. Econocaribe rejected Amoy’s requests to communicate directly with Maersk and insisted that all

communications to Maersk go through Econocaribe. See Declaration of Melissa Chen, ¶13. As can be noted in the emails from Econocaribe to Maersk from June 2013, through May 2014, Econocaribe referred to Amoy generically as “our customer” in its communications with Maersk. This coincided with Maersk’s position that Amoy was not a party to the bill of lading. See, for example, ECONO PFF App. 00249 “While understand that there are several relationships involved in this transaction. Econocaribe is Maersk B/L shipper and ultimately will be held liable for all charges. Any further delays will cause charges to continue to creep up.”; ECONO PFF App. 00251: “please keep in mind that you customer is not a party to our B/L and shipper is ultimately liable for all charges under our Maersk Bill of Lading” Maersk’s email was placing Econocaribe on notice of its duty to mitigate, a responsibility that it should have exercised from the beginning. Moreover, since Econocaribe prohibited direct contact between Maersk and Amoy, Econocaribe knew that Amoy was relying on it to accurately and fully convey all information about the shipment and to take whatever action was in the best interests of Amoy in mitigating the situation.

At all times, Econocaribe could have and should have acted on its responsibility, particularly at the outset when costs were minimal. Econocaribe’s argument that “nothing prevented Amoy from undertaking the task of returning the cargo to the United States” is a red herring. As Maersk advised Econocaribe, Amoy was not a party to the bill of lading and it was Econocaribe that was required to take action as to the disposition of the containers in China. Moreover, Econocaribe prohibited any direct communication between Maersk and Amoy.

Econocaribe makes other unfounded claims to support its argument that it acted reasonably and did not cause the demurrage. Amoy will address each of them.

Econocaribe's claim that it had no physical possession of the cargo and that China Customs had control of the cargo omits recognition that Maersk, Econocaribe's carrier, Maersk had both physical possession and control over the cargo for 90 days after the cargo landed in China. But Econocaribe took no affirmative action during that time period. After the 90 days lapsed, the cargo was seized by China Customs. On September 6, 2013, Maersk warned Econocaribe, before the cargo was seized, that its best option was to find a new consignee or re-export the cargo. ECONO PFF App. 00148 and 00237. Econocaribe failed to act on that warning and failed to pass that warning on to Amoy despite sending 3 email during the same month, ie. September 2013, to Amoy. Amoy should not be held responsible for Econocaribe's breach of its duty to act reasonably by effecting re-export of the shipment before seizure. In the very least, it should have advised Amoy of the re-export warnings from Maersk so that Amoy could have, in turn, pressured Econocaribe to effect the re-export. Since Amoy was not a party to the Maersk bill of lading, Econocaribe knew that it was up to Econocaribe to take affirmative action to get the shipment re-exported.

The disingenuousness of Econocaribe's next claim, i.e. that it didn't want to spend its own money, is reflected in the fact that exorbitant expenses arose as a result of Econocaribe's inaction. The \$200,000 amount that Econocaribe refers to in its brief is the amount that accrued as of May, 2014. ECONO PFF App. 00237. But that amount would not have accrued if Econocaribe had responded to Maersk's warning in September 2013 to re-export the cargo

before seizure by Chinese Customs. At that time, detention costs were 171480 RMB or about \$27,000, at the exchange rate of 6.1 RMB to \$1.00. ECONO PFF App. 00148. Other costs as of June 4, 2014 were \$17,203. ECONO PFF App. 00255-00257. If Econocaribe had acted on Maersk's warning to re-export in September 2013, it would not have incurred further detention nor the Customs warehouse cost for 379 days of storage. It appears that the Customs warehouse cost was an overcharge, since the cargo, as of that date, hadn't been in China for a year and wasn't seized until September, 2013. In all likelihood, based on the reduction of the detention cost that was negotiated between Maersk and Econocaribe, \$171K to \$50K, ECONO PFF App. 00257, or a 70% reduction, Econocaribe could have negotiated a similar reduction of the \$27,000 detention cost pending in September 2013. This would have resulted in a reduction to \$8,100. Amoy believes that had Econocaribe acted in September, 2013 to return the cargo or passed Maersk's warning onto Amoy, the cost exposure would have been no more than \$25,000 and demurrage would not have accrued after that time.

