

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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

Complainants,

v.

BARSAN GLOBAL LOJISTIKS VE GUMRUK MUSAVIRLIGI A. S.,
BARSAN INTERNATIONAL, INC., and
IMPEXIA INC.

Respondents.

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COMPLAINANTS' BRIEF

Complainants AFI Elektromekanik Ve Elektronik San. Tic. Ltd. Sti. ("AFI") and DNB Exports LLC ("DNB") pursuant to the March 5, 2013, Procedural Order ("Procedural Order") and the Federal Maritime Commission Rule 221, 46 C.F.R. 502.221, hereby submit their Brief. Also, in addition to Complainants' Brief, pursuant to the above-cited Procedural Order, Complainants are simultaneously filing Proposed Findings of Fact, and an Appendix containing the evidence upon which Complainants' Proposed Findings of Fact are based.

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PERTINENT PROCEDURAL HISTORY
AND NOTICE FOR REQUEST TO SUBMIT SUPPLEMENTAL EVIDENCE:
CUNEYT KARDAGLI APPEARS ON BARSAN INT'L'S PAYROLL RECORDS

On March 20, 2013 the Administrative Law Judge ("ALJ") issued an *ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANTS' RENEWED MOTION TO COMPEL COMPLIANCE WITH OUTSTANDING DISCOVERY AND FOR SANCTIONS* in which the ALJ stated in its Order, among other things, the following:

BGL/Barsan state that they have produced all documents responsive to the underlying requests for production, but also state that they "did not produce an email from Ms. Karadagli to her husband in which the subject of what they are having for dinner is discussed." (BGL/Barsan Opposition at 15-16.) BGL/Barsan are ordered to produce all emails between Burcin Karadagli and Cuneyt Karadagli.

Counsel for the Barsan Respondents provided on April 3, 2013, a response to this part of the Order, with the following commentary:

Attached please find additional documents being produced pursuant to the ALJ's Order of March 20, 2013. As reflected in prior correspondence, Barsan recovered all of the documents from six separate workstations in the office where Burcin Karadagli worked. The documents produced are therefore largely duplicative of each other. These documents are also duplicative of documents previously produced in discovery **with the exception of correspondence from Burcin Karadagli to her husband related to family matters such as children's birthday parties and the like.** (Emphasis supplied).

In fact, the disk provided on April 3, 2013, by counsel for Barsan Respondents contained 8,730 pages, most of which were in Turkish and as will be noted herein will require review. The reason for highlighting this at this time is not frivolous. Notwithstanding that representations were made that the Burcin e-mails included in the response to the ALJ's Order were "related to family matters such as children's birthday parties and the like", even upon preliminary review, the disk contains much more serious materials relevant to this case. Materials which Complainants' counsel could review which were in English focused us on the attached payroll records which

clearly indicate that Cuneyt Karadagli (hereinafter either “Jimmy” or “Cuneyt”), the President of Impexia, was shown as an employee of Barsan Int’l during a period pertinent to this proceeding, and was being paid substantial sums. (AFI/DNB App. 2163-2171). This finding is significant in and of itself since Complainants have been alleging that Impexia and Barsan Int’l were working in concert in the matter at hand. This clearly seemed to be pertinent. However, upon further review by our clients, there was an e-mail also included in the disk produced April 3, 2013, dated February 5, 2009, from Burcin Karadagli to her husband, Cuneyt Karadagli in which she requests that Cuneyt Karadagli draft a check to Barsan Int’l in the same gross amount as the payroll indicated was paid to him, in addition to sums paid by Barsan Int’l related to various withholding sums. We are still reviewing other e-mails from the disk in which there is reference to legal work which Barsan Int’l was financing related to amounts owed to Immigration attorneys for work done by them. An e-mail from October 29, 2008, from Immigration attorneys Frenkel, Hershkowitz & Shafran LLP concerning the need to receive official clearances for Cuneyt Karadagli from the Federal Bureau of Investigation, and a failure to have indicated a previous arrest.

Therefore, in view of the above, it is our view that either: a) Cuneyt was an employee of Barsan Int’l which has very relevant implications with regard to allegations made in this case that Impexia and Barsan Int’l were working in concert; or b) it could well be that the payroll entry for Mr. Karadagli was intended to fraudulently show employment for other purposes, such as demonstrating sufficient income for purposes of obtaining Immigration status, or to fraudulently qualify for credit. In the latter case, this could be a serious criminal matter for all involved if false employment and salary representations were made to government officials, and could definitely impact subject case. This latter matter is brought up because at least some of the documents being

reviewed related to fees owed to Immigration counsel. Additionally, see the attached from Burcin Karadagli, AFI/DNB App. 2220-2221 wherein she expressed thanks to Ugur Aksu, President of Barsan Int'l, for assisting with the payroll matter relating to Jimmy Karadagli. At the very least, this indicates that Barsan Int'l's most senior officer was aware of the payroll events, and further that Barsan Int'l was extremely accommodating to Cuneyt Karadagli, even on what may turn out to be a serious matter. It certainly raises the specter that Cuneyt Karadagli enjoyed a special relationship with Barsan Int'l, which Complainants believe extended to making Complainants' proprietary information available to Mr. Karadagli which resulted in the business losses subject of this proceeding.

In any case, in view of the above, and the fact that this voluminous material was provided only recently, and that there may be other information pertinent to this case, we respectfully submit that this be considered notice that Complainants may formally request that the record be kept open until the review on the late-supplied disk has been completed at which time Complainants would make the appropriate applications to the ALJ to receive additional evidence, if necessary, and provide other remedies as may be required.

INTRODUCTION

On April 14, 2011, Complainants AFI/DNB filed a Verified Complaint and Complainants' First Set of Interrogatories and Requests for Admissions and Production of Documents. The Complaint alleged that Respondents Barsan Global Lojistiks Ve Gumruk Musavirligi A. S. ("BGL")¹, and Barsan International, Inc. ("Barsan Int'l"), knowingly disclosed, offered, solicited and received information concerning the nature, kind, quantity, destination, shipper, consignee, and routing of the property tendered or delivered to Barsan Int'l by DNB and/or AFI, and without the consent of DNB and/or AFI, unlawfully disclosed that information to Impexia, Inc., as a result

¹ Barsan Global Lojistiks is the Turkish spelling.

creating a competitor to Complainants, and thereby have violated Section 10(b)(13) of the Shipping Act, 46 USC § 41103 (a). It is also alleged that Impexia violated 10(b)(13) of the Shipping Act, 46 USC § 41103 (a) as a person in conjunction with the Barsan Respondents, directly or indirectly, receiving the aforesaid information.

Disclosure of Information. It is undisputed by the Barsan Respondents that Burcin Karadagli, the former accounting manager of Respondent Barsan Int'l, knowingly disclosed Complainants' proprietary business information provided to Barsan Int'l in the ordinary course of Complainants tendering cargo and documents to Barsan Int'l for purposes of exporting this cargo. This cargo and information related to the cargo was tendered pursuant to Barsan Int'l's business as a licensed Federal Maritime Commission ocean freight forwarder and non-vessel operating common carrier. It is also clear from the preponderance of the evidence that this information and documentation was conveyed to Cuyinet Karadagli, the President of Respondent Impexia, during normal business hours at Respondent Barsan Int'l's open office space, for a period of roughly two years from February 2009 to February 2011.

Barsan Int'l's Participation. Notwithstanding that Barsan Respondents have denied their knowledge or participation of the aforementioned illegal activities, the preponderance of the evidence demonstrates that the documents and information produced by Respondents in discovery, and other evidence, conclusively demonstrates that Barsan Respondents conspired with Impexia to provide this information, or at the very least knew or should have known of said violations of 46 USC § 41103. Therefore, Barsan Respondents knowingly disclosed, and Respondent Impexia received Complainants' proprietary business information concerning the nature, kind, quantity, destination, consignees and routing of Complainants' cargo tendered and delivered to Barsan Respondents for export.

Disclosure Created a Competitor to Complainants and a Customer for the Barsan Respondents. These disclosures resulted in creating a competitor to Complainants which, but for the information unlawfully provided, as will be demonstrated, Impexia could not have competed in the very technical engineering environment in which Complainants operate without an abundance of engineering and other infrastructure and corresponding expenses. Further, the disclosures correspondingly created a captive customer in Impexia for the Barsan Respondents.

Disclosure of Information was Used to the detriment or prejudice of Complainants. The disclosures resulted in extreme detriment and prejudice to Complainants' business. In fact the evidence will show that Impexia's customer list became a mirror image of Complainants' customers, and that as of January 31, 2012, Respondent Impexia has conducted over \$3,842,475.85 million in transactions with AFI/DNB's Customers.

Complainant is entitled to actual damages flowing from the alleged violation.

The gravamen of Complainants' damages is that in a case involving an improper "disclosure of its business transactions to a competitor" is akin to cases relating to Trade Secrets. The damages theories applicable to those cases are applicable by analogy to the case at hand, and consistent with the Commission's requirements to compensate claimants for actual damages. Complainants assert that damages under the circumstances described herein should be the damages proximately resulting from Respondents' wrongs, measured by an accounting of profits on sales made to the diverted customers by Respondents after they obtained the unlawful information. Further, these cases demonstrate that these damages could extend, not only to the period during which the information was being disclosed, but for a period of time which would have been required by Respondents to reproduce Complainants' products/services without the wrongful

appropriation, generally termed in trade secret cases the “head start” rule. The “head start” rule is generally regarded as a restrictive concept---i.e., it limits the time for damages to accrue. The evidence will show that the head start rule applied to the matter at hand is at the very least a seven to ten year period.

ARGUMENT

I. The Legislative History of the Shipping Act of 1998 As Amended (“the Act”) Requires that the Act, Including 46 USC § 41103(a) Be Treated as a Remedial Statue and Shall be Broadly Construed to Protect the Shipping Public.

A. General Application of this Principle to Case.

The Complaint was filed pursuant to Section 11(a) of the Shipping Act, 46 § 41301. Complainants are seeking reparations for injuries caused to them by Respondents as a result of their violations of 10 (b) (13) of the Shipping Act, 46 USC § 41103 (a). The essence of the alleged violations relate to Barsan Int’l, a Federal Maritime Commission licensed ocean freight forwarder, and non-vessel operating common carrier, knowingly disclosing information concerning the nature, kind, quantity, destination, shipper, consignee, and routing of the property tendered or delivered to Barsan Int’l by Complainants DNB and/or AFI, by, and without the consent of DNB and/or AFI, using that information to the detriment and disadvantage of DNB and/or AFI, by unlawfully disclosing that information to Impeixa, thereby creating a competitor. These alleged violations involve the most basic of duties of the Commission to protect the shipping public. If this practice of ocean transportation intermediaries and ocean carriers sharing sensitive commercial information with competitors became a routine experience, global trade as we know it would cease to exist. To maintain the integrity of the ocean shipping environment in the foreign commerce of the United States is a serious Congressional mandate to the Commission.

