IN THE MATTER OF AN ARBITRATION
BETWEEN "LONGO IMPORTS," AND "CHAN MANUFACTURING" ON
CONTRACT FOR THE INTERNATIONAL SALE OF MOTORIZED VEHICLES (the "SALES CONTRACT")

-and-

THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISION ARBITRATION RULES ("CIETAC Arbitration Rules")

ADMINISTERED BY THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISION ("CIETAC")

-between-

LONGO IMPORTS

("Buyer" or "Longo" or the "Claimant")

v.

CHAN MANUFACTURING

(the "Seller" or "Chan" or "Respondent" and together with the Claimant, the "Parties")

RESPONDENT'S MEMORANDUM

TEAM 001

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I. Governing Law

A. The Parties Entered Into an Agreement for the Sale of One Car

Chan Manufacturing ("Chan") and Longo Imports ("Longo") entered into negotiations on a contract for electric cars on January 5, 2011. Ultimately, the parties agreed to a contract for one car and successfully executed the deal. On March 20, 2011 Chan specified that the UNIDROIT Principles would be the governing law of the aforementioned contract. Longo tacitly agreed to this condition by paying for the car by March 25, 2011. In doing so, the parties implicitly agreed that the contract would be governed by the UNIDROIT Principles instead of the CISG.

1. *The Parties Agreed that the One-Car Contract Shall be Governed by the UNIDROIT Principles*

The UNIDROIT Principles 2010 ("UNIDROIT") apply to international commercial contracts when both parties agree to use the UNIDROIT as the governing law. (*See* UNIDROIT Principles 2010, Preamble). A party's conduct indicating assent to an offer is considered an acceptance. (*See* UNIDROIT Principles 2010, Art. 2.1.6). In the instant case, Chan indicated that the one-car contract would be distinct from a proposed 1000-car deal and proposed that the UNIDROIT Principles 2010 be the governing law (*See* Ex. 10). Longo paid for the one car and gave instructions to Chan over the phone regarding its shipment. (*See* Ex. 10). This performance of the contract indicates a clear and unequivocal agreement to use the UNIDROIT principles as the governing law for the one car-contract.

2. *The Parties Opted Out of the Convention for the International Sale of Goods ("CISG")*

The Convention on the International Sale of Goods ("CISG" or "Convention") governs transactions for the international sale of goods when both parties have their place of business in a contracting state. (*See* CISG, Art. Article 1(1)(a); *See* ALLISON E. BUTLER, PRACTICAL GUIDE TO THE CISG: NEGOTIATIONS THROUGH LITIGATION (Aspen Publ. 2007), at p. 3 (citing to numerous CISG cases)). Both Longo and Chan have their respective principal places of business in contracting states to the Convention. (*See Clarification to Fact Pattern*, at ¶ 20). Had the parties not opted out of the CISG the one-car contract would have been governed by the Convention. However, the parties may agree implicitly to exclude the application of the Convention by choosing one of the parties' domestic laws. (*See U.S District Court, Northern District California 27 July 2001, CISG-Online No. 616*). While a conventional governing law clause would not ordinarily suffice for implicit derogation from the CISG courts have found that when parties refer to a specific part of the law of a country, as opposed to a general reference to the laws of that state, the parties have done enough to derogate from the CISG. (*See* PETER HUBER, ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS, at p. 64 (2007)(citations omitted); *see also id.*).

II. The Parties did not Come to Terms on a Contract for 1000 Cars

Despite the parties' course of negotiations and successful execution of a deal for one car, there was never a meeting of the minds on a deal for 1,000 cars. Specifically, there was no contract because Chan's "reply to [Longo's] offer … contain[ed] … modifications [and so] is a rejection of the offer and constitutes a counter-offer." (UNIDROIT Art. 2.1.11). Chan's response proposed a different quantity of cars, meaning that a material term of Longo's offer was rejected. (*See* Ex. 10) The order form

proposed 1,000 cars. The parties previously discussed an order for 1,000 cars where one car would be sent as a sample and the "remaining cars" shipped thereafter. (*See* Ex. 8). However, Chan proposed a deal for 1,000 cars "separate" from the deal for the first car. That is, under Chan's counteroffer, there would be 1,001 cars transacted, which was an entirely novel quantity. The deal executed by Chan and Longo for the sample car was a standalone contract entirely "separate" from any purported agreement for 1,000 cars.

