

FEDERAL MARITIME COMMISSION

DOCKET NO. 11-07

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

v.

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

INITIAL DECISION¹

I. INTRODUCTION AND SUMMARY OF DECISION.

On April 14, 2011, complainants DNB Exports LLC (DNB) and AFI Elektromekanik Ve Elektronik San. Tic. Ltd. Sti. (AFI) (jointly DNB/AFI or Complainants) commenced this proceeding by filing a Verified Complaint with the Secretary of the Commission alleging that respondents Barsan Global Lojistiks Ve Gumruk Musavirligi A.S. (BGL) and Barsan International, Inc. (Barsan Int'l) (jointly BGL/Barsan), and Impexia Inc. (Impexia) (BGL/Barsan and Impexia may be referred to jointly as Respondents) violated the Shipping Act of 1984 (Shipping Act or Act). The parties have filed their briefs on the merits, proposed findings of fact, and appendices with their evidence, and this proceeding is ripe for decision.

AFI, a Turkish corporation, is a wholesale distributor of U.S. standard electrical goods to construction firms in the Greater Middle East and has been for more than fifteen years. DNB, a subsidiary of AFI, is a Delaware corporation and acts as AFI's procurement agent in the United States.

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Barsan Int'l, a New York corporation, offers integrated logistics services including international transportation of cargo. Barsan Int'l is licensed by the Commission as a non-vessel-operating common carrier (NVOCC) and as an ocean freight forwarder. Barsan Int'l also operates a warehouse and operates as an air freight forwarder. Barsan Int'l is a subsidiary of BGL, a Turkish corporation. BGL is not licensed by the Commission as an ocean transportation intermediary (OTI) and does not provide transportation or ocean freight forwarder services in the United States trades.

DNB/AFI identify a third entity related to BGL and Barsan Int'l in their Complaint, alleging that "BGL also incorporated Barsan Global Logistics Corp[.] in the State of New Jersey with its principal place of business at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410, the same location as Barsan Int'l." (Complaint ¶ 7.) BGL/Barsan admit this allegation in their Answer. (BGL/Barsan Answer ¶ 7.) DNB/AFI did not identify Barsan Global Logistics Corp. as a respondent in this proceeding. The stipulations filed by the parties include the following: "Barsan Global Logistics Corp[.] was incorporated in the State of New Jersey with its principal place of business at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410, the same location as Barsan Int'l, and it is not an operating company." (Stipulations of Uncontested Facts ¶ 7.) DNB/AFI proposed the following identical finding of fact: "BGL also incorporated Barsan Global Logistics Corp[.] in the State of New Jersey with its principal place of business at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410, the same location as Barsan Int'l." (DNB/AFI Prop. FF 7.)² BGL/Barsan responded: "Complainants cite no evidence to support their assertions, instead simply relying upon allegations contained in their complaint. Such allegations do not constitute evidence and therefore lack any evidentiary basis. Further, the [Complainant's] statement that 'BGL incorporated Barsan Global Logistics Corp.' is false." (BGL/Barsan Resp. to DNB/AFI Prop. FF 7.)

BGL/Barsan are bound by the admission in their Answer and by the stipulation that BGL incorporated Barsan Global Logistics Corp. Since DNB/AFI do not refer to Barsan Global Logistics Corp. in their briefs on the merits, neither its role as a non-party, if any, in the Shipping Act violations alleged by DNB/AFI nor its significance to this proceeding is explained. Ugur Aksu is president of Barsan Int'l and Barsan Global Logistics Corp. (DNB/AFI Prop. FF 8 and BGL/Barsan Response.) It is not readily apparent from the record whether Ugur Aksu is also president of BGL.

Impexia, incorporated by Cuneyt Karadagli (also known as Jimmy Karadagli) on March 11, 2010, in New Jersey, is a procurement firm that specializes in providing overseas services to the United States government and to global construction companies. Cuneyt Karadagli is now the president and only member of Impexia. Impexia performs procurement management providing building materials and complete industrial products. Impexia is not licensed by the Commission as

² References to the parties' briefs are as follows: party name and title at page number; e.g., DNB/AFI Brief at 8; DNB/AFI Resp. to Impexia Brief at 8. References to the parties' appendices are to party name App. at page number; e.g., DNB/AFI App. at 8; DNB/AFI Supp. App. at 8. References to proposed finding of fact and responses are to party name at paragraph number; e.g., DNB/AFI Prop. FF 7; BGL/Barsan Resp. to DNB/AFI Prop. FF 7.

an OTI and DNB/AFI have not identified any evidence proving that Impexia provides transportation or ocean freight forwarder services in the United States trades.

On January 15, 2009, DNB and Barsan Int'l executed a Contract Carrier Agreement. DNB/AFI used Barsan Int'l's NVOCC services to transport cargo from the United States to Turkey and other foreign countries pursuant to that agreement. Some shipments were transported by water and others by air. To facilitate the shipments, DNB/AFI provided Barsan Int'l with commercial invoices, packing lists, and other documents setting forth information about their products, pricing, suppliers, customers, and other proprietary information.

Barsan Int'l employed Burcin Karadagli, who is not a party in this proceeding, as an accounting clerk from 2001 to 2004 and as an Accounting Manager/Accounting Operations Supervisor from 2004 to April 2011. Burcin Karadagli is the wife of Cuneyt Karadagli. In February 2009 Burcin Karadagli began forwarding information that Barsan Int'l received from DNB/AFI to Cuneyt Karadagli. DNB/AFI alleges that in a "scheme" with BGL/Barsan, Impexia used this information to steal customers and business from DNB/AFI.

Section 10(b)(13) of the Act prohibits a common carrier, marine terminal operator, or ocean freight forwarder from knowingly disclosing, offering, soliciting, or receiving any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information – (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or (2) may improperly disclose its business transaction to a competitor. 46 U.S.C. § 41103(a).³

In their Complaint, DNB/AFI allege that BGL controls the operations of its subsidiary Barsan Int'l, and because of the manner in which BGL exercised that control, their separate corporate identities should be ignored and they should be treated as one unit. (Complaint ¶ 9.)⁴

³ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., United Logistics (Lax) Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 13-01 (FMC Jan. 25, 2013) (Order of Investigation and Hearing). I follow that practice in this Initial Decision.

⁴ On November 15, 2012, DNB/AFI filed a motion for leave to file an amended complaint to increase their damages claim to \$4,784,000. The motion was granted. Because the increase in the ad damnum clause was the only change to the Complaint, DNB/AFI were not required to file an amended complaint. *DNB Exports LLC v. Barsan Global Lojistiks Ve Gumruk Musavirligi A.S.*, FMC No. 11-07 (ALJ Feb. 7, 2013) (Order on DNB/AFI Motion for Leave to File Amended Complaint).

DNB/AFI allege that Impexia is a corporate shell or alter ego created by BGL and Barsan Int'l for the purpose of unlawfully competing with shipping customers of Barsan Int'l, for the purpose of making unlawful profits, and that Impexia should not be considered a separate corporate entity from BGL and Barsan Int'l. (Complaint ¶¶ 10, 33, 35.) DNB/AFI allege that:

Respondents' BGL, Barsan Int'l, acting on their own behalf and as a mere shell of BGL, and Impexia as BGL's and Barsan Int'l's alter ego by knowingly disclosing, offering, soliciting and receiving 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, by, 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 [Impexia] as a competitor [of DNB and AFI] have violated Section 10(b)(13)

(Complaint at 10-11). DNB/AFI allege that BGL, Barsan Int'l, and Impexia function as one unit, and contend that Respondents should be held jointly and severally liable for the actual injury DNB/AFI claim resulted from alleged violations of section 10(b)(13) committed by any Respondent. In their Complaint, DNB/AFI alleged damages of at least \$1.2 million. (Complaint ¶ 34.) On February 7, 2013, I granted their motion to increase the ad damnum clause to \$4,784,000. *See* n.3. In their proposed findings of fact, DNB/AFI allege damages of \$11,676,474. (DNB/AFI Prop. FF 114.)

