

FEDERAL MARITIME COMMISSION

DNB EXPORTS LLC, AND AFI
ELEKTROMEKANIK VE
ELEKTRONIK SAN. TIC. LTD.
STI.

Complainants,

v.

BARSAN GLOBAL LOGISTIKS
VE GUMRUK MUSAVIRLIGI
A.S., BARSAN
INTERNATIONAL, INC., AND
IMPEXIA INC.

Respondents.

Docket No. 11-07

Served: September 4, 2014

BY THE COMMISSION: Mario CORDERO, *Chairman*;
Richard A. LIDINSKY, Jr. and William P. DOYLE,
Commissioners. Rebecca F. DYE, *Commissioner*, dissenting.
Michael A. KHOURI, *Commissioner*, dissenting.

Order on Exceptions to Initial Decision

I. PROCEEDING

This proceeding was initiated by a complaint filed by DNB Exports LLC and AFI Elektromekanik Ve Elektronik San. Tic. Ltd.

Sti. (DNB/AFI or Complainants) on April 14, 2011. Complainant AFI is a Turkish corporation and a wholesale distributor of U.S. standard electrical goods to construction firms in the Middle East. Complainant DNB is a Delaware corporation and acts as AFI's procurement agent in the United States. In their Complaint, DNB/AFI allege that Barsan Global Logistiks Ve Gumruk Musavirligi A.S. (BGL), Barsan International, Inc. (Barsan Int'l), and Impexia Inc. (Impexia) (collectively Respondents), violated section 10(b)(13) of the Shipping Act of 1984 (the Shipping Act).¹ BGL is a Turkish corporation and the parent company of Barsan Int'l. Barsan Int'l is a New York corporation, and is licensed by the Commission as a non-vessel-operating common carrier (NVOCC) and ocean freight forwarder (OFF). Impexia is a New Jersey corporation, and acts as procurement firm specializing in providing overseas services to the United States government and global construction companies.

DNB and Barsan Int'l signed a Contract Carrier Agreement on January 15, 2009, and shortly thereafter, DNB began tendering shipments to Barsan Int'l to be transported from the United States to Turkey and other foreign countries. Complainants allege that Respondents violated section 10(b)(13) by disclosing Complainants' proprietary information to Impexia, thereby causing Complainants to lose customers and business. Specifically, Complainants allege (1) that Barsan Int'l employed Burcin Karadagli as an accounting Manager, and that in 2009, she began

¹ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. Section 10(b)(13) is now codified as 46 U.S.C. § 41103(a), and provides that "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). The Commission continues to cite provisions of the Shipping Act by their section numbers as originally enacted.

forwarding information concerning Complainants' shipments, provided to Barsan Int'l by Complainants, to her husband Cuneyt Karadagli, the president of Impexia, and (2) that BGL, Barsan Int'l, and Impexia used that information to steal customers and business from Complainants.

On January 24, 2014, an Administrative Law Judge (ALJ) issued an Initial Decision (ID). *DNB Exports LLC v. Barsan Global Logistics*, 33 S.R.R. 133 (ALJ 2014).² In the ID, the ALJ concluded that DNB/AFI failed to meet their burden of proving by a preponderance of the evidence that Respondent Barsan Int'l violated section 10(b)(13) and dismissed with prejudice the complaint against Barsan Int'l. *Id.* at 192. The ALJ also concluded that DNB/AFI did not establish that either Respondent Impexia or Respondent BGL is subject to the Commission's jurisdiction, and he therefore dismissed with prejudice the complaint against both Impexia and BGL. *Id.* at 164, 169.

II. EXCEPTIONS, REPLIES, AND MOTIONS

Complainants filed Exceptions to the ID on February 18, 2014. In Appendix A to their Exceptions, Complainants list numbered exceptions in which they identify the following alleged issues: (1) the lack of factual support for conclusions reached in the ID; (2) the need to determine whether the information disclosed by Burcin Karadagli in certain email messages is protected under section 10(b)(13); (3) the failure to consider the credibility of testimony provided by Ugur Aksu³ and Cuneyt Karadagli; (4) the connection between Barsan Int'l and Impexia; (5) errors in

² In addition to the ID, on January 24, 2014, the ALJ also issued (1) an Order on Motions for Confidential Treatment of Merits Briefs and Materials filed with Merits Briefs, *DNB Exports LLC v. Barsan Global Logistics*, 33 S.R.R. 124 (ALJ 2014); and (2) an Order on Complainants' Motion for Submission of Supplemental Evidence (ALJ Jan. 24, 2014). Complainants did not file exceptions to the conclusions reached in either of these two Orders.

³ Ugur Aksu is the president of Barsan Int'l and BGL. 33 S.R.R. at 146.

identification of some shipments as air shipments rather than ocean shipments; (6) whether Barsan Int'l knowingly disclosed protected information based on the fact that Burcin Karadagli, a Barsan Int'l manager, knowingly disclosed the information in emails forwarded to her husband Cuneyt Karadagli; (7) the erroneous conclusion that the evidence does not support Complainants' contention that Impexia learned about certain customers of Complainants from information unlawfully disclosed by Barsan Int'l; (8) the erroneous conclusion that Complainants did not prove that Burcin Karadagli is an officer of Barsan Int'l; (9) the erroneous conclusion that Complainants have not identified any actual injury that resulted from Impexia's receipt of Complainants' information; (10) the erroneous conclusion that Impexia's success comes from customers who tell Impexia the products they want, rather than from Complainants' information that Barsan Int'l provided to Impexia; and (11) the erroneous conclusion that "section 10(b)(13) 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, especially in a circumstance when a spouse of an employee is a competitor to a current shipper customer." Exceptions at 50-55.

Barsan Int'l and Impexia filed replies to Complainants' Exceptions on March 26, 2014. In its Response to Complainants' Exceptions, Barsan Int'l makes the following arguments: (1) Barsan did not disclose proprietary information, as Burcin Karadagli's actions cannot be attributed to Barsan and Barsan did not know about Burcin Karadagli's disclosures to her husband; (2) Burcin Karadagli's improper disclosures to her husband involved air shipments over which the Commission has no jurisdiction; (3) the circumstantial evidence submitted by Complainants is based on conjecture, speculation, or mere possibility, and therefore is unreliable; (4) Complainants' claims of damages from the alleged violation of the Shipping Act lack a credible basis; and (5)

Complainants' arguments about alleged improprieties in an immigration proceeding are irrelevant.⁴

In its Opposition to Complainants' Exceptions, Impexia argues that the ALJ properly determined that the Commission has no jurisdiction over Impexia, and that Complainants' "irrelevant, speculative, and unsupported 'facts' can in no way be accepted as credible evidence." Impexia Opposition at 8. With regard to jurisdiction, Impexia states that Complainants have failed to prove that Impexia is a common carrier, marine terminal operator, or ocean freight forwarder subject to the Shipping Act. Impexia argues that it "is merely a procurement firm that hires shipping entities, e.g., ocean freight forwarders/NVOCCs, to transport products overseas," and therefore, the Commission lacks personal jurisdiction over it. *Id.* at 4. Impexia notes that based on Complainants' argument that Impexia was a corporate shell or alter ego of BGL and/or Barsan, the ALJ ordered Complainants to address the factors set out in *Rose Int'l Inc. v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119 (FMC 2001), to determine whether the corporate veil should be pierced. Impexia states that Complainants have failed to address the factors set out in *Rose*, and therefore their claim that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l (Barsan Respondents) should be considered abandoned. If the claim is not considered abandoned, Impexia argues that the weight of the evidence supports a finding against piercing the corporate veil, stating that Complainants have failed to meet their burden of proof to show the following: that Impexia and Barsan Respondents have overlapping officers; that there is shared ownership between Impexia and Barsan; that there is commingling of assets; or that there is inadequate capitalization. Finally, Impexia argues that because Impexia is not a regulated entity, section 10(b)(13) is not applicable to it. *Id.* at 7.

⁴ In a footnote, Barsan Int'l states that Complainants' Exceptions exceed the page limit set out in the Commission's regulations at 46 C.F.R. § 502.227(e), and that the "appropriate response should be to strike the Brief." Barsan Response at 1 n. 2.

Following the filing of Respondents' replies, Complainants filed a Motion to Strike Footnote 2 of Barsan Int'l's Response to Exceptions. In footnote 2, Barsan Int'l noted that Complainants' Exceptions "[s]ubstantially exceed the page limit set forth in the Commission's regulations. 46 C.F.R. § 502.227(e)," and stated that if Complainants "needed more pages they should have requested permission as provided in this rule." Barsan Int'l Response at 1 n. 2. Barsan Int'l stated that the appropriate response should be to strike the Brief. *Id.*

In their Motion to Strike Footnote 2, Complainants argue that the 50 page limit contained in the Commission's regulation at 46 C.F.R. § 502.227(e) "clearly applies to the brief only," and that the "pages of exceptions should not be counted into the pages of the brief." Motion to Strike Footnote 2 at 2 (page not numbered). Alternatively, Complainants state that if the Commission concludes that 46 C.F.R. § 502.227(a)(2) and (e) do include the exceptions as part of the page limitation, Complainants "request the Commission consider this as a motion requesting waiver of the page and time limitation, and to allow the additional pages in subject brief." *Id.* Finally, Complainants filed a Motion to Strike Impexia's Opposition on the grounds that Impexia did not file a motion for enlargement of time to file its reply, and the reply was filed 14 days after the due date of March 12, 2014.

