

BEFORE THE
FEDERAL MARITIME COMMISSION

DNB EXPORTS LLC; and
AFI ELEKTROMEKANIKANIK VE
ELEKTRONIK SAN. TIC. LTD. STI.,

Complainants,

v.

BARSAN GLOBAL LOGISTIKS VE GUMRUK
MUSAVIRLGI A.S.; BARSAN
INTERNATIONAL, INC.; and IMPEXIA, INC.,

Respondents.

Docket No. 11-07

**RESPONDENT BARSAN INTERNATIONAL, INC.'S RESPONSE TO
COMPLAINANTS' EXCEPTIONS TO INITIAL DECISION**

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**RESPONDENT BARSAN INTERNATIONAL, INC.’S RESPONSE TO
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Pursuant to 46 C.F.R. §502.227, Barsan International, Inc. (“Barsan”) ¹ hereby files its response in opposition to the Exceptions asserted by Complainants DNB Exports LLC and AFI Elektromekanik Ve Elektronik San. Tic. Ltd. Sti. (“DNB/AFI”) to the Administrative Law Judge’s Initial Decision of January 24, 2014. DNB/AFI’s Exceptions are unfounded as a matter of fact and law. Therefore, they must be rejected.²

¹ The Administrative Law Judge ordered that the Complaint against Barsan Global Lojistiks Ve Gumruk Musavirligi A.S. (“BGL”) be dismissed for lack of Commission jurisdiction over the company, a ruling to which DNB/AFI have not taken exception.

² DNB/AFI’s Exceptions substantially exceed the page limit set forth in the Commission’s regulations. 46 C.F.R. §502.227(e). If DNB/AFI needed more pages they should have requested permission as provided in this Rule. The appropriate response should be to strike the Brief.

INTRODUCTION

Like a basketball fan whose team just lost, DNB/AFI now cries that the referee was on the side of their opponents. Accusing the Administrative Law Judge (“ALJ”) of “an unexplainable bias” and engaging in “advocacy,” DNB/AFI asks the Commission to overturn the Initial Decision. Nevertheless, in the face of the careful analysis and compelling logic supporting the Initial Decision’s finding that there is no substance to DNB/AFI’s allegations that Respondent Impexia was the alter ego or corporate shell of Barsan and BGL, they have now abandoned that claim, which was once the centerpiece of their case. Instead, they now fall back on attacks on the impartiality of the judge, *ad hominem* mudslinging against the principals of Barsan and Impexia, and a continued reliance on the flimsiest of circumstantial evidence, which even they liken to “dark matter” which “cannot be seen directly with telescopes.” Failing to convince the ALJ of the existence of any substance in the “dark matter” of their proffered circumstantial “evidence,” they apparently hope the Commission will use a different telescope to detect something real in the mass of unrelated facts and theories they present as their case.

Having abandoned their alter ego and corporate shell theory as a way of tying Barsan to Impexia, DNB/AFI now rely on their assertion that Burcin Karadagli, Barsan’s accounting manager, acted for Barsan when she transmitted information about a limited number of DNB/AFI shipments to her husband, Cuneyt Karadagli, Impexia’s principal. The facts, however, clearly show that Mrs. Karadagli carefully concealed from Barsan the fact that she was relaying this information to her husband and that, in doing so, she was acting exclusively for her own interests and not for the interests of Barsan. Moreover, as the judge convincingly demonstrates in the Initial Decision, in only one case was this information tied to a customer served by both DNB/AFI and Impexia and that customer convincingly testified that its dealings with Impexia

arose out of a longstanding personal relationship with Mr. Karadagli, not from any information relating to DNB/AFI's shipments with Barsan. Further, the vast majority of the information conveyed to Mr. Karadagli by his wife related to air shipments by Barsan over which the Commission has no jurisdiction.

Finally, even if DNB/AFI could show that Barsan knowingly disclosed proprietary information subject to Section 10(b)(13) of the Shipping Act and that such disclosures were made for ocean shipments subject to the Commission's jurisdiction – which they cannot – DNB/AFI would still have to demonstrate that they suffered actual injury as a result of the alleged violation. What DNB/AFI has produced as so-called damages are simply unsupported conjectures by the principals of DNB and AFI. And even those conjectures are based on wildly unrealistic assumptions such as that their business would increase “10-fold” in 2010 and that they would have retained their customers in perpetuity despite charging more than Impexia for their services.

I. Barsan Did Not Disclose Proprietary Information

DNB/AFI have alleged that the Respondents violated Section 10(b)(13) of the Shipping Act, which provides as follows:

A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information - - (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or (2) may improperly disclose its business transaction to a competitor.

46 U.S.C. §41103(a).

Throughout this case, DNB/AFI have proffered various theories as to how Barsan has violated this provision. For the first two years of the case, they alleged that Barsan and its parent company, BGL, were the same entity and that Impexia was the alter-ego of both. In their final submissions to the Administrative Law Judge, however, DNB/AFI abandoned those theories. Rather than presenting evidence demonstrating the need to pierce any corporate veil between Barsan and Impexia under the Commission's leading decision on this issue, *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R. 119, 167-168 (FMC 2001), the Complainants essentially ignored this argument. As the ALJ found in the Initial Decision:

DNB/AFI have not identified any evidence or proposed findings of fact on *Rose Int'l Factors* 2, 3, 4, 5, 8, or 9. The evidence in the record on *Rose Int'l Factors* 1, 6, and 7 does not establish by a preponderance of the evidence that Impexia is a corporate shell or alter-ego of BGL and/or Barsan Int'l.