On May 23, 2011, BGL and Barsan Int'l filed a joint Answer denying that they should be considered a single corporate entity, denying that they established Impexia as alleged in the Complaint, and denying that they disclosed information protected by section 10(b)(13). BGL and Barsan Int'l also filed crossclaims for indemnity and contribution against Impexia. On June 6, 2011, in lieu of an answer, Impexia filed a motion to dismiss the Complaint against it for lack of personal jurisdiction. Impexia argued that it is not a common carrier, marine terminal operator, or ocean freight forwarder subject to section 10(b)(13) or Commission jurisdiction, and that DNB/AFI's claim that Impexia operated as a corporate shell or alter ego of BGL and Barsan Int'l is not supported by the evidence. I deferred ruling on the motion to dismiss to permit the parties to take discovery. *DNB Exports v. Barsan Global Logistics*, FMC No. 11-07 (ALJ July 7, 2011) (Memorandum and Order on Motions to Dismiss). Impexia then filed an answer denying that it is a common carrier, marine terminal operator, or ocean freight forwarder, denying liability, and denying that it operates as a corporate shell or alter ego of BGL and Barsan Int'l.

The parties have engaged in discovery and have filed their briefs, proposed findings of fact, and supporting evidence. Based on the evidence and controlling law, I find that DNB/AFI have not proved by a preponderance of the evidence that Impexia is a common carrier, marine terminal operator, or ocean freight forwarder or that it operates as a corporate shell or alter ego of BGL and/or Barsan Int'l. I find that DNB/AFI have not proved by a preponderance of the evidence that BGL is a common carrier, marine terminal operator, or ocean freight forwarder or that BGL and Barsan Int'l operate in such a manner that their separate corporate existence should be ignored. Because neither BGL nor Impexia is a common carrier, marine terminal operator, or ocean freight

forwarder and neither operated as an alter ego or corporate shell of Barsan Int'l, the Commission does not have jurisdiction over them. Therefore, the claims against BGL and Impexia are dismissed with prejudice for lack of personal jurisdiction. Based on the evidence and controlling law, I find that DNB/AFI have not proved by a preponderance of the evidence that Barsan Int'l knowingly disclosed DNB/AFI's information. Therefore, the claims against Barsan Int'l are dismissed with prejudice. BGL/Barsan's crossclaims against Impexia are dismissed as moot.

In their briefs, Complainants generally conflate the claims of the two Complainants. (*See, e.g.*, DNB/AFI Brief at 3 (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").) In their briefs in response, BGL/Barsan and Impexia echo this approach and, more importantly, do not contend that the claims belong to AFI and not DNB or vice versa. Therefore, this decision treats the claims as if they belong to both DNB and AFI.

This decision is divided into six parts. Part I is this introduction and summary. Part II sets forth the controlling authority. Part III sets forth the findings of fact. Part IV sets forth the conclusions of law on the claims against Impexia. Part V sets forth the conclusions of law on the claims against BGL. Part VI sets forth the conclusions of law on the claims against Barsan Int'l.

II. CONTROLLING AUTHORITY.

A. Statutory Background.

DNB/AFI filed their Complaint pursuant to section 11 of the Act: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

The Complaint alleges that Respondents violated section 10(b)(13) of the Act.

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

46 U.S.C. § 41103(a). Section 10(b)(13) is a recognition that in the course of providing ocean transportation of cargo, common carriers, marine terminal operators, and ocean freight forwarders regulated by the Commission may receive proprietary information from a shipper that the shipper

would want the regulated entity to keep confidential and is designed to impose a duty on the regulated entities to refrain from disclosing the proprietary information.

The regulated entities that are subject to section 10(b)(13)'s mandate are defined as follows.

The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6). "The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16).

The term "marine terminal operator" means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

46 U.S.C. § 40102(14).

The term "ocean freight forwarder" means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.

46 U.S.C. § 40102(18). The Commission has subject matter jurisdiction over a claim that a common carrier, marine terminal operator, or ocean freight forwarder disclosed information in violation of section 10(b)(13). *DSR Shipping Co., Inc. v. Great White Fleet, Ltd. d/b/a Chiquita Brands, Inc.*, 26 S.R.R. 191, 192, 198 (ALJ 1992), *affirmed*, 26 S.R.R. 627, 631-632 (FMC 1992) (discussing section 10(b)(16), later renumbered section 10(b)(13)). *See also Great White Fleet, Ltd., v. Federal Container Line, Inc.*, 92 Civ. 1255, 1992 U.S. Dist. LEXIS 17811, 1992 WL 367110 (S.D.N.Y. Nov. 23, 1992); *Kawasaki Kisen Kaisha, Ltd. v. Intercontinental Exchange, Inc.*, 28 S.R.R. 1589, 1591 n.3 (ALJ 2000).

The Complaint alleges that the DNB/AFI suffered actual injury as a result of Respondents' alleged violations and seeks a reparation award for their injuries. (Complaint ¶ 34.) The Act defines actual injury.

(a) *Definition.* – In this section, the term “actual injury” includes the loss of interest at commercial rates compounded from the date of injury.

(b) *Basic amount.* – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

B. Evidence and Burden of Persuasion.

Under the Administrative Procedure Act (APA), an administrative law judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981). All documents provided by the parties in their appendices filed with their briefs on the merits are admitted as evidence. This initial decision is based on the Complaint, Respondents’ Answers, the parties’ Stipulations, the parties’ memoranda on the merits, the parties’ appendices filed with the memoranda, and the supplemental evidence and memoranda filed by the parties.

This initial decision addresses only material issues of fact and law. The parties disagree about many things. It is not necessary to resolve disagreements on matters not material to the outcome of this proceeding. Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983).

A complainant alleging a violation of the Shipping Act “has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). *See* 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424

(FMC 1994). If DNB/AFI prove a violation of the Act, they the burden of proving entitlement to reparations. See *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003) (“As the Federal Maritime Board explained long ago: ‘(a) damages⁵ 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.’”).

C. Piercing the Corporate Veil.

DNB/AFI’s Complaint alleges that corporate veils should be pierced and BGL, Barsan Int’l, and Impexia should be treated as one entity. Because the issue of piercing the corporate veil arises under the Shipping Act, it is a question of federal law as to whether the veil should be pierced. See *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993) (“Whether a company or individual is responsible for the financial obligations of another company or individual is a question of federal law when it arises in the context of a federal labor dispute [under the National Labor Relations Act].”).

In accordance with prior Tenth Circuit precedent and after careful consideration of the analysis of this issue offered by our sister courts, we conclude that the federal common law doctrine of piercing the corporate veil under an alter ego theory can best be described by the following two-part test: (i) was there such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct, and (ii) would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

The “separate corporate identity” prong is meant to determine whether the stockholder and the corporation have maintained separate identities. There are strong public policy reasons for upholding the corporate fiction. Where stockholders follow the technical rules that govern the corporate structure, they are entitled to rely on the protections of limited liability that the corporation affords. In determining whether the personalities and assets of the corporation and the stockholders have been blurred we consider (i) the degree to which the corporate legal formalities have been maintained, and (ii) the degree to which individual and corporate assets and affairs have been commingled.

Id. at 1052 (citations and footnotes omitted). See also *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982) (The factors are evaluated under “a two-prong test: (1) is there such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist?; and (2) if the acts are treated as those of the corporation alone, will an inequitable result

⁵ Reparations under the Shipping Act and damages are synonymous. See *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

follow? Relevant to the first question is the issue of the degree to which formalities have been followed to maintain a separate corporate identity. The second question looks to the basic issue of fairness under the facts.” “[T]he burden of proof on this issue rests with the party attempting to negate the existence of a separate entity.” *Trs. of the Nat’l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 197 (3d Cir. 2003), quoting *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979).