Econocaribe's also claims that it didn't want "to exercise domain over some else's cargo" is similarly disingenuous since Econocaribe was fully aware, from the outset, that the cargo was abandoned. ECONO PFF App. 00094. In fact, before the shipment even arrived in China, Amoy diligently advised Econocaribe that it could not locate the shipper and, shortly thereafter, on July 4 and July 8, 2013, Maersk notified Econocaribe that the consignee denied that the shipment belonged to it. ECONO PFF App. 00133-00134. Thus, within less than one month of the cargo's arrival in China, long before seizure by China Customs, Econocaribe knew that the cargo had no known shipper or consignee. Notably, Econocaribe eventually exercised domain over the cargo when it returned the cargo to the US without any apparent hiccup.

Econocaribe characterizes itself as a nondefaulting party. That is incorrect. Econocaribe had an affirmative duty, as a shipper to Maersk and a carrier to Amoy, and, more importantly, knowing that Amoy was relying on it, to accurately relay information and diligently work to minimize costs. Notwithstanding this duty, between September 26, 2013 and April 15, 2014, a period of seven months, Amoy received only one mail from Econocaribe regarding the cargo problem, an email dated November 1, 2013. Amoy believed that Econocaribe's request for a revised letter of abandonment on September 8, 2013 had successfully addressed the issue. See Declaration of Melissa Chen, ¶24, AMOY 0017-0019. It turned out that the reason for the revised letter was an attempt by Maersk to pressure China Customs to order disposing of the cargo was not communicated to Amoy. See Declaration of Melissa Chen, ¶27, AMOY 0021-0022. Econocaribe knew as of July 17, 2013 that the cargo could not be abandoned. Instead, the options were either to return it or to destroy it. EACONO PFF App. 00127-0128. Yet, Econocaribe tells Amoy that the cargo is abandoned and the containers will be emptied and returned to the carrier. Thus, Econocaribe's claim that it may have been entirely reasonable to choose abandonment, especially if that decision was to be made in the light of Maersk's September, 2013 warning is entirely baseless and contrary to the facts.

Similarly, Econocaribe's claim that its "failure to advise Amoy to return the cargo was not unreasonable nor did it violate any duty" is baseless and contrary to the facts.

Amoy did not refuse "again and again to act" nor did it merely equivocate between abandoning the cargo or repatriating it. Econocaribe argues that Amoy failed to the email that is

proposed Finding of Fact No. 43, inferring that Amoy was undecided about returning the 4 containers of cargo. There was no such equivocation. Econocaribe fails to cite later emails showing that there was an ongoing request by Amoy for the re-export cost. ECON PFF App. 00093, 00095, 00101, 00103, 0131.

Econocaribe claims that it replied to Amoy continually, conveying Maersk's updates and proactively seeking solution. However, Econocaribe failed to convey to Amoy Maersk's warning of September 6, 2013 that the best option was to see about re-export options. ECON PFF App. 00148. If Econocaribe has done so, Amoy would have begun the process. See Declaration of Melissa Chen ¶5, AMOY 0155. Amoy believed that, not having heard from Econocaribe for almost six months, the revised letter of abandonment, that it sent to Econocaribe in September, 2013, had addressed the cargo issue. This was confirmed by Mr. Kamada's September 26, 2013, email confirming abandonment. See Declaration of Melissa Chen, ¶27, AMOY 0165, 0174-0175. Econocaribe sent only one email to Amoy in the seven month period between September, 2013 and April, 2014, undermining its claim that its communications with Amoy was wholly reasonable. Moreover, when Econocaribe decided that it would be the communication link between Maersk and Amoy, it undertook the responsibility of keeping Amoy continually apprised of the status of the cargo problem. The seven month gap in communications reflects a failure in that responsibility.