Initial Decision at 33.

In their exceptions, DNB/AFI also make no arguments that BGL and Barsan are the same entity or that Impexia is an alter-ego of Barsan or BGL. Rather, they now rely on two other arguments to prove that Barsan disclosed proprietary information to Impexia. Neither of these arguments has merit.

(a) Burcin Karadagli's Actions Cannot Be Attributed to Barsan

DNB/AFI's first argument is that the actions of Barsan's accounting manager, Burcin Karadagli, may be attributed to Barsan International. While Burcin Karadagli did send a very limited amount of information relating to DNB/AFI shipments to her husband, Cuneyt Karadagli, during her employment at Barsan, these communications cannot be attributed to Barsan because they were made solely in the interests of Burcin Karadagli; were adverse to the interests of Barsan; and were not made while Burcin Karadagli was acting within the scope of her employment.

As the Commission has recognized, “[a]s a general matter, the knowledge of an agent is imputed to its principal.” *Mitsui O.S.K. Lines, Limited v. Global Link Logistics, Inc., Olympus Partners, Olympus Growth Fund III, L.P., Louis J. Mischianti, David Cardenas, Keith Heffernan, CJR World Enterprises, Inc., and Chad J. Rosenberg*, __S.R.R. __ (Docket No. 09-01, January 30, 2014), Order Adopting Initial Decision, *Slip Op.* at 23. The Commission has also recognized, however, that “an agent generally must be found to have acted within the scope of ‘his employment’ and that ‘knowledge of an agent acquired in the course of the agency relationship is not imputed to the principal if the knowledge is acquired by the agent in a course of conduct that is entirely adverse to the principal.’” *Id.* at 23, 24. Here, as opposed to the situation in *Mitsui*, Burcin Karadagli’s interest was entirely adverse to Barsan. The record in this case is clear that the purported acts of Burcin Karadagli in sharing information with her husband were taken for purely personal motives rather than due to any desire to benefit Barsan and that, further, Barsan had no knowledge of these disclosures.

Whether Burcin Karadagli’s conduct should be imputed to Barsan is dependent on whether her actions were taken on behalf of Barsan or on her own behalf (or that of her husband.) Such analysis is analyzed under the “adverse interest exception.” As federal circuit courts have uniformly recognized, under that exception, conduct of a corporation’s employees, and even of its officers, will not be imputed to the corporation if the employee’s interests are adverse to the corporation, and “not for the benefit of the corporation.” *See, e.g., Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 359 (3d Cir. 2001); *Nissellson v. Lernout*, 469 F.3d 143, 156 (1st Cir. 2006) (wrongdoers’ acts will not be imputed to a corporation when the wrongdoer is acting contrary to the corporation’s present interests); *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429, 436 (6th Cir. 1980) (agent’s actions not

imputed to principal where agent's interest adverse to those of the principal); *Solomon v. Gibson*, 419 Pa. Super. 284, 615 A.2d 367 (Pa. 1992) (when employee acts in his own interest which is antagonistic to that of his employer or takes action which is beyond the scope of his actual or apparent authority and principal has received no benefit therefrom, employer not be liable for the employee's tort).

It is hornbook law that if an employee acts "from purely personal motives . . . which is in no way connected with the employer's interests, he is considered in the ordinary case to have departed from his employment, and the master is not liable." *Prosser and Keaton on Torts*, Section 70 (5th ed.) at p. 506; *see also, Scottsdale Ins. Co. v. Sandler*, 381 Fed. Appx. 554, 2010 WL 2545486 (6th Cir. 2010) (same).

Here, there is nothing in the record that hints at, much less proves, that Burcin Karadagli was acting in the interest of Barsan when making these disclosures. As the Administrative Law Judge noted in his exhaustive analysis of the disclosures in the Initial Decision, Burcin Karadagli took pains to make sure that no Barsan employee was copied in on the emails she sent to her husband. Initial Decision at 52 - 65. Moreover, there is evidence in the record showing that her sole desire in making these disclosures was to bolster her own personal economic position. For example, in an email to her husband in June of 2009, Burcin Karadagli says: ". . . I am so scared. What if no sales will be concluded and no goods will be delivered according to the contract . . . meanwhile, I am hungry . . ." AFI/DNB App. 659. This email provides compelling evidence that Burcin Karadagli's actions were not being taken to advance Barsan's interests, but instead were advancing her own private interests. Indeed, if she were acting to advance Barsan's interest, rather than her and her family's, she would not have taken pains to ensure that her disclosures to her husband were hidden from other Barsan employees. In addition, if she were

acting in Barsan’s interests, Barsan would not have summarily terminated her employment as soon as it became aware of what she had done.

The plain truth is that Burcin Karadagli’s disclosures were completely adverse to Barsan’s interests. As between its interests in continuing to provide services to DNB/AFI and its alleged “interest” in helping Impexia, it is clear beyond a shadow of a doubt where Barsan’s true interest lay. Prior to the discovery of Burcin Karadagli’s disclosures to her husband, Barsan handled numerous shipments on behalf of DNB/AFI. FoF 88;³ *see also* Burak Bal Affidavit ¶ 48 (AFI/DNB App. 2250) (reflecting that Barsan’s freight charges to DNB exceeded \$350,000). In stark contrast, Barsan received a total of four shipments from Impexia. FoF 15, 57. It defies logic to believe that Barsan would want to replace a large, well-funded customer that provided it with considerable revenues with a small, start-up company with little potential to provide Barsan with significant business and whose owner had a history of payment difficulties with Barsan.