On March 28, 2014, Impexia filed a Reply to Complainants' Motion to Strike Impexia's Opposition, stating that it was prepared to file a request for an extension of time to file its reply, when the Commission's Secretary served a Notice that the time to file replies to Exceptions was extended to March 26, 2014. Impexia states that the day after the Notice was served, it called the Secretary's office and confirmed that the Notice extending the time to file replies applied to both Impexia and Barsan Int'l. Impexia's Reply at 2.

III. DISCUSSION

A. Motions

As noted above, Barsan Int'l states in Footnote 2 of its Response to Complainants' Exceptions that the Exceptions exceed the page limit set out in the Commission's regulations, and that the appropriate response should be to strike Complainants' Brief. Barsan Int'l did not file a formal Motion to Strike. Complainants filed a Motion to Strike Footnote 2, or alternatively, a Motion to Waive the Page Limitations of 46 C.F.R. § 502.227(e).

In their Motion to Waive the Page Limitations, Complainants request waiver of the requirement that "[a]ll briefs and replies filed pursuant to this section shall ordinarily be limited to fifty (50) pages in length, exclusive of pages containing the table of contents, table of authorities, and certificate of service, unless the Commission allows the parties to exceed this limit for good cause shown and upon application filed not later than five (5) days before the time fixed for filing of such a brief or reply." 46 C.F.R. § 502.227(e). Complainants' Brief and Attachment A together total 55 pages, or five pages over the 50 page limit. We treat Complainants' motion requesting waiver of the page limit as an application requesting leave to exceed the page limit, and we grant the request.

The Secretary's Notice extending the time to file replies applied to all Respondents in the proceeding, and Impexia's Opposition was timely filed. Therefore, Complainants' Motion to Strike Impexia's opposition is denied.

B. Exceptions to the Initial Decision

1. *Standard of Review*

Pursuant to the Commission's Rules of Practice and Procedure, when exceptions are filed to, or the Commission reviews, an initial decision, "the Commission, except as it may limit

the issues upon notice or by rule, will have all the powers which it would have in making the initial decision.” 46 C.F.R. § 502.227(a)(6). Accordingly, we review the Initial Decision *de novo*.

2. *Findings of Fact*

In the ID, the ALJ set out 26 findings of fact related to Complainants; Respondents; connections between Barsan Int’l and BGL; Burcin Karadagli’s positions as an employee of Barsan Int’l; the relationship between Burcin and Cuneyt Karadagli, and Cuneyt’s position at Impexia; the contract carrier agreement between DNB and Barsan Int’l; the nature of the shipments that Barsan Int’l handled for Complainants, the kind of information Complainants supplied to Barsan Int’l related to the shipments, and the time period within which Barsan Int’l handled the shipments; and the identities of Barsan Int’l personnel who had access to Complainants’ shipping information. 33 S.R.R. at 145-147. The ALJ linked each finding of fact to a citation in the record. Complainants do not take exception to the 26 findings of fact in the ID. We find no error, and adopt the ALJ’s Findings of Fact, numbered 1 through 26.

3. *Issues Concerning Conclusions of Law*

As noted above, the ALJ concluded that Complainants did not establish that the Commission has jurisdiction over either Impexia or BGL for the alleged violations of section 10(b)(13), and the ALJ therefore dismissed the claims against Impexia and BGL with prejudice. *Id.* at 164, 169. With regard to Barsan Int’l, the ALJ concluded that while the Commission has jurisdiction over the claims against Barsan Int’l, Complainants did not meet their burden of proving by a preponderance of the evidence that Barsan Int’l violated section 10(b)(13) by disclosing protected information. The ALJ stated that to “prove that Barsan Int’l, a corporation, violated section 10(b)(13), DNB/AFI must prove by a preponderance of the evidence that Barsan Int’l knowingly disclosed protected

information.” *Id.* at 171. The ALJ concluded that Complainants did not meet this burden.

Section 10(b)(13) prohibits disclosure of information, by a regulated entity, related to “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 “may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier,” or if the information “may improperly disclose its business transaction to a competitor.” 46 U.S.C. § 41103(a). In order to establish a violation of section 10(b)(13), the following elements must be shown: (1) disclosure of information concerning the nature, kind, quantity, destination, consignee or routing of property tendered or delivered to a common carrier; (2) that such disclosure was knowingly made by a common carrier or ocean freight forwarder, either alone or in conjunction with any other person; and (3) that the information disclosed is of the type that could be used to the detriment or prejudice of the shipper, consignee, or any common carrier, or could improperly disclose its business transaction to a competitor. In order to receive reparations for a violation of section 10(b)(13), a complainant must show that disclosure of information caused actual injury.⁵ The ALJ concluded that while Complainants’ disclosed

⁵ The language in the current section 10(b)(13) tracks language that first appeared in section 20 of the Shipping Act of 1916, and has been carried forward without comment as to the intent of the drafters. *See, e.g.*, P.L. 64-260, chapter 451 (September 7, 1916). The concept appears to have been taken from a similar provision in the Interstate Commerce Act, which has also been carried forward and appears currently at 49 U.S.C. § 11904(a) and (b). The provision had previously appeared in section 11910(a) of the Interstate Commerce Act, and the purpose of the section has been described as follows: “The purpose of Section 11910(a) is to curb the disclosure of commercial business information by a carrier or its agents to business competitors of the shipper or consignee, and the information of which disclosure is prohibited is that which may be used to the prejudice of such shipper or consignee.” JOHN GUANDOLO, *TRANSPORTATION LAW*, at 55 (4th ed. 1983). There is a significant difference, however, between the provision applicable to rail carriers and section 10(b)(13), in that the rail carrier may be fined not more than \$1,000 for disclosing proprietary shipper information

information was the kind of information intended to be protected by section 10(b)(13), Barsan Int'l was not responsible for the disclosure. Therefore, he concluded that Barsan Int'l did not violate section 10(b)(13).

Complainants' Exceptions raise issues concerning (1) the ALJ's conclusions about Complainants' direct evidence, including (a) whether Barsan Int'l, acting as a common carrier or ocean freight forwarder, knowingly disclosed protected information based on the fact that Burcin Karadagli, Barsan Int'l's Accounting Manager, knowingly disclosed such information, and (b) whether the Commission has jurisdiction over shipments involving air movements; (2) the ALJ's conclusions about Complainants' circumstantial evidence, including the use of inferences; (3) whether Complainants have identified any actual injury that resulted from Impexia's receipt of Complainants' information; and (4) whether actual damages resulted from disclosure of Complainants' information.

without the consent of the shipper or consignee, whereas under the Shipping Act, a shipper or consignee must seek reparations for a violation of section 10(b)(13). As with section 10(b)(13), there does not appear to be significant precedent concerning violations of § 11904. In one decision, a court concluded that the prohibition against disclosure of proprietary information was not violated by the rail carrier, despite the fact that the carrier issued freight bills which incorporated the names of the original shipper and consignee. *United States v. Balt. & Ohio R.R. Co.*, 319 F. Supp. 1103 (D. Md. 1970) (*B. & O. R. Co.*). The court in *B. & O. R. Co.* noted an earlier Interstate Commerce Commission (ICC) decision in which reparations were sought for disclosure of information, *Mendell v. Long Island R.R. Co.*, 227 I.C.C. 278 (1938). In *Mendell*, the ICC concluded that there was no violation of the Interstate Commerce Act, on the grounds that the only showing made by complainant was that "certain disclosures were made to ultimate consignees, and there is no showing that such parties derived any information therefrom." 227 I.C.C. at 280.

a. Issues Raised Concerning Direct Evidence

(1) Did Barsan Int'l knowingly disclose Complainants' information

The ALJ concluded that the Commission has jurisdiction over the section 10(b)(13) allegations against Barsan Int'l,⁶ based on Barsan Int'l's status as a licensed NVOCC and ocean freight forwarder. 33 S.R.R. at 169. In addition, the ALJ determined that "the information disclosed by Burcin Karadagli in the February 2, 2009, February 27, 2009, April 29, 2009, May 1, 2009, May 22, 2009, June 1, 2009, and June 3, 2009, emails is protected by section 10(b)(13)," as the information included invoices, consignees, destinations, cargo descriptions, and prices related to Complainants' shipments tendered to Barsan Int'l, and that this is the kind of information intended to be protected under section 10(b)(13). *See id.* at 173-178. The ALJ also found that while Burcin Karadagli knowingly disclosed the protected information, her knowing disclosure of information protected by section 10(b)(13) did "not necessarily mean that Barsan Int'l knowingly disclosed the information." *Id.* at 180. The ALJ ultimately concluded that Barsan Int'l did not knowingly disclose the protected information, based on the following analysis:

The emails that Burcin Karadagli sent to Cuneyt Karadagli were not copied to any other Barsan Int'l employee and DNB/AFI have not identified any evidence that would support a finding that Barsan Int'l had actual knowledge that Burcin Karadagli sent the emails DNB/AFI have not proved that Burcin is an officer or director of Barsan Int'l, nor have they established that Barsan Int'l put

⁶ Complainants do not take exception to the ALJ's conclusions that they did not meet their burden of showing that the Commission has jurisdiction over either BGL or Impexia for purposes of finding that either entity violated section 10(b)(13).

her “in such a position of general authority . . . that notice to [her] will be notice to [Barsan Int’l] 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 prove Burcin Karadagli was acting within the scope of her employment when she sent the emails. Therefore, I find that Barsan Int’l did not knowingly disclose the information in the emails to Cuneyt Karadagli.