Nor can Econocaribe be proud of the fact, that despite the Amoy's repeated requests, Econocaribe never provided Amoy with the re-export cost until nearly 11 months after Amoy's initial request. This omission undermines Econocaribe's claim that it regularly advised Amoy of

all costs that were for its account. Re-export was one of those costs. Moreover, Amoy was not informed of other costs that Econocaribe is claiming from Amoy until April 15, 2014 ECONO PFF App. 00208-00210; Declaration of Melissa Chen, ¶24, AMOY 0164.

Econocaribe claims that Amoy never instructed Econocaribe to start the return process, citing proposed Findings of Fact Nos. 43 and 44. These proposed findings relate to a June 21, 2013 email from Econocaribe, where it requested Amoy to confirm that all 4 containers need to be returned to the US and that Amoy didn't respond to that email. However, Econocaribe overlooks emails that were exchanged following the June 21 email. For example, ECONO PFF App. 00096 a June 24, 2013 Amoy email to Econocaribe: "Hi John please help to check if anything from MSK" and Econocaribe's response on June 24, 2013, ECONO PFF App. 00095-00094 "Hello Melissa, Maersk stated their sales team is still working on the pricing for the 4 container to be returned back to the US." These emails, which came after the email cited in proposed Finding of Fact No. 43, show that Econocaribe knew that Amoy wanted to return the cargo and was continuing to work on getting the re-export cost.

Econocaribe claims that "it shared what information it obtained from Maersk, and that was all it could do." However, Econocaribe could have done more. It should have permitted Amoy to communicate with Maersk. At least Amoy would have learned what Maersk would have done to address the cargo issue, ECONO PFF App. 00134-00135, since Econocaribe failed to provide a response to Amoy's question.

Econocaribe claims, from Maersk's July 17, 2013 correspondence, that Amoy was aware that it must find a buyer or arrange for re-export within 90 days of arrival, otherwise China Customs would dispose of the cargo either by ordering a return to origin, auction or destruction and that cost would go sky high. Yet, Econocaribe claims that Amoy did not request a return but foolishly opted for inaction, perhaps believing that sky high demurrage plus cost of destruction would still be cheaper than return costs. It claims that it acted exceedingly reasonably as an involuntary go-between Amoy and Maersk. That claim is nonsense and has no factual support.

As of July 17, 2013, Amoy was still trying to get a re-export cost for the cargo because the cargo was prohibited in China. ECONO PFF App. 00083-00096. Neither Maersk nor Econocaribe provided that cost until May 12, 2014. See Declaration of Melissa Chen, ¶26, AMOY 0020-0021. Since June 19, 2013, Amoy had been requesting a re-export cost. By June 21, 2013, with no response from Maersk as to the re-export cost, Amoy began looking for ways to speed up the process and believed that tendering a letter of abandonment would help and Econocaribe agreed. ECONO PFF App. 00093-00097. On June 26, 2013, Econocaribe sent the abandonment letter on to Maersk, with the request to advise of the return cost. ECONO PFF App. 00107. On July 1, 2013, Amoy followed up by asking why the process was taking a long time. ECON PFF App. 00101. By July 9, there still was no response from Maersk or Econocaribe on the re-export cost. Amoy sent another email to Econocaribe noting that the cargo has to be either returned or abandoned and to please advise. ECONO PFF App. 00131-00132. The next day, Econocaribe advised Amoy that it can either abandon the cargo or to re-

export, but re-exporting is usually more expensive and the abandonment could begin immediately. ECONO PFF App. 00129-00130. As a result, Amoy opted for abandonment.

