

**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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**COMPLAINANT'S BRIEF**

Complainant, Econocaribe Consolidators, Inc. ("Econocaribe") pursuant to the Scheduling Order dated October 4, 2014, Order on Complainant's Motion to Extend Time to File Proposed Findings of Fact and Brief dated March 10, 2015, and 46 C.F.R. 502.221, hereby submits its brief. Also, in addition to Complainant' Brief, pursuant to the above-cited Procedural Order, Complainant is simultaneously filing Proposed Findings of Fact, and an Appendix containing the evidence upon which Complainant's Proposed Findings of Fact are based. Respondent Amoy International, LLC is hereinafter referred to as "Amoy".

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## INTRODUCTION

Amoy shipped four containers of cut, used, baled tires from the U.S. to China via the services of Econocaribe. Amoy misdeclared the cargo. Having collected the waste rubber from a waste recycler, they declared them to be "auto parts (new)". The cargo was prohibited entry by Customs at the port of Tianjin, China. Prior to export, Amoy knew or should have known of the prohibition both because it was a rubber seller and because it holds a Chinese maritime license. It confirmed its knowledge of the nature of the goods on the day of arrival of the cargo (July 17, 2013) in China, confirmed (internally) its knowledge of the cargo's prohibited status the next day, and the need to re-export it all on the day after that (July 19, 2013). Notwithstanding this knowledge, it never arranged return of the goods or provided shipping instructions back to the USA or elsewhere. The goods were seized by Chinese Customs. Amoy decided to abandon the cargo, fully aware that this did not relieve it of responsibility for prior and subsequent costs attaching to the waste. The cargo was seized by Chinese Customs and ultimately ordered re-exported. The cargo incurred storage, seizure, and demurrage charges in China exceeding \$200,000.00. Econocaribe mitigated the damages and settled these charges with Maersk for \$70,000.00 in order to avoid accrual of further charges and a threatened lawsuit from Maersk. Econocaribe shipped the cargo back to the United States for destruction. Econocaribe paid all charges arising in China plus the return freight, customs clearance, drayage, storage and is committed to paying the destruction costs in the United States once it is accomplished.<sup>1</sup> Econocaribe has incurred very significant legal expenses. Its total expenses are fast approaching, and will likely exceed, \$175,000.00. All the expenses in this matter, including legal fees and

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<sup>1</sup> As of this writing the cargo is in U.S. Customs' custody in Miami, FL, continually accruing further storage charges. Destruction in lieu of reentry has not been authorized yet.

costs, are rightfully for the account of Amoy, which has not paid a cent of the above costs which are all directly resultant from its acts. Econocaribe seeks reimbursement.

## ARGUMENTS

### *I. Violation of 46 U.S.C. § 41104(2)(A)*

46 U.S.C. § 41104(2)(A) provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not ... provide service in the liner trade that is ... not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title ...

46 C.F.R. § 502.2 defines common carrier as:

... a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

- (1) Assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and
- (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:
  - (i) If the common carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities and
  - (ii) Only with respect to the carriage of those commodities.

Unlike Section 10(a)(1) of the Shipping Act of 1984, as amended, acting knowingly and willfully is not an element of a 46 U.S.C. § 41104(2)(A) violation. *See Oceanic Bridge Int'l, Inc. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 2014 WL 5454231, at \*18 (F.M.C. ). Under the statute, a finding of knowing and willful violation is for the purpose of assessing penalties. *See Id.*

In this case, Amoy is a common carrier because it is an Ocean Transportation Intermediary under Federal Maritime Commission license number 019113N (as an NVOCC). ¶2, Proposed Findings of Facts. 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. ¶159, Proposed Findings of Facts. Amoy would not have been allowed by Econocaribe to move this cargo under the false declaration of "auto parts (new)". ¶180, Proposed Findings of Facts. Therefore Amoy has violated 46 U.S.C. § 41104(2)(A).

## *II. Violation of Section 10(b)(2)(A) of the Shipping Act of 1984, as amended*

Section 10(b)(2)(A) of the Shipping Act provides "[n]o common carrier, either alone or in conjunction with any other person, directly or indirectly, may ... provide service in the liner trade that ... is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 1707 of this Appendix ..." 46 U.S.C. App. § 1709(b)(2)(A).