Id.

In order to find a violation of section 10(b)(13), the Commission must find that Barsan Int’l, an entity over which the Commission has jurisdiction, disclosed Complainants’ protected information without Complainants’ consent. Burcin Karadagli was employed by Barsan Int’l as an accounting clerk from 2001 to 2004, and as an Accounting Manager/Accounting Operations Supervisor from 2004 to 2011. *Id.* at 139. According to Ugur Aksu, President and Director of Barsan Int’l, Burcin Karadagli “was routinely provided with bills of lading and other Barsan Int’l shipping records in order to perform her job responsibilities.” Declaration of Ugur Aksu, Barsan App. at 4.

As Barsan Int’l’s Accounting Manager/Accounting Operations Supervisor, Burcin Karadagli is considered an agent of Barsan Int’l. Agency is defined as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). Agency “encompasses a wide and diverse range of relationships and circumstances,” and the “elements of common-law agency are present in the relationships between employer and employee, corporation and officer” *Id.* ch. 1, cmt. C.

Generally, “for purposes of determining a principal’s legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent’s duties to the principal,” unless the agent “acts adversely to the principal,” or “is subject to a duty to another not to disclose the fact to the principal.” *Id.* § 5.03. Barsan Int’l argues that the “adverse interest exception” should be used to analyze the question of whether Burcin Karadagli’s disclosure of protected information should be imputed to Barsan Int’l. The “adverse interest exception” provides that there is no imputation of knowledge to a principal “if an agent acts adversely to the principal,” subject to two exceptions. One of the exceptions provides that notice of a fact that an agent knows or has reason to know is imputed to the principal when necessary to protect the rights of a third party who dealt with the principal in good faith. The RESTATEMENT provides as follows:

§ 5.04 An Agent Who Acts Adversely to a Principal

For purposes of determining a principal’s legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent’s own purposes or those of another person. Nevertheless, notice is imputed

- (a) When necessary to protect the rights of a third party who dealt with the principal in good faith; or
- (b) When the principal has ratified or knowingly retained a benefit from the agent’s action.

In this case, Complainants dealt with Barsan Int’l in good faith when they signed a “Contract Carrier Agreement” with Barsan

Int'l, and provided Barsan Int'l with proprietary information about commodities being shipped, identifying numbers or codes associated with these commodities, unit prices for the commodities, and consignees to whom the commodities were being shipped. Therefore, even if Burcin Karadagli acted solely for her own purposes or those of her husband, Cuneyt Karadagli, notice of her actions in forwarding Complainants' proprietary information may be imputed to Barsan Int'l, based on the fact that Complainants dealt with Barsan Int'l in good faith. *See* RESTATEMENT § 5.04(a).

We also note evidence in the record of Barsan Int'l's relationship with Cuneyt Karadagli and Impexia. Complainants introduced evidence intended to show that Cuneyt Karadagli was at one time an employee of Barsan Int'l. While Barsan Int'l denied that Mr. Karadagli had been an employee, the ALJ concluded that "[e]ither Cuneyt Karadagli was a bona fide employee of Barsan Int'l in 2009, in which case Barsan Int'l and Impexia falsely claim that he was not, or Barsan Int'l falsely represented that he was an employee" 33 S.R.R. at 190. In addition, there is evidence in the record that Impexia used Barsan Int'l's address for certain purposes. While Barsan Int'l stated that it was not aware of Impexia's use of its address, the ALJ concluded that "[w]hether or not BGL/Barsan were aware of it, the evidence establishes that Impexia used the Barsan Int'l address, 17-09 Zink Place Unit 5, as its mailing address on its invoices and in emails." *Id.* at 157.

We conclude that notice of the fact that Burcin Karadagli was knowingly disclosing Complainants' information to her husband is to be imputed to Barsan Int'l, based on the following facts: (1) the fact that Barsan Int'l placed Burcin Karadagli in the position of Accounting Manager/Accounting Operations Supervisor and routinely provided her with bills of lading and other shipping records so that she could perform her job responsibilities, thereby giving her access to shippers' proprietary information, and (2) the fact that Complainants dealt with Barsan Int'l in good faith when they signed a Contract Carrier Agreement with Barsan Int'l and

provided Barsan Int'l with their proprietary information related to shipments tendered to the carrier. Because notice of Burcin Karadagli's knowing disclosure of information is imputed to her employer Barsan Int'l, Barsan Int'l is found responsible for knowing disclosure of Complainants' information in the emails forwarded by Burcin Karadagli to Cuneyt Karadagli.

(2) Complainants' disclosed information relating to shipments moving by water

In the ID, the ALJ determined that Complainants' information, related to a shipment by water and protected by section 10(b)(13), was disclosed in connection with one email forwarded on February 22, 2011. The ALJ also found that while information contained in emails of February 2, 2009; February 27, 2009; April 29, 2009; May 1, 2009; May 22, 2009; June 1, 2009; and June 3, 2009, is the kind of information protected by section 10(b)(13), "in each of those cases, the information concerned a shipment by air, not water." 33 S.R.R. at 179. While the ALJ concluded that information forwarded on February 22, 2011, involved a shipment by water, Complainants state that the ALJ failed to find that disclosures made on April 29, 2009, and on June 26, 2009, also involved information related to shipments by water. Discussion of information disclosed on these three dates follows.

(a) February 22, 2011 disclosure of information

The information attached to the email forwarded by Burcin Karadagli to her husband on February 22, 2011, is related to an ocean shipment. Documents forwarded in the email include a Barsan Int'l bill of lading for a DNB shipment, showing the port of loading as New York and the port of discharge as Ambarli, which serves Istanbul. The consignee is shown as GMG, an affiliate of AFI. *See* 33 S.R.R. at 178. In addition, the evidence also contains a DNB invoice identifying products, product numbers, and product

unit prices. This is the kind of information intended to be protected from disclosure under section 10(b)(13). *See* DNB/AFI App. at 482-488.

(b) April 29, 2009 disclosure of information

In addition to the email of February 22, 2011, emails forwarded by Burcin Karadagli to her husband on April 29, 2009, and June 26, 2009, also contain information appearing to relate to ocean shipments. Documents in the information forwarded on April 29, 2009, include an email from Barsan to AFI concerning freight that arrived that day at the Barsan warehouse, and referencing a full container delivery involving Mersin, a port in southern Turkey. The documents also include a check dated April 29, 2009, from Barsan Int'l to a vessel-operating common carrier (VOCC). Also included in the documents are five BGL "Receiving Reports," each separately numbered from 10361 through 10365, showing three different suppliers and AFI as the consignee. In addition, packing lists from three suppliers are included, showing commodity descriptions, quantities, and item numbers.

The ALJ concluded that the attachments to the April 29, 2009, email forwarded by Burcin Karadagli to her husband related to property shipped by air rather than water. 33 S.R.R. at 179. Examination of the numbers on the suppliers' packing lists, compared to a listing of packing list numbers related to an air shipment that appear on a later email, reveals that two of the shipments (DNB/AFI App. 395, 402) are not included in the air shipment. While the documents do not conclusively establish whether these two shipments moved by air or water, taking into consideration the April 29, 2009, email referencing freight that arrived at Barsan's warehouse that day and ocean shipment, as well as the check dated April 29, 2009, from Barsan to a VOCC, it appears more likely than not that these two shipments were transported by ocean carrier.

In connection with one of the shipments, the disclosed documents include information that identifies a company dealing in wholesale electrical supplies, but the remainder of the information on the documents is illegible. *Id.* at 396-397. In connection with the second shipment, there is a document dated April 27, 2009, which identifies the supplier and AFI Elektrik as the purchaser. It includes information about the commodities being shipped, including commodity item numbers, descriptions, and quantities. *Id.* at 403. This is the kind of information that is protected from disclosure under section 10(b)(13).

(c) June 26, 2009 disclosure of information

Included with information forwarded June 26, 2009, by Burcin Karadagli to her husband, is a Turkon Line bill of lading, issued June 19, 2009, showing Barsan Int'l as the shipper and Barsan Global Logistik as consignee, with New York as the port of loading and Istanbul as the port of discharge. *Id.* at 458-460. Also included is what appears to be a Barsan Int'l bill of lading dated June 19, 2009, identifying DNB Exports as the shipper, GMG as the consignee, New York as the port of loading and Ambarli (Istanbul) as the port of discharge, and the commodity being shipped. *Id.* at 479. Finally, included in the email attachments is a DNB Exports' commercial invoice, identifying commodity item numbers, quantities, commodity descriptions, and unit prices. *Id.* at 480-481. Again, this is the kind of information intended to be protected from disclosure under section 10(b)(13).

(3) Does section 10(b)(13) cover disclosed information related to shipments moving by air

As discussed above, Complainants submitted copies of emails forwarded by Burcin Karadagli to her husband, Cuneyt Karadagli, and the ALJ concluded that only one of the emails, forwarded February 22, 2011, contained information about a shipment by water. 33 S.R.R. at 179. The ALJ concluded that the remainder of the emails contained information about shipments by

air, rather than water, and noted that BGL/Barsan respondents argued that the purported transmission of proprietary information about air shipments is not within the scope of the Shipping Act or the Commission's jurisdiction. *Id.* The ALJ stated that while respondents' arguments regarding air shipments raised questions as to the Commission's jurisdiction under section 10(b)(13), it was not necessary to answer these questions, "[g]iven the ultimate resolution of this proceeding." The ALJ concluded as follows:

For the purposes of this decision, I assume 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). Therefore I find that the information disclosed by Burcin Karadagli in the February 2, 2009, February 27, 2009, April 29, 2009, May 1, 2009, May 22, 2009, June 1, 2009, and June 2, 2009, emails is protected by section 10(b)(13).