In decisions consistent with *N.L.R.B. v. Greater Kansas City Roofing*, the Commission has long recognized that the corporate veil may be pierced in appropriate cases. The Commission has identified factors that should be considered on a claim that the corporate veil should be pierced. *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R 119, 167-168 (FMC 2001) (*Rose Int’l*), cited in *Worldwide Relocations, Inc. – Possible Violations*, FMC No. 06-01, Order at 23 n.7 (FMC Mar. 15, 2012) (Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part).

[S]ome of the major factors used to determine domination and control, and which we will consider, are as follows: (1) the nature of the ownership and control; (2) failure to maintain corporate minutes or adequate corporate records and failure to follow corporate formalities; (3) commingling of funds and other assets; (4) inadequate capitalization; (5) diversion of the corporation’s funds or assets to non-corporate uses; (6) use of the same office or business location by the corporation and its shareholders; (7) overlapping ownership, officers, directors and personnel; (8) the amount of business discretion displayed by the allegedly dominated corporation; and (9) whether the corporations are treated as independent profit centers. *Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd.*, 774 F. Supp. 840, 844-45 (S.D.N.Y. 1991) [*Holburn*]; *Labadie Coal Co. v. Black*, 672 F.2d 92, 96-99 (D.C. Cir. 1982); *Ariel Maritime Group, Inc.*, 24 S.R.R. 517 (1987) (Order Adopting in Part, Reversing in Part, and Supplementing I.D.). Moreover, the Commission has found that “[i]t is appropriate to pierce the corporate veil in order to prevent such use of the corporate device to commit . . . statutory violations” and when “failure to do so would enable the corporate device to be used to circumvent a statute.” *Ariel*, 24 S.R.R. at 530 (quoting *Joseph A. Kaplan & Sons v. Federal Trade Comm’n*, 347 F.2d 785, 787 n.4 (D.C. Cir. 1965)); see also *Capital Tel. Co., Inc. v. Federal Communications Comm’n*, 498 F.2d 734, 738 n.10 (D.C. Cir. 1974) (“Where the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation.”).

Rose Int’l, 29 S.R.R at 167-168.

At issue in *Rose Int’l* was whether an entity called “OSSI was the alter ego of OMNI, Ltd and as such the Commission should ignore OSSI’s corporate form.” *Rose Int’l*, 29 S.R.R at 166-171. The Commission reviewed the evidence relating to the factors and found that:

- OMNI, Ltd and its members are obvious participants in the ownership and control of OSSI;
- OSSI did not follow any corporate formalities beyond incorporating itself and issuing stock;
- OSSI's finances were so intertwined with OMNI, Ltd that OSSI would be unable to operate without OMNI, Ltd's financial support;
- OSSI appeared to be operating from a very limited revenue base;
- It appeared that OSSI was run by employees of OMNI, Ltd and Bowen, but did not have an independent location or staff;
- Bowen and OMNI, Ltd together made business decisions and managed the daily operations of OSSI and much of OSSI's agents' obligations to OSSI were handled by OMNI, Ltd; and
- OSSI was never intended to make a profit, and the minimal financial records show that OSSI had no net revenue and actually seemed to be continually in debt to OMNI.

Rose Int'l, 29 S.R.R at 169-171. The Commission concluded: "In our view, application of the factors justifying piercing the corporate veil supports a finding that OMNI, Ltd was very much in control of and dominated OSSI. Both structurally and financially, OSSI was operated by Bowen and OMNI, Ltd." *Rose Int'l*, 29 S.R.R at 171.

As discussed more fully below, DNB/AFI do not cite any cases or make any argument regarding piercing the corporate veil in their briefs on the merits. DNB/AFI cited two other Commission cases in their supplemental opposition to Impexia's motion to dismiss. (Complainants' Reply to Impexia's Response to Complainants' Supplemental Opposition to Impexia's Motion to Dismiss (filed Oct. 4, 2012) at 3). In those cases, the Commission discussed the factors found to indicate sufficient connections between two corporate entities to treat them as one. DNB/AFI do not cite to these cases in their reply to Impexia's brief on the merits.

The first case cited in the supplemental opposition concerned wholly-owned subsidiaries. *In the Matter of the Status of Matson Agencies, Inc. and Matson Freight Agencies, Inc.*, FMC No. 83-52, 22 S.R.R. 752, 754 (FMC 1984) (*Matson Agencies*). The evidence proved that Matson Agencies, Inc. (Matson Agencies) and Matson Freight Agencies, Inc. (MFA) were owned by Matson Navigation Company, Inc. (Matson), a common carrier, and Matson Terminals, Inc. (Matson Terminals), an "other person" subject to the Act. Matson Agencies was a wholly-owned subsidiary of MFA and the officers and directors of Matson Agencies are also officers and directors of MFA. Matson Agencies had no employees of its own and the employees of MFA managed its day-to-day business. MFA, in turn, was a wholly-owned subsidiary of Matson. Most of MFA's officers and

directors were also officers of Matson. Certain corporate functions such as personnel, legal, purchasing, corporate accounting, and treasurer's functions are performed for MPA by Matson pursuant to an agreement between the companies. *Matson Agencies*, 22 S.R.R. at 752-753.

Matson Agencies and MFA had agency agreements to perform steamship agency services for several other carriers. Because of their affiliation with Matson and Matson Terminals, they filed their agency agreements with the Commission for approval and at the same time filed a petition seeking a ruling that they should not have to file the agreements, arguing that they were not subject to the Act unless they were so deemed because of their affiliation with Matson and Matson Terminals. The Commission stated:

It is well established that where the statutory purposes of the Shipping Act could be frustrated through the use of separate corporate entities, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation. The reasons for separate incorporation are not controlling when the fiction of corporate entity defeats a legislative purpose. Accordingly, the Commission may not disregard the fact that Petitioners are subsidiaries of Matson in determining their status under the Shipping Act.

Matson Agencies, 22 S.R.R. at 754 (citations omitted). The Commission held that there may be circumstances in which Matson and Matson Terminals would be considered common carriers or other persons subject to the Act, but also held that in the circumstances stated in the petition, the agreements were not subject to the Act. *Id.* at 755.

In the second case cited by DNB/AFI in their supplemental opposition to the motion to dismiss, Guatemala exempted certain industries from paying import duties on specified cargoes provided they were carried on vessels of Flota Mercante Gran Centroamericana (Flomerca) or a steamship line with which Flomerca had an agreement. *In the Matter of Agreement 9597 Between Flota Mercante Gran Centroamericana, S.A., Continental Lines, S.A., and Jan C. Uiterwyk Co., Inc.*, 10 S.R.R. 177, 192 (ALJ) (*Flota Mercante*), adopted, 12 F.M.C. 83 (FMC 1968). Flomerca entered into an agreement authorizing Continental to carry cargo and appointing Jan Uiterwyk as agent. The administrative law judge describes the interrelationships of the various companies, including evidence demonstrating that all of the various companies were owned and supported by Uiterwyk and his family, *Flota Mercante*, 10 S.R.R. at 178-192, and concluded that "insofar as section 15 is concerned, Uiterwyk and its related companies are all one and the same, as are Continental, Contramar, and Capital to Capital. The same is also true of Uiterwyk/Continental and Navigation, Ltd." *Id.* at 192. The administrative law judge held:

Where a corporation is so organized and controlled, and its affairs are so conducted as to make it a mere sham, agent, or adjunct of another, its separate existence as a distinct corporate entity will be ignored, and the two corporations will be regarded in legal contemplation as one unit. It is settled law that the corporate entity may be disregarded if failure to do so would aid in the perpetration of a fraud or the

circumvention of an applicable statute. Corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose.

Flota Mercante, 10 S.R.R. at 192. (See Complainants' Reply (filed Oct. 4, 2012) at 2-3.)