However, on July 17, 2013, Maersk informed Econocaribe, who in turn informed Amoy, that the containers could not be abandoned. Maersk also stated that the options were to find a new buyer or to re-export the cargo, otherwise the cargo would be destroyed. ECONO PFF App. 000127-00129. Since Amoy could not find a new buyer, because the cargo could not be exported into China, and it had not been provided with a re-export cost, it understood that the remaining option was that the cargo would likely be destroyed. It asked Econocaribe to advise the procedures. Econocaribe did not respond to that request. ECONO PFF App. 00127, See Declaration of Melissa Chen, ¶14, AMOY 0159.

In view of the fact that Amoy could not find a buyer in China and Maersk failed to respond to Amoy's request for re-export cost, Amoy believed that its remaining option was that the cargo would be destroyed. Amoy could not have made a decision on whether destruction and demurrage would be cheaper than re-export because Econocaribe never provide that information to Amoy. Amoy did not opt for inaction, since destruction appeared to be the only available option under the circumstances. Moreover, Econocaribe was not an involuntary go between for Amoy and Maersk. It had a relationship with Maersk that imposed upon Econocaribe as much responsibility to address the cargo issue as Amoy, perhaps even more so, because of the nature of that relationship. ECONO PFF App. 00237. In fact, it prohibited direct communication between Maersk and Amoy. See Declaration of Melissa Chen, ¶13, AMOY 0158. Under the circumstances, it acted unreasonably because it failed to take action at critical points to avoid the

accrued damages. Its failure to act reasonably and responsibly in September, 2013 by not acting on Maersk's warning to re-export the cargo or to pass that warning on to Amoy is a prime example.

Econocaribe's final claim is that it successfully negotiated downward the Chinese port and other charges by a factor of roughly two-thirds. That is not a truthful statement. There are absolutely no facts to show that Econocaribe had any interaction with the Chinese authorities or that any cost other than Maersk's demurrage/detention costs were negotiated. If any downward negotiation was done, it was done by Maersk Line with Maersk China. ECONO PFF App. 00237.

**11. DAMAGES SHOULD NOT BE AWARDED IN THIS CASE IN LIGHT OF ECONOCARIBE'S FAILURE TO SUSTAIN ITS BURDEN OF PROVING AMOY'S VIOLATION OF THE STATUTES AND CFR ALLEGED IN THE COMPLAINT.**

Amoy believes that damages should not be an issue in this case because there is insufficient evidence submitted by Econocaribe to sustain its burden of proving violations on the party of Amoy of the statutes and CFR asserted by Econocaribe in this proceeding. To the extent that there are any damages that Econocaribe can credibly assert, as adjusted by its failure to mitigate such damages, that such damages should be pursued in a different forum. The Commission is not a collection agency and not the proper forum for a breach of contract action. China Ocean Shipping Company v. DMV Ridgeview, Inc., 1991 WL 383093 (FMC).

## 12. CONCLUSION

While the circumstances surrounding the shipment at issue are certainly regrettable, the facts do not sustain Econocaribe's burden of proving that Amoy violated the Shipping Act, the statutes or the CFR alleged. Respondent Amoy followed its regular practice of requesting and receiving documents to support the description of the cargo as new auto parts. When Amoy lost contact with the shipper, it immediately contacted Econocaribe and made all reasonable effort to resolve the matter by requesting re-export costs and instructions. It was derailed in that effort by Econocaribe's unfortunate decision regarding abandonment of the cargo. The problem was exacerbated by Econocaribe's failure to forward Maersk's warnings to re-export to Amoy before the cargo was seized by Chinese Customs.

Based on the foregoing, Amoy respectfully requests that the Commission find in its favor.

Respectfully submitted,

DATED: May 4, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that the original and appropriate number of copies of the foregoing Respondent Amoy International, LLC's Opposition Brief were sent by overnight mail to the Commission on May 4, 2015 and that a copy was also emailed to the Commission on that date.

I certify that a true and correct copy of the foregoing Respondent Amoy International, LLC's Opposition Brief was served on the below-mentioned counsel via Email on May 4, 2015.

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