The analysis under Section 10(b)(2)(A) of the Shipping Act of 1984, as amended, is the same as 46 U.S.C. § 41104(2)(A), because both contain the same statutory provisions. In this case, Amoy is a common carrier because it is an Ocean Transportation Intermediary (NVOCC) under Federal Maritime Commission license number 019113N (NVOCC). ¶2, Proposed Findings of Facts. Amoy provided service to its shipper that was not in accordance with the rates, charges, classifications, rules, and practices contained in its published tariff or Econocaribe's tariff by deluding Econocaribe. ¶159, Proposed Findings of Facts. Both tariffs would require Amoy to accurately have declared the cargo as used cut rubber tires. Amoy would not have been allowed

by Econocaribe to move the cargo under the false declaration of "auto parts". ¶180, Proposed Findings of Facts. Therefore Amoy has violated Section 10(b)(2)(A) of the Shipping Act of 1984, as amended.

### *III. Violation of Section 10(a)(1) of the Shipping Act of 1984, as amended*

10(a)(1) of the Shipping Act of 1984, as amended, provides 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." 46 U.S.C. § 41102(a).

Amoy's violation of Section 10(a)(1) is two folds. First, Amoy knowingly and willfully by means of false classification obtained ocean transportation for property at less than the rates or charges that would otherwise apply. Second, Amoy's refusal to pay the demurrage, return freight and subsequent costs constitutes knowingly and willfully by "other unjust or unfair device or means" obtaining ocean transportation for property at less than the rates or charges that would otherwise apply.

"Section 16 [of the Shipping Act of 1916] is violated only if the false classification was 'knowingly and willfully' made." *Royal Netherlands S. S. Co. v. Fed. Mar. Bd.*, 304 F.2d 938, 942 (D.C. Cir. 1962). The Supreme Court discussed these words in *United States v. Illinois Central R. Co.*, 303 U.S. 239 (1938). Knowingly means the knowledge of facts. *Id.* at 243. Willfully means "purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *Id.*

#### A. Amoy Knowingly and Willfully Made False Classification

In this case, Amoy knowingly and willfully made false classification and by the false classification, it obtained ocean transportation of used tires at less than the rates or charges that would otherwise apply. Amoy's knowledge regarding the actual nature of the cargo was either imputed from its employee's knowledge or imputed from the fact that Amoy specifically dealt with used rubber and plastic, specifically used tires, and collected this cargo from a waste recycler.

Krystal Lee, an employee of Amoy, knew that the cargo was used tires rather than new auto parts prior to the booking with Econocaribe. ¶165, 167, Proposed Findings of Facts. With this false classification, Amoy obtained a rate from Econocaribe - \$755.00 per container (ECONO PFF App. 00061) - that Econocaribe would never have agreed to had it known that the cargo was, in fact, waste items prohibited entry into China. Econocaribe would have never agreed to ship prohibited cargo to China without assurances that an exception to the applicable prohibition had been obtained, and then not falsely declared or at this rate.

An employee's knowledge is imputed to the employer. *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., et. al.*, 2014 WL 5316330, at \*12 (FMC Docket 09-01) (finding employees' knowledge imputed to employer)(citing Restatement (Third) of Agency § 5.03, Comment a. that "a principal is charged with notice of facts that an agent knows or has reason to know."). Thus Amoy had the essential knowledge of false information. Its misdeclaration of the cargo was made knowingly.

Furthermore, under the doctrine of *respondeat superior*, Amoy is liable for Krystal Lee's willful conduct. See *In re Ivan F. Boesky Sec. Litig.*, 36 F.3d 255, 265 (2d Cir. 1994) ("If an employee of the agent commits the act constituting a breach of the agent's fiduciary duty to the principal, under the doctrine of *respondeat superior* the agent is liable to the principal only if the

agent's employee was acting within the scope of his employment.) Krystal Lee was employed as a sales and marketing person, and performed operational tasks. ¶6-7, Proposed Findings of Facts. Booking space with and providing information to carriers/NVOCCs was certainly within the scope of her employment. ¶6-7, Proposed Findings of Facts. Therefore, Amoy is liable for Krystal Lee's misconduct.