Id. Complainants "request that the Commission deal directly with the jurisdiction issue since an 'assumption' by an ALJ is of little legal consequence, especially since Complainants have severe reservations as to 'the ultimate resolution of this proceeding' as it was ultimately resolved by the ALJ." Exceptions at 13.

Complainants state that Barsan Int'l "handles AFI/DNB's ocean and air shipments," and the air and ocean shipments must be considered together because "[t]he information disclosed from ocean or air cannot be separated . . ." *Id.* at 15. Complainants refer to a specific email forwarded by Burcin Karadagli on April 29, 2009, to her husband Cuneyt Karadagli, which included attachments containing "detailed information for both air and ocean shipments related to suppliers, product descriptions, and AFI Catalogue numbers shared with Barsan Int'l," and state that the "information for both air and ocean was crisscrossed to develop

products and services destined for particular destinations, projects and overseas customers.” *Id.* Complainants argue as follows:

It is reasonable to conclude that sensitive information was transmitted from the information and documents related to Complainants’ ocean shipments, and that such disclosures were contained in both air and ocean transactions. The main point in this is that the ocean documentation contained sensitive product, supplier, and pricing information, and that this documentation rarely contained customer and project information. That information, however, was contained in the air or air courier information so that Barsan Int’l could by combining the information on both ocean and air documentation develop a composite picture of the whole transaction for particular projects.

Id. at 17. Complainants argue that “the ocean/air distinction does not make a difference since the marketing picture created by Barsan and Impexia from Complainants’ information and documentation is really a composite of information from both air and ocean shipments.” *Id.* Complainants “request that the Commission find that it has jurisdiction to consider air and ocean shipments with regard to 46 [U.S.C.] §41103 when, as is the case here, the information disclosed involves both modes of transport to the same customers and the composite of information from the documentation of both modes of transport complement to provide a complete picture of the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to Barsan.” *Id.* at 18-19.

To the extent that Complainants’ information disclosed by Barsan Int’l related to shipments that moved by water in the foreign commerce of the United States, Barsan Int’l operated as an OTI subject to the Commission’s jurisdiction, and information related to the shipments may be protected by section 10(b)(13). Complainants

introduced copies of emails sent by Complainants to Barsan Int'l, and forwarded by Burcin Karadagli to her husband Cuneyt Karadagli. The emails contained information concerning the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to Barsan Int'l, a common carrier over which the Commission has jurisdiction, and Complainants did not consent to disclosure of the information. Therefore, this information may be protected from disclosure under section 10(b)(13). In addition, this information could be used to the detriment or prejudice of Complainants, or could improperly disclose their business transactions to a competitor. *See* 46 U.S.C. § 41103(a)(1) – (2).

To the extent that information disclosed in the emails forwarded by Burcin Karadagli to her husband related solely to shipments by air, Barsan Int'l would not have operated as a “common carrier, marine terminal operator, or ocean freight forwarder” subject to the prohibition in section 10(b)(13).⁷ Common carriers, marine terminal operators, and ocean freight forwarders subject to the Shipping Act perform activities related to the movement of cargo by water. Therefore, the disclosure of

⁷ A common carrier is defined in the Shipping Act as follows: “The term ‘common carrier’ – (A) 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 of point or 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)(A). A marine terminal operator is defined as follows: “The term ‘marine terminal operator’ means 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” *Id.* at § 40102(14). An ocean freight forwarder is defined as follows: “The term ‘ocean freight forwarder’ means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.” *Id.* at § 40102(18).

information related to shipments transported solely by air does not appear to be covered by section 10(b)(13).

- (4) Barsan Int'l violated section 10(b)(13) by disclosing Complainants' protected information on shipments moving by water

Based on direct evidence that Complainants' information related to shipments moving by water between the United States and a foreign country was (1) disclosed by Barsan Int'l without Complainants' consent, and (2) was of the type that could be used to Complainants' detriment or could improperly disclose Complainants' business transactions to a competitor, Complainants have established that Barsan Int'l violated section 10(b)(13) in connection with disclosure of information related to those shipments. As set out above, information contained in disclosures made on February 22, 2011; April 29, 2009; and June 26, 2009, related to shipments by water and is of the type protected under section 10(b)(13). Having shown that Barsan Int'l knowingly disclosed Complainants' information that is protectable under section 10(b)(13), Complainants must show that they suffered actual injury as a result of the disclosed information, in order to be awarded reparations. We will address actual injury following consideration of Complainants' circumstantial evidence and arguments related to this evidence.

b. Issues Raised Concerning Circumstantial Evidence

In addition to the direct evidence of information forwarded by Burcin Karadagli, the ALJ considered circumstantial evidence submitted by DNB/AFI. In their Brief, DNB/AFI had argued that while "there is a paucity of information provided by Respondents between beginning activities described commencing in 2009, through the April, 2011 date when the complaint was filed," there was "a wealth of information from which logical inferences, consistent with case law, can be made that establish that the disclosures from both ocean and air shipments were unlawfully

disseminated to Impexia from 2009 through April, 2011.” DNB/AFI Brief at 17. In their Exceptions, Complainants argue that “due to the nature and paucity of documentation provided by Respondents, and the fact that certain Respondents are given to misrepresent facts, this is a case which can only be viewed through circumstantial evidence.” Exceptions at 21.

The ALJ identified four categories of circumstantial evidence relied upon by Complainants to prove that Barsan Int’l knowingly disclosed protected information to Cuneyt Karadagli/Impexia:

(1) DNB/AFI contend that the fact that “a listing of Impexia’s leading customers is a mirror image of Complainants’ customers” could have only resulted if Barsan Int’l gave Impexia information protected by section 10(b)(13); (2) DNB/AFI’s [sic] contend that their investment in money and time establishing their business in contrast to Cuneyt Karadagli/Impexia’s immediate success with essentially a one-person operation could have only resulted if Barsan Int’l gave Impexia information protected by section 10(b)(13); (3) Impexia’s use of products from Harger Lightning & Grounding could only have resulted from use of information supplied by Barsan Int’l; and (4) Cuneyt Karadagli does not have the knowledge or experience to operate Impexia without help from Barsan Int’l. (DNB/AFI Brief at 21-26.)

33 S.R.R. at 181. The ALJ considered the circumstantial evidence in the four categories, and concluded in each case that the evidence did not prove that Barsan Int’l violated section 10(b)(13).

In their Exceptions, Complainants argue that the ALJ “never consider[ed] the record as a whole, as the law requires, to determine whether a case was sufficiently presented by circumstantial evidence by Complainants to meet the preponderance of the evidence standard.” Exceptions at 19. In other words, according to Complainants, “the ALJ never properly reviewed the case from a circumstantial evidence perspective.” *Id.*

(1) Circumstantial evidence relating to Complainants’ customers taken by Impexia

In their Exceptions, Complainants point to circumstantial evidence in connection with seven companies it states were long time customers, “which were literally taken by Impexia through information provided by Barsan Int’l.” Metag, 77 Insaat, Feka Ins., Epik Ins., Ayken Elk, Yenigun Ins., Ceytun, and Delta Om Muh. *Id.* at 35. In connection with each company except Epik Ins., Complainants cite circumstantial evidence in the record which they argue “clearly indicates that the success of Impexia can only be gauged by the information made available from the shipping files maintained by Barsan for AFI’s shipments.” *Id.* at 36. Complainants’ evidence in connection with each company is considered below.

(a) 77 Insaat (77 Construction)

Complainants cite to the following pages in their Appendix in support of their contention that information relating to shipments directed to 77 Construction were disclosed by Barsan Int’l: AFI/DNB App. at 1376, 1412, 1413, 1437, 1438, and 1505. *Id.* at 26.⁸ The documents identified by Complainants include Shipper’s

⁸ The ALJ denied Complainants’ motion for confidential treatment of documents cited by Complainants in connection with each company, contained in pages 1028 through 1793 in Complainants’ Appendix. 33 S.R.R. at 128. No exceptions were filed to this determination.

Letters of Instruction, one of which identifies Barsan Int'l as the forwarding agent (DNB/AFI App. at 1376), DNB Exports as the U. S. Principal Party in Interest (USPPI), and 77 Construction in Baghdad, Iraq as the consignee. Barsan Int'l does not appear on the other documents identified by Complainants.

The ALJ concluded that the evidence in the record does not support Complainants' contention that Impexia learned about 77 Construction from information unlawfully disclosed by Barsan Int'l. 33 S.R.R. at 182. Complainants argue that "it is more likely than not, considering the clear record that has been established of Barsan providing information and documents of Complainants' customers, that Barsan provided protected information to Impexia related to this customer prior to Impexia contacting this firm, as well as after that date." Exceptions at 26. Complainants have failed to show, however, in connection with the documents relating to 77 Construction, that information in the documents relates to shipments that moved by water, or that the information was disclosed by Barsan Int'l. These elements are necessary to show that Barsan Int'l violated section 10(b)(13). The application of inferences to this evidence will be considered below.