The alleged violations must be examined within the full perspective of the terms of the Shipping Act of 1998, as amended, and its predecessors. These have long been recognized as remedial statutes. The Acts' remedial purposes are particularly evident in the licensing and bonding provisions for Ocean Transportation Intermediaries ("OTI"). When a statute is recognized as remedial, it is to be broadly construed so as to suppress the harm and promote the remedy.

As the Commission stated in the Order entered in Docket No. 06-08, *In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries-Petition for Declaratory Order*, served February 15, 2008:

The touchstone of statutory interpretation is the application of the law in the spirit of the policy that motivated Congress to act. *American President Lines, Ltd.-Modification of Description Covering Subsidized Atlantic/Straits Service*, 1 MA 143, 2 S.R.R. 633 (1963) citing SUTHERLAND, STATUTORY CONSTRUCTION § 4701. The spirit and basic policy that motivated Congress to enact the bonding and licensing provisions of the Shipping Acts of 1916 and 1984, as amended were to provide protection to the shipping public from unqualified and potentially unscrupulous service providers.

The most egregious act that a shipper must be protected against is the unlawful dissemination of sensitive business information to its competitors. That is exactly what this case is about. Not only did Barsan Int'l provide information to a competitor, it, in effect, created the competitor by disseminating to it crucial sensitive information without which Impexia could not have succeeded.

The Commission further states in in Docket No. 06-08, *In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries-Petition for Declaratory Order* :

The Shipping Acts of 1916 and 1984, as amended, have long been recognized as a remedial statute. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311-12 (1934); *Tariff Filing Practices of Containerships, Inc.*,

9 F.M.C. 56, 69 (1965). When a statute is recognized as remedial, it is to be broadly construed so as to “suppress the evil and advance the remedy.” NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60:1 (6th ed. 2001). The policy that a remedial statute should be construed so as to effectuate its intended remedial purpose is firmly established. SINGER, *supra* § 60:1. See *California v. United States*, 320 U.S. 577, 584 (1944); *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 69-70 (1965); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Tcherenin v. Knight*, 389 U.S. 332 (1967); and *Nepera Chemical, Inc. v. Fed. Maritime Comm’n*, 662 F.2d 18 (D.C. Cir. 1981). Even where there is ambiguity in a remedial statute, it should be construed to address the problems that are within the spirit or reason of the law or within the “evil” it was designed to remedy. Reasonable doubts are to be resolved in favor of applicability to a particular case.

The Commission should further consider these remedial statutes when it considers whether to grant remedies to Complainants, who suffered damages solely caused by Respondents’ violation of the Act. These acts by Respondents within the context of remedial statutes, which target with specificity the acts of Ocean Transportation Intermediaries, deserve to be reviewed with the objectives of such remedial statutes. Therefore, notwithstanding that the facts and applicable laws may be matters of first instance for the Commission, the agency should construe the law and the facts “so as to ‘suppress the evil and advance the remedy.’” NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60:1 (6th ed. 2001). This is a particularly significant case since it is the first opportunity for the Commission to address wrongs, contemplated by the remedial statutes, for actions taken in violation of46 USC § 41103(a).

B. Specific Application of this Remedial Principle to Case Where Ocean/Air Shipments are Involved.

Respondents have raised the issue that some of the shipments related to this matter were air shipments, and, therefore, beyond the reach of the Commission’s jurisdiction. We disagree for the following reasons. First of all we would agree with Respondents if Barsan Int’l only handled air shipments for Complainants. However, here, during the period in question (February, 2009 to

February, 2011, the period when information was disclosed to Impexia), Barsan Int'l tendered both air and ocean shipments, and corresponding proprietary information, for its customers that would subsequently become Impexia's customers. (For breakdown of air/ocean transactions (AFI/DNB App. 2120-2162)). (AFI/DNB App. 2120-2162) is a data base shared with the Barsan Int'l Respondents (Barsan's officers and staff particularly involved: Isik Onur, Sevgi Cebe, Tugsan Uresin, Ugur Aksu—See Devrim Bal Affidavit, AFI/DNB App. 2228-2230). These officers and staff had access to this spreadsheet which contained detailed information for both air and ocean shipments related to suppliers, product descriptions, and AFI Catalogue numbers shared with Barsan Int'l. The information for both air and ocean was crisscrossed to develop products and services destined for particular destinations, projects and overseas customers. Therefore, it will be demonstrated through a preponderance of evidence that the information which is protected by the Shipping Act related to ocean shipments, which disclosed Complainants' customer, supplier, project, and, pricing information, was transmitted to Impexia, and manipulated by that company to create a composite data basis from all sources within its grasp, including information pertaining to both air and ocean shipments.

Therefore, notwithstanding, that air shipments comprise some of the transactions during the period in question, it is also clear that ocean shipments were accomplished during the same period to the same projects in Afghanistan and Iraq. Therefore, 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.

Complainants submit 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. There were basically three scenarios which generated both air and ocean shipments, but which only together would form the basis from which Impexia could implement its unlawful activities. (See Devrim Bal, Affidavit, AFI/DNB App. 2228-2230)) These scenarios were:

Scenario 1:

AFI/DNB would send a shipment containing product samples (for example lighting fixtures) directly to its customer by air, identifying the customer by name. Then, upon product review and approval, Complainants organized a larger ocean shipment from DNB to GMG DIS TICARET LTD STI ("GMG"), a related company in Turkey, to be sold to its customer in Afghanistan or Iraq. Therefore, Barsan Int'l/Impexia could correlate that the products which were shipped by ocean to GMG were, in fact, to be sold and shipped to the same customer identified in a corresponding air waybill shipping the identical products but which included specific customer, project, contact person, and contact information. Therefore, between the more complete product, including pricing and manufacturer/catalogue information identified in the ocean shipments to GMG, Barsan/Impexia could identify the buyer of said products from the sample shipments on the air waybills. Therefore, the composite information obtained from both the ocean and air shipments became the whole picture for a party wishing to emulate Complainants' business. The information on each of the ocean and air bills of lading and shipping documents were, therefore, necessary for Impexia to form its marketing strategy and enter a field that would have taken years to penetrate.

Scenario 2:

Complainants would send a container load of products (for example lighting fixtures) by ocean to GMG, Complainants' related company in Turkey, for sale to a project in Afghanistan. Then it could happen that Complainants were informed by their customer that some materials were damaged during shipment and they desperately needed replacements for damaged items. Then, an air shipment would be organized through Barsan Int'l directly to AFI/DNB's customer. Again Barsan/Impexia could easily determine what products went to what customers by correlating the information on both air and ocean shipments.

Scenario 3:

When a project was late, Complainants would require that Barsan Int'l officers split the material into two separate shipments (one shipment by air and the remainder by ocean). The air shipment was sent directly to Complainant's customer at the job site in Afghanistan or Iraq so that while the construction workers were occupied installing the first part of the material, the remainder could get to the site by ocean to save money on shipping costs. Again, this was a method by which Barsan/Impexia could create through the related air/ocean transactions composite pictures of suppliers, products, catalogue descriptions, projects, customers, and on-site customer contract information.

In support of the above scenarios, see attached examples of Shipper's Letter of Instructions for shipments related to the above scenarios directed to the following consignees by either air couriers or air carriers to Afghanistan and Iraq which disclose Customer names, project identification, contact person, contact information, and products shipped, and pricing: (AFI/DNB App.1376, 1389,1430,1448, 1468), Also see attached examples of ocean shipments consigned to

GMG (ocean bills of lading and commercial invoices) wherein the products are described in detail, including catalogue numbers for the products shipped: (AFI/DNB App. 1234-1236, 1237-1240, 1248-1250, 1254-1256, 1280-1282) For the entire universe of ocean and air shipments see AFI/DNB App. 1232-1358.

The overwhelming coincidence that strains any credulous interpretation to the contrary is that 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. Also compare Complainants' client list for comparison (AFI/DNB App. 490). The following are Complainants' customers which were literally taken by Impexia through information provided by Barsan Int'l: (Anglicized versions)-Metag, 77 Insaat, Feka Ins., Epik Ins., Ayken Elk, Yenigun Ins., Delta OM Muh, and Cakmaklar Pano.

The other role that air shipments may play in this case is that Complainants' losses are measured in business transactions for both ocean and air shipments which they lost as a result of the unlawful disclosures. We submit that air shipments for purposes of measuring losses flowing from the violation of the pertinent statute are properly included in that measurement since Complainants' loss was not transportation, but rather the underlying business transaction. 46 USC § 41103 states in pertinent parts, that a common carrier or ocean freight forwarder may not knowingly disclose 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 . . . may be used to the detriment or prejudice of the shipper or the consignee.** (Emphasis supplied). Therefore, it is clear that the detriment is not restricted to ocean carriage events. The statute speaks in terms of "detriment or prejudice of the shipper or the consignee" without any qualifications---i.e., that detriment or prejudice can include

loss of business whether handled by ocean or air, or for that matter for a loss which flows from that disclosure whether or not it involves transportation activities.

As noted above in the prior sub-section, the Shipping Acts of 1916 and 1984, as amended, have long been recognized as a remedial statute. When a statute is recognized as remedial, it is to be broadly construed so as to “suppress the evil and advance the remedy.” The policy that a remedial statute should be construed so as to effectuate its intended remedial purpose is firmly established, and in a circumstance such as the one at hand where the ocean transportation intermediary is alleged to have seriously compromised the information and documentation provided by Complainants, the Commission should be ready and eager to assert its jurisdiction. Complainants hereby submit that the disclosed information transported by ocean common carriers involved certain key information (product, catalogue references, pricing) to GMG and that this disclosure was vital information in providing the marketing short cut to Impexia by referencing the ocean shipments to the air courier shipments which identified further information related to customers, projects, and customer contact information. Again, as previously noted, this is a particularly significant case since it is the first opportunity for the Commission to address wrongs, contemplated by the remedial statutes, for actions taken in violation of 46 USC § 41103(a).