As an experienced dealer in used tires and rubber which collected the goods from a waste recycler, ¶170, Proposed Findings of Facts. 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. Especially in light of its recent similar Zim and MSC waste shipping debacles, ¶187-194, Proposed Findings of Facts. Amoy should have *at least* asked its shipper to provide a certificate of origin together with commercial invoices. Cavalierly abandoning any pretence of due diligence, Amoy recklessly misdeclared the cargo. 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). *See Rose Int'l, Inc v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 164-165 (FMC 2001) (citing *Portman Square Ltd.,- Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84 and *Ever Freight Int'l*, 28 S.R.R. 329, 333 (ALJ 1998)(it must be shown that a person has knowledge of the facts of the violation and intentionally violates or acts with *reckless disregard* or plain indifference to the Shipping Act, or with purposeful or obstinate behavior akin to gross negligence).

#### B. Amoy Knowingly and Willfully Refuses to Pay Demurrage without a Valid Legal Defense

The same knowledge and willfulness requirements for false description/classification apply as well to the requirement for unjust or unfair means. *Capitol Transp., Inc. v. United States*, 612 F.2d 1312, 1323-24 (1st Cir. 1979). In *Capital Transp.*, the Court upheld the

Commission's finding that Capitol's refusal to pay demurrage without a good faith legal defense constituted knowingly and willfully obtaining ocean transportation for property at less than the rates or charges that would otherwise apply by other unjust or unfair device or means. *Id.* As will be discussed later, Amoy's purported legal defense that Econocaribe failed to reasonably mitigate its loss is invalid. Amoy's defense is not raised in good faith. Had Amoy acted in good faith, it would have at least paid the "undisputed portions" of the bills - which includes the return freight and subsequent disposition costs. But it has not paid one penny thus far to alleviate the mess it created.

Amoy, a very sophisticated shipper itself, is contractually liable to Econocaribe for all per diem, seizure expenses, demurrage, return freight, U.S. Customs clearance services, export forwarding from China, U.S. warehousing and demurrage, inland transportation, legal expenses and subsequent disposition costs, etc. Under the terms of Econocaribe's Bill of Lading, ¶160 - 161, Proposed Findings of Facts, incorporated into its Tariff, ¶156, Proposed Findings of Facts, and enforced by the Federal Maritime Commission, Amoy is liable to Econocaribe and shall indemnify Econocaribe "against all loss, damage, delay, fines, attorney fees and/or expenses arising from any breach of any of the warranties in clause 14.3 or from any other cause whatsoever in connection with the Goods for which the Carrier is not responsible." (Paragraph 15 of Econocaribe's Terms and Conditions (¶160, Proposed Findings of Facts)). Pursuant to Clause 14.3 of the Econocaribe bill of lading, Amoy warranted to Econocaribe that the information or description of the cargo had been checked by Amoy and that this information was adequate and correct. ¶161, Proposed Findings of Facts. By misdeclaring the cargo, Amoy breached its warranty(s). Additionally, according to Clause 14.3, Amoy warranted that the cargo was lawful goods and that the cargo will not cause loss, damage or expense to Econocaribe.

¶161, Proposed Findings of Facts. By shipping cut baled used truck tires, which were prohibited entry into China, Amoy breached its warranty. Because of these breaches, Amoy should bear all the cost of resulting loss, damage, attorney fees and/or expenses arising from the breach.

Clause 15.3 of the Terms and Conditions requires Amoy to comply with "all regulations or requirements of customs, port and other authorities", and Amoy, as merchant, "shall bear and pay all ... any additional Carriage undertaken, incurred or suffered by reason [of failure of compliance with regulations or requirements of customs, port and other authorities], or by reason of any illegal, incorrect or insufficient declaration, or by reason of any illegal, incorrect or insufficient declaration ..." and "shall indemnify the Carrier." ¶160, Proposed Findings of Facts. Therefore, by giving a false, illegal declaration, and shipping prohibited merchandise, Amoy failed to comply with China Customs regulations or requirements, and caused additional carriage (the return freight) and destruction costs. Amoy shall pay all such costs and shall indemnify Econocaribe, pursuant to the Econocaribe bill of lading terms and conditions. The bill of lading Terms and Conditions appear in full in Econocaribe's tariff, and Amoy's breach of them constitutes a violation of the Shipping Act provisions cited throughout this brief.