(b) Metag

Complainants cite to the following pages in their Appendix in support of their contention that Barsan Int'l disclosed information concerning Complainants' shipments to Metag: AFI/DNB App. at 1386, 1387, 1442, 1443, 1469, 1470, 1498, 1499, 1543, 1544, 1426, 1427, 1452, 1454, 1471, 1527, 1532, 1533, 1535, 1536, and 1541. Exceptions at 27. Documents included in the cited pages consist primarily of Shipper's Letters of Instructions, some with the initials "BGL." On one document, Barsan Int'l is shown as forwarding agent, DNB Exports is shown as the USPPI, and Metag Construction Co., Kabul, Afghanistan, is shown as the consignee. No commodities are listed on the document. DNB/AFI App. at 1386. Also included in the cited pages are documents showing DHL

Express as forwarding agent; Metag is not shown as consignee. *See e.g., id.* at 1426, 1554.

The ALJ concluded that the evidence in the record does not support Complainants' contention that Impexia learned about Metag from information unlawfully disclosed by Barsan Int'l. 33 S.R.R. at 182. Complainants argue that "it is more likely than not, considering the clear record that has been established of Barsan providing information and documents of Complainants' customers, that Barsan provided protected information to Impexia related to this customer." Exceptions at 27. Complainants have failed to show, however, in connection with documents relating to Metag, that information in the documents related to shipments that moved by water, or that the information was disclosed by Barsan Int'l. These elements are necessary to show that Barsan Int'l violated section 10(b)(13). The application of inferences to this evidence will be considered below.

(c) Feka Ins.

Complainants cite to the following pages in their Appendix in support of their contention that Barsan Int'l disclosed protected information, relating to shipments to Feka, to Impexia: AFI/DNB App. at 1378, 1379, 1381, 1382, 1384, 1385, 1392, 1395, 1396, 1398, 1399, 1415, 1418, and 1419. Exceptions at 27. Documents included in the cited pages consist of Shipper's Letters of Instructions, without identifying mark, showing DNB Exports LLC as the USPPI; Feka Camp, Helmand, Afghanistan as ultimate consignee; DHL Express as forwarding agent; and commodity descriptions, "Schedule B" numbers, and values. No carrier is identified. Also included are DHL Express air waybills, showing Barsan International as sender, and delivery address as Feka Camp, Helmand, Afghanistan.

The ALJ concluded that evidence in the record did not support Complainants' contention that Impexia learned about Feka from information unlawfully disclosed by Barsan Int'l. 33 S.R.R. at

182. Complainants argue that “it is more likely than not, considering the clear record that has been established of Barsan providing protected information and documents of Complainants’ customers, that Barsan provided protected information to Impexia related to this customer.” Exceptions at 27. Complainants have failed to show, however, in connection with the documents related to Feka, that information in the documents relates to shipments that moved by water, or that the information was disclosed by Barsan Int’l. These elements are necessary to show that Barsan Int’l violated section 10(b)(13). The application of inferences to this evidence will be considered below.

(d) Ayken

Complainants state that Ayken is a subcontractor of Yenigun Ins, and Complainants provided “in depth information on this customer through Yenigun Ins. for multiple shipments via Shippers Letter of Instructions/other shipping documents with detailed information on the customer prior to March, 2010, the date that Impexia was set up.” *Id.* at 28. The ALJ stated that while Complainants included a declaration from an Ayken employee, “the declaration does not mention its relationship with Impexia.” 33 S.R.R. at 182 (citing DNB/AFI Supp. App. at 2335). Therefore, the ALJ concluded that the record did not support Complainants’ contention that Impexia learned about Ayken from information unlawfully disclosed by Barsan Int’l. *Id.*

Again, Complainants argue that “it is more likely than not considering the clear record that has been established of Barsan providing information and documents of Complainants’ customers that Barsan provided protected information to Impexia related to this customer.” Exceptions at 28. Complainants have failed to show, however, in connection with documents relating to Ayken, that information in the documents relates to shipments that moved by water, or that the information was disclosed by Barsan Int’l. These elements are necessary to show that Barsan Int’l violated

section 10(b)(13). The application of inferences to this evidence will be considered below.

(e) Yenigun Ins.

Complainants cite to the following documents in their Appendix in support of their contention that Barsan Int'l disclosed to Impexia protected information relating to Complainants' shipments to Yenigun: DNB/AFI App. at 1389, 1390, 1421, 1422, 1448, 1479, 1480, 1482, 1484, 1490, 1494, 1500, 1501, 1502, 1507, 1510, 1519, 1520, 1530, 1531, 1534, 1539, 1540, 1545, and 1546. Exceptions at 28. The documents identified by Complainants include Shipper's Letters of Instructions, and DHL Express shipment air waybills. The Shipper's Letters of Instructions all lack an identifying mark except one, which has BGL's initials. *Id.* at 1510. The Letters of Instructions identify DNB as the USPPI, and either Yenigun Construction Industry & Commerce, Inc., Kandahar Airfield, Afghanistan or NATO Maintenance and Supply Agency (NAMSA) as the ultimate consignee. DHL Express is listed as the forwarding agent, and no carrier is identified. Most of the Letters provide commodity descriptions, Schedule B numbers, and commodity values. Some of the DHL Express air waybills show DNB or NAMSA as the shipper and Yenigun as the receiver, but some of the air waybills are illegible.

The ALJ concluded that the evidence in the record does not support Complainants' contention that Impexia learned about Yenigun from information unlawfully disclosed by Barsan Int'l. 33 S.R.R. at 183. Complainants again argue that "it is more likely than not considering the clear record that has been established of Barsan providing information and documents of Complainants' customers that Barsan provided protected information to Impexia related to this customer." Exceptions at 28-29. Complainants have failed to show, however, in connection with documents relating to Yenigun, that information in the documents relates to shipments that moved by water, or that the information was disclosed by Barsan Int'l. These elements are necessary to show that Barsan Int'l violated

section 10(b)(13). The application of inferences to this evidence will be considered below.

(f) Delta Om Muh

Complainants state that Delta Om Muh is a subcontractor for Metag, and Complainants “provided in depth information on this customer through Metag for multiple shipments via Shippers Letter of Instructions/other shipping documents with detailed information on the customer prior to the end of 2010, the date that Delta Om began receiving solicitations from Impexia.” *Id.* at 29. Therefore, Complainants argue, “it is more likely than not, considering the clear record that has been established of Barsan providing information and documents of Complainants’ customers, that Barsan provided protected information to Impexia related to this customer.” *Id.*

The ALJ concluded that evidence in the record did not support Complainants’ contention that Impexia learned about Delta Om Muh from information unlawfully disclosed by Barsan Int’l. 33 S.R.R. at 183. Complainants state that the ALJ failed to consider the affidavit of the owner of Delta Om, Mr. Ekrem Benli, in which Mr. Benli stated that Cuneyt Karadagli urged him to sign an affidavit that they had been introduced by a certain individual, but Mr. Benli stated that they had not been introduced by this individual and refused to sign the affidavit. Exceptions at 29. Complainants included an affidavit from Mr. Benli in their Appendix. *See* DNB/AFI App. at 2325-2326. Finally, Complainants state that Mr. Benli’s affidavit “underscores that Respondent Impexia and its president, Cuneyt Karadagli, have complete disregard for the truth and the legal system of the United States.” *Id.* at 30.

Complainants’ arguments notwithstanding, Complainants have failed to show that documents in the record relating to Delta Om Muh concerned shipments by water, or that the information in the documents was disclosed by Barsan Int’l. These elements are

necessary to show that Barsan Int'l violated section 10(b)(13). The application of inferences to this evidence is considered below.

(g) Ceytun

Complainants note that Ceytun is included as a customer in its Complaint, and that Ceytun is also included in Impexia's customer list. Complainants point out that they have identified "Impexia's sale [of certain products] to Ceytun as the seminal event that resulted in this proceeding." *Id.* Complainants identify the following documents that they allege show that Barsan Int'l disclosed their protected information to Impexia: DNB/AFI App. at 1547, 1548, 1552, and 1553. *Id.* at 31. Included in the documents are two Shipper's Letters of Instructions, without identifying marks, showing DNB Exports as the USPPI and Ceytun Construction LTD, Kandahar, Afghanistan as the consignee. No carrier is identified and no commodity information is provided. There are also two DHL Express waybills, one being a Shipment Air Waybill and the other an International Shipment Waybill, with both showing DNB as the shipper and Ceytun as the receiver.

The ALJ concluded that the evidence in the record did not support Complainants' contention that Impexia learned about Ceytun from information unlawfully disclosed by Barsan Int'l. Complainants again argue that it is more likely than not that, "considering the clear record that has been established of Barsan providing information and documents of Complainants' customers that Barsan provided protected information to Impexia related to this customer." *Id.* Complainants have failed to show, however, in connection with documents relating to Ceytun, that information in the documents relates to shipments that moved by water, or that the information was disclosed by Barsan Int'l, elements that are necessary to show that Barsan Int'l violated section 10(b)(13). The application of inferences to this evidence is considered below.