II. BGL and Barsan Int’l Disclosed Complainants Proprietary Business Information to Impexia.

A. The beginnings of the violations. The Barsan Respondents have disingenuously taken the position that the unlawful disclosures subject of this Complaint did occur, but that these were done through roguish acts of Burcin Karadagli, without their knowledge or participation in any act by Barsan Int’l, nor with Barsan Int’l’s knowledge. We disagree. The following sequence of events

demonstrate the mechanics of what was transpiring by which one can conclude that the Barsan Int'l Respondents were engaged in unlawfully disclosing Complainants' information to Jimmy Karadagli, which resulted in the formation of Impexia, and the ultimate cannibalizing of Complainants' customers:

1. The following are examples of initial information related to Complainants shipments, products, pricing, including ocean shipments, submitted for purposes of establishing the procedures utilized by Barsan Respondents to provide this information to Jimmy Karadagli in 2009, which ultimately led to the formation of Impexia in 2010. (These initial disclosures in February, 2009, interestingly coincide with the period when Barsan Int'l was involved with Cuneyt Karadagli as either an employee or in a scheme to misrepresent his employment status. (AFI/DNB App. 2163-2171) :

a) IMPEXIA00137, includes an e-mail, demonstrating that on February 2, 2009, 3:55PM, Burcin Karadagli sent DNB's website and AFI/DNB's proforma invoice to Jimmy Karadagli. This clearly shows that the unlawful process has commenced since the proforma invoice does contain product and other proprietary information. (AFI/DNB App. 378-380),

b) IMPEXIA00131-00136, includes an e-mail, demonstrating that on February 27, 2009, 2:18PM, Burcin Karadagli sent AFI/DNB shipping information, and a copy of Complainant's commercial invoice to 77 Insaat, a customer ultimately stolen by Impexia from Complainants. While this involves an inquiry relating to air rates, it is important to see the methods used to convey information which would apply also to ocean shipments shipped by Complainants to this customer. (AFI/DNB App. 381-386)

c) IMPEXIA00083---00100, includes an e-mail, demonstrating that on April 29, 2009, 5:27 PM, Burcin Kradagli forwarded AFI/DNB's Ocean Shipment information to Jimmy Karadagli, with proprietary products and supplier information (Suppliers: Grainger, Franklin Electric Co.). (AFI/DNB App. 387-405).

d) IMPEXIA00108-00116, includes an e-mail, demonstrating that on May 1, 2009, 10:07 AM, Burcin Karadagli forwarded a AFI/DNB commercial invoice and shipper's letter of instructions to Jimmy Karadagli which included detailed product information. (AFI/DNB App. 406-417).

e) IMPEXIA00168-00172, includes an e-mail, demonstrating that on May 18, 2009, Burcin Karadagli forwarded AFI/DNB shipping/products information to Jimmy Karadagli and which clearly shows the recipient of the goods as Camp Phoenix, Kabul Afghanistan. (AFI/DNB App. 418-422).

f) IMPEXIA00117-00130, includes an e-mail, demonstrating that on May 22, 2009, 10:21 AM, demonstrating that Burcin Karadagli forwarded AFI/DNB shipping information, communication, commercial invoice, shipper's letter of instruction to Jimmy Karadagli (AIR Yuklemesi). These contain detailed product and pricing information provided by Complainants. (AFI/DNB App. 423-442)

g) IMPEXIA00101-00107, includes an e-mail, demonstrating that on June 1, 2009, 9:36 AM, Burcin Karadagli forwarded AFI/DNB commercial invoice (Including Item Number, Description, Unit Price, etc.) and shipper's letter of instructions to Jimmy Karadagli. These contain detailed product and pricing information provided by Complainants. (AFI/DNB App. 443-451).

h) IMPEXIA00139—00143, includes an e-mail, demonstrating that on June 3, 2009, 8:36AM, Burcin Karadagli sent AFI/DNB shipping documents, commercial invoices, to Jimmy Karadagli which contained proprietary product and pricing information. (AFI/DNB App. 452-457).

i) IMPEXIA00165---00167, includes an e-mail, demonstrating that on June 26, 2009, 8:09 AM, Burcin Karadagli forwarded Jimmy Karadagli, DNB/AFI a Barsan House Ocean Bill of Lading and corresponding commercial invoice with product and pricing information. (AFI/DNB App. 458-481).

From the above examples, the modus operandi is established as to how and what kinds of information was unlawfully disclosed by Barsan to Impexia.

B. The Ending Disclosure activities. Respondent Impexia and Barsan Respondents have been less than forthcoming in providing the materials provided electronically or manually to Impexia by Barsan relating to this matter between February, 2009, and April 14, 2011, the date this Complaint was filed at the Commission, which resulted in Ms. Burcin Karadagli being fired shortly thereafter.

We state “manually” since, as will be shown herein, Jimmy Karadagli, maintained an office, and desk space at the Barsan Int’l facility with complete access to Barsan staff and Barsan Int’l information. Additionally, Barsan officers and senior staff routinely handled not only Complainants’ supplier/customer and product information on paper, but they also physically and directly handled the export materials when Complainants’ purchases entered in their warehouse. When these materials (items purchased in the U.S.) arrived at Barsan Int’l’s warehouse they were stored in the warehouse for several weeks waiting for additional materials/orders to arrive so that

they could consolidate all of the materials into a single container (to save on shipping costs). During this time Complainants had Barsan officers and staff inspect and count these materials and, Barsan would break large skids into multiple smaller skids for both items to be shipped by air or ocean. In addition to handling Complainants' documents, Ugur Aksu, Sevgi Cebe, Isik Onur, Mustafa Turkoglu, Tugsan Uresin, all handled Complainants' materials physically and sometimes they emailed pictures to Complainants regarding damaged materials. In many cases, Complainants referred their customers to Barsan to organize shipments directly when sales were made to the customer on an FOB, NJ basis. Therefore Barsan officers became very familiar with Complainants' products and customers. Baris Devrim Bal, an officer of Complainant DNB had a table in a section of Barsan int'l's warehouse allocated for his exclusive use, and he was there on certain days, working alongside with these individuals sifting through the aforesaid materials. (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit 2237-2254). Additionally, it was the custom of Barsan Int'l later on to provide Jimmy Karadagli access to their facilities during non-working hours. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254).)FI/DNB App. 2223-2224).

In any case, there is a paucity of information provided by Respondents between the beginning activities described commencing in 2009, through the April, 2011 date when the Complaint was filed. However, there is 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. But first we should look at the other book-end which is the following shipment dated 2/22/2011, which, in effect, appears to contain information on one of the last ocean shipments for which information was clearly provided to Impexia (then we will discuss in the next section the basis for making

inferences consistent with case law relating to circumstantial evidence on the information provided between the book-ends---i.e., the disclosures made by Barsan Int'l to Impexia between February, 2009 and April, 2011):

1. AFI-406 demonstrating that on February 22, 2011, Burcin Karadagli forwarded via email(s) AFI/DNB proprietary business information to Jimmy Karadagli on February 22, 2011 . (AFI/DNB App. 482-488). (The translation was provided by a third party translator and was duly sworn as required by Commission regulations.). The aforementioned forwarded e-mail was from Isik Onur, Export Traffic Manager to Burcin Karadagli dated January 14, 2011, sending Barsan Intl's house ocean bill of lading and a commercial invoice with detailed product and pricing proprietary information, and an email from Burcin Karadgali forwarding that same Information to Jimmy Karadagli, President of Impexia, on February 22, 2011. Exhibit AFI-407, (BAR001644-47). (The translation was provided by a third party translator and was duly sworn as required by Commission regulations.)

C. Reasonable Inferences as to Disclosures. In astronomy and cosmology, dark matter is a type of matter hypothesized to account for a large part of the total mass in the universe. Dark matter cannot be seen directly with telescopes; evidently it neither emits nor absorbs light or other electromagnetic 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. Similarly, in law, one can reasonably conclude through circumstantial evidence, through a preponderance of evidence, that a multitude of disclosures were made between Barsan Int'l and Impexia between the February 22, 2009 date and April 14, 2012, the date this Complaint was filed, which resulted in the creation of a competitor predator feeding on Complainants customers. Circumstantial evidence has been defined as "that which establishes the fact to be proved only

through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present.” *Paulino v. Harrison*, 542 F.3d 692, 700 n. 6 (9th Cir.2008) (quoting *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir.1950)); see also *United States v. McIntyre*, 997 F.2d 687, 702 n. 16 (10th Cir.1993); *Byrth v. United States*, 327 F.2d 917, 919–20 (8th Cir.1964), *cert. denied*, 377 U.S. 931, 84 S.Ct. 1333, 12 L.Ed.2d 295 (1964). Such evidence “requires an inferential step,” *United States v. Ruiz*, 105 F.3d 1492, 1500 (1st Cir.1997), that is, a factual premise used to reason deductively to a factual conclusion that represents a “preponderance of probabilities according to the common experience of mankind.” *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 74 (3d Cir.1996) (quoting *Bornstein v. Metro. Bottling Co.*, 26 N.J. 263, 139 A.2d 404, 411 (1958)); see also *United States v. Henderson*, 693 F.2d 1028, 1031 (11th Cir.1982). This inferential process distinguishes circumstantial evidence from mere speculation—the former yields a preponderant probability, the latter only a mere possibility. See *Fedorczyk*, 82 F.3d at 74; see also *Dept. of Econ. Dev. v. Arthur Andersen & Co.*, 924 F.Supp. 449, 474 (S.D.N.Y.1996) (“Circumstantial evidence is evidence that tends to prove a disputed fact whose existence follows inferentially from the existence of evidentiary facts; it is not merely evidence that is as consistent with the fact sought to be proved as with its opposite.”); see generally, Restatement (Second) of Torts § 433B (1965). See *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir.1991); *Williams v. Steuart Motor Co.*, 494 F.2d 1074, 1080 (D.C.Cir.1974) (breach “may be established by direct or circumstantial evidence or by a combination of the two kinds of evidence”); *Menovcik v. BASF Corp.*,

2010 WL 3518008, at (E.D.Mich. Sept. 8, 2010); *Platner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1994903, at *12 (N.D.Okla. May 18, 2010); *Rochester Midland Corp. v. Enerco Corp.*, 2009 WL 1561817, at *16 (W.D.Mich. June 1, 2009); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 2008 WL 2694750, at (S.D.Fla. July 8, 2008); see also *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1491 n. 7 (8th Cir.1992).

In the case at hand, there are ample evidentiary facts (the “factual premises”) from which inferences can be readily made that are probable (a “preponderance of probabilities”), and not merely possible, which meets the test of establishing circumstantial evidence as reasonable. The two book ends previously discussed are direct evidence that Barsan Int’l commenced providing shipment and proprietary information in February, 2009, and the evidence herein further demonstrates that the disclosure activity continued through February, 2011. These “book-ends” provide the “inferential steps,” that is, “the factual premises) which can be used to reason deductively to a factual conclusion that represents a “preponderance of probabilities according to the common experience of mankind” with regard to disclosures that occurred in the interim between those two sets of events in February, 2009 and February, 2011.