Amoy knows that it is beholden to Econocaribe's tariff and contractually liable for Econocaribe's damages, including the demurrage, return freight, destruction costs, and attorney's fees. Yet Amoy purposely and obstinately avoids indemnifying Econocaribe. The avoidance results in Amoy obtaining rates less than that would otherwise apply. Without a valid and a good faith legal defense, Amoy's knowingly and willfully violated 10(a)(1) of the Shipping Act of 1984, as amended.

*IV. Violation of Section 10(b)(1) of the Shipping Act of 1984, as amended*

Section 10(b)(1) of the Shipping Act provides that "[n]o common carrier, either alone or in conjunction with any other person, directly or indirectly, may ... allow any 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 by any other unjust or unfair device or means ..." 46 U.S.C. App. §1709(b)(1). Under for a finding of the violation of Section 10(b)(1) violation, it is "not necessary to find that [the person] had acted willfully" because "that section could be violated merely by the act of charging rates other than those specified in tariffs ..." *Martyn Merritt, AMG Services, Inc*, 1995 WL 215656, at \*3 (F.M.C.1995).

Amoy is a common carrier within the definition of the Shipping Act. It allowed its shipper to obtain transportation of the used, cut baled truck tires at a less than applicable rates established by Econocaribe in its tariff (and presumably Amoy's tariff as well) by means of false classification/misdeclaration. Further, under Amoy's tariff, at its bill of lading terms Paragraph 23 in the rules, Amoy's shipper would have been liable for the demurrage, return freight and subsequent disposition costs. (ECONO PFF App. 00371). However, Amoy has steadfastly refused to transmit any of those costs. Instead it took for itself, and allowed its shipper to obtain, transportation to and from China for property at less than the rates established by Econocaribe's tariff by unjust or unfair devices or means.

Lastly, either a) Amoy had actual knowledge that the cargo was in fact used tires, ¶165-167, Proposed Findings of Facts, or b) as a sophisticated shipper - especially of used tires ¶170, Proposed Findings of Facts, - Amoy should have known that the cargo was used tires because it was in this business. It also knows its obligations under the facts of the transaction at issue. Given the actual or imputed knowledge from its shipping business, rubber business, Chinese

maritime license, U.S. maritime license, Chinese offices, and/or collection from a recycled waste company, Amoy willfully accepted, and allowed its shipper to obtain, rates other than those specified in a common carrier's tariff: Econocaribe's at a minimum, if not Amoy's own as well. It is worth noting that Amoy itself provided Econocaribe, after the fact, with photographs of the containerized baled tires. (ECONO PFF App. 000390-000391). So Amoy cannot claim it does not know what the cargo in fact was, and yet it has not paid any resulting costs nor passed them on to its shipper.

*V. Violation of 46 C.F.R. §515.31(e)*

46 C.F.R. §515.31(e) provides that "[n]o 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."

Amoy is a licensee of the FMC. Amoy had also prepared documents it had reason to believe were false or fraudulent and imparted to Econocaribe, and consequentially to Maersk, false information. Amoy had reasons to believe that the document it was preparing were false because Krystal Lee knew that the cargo was used tires prior to the shipping, ¶165-167, Proposed Findings of Facts, and because it declared "auto parts (new)" as the description of cargo it picked up from a waste recycler. An employee's knowledge is imputed to the employer. *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., et. al.*, 2014 WL 5316330, at \*12 (FMC Docket 09-01). Also, being in the used rubber and used tires industry, Amoy absolutely "had reason believe" that the cargo it was handling was highly unlikely to be new auto parts.

*VI. Violation of 46 U.S.C. § 41102(c)*

46 U.S.C. § 41102(c) provides that "[a] common carrier, marine terminal operator, or ocean transportation intermediary 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." Amoy's violation of 46 U.S.C. §41102(c) is twofold:

First, Amoy's tender of misdeclared cargo to Econocaribe, and subsequent refusal to assist in repatriating it back to the U.S. is grossly unjust and unreasonable. Amoy tries desperately to suggest it attempted to assist in repatriating the cargo back to U.S. by inquiring as to returning the freight and making self-serving statements that "we sincerely just want to solve this matter the quickest possible". ¶45, Proposed Findings of Facts. Meanwhile, it has in fact been steadfastly unwilling to contribute a single penny toward the expenses, or actually undertake the task of return itself. There is no showing whatsoever of a sincere effort at mitigating damages and assisting in the actual repatriation of the cargo.