(2) Inferences applied to circumstantial evidence of record

Complainants argue that the ALJ “completely ignored the legal consequences of circumstantial evidence.” *Id.* Complainants state that circumstantial evidence “requires an inferential step,” and cite the Commission’s decision in *Worldwide Relocations, Inc. – Possible Violations of Shipping Act*, 32 S.R.R. 495 (FMC 2012), as providing guidance on the use of “proper inferences under certain conditions which are appropriate to this case.” Exceptions at 32. Complainants state that in *Worldwide Relocations*, the Commission found the use of inferences appropriate “when there appears to be uniform evidence on one element for a given number of shipments for an entity but no evidence on that same element for a different shipment in a given time period.” *Id.* at 33. Complainants state that in this case, the ALJ concluded that “disclosures were made of their protected information for some shipments, but no evidence on that same element for different shipments in a given time period.” *Id.* Complainants contend that applying *Worldwide Relocations* to this proceeding, “the reasonable inference should be that there were more disclosures by Barsan to Cuneyt Karadagli in that there appears to be uniform evidence on Barsan’s disclosures for a given time period.” *Id.* According to Complainants, a “proper inference can follow that in a case such as this one, where, as has been demonstrated, Impexia ended up with a customer base substantially similar to AFI’s, consistent with the circumstantial cases . . . that the inferences Complainants are seeking are proper and consistent with Commission case law.” *Id.* Complainants also cite *Waterman Steamship Corp. v. General Foundries Inc.*, 26 S.R.R. 1173 (ALJ 1993), for the proposition that “[i]t is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation.” Exceptions at 33.

Complainants argue that direct evidence showing that Barsan Int’l began providing shipment and proprietary information in February of 2009, and continued providing such information

through at least February of 2011, provides inferences leading to a factual premise “that Barsan did routinely disclose protected information to Impexia.” *Id.* at 34. According to Complainants,

The most amazing fact is that a listing of Impexia’s leading customers is a mirror image of Complainants’ customers. As previously noted, this is an overwhelming coincidence that strains any credulous interpretation to the contrary. The client list provided by Impexia in discovery (AFI/DNB App. 489) lists nine (9) of Complainants’ main customers, and the source for a large amount of the claimed damages. The amount generated by Impexia from sales to these AFI/DNB customers, from the inception of Impexia, March, 2010, through January 31, 2011, is \$3,842,475.85. See bank statements from Impexia which support this total at (Impexia Bank statements from March 2010 to January 2012 (AFI/DNB App. 774-1024)).

Exceptions at 34. Complainants argue that the

duplication of Complainants’ business by Impexia cannot be explained away by other than reasonable inference that Impexia had unlawfully obtained Complainants’ supplier, product, pricing, project, and customer information which made this possible for which there is a factual basis to inferentially conclude that such disclosures were made based on the direct factual evidence that Barsan between February, 2009, and February, 2011, as the record clearly shows, did disclose this information to Cuneyt Kardagli [sic] and Impexia.

Id. at 35.

In *Worldwide Relocations*, the Commission noted that in the Initial Decision in that proceeding, the ALJ “appears to have made inferences on the question whether an entity ‘held out’ for determining common carrier status for certain shipments,” and stated that “[a]pplying this type of inference is appropriate when there appears to be uniform evidence on one element [of common carrier status] for a given number of shipments for an entity but no evidence on that same element for a different shipment in a given time period.” 32 S.R.R. at 503, 504. The question of an entity’s status was one element involved in reaching a determination of whether respondents violated sections 8 and 9 of the Shipping Act, in connection with specific shipments. In *Worldwide Relocations*, there was evidence in the record of specific shipments handled by the various respondents in that proceeding, and inferences were used to determine each entity’s status in connection with specific shipments: “the ALJ included a chart detailing shipments for which there were sufficient documents to support a finding that a shipment occurred” *Id.* at 502.

Likewise, in *Waterman*, there was evidence related to the specific shipments at issue, and the injury claimed was \$52,000 for freight allegedly due. With regard to evidence of record in *Waterman*, the ALJ stated that “the testimonial evidence consists of affidavits . . . , supplemented by various shipping documents, bills of lading, invoices, correspondence between Waterman and General Foundries, Inc., and the relevant tariff page.” 26 S.R.R. at 1180. In *Waterman*, the ALJ used inferences to determine whether respondent’s conduct was fraudulent, stating as follows: “General Foundries contends that there is no evidence of fraudulent intent on its part However, it is often the case in law that defendants accused of conspiracy or fraud will not provide direct evidence or confess to their intentions with the results that courts and agencies must draw inferences” *Id.* The question of whether respondent’s conduct was fraudulent was one element involved in reaching a determination of whether respondent violated section 10(a)(1) of the Shipping Act.

Inferences discussed in *Worldwide Relocations* and *Waterman* related to conduct in connection with specific shipments, and there was evidence in the record relating to the shipments in both proceedings. In this proceeding, Complainants are seeking to have the Commission use an inference to determine that direct evidence of three emails containing Complainants' proprietary information, disclosed by Barsan Int'l to Cuneyt Karadagli in 2009 and 2011, combined with circumstantial evidence that "a listing of Impexia's leading customers is a mirror image of Complainants' customers," leads to the conclusion that Barsan routinely disclosed protected information to Impexia in violation of section 10(b)(13).

The problem with Complainants' argument is that the three emails disclosing the information they provided to Barsan Int'l contain no information that ties the involved shipments to any of Complainants' customers. Complainants acknowledge this fact, stating that "the ocean documentation contained sensitive product, supplier, and pricing information, and . . . rarely contained customer and project information." Exceptions at 17. Complainants argue, however, that the air shipments Barsan handled for them, which do contain the names of specific customers, must be considered in conjunction with the shipments by water: "the ocean/air distinction does not make a difference since the marketing picture created by Barsan and Impexia from Complainants' information and documentation is really a composite of information from both air and ocean shipments." *Id.* While Complainants request that the Commission find that it has jurisdiction to consider both air and ocean shipments in connection with section 10(b)(13), as noted above, Barsan Int'l did not act as a "common carrier, marine terminal operator, or ocean freight forwarder" subject to the prohibition in section 10(b)(13), on shipments that moved solely by air. Therefore, the Commission has no basis to find that Barsan Int'l violated section 10(b)(13) on air shipments.

Furthermore, in connection with Complainants' information relating to ocean shipments, disclosed by Barsan Int'l, the movements appear to be port-to-port, as there is no evidence of an

air component in the documents provided. In addition, the consignees (or purchaser in the April 29, 2009 documents) shown on the documents are either AFI (information disclosed on April 29, 2009), or GMG, a company affiliated with AFI (information disclosed on February 22, 2011, and June 26, 2009). None of the companies identified by Complainants as their customers are shown in the ocean shipment documents. Therefore, there is no basis to “inferentially conclude” that Complainants’ information relating to ocean shipments, disclosed by Barsan Int’l, led to the “duplication of Complainants’ business by Impexia.” Complainants’ Exceptions at 35. In addition, with regard to the circumstantial evidence of Complainants’ shipments via Barsan Int’l, set out above in connection with seven companies, there is no evidence that these shipments moved by water or that the information in the shipping documents was disclosed by Barsan Int’l to Cuneyt Karadagli.

c. Credibility of Ugur Aksu and Cuneyt Karadagli

In addition to their arguments related to direct and circumstantial evidence, discussed above, Complainants argue that the ALJ erred by relying on evidence provided by Ugur Aksu and Cuneyt Karadagli, without considering their character and lack of credibility. In the ID, the ALJ stated as follows:

Either Cuneyt Karadagli was a bona fide employee of Barsan Int’l in 2009, in which case Barsan Int’l and Impexia falsely claim that he was not, or Barsan Int’l falsely represented that he was an employee to assist an unidentified person in getting an H-1B visa. While this adversely affects credibility, particularly of Ugur Aksu, it does not prove by a preponderance of the evidence that Barsan Int’l violated section 10(b)(13).

33 S.R.R. at 190. Complainants note that “[w]hile the ALJ states that these matters affect the credibility of Ugur Aksu, the ALJ never in his ID identifies anywhere where this credibility is put into doubt

notwithstanding that Ugur Aksu's declarations are quoted and relied upon throughout the ID." Exceptions at 3. With regard to Cuneyt Karadagli's actions in this matter, Complainants state that he was "either lying to the Commission about his employment with Barsan, or on the other hand participating in a deception involving the U.S. Immigration Services." *Id.* Complainants note that "while the lies alluded to matters relating to moral turpitude which Commission staff would likely use as support for not granting a license to an applicant for an ocean transportation intermediary license, the ALJ never again cited credibility as an issue while reviewing Ugur Aksu's or Cuneyt Karadagli's declarations, or declarations which had been obtained by Mr. Karadagli from third parties." *Id.* at 3-4.

With regard to Ugur Aksu's credibility, Complainants argue that while the ALJ stated in the ID that Mr. Aksu's credibility was adversely affected by evidence related to the question of whether Cuneyt Karadagli was an employee of Barsan Int'l in 2009, the ALJ nonetheless quoted and relied on Mr. Aksu's declarations throughout the ID. *Id.* at 3. Complainants do not specify where in the ID the ALJ relied upon Mr. Aksu's statements. Examination of the ID, however, shows that in the discussion about whether Impexia may be considered a corporate shell or alter ego of BGL and/or Barsan Int'l, the ALJ noted statements in Ugur Aksu's declaration, and concluded that Complainants failed to identify any evidence that would rebut Mr. Aksu's statements. *See e.g.*, 33 S.R.R. at 154, 156, 157, 158, 167, and 168.