The “dark matter” in this case that needs to be reconstructed are the “messages that are deleted, but not recoverable, as the PST container no longer has the information available for parsing.” (Barsan Affidavit of Jonathan Robbins, AFI/DNB 2095). This could also by inference mean that materials were not provided to Complainants in discovery for whatever reason, or the “dark matter” to be logically inferred , can also refer to information and documents provided directly to Jimmy Karadagli during his ubiquitous presence at the Barsan Int’l facility which do not leave a physical trail. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal

Affidavit AFI/DNB App. 2237-2254). However, the following are further factual premises which are pertinent for purposes of additionally establishing reasonable factual premises from which to reasonably infer certain facts relating to disclosures of vital information to Impexia and Barsan Int'l's participation in that process:

1. 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 (see Exhibit 64) 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)). Also see Complainants' client list for comparison with Impexia's client list. (AFI/DNB App. 490) The following are Complainants' customers which were literally taken by Impexia through information provided by Barsan Int'l: (Anglicized versions)-Metag, 77 Insaat, Feka Ins., Epik Ins., Ayken Elk, Yenigun Ins., Delta OM Muh, Cakmaklar Pano. This duplication of Complainants' business by Impexia cannot be explained away by other than a reasonable inference that Impexia had unlawfully obtained Complainants' supplier, product, pricing, project, and customer information which made this possible. To have us believe that this mirror image customer base is as a result of Jimmy Karadagli's great skills as an entrepreneur is akin to having us believe that if you sit someone (the illustration used to utilize "a chimp" to make the point) in front of a typewriter, that person could eventually produce Shakespeare-like plays. The probabilities of that are so minute

that they can be deemed non-existent. This conclusion is bolstered by further facts as will be noted below.

2. Complainants invested substantial money and time in infrastructure and personnel to be able to sell its specialty electrical products to the Middle East, principally in Afghanistan and Iraq. By contrast, Impexia with a single person (Jimmy Karadagli) was an immediate success. This preparation for this marketplace includes, but is not limited to, obtaining approval for the subject products submitted to the consultants for the specific U.S. projects. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254). Selling U.S. standard Electrical products outside of the U.S. is a very difficult, cumbersome and tedious process. U.S. standards on electrical products are, of course, very different from the rest of the world, and they are not compatible with each other. The obvious difference is that the U.S. uses 110 Volt / 60 Hz. whereas most of the other countries use 220V / 50 Hz. In addition to this difference, U.S.-standard wiring devices, lighting fixtures even cables are not interchangeable and compatible with the rest of the world. Therefore there are very limited projects that require U.S. standard products for use outside of the U.S. Most of these projects are related to U.S. Government, U.S. Military, Oil Sectors, or large U.S. design firms executing jobs overseas such as airports, high rise buildings, etc. The market is small, project-oriented and mostly government-driven. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254). This requires that a company like those of Complainants spend resources in qualifying appropriate products for specific projects overseas. This involves, not only, experienced sourcing staff, but also engineering staff to ensure that the products for a particular project are appropriate and qualified for a specific project. This procedure is an expensive process, which

ultimately requires approvals from the project site. These products end up in Complainants' Industrial Supply Catalogue.

A typical transaction from inquiry to order in Complainants specialized industry will follow the steps below . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254):

- a) Complainants study the Bill of Material for the intended project if there is one or study the projects documents for material take-off and determine the quantities required for the project.
- b) Complainants study the inquiry together with other project documents such as drawings and specifications, and determine a suitable product to offer for each line.
- c) Complainants submit their proposal backed by the product datasheets & manufacturer's specific catalog numbers.
- d) If all goes well, Complainants receive the approval for the products submitted from the on-site customer or their consultants..
- e) In the event that they do not get the approval, Complainants repeat the last three steps until such time the approval for the products are received.
- f) Complainants anticipate to be rewarded with a Purchase Order based on their offer. The offer will include the overhead components for the product qualification described herein.
- g) At this stage, where the products have been vetted, mainly through Complainants' extensive and costly efforts, the buying phase of the process begins.
- h) The target prices for the ultimate buyer customers are based on Complainants' offer, which fairly contains components for the product selection and qualification process.

3. Another example of Impexia's *modus operandi* in coming into the scene and taking advantage of Complainants extensive efforts and expense in establishing product lines relates to

Harger Lightning & Grounding, for which Complainants are a distributor. It is a medium size US Company manufacturing Lightning Protection & Grounding to U.S. standards. They were not known in the Great Middle East region, including Afghanistan, until AFI/DNB started working heavily to specify their products about three years ago. Alternative products from Turkey and other countries in the neighborhood were used in place of theirs. The specific example is "Kandahar Milcon Pkg. 10-1 Project, Expeditionary Fighter Shelters" in Afghanistan. Complainants' sales representative, Mr. Asim Seyhoglu, received the site Grounding Plan in the form of drawings and spent days for the grounding material take-off. Having calculated what was required for the job, he prepared his sales offer including (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit 2237-2254):

- Harger's specific catalog numbers,
- Unit prices for each,
- Datasheets for the products offered.
- (Please see attached document for his quotation) (AFI/DNB App. 2226).

Again, it is at this point that Impexia has stepped into the stage, their work already done for them. They have the manufacturer's or Complainants' specific catalog numbers for products already vetted for specific projects, obtained from both the air and ocean shipments from information provided to Barsan Int'l for products already vetted by Complainants, or as previously noted, directly from Complainants' Catalogue. Again, there is no overhead factor to Impexia's quotations for these lighting products. As noted before, it is reasonable to conclude that Impexia's successes in stealing away Complainants' customers could only have been achieved by having unlawfully obtained the sensitive product, vendor, pricing, and catalogue information from Complainants documents and information provided to Barsan Int'l for ocean and courier

shipments. Again, this is the stage where Impexia stepped in, got hold of Complainants' quote with all technical details with target prices dictated by the contractor, Metag, on this particular occasion, and contacted a domestic Harger Lightning & Grounding for a quote.

(Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254).

This is yet another example to establish yet another factual premise to add to those already discussed to provide further basis for arriving at the inferences that flow from these factual premises.

4. This shortcomings on the part of Impexia, and its reliance on materials taken from Complainants is well illustrated further in the e-mail exchanges between Impexia, Metag (former AFI/DNB customer), and World Electric Supply (AFI/DNB U.S. supplier) with references to products already vetted by Complainants and contained in their Catalogue. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254). Jimmy Cuneyt of Impexia demonstrates he does not have in-depth product knowledge, from the emails attached hereto (AFI/DNB App. 2210-2219) Impexia ended up selling the wrong type of product to Metag. Additionally, Impexia unethically edited the spec sheet of the product to include the word ("waterproof") to cover its lack of expertise in not being able to source a waterproof product as required by Metag. (A pattern of manufactured documentation seems to be developing in this case). The reason that these facts are known is that Impexia was using Complainants catalog cut sheets for reference. Attached is the original catalog cut sheet from the manufacturer that does not have the word ("waterproof") to compare to the one attached to the e-mails between Impexia and Metag. Also notable in this matter is that Impexia is selling the TEXAS Fluorescents brand. There are many very well-known lighting manufacturers in the USA such as GE, Hubbell Lighting,

Cooper Lighting, etc. What is important in this incident is that Impexia altered the catalogue cut out to make Metag think that the products were “waterproof” as required by the customer. The other salient fact which demonstrates the unlawful *modus operandi* of Respondent Impexia is that Complainants were the first exporters to ever sell TEXAS Fluorescents to the Middle East. Complainants registered TEXAS Fluorescents’ name and specified its products for the projects in Afghanistan. And again, Impexia merely stole the information without incurring any of the expenses in qualifying the products for sale to specific projects. And then, additionally, in view of their lack of expertise and professionalism, Impexia unethically mischaracterized the product as “waterproof.” This further underscores that Impexia, but for the stolen information, could not be a competitor in this environment. This is clearly another set of factual events which bolster the circumstantial construct which is discussed herein that reasonably supports a conclusion that Barsan Int’l fed Complainants’ proprietary information to Impexia, a company, otherwise unfit to be participating in this industry. Again, another example in providing a factual premise upon which to form reasonable inferences.

D. Reasonable Inferences as to Barsan Respondents’ Involvement.

1. Before Impexia was set up in March, 2010, Mr. Karadagli describes his prior business experience, which is summarized as follows:

Since 2005, I have incorporated and operated several companies, including Source Concept, Inc. d/b/a Myra Home, House of Water LLC, House of Water Inc, and Impexia Inc. Source Concept, Inc. d/b/a Myra Home was incorporated on July 20, 2005 and ceased operations in April of 2009. House of Water, Inc. was incorporated in June 2009 and ceased operations in December of 2009. I was president with a 33% share with two other partners. In January of 2010, which was previously House of Water, Inc. became House of Water LLC. House of Water ceased operations in November of 2010.

(Cuneyt Karadagli’s Declaration ¶5, AFI/DNB App. 241))

Further, the president of Impexia admitted that he did not have prior experience in selling electrical products and complementary parts. (Impexia's Responses to Complainants' Second Set of Discovery Requests, Interrogatories. Responses Nos. 32, 33, 34, 46, 55 (AFI/DNB App. 123, 124, 132, 137.)

Barsan Respondents are also aware that that Burcin Karadagli and her husband were facing economic hardships and that Mr. Karadagli was having a hard time making payments for transportation services provided by Barsan on behalf of companies he operated before Impexia was set up (AFI/DNB App. 710, 713-714, 715-718, 719-758, 759-760). These facts are submitted only for purposes of illustrating that the principals of Impexia did not have a significant track record in the importing/exporting business, and, only had some experience in a very mundane setting, and suddenly achieved unlikely marked success in an endeavor requiring much more experience, expertise, and infrastructure. Additionally, it demonstrates that the Barsan Respondents were well aware of Impexia's principal's limitations in the export/import arena since monies went to them. Barsan Respondents would clearly have immediately noted the details of its new found success under Impexia for several reasons, not least of which was that Impexia was now a paying customer, and had caught up in monies previously owed. . These are facts which underscore Barsan Int'l's readiness to accept this change of fate on the part of Impexia, but what should have given them pause as to what new fortune had befallen Impexia, Barsan Int'l seemed to flow along without concern. Again, a likely inference is that Barsan Int'l was assisting Jimmy Karadagli "engineer" his way out of debt. This would also reasonably explain why Barsan Int'l would accommodate Jimmy Karadagli with employment or with questionable assistance in obtaining a desirable Immigration status, or for whatever reason there was to fraudulently show Mr. Karadagli as an employee of Barsan Int'l.