In the face of this overwhelming evidence, the Initial Decision properly concluded that:

The emails that Burcin Karadagli sent to Cuneyt Karadagli were not copied to any other Barsan International employee and DNB/AFI have not identified any evidence that would support a finding that Barsan International had actual knowledge that Burcin Karadagli sent the emails. As discussed above, DNB/AFI have not provided that Burcin Karadagli is an officer or director of Barsan International, nor have they established that Barsan International put her “in such a position of general authority. . .that notice to [her] will be notice to [Barsan International] because it must be deemed within [her] authority to receive it. . .” *American Standard v. National Cement*, 643 F.2d at 270 n. 16. DNB/AFI have not identified any evidence that would provide Burcin Karadagli was acting within the scope of her employment when she sent the emails. Therefore, I find that Barsan International did not knowingly disclose the information in the emails to Cuneyt Karadagli. *Id.*

Initial Decision at 67.

³ “FoF” refers to Barsan’s Proposed Findings of Fact filed on May 20, 2013.

In their Exceptions, DNB/AFI simply restate their previous unsupported allegations concerning Burcin Karadagli. They assert, for example, that “Burcin Karadagli was considered a senior manager within the Barsan framework with broad general authority in many areas of the Barsan enterprise.” Exceptions at 40. The support they give for this proposition is, however, so flimsy as to be virtually non-existent. DNB/AFI assert that “Burcin Karadagli worked for Barsan Int’l as an Accounting Manager/Accounting Operations Supervisor from 2004 to April 2011.” *Id.* It is self-evident that an accounting manager is not a person with “broad general authority” in areas outside their responsibilities for accounting. DNB/AFI implicitly recognize this when they fail to make any argument as to why her position as Barsan’s accounting manager gave Burcin Karadagli such “broad general authority.” Quite simply, bald assertions do not constitute evidence.

The second fact DNB/AFI cite to support their allegation is that Burcin Karadagli once sent an email to a colleague stating that “[w]hen Ugur is not here, we need to support each other as you are the VP of Operations, and I am the VP of Finance.” *Id.* The contention here seems to be that, just because Burcin Karadagli exaggerated her position in an internal email to a colleague, somehow that proves first, that she actually was VP of Finance for the company, and second, that a VP of Finance at Barsan has “broad general authority in many areas of the Barsan enterprise.” This is such a long stretch as to border on the absurd. As the Initial Decision correctly recognized, DNB/AFI have the burden of proving their case by a preponderance of the evidence. Having failed to come forward with any such evidence, whether in the form of deposition testimony or otherwise, that Burcin Karadagli was an officer or director of Barsan or had broad general authority, their claim must be rejected. Initial Decision at p. 27.

The third fact DNB/AFI use to support this allegation of Burcin Karadagli's "broad general authority" is that "Burcin Karadagli is also referred to as Accounting Manager, Registered Agent of Barsan International's Florida office, and as Human Resources Manager ("HR Manager") and further, that "as the HR Manager, Burcin Karadagli, on behalf of Barsan International, drafted a letter to the United States Embassy in Istanbul – Turkey to prove that Ugur Aksu was the "Director of the Company." *Id.* Again, the recitation of this so-called "evidence" begs the question of what it is supposed to mean. The actual evidence presented by DNB/AFI fails to show that as an accounting manager or registered agent of a branch office or a human resources manager - - even one with the power to send a letter to a United States Embassy - - Burcin Karadagli was an officer of the company with "broad general authority in many areas of the Barsan enterprise." Accounting managers and human resources ordinarily are not major wielders of influence within corporate organizations and there is no reason to believe, absent compelling proof to the contrary, that Burcin Karadagli had assumed such great importance within Barsan. Certainly, she was an employee of the company and, perhaps, a trusted employee of some years standing before knowledge of her betrayal of Barsan's interests became known. She was clearly not an officer or director of the company; there is no evidence she participated in the company's strategic decision making; and she certainly did not receive the company's approval to make the disclosures at issue to her husband. By taking such care to disguise her disclosures and prevent other Barsan employees from knowing about them, Burcin Karadagli herself provides the most compelling evidence that her interests were entirely personal and completely adverse to Barsan. If she were truly a senior manager at Barsan with some broad influence, there would be no need to mask her actions.

DNB/AFI's remaining reasons given for asserting that Burcin Karadagli was acting for Barsan's interests are equally bizarre and non-availing. They state, for example, that "Impexia continued to ship cargo through Barsan from its inception until when it stopped dealing with Barsan. . .". *Id.* This is simply a tautological statement that could be made of any customer of Barsan, including DNB/AFI. DNB/AFI also state that Mr. Karadagli's marketing letters on behalf of Impexia mentioned that it used Barsan, as well as other named forwarding companies, for its shipments. *Id.* But how do statements in Impexia's marketing letters prove that Burcin Karadagli was acting on behalf of Barsan when she disclosed information to her husband? Clearly, just saying it, does not make it so.

DNB/AFI also allege that Barsan would "negotiate favorable ocean and air transportation rates for Impexia;" that the president of Barsan at one time sent information about business machines to Burcin Karadagli; and that a Barsan employee sent a referral for a U.S. Army job in Afghanistan to Impexia is all proof that Burcin Karadagli's disclosures to her husband were done in the interest of Barsan. Exceptions at 40-41. In each of these instances, it is apparent that Barsan was simply taking actions to help a customer, as companies in the service business do with most, if not all, of their customers. To assert that these types of actions somehow demonstrate that Burcin Karadagli was actually acting for Barsan at the time when she was betraying Barsan simply beggars the imagination.