In *Holborn*, cited by the Commission in *Rose Int'l*, Sanko, the winner of an arbitration award for demurrage, sought to recover its judgment against Intertanker Ltd. (Intertanker) by piercing the corporate veil between Intertanker and its parent corporation, Interpetrol Bermuda Ltd. (Interpetrol). The matter was before the court on a motion for summary judgment filed by defendant Interpetrol. In denying the motion, the court cited the following evidence establishing a relationship between Intertanker and Interpetrol:

- In the Intertanker-Sanko charterparty "Interpetro Bermuda" [sic] is the radio call name provided;
- Sanko's internal fixture memorandum, dated August 25, 1981, lists the charterer of the Judith Prosperity as "Intertanker Ltd. of Hamilton (Interpetrol)";
- Confusion concerning the true owner of the cargo, which is variously listed as Intercarbon Bermuda and Intercarbon N.V.;
- Interpetrol's former accountant stated that "the same personnel who were one day trading in the name of Interpetrol Bermuda, Ltd. were then trading in the name of Intercarbon Bermuda, Ltd.";
- The president and general manager of Interpetrol referred to Intertanker and Interpetrol jointly as the "Interpetrol Group";
- Evidence of overlapping operations and management at Interpetrol and Intertanker, including testimony of a director of both Interpetrol and Intertanker that the corporations had interlocking directorships and shared offices and facilities and that Intertanker had no employees of its own;
- Evidence that Intertanker had no corporate control independent of Interpetrol, a claim supported by testimony concerning resignations from and absence of any meetings of Intertanker's board of directors;
- Evidence of the absence of arms length dealing and Interpetrol's use of Intertanker for its own benefit is also presented, including evidence that Intertanker's only role was to act as a booking agent for Interpetrol;
- Evidence of interrelated finances including commissions earned by Intertanker were kept by Interpetrol, about three quarters of a million dollars in cash was transferred from Intertanker to Interpetrol, and Interpetrol owed Intertanker \$1,531,169.70;

- Evidence that Interpetrol stripped Intertanker's assets and that Interpetrol's books were altered to obscure the alleged transfers.

In each of these cases, the court or the Commission based the decisions to pierce the corporate veil on substantial evidence of close connections between the corporate entities.

III. FINDINGS OF FACT.⁶

1. AFI Elektromekanik Ve Elektronik San. Tic. Ltd. Sti. (AFI) is a corporation organized and existing pursuant to the laws of Turkey, with its principal place of business at Serifali Mahallesi, Emin Sok. No: 51 P.K. 34775, ÜMRANIYE /ISTANBUL, Turkey. (DNB/AFI App. at 2 (Complaint ¶ 1).)
2. AFI is a wholesale distributor of U.S. standard electrical goods to construction firms in the Greater Middle East and has been for the past fifteen years. (DNB/AFI App. at 2 (Complaint ¶ 1).)
3. DNB Exports LLC (DNB) is a corporation organized and existing pursuant to the laws of the State of Delaware, with its principal place of business at 110 Harmon Dr., Unit 106, Blackwood, NJ 08012. (DNB/AFI App. at 2 (Complaint ¶ 2).)
4. DNB acts as AFI's procurement agent in the United States. (DNB/AFI App. at 2 (Complaint ¶ 2).)
5. Respondent Barsan Global Lojistik Ve Gumruk Musavirligi A. S. (BGL) is a corporation organized and existing pursuant to the laws of Turkey with its principal place of business at Merkez Mahallesi Nadide Sok. No.1, Barsan Business Center, 34381 Şişli, Istanbul, Turkey. (DNB/AFI App. at 2 (Complaint ¶ 3).)
6. BGL is not a common carrier, marine terminal operator, or ocean freight forwarder. (BGL/Barsan App. at 1.)
7. Respondent Barsan International, Inc. (Barsan Int'l) is a corporation organized and existing pursuant to the laws of the State of New York with its principal place of business at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410.
8. Barsan Int'l is a subsidiary of BGL. (Stipulations of Uncontested Facts ¶ 4.)

⁶ To the extent any finding of fact may be deemed a conclusion of law, it should be considered a conclusion of law. Similarly, to the extent any conclusion of law may be deemed a finding of fact, it should be considered a finding of fact. Additional findings of fact are set forth in the sections discussing the claims against each Respondent.

9. Barsan Int'l describes itself as a "division of Barsan Global Lojistik A.S." (DNB/AFI App. at 20 (Barsan Int'l invoice).)
10. Barsan Int'l is licensed by the Commission as a non-vessel-operating common carrier (NVOCC) in the waterborne foreign commerce of the United States and as an ocean freight forwarder (FMC License No. 004656NF, Org No. 015750), pursuant to the Shipping Act and 46 C.F.R. § 515.21 et al. and 46 C.F.R. Part 520 of the Federal Maritime Commission Regulations. (DNB/AFI App. at 2; BGL/Barsan App. at 1.)
11. BGL also incorporated Barsan Global Logistics Corp. in the State of New Jersey with its principal place of business at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410, the same location as Barsan Int'l. (Complaint (DNB/AFI App. at 3).)
12. Ugur Aksu serves as President of Barsan, Int'l and BGL. (Complaint ¶ 8 (DNB/AFI App. at 3), Barsan Respondents Answer ¶ 8 (DNB/AFI App. at 48).)
13. Barsan Int'l's bills of lading and invoices carry the BGL logo. (DNB/AFI App. 3 (Complaint ¶ 9); DNB/AFI App. 48 (BGL/Barsan Answer ¶ 9); DNB/AFI App. at 19 (Barsan Int'l bill of lading); DNB/AFI App. at 20 (Barsan Int'l invoice).)
14. In 2011, Barsan Int'l had revenue in excess of \$10,000,000. (Barsan App. at 8).
15. Burcin Karadagli was employed by Barsan Int'l from 2001 to April 2011. Burcin Karadagli worked for Barsan Int'l as an accounting clerk from 2001 to 2004 and as an Accounting Manager/Accounting Operations Supervisor from 2004 to April 2011. (DNB/AFI Prop. FF 10; BGL/Barsan Resp. DNB/AFI Prop. FF 10; Impexia Resp. DNB/AFI Prop. FF 10.)
16. Respondent Impexia Inc. (Impexia) is a New Jersey corporation incorporated on or about March 11, 2010, with Cuneyt Karadagli and Okan Eker as the two members of its initial board of directors and its initial registered office located at 14 Hasbrouck Place, Rutherford, NJ 07070. (DNB/AFI App. at 252.)
17. Cuneyt Karadagli is the president of Impexia. (DNB/AFI App. at 107 and 252.)
18. Cuneyt Karadagli is the only member of Impexia. (DNB/AFI App. at 241.)
19. Impexia is a procurement firm that specializes in providing overseas services to the United States Government and to global construction companies performing procurement management providing building materials and complete industrial products. (DNB/AFI App. at 240.)
20. Cuneyt Karadagli is the husband of Burcin Karadagli. (DNB/AFI App. at 242.)

21. Impexia is not and has never operated as an “ocean common carrier,” a “marine terminal operator,” or an “ocean transportation intermediary” and does not and never has provided transportation by water for cargo between a port in the United States and a port in a foreign country. Impexia hires an ocean freight forwarder, NVOCC, or ocean common carrier to transport its cargo by ocean in the U.S. foreign commerce. (DNB/AFI App. at 241.)
22. Impexia has never issued a bill of lading. (DNB/AFI App. at 241.)
23. Impexia has never held itself out as an ocean freight forwarder. (DNB/AFI App. at 241.)
24. On January 15, 2009, DNB and Barsan Int’l executed a Contract Carrier Agreement. (DNB/AFI App. at 21-25.)
25. From January 2009 to March 2011, Barsan Int’l handled DNB air freight shipments and DNB shipments by water and obtained DNB commercial invoices, packing lists that include descriptions of DNB’s products, suppliers, prices, and quantities. (DNB/AFI App. at 1025-1793.)
26. Barsan Int’l personnel Ugur Aksu, Sevgi Cebe Tugsan Uresin, and Isik Onur had access to DNB shipping information on a regular basis. Burcin Karadagli may also have been able to access computer files and possibly hard copies of files with such information. (DNB/AFI App. at 199.)