In addition, Chan's March 20 letter was a counteroffer because Chan objected to the price offered by Longo. (*See* Ex. 10). Chan urged Longo to "refer to our terms and conditions." (*Id*). This is significant for two reasons: first, Chan's terms explicitly indicate that they do not offer discounts. (*See* Ex. 4). A response with a different price is a counteroffer, not an acceptance. In addition, "by including the General Conditions in its purchase confirmation form, [Seller] materially altered [Buyer]'s offer. Accordingly, [Seller]'s purchase confirmation form constituted a counteroffer." (*CSS Antenna, Inc. v. Amphenol-Tuchel Electronics*, CCB-09-2008 (Dist. Maryland 2011)). Finally, Chan made direct reference to its preferred INCOTERMS. (*See* Ex. 10). This constitutes a material alteration to Longo's initial offer because courts recognize transportation costs as material terms. Chan's response "contained a change of [Longo]'s offer … as [Chan] did not want to pay the transportation costs. The writing of [Chan] therefore constitutes a counter-offer." (8U 1909/01, Apellate Court Koblenz 2002). Longo never accepted Chan's counteroffer because it merely replied with a counteroffer of its own by insisting on using its own terms and conditions. (*See* Ex. 13).

The subsequent actions of both parties prove that there was never a meeting of the minds regarding the 1,000 car deal. First, just ten days after its counteroffer, Chan

explained that there was only "one issue which needs to be sorted out," and referred to the transaction for the first car. (*See* Ex. 12). Chan indicated that Longo was responsible for the disposal of the car, which is directly contrary to the last stipulation in Longo's order form. This indicates that Chan never contemplated that the deal for 1,000 cars found in its counteroffer was operative. In addition, Longo continued to negotiate on the proposed 1,000-car deal by insisting upon contracting based on its own terms and conditions. (*See* Ex. 13). The back-and-forth negotiations never resulted in a meeting of the minds. Therefore, there was never a contract for 1,000 (or 999) cars.

A. The Tribunal Should Find that it Does not Have Jurisdiction to Hear the Case as the Parties Did not Agree to Arbitrate their Disputes

The parties never agreed to arbitrate and no valid arbitration agreement has ever come into force. The Tribunal should, thus, respect the autonomy of the parties.

As set forth in section II above Respondent never gave any indication of assent to Clause 12 of Claimant's Terms and Conditions. The Claimant's purchase order excluded Clause 12 and Clause 11 from its Terms and Conditions, two contentious clauses involving dispute resolution and consequential damages. (*See* Ex. 2). This shows that the Claimant intentionally omitted the dispute resolution clause. Claimant only mentions the Terms and Conditions on two occasions: once in the letter dated June 10, 2011, and the other in the letter dated August 20, 2011. (Ex. 13; Ex. 16). Following receipt of these letters, Respondent did not give any indication of assent to the Claimant's Terms and Conditions. As such, the Tribunal must respect the parties' choices and dismiss this arbitration.

1. *Even if the Arbitrators Find that a Contract for 1,000 Cars Existed and that it Included Longo's Arbitration Clause, the Clause is Inoperable and Invalid.*

In the event that the Tribunal finds that a contract for 1,000 cars existed, the Tribunal should still dismiss this arbitration due to the inoperable nature of Claimant's arbitration clause. First, the clause creates two potential seats of arbitration, stating the need to arbitrate "in Cadenza," while emphasizing that the seat is in Beijing. (*See* Ex. 2). The seat and place of arbitration are interchangeable terms and, without further clarification, it is impossible to ascertain the intent of the parties. Second, the clause forces the parties to refer their disputes to the China Trade Commission, a private party that primarily conducts background checks for foreigners seeking to do business in China. (*See* www.chinatradecommission.org). The Respondent would never accept such an obscure entity to resolve a $10M contract that has no relationship to China. Third, the clause requires a referral to the China Trade Commission, mandatory conciliation under unspecified rules, and arbitration in a dubious seat with the "relevant rules." (Ex. 2). These three processes could conflict with one another. The China Trade Commission, for example, could resolve the dispute, only for the parties to have to conciliate the dispute yet again. For these reasons the Claimant's arbitration clause is inoperably vague and should be deemed invalid and inapplicable.