(b) Barsan Did Not Know About Burcin Karadagli's Disclosures to Her Husband

DNB/AFI's second argument is that Barsan "knew or should have known of the disclosure of protected information." Exceptions at 41. The record is devoid of any evidence that Barsan knew of disclosure of protected information. Indeed, such a contention is belied by the fact that, as painstakingly documented in the Initial Decision, Burcin Karadagli went to great

lengths to hide her disclosures to her husband from other Barsan employees, and that neither Burcin Karadagli nor Cuneyt Karadagli ever discussed DNB/AFI with Barsan's senior management or told them what they were doing. It is further belied by the fact that when Barsan was informed that Burcin Karadagli had disclosed information to her husband, she was immediately terminated.

This leaves DNB/AFI with the burden of showing that Barsan International "should have known" of the disclosure of protected information. The allegations DNB/AFI make in support of this theory are not substantial enough to carry this burden. Indeed, they are not only legally incorrect, they are absurd.

Basically, DNB/AFI assert that NVOCCs and freight forwarders such as Barsan have an obligation to (a) monitor the financial status of each of their customers; (b) closely monitor the various markets in which its customers operate; and (c) closely monitor the commodities shipped by each of its customers and compare those with commodities shipped by other customers. Simply to state this proposition is to refute it. There is nothing in law or policy within the Commission's jurisdiction that imposes these standards on NVOCCs and freight forwarders. With respect to Barsan's obligation to monitor the financial affairs of its customers, DNB/AFI allege that Barsan should have noticed when the Karadagli's were able to pay off debts *in the hundreds of dollars* and investigate the reasons for such good fortune. Exceptions at 41-42. This, at a time when Barsan International's revenues were in excess of \$10,000,000. *See* Initial Decision at 78. In the Initial Decision the Administrative Law Judge found that Section 10(b)(13) of the Shipping Act "does not impose a duty on a common carrier to investigate whether one of its employees is disclosing protected information every time one of its shippers/customers pays delinquent bills" and "does not impose a duty on a common carrier to

keep track of the property contained in each shipment that it carries and investigate whether one of its employees has improperly disclosed information any time two shippers ship the same product.” Initial Decision at 78; *see also, Bermuda Container Line Ltd. v. SHG International Sales, Inc.*, 1999 WL 569364 at * 2 (FMC 1999)(rejecting imposition of policing duty, finding that nothing in the Commission’s regulations requires a licensed freight forwarder to “investigate its principals, *i.e.*, its shipper customers.”) The Initial Decision is absolutely correct and should be affirmed.

DNB/AFI also allege that Barsan should have kept track of where Impexia was sending its cargo and the type of cargo it was sending to determine whether there was some overlap in this regard between DNB/AFI and Impexia. But why should Barsan have done this? Barsan has hundreds of customers and handles many thousands of shipments each year. Why, on a daily basis, should Barsan employees pick out and examine customer files to determine who their consignees are and whether those consignees had also at some time been served by another customer of Barsan. It is as if DNB/AFI believe that all Barsan employees had to do on a daily basis was to somehow police the markets its customers could serve. This is simply not the role of NVOCCs, nor could it or should it be. NVOCCs provide highly complex, sophisticated services to their customers which involves making sure that shipment paperwork (bills of lading, arrival notices, commercial invoices, packing lists, letters of credit, shipper’s export declarations, etc.) is done correctly, quickly and accurately; that relationships with ocean carriers are maintained and that bookings of transportation routes and carriers are made for each customer on the most sensible and cost efficient basis. At the same time, employees of NVOCCs are expected to deal with issues raised by customers themselves as well as various regulatory agencies with jurisdiction over their operations and to solve the myriad problems that can arise in

the ocean shipping business. It is simply impossible that NVOCCs would have the time, inclination, responsibility, or interest in doing this type of police work, which is irrelevant to their business. Thus, as a matter of simple logic, there is no reason that Barsan “should have known” that Burcin Karadagli provided proprietary information to her husband or that her husband was allegedly using that information to the detriment of DNB/AFI.

Moreover, even if Barsan had chosen to engage in such detective work, it is readily apparent that it still would not have discovered that Impexia was using proprietary information purportedly obtained from DNB/AFI. Barsan only ever handled four shipments for Impexia. FoF 11, 15, 16. Further, *none of those shipments involved electrical parts and only one of them was sent to a customer of DNB/AFI.* FoF 11, 15, 16. That one shipment went to 77 Construction, a large construction company in Turkey -- to whom Barsan had shipped cargo long before it ever did business with DNB/AFI. FoF 17, 19, 22. Moreover, goods shipped to 77 Construction on behalf of Impexia consisted of metal doors and overhead. *Id.* The idea that Barsan must have known that Impexia had stolen proprietary information from DNB/AFI because Impexia on one occasion sent metal doors to a large construction company in Turkey is, quite simply, ludicrous. Similarly, the notion that Barsan should have known that something was amiss because Impexia was apparently successful in 2011 and early 2012, ignores the fact that Barsan had no involvement with Impexia during that time period and certainly no way of knowing how successful it may or may not have been.

In short, notwithstanding the suppositions, conjectures and theories presented by DNB/AFI, they have failed to prove that Barsan either knew or should have known that Burcin Karadagli was improperly disclosing information to her husband.

II. Burcin Karadagli's Improper Disclosures To Her Husband Involved Air Shipments Over Which The Commission Has No Jurisdiction

In the Initial Decision, the Administrative Law Judge carefully analyzed the eleven alleged disclosures made by Burcin Karadagli to her husband. Initial Decision at 57-65. Of these eleven disclosures only two involved ocean shipments. *Id.* The remaining nine disclosures contained information relating to air shipments handled by Barsan in its capacity as an air freight forwarder. These shipments are not subject to the Commission's jurisdiction.