2. In addition to Impexia, Mr. Cunyent Karadagli previously founded several companies which had also maintained a close business relationship with Respondent Barsan Int'l. a invoiced amount of one hundred dollars on time. (Barsan Customers Balance Details (AFI/DNB App. 642-644) (AFI/DNB App. 710, 713-714, 715-718, 719-758, 759-760)). After Impexia was set up, however, Mr. Karadagli suddenly changed his pattern and frequency of payments to Barsan Int'l. The following documents illustrate some of the transactions between Barsan Respondents and Mr. Karadagli, the principal of Impexia, and provide an understanding of how Barsan Int'l and companies with which Mr. Karadagli was associated, including Impexia, were accommodated and acting towards a common purpose in improving Impexia's good fortunes to the detriment of Complainants, and to the benefit of Impexia and the Barsan Responedents:

- a. BAR002057 shows that before Impexia was set up Mr. Karadagli's previous companies made a monthly payment in the amount of \$100 to Barsan Int'l. (AFI/DNB App. 710).
- b. BAR002144, is an email of October 14, 2009, indicating that it was difficult for Source Concept, one of Mr. Karadagli's previous company, to pay \$300 to Barsan Int'l. (AFI/DNB App. 711-714).
- c. BAR002146, is an email of May 22, 2009, indicating that Source Concept, one of Mr. Karadagli's companies would deposit \$100 each Friday and that Source Concept had a problem in the deposit of a \$200 check. (AFI/DNB App. 715-718).
- d. BAR002161, is an email of May 14, 2009 from Urgur Aksu, Barsan Int'l's President to Burcin Karadagli, demonstrating that Source Concept had not made any payment to Barsan Int'l for more than a year. (AFI/DNB App. 719-758).

- e. BAR002221 is an email of February 10, 2009, indicating that Burcin Karadagli would pay \$100 every month from her paychecks to Barsan Int'l for her husband's companies' outstanding debts. (AFI/DNB App. 759-760).
- f. BAR002225 is an email of August 17, 2009, showing that Mr. and Mrs. Karadagli faced some problems with payments of a car insurance and lease. (AFI/DNB App. 761-762).
- g. BAR002960 is an email dated May 18, 2010, indicating that Mr. and Mrs. Karadagli could not pay \$150 school fees for their children before Impexia was established. (AFI/DNB App. 763-770).
- h. BAR003047 is one of Barsan Respondents' Invoices, dated April 22, 2010, indicating that Barsan invoiced Impexia for \$800 in exports fees. (AFI/DNB App.771).
- i. BARSAN000027, demonstrates that Barsan Int'l had an interest in Impexia's success in that Impexia was the only one of Mr. Karadagli's undertakings with Barsan that was paying off. Only after Impexia was started in March, 2010, was Barsan Int'l paid other than token amounts by House of Water and Source Concept, and by May, 2011, all invoices had been paid off. Barsan Int'l's monetary interest in the successes of Impexia is clear. (AFI/DNB App. 642-644)).

Indeed, before Impexia was set up, Mr. and Mrs. Karadagli even had problems buying lunch. After Impexia was set up, and it commenced receiving proprietary information from Barsan Int'l, Mr. Karadagli was transformed into a successful businessman overnight. He went from not being able to buy lunch to being able to purchase a \$3,000 player's jersey in a fundraiser for his favorite Turkish soccer club (Turkish Press. (AFI/DNB App. 772-773)). Impexia's bank statements highlight the cause of this rapid success as they show that a single transaction with

Complainants' customers exceeded the total amount of transactions for the previous two years of Mr. Karadagli's previous companies. In fact, as has been shown, this tremendous reversal of fortunes ended up with a business with gross sales of \$3,842,475.85 for thirteen months through January 31, 2012. This was surely a reversal which can be reasonably concluded was noted, in fact, assisted by Barsan, especially since its accounts were suddenly brought current, and Impexia was generating new revenues.

3. The most salient of events that demonstrates that Barsan Int'l had knowledge of the components of Impexia's new fortune was that it commenced to handle Impexia's business which was familiar business to Barsan Int'l. In fact, it was identical to the business it had been handling for Complainants. By Barsan Int'l's own admissions, AFI/DNB were Barsan' Int'l's only customers to ship electrical equipment and complementary parts to Turkey/and the Great Middle East before Impexia was set up(Barsan Respondents' Objections and Responses to Complainants' Second Set of Discovery Requests, Admissions No. 7 and 8, (AFI/DNB App. 198)). (AFI/DNB App. 494—505) includes the shipping documents, Barsan's bill of lading, the master bill of lading with the Barsan Int'l address as Impexia's and lists merchandise the Barsan Respondents shipped for Impexia to 77 Construction that is identical to the merchandise the Barsan Respondents shipped for Complainants. (AFI/DNB App. 494—505). When Impexia sent this commercial invoice to a customer, kan Eker, a Barsan Int'l officer, was copied. The e-mails were exchanged between Cuneyt Karadagli and Isik Onur with other Barsan's officers were copied, who are Tugsan Uresin, Sevgi Cebe, Ugur Aksu, etc.. Cuneyt Karadagli's signature sections contained Barsan's addresses (IMPEXIA00218---00239 (App 288-308)); Jimmy Karadagli's Emails to Isik Onur, Cc: Tugsan Uresin, Sevgi Cebe, Ugur Aksu, and Isik Onur , Isik Onur's emails to Jimmy Karadagli and, Cc: Tugsan Uresin, Sevgi Cebe, Ugur Aksu (AFI/DNB App. 287-308, 310-316,

310-316, 318-333). To further illustrate the physical proximity of the Barsan Int'l staff is the fact that all employees worked in a single room with close proximity with each other. The reasonable inference is that no one, including Bursin, could reasonably act without the full knowledge of all the remainder of Barsan Int'l staff. Barsan Int'l has a small and open office and all employees sat close to each other. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254).

4. An illustration as to how overlapping and interlocking the Impexia activities were with Barsan Int'l activities, according to an e-mail sent by Isik Onur To Jimmy Karadagli on December 6, 2010 (BARSAN 000005. (AFI/DNB App. 2176)), Barsan Int'l consented to Impexia's request to have Burcin Karadagli sign an Impexia Shipper's Letter of Instruction. The text of the e-mail is telling in several ways:

From : Isik Onur (mailto:isik.onur@barsan.com)
Sent: Monday, December 06, 2010 4:51 PM
To: Jimmy Karadagli
Cc: Tugsan Uresin; Sevgi Cebe; Ugur Aksu
Subject : RE: SHIPMENT TO CAMP BASTION
Cuneyt Abi; I received the documents, but the schedule B # for these items are not mentioned, can you get them from the people who sold you these and forward to me, this information is required at USA Customs entry point, to make it to tomorrow's cut off date.
I will have Burcin sign the SLI, it is not a problem, however your customer may need the original invoice, is there someone in Turkey that can prepare the original invoices for your customer? Otherwise they might have to be sent from here.

(AFI/DNB App. 2176)

Burcin who is Barsan Int'l's accounting manager, is being asked by Respondent Barsan Int'l to execute Impexia's Shipper's Letter of Instructions ("SLI"). Whether or not an SLI is required to be signed is immaterial. What is important is that all of the Barsan Int'l officers and staff dealt with Burcin, a Barsan Int'l senior manager, as if she also had

an interest in Impexia. This underscores the fact that Barsan Int'l and Impexia knowingly engaged in jointly promoting the Impexia activities. But that is not the sole message in this communication. Note the "Subject" line on the e-mail, "SHIPMENT TO CAMP BASTION". This is clearly a project in which AFI/DNB were engaged from the very inception of the U.S. activities in Afghanistan, and Complainants had been one of the first vendors to that project, and Barsan Int'l was fully aware of this. Complainants' were one of the first suppliers that supplied many products to many contractors in Camp Bastion Base, and, in fact, Complainants had shipped materials to Camp Bastion through Barsan Int'l. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254).

E. Reasonable Inferences of Barsan Intl's Knowing Direct and/or Indirect Involvement in Disclosures to Impexia.

As previously discussed, this case involves direct evidence and circumstantial evidence which result in a preponderance of the evidence demonstrating that the alleged violations occurred, and that the perpetrators include, not solely Bursin Karadagli, but rather the Barsan Respondents.

Documents produced by Impexia clearly demonstrate that as early as the beginning of February, 2009, immediately after AFI/DNB executed the Contract Carrier Agreement with the Respondents Barsan Global LojistikVeGumrukMusavirligi A. S. ("BGL") and Barsan International, Inc. ("Barsan Int'l"), these Respondents embarked in a process of divulging all aspects of Complainants' confidential commercial information through the acts of Burcin Karadaglia. Again in February, 2011 Impexia documents illustrate that this same practice of disclosing Complainants commercial invoices (with selling price information), packing lists, and other shipping documents which contained information concerning the nature of the products,

supplier identification, catalogue references, Customer identification, including contact persons and information was still being divulged to Impexia. It has also been shown that through the analytical process of circumstantial evidence based on factual premises that it is reasonable to conclude that there was a continuous disclosure of Complainants' information between February, 2009 and February, 2011.

The record also shows that there was ample exposure to the Barsan Int'l officials to the fact that the principal of Impexia, Cuneyt Karadagli's fortunes had turned and that he was suddenly meeting long standing obligations from prior shipments with different companies with which he had been involved that owed money to Barsan Int'l, and was successful with the new Impexia activities. There is ample evidence as well that Impexia was, in fact, shipping the same materials from the same suppliers, to the Customers and projects as had AFI/DNB, and that Barsan Int'l officers and staff were aware of this fact.

There is no record of Barsan Int'l ever questioning the Impexia good fortune, or that the Impexia customer list, goods shipped, and suppliers mirrored those of AFI/DNB. The evidence shows to the contrary that all sorts of e-mails in which Barsan Int'l officials were copied clearly pointed to the fact that the materials shipped, the Customers being served, and the suppliers were familiar to Barsan Int'l from their AFI/DNB experience. There is also evidence that Barsan Int'l accommodated Cuneyt Karadagli in many ways, including whatever benefits were derived by him by being put on Barsan Int'l's payroll, and by giving him free unfettered access to Barsan Int'l offices and warehouse during non-working hours.

The language of 46 USC § 41103 states that a common carrier or ocean freight forwarder, either alone or in conjunction with any other person, **directly or indirectly, may not knowingly**

disclose 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 may be used to the detriment or prejudice of the shipper or disclosed to a competitor. (Emphasis supplied).

In the instant case, the evidence has clearly indicated that Burcin Karadagli routinely disclosed the type of information prohibited by the statute. Ms. Karadagli was clearly a senior manager in the Barsan Int'l ranks. As noted above it was clear that Barsan officials knew that the cargo being generated by Impexia was identical to that previously generated by their customer AFI/DNB.