Amoy needed to nominate a shipper, which could have been itself, and a consignee, which *should* have been Amoy itself, and pay the storage, demurrage, and other costs which arose as a result of its malfeasance. It need not look to Econocaribe for buyers or instructions. It stalled and avoided questions, ¶44, Proposed Findings of Facts. until ultimately it said it would neither pay nor take the cargo back. ¶121, 125, Proposed Findings of Facts. It did nothing.

Second, given that Amoy admits that Krystal Lee had repeatedly misdeclared cargo tendered to other carriers previously, ¶114, 121, 169, Proposed Findings of Facts. a reasonable and just practice would have been either terminating her employment or removing her from customer contact altogether. Amoy did neither. Incredibly, she was assigned to solicit more cargo as a salesperson after the Zim and MSC debacles, and the misconduct continued.

Krystal Lee made numerous similar misdeclarations within a very short period of time (she made the misdeclaration to ZIM in or about October 2012, only a few months preceding her booking with Econocaribe, and with MSC as well) (ECONO PFF App. 00028) Such multiple similar acts within a short period of time, constitute a “practice.” *See Chief Cargo Servs., Inc. v. Fed. Mar. Comm’n*, 586 F. App’x 730 (2d Cir. 2014). Amoy had a practice of misdeclaring cargo and allowing huge bills to accrue overseas, which it never paid. That is beyond dispute. ¶114, 121, 169, 194, Proposed Findings of Facts.

Third, Amoy's own bills of lading (at Paragraph 23 therein) hold its shipper liable for all of the costs Econocaribe is seeking from *its* shipper, Amoy. ECONO PFF App. 00371 and ¶147, 149, 152, Proposed Findings of Facts. It is only a just and reasonable practice that Amoy acknowledges 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.

#### *VII. Violation of Section 10(b)(2)(B) of the Shipping Act of 1984, as amended*

Section 10(b)(2)(B) of the Shipping Act of 1984, as amended, provides that “[n]o common carrier, either alone or in conjunction with any other person, directly or indirectly, may provide service in the liner trade that is under a tariff or service contract which has been suspended or prohibited by the Commission under section 9 of this Act or the Foreign Shipping Practices Act of 1988 (46 U.S.C. App. 1701a).” 46 U.S.C. App. §1709(b)(2)(B).

In the case at bar, Amoy not only exported explicitly prohibited goods to China, but it did so under prohibited tariff conditions, i.e. through blatant misdescription of the cargo. ¶162, 163, 166-168, 170, Proposed Findings of Facts. Amoy then issued its house bill of lading to its shipper-customer under the same prohibited conditions.

*VIII. Econocaribe Did Not Cause the Demurrage and It Has Reasonably Mitigated the Damages*

"Shippers are absolutely liable for demurrage except ... where the delay is the fault of the carrier or those for whom he is responsible or where the delay is caused by a vis major." *Safmarine v. Colombia Container Lines (USA), Inc.*, 2010 WL 7134001 at \*3 (E.D.N.Y. Dec. 15, 2010). In this case, Amoy is absolutely liable for demurrage because it caused the shipment of prohibited cargo to China and equivocated on returning the cargo to the United States, resulting in the enormous charges.

Injured parties suffering from a breach of contract have a duty to mitigate damages. However, mitigation is not a defense to Amoy's violations of the Shipping Act. It is only relevant to a damages analysis. *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd America, Inc.*, 2014 WL 5316331, at \*12-13 (FMC). Failure to mitigate damages prevents the non-breaching party from recovering damages that otherwise could have been avoided. *See Buras v. Shell Oil Co.*, 666 F.Supp. 919, 924 (S.D.Miss.1987). The test for mitigation of damages is whether a party's actions were within the "range of reason." As Judge Friendly explained:

"[I]f the plaintiff takes such action within the range of reason, the defendant is liable for further damages resulting therefrom.... It is not fatal to recovery that one course of action, reasonably open but not followed, would have avoided further injury whereas another, also reasonable and taken, produced it."

*Ellerman Lines, Ltd. v. President Harding*, 288 F.2d 288, 290 (2d Cir.1961).

"The standard of what reason requires of the injured party is lower than in other branches of law." *APL Co. PTE Ltd.*, 2008 WL 539927. Further, "the burden lies on the party challenging the mitigation efforts undertaken to show that they were unreasonable." *Fortis Corporate Ins., S.A. v. M/V Cielo Del Canada*, 320 F. Supp. 2d 95, 106 (S.D.N.Y. 2004).