In the Initial Decision, the Administrative Law Judge assumed, for the purposes of his discussion, that "information about the nature, kind, quantity, destination, consignee, or routing of property that Barsan Int'l acquired while handling DNB/AFI's shipments by air is sufficiently related to DNB/AFI's shipments by water to be protected by Section 10(b)(13)." Initial Decision at 66. Even accepting this unjustified extension of the Commission's jurisdiction, the Administrative Law Judge nonetheless, and correctly, ruled that Barsan did not knowingly disclose improper information. Curiously, DNB/AFI takes exception to the Administrative Law Judge's provisional treatment of the air shipments, which is clearly to their benefit.

Notwithstanding the Judge's provisional treatment of the air shipments as being within the Commission's jurisdiction, the Commission is an agency of limited jurisdiction created by Congress which is bound by the clear language of its governing statute; in this case, the Shipping Act. As the United States Court of Appeals, clearly stated in *Landstar Express America, Inc. and Landstar Global Logistics, Inc. v. Federal Maritime Commission*, 569 F.3d 493, 496 (D.C. Circuit 2009): ". . .where the Shipping Act includes a precise definition, 'the limits of the Commission's jurisdiction to regulate carriers under [the Act] must necessarily depend upon the meaning and interpretation of the [statutory] definition.' *Austasia Intermodal Lines, Ltd. v. FMC*, 580 F2d. 642, 644 (D.C. Circuit 1978)." In this case, Section 10(b)(13) of the Shipping

Act, 46 U.S.C. §41103, prohibits common carriers, marine terminal operators, or ocean freight forwarders from disclosing certain types of information about “any property tendered or delivered to a common carrier. . .”. “Common carrier”, “marine terminal operator”, and “ocean freight forwarders,” are all defined terms in the Shipping Act. The term “common carrier” means a person that - -

- (i) Holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;
- (ii) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and
- (iii) Uses, 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. . .

46 U.S.C. §40102(6).

The Shipping Act defines an ocean freight forwarder as a person that “dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (ii) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. §40102(18).

A marine terminal operator is defined as “a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier....” 46 U.S.C. §40102(14).

As these definitions make clear, each of these entities engages in the transportation of goods by water. Nowhere in these definitions; indeed, nowhere in the Shipping Act, is the Commission given jurisdiction over transportation of cargo by air. The Commission, therefore, only has jurisdiction to consider the lawfulness of the two disclosures Burcin Karadagli made to

her husband involving shipments by water and cannot bootstrap jurisdiction over air shipments by in some manner relating them to shipments by water. To the extent it might seek to impose obligations upon entities that do not meet the statutory definition of a regulated party under the Shipping Act, the Commission clearly exceeds its authority. *Austasia Intermodal Lines, Ltd. v. FMC*, 580 F.2d 642 (D.C. Cir. 1978); *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950 (9th Cir. 1991) (upholding the Commission’s finding that it lacks jurisdiction over unregulated activities and parties under the Shipping Act, even if it has jurisdiction over their regulated activities.); *see also, Bethlehem Steel Corp. v. Indiana Port Commission*, 18 S.R.R. 1485 (FMC 1979), *affirmed* 642 F.2d 1215 (D.C. Cir. 1980) (Commission recognized that, while it has jurisdiction over some activities of regulated entities, it lacks jurisdiction over actions taken outside of the scope of the Shipping Act.); *accord Burlington Northern R. R. Co. v. M.C. Terminals, Inc.*, 22 S.R.R. 682, 692 (Initial Decision 1992) (although marine terminal operators are regulated entities, that does not mean all of their activities fall within the scope of the Commission’s jurisdiction.)

Thus, the Commission should not assert jurisdiction over Barsan’s activities as an air freight forwarder by considering any air shipment proffered by Complainants in support of their position in this case. To do so would fly in the face of the fact that Congress has not chosen to give the Commission that power. As the Federal Appeals Court in the *Austasia* decision expressed it:

It is not, however, the prerogative of a court or an administrative agency to expand the scope of legislation beyond what was originally intended by Congress.

580 F.2d at 647; *see also, Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171, 127 S.Ct. 799, 166 L.Ed. 2d 638 (2007) (“Statute’s remedial purpose cannot compensate for the lack of a statutory basis [in text]”); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.

2d 908 (2002) (“we will not alter the text in order to satisfy the policy preferences of the Commissioner.”). *Landstar Express America, Inc. and Landstar Global Logistics, Inc. v. Federal Maritime Commission*, 569 F.3d at 498, (“neither courts nor federal agencies can rewrite a statute’s plain text to correspond to its supposed purposes.”)

III. The Circumstantial Evidence Submitted By DNB/AFI Is Based On Conjecture, Speculation, Or Mere Possibility And Is, Therefore, Unreliable

DNB/AFI once again present a mass of what they term “circumstantial evidence” in support of their theory that Barsan actively cooperated with Impexia to injure their business. While circumstantial evidence can be probative in certain circumstances, the conclusions to be derived from such evidence must necessarily be based on inferences and “[u]nder a federal test of the sufficiency of circumstantial evidence, an inference must not be based on conjecture, speculation or mere possibility.” *Menne v. Celotex Corp.*, 861 F.2d 1453, 1463 (10th Cir. 1988), *see also, Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986) (“permissible inferences must . . . be within the range of reasonable probability”). In this case, the inferences DNB/AFI ask the Commission to make go beyond the realm of conjecture and speculation and enter into the world of fantasy.