IV. CONCLUSIONS OF LAW ON DNB/AFI’S CLAIMS AGAINST IMPEXIA.

A. Introduction and Additional Background.

Impexia is not licensed by the Commission as an OTI and DNB/AFI’s Complaint does not allege that Impexia is a common carrier, marine terminal operator, or ocean freight forwarder. The Complaint against Impexia is based on a theory that BGL, Barsan Int’l, and Impexia functioned as one entity. DNB/AFI allege that Barsan Int’l is a “mere sham, agent, or adjunct of BGL, that its separate existence as a distinct corporate entity should be ignored, and the two corporations should be regarded as a single corporate unit.” (Complaint ¶ 9.) Impexia, in turn, is alleged to be

a mere corporate shell of BGL and Barsan Int’l for the purpose of obtaining and utilizing BGL’s and/or Barsan Int’l’s customers commercial proprietary information, which is routinely obtained for performing Barsan Int’l’s NVOCC/freight forwarding/NVOCC [*sic*] services, with the purpose of engaging in the same business as Barsan [Int’l’s] customers and to solicit import/export trading business from their customers’ clients.

(*Id.* ¶ 10.) In Paragraph 15, DNB/AFI repeat the allegation focusing on information provided to Barsan Int’l by DNB and AFI.

Upon information and belief, Impexia is a mere corporate shell of BGL and Barsan Int'l for the purpose of obtaining and utilizing BGL's and/or Barsan Int'l's customers commercial proprietary information, which is routinely obtained for performing Barsan Int'l's NVOCC/freight forwarding/NVOCC [*sic*] services, with the purpose of engaging in the same business as DNB and/or AFI and to solicit import/export trading business from DNB's and/or AFI's customers.

(*Id.* ¶ 15.)

The Complaint alleges a number of facts that DNB/AFI contend establish the claimed relationship between Impexia and BGL and/or Barsan that they contend support a finding that Impexia is a "mere corporate shell" of BGL and/or Barsan.

17. Upon information and belief, Mr. Jimmy Cuneyt Karadagli holds out as the owner of Impexia. Mr. Jimmy Cuneyt Karadagli, at all relevant times to this Complaint, is the husband of Ms. Burcin Karadagli, Accounting Manager of Barsan Int'l located at the New Jersey location.
18. Upon information and belief, Impexia and Barsan Int'l initially, upon the formation of Impexia, shared the same business address in New Jersey.
19. Upon information and belief, Impexia stopped indicating that its offices were located at the same location as Barsan Int'l when Respondents became aware that Complainant had obtained knowledge of Impexia and its unlawful scheme, on or about December, 2010. At this time Respondents changed its address on its web-site.
20. Impexia indicates on its web-site that it has three offices in New Jersey, Florida and Texas, which upon information and belief are close to Barsan Int'l's or BGL's offices in these three States. Further, Impexia only has one contact telephone no., i.e. a New Jersey no., for the three offices.
21. Impexia used to display its business address in New Jersey as the same address as Barsan Int'l's address in its web-site. Mr. Jimmy Cuneyt Karadagli's full name was also displayed in the [Impexia] webpage.
22. Barsan Int'l's officers, President Ugur Aksu, Vice President Sevgi Cebe and Export Manager Tugsan Uresin, also maintain a close relationship with Impexia. See Exhibit 5, Barsan Int'l's officers' Names and Pictures Listed as Mr. Cuneyt Karadagli's Friends at His Facebook page.

(Complaint at 5-6 (most citations to exhibits attached to Complaint omitted).)

When BGL and/or Barsan Int'l provided NVOCC services to AFI and/or DNB, BGL's and/or Barsan Int'l's officers repeatedly stated that they were not making any profits from their NVOCC business by shipping BGL's and/of AFI's cargo. DNB and AFI are now aware of BGL, Barsan Int'l and Impexia's scheme, and DNB and AFI now understand their scheme i.e. a [fraudulent] [business] model by providing NVOCC services at little to no profit for the purposes of exploiting, receiving and soliciting information obtained through NVOCC business, and by unlawfully competing with their customers by setting up another company, i.e. Impexia in this case, to make unlawful profits.

(Complaint ¶ 33.) DNB/AFI conclude:

Respondents BGL, Barsan Int'l, acting on their own behalf and as a mere shell of BGL, and Impexia as BGL's and Barsan Int'l's alter ego by knowingly disclosing, offering, soliciting and receiving 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, by, 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 [Impexia] as a competitor have violated Section 10(b)(13) of the Shipping Act, 46 U.S.C. § 41103(a).

(Complaint ¶ 35.) Therefore, the Complaint concludes, BGL, Barsan Int'l, and Impexia are jointly and severally liable for any violations of the Act committed by any Respondent. (*Id.* at 11.)

In lieu of an answer, Impexia filed a motion to dismiss the Complaint against it for lack of personal jurisdiction. Impexia argued that:

Impexia is not a regulated person or entity under the Shipping Act (*i.e.*, it is not an ocean freight forwarder, [NVOCC], ocean common carrier, marine terminal operator); did not engage in conduct or behavior regulated by the Shipping Act or the FMC; and has not held itself out in any manner or capacity that would result in Commission oversight.

(Impexia Motion to Dismiss at 3.) Impexia argued that DNB/AFI's allegations that Impexia is a "mere corporate shell" and an "alter ego" of BGL/Barsan Int'l are not supported by the evidence and that Complainants had not made a *prima facie* showing that the Commission has personal jurisdiction over Impexia. Impexia attached a thirty-eight paragraph declaration signed by its president and twenty-two other exhibits to support its argument.

DNB/AFI filed an opposition to Impexia's motion to dismiss. DNB/AFI argued that facts regarding the relationship of BGL, Barsan Int'l, and Impexia alleged in the Complaint – that Impexia is a "mere corporate shell" or "adjunct" of BGL and Barsan Int'l – must be taken as true on a motion to dismiss.

I deferred ruling on Impexia's motion to dismiss.

A court considering a motion to dismiss for lack of personal jurisdiction has the option of holding in abeyance a decision on the motion or even ordering a hearing with oral testimony. Deferring a decision will enable the parties to engage in discovery on jurisdictional issues. 5B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Civil 3d* § 1351 (2004). Delay may be particularly appropriate when the issue of jurisdiction is interwoven with the merits of the case. 5C C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Civil 3d* § 1373 (2004) (discussing former Fed. R. Civ. P. 12(d), current Fed. R. Civ. P. 12(i)).

The evidence on which Complainants rely for their claim that Impexia is "a mere corporate shell of BGL and Barsan Int'l" is not compelling. This issue is interwoven with the merits of Complainants' claim, however. Therefore, I will defer ruling on the issue of jurisdiction over Impexia pending a fuller record. The parties should not construe this deferral as limiting discovery from Impexia to the issue of personal jurisdiction.

DNB Exports v. Barsan Global Lojistiks, FMC No. 11-07, Order at 7 (ALJ July 7, 2011) (Memorandum and Order on Motions to Dismiss).

I revisited Impexia's motion to dismiss before addressing a DNB/AFI motion to compel Impexia to produce additional discovery.

Complainants have now had one year of discovery to seek additional evidence that would show the claimed link between Impexia and Barsan Respondents. . . .

Before considering Complainants' motion to compel, it is appropriate to revisit the deferred issue of whether the Commission has jurisdiction over Impexia on Complainants' Complaint. Therefore, . . . Complainants are ordered to supplement their opposition to Impexia's motion to dismiss the complaint with evidence and argument demonstrating that Impexia is a corporate shell of Barsan Respondents or is otherwise subject to Commission jurisdiction. In their supplement, Complainants should address the elements the Commission has stated should be considered on a claim that a corporate veil should be pierced. *See [Rose Int'l]*. . . . Impexia and Barsan Respondents may file responses to Complainants' supplement [and] Complainants may file a reply to Impexia's and Barsan Respondents' responses.