With regard to Cuneyt Karadagli's credibility, the ALJ stated that Mr. Karadagli's claim that "Impexia's customers identify the products that they want and ask Impexia to obtain them," was "substantiated by representatives of Metag, 77 Construction, Epik, Ayken, Yenigun, Delta Om, Cakmaklar Pano, and Ceytun." *Id.* at 184. The ALJ concluded that the "evidence suggests that the success of Impexia's 'one-person operation' comes from customers who tell Impexia the products they want, not information Impexia learned from Barsan Int'l." *Id.*

Complainants provided affidavits from employees of Metag (DNB/AFI Supp. App. at 2336, 2328); 77 Construction (*Id.* at 2327); Epik (*Id.* at 2334); Ayken (*Id.* at 2335); and Delta Om Muh (*Id.* at 2325-2326). Complainants did not provide affidavits from employees of Yenigun, Cakmaklar Pano, or Ceytun, but Impexia did provide affidavits from employees at these three companies. *See* Impexia App. at 23-24 (Yenigun); 19-20 (Cakmaklar Pano); and 27-28 (Ceytun).

In the affidavits provided by Complainants, only two employees referred to Impexia, and they appear to tell Impexia the products they want. *See* DNB/AFI Supp. App. at 2327, 2325-2326. In most of the affidavits provided by Complainants, the employees said that their companies would continue to do business with Complainants. In the affidavits supplied by Impexia, employees of Yenigun, Ceytun, and Cakmaklar Pano all stated that their companies “used Impexia to source a wide range of products and materials,” and continued to do business with Impexia since “Impexia offers fair pricing, quick delivery, and overall excellent service.” *See* Impexia App. at 23-24, 27-28, and 19-20.

Complainants provide no basis upon which to reverse the ALJ’s conclusions on statements made by either Ugur Aksu or Cuneyt Karadagli. With regard to Mr. Aksu, Complainants offered no evidence to rebut his statements. With regard to Mr. Karadagli, while most of the employee affidavits in evidence do not contain descriptions of how their companies did business with Impexia, there is nothing in the statements proving that Barsan Int’l provided Cuneyt Karadagli with information about their transactions with Complainants. Therefore, while there may be credibility issues with the statements of Ugur Aksu and Cuneyt Karadagli, Complainants have not shown that the ALJ erred in relying on unrebutted points made in their statements.

4. *Actual Injury*

Consistent with section 11(g) of the Shipping Act, the “Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.” 46 U.S.C. § 41305(b). This language has been construed to mean that, “in order to recover reparations, the complainant must prove that it suffered monetary loss that was proximately caused by the actions of respondents.” *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 1808, 1850 (ALJ 2013). The Commission has said that “(a) damages must be the proximate result of violation of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.” *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (FMB 1950); *see also Brewer v. Maralan*, 28 S.R.R. 1331, 1335 (ALJ 2000). The Commission has discussed situations “where a wrongdoer has by its own action prevented the precise computation of damages,” and has noted that “the [Supreme] Court has stated that the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data.” *California Shipping Line*, 25 S.R.R. at 1230 (citing *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1945)). The Commission has noted, however, that “courts have also said that damages can be awarded only if the evidence provides a sufficient basis for estimating them with a reasonable degree of certainty.” *Id.*

In the ID, the ALJ stated that “[e]ven if it is assumed that Burcin Karadagli’s sending of the emails to Cuneyt Karadagli may be attributed to Barsan Int’l and that Barsan Int’l violated section 10(b)(13) of the Act, there is no presumption of actual injury resulting from a violation of the Act.” 33 S.R.R. at 180. The ALJ further stated that Complainants’ only customer allegedly “taken” by Impexia was 77 Construction, and notes that the former business development manager for 77 Construction stated that he had known

Cuneyt Karadagli since 2001, and that he requested quotes from Impexia for various products. The ALJ concluded that Complainants did not prove by a preponderance of the evidence that Cuneyt Karadagli's receipt of information from Barsan resulted in Impexia's taking this customer from Complainants, and that Complainants did not explain what specific use, if any, that Impexia made of the disclosed information or how the claimed violation caused injury to Complainants. The ALJ stated that "DNB/AFI have not identified any actual injury that resulted from Impexia's receipt of the information in the emails." *Id.*

Complainants request that the Commission "review and consider their damages claims in [the] amount of \$11,676,474 as claimed in Complainants' Brief at 37-51, which include but are not limited to Complainants' lost profits of \$1,994,772.10 during 2011 and 2012, lost profit margin of \$2,700,000 during 2011 and 2012, [and] the 'head start' loss of \$6,981,702.35." Exceptions at 48. In support of their damages claims, Complainants refer to the following evidence: the Affidavit of Baris Devrim Bal (DNB/AFI App. at 2227-2236); Impexia bank statements from March 2010 to January 2012 (*Id.* at 506-641);⁹ Impexia's commercial invoices issued to Complainants' customers (*Id.* at 774-1024);¹⁰ and Complainants' "Margin" (*Id.* at 1794-2076).¹¹ Complainants state that their claims "are based on the amounts deposited into

⁹ In the ALJ's Order on Motions for Confidential Treatment of Merits Briefs and Materials Filed with Merits Briefs, issued January 24, 2014, noted in footnote 2 above, the ALJ stated that Impexia's bank statements "contain information about the account that should be protected." *See* 33 S.R.R. at 130.

¹⁰ With regard to Impexia's commercial invoices, the ALJ granted confidential treatment for pages 774 through 1014 of DNB/AFI's Appendix, and denied confidential treatment for pages 1015 through 1024. *See id.* No exceptions were filed to this determination.

¹¹ With regard to evidence relating to Complainants' "margin," the ALJ denied confidential treatment. *See id.* at 128. No exceptions were filed to this determination.

Impexia's bank account which are comprised from Complainants' customers, which they would not have attained but for receipt of the protected information received from Barsan." Exceptions at 48-49.

a. Claim for reparations of \$1,994,722.10 for lost profits

The Commission recently affirmed (1) an ALJ's award of reparations for a violation of section 10(b)(13), based on specific valuations of two shipments, and (2) a denial of reparations for lost profits. *See Smart Garments v. Worldlink Logix Services, Inc.*, 33 S.R.R. 65 (FMC 2013).¹² The ALJ's treatment of the claim for lost profits in *Smart Garments* provides guidance for addressing the claim for lost profits in the current proceeding. In *Smart Garments*, the ALJ declined to award damages for lost profits, stating that "[c]laims of lost profits must take into account competition and other market factors," citing *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 S.R.R. 1054, 1058 (FMC 1984), and *Rose*, 29 S.R.R. at 119.

The Commission has in the past required detailed evidence to award reparations for lost profits. In *Rose*, the Commission noted with regard to lost profits that complainant Rose failed to "differentiate between any of its fixed and variable costs in determining its lost profits," and "failed to provide any lost profit calculations that account for its variable costs for the shipments at

¹² In *Smart Garments*, the Commission affirmed a default judgment on a section 10(b)(13) claim but noted that the "allegation in the Complaint – a basic recitation of the language of 10(b)(13) – may not have survived a motion to dismiss for failure to state a claim had the Respondent lodged it," but stated that because "Respondent failed to appear, the allegation in the Complaint is deemed admitted, and the Respondent has admitted that it violated section 10(b)(13)." *Id.* at 69 n. 2. Whether Respondent responds to a complaint or not affects the admission of facts in a Commission proceeding; a ruling is made based on only one party's factual allegations. The substantive law is not altered. Notwithstanding the Respondent's failure to appear in *Smart Garments*, the case provides the Commission with some precedential guidance on what constitutes a violation of 46 U.S.C. § 41103(a) and what damages are available to a successful complainant.

issue.” 29 S.R.R. at 188. The Commission concluded that “Rose’s per container profit calculations are unreliable and do not prove Rose’s losses with ‘reasonable certainty.’” *Id.* The Commission further determined that “Rose failed to properly consider competition and other market factors in its analysis of lost profits,” and stated that the “Commission considers competition as a factor that must be addressed in determining whether a party would be entitled to lost profits,” citing *Prudential. Id.*

In *Prudential*, the Commission concluded that respondent Farrell violated sections 18 (b)(1) and (3) of the Shipping Act, but denied reparations based on complainant PLI’s “failure to show a causal connection between the violation and the alleged injury or injury in fact.” 22 S.R.R. at 1055. The Commission stated that PLI based its claim for reparation “solely on the assertion that Farrell’s service was unlawful and that but for Farrell’s service it would have carried the cargo which Farrell carried.” *Id.* at 1058. The Commission noted, however, that “whether or not PLI would have carried the cargo depended upon what other carriers operated competitive services, what the frequency of those services was, and what PLI’s rates were on the particular cargo involved.” *Id.* The Commission stated that PLI failed to produce “the relevant data with respect to its own operations and the extent to which they competed with those of Farrell,” and therefore was not entitled to reparations. *Id.* at 1058-1059.

Complainants in this proceeding have not produced the kind of data the Commission has used in the past to show entitlement to reparations for lost profits. Complainants cite the affidavit of Baris Devrim Bal, Managing Director of DNB, in support of their claim for lost profits. In his affidavit, Mr. Bal stated that “Complainants have conservatively estimated Impexia’s 2012 sales and Complainants’ resulting lost profits to be the same as in 2011, or \$997,386.05,” resulting in Complainants’ total damages of \$1,994,772.10 from sales lost to Impexia during 2011 and 2012. DNB/AFI App. at 2233.