The circumstantial evidence upon which DNB/AFI ask the Commission to rely begins with a wholly unwarranted accusation that Barsan engaged in spoliation of evidence, an accusation the Administrative Law Judge has already considered and found to be without merit. *Order on Complainants Motion for Submission of Supplemental Evidence* (ALJ, January 24, 2014).⁴ Ignoring the ALJ’s clear finding, DNB/AFI assert that because it lacks evidence that

⁴ The DNB/AFI also assert that have been precluded from introducing evidence in the case by Impexia and Barsan’s failure to produce responsive documents. These assertions are no more well founded than the other Exceptions they have asserted. First, the argument ignores the fact that Barsan actually hired a third party expert, Ricoh, to obtain forensic images of its

Barsan disclosed large amounts of proprietary information to Impexia, such evidence must have been destroyed. This argument has no evidentiary basis and is wholly lacking in credibility. To the extent DNB/AFI are accusing the Administrative Law Judge of twisting or “canting” (*see* Exceptions, at 19, 26) his decision on this issue, those allegations are unseemly and untrue.

Virtually all of DNB/AFI’s “circumstantial evidence” consists of a recitation of the same formula. That is, that DNB/AFI had provided information concerning a particular customer to Barsan and that therefore, Barsan must have provided this information to Impexia. Exceptions at 26-31. DNB/AFI apparently base this argument on their assumption that Impexia could never have learned what equipment and supplies to purchase on projects it was handling unless the information was disclosed to it by Barsan. The Initial Decision, however, easily rejects this notion in finding that it is more likely that such information came from customers of Impexia who told them the products they wanted. *See, e.g.*, Initial Decision at 73. In fact, given the admitted fact that DNB/AFI’s prices were much higher than Impexia’s, it makes perfect sense that Impexia’s customers would forward it information in regard to the products they needed, rather than pay DNB/AFI’s high prices.

In essence, DNB/AFI’s argument about circumstantial evidence is: “Barsan had the information; therefore Barsan disclosed it and the fact that we have no evidence of those disclosures means that Barsan destroyed it.” This is not evidence, circumstantial or otherwise. It

workstations so as to avoid any baseless claims that all responsive documents had not been provided. Incredibly, DNB/AFI still alleged that documents must have been altered because in one instance an email had an individual on the cc line and a separate email with the same message did not. Based upon this thin reed, DNB/AFI alleged spoliation and fraud. In so doing, they failed to explain why Barsan would have gone to the trouble of doctoring the emails and then producing them both in discovery. For such an allegation to have had merit, Barsan would have had to have been guilty of both fraud and stupidity. *See* Barsan Respondent’s Response to Complainants’ Supplemental Evidence (June 5, 2013) at 3.

is simply nonsense. DNB/AFI's approach to this issue - - and other issues - - is similar to their approach to the corporate veil issue as described by the ALJ in the Initial Decision:

Their argument seems to be that when a party seeking to pierce the corporate veil to treat two corporations as one cannot or does not have evidence . . . the trier of fact should look at a mass of facts and, without applying any analysis, simply conclude that the two corporations should be treated as one.

Initial Decision at 35.

In their earlier briefing to the Administrative Law Judge prior to his Initial Decision, DNB/AFI likened their circumstantial evidence to “dark matter.” They stated: “Dark matter cannot be seen directly with telescopes, evidently it neither emits nor absorbs light or other electromagnetic or radiation at any significant level. Instead, its existence and properties are inferred from its gravitational effects on visible matter, radiation, and the large-scale structure of the universe.” DNB/AFI Brief at 18, *quoted* in the Initial Decision at 68. Barsan submits that the “circumstantial evidence” presented by DNB/AFI in this proceeding and on their Exceptions, is identical to dark matter in that it simply cannot be seen and nothing DNB/AFI have offered has sufficient gravity to make it visible. In sum, as the Administrative Law Judge properly concluded in the Initial Decision, none of DNB/AFI's allegations “prove by a preponderance of the evidence that Impexia's success is based on information that Barsan Int'l knowingly disclosed in violation of Section 10(b)(13).” Initial Decision at 68-77.⁵

⁵ The underlying basis for much of DNB/AFI's circumstantial evidence claims is their assumption that Impexia would have to have conducted its business in the identical manner as DNB/AFI to have achieved success. As Impexia demonstrated in its own submissions and as the ALJ found, this assumption is patently false. Impexia's method of business was far simpler than that of DNB/AFI and, in fact, enabled DNB/AFI's and Impexia's common customers to achieve substantial cost savings with Impexia compared to the prices they were paying DNB/AFI. *See* Initial Decision at 56, 68-77.

IV. DNB/AFI's Claims Of Damages From The Alleged Violation Of The Shipping Act Lack A Credible Basis

DNB/AFI claim that they have suffered damages in the amount of \$11,676,474.00 as a result of the alleged violations of the Shipping Act by Barsan. As an initial matter, even if they could prove such violation, DNB/AFI have failed to show the connection between any violation committed by Barsan and the specific damages they are seeking. As noted by the Administrative Law Judge in the Initial Decision, only one of the alleged disclosures by Burcin Karadagli to her husband involved a customer that DNB/AFI claims was “stolen” by Impexia. Initial Decision at 58-59. However, the disclosure with respect to this customer was made in regards to a shipment by air over which the Commission has no jurisdiction. Moreover, as the Administrative Law Judge found with respect to that disclosure, DNB/AFI “do not explain what specific use, if any, they contend that Impexia made of the information about the oil drum pump kits in the invoice [that was disclosed by Burcin Karadagli].” Initial Decision at 59. Finally, the Administrative Law Judge also found that Impexia had presented credible evidence demonstrating that it had met this customer through a pre-existing relationship between Cuneyt Karadagli and the former business development manager for 77 Construction. Thus, DNB/AFI cannot present any evidence tying the alleged violation by Barsan to damages they have allegedly suffered.