III. Even if there were a Contract for 1,000 Cars, Longo Breached and Chan had the Right to Terminate

Even if Chan were to concede that there was a contract for 1,000 cars Chan would have been well within its right to terminate. Chan "may terminate the contract where the failure of [Longo] to perform an obligation under the contract amounts to a fundamental non-performance." (UNIDROIT Art. 7.3.1). Longo's failure to nominate a ship "amounts to a fundamental non-performance … [because] the obligation which has not been

performed is of essence under the contract." (UNIDROIT Art. 7.3.1(2)(b)). Nominating the ship is of essence because that is the sole method of conveying the goods to the buyer and Longo failed to do so.

IV. Longo is Not Entitled to Damages

Chan contends that the only contract was for one car or, in the alternative, that Longo breached the bigger contract. However, even if Chan concedes both of those contentions, Longo cannot recover any damages. First, Longo cannot recover because "compensation is due only for harm … that is established with a reasonable degree of certainty." (UNIDROIT Art. 7.4.3). The market for electric cars, novel as it is, is indeterminate. As a result, Longo cannot show with any certainty what its lost profits would be. "Certainty relates not only to the existence of the harm but also to its extent." (UNIDROIT Notes, at p. 270). Since the market is highly competitive, (*See* Ex. 1), there is reason to believe that Longo's profit margins would be razor-thin. Just because Longo "anticipate[d] that [its] yearly sales would be around 10,000 cars" does not mean that there was a basis for this estimation. (*Id.*). Thus, Longo cannot recover consequential damages because any lost profits are merely speculative.

Still, even though Longo can prove certain other damages with certainty, those cannot be recovered because they were entirely unforeseeable to Chan. Chan "is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract." (UNIDROIT Art. 7.4.4). Even though Longo had forward orders for cars, there was no way that Chan could have been aware of such advance purchases. (*See* Ex. 16). Moreover, "What was foreseeable is to be determined by reference to the time of the conclusion of the contract" and not a later point in time. (UNIDROIT Notes, at p. 272).

Longo contends that a contract was entered into in March, yet it only made reference to forward orders in August. (*See* Ex. 16). Thus, even if one accepts the (dubious) proposition that there was a contract at all, the forward orders would have to have been in place in March in order for Longo to recover for them.

Longo cannot recover damages because Longo itself was the cause of any damages it sustained. Longo's damages "shall be reduced to the extent that" Longo itself caused the harm. (UNIDROIT Art. 7.4.7). Longo's repeated failure to nominate an appropriate ship and its decision not to verify the quality of the sample car are the only two reasons that Longo did not receive the cars. Finally, Longo did not fulfill its duty to mitigate those losses. Chan is "not liable for harm suffered by [Longo] to the extent that the harm could have been reduced by [Longo's] taking reasonable steps. (UNIDROIT Art. 7.4.8). Longo went so far as to point out that the market for electric cars is "a competitive market and we expect to be offered a very good price." (*See* Ex. 1). Despite its own recognition of a robust market, there is no evidence that Longo took any measure to mitigate by trying to cover. Therefore, Longo may recover no damages from Chan.

V. Request for Relief

Respondent respectfully requests the Tribunal to find that:

1. The Tribunal has no jurisdiction to hear this dispute.
2. That the Parties did not enter into an agreement for the sale of 1,000 cars
3. If the Tribunal upholds its jurisdiction and finds that a contract exists for the sale of 1,000 cars it was Claimant who was in breach.
4. If the Tribunal finds that Respondent was in breach, Claimant is not entitled to recover damages.

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