The Commission has repeatedly interpreted “knowingly and willfully” relying on *United States v. Illinois Central Railroad Co.*, 303 US 239 (1938). In *Misclassification of Tissue Paper as Newsprint Paper*, 4 FMB 483 (1954), the Commission, citing the Supreme Court stated:

We believe . . . that the phrase ‘knowingly and willfully’ means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements.

The Commission again defined “knowingly and willfully” in *Transpacific Forwarding, Inc.---* *Possible Violations/ 1984 Act*, 27 SRR 409, 412, February 9, 1996. The Commission stated:

The phrase “knowingly and willfully” means purposely or obstinately and is designed to describe the attitude of a carrier, who having free will or choice, **either intentionally disregards the statute or is plainly indifferent to its requirements.** (Case citations omitted.) A violation of 10(b)(1) could be termed “willful” if the carrier knew **or showed “reckless disregard” for the matter of whether its conduct was prohibited by the 1984 Act.** The conduct could also be described as willful if it was “marked by careless disregard for whether or not one has the right so to act.” (Citations omitted.) The Supreme Court cited with approval these “reckless or careless disregard” standard in *Trans-World Airlines, Inc.* v. *Thurston*, 469 US 111, 125-129 (1985). (Emphasis supplied).

The Commission further elaborated in that case as follows: (*Id.*)

We agree that a persistent **failure to inform or even to attempt to inform himself by means of normal business resources** might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. **Diligent inquiry must be exercised** by shippers and freight forwarders in order to measure up to the standards set by the Act. **Indifference on the part of such persons is tantamount to outright and active violation.** (Emphasis supplied).

The preponderance of the evidence presented herein clearly demonstrates that Barsan Int'l clearly disregarded the statute or was plainly indifferent to its requirements. Further Barsan Int'l showed reckless disregard for the matter of whether its conduct was prohibited by the 1984 Act as amended. Even if one were to give Barsan Respondents the benefit of the doubt that Burcin Karadagli, whose work space was within a few feet of all of the Barsan officers and staff, was the sole perpetrator of the disclosures, Barsan Int'l failed to inform or even to attempt to inform itself by means of normal business resources that its senior accounting manager was acting knowingly and willfully in violation of the Act. While it is difficult to believe Barsan Int'l was not involved in the scheme, notwithstanding all the other thousands of clues that Barsan Int'l experienced in handling Impexia's cargo, cargo which was the same Middle East cargo which it had handled for Complainants, Barsan Int'l still failed to inform or even to attempt to inform itself of the underlying facts. In this case, even if we give the Barsan Respondents the benefit of the doubt that they knew nothing, indifference on their part is tantamount to outright and active violation.

III. Barsan Respondents' Is Liable for Burcin Karadagli's Unlawful Activities Under Agency Law.

It is Complainants' position that the Barsan Respondents are independently liable as an ocean freight forwarder and an NVOCC by knowingly, directly or indirectly, having disclosed the statutorily prohibited information to Impexia without the consent of and to the detriment of Complainants. Complainant also submits that the Barsan Respondents also are culpable in that Burcin Karadagli's direct acts of disclosing vital commercial information to Impexia was within

her scope of employment in the furtherance of the business of the Barsan Respondents. "An act is within the scope of a servant's employment [where] reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." *Id.* (quotation marks and citation omitted). *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 803 F. Supp. 2d 469, 506 (E.D. Va. 2011). It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority or employment. Conduct is within the scope of the agent's authority or employment if it occurs while the agent is engaged in duties that the agent was authorized or employed to perform and if the conduct relates to those duties. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary to perform an authorized act is within the scope of the agent's authority or employment. *Bowman v. Bulkmatic Transp. Co.*, 739 F. Supp. 2d 1028,1030 (E.D. Tenn. 2010).

Notwithstanding that Barsan Respondents assert 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, the following facts showing a collective benefit are to the contrary:

- 1) After Impexia commenced shipping through Barsan Int'l all of the prior debts in which Cuneyt Karadagli had an interest were paid to Barsan Int'l;
- 2) Impexia transport business was flowing through the Barsan Respondents companies;
- 3) Burcin Karadagli's participation in a payroll scheme involving her husband was approved by Barsan Int'l's President, indicating a common interest in Cuneyt Karadagli's welfare; and
- 4) Since Burcin Karadaglia was a senior employee of Barsan Int'l, it was less likely for Impexia to move on to another logistics company for services.

The facts in this case clearly demonstrate that Burcin Karadaglia's Conduct was within the scope of her authority or employment and that it occurred while Burcin Karadagli was engaged in duties that she was authorized to perform. The fact that she and her husband were given access to the Barsan Int'l facilities after work hours underscores this fact. The duties clearly were to grow Impexia's business to the benefit of all concerned, including Barsan Int'l. Burcin Karadagli's conduct was for the benefit of the principal and was incidental to, and was necessary to perform acts authorized by Barsan Int'l, and was, therefore within the scope of her authority or employment.

Burcin Karadagli obtained Complainants' proprietary business information within her scope of employment with the Barsan Respondents. Complainants' provided that information to the Barsan Respondents relying on the protection of the Shipping Act, and trusted the Barsan Respondents in large part because Barsan Int'l was an FMC licensed NVOCC. Burcin Karadagli disclosed that information to her husband during working hours at Barsan Int'l's open office (and very likely as well after hours with Barsan Int'l' approval), and Respondent Impexia received that information. Pursuant to the principles of agency law, regardless of when Barsan Respondents became aware of her activities, Burcin Karadagli's illegal activities must be attributed to Barsan Respondents.

IV. Respondents Released Complainants' Trade Secret and Complainant is Entitled to Damages Pursuant to Analogous Trade Secret Case Law

A trade secret is generally defined as any formula, pattern, device or compilation of information which is used in one's business, and which gives an opportunity to obtain an advantage over competitors who do not know or use it.

The gravamen of Complainants' damages is that in a case involving an improper "disclosure of its business transaction to a competitor" is akin to cases relating to Trade Secrets. The damages theories applicable to those cases are applicable by analogy to the case at hand, and consistent with the Commission's requirements. In short, the Federal Maritime Commission has the authority to direct the payment of reparations to the Complainants for "actual injury" caused by a violation of this part, plus reasonable attorney fees. 46 USC § 41305(b). Commission case law states that: "(a) damages must be the proximate result of violations 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 (1950); *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 2003 WL 22067203 (Aug. 26, 2003).

The Trade Secrets cases relating to damages, and, therefore, the theory of damages pursuant to 46 USC § 41103, by analogy, would include damages which continue beyond the point of when the information was unlawfully obtained pursuant to various theories which are applicable to the case at hand, and consistent with the Commission's mandate on reparations. These damages principles involve, but are not limited to: a) damages proximately resulting from Respondents' wrongs, measured by an accounting of profits on sales made to the diverted customers by Respondents after they obtained the unlawful information; b) damages may be limited, in some cases, for a period of time which would have been required by Respondents to reproduce Complainants' products/services without the wrongful appropriation, generally termed the "head start" rule, which can run years after the wrongful appropriation; and c) if the facts are egregious enough, as they are in subject case, the "head start" principle would not be applicable and the

damages could run for an indefinite period, and “royalties” may be the appropriate damages for an indefinite period.

In view that this is a case of first instance with respect to the alleged violation of 46 USC § 41103, and consequently there is no case precedence to guide the agency, Complainants’ argument for damages will be grounded on damages theory found in Trade Secrets cases, and by analogy applicable to subject case. It is Complainants’ position that 46 USC § 41103, with respect to applicable theories of damages, is analogous to those in use in Trade Secret proceedings, and that their application would still conform to the damages standard included in 46 USC § 41305(b).

The Respondents unlawfully disclosed and knowingly misused Complainants’ trade secrets and other proprietary information. As stated in Complainants’ Motion to Compel Compliance with Outstanding Discovery Requests and for Sanctions (“Motion to Compel”), over the past 30 years, the President of AFI has accumulated tremendous knowledge of products, developed contacts and connections with U.S. manufacturers and suppliers, and most importantly created a network of distributors, contractors and end users. *Motion to Compel*, at 1-2. As discussed in Complainants’ Opposition to Barsan Respondents’ Motion for Bifurcated Briefing, Respondent Impexia, obtained business in the high-technology intensive industry without any overhead. Complainants have incurred roughly \$1.5 million USD of overhead annually which includes but is not limited to research and business development (R&D), salaries, rents, travel expenses, catalogues, website maintenance, samples, etc. However, this miracle magically happened to the president of Respondent Impexia who has been obtaining business from Complainants’ customers without any overhead, and, thereby pricing the goods with good effect. Impexia has ridden Complainants’ overhead coattails without having to incur the overhead costs inherent in this type

of business. See *Complainants' Opposition to Barsan Respondents' Motion for Bifurcated Briefing* at 3-5.

Complainants' industry is very specialized. Without the "head start" benefits it obtained by taking the protected information and materials, it was unlikely for Complainants to have entered into and survived in this industry. For example, with the expertise, experience, and knowledge, Complainants specify manufacturers' standard material for certain applications. For example, as noted previously in this brief, when the U.S. Embassy project in Kabul required 2X36 Watt Surface Mounted Fluorescent Fixture with electronic ballast, Complainants read and analyzed this information from the shop drawings and spread sheets, compared the U.S. standards with the standards used by other countries, accordingly found an appropriate product from their manufacturer to meet the job requirements. The manufacturer Complainants found was Texas Fluorescent. Thereafter, Complainants made a submittal to the consultants of the job, got approval and at the end the contractor went into the market for pricing of this specific part number and manufacturer. There are at least ten (10) manufacturers in the U.S. making these fixtures and some of them are better known than Complainants' manufacturer. However, Complainants' efforts secured the order for the products of their manufacturer. It is the longest and most difficult (and expensive) part of Complainants' task to convince the consultants of the job and to get their approval of the products of the specific manufacturer. After Complainants spent all the time and money to get their suppliers' products approved for the U.S. projects, Impexia inappropriately obtained all Complainants' chain and channel information and saved all start-up costs.

Lost profits should be awarded to Complainants for the following reasons: (1) they spent time and efforts on R&D to develop the products submitted and approved by the U.S. projects, and Complainants' expertise and knowledge of the industry made them build the entire U.S.

overseas projects supply chains tailored to each project, supplier, customer, products; (2) an individual factor of the entire supply chain may be obtained through public channels, but the entire chain constitutes Complainants' trade secret and is unlikely to be found through any public channels; (3) Complainants' "REAL" competitors operate in the same way as Complainants, i.e. by expending time, money, efforts, expertise, knowledge, etc. to compete in this industry; (4) the "REAL" competitors are unlikely to market products at those low prices which Impexia offered to Complainants' customers due to R&D and other costs described herein; (5) Complainants tailored each of the supplier's products to meet the requirements of the U.S. projects which involved R&D costs, and expertise/knowledge; (6) the "REAL" competitors can only substitute the products which Complainants submitted to and got approved by the U.S. projects by spending for R&D and re-submitting/obtaining approval of their suppliers' products; (7) Impexia obtained all of the necessary factors of Complainants' trade secret, i.e. the entire supply chain and is selling the approved products at much lower prices to Complainants' customers. Under any lost profits approach, Complainants' loss of profits should be awarded, which include their loss due to reduced profits margin and Impexia's profits from its sales to customers diverted from Complainants.