The Shipping Act requires that DNB/AFI prove “actual injury” in order to recover damages, or reparations, for Shipping Act violations. 46 U.S.C. §41305(b). The Commission has held that “[p]roof of injury or damages must rest on reliable evidence that shows that the violation of law was the proximate cause of the damages.” *Adair v. Penn-Nordic Lines, Inc.*, 22 S.R.R. 11, 25 (ALJ 1991). “[A]lleged damages based on unreliable or speculative evidence are not allowed.” *Id.*

In *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (FMC 1990), the Commission addressed the type of evidence required to prove damages. In that case, involving the failure of the respondent to make the essential terms of three service contracts available to the complainant, the complainant sought profits that it would have made if the service contracts had been made available. There, like here, the Commission was not dealing with a damages summary prepared by an expert, but instead a summary prepared by the complainants' president. *Id.* at 1230.⁶ The Commission found that the complainant had not established its actual injury with a reasonable degree of certainty because its proof was so speculative and conjectural that it lacked the requisite degree of certainty. *Id.* at 1230.

Even more telling is the Commission's decision in *Rose Int'l Inc. v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119 (FMC 2001). There, the complaint alleged that the respondent violated the Shipping Act by creating a sham corporation to obtain transportation at rates or charges less than would otherwise be applicable. The complainant sought lost profits and lost growth opportunities as part of its reparation claims.

The Commission denied the lost profit submission on the grounds that it was speculative and failed to consider competition and other market factors in its analysis. *Id.* at 188. Among the defects identified by the Commission was that the complainant relied upon gross profits, instead of net profits, and that it failed to properly account for variable overhead costs (i.e., costs that vary depending upon the volume of business). *Id.* In addition, the complainant simply assumed that certain customers would have done business with it but for the action of the respondents. *Id.* at 189. The Commission found, however, that there was no proof that all of such business would have gone to the complainant, particularly given that markets are not static

⁶ Here, there is not even a damages summary prepared by the Bals.

and that the complainant had offered no testimony or affidavits from its purported customers to supports its claims that, but for the alleged Shipping Act violation, the customer would have done business with the complainant. *Id.* Finally, the Commission recognized that, in addition to a faulty, speculative and incomplete presentation in regard to lost profits, the complainant relied on profit and loss statements prepared by its president rather than an independent expert. “The Commission has found that a complainant that has relied on its president to supply the evidence of damages via a damages summary, even though supported somewhat by additional evidence was ‘an unconvincing basis upon which to award damages.’” *Id.*, citing *California Shipping*, 25 S.R.R. at 1230.

The Commission in *Rose Int’l* also rejected the complainant’s damages claim based on a lost growth opportunity. The complainant asserted that it had enjoyed steadily increasing growth before the violations complained of and that it was reasonable to infer that it would continue to grow thereafter. The Commission rejected the claim on the grounds that it was speculative to assume that there would have been dramatic growth but for the respondents’ actions, particularly given complainant’s failure to present an expert or independent analysis to support such assumptions. *Id.* at 190. Thus, having determined that “there is no credible basis upon which to determine a reasonable calculation of growth opportunity”, the Commission concluded that the complainant was not entitled to reparations. *Id.*

The same conclusions are warranted here because DNB/AFI have offered no credible evidence as to the damages allegedly suffered. Rather than retain an expert to provide an independent analysis of the reparations to which they are allegedly entitled, DNB/AFI simply submit rambling affidavits of the owners of the companies containing grossly overstated damage calculations based upon wildly unrealistic assumptions. Indeed, unlike in *Rose Int’l*, DNB/AFI

have provided no documentation whatsoever to support their damage calculations. Thus, rather than submit profit and loss statement or income tax reports for the years in question, DNB/AFI simply submit the bald statements and conclusions of their owners as to what their income and profit margins were for the years prior to the alleged Shipping Act violation and how those profit margins subsequently decreased. Further, the damage calculations are based upon assumptions that charitably would be referred to as wildly optimistic, and more realistically would be characterized as delusional. Thus, among the assumptions they make in calculating their damages are that they planned on growing their business “10 fold” in 2010 Baris Devrim Bal Affidavit at ¶ 38 (AFI/DNB App. 2234); and that, because of Impexia, DNB/AFI had to pay more for light fixtures in 2012 than it paid in 2010, *Id.* at ¶ 43 (AFI/DNB App. 2235); and that their damages are “perpetual,” *Id.* at ¶ 40 (AFI/DNB App. 2235).

In addition, DNB/AFI simply assume that all customers with whom they have ever done business would have continued to do business with them in perpetuity but for the actions of Burcin Karadagli. Such assumptions are nonsensical. First, at a minimum, DNB/AFI must show that information in regard to specific customers was disclosed to Impexia, which it has not done here. Further, as the Commission recognized in *Rose Int’l*, no such conclusion can be reached given DNB/AFI’s failure to provide any testimony or affidavits from its customers stating that but for the alleged Shipping Act violations, they would only have done business with DNB/AFI. 29 S.R.R. at 189. Finally, the conclusion that business would have remained with DNB/AFI forever is particularly unwarranted here, given that many of DNB/AFI’s “long time customers,” only have done business with them for a brief time or on a sporadic basis. Thus, for example, while DNB/AFI continuously refers to Ceytun as a long-time customer, the first time they ever

sold them any product was in the middle of 2010. FoF 111. DNB/AFI first provided material to 77 Construction in 2008. FoF 112.