In this case, Econocaribe had no physical possession of the cargo. China Customs had the control over the cargo. To mitigate its damages, Econocaribe had several options: (1) request the return of the cargo by paying for the return freight and subsequent costs (as what is happening now), (2) communicate information between Amoy and Maersk (as to what had happened), *see. e.g.*, ¶¶70, 73, 75, 97, 98, 109, 110, 112, 113, 115, 129, 130, 223, 230, Proposed Findings of Facts.

Econocaribe's decision was not to spend its own money exclusively or foolishly, nor to exercise domain over someone else's cargo by taking it back to the USA cargo prior to settlement with Maersk and exhausting efforts to have Amoy arrange the return. This certainly was reasonable: to have done otherwise would have meant paying more than \$200,000.00 ¶¶133, 241, Proposed Findings of Facts, rather than \$70,000.00, ¶¶134, 242, Proposed Findings of Facts, triple the final amount negotiated. In select circumstances, the duty to mitigate includes making reasonable expenditures toward avoiding further damage. *See Buras v. Shell Oil Co.*, 666 F.Supp. at 924. Econocaribe, the nondefaulting party, did exactly that. However, the nondefaulting party "is not required to make extraordinary expenditures to diminish the harm caused by the act of the party at fault." *Id.* The return freight plus subsequent expenses in disposing of the cargo would have been (and has proved to be) a very substantial expenditure, still accruing, even with a \$140,000.00 mitigation having been negotiated.

Econocaribe's communication with Amoy was reasonable. In considering mitigation, the Court need not determine "whether hindsight suggests that an objectively better choice was available," but rather "whether the mitigation efforts actually chose were reasonable." Now, with the benefit of hindsight and knowledge of Amoy's recent problems, we know that re-export of the cargo was a better choice for Amoy to make. But without the benefit of such hindsight or knowledge at the time, it may have been entirely reasonable to choose abandonment.

Econocaribe's failure to advise Amoy to return the cargo was not unreasonable nor did it violate any duty. Amoy had to choose and act. It refused again and again to act, but merely equivocated between abandoning the cargo or repatriating it. ¶43, 44, 62, Proposed Findings of Facts. Econocaribe both acted to repatriate and mitigated the damages for Amoy. ¶134, 241-243, Proposed Findings of Facts.

Econocaribe's communication with Amoy and Maersk during the period between June 17, 2013 and July 9, 2013 was wholly reasonable. Econocaribe replied to Amoy continually, conveying Maersk's updates and proactively seeking a solution. ¶25-32, 36, 39-42, 43-44, 45-47, 48-50, 51-54, 55-57, Proposed Findings of Facts. Amoy was regularly advised that all costs were for its account. ¶58, 64, Proposed Findings of Facts. Amoy never instructed Econocaribe to start the return process. ¶43-44, Proposed Findings of Facts. As an experienced NVOCC with offices in China, it was always in a position to directly obtain the necessary information from its offices or from Maersk. Nothing prevented Amoy from undertaking the task of returning the cargo to the United States, which Maersk and Econocaribe both would have welcomed. Amoy delayed, although it stated that it knew a lawsuit and six figures in damages would result.

Maersk's July 9, 2013 correspondence was relayed to Amoy. ¶55-56, Proposed Findings of Facts. Amoy knew that it had to advise Econocaribe or Maersk if it needed to find new consignee to help it with return issue. Instead of advising Econocaribe, Amoy stalled by asking for more advice. ¶57, 59, Proposed Findings of Facts. Econocaribe was in no position, nor did it have either a legal right or obligation, to make decisions for Amoy. It shared what information it obtained from Maersk, and that was all it could do. When asked to compare costs between return to the United States and auction in China, Econocaribe correctly told Amoy that *usually* abandonment was cheaper. ¶64, 208, 218, Proposed Findings of Facts. Econocaribe never

represented to Amoy that abandonment *would be* cheaper in this matter. Amoy made its choice to proceed with abandonment. Econocaribe always acted reasonably in communicating with Amoy and Maersk. Indeed, given that the problem was not of its making, it went above and beyond any reasonable requirement to help. All the while, since at least June 18, 2013, Amoy knew but did not tell Econocaribe, that abandonment was impossible because the goods were prohibited in China. ¶34, Proposed Findings of Facts.