With regard to the figures cited in Mr. Bal's affidavit, in earlier cases involving claims for damages supported by summaries produced by a complainant's president, the Commission has concluded that such evidence is not a persuasive basis upon which to award damages. In *Rose*, the Commission stated that it "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, [has produced] . . . 'an unconvincing basis upon which to award damages.'" 29 S.R.R. at 189 (citing *California Shipping Line*, 25 S.R.R. at 1230).

In addition to citing Mr. Bal's affidavit in support of their damages claims, Complainants cite to Impexia bank statements (DNB/AFI App. at 506-641), and Impexia commercial invoices issued to Complainants' customers (*Id.* at 774-1024). The evidence related to Impexia's bank statements, and Impexia's commercial invoices issued to Complainants' customers, similarly provides no basis for awarding damages. While copies of Impexia's bank statements covering the period from March 2010 to January 2012 show numerous deposits which appear to come from companies served by Complainants, there is no causal link between: (1) Impexia's receipt of payments from these companies, and (2) Complainants' information disclosed in the emails forwarded on February 22, 2011, April 29, 2009, and June 26, 2009, by Burcin Karadagli, as that information did not contain the names of any of these companies. With regard to Impexia's commercial invoices, which show that Impexia billed customers served by Complainants for products and shipping charges, there is again no causal link between Impexia's invoices and Complainants' disclosed information.

Complainants state that their claims for damages "are based on the amounts deposited into Impexia's bank account which are comprised from Complainants' customers, which they would not have attained but for receipt of the protected information received from Barsan." Exceptions at 49. As the Commission noted in *Rose*, complainant Rose assumed that certain shippers "would have

shipped with Rose in 1995 and 1996 but for the actions of Respondents,” but “there is no proof in the record that Rose would have carried this cargo except for the fact that Rose carried cargo for these four customers in the years before 1994, prior to the formation of OSA [OMNI Shippers’ Association].” 29 S.R.R. at 189. The same is true in this case, as there is no proof that Complainants would have sold products after 2010, when Impexia was formed, to the same customers to whom they sold products prior to 2010.

As noted above, the three emails containing Complainants’ protected information, disclosed by Barsan Int’l to Cuneyt Karadagli, contain no information that ties the involved shipments to any of Complainants’ customers, a fact acknowledged by Complainants. None of the companies identified by Complainants as their customers are shown as consignees in the disclosed ocean shipment documents. The movements in the ocean shipment documents appear to be port-to-port movements, and the consignees are either AFI, one of the Complainants, or GMG, a company affiliated with AFI.

b. Claim for reparations of \$2,700,000 for lost profit margin

In addition to lost profits, Complainants also seek reparations of \$2,700,000 for lost profit margin during 2011 and 2012. Exceptions at 48. In his affidavit, Baris Devrim Bal, Managing Director of DNB, provides the following statement about DNB’s profit margins:

Our good name and trust that we built up with [our] . . . customers over the years has been trashed. We cannot explain to our long-time customers the quotes that we originally prepared for \$250,000, which is beaten by Impexia with 20% margin. . . . [A]fter our customers found out our higher margins, we lost trust and customers. In addition, the customers

started fiercely negotiating for our local stock items as well. In the past we would easily sell those products with good margins. However, after BGL/Barsan Int'l disclosed our business information to Impexia, and after Impexia started soliciting business from our customers, the word got around that AFI/DNB is making large profits. In turn our customer, without exception, have been heavily negotiating prices. Before Impexia got our secrets, our customers were not negotiating this hard, if we don't cut our prices now our customers threaten to give the order to Impexia, with reluctance we are accepting orders with razor thin margins.

DNB/AFI App. at 2232. Mr. Bal further stated that “[p]rior to Impexia’s operation, we earned an average profit margin . . . [of] 30% on our annual sales,” but “[s]ince Impexia’s creation, however, we have seen our average profit margin plunge to 15%.” *Id.* at 2233. Mr. Bal computes DNB’s lost profit margins as follows:

In 2011, we conducted \$8 million in sales. Due to expansion in other areas unrelated to Impexia, [o]ur total sales increased in 2012 to \$10 million. Based on the average reduced profit margin rate of 15%, our reduced profit margin damages in 2011 were \$1,200,000, and \$1,500,000 in 2012, for a total of \$2,700,000.

Id. at 2233-2234.

In support of damages for lost profit margin, Complainants’ rely on documents including DNB and AFI invoices to customers, supplier invoices to DNB and AFI, and air and ocean shipping documents. *Id.* at 1794-2076.¹³ Complainants also rely on three

¹³ As noted in footnote 9, the ALJ denied confidential treatment for

separate lists showing DNB invoice totals, cost totals, and margins for certain customers, covering periods in 2010, 2011, and 2012. These three lists also show what appears to be an average margin figure for each time period, with the average margin shown declining from 2010 to 2012. *See id.* at 1794, 1913, and 2006. Again, no causal link has been shown between what purports to be Complainants' declining profit margin from 2010 to 2012, and Complainants' information disclosed to Impexia in the three email messages. This is especially true given that the sales figures used by Mr. Bal to compute lost profit margin show that DNB had increased sales in 2012 over 2011, "due to expansion in other areas unrelated to Impexia." *Id.* at 2233-34. Complainants are seeking reparations for alleged injury resulting from Barsan's disclosure of information to Impexia, and therefore a reduced profit margin tied to profits generated in areas "unrelated to Impexia" has no causal link to the violation.

c. Claim for reparations of \$6,981,702.35 for "head start" loss

In his affidavit, Mr. Bal states that his "industry is very unique," and involves an "apprenticeship" process that takes seven to ten years. Mr. Bal concludes that "[w]ithout the 'head start' benefits that Impexia obtained by taking the protected information and materials, it is very unlikely for Impexia to have entered and survived in this industry," and "[t]herefore, we should be awarded additional monetary damages of \$997,386.05 X 7 years = \$6,981,702.35 for head start." DNB/AFI App. at 2234.

Again, there is no causal link between the reparations sought for "head start" losses and the disclosure of Complainants' information in the three emails. While Complainants state in their Exceptions that their claims for reparations are "based on the amounts deposited into Impexia's bank account which are

information related to Complainants' "margin." *See* 33 S.R.R. at 128. Complainants did not file exceptions to this denial.

comprised of Complainants' customers," in the case of reparations sought for head start losses, there is no connection with Complainants' customers "taken" by Impexia through disclosed information. Mr. Bal based his head start loss claim amount on the \$977,386.05 claimed as lost profits in 2011, and multiplied this figure by seven, presumably based on his assertion that it takes seven to ten years of apprenticeship to enter and survive in his industry. As concluded above, Complainants have not produced the kind of data the Commission has used in the past to show entitlement to reparations for lost profits. Neither Mr. Bal's affidavit setting out figures claimed as lost profits, nor evidence in Impexia's bank statements and invoices, supports Complainants' claim for \$6,981,702.35 for "head start" losses.

Based on Commission precedent involving evidence required to demonstrate actual injury caused by a violation of the Shipping Act, we believe that Complainants in this proceeding have failed to show a causal connection between the violation of section 10(b)(13) and their claimed reparations of \$11,676,474 for lost profits, lost profit margin, and "head start" losses. Therefore, Complainants have failed to establish that they are entitled to receive the reparations claimed.¹⁴

¹⁴ The Commission retains authority to take action in connection with Barsan Int'l's OTI license, after opportunity for notice and hearing.

IV. CONCLUSION

Upon consideration of the analysis and discussion set forth above, we (1) grant Complainants' Motion to Waive the Page Limitations of 46 C.F.R. § 502.227(e); (2) deny Complainants' Motion to Strike Impexia's Opposition; (3) conclude that Barsan Int'l knowingly disclosed Complainants' information related to shipments by water, and that information disclosed on February 22, 2011, April 29, 2009, and June 26, 2009, is the kind of information protected by section 10(b)(13); (4) conclude that with regard to shipments moving solely by air, Barsan Int'l did not act as a common carrier or ocean freight forwarder subject to the Shipping Act, and therefore disclosure of information relating solely to shipments moving by air is not protected by section 10(b)(13); (5) determine that Barsan Int'l violated section 10(b)(13) when it disclosed Complainants' information related to shipments by water; and (6) conclude that Complainants have failed to show actual injury as a result of the information disclosed, and are therefore not entitled to the claimed reparations of \$11,676,474.

THEREFORE, IT IS ORDERED, That the Motion to Waive the Page Limitations of 46 C.F.R. § 502.227(e) is granted.

IT IS FURTHER ORDERED, That the Motion to Strike Impexia's Opposition is denied.

IT IS FURTHER ORDERED, That the conclusion that Barsan Int'l did not violate section 10(b)(13) is reversed, and Barsan Int'l is found to have violated section 10(b)(13) in connection with information disclosed on February 22, 2011; April 29, 2009; and June 26, 2009.

IT IS FURTHER ORDERED, That Complainants DNB/AFI have failed to show actual injury as a result of the violation, and Complainants are therefore not entitled to receive reparations.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary

Commissioner DYE, dissenting.

I would affirm the Initial Decision of the Administrative Law Judge in this proceeding.

Commissioner KHOURI, dissenting.

While I concur in the majority's holding that Complainants DNB/AFI failed to show actual injury, I do not agree with the holding that a violation of section 10(b)(13) was established by record evidence. In this regard, I would uphold the Administrative Law Judge's findings of fact, conclusions of law and holdings as set forth in his Initial Decision.