The entire premise of DNB/AFI's damage presentation is also unfounded because it fails to consider market dynamics, as it is required to do under *Rose Int'l*. Essentially DNB/AFI argue that before Impexia came to the market, they were able to make exorbitant profits selling goods for military projects of the United States Army in Afghanistan, such as Camp Bastion. They complain that, now that there is some competition on such projects, their profit margin is only 15% instead of 30%. *See* Baris Devrim Bal Affidavit at ¶ 33 (AFI/DNB App. 2233). This assumption ignores that market dynamics change and that it is inevitable that there will be competition on huge construction projects, particularly involving the military, where the opportunity to charge above market rates exists. Under these circumstances, the notion that DNB/AFI should be able to recover reparations due to the fact that other parties are bidding on such projects is unwarranted.

Further, as pointed out in Impexia's Opposition to Complainant's Brief (Impexia Brief, pp. 50-59), basing DNB/AFI's damages calculations on Impexia's sales, invoices or banking data cannot be relied upon. Such a presentation relies on incorrect and faulty assumptions concerning, among other things, the usefulness of bank statements and commercial invoices to calculate net profits absent any information about Impexia's costs; the assumption that Impexia's business model and DNB/AFI's business model and method for doing business were identical, the assumption that DNB/AFI's customers would stay with them in perpetuity, and the assumption that market dynamics and market competition would have no impact on DNB/AFI's revenues or profits. These factors also make DNB/AFI's damages calculations purely speculative.

Finally, DNB/AFI rely on a theory derived from state trade secret law in claiming that they should be awarded “head start” damages for the alleged violations of the Shipping Act. State trade secret law is not, however, analogous to the Shipping Act requirement that proof of actual injury is required to justify reparations damages. Moreover, even assuming that the Commission would consider using such a theory of damages in this case, DNB/AFI have misapplied the applicable trade secret standards by simply asserting, without any evidentiary support, that, but for Impexia’s unlawful acquisition of DNB/AFI’s “protected information and materials,” Impexia would not have been able to start its business for at least seven years. In making this claim, DNB/AFI improperly assume that Impexia’s business model was identical to theirs despite overwhelming evidence presented by Impexia to the contrary. DNB/AFI’s theories of damages in this area, as in the other areas discussed above, are based upon pure speculation and wishful thinking. They do not support in any manner a claim for “actual injury” as required by the Shipping Act.

V. DNB/AFI’s Arguments About Alleged Improprieties in an INS Proceeding are Irrelevant

In what may be the most glaring demonstration of the barrenness of DNB/AFI’s arguments, they spend almost 20% of their brief on exceptions discussing improprieties in an immigration and naturalization service proceeding by Barsan’s President and Cuneyt Karadagli. In this regard, Barsan’s President admitted that in early 2009, more than a year before Impexia was formed, he allowed Cuneyt Karadagli to be represented as an employee of Barsan for the purpose of helping another Barsan employee with supervisory responsibilities qualify for an H-1B Visa, although Mr. Karadagli was not, and never has been, an employee of Barsan. The ALJ took appropriate note of this in his Initial Decision and its effect on the credibility of Barsan’s President. Initial Decision at 80-82. If the instant case were an INS proceeding, DNB/AFI’s

lengthy discussion of this issue might be warranted. This is, however, an FMC proceeding under the Shipping Act. Thus, in order to prevail, the DNB/AFI must establish a Shipping Act violation, not that in once instance a Barsan employee had a lapse in judgment. The Initial Decision's conclusions in this regard are sound and fully supported.

CONCLUSION

In sum, DNB/AFI case for their exceptions to the Initial Decision must fail for the same reasons as those upon which the Administrative Law Judge based his Initial Decision. Most importantly, there is simply no evidence to support DNB/AFI's allegations that Barsan improperly disclosed information to Cuneyt Karadagli or that Barsan had a vested interest in Impexia's success. Indeed, the credible evidence presented in this proceeding is all to the contrary. It is clear that Burcin Karadagli, acting for reasons that were solely and uniquely her own, disclosed information to her husband and these disclosures were entirely adverse to Barsan's interests, as proved by the fact that such disclosure were carefully hidden from Barsan and Barsan summarily terminated Burcin Karadagli's employment as soon as it became aware of the disclosures. Thus, any actions by Burcin Karadagli in this matter cannot be attributed to Barsan. Moreover, the vast majority of the disclosures in question were made with respect to air shipments over which the Commission has no jurisdiction and which, therefore, should not be considered in this case. Further, the circumstantial evidence presented by DNB/AFI in this proceeding is based on speculation, wishful thinking, and wildly inaccurate accusations directed at both Barsan and the Administrative Law Judge and are deserving of no credibility. Finally, even if it could be shown that Barsan committed a violation of the Shipping Act, DNB/AFI have offered no evidence to show that such a violation was approximate cause of any actual injury

they suffered. Accordingly, the Commission should uphold the findings of the Administrative Law Judge in the Initial Decision and dismiss all of DNB/AFI's claims against Barsan.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document was delivered to the following addressees at the addresses stated by depositing same in the United State mail, first class postage prepaid, and/or by electronic transmission, this 26th day of March, 2014:

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