Maersk's July 17, 2013 correspondence was relayed to Amoy. Amoy knew that it must either find a buyer or arrange re-export within 90 days from arrival. ¶73, Proposed Findings of Facts. Otherwise the cargo would be disposed by China Customs in accordance with one of the three options - a) order return to origin, b) auction or c) destruction. ¶73, Proposed Findings of Facts. Amoy knew that after 90 days, the costs would be sky high. ¶76, Proposed Findings of Facts. Yet it still did not request return. Amoy foolishly opted for inaction, perhaps believing that sky high demurrage plus the cost of destruction would still be cheaper than return freight costs. Econocaribe, for its part, acted exceedingly reasonably as an involuntary go-between for Amoy and Maersk. ¶224, 225, 234, Proposed Findings of Facts.

Finally, Econocaribe successfully negotiated downward the Chinese port and other charges by a factor of roughly two-thirds. ¶133, 134, 241, 242, Proposed Findings of Facts. In order to avoid further costs, including those of Chinese Customs, Econocaribe paid all the return freight charges and Chinese charges including demurrage, seizure fees, freight and storage to bring the cargo back to the United States which was *unquestionably* the responsibility of Amoy.

#### *IX. Econocaribe's Damages*

As a direct result of Amoy's violations of the Shipping Act, misdeclared baled cut used truck tires were shipped to China and seized by Chinese Customs. These cut baled used truck

tires had to be returned to the United States. In order to mitigate the demurrage and other costs, Econocaribe entered into an agreement with Maersk to ship the cargo back to the U.S., even though Amoy refused to assist. These used tires will be destroyed upon authorization by U.S. Customs and Border Protection. Amoy's violations of the Shipping Act gave rise to the demurrage charges, additional carriage, customs clearance, dray and subsequent storage, destruction and litigation costs. ¶242-246, Proposed Findings of Facts. Amoy's steadfast refusal to nominate a shipper or consignee left Econocaribe no choice but to pay such costs in advance. These costs are an "actual injury" under 46 U.S.C. § 41305(a).

### CONCLUSION

WHEREFORE, Complainants respectfully request that the Commission issue the following:

1. An Order holding that the Respondent Amoy's activities described herein were unlawful and in violation of 46 U.S.C. § 41104(2)(A); Section 10(b)(2)(A) of the Shipping Act of 1984, as amended; Section 10(a)(1) of the Shipping Act of 1984, as amended; Section 10(b)(1) of the Shipping Act of 1984, as amended; 46 C.F.R. §515.31(e); 46 U.S.C. § 41104(c); and Section 10(b)(2)(B) of the Shipping Act of 1984, as amended;
2. An Order compelling Respondent Amoy to make reparations to Complainant Econocaribe in the amount of \$175,000.00 for damages suffered by Econocaribe, which includes freight, storage, drayage, demurrage, per diem, and destruction costs, and in addition to that sum attorneys' fees and costs, plus interest as may be permitted by law;
3. An Order revoking Respondent Amoy's NVOCC license and further prohibiting Respondent Amoy and its officers from engaging in the Ocean Transportation Intermediary business in the United States waterborne trade; and

Such other and further relief as the Commission deems just and proper.

DATED: April 2, 2015

**THE MOONEY LAW FIRM, LLC**

A handwritten signature in black ink, appearing to read "Neil B. Mooney", written over a horizontal line.

**Neil B. Mooney, Esq.**

nmooney@customscourt.com

1911 Capital Circle N.E.

Tallahassee, FL 32308

Tel. 850-893-0670

Fax. 850-391-4228

*Counsel for Complainant*

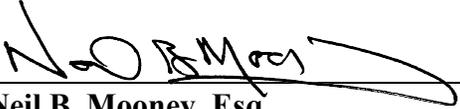
Econocaribe Consolidators, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **COMPLAINANT'S STATEMENT OF FACTS**

**AND BRIEF** was sent to the below-mentioned counsel via email on April 2, 2015.

Joseph N. Mirkovich, Esq.  
RUSSELL MIRKOVICH & MORROW  
Email: [jmirkovich@rumlaw.com](mailto:jmirkovich@rumlaw.com)  
Attorneys for Respondent  
AMOY INTERNATIONAL LLC.

  
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Neil B. Mooney, Esq.