DNB Exports v. Barsan Global Lojistiks, FMC No. 11-07, Order at 4 (ALJ July 27, 2012) (Order on Pending Motions).

After review of the parties' supplemental filings, I denied Impexia's motion to dismiss without determining whether Impexia was a corporate shell of BGL/Barsan.

As noted above, the evidence cited in the Complaint to support the claim that Impexia is a mere corporate shell of BGL and Barsan Int'l is not compelling. The evidence submitted by DNB/AFI in their supplemental briefing is not much more compelling. Nevertheless, the Commission is highly protective of a litigant's right to assert its claim based on a record that is complete as possible without the administrative law judge resolving any factual disputes prior to a hearing on the merits. *See EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F. R. § 515.27*, FMC No. 06-06, Order at 7-11 (FMC Dec. 18, 2008) (Order on Appeal of the Administrative Law Judge's Grant of Summary Judgment) (inferences to be drawn from the facts are to be viewed in the light most favorable to the party opposing summary judgment). "If the evidence is such that a reasonable jury could return a verdict for . . . the nonmoving party, there is a genuine issue." *Id.* at 16.

DNB/AFI contend the facts support a finding that Impexia is a mere corporate shell and an alter ego of BGL/Barsan. Impexia and BGL/Barsan contend otherwise. Although the facts are not compelling, viewed in the light most favorable to DNB/AFI, a reasonable jury might return a verdict for DNB/AFI on the issue of whether Impexia is the alter ego of BGL/Barsan. Therefore, Impexia's motion to dismiss the complaint is denied. *The parties should not construe this order as a finding that Impexia is a mere corporate shell or the alter ego of BGL/Barsan.* Given this holding, there is no need to determine at this stage in the proceeding whether Impexia is a common carrier, marine terminal operator, or ocean freight forwarder.

DNB Exports v. Barsan Global Logistics, FMC No. 11-07 (ALJ Feb. 13, 2013) (Memorandum and Order on Motions to Dismiss Filed by Impexia Inc.) (emphasis added). The parties were ordered to file their briefs on the merits, proposed finding of fact, and supporting evidence. *DNB Exports v. Barsan Global Logistics*, FMC No. 11-07 (ALJ Mar. 5, 2013) (March 5, 2013, Briefing Schedule).

B. DNB/AFI Have Not Established That Impexia Is Subject to Commission Jurisdiction.

1. DNB/AFI have not proved that Impexia operated as a common carrier, marine terminal operator, or ocean freight forwarder.

DNB/AFI's Complaint does not allege that Impexia operated as a common carrier, marine terminal operator, or ocean freight forwarder. As noted above, Impexia based its motion to dismiss in part on the fact that it is not a common carrier, marine terminal operator, or ocean freight forwarder subject to the Act. DNB/AFI apparently concede that Impexia is not a common carrier, terminal operator, or ocean freight forwarder, arguing in their opening brief on the merits that "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 to 46 USC § 41301.” (DNB/AFI Brief at 53.)

Impexia responds that the Commission does not have jurisdiction over it since it is “a non-shipping entity.” (Impexia Opp. Brief at 3.)

Whether the Shipping Act is remedial or not, the Commission’s jurisdiction is limited and not without boundaries; it is confined to the authority Congress has delegated to the agency. That delegation of power has never extended to jurisdiction over non-shipping entities. Moreover, the statute under which Complainants assert their claims plainly shows that its focus is to regulate only the conduct of “common carriers, marine terminal operators, and ocean freight forwarders,” and Impexia is none of those.

(Impexia Opp. Brief at 3.)

Impexia continues:

Impexia is not, nor has it ever been, engaged in the business of providing ocean freight forwarding and/or NVOCC services, nor does it hold itself out to the public as an “ocean common carrier.” Rather, Impexia is merely a procurement firm based in the United States that specializes in acquiring a variety of U.S.-designed and manufactured products, including, but not limited to, electrical, mechanical, plumbing, fire protection, and industrial products, as well as building materials for its overseas customers. Impexia is not an [OTI] licensed with the FMC. In the course of sourcing products for its customers, Impexia hires shipping entities, e.g., ocean freight forwarders/NVOCCs, to transport products overseas. Consequently, Impexia is not a “person” subject to the Shipping Act, and the Commission lacks personal jurisdiction over it. Impexia should therefore be dismissed from this action

(*Id.* at 6-7 (citations to record omitted).) DNB/AFI do not respond to this argument in their reply brief.

Impexia proposed the following findings of fact, set out with DNB/AFI’s responses to the proposed facts.

Impexia Prop. FF 12: Impexia has never been, an “ocean common carrier,” a “marine terminal operator,” or an “[OTI].” Impexia has never engaged in ocean transportation or issued a bill of lading. Impexia has always hired an ocean freight forwarder, NVOCC, or ocean common carrier to transport its products by ocean in the U.S. foreign commerce. C. Karadagli Affidavit at 12, May 31, 2013 (Impexia App. 2)

DNB/AFI Resp: Deny. Given the questionable value of the affidavits proffered by Impexia, which form the proposed finding of fact No. 12, Complainants' respectfully requests that the Administrative Law Judge give these little or no effect. See Complainants' Reply Brief at 1-5. Complainants further address their opposition to the above proposed finding of fact in Complainants' Reply.

Impexia Prop. FF 13: Impexia is not an [OTI] licensed with the Federal Maritime Commission. Id. (Impexia App. 2.)

DNB/AFI Resp: Complainants deny Proposed Finding of Fact No. 13 in that Complainants do not have information as to the allegation of Proposed Finding of Fact No. 13.

(Impexia Prop. FF 12, 13; DNB/AFI Resp. to Impexia Prop. FF 12, 13.) DNB/AFI do not identify any evidence that would support a finding that Impexia is a common carrier, marine terminal operator, or OTI or evidence to rebut Impexia's evidence showing that it is not one of these entities.

If they contend that Impexia is a common carrier, marine terminal operator, or OTI, the burden is on DNB/AFI to prove by a preponderance of the evidence that Impexia operated as one. The burden is not on Impexia to prove that Impexia did not operate as a common carrier, terminal operator, or ocean freight forwarder. DNB/AFI do not identify any evidence that would prove that Impexia is a common carrier, terminal operator, or ocean freight forwarder or rebut Impexia's evidence that it is not. Therefore, I find that Impexia is not a common carrier, marine terminal operator, or ocean freight forwarder.

2. **DNB/AFI have not proved that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l.**
 - a. **DNB/AFI have abandoned their claim that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l.**

As set forth above, DNB/AFI allege that "Impexia is a mere corporate shell of BGL and Barsan Int'l" (Complaint ¶ 10) and acts "as BGL's and Barsan Int'l's alter ego." (Complaint ¶ 35.) The burden is on DNB/AFI to prove by a preponderance of the evidence that "Impexia is a mere corporate shell of BGL and Barsan Int'l." Impexia and BGL/Barsan do not have the burden of proving that Impexia is not a corporate shell of BGL/Barsan.

In its initial opposition to Impexia's motion to dismiss filed in 2011, DNB/AFI argued:

Pursuant to the Commission's precedents, assuming the factual allegations of the Complaint were true, corporate entities must be disregarded in that they are made the implement for avoiding a clear legislative purpose of Section 10(b)(13) In the case at hand, failure to do so would aid in the perpetration of a fraudulent scheme as asserted in the Complaint as well as allow Respondent's circumvention of an

applicable statute, Section 10(b)(13) Provided that the factual allegations of the Complaint are taken as true, Respondents' use of separate corporate entities have definitely frustrated the remedial purposes of the Shipping Act, specifically the legislative purpose of Section 10(b)(13) . . . , and therefore, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation. Provided that the facts asserted in the Complaint are taken as true on Impexia's Motion to Dismiss, the Commission could pierce all Respondents' corporate veils and hold them jointly and severally liable for their violations of the Shipping Act. The FMC itself, and its predecessor agencies, have decided cases pertinent to the criteria required to pierce the corporate veil. The Complaint alleges sufficient facts, that when considered in the light of applicable law, to pierce all Respondents' corporate veils and hold them jointly and severally liable for their violations of the Shipping Act, and accordingly would consequently confer ample personal jurisdiction to the . . . Commission over Impexia.