The protected information, however covers much more than pricing, and involves the following: a) the identity of suppliers, and their corresponding managers engaged in this trade for the specific projects; b) the identity of Complainants' customers to whom Complainants were selling their merchandise, and their corresponding managers engaged in this trade for the specific projects; c) the goods (merchandise) which were being sold to these customers, which had been identified, sourced, and tested, by Complainants' engineers as appropriate to the specific projects, and approved by Complainants' customers by specific projects; and, lastly, d) pricing of the goods in question. The protected items are to be considered as an integrated package, and the only

variable which could be time sensitive would be the individual pricing of the goods, but the integrated package of information is in itself information protected pursuant to Trade Secret laws and the pertinent Shipping Act provision relating to unlawful disclosures.

To illustrate, pricing of a commodity in use for the projects described above at any given time, would be useless without the context of what goods have been approved by customers for specific projects, the identity of the customers, and the suppliers which provide the pertinent merchandise for the specific projects. Additionally, Impexia, with a one-man show, without the need for experienced engineers to review the product requirements of the pertinent projects, could always undersell Complainants' pricing models. This "competition" results, of course, not because Impexia was particularly diligent in its delivery of services and goods, but rather, because, it could compete with the ill-gotten information relating to suppliers, customers, and the identity of products already vetted for the projects involved.

Equally important, since Impexia's customer list is identical to Complainants' customer list, it is not a stretch to conclude that the customer/suppliers lists stolen from Complainants remains an important cornerstone for Impexia's successes. Before Impexia was formed, Mr. Cuneyt Karadagli who is now a roaring success had been an importer of water, and other home products, and had accrued huge debts to Barsan. Barsan saw this whole transition of Mr. Cuneyt Karadagli and were fully aware as to who were Complainants' suppliers, customers, and the identity of the products, and they witnessed the slow transition of the business from Complainants to Respondent Impexia. Impexia would have us believe that a one-man shop could independently carve out this niche in record time without any of the ill-gotten information. All of the components of the information stolen are inextricable to this successful business. Pricing is but a small part of the formula for a successful business in this context, keeping in mind that the product selection

process, which is expensive to develop, has already been accomplished by Complainants. Impexia would clearly be competitive since they do not have this overhead engineering factor to consider. In short, they have unlawfully obtained this valuable information from Complainants through Barsan, which includes, among other things, the customer and supplier infrastructure for this business. And this unfair advantage did not terminate on January 31, 2012, and continues to-date.

Damages to Complainants resulting from Respondents' violations should primarily be measured by Impexia's profits derived from Complainants' customers, and Complainants' loss of sales/reduced profits. These constitute the actual injury to Complainants. This damages' principle is routinely applied in trade secret cases.

In a prominent trade secret New Jersey case, *Platinum Management, Inc. v. Dahms*, 285 N.J.Super. 274 (1995), the court found that the real harm to the plaintiff was the unfair advantage gained by the defendant in competing for customers. The profits to defendants from such sales were found to be a reliable indication of the value of that unfair advantage. The court stated damages to the plaintiff proximately resulting from defendants' wrongs, measured by an accounting of profits to the defendant on sales **made to the diverted customers**, were appropriately allowed in this case, involving essentially unfair competition-a wrongful acquisition of the plaintiff's customers. In that case there was a violation of a covenant not to compete, whereas in instant case, the breach, more seriously involves a violation of a federal statute. In the New Jersey case it was found that defendants intentionally interfered with the plaintiff's prospective economic advantage. *See Id.* at 308 (citing *Imperial Fur, supra*, 2 N.J. at 250-51, 66 A.2d 319; *A. Hollander & Son v. Philip A. Singer & Bro.*, 119 N.J.Eq. 52, 69-72, 180 A. 671 (Ch.1935), *aff'd*, 120 N.J.Eq. 76, 183 A. 296 (E & A 1936); *see also Zippertubing, supra*, 757 F.2d at 1411; *Adolph Gottscho, Inc. v. American Marking Corp.*,

26 N.J. 229, 237, 139 A.2d 281 (1958)). This form of relief represents compensation computed and measured by the same rule that applies to cases of a trustee who has wrongfully used the trust property for his own advantage, a somewhat similar situation as to when an ocean transportation intermediary is provided information and documentation required to accomplish the intended transport. *Id.* (Citing *Philip A. Singer*, supra, 119 N.J.Eq. at 69, 180 A. 671. It has also been described as a remedy consistent with constructive trust principles, the accounting for profits being a special form of constructive trust. It affects the policy of discouraging tortious or wrongful conduct by depriving the wrongdoer of the opportunity to profit from wrongdoing. *Id.*

As discussed above, Complainant is entitled to damages pursuant to analogous trade secret case law proximately resulting from Respondents' wrongs, measured by an accounting of profits to Respondents on sales made to the diverted customers after they obtained the unlawful information. The wrongfully obtained business from Complainants' diverted customers continues to this date, and Complainants are entitled to corresponding damages---i.e., lost profits.

At the very least, Complainants are entitled to include damages for a period of time that would be considered a period in which Impexia could have developed this business on its own, the so-called "head start" principle common in trade secret cases. The "head start rule" allows a plaintiff to recover damages for "the time it would have taken the defendant to discover the secret without misappropriation." *Agilent Technologies, Inc. v. Kirkland*, 2010 WL 610725, 26 (Del.Ch. Feb.18, 2010). For the type of business in which Complainants participate, there would be at the very least a seven to ten year curve to cover before being able to compete fairly. . (Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254). This presupposes that Respondent Impexia would hire an engineering staff and participate in product selection and project matching, which we believe unlikely. The

nature of the provisions of 46 USC § 41103 clearly deal with the release of proprietary information which is analogous, if not identical, to the Trade Secret cases. This is a case of first instance with the Commission, but the allegations in this case are very common in trade secret cases----i.e., that certain proprietary information was improperly disclosed to create a competitor. This information creates a “head start” advantage generally recognized in these types of cases for which damages are generally awarded as flowing from the infringement well after the infringement takes place.

In view of the facts developed in the proceeding and the uniqueness of Complainants’ industry, the “head start rule” alternative for awarding monetary damages in trade secret misappropriation cases should at the very least apply in this case. The “head start” rule is also advocated by the Uniform Trade Secrets Act. *See UNIF. TRADE SECRETS ACT T § 3 cmt.* (amended 1985).

V. Damages for Misappropriation of a Trade Secret May be Measured by Either Complainants’ Losses or the Profits Unjustly Gained by Respondents

As the complainants, AFI/DNB have the burden of proving entitlement to reparations. Pursuant to the Shipping Act, damages must be the proximate result of violations of the statute in question. The fact of injury must be shown with reasonable certainty. The amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences. Regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits. Complainant submit that the preponderance of the evidence demonstrates the violations and the damages claimed herein.

A. Complainants’ Lost Profits.

The following facts are derived from Baris Devrim Bal, Affidavit (AFI/DNB App. 2227-2236) and Burak Bal Affidavit (AFI/DNB App. 2237-2254). Documents produced by Impexia show that

Impexia conducted \$3,842,475.85 in transactions with AFI/DNB customers during the 13-month period from January 2011 to January 2012. Impexia's 2011 annual sales to Complainants' customers totaled \$3,324,620.16. Impexia's sales amounts to Complainants' customers in January 2012 is \$518,548.85, totaling \$3,842,475.85 for the thirteen month period for which the ALJ allowed discovery. Prior to Impexia's obtaining Complainants' customers, Complainants' average profit margin was 30%. Applying that profit margin rate to Impexia's 2011 annual sales, Complainants lost \$997,386.05 in profits in 2011 as the result of Respondents' unlawful acts. It cannot be stressed enough that Complainants' margin is derived taking into account all aspects of this business, such as qualification of products which requires engineering and other infrastructure. Therefore, the fact that Impexia may apply a lower profit margin reflects the fact that it obtained "ripe" product information from Complainants without a corresponding expense factor.

Complainants cannot determine the full extent of Impexia's transactions with Complainants' customers during calendar year 2012 because Impexia has not produced any commercial invoices or bank statements after January 2012. However, Complainants have discovered that the amounts of Impexia's transactions with at least one of Complainants' customers, 77 Construction, have doubled in 2012. Assuming Impexia's 2012 sales to AFI/DNB's other customers also increased from their 2011 levels, Complainants' lost profits for 2012 would be significantly higher than the \$997,386.05 lost during 2011. Complainants have conservatively estimated Impexia's 2012 sales and Complainants' resulting lost profits to be the same as in 2011, or \$997,386.05. Accordingly, Complainants' total damages resulting from lost sales to Impexia during 2011 and 2012 are \$1,994,772.10.

Additionally, Complainants found that almost immediately after they filed the instant lawsuit with the FMC, Impexia's President, Cuneyt Karadagli, set up a new company, ETDE Engineering ("ETDE"), overseas under his cousin's name. Mr. Karadagli appears to be using ETDE as an extension of Impexia and has started shifting Impexia's business transactions with Complainants' customers to ETDE. Respondents cannot avoid the consequences of their unlawful actions simply because Impexia has established an affiliated company abroad and seeks to transfer its operations overseas. Complainants continue to suffer, and are entitled to recover, damages resulting from Impexia's transactions with Complainants' customers, including those transactions shifted to ETDE by Impexia. Complainants' damages from these transactions continue to accrue and must be determined through additional discovery, or will be brought forward in a separate proceeding at the Commission or in another forum.