(Complainants' Reply to Impexia Inc.'s Motion to Dismiss at 6.) I deferred ruling on this motion to permit discovery on this and other issues. *DNB Exports v. Barsan Global Logistik*, FMC No. 11-07, Order at 7 (ALJ July 7, 2011) (Memorandum and Order on Motions to Dismiss).

On May 4, 2012, DNB/AFI filed a motion to compel discovery from Impexia. Prior to addressing that motion, I required the parties to file supplemental briefs on Impexia's motion to dismiss, noting that "[a]lthough Complainants recently filed a motion to compel additional discovery from Impexia, the motion seeks commercial invoices and bank statements claimed to be 'extremely relevant to demonstrate Complainants' damages,' (Complainants Motion to Compel at 4), not information related to their claim that Impexia is a corporate shell." *DNB Exports v. Barsan Global Logistik*, FMC No. 11-07, Order at 4 (ALJ July 27, 2012) (Order on Pending Motions). "In their supplement, Complainants should address the elements the Commission has stated should be considered on a claim that a corporate veil should be pierced. *See Rose Int'l.*" *Id.*

DNB/AFI filed a supplemental brief, but did not address the *Rose Int'l* factors. Nevertheless, I denied the motion to dismiss. *DNB Exports v. Barsan Global Logistik*, FMC No. 11-07 (ALJ Feb. 7, 2013) (Memorandum and Order on Motions to Dismiss Filed by Impexia Inc.)

DNB/AFI have had a full and fair opportunity to conduct discovery and present evidence and argument to support their claim that Impexia is a corporate shell and alter ego of BGL and/or Barsan Int'l. DNB/AFI do not set forth any argument and do not cite any cases on this claim, and the words and phrases "corporate shell," "sham," "pierce," "veil," and "alter ego" do not appear in DNB/AFI's opening brief on the merits filed April 30, 2013. DNB/AFI do not address the factors that the Commission identified in *Rose Int'l*. DNB/AFI do not propose any findings of fact on the *Rose Int'l* factors.

In its response to DNB/AFI's opening brief, Impexia argues:

Complainants fail to even make mention of the alter ego issue in their original trial brief. The alter ego argument was the only reason that Impexia was kept in this case, and when granted the full opportunity to present what evidence they have now, Complainants do not address the *Rose* factors in their original trial brief, or even their supplemental brief. Instead, Complainants only make a mere passing reference to an “alter ego” in their Motion for Submission of Supplemental Evidence, and include far-reaching inferences concerning personal relationships and allegedly similar interests. *DNB Exports LLC v. Barsan Global Lojistiks Ve Gumruk Musavirligi A.S.*, FMC No. 11-07, Complainants’ Motion for Submission of Supplemental Evidence at 24 (May 17, 2013). These ambiguous assertions are not identified as factors to be considered under *Rose* and therefore carry little weight.

(Impexia Opp. Brief at 9.)

DNB/AFI do not address Impexia’s argument and the words and phrases “corporate shell,” “sham,” “pierce,” “veil,” and “alter ego” do not appear in DNB/AFI’s reply to Impexia’s brief filed June 24, 2013.

In their response to DNB/AFI’s brief on the merits, respondents BGL/Barsan also address DNB/AFI’s failure to identify evidence that would establish that Impexia is the alter ego of BGL/Barsan.

Complainants have failed to come forward with any meaningful evidence to justify their assertion that Impexia and Barsan Int’l are alter egos of one another. Indeed, they have failed to establish a single factor supporting such a finding – out of the nine factors identified by the Commission in *Rose Int’l*. Complainants have not even addressed most of these factors. To the extent they purport to address any of the factors, they fail to produce evidence to support their assertions.

Complainants do not even allege that Barsan Int’l (or Impexia) failed to maintain corporate minutes or adequate corporate records or that either entity in any way failed to follow corporate formalities (Factor 2). There is also no evidence, nor could there be, of commingling of funds and other assets between the companies (Factor 3). Complainants’ pleadings are devoid of any suggestion of inadequate capitalization (Factor 4); diversion of the corporation’s funds or assets to non-corporate uses (Factor 5); Impexia’s failure to exercise business discretion (Factor 8); or that the separate entities did not act as independent profit centers (Factor 9).

Quite simply, there is not a shred of evidence of overlapping ownership, or shared officers or directors. FoF 75.

(BGL/Barsan Int’l Opposition to Relief Sought by the Complainants at 9-10.)

DNB/AFI do not address BGL/Barsan's argument and the words and phrases "corporate shell," "sham," "pierce," "veil," and "alter ego" do not appear in DNB/AFI's reply to BGL/Barsan's brief filed June 25, 2013.

Despite the allegations in their Complaint and their argument in opposition to the motion to dismiss, in their merits briefing, DNB/AFI have failed to address their claim that Impexia is a "sham," and a "corporate shell" and "alter ego" of BGL and Barsan Int'l and that their status as distinct corporate entities should be ignored as they allege in their Complaint.

[DNB/AFI's] failure to brief and argue this issue is grounds for finding that the issue has been abandoned. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982) (citing *U.S. v. Indiana Bonding & Surety Co.*, 625 F.2d 26, 29 (5th Cir. 1980) (finding that "even though [an] issue was listed as one of the defendant's contentions in the pretrial order, and was thus presumably triable, [the defendant's] failure to present evidence in support of the defense before the district court precludes our review of it [on appeal]"). Cf. *McMaster v. United States*, 177 F.3d 936, 940-41 (11th Cir. 1999) (noting that a claim may be considered abandoned when the allegation is included in the plaintiff's complaint, but he fails to present any argument concerning this claim to the district court); *Lyes v. City of Riviera Beach, Fla.*, 126 F.3d 1380, 1388 (11th Cir. 1997) (noting that "the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned") (citation omitted), *reh'g granted and vacated by*, 136 F.3d 1295 (1998), reinstated by, 166 F.3d 1332, 1336 (11th Cir. 1999) (*en banc*); *Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir. 1994) (concluding that a district court "could properly treat as abandoned a claim alleged in the complaint but not even raised as a ground for summary judgment").

Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1326 (11th Cir. 2000).

DNB/AFI have not presented argument to support the allegation in their Complaint that Impexia is a "sham," a "corporate shell," and an "alter ego" of BGL and/or Barsan Int'l, and have not proposed findings of fact or identified evidence relevant to the *Rose Int'l* factors that would support this argument. Therefore, I find that DNB/AFI have abandoned their claim that Impexia is a "sham," a "corporate shell," and an "alter ego" of BGL and/or Barsan Int'l.

- b. **If the claim that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l is not considered to have been abandoned, DNB/AFI have not proved by a preponderance of the evidence that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l.**

i. **The parties' arguments.**

As noted above, the words and phrases "corporate shell," "sham," "pierce," "veil," and "alter ego" do not appear in DNB/AFI's opening brief. Despite the fact that DNB/AFI's brief did not argue the claim they made in their Complaint and argued in their opposition to Impexia's motion to dismiss, Impexia addresses DNB/AFI's claims about Impexia's alleged status as an alter ego or corporate shell made in other filings and does address this issue. Impexia contends:

To the extent that consideration is given to Complainants' previous argument that Impexia is an "alter ego" of Barsan, application of the *Rose* factors against the paucity of facts presented, as well as the stark absence of facts for the majority of the factors to be considered, reveals that this is yet another of Complainants' fictions to keep Impexia unjustly entangled in this action before the FMC.

(Impexia Opp. Brief at 3.)