B. Complainants' Lost Profit Margins.

Complainants have also suffered a dramatic reduction in their profit margin as a result of Respondents' unlawful conduct. Prior to Impexia's operation, Complainants' earned an average profit margin 30% on their annual sales. Since Impexia's creation, however, Complainants have seen their average profit margin plunge to 15%. Due to Respondents' unlawful acts, Impexia has been able to employ Complainants' proprietary business model without incurring any of the years of development and overhead costs associated with this business. One of the main areas where Impexia has gained substantial advantage, as has been demonstrated is the area of product selection and approval for corresponding projects. Impexia was given Complainants' customers and suppliers, and was easily able to determine Complainants' costs and profit margins relating to project specific transactions. As a result, Impexia was able to compete for

Complainants' customers by quoting one-half the normal profit margin which would be fairly applicable for companies that do incur the costs that Impexia has literally avoided by the taking of valuable product, supplier, customer, project and contract information from Complainants. In order to remain competitive in the face of Impexia's unlawful practices, Complainants have had to reduce their margins substantially and offer new credit arrangements to their existing customers to continue doing business with them. It is Complainants' theory that information obtained unlawfully as alleged in the Complaint precludes the necessity for Respondent Impexia to maintain engineering staff, hard assets, and other costly overhead, and, therefore, with stolen supplier/commodity/ and customer lists, Impexia can readily cut normal margins for this type of business, and, in effect, has done just that.

For 2011 and 2012, Complainants' damages flowing from reduced profit margins totals \$2.7 million. In 2011, Complainants conducted \$8 million in sales. Due to expansion in other areas unrelated to Impexia, Complainants' total sales increased in 2012 to \$10 million. Based on the average reduced profit margin rate of 15%, Complainants' reduced profit margin damages in 2011 were \$1,200,000, and \$1,500,000 in 2012, for a total of \$2,700,000.

The following are examples of how Impexia under bid Complainants, destroying realistic margins, for reasons indicated herein, and which can be bid as low as they did because of information on products which Impexia did not have to accomplish, thereby lowering overhead considerably:

Impexia Invoice No. 2089940-1 dated January 5, 2012, which indicates that Impexia sold Harger Ground Rods considerably lower, around 10% less, than Complainants' selling prices. The Part Number is 3410-3/4"X10' Ground Rod, as per Impexia Invoice # 2089940-1 Impexia Selling price to Metag Insaat was \$27.32 / each. Whereas historically Complainants sold this item around

\$30.00 / each. (AFI/DNB App.2103). All these invoices are for Bagram Air Base Construction, which is a vast US Air Base and there are dozens of Turkish Contractors executing jobs there. Impexia invoices demonstrate that it only sold to Complainants' customers which Complainants provided information to Barsan Respondents. For Complainants' other customers, of which Complainants did not provide information, Impexia has not conducted transactions with those non-disclosed customers.

Impexia Invoice No. 2089941-1 was issued to Metag dated January 5, 2012 for the Texas Fluorescent Exit Fixture and Impexia's selling price was \$102.00 / each. Complainants sold these fixtures in earlier dates to Metag, Akgul and others in Afghanistan much higher than Impexia's prices. (AFI/DNB App. 2104-2106). There are lots of manufacturers in the U.S. making and selling EXIT lights. However, Impexia did not change the manufacturer name and sell other manufacturers' products. Impexia has only sold Complainants' manufacturer's products. Complainants' manufacturer Texas Fluorescent is a small and not well known manufacturer in the industry. Impexia doesn't bother to change the manufacturer because it takes weeks and lots of efforts and requires Impexia send samples, cut sheets, drawings etc. in order to change the manufacturer, Impexia saved all because Impexia knows who is the buyer, what is Complainants' price and who is the manufacturer. Impexia obtained all Complainants' trade secret from Barsan Respondents.

Impexia Invoice to Ceytun dated April 01, 2011 is for Square D Load Centers. Impexia selling price for QO342MQ225RB Complete with Doors was \$575.00 / each. Complainants sold these panelboards without doors on September 2010 and the price was \$621.38. Thereafter, on December 10, 2010, Complainants sold the doors at \$30.00 to CEYTUN, so Complainants' total price complete with doors is \$651,38. (AFI/DNB App. 2107-2109).

Impexia sold Grounding Bar Kit (part # PK23GTA) at \$11.00. Complainants' invoice demonstrates that the price is \$11.25. Impexia Invoice to 77 Construction dated June 07, 2012 is for Texas Fluorescent Fixtures and Impexia's TOTAL selling price for two types of fixtures is \$839,40, and Complainants' quotation was made six weeks earlier. Complainants specified these two very strange types of fixtures with 77 Construction. However, after all their efforts to specify the products, Complainants never received the order, because with all Complainants' trade secret, Impexia cut Complainants' prices by 15%. (AFI/DNB App. 2110-2111).

Impexia Invoice to Delta Om dated December 02, 2011 is for Square D Safety Switches, and Impexia's selling price for HU361 and HU 362 were \$31,42 and \$54,62 respectively. Complainants' prices to Metag on February 20, 201, about ten months earlier, were \$103,23 and \$180,38. The reason why there is a large gap between Complainants' prices and Impexia is that Complainants made lots of efforts to send samples, catalogs and educate Metag engineers as how to use and install these Safety Switches. In order to cover all these costs Complainants have to mark up the prices. This was the Cold Storage Building for US Army initially executed by Metag and later on Metag subcontracted this job to Delta Om. (AFI/DNB App. 2112-2113).

C. Complainants' Head Start losses.

Complainants' industry is very specialized. Without the "head start" benefits it obtained by taking the protected information and materials, it was unlikely for Complainants to have entered into and survived in this industry. It takes seven to ten years for a person to commence business and compete in this industry. Therefore, Complainants should be awarded additional monetary damages to account for the "head start" loss to Complainants, i.e., $\$997,386.05 \times 7 = \$6,981,702.35$.

Over the last several years, this has been a growing market. As a result, Complainants have grown their business over these past ten years and had made investments to continue growing. However, while Complainants invested more in their business, Impexia unlawfully stole and used Complainants' trade secrets, causing Complainants' growth plans to go unrealized, despite a growing market. Even if Impexia were to be shut down, Complainants' damages would continue to accrue.

In view of the above facts, Complainants' claimed damages directly resulting from the violation of the Shipping Act are a total of \$11,676,474.

VI. The Plain Language of 46 USC § 41301 Subjects Impexia to the Commission's Jurisdiction.

46 USC § 41301, provides:

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 . . . information concerning the kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier. [46 USC § 41103(a) (emphasis supplied).]

The plain language of the provision, reaches equally to common carriers, marine terminal operators or ocean freight forwarders, as well as "any other person" with whom any of these companies is acting with to violate this provision. If Congress intended to make this a provision that would reach only those categories of regulated entities---i.e., common carriers, terminal operators or freight forwarders----it would have stated "in conjunction with each other" instead of "in conjunction with any other person." The likely scenarios for trade secret type violations in the context of ocean shipping would reach shipper and consignees, and their competitors. That is exactly what is at stake in the case at hand. It seems counterintuitive that Congress would make it

unlawful to provide the information described in the provision for the party providing it, but not to the party receiving and benefitting from the disclosed information. In short, the plain meaning of the statute reaches to “any person.” Impexia selectively ignores the section's reference to “any other person.”

Similarly, in FMC Docket No. 09-01, *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et. al.*, Complainants named Global Link Logistics, Inc. and its prior directors/shareholders as Respondents and claimed that Respondents violated, among others, Section 10 (a) (1) of the Shipping Act, 46 USC § 41102 a), which provides:

46 USC § 41102 a) Obtaining Transportation at Less Than Applicable Rates.— A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

Respondent Global Link Logistics, Inc. asserted that the Commission lacked personal jurisdiction over them in that the Complainant failed to allege a theory of piercing the corporate veil. The Administrative Law Judge did not sustain this argument and held:

With regard to the alleged section 10(a)(1) violation in particular, the Commission has held that: To prove a violation of section 10(a)(1), Complainant has the burden of proving that (a) a person, (b) knowingly and willfully, (c) by an unjust device or means, (d) obtained or attempted to obtain ocean transportation rates for property at less than the rates or charges that would be otherwise applicable.

(FMC Docket No. 09-01 Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et. al. , Memorandum and Order on Motion to Dismiss, Served: June 22, 2010, at 22.)

In that respect, 46 USC § 41301

is analogous to 46 USC § 41102 a) with regard to the fact that both sections reach other “persons”.

The plain language of this section clearly indicates that this violation may be committed by “[a] common carrier, marine terminal operator, or ocean freight forwarder” either alone, “or in conjunction with any other person”. It does not make any sense from a regulatory perspective to

conclude that the Commission has jurisdiction only over the common carrier, marine terminal operator, or ocean freight forwarder, and that the accomplice, “any other person”, just walks free. As noted, in the context of 46 USC § 41102 a), the Shipping Act has routine jurisdiction over other persons who are not common carriers, marine terminal operators, or ocean freight forwarders. It would create an unreasonable and unjust circumstance to allow any other person, Impexia, in this case, to walk away from the violation while its cohorts, Barsan Respondents remain to face the music. The statute clearly intends for the Commission jurisdiction to extend to accomplices.

Complainants do not have any burden to allege and prove that Impexia was or acted as an ocean common carrier, terminal operator, or ocean freight forwarder to subject Impexia to 46 USC § 41301. In view of the plain languages of the Shipping Act and the authority of the Commission delegated by Congress, the Commission has jurisdiction over Respondent Impexia.

CONCLUSION

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

1. An Order holding that the Respondents BGL’s, Barsan Int’l’s and/or Impexia’s activities described herein were unlawful and in violation of Section 10(b)(13) of the Shipping Act, 46 USC § 41103 (a);
2. An Order compelling Respondents BGL, Barsan Int’l and/or Impexia to jointly and severally make reparations to Complainants DNB and AFI in the amount of \$11,676,474 for DNB and/or AFI’s loss of business and customers with interest as may be lawfully permitted by law, costs, and attorneys’ fees;

3. An Order compelling Respondents BGL, Barsan Int'l and Impexia to cease and desist their activities in violation of the Shipping Act as alleged herein;
4. An Order revoking Respondent Barsan Int'l's NVOCC and freight forwarder license and further prohibiting Respondents BGL, Barsan Int'l and its officers from doing NVOCC and freight forwarding business in the U.S.; and
5. Such other and further relief as the Commission deems just and proper.

Respectfully submitted,

By:

Carlos Rodriguez c/o ZX

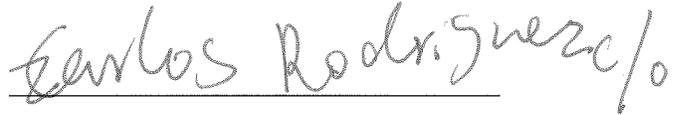
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Dated in Washington, D.C. this twenty-ninth day of April, 2013.

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Dated in Washington, D.C. this twenty-ninth day of April, 2013.

CERTIFICATE OF SERVICE

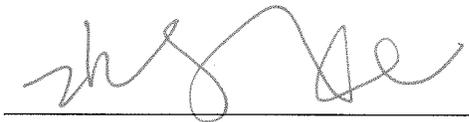
I hereby certify that I have this day served the foregoing document upon the following individuals by first-class mail:

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