Later in its brief, Impexia argues:

Before discovery began in this case, a lack of compelling evidence demonstrating Impexia acted as Barsan's corporate shell was apparent, but the determination of jurisdiction over Impexia was deferred. Complainants then had one year of discovery, and were ordered to supplement their argument and explicitly address the *Rose* factors. Complainants failed to do this.

Complainants are now given yet another chance, a final chance, to present their argument on this point. Yet, Complainants fail to even make mention of the alter ego issue in their original trial brief. The alter ego argument was the only reason that Impexia was kept in this case, and when granted the full opportunity to present what evidence they have now, Complainants do not address the *Rose* factors in their original trial brief, or even their supplemental brief. Instead, Complainants only make a mere passing reference to an "alter ego" in their Motion for Submission of Supplemental Evidence, and include far-reaching inferences concerning personal relationships and allegedly similar interests. These ambiguous assertions are not identified as factors to be considered under *Rose* and therefore carry little weight.

(Impexia Brief at 9.) DNB/AFI do not respond to this argument in their reply to Impexia's brief.

Respondents BGL/Barsan also address DNB/AFI's failure to prove that Impexia is an alter ego of BGL/Barsan.

The lone "evidence" Complainants cite for the notion that Barsan Int'l and Impexia are alter egos of one another is that, for a limited period of time, Impexia apparently listed the Barsan address on its website and sometimes sent out emails with a Barsan Int'l mailing address at the bottom. Given that such actions were taken without Barsan Int'l's knowledge or consent, the evidence in this regard clearly falls short of establishing a basis for concluding that Barsan and Impexia are alter egos of one another.

(BGL/Barsan Brief at 10.) BGL/Barsan then argue that BGL/Barsan did not know that Impexia had used Barsan Int'l's address. (*Id.* at 11.) They conclude:

Thus, the most that Complainants can establish is that, for a brief period of time, Impexia used Barsan's address without Barsan's knowledge or consent. When Barsan learned of this, it demanded that Impexia immediately cease the practice and Impexia did so. That thin reed does not support a finding that Barsan and Impexia are alter egos of one another.

(*Id.* at 12.) DNB/AFI do not respond to this argument in their reply to BGL/Barsan's brief.

ii. Discussion.

In *Rose Int'l*, the Commission described the evidence supporting its determination that the OSSI/OMNI corporate veil should be pierced. *Rose Int'l*, 29 S.R.R. at 169-171. *See* above at 9. Each of these factors is addressed below.

Rose Int'l (1) The nature of the ownership and control.

Rose Int'l (7) Overlapping ownership, officers, directors and personnel.

DNB/AFI do not propose a finding of fact on the issue of whether Impexia and BGL/Barsan have overlapping ownership, officers, and directors. Impexia's Certificate of Incorporation, filed with the state of New Jersey on March 11, 2010, identifies Cuneyt Karadagli as its initial registered agent and Cuneyt Karadagli and Okan Eker as the two members of its initial board of directors. (DNB/AFI App. 252.) DNB/AFI do not identify any evidence that would support a finding that either Cuneyt Karadagli and Okan Eker was ever an officer or director of BGL or Barsan Int'l or that Impexia ever had any other officers or directors who were also officers or directors of BGL or Barsan Int'l.

In their proposed findings of fact, BGL/Barsan state: "Barsan Int'l and BGL have no common or overlapping ownership, officers, directors or personnel with Impexia." (BGL/Barsan Prop. FF 75.) BGL/Barsan rely on the Ugur Aksu Declaration dated May 14, 2013, for evidentiary support. (Barsan App. 10.) DNB/AFI respond: "Complainants deny Proposed Finding of Fact

No. 75. Ugur Aksu's Declaration lacks credibility and/or evidentiary support." (DNB/AFI Resp. to BGL/Barsan Prop. FF 75.) DNB/AFI do not identify any evidence that would rebut Ugur Aksu's Declaration, however, and do not identify any evidence that would support a finding that Impexia and BGL/Barsan Int'l have overlapping ownership. As noted below, other evidence in the record supports a finding that Ugur Aksu's credibility is compromised. See Part VI.B.2.c. below. His compromised credibility does not lead to a conclusion that everything that he states is false, however. Despite over one year of discovery and the opportunity to depose Aksu and other BGL/Barsan officials, DNB/AFI do not cite to any evidence that would rebut this and other statements.

DNB/AFI propose the following finding of fact: "Burcin Karadagli was employed by Barsan Int'l from 2001 to April 2011: Burcin Karadagli worked for Barsan Int'l as an accounting clerk from 2001 to 2004 and as an Accounting Manager/Accounting Operations Supervisor from 2004 to April 2011." (DNB/AFI Prop. FF 10.) BGL/Barsan and Impexia admit this fact. (BGL/Barsan Resp. DNB/AFI Prop. FF 10; Impexia Resp. DNB/AFI Prop. FF 10.) BGL/Barsan proposed: "Burcin Karadagli was the accounting manager for Barsan Int'l from 2005 to 2011. In this capacity she was routinely provided with bills of lading and other Barsan Int'l shipping records in order to perform her job responsibilities." (BGL/Barsan Prop. FF 26.) DNB/AFI respond: "Deny. The only evidence cited is Ugur Aksu Declaration, which does not have any evidentiary support." (DNB/AFI Resp. to BGL/Barsan Prop. FF 26.) DNB/AFI do not identify any evidence that would rebut Ugur Aksu's Declaration, however, and do not cite to any evidence that Burcin Karadagli was anything other than the accounting manager/accounting operations supervisor for Barsan Int'l.

In their motion for submission of supplemental evidence, DNB/AFI contend that Burcin Karadagli should be considered to be a "senior person" at Barsan Int'l because in an email dated March 9, 2009, "Burcin Karadagli asserts to Sevgi Cebe that '[w]hen Ugur is not here, we need to support each other as you are the VP of Operations, and I am the VP of Finance'"⁷ and that "Burcin Karadagli on behalf of Barsan Int'l drafted a letter to the United States Embassy in Istanbul-Turkey to prove that Ugur Aksu was the 'Director of the Company.'" (Complainants' Motion for Submission of Supplemental Evidence at 11-12.) DNB/AFI contend: "It is apparent that Burcin Karadagli held an officer status or in any case held out as such without contradiction from Barsan Int'l." (*Id.* at 12.) BGL/Barsan respond that Barsan Int'l did not have the position of vice president for finance and that Burcin Karadagli was Barsan's accounting manager. (Barsan Resp. to DNB/AFI Mot. Supp. Evid. at 11-12.) There is no indication in the record that DNB/AFI ever sought to clarify Burcin Karadagli's position through deposition testimony of either Burcin Karadagli or a representative of Barsan Int'l. I find that Burcin Karadagli's statement in the email and the letter to the embassy do not establish by a preponderance of the evidence that Burcin Karadagli was an officer or director of Barsan Int'l.

⁷ DNB/AFI do not provide a cite to this email. According to BGL/Barsan, this email does not appear to be in DNB/AFI's appendix. (See Barsan Resp. to DNB/AFI Mot. Supp. Evid. at 11.)

Arguably addressing a portion factor 7, DNB/AFI contend that the close relationship between Impexia and BGL/Barsan is demonstrated by the fact that on December 6, 2010, Isik Onur, a member of Barsan's staff, sent Cuneyt Karadagli an email that stated Onur would have Burcin Karadagli sign a Schedule B or shipper's letter of intent for an Impexia shipment. DNB/AFI quote and cite to DNB/AFI proposed finding of fact 61. (DNB/AFI Brief at 31.)

61. According to an e-mail sent by Isik Onur To Jimmy Karadagli on December 06, 2010 (BARSAN 000005), Barsan Int'l consented to Impexia's request to have Burcin Karadagli sign the required SLI document:

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.

As Respondent Barsan Int'l's accounting manager, Respondent Barsan Int'l asked Burcin Karadagli to execute Impexia's Shipper's Letter of Instructions. (AFI/DNB App. 2176).

(DNB/AFI Prop. FF 61.)

BGL/Barsan respond:

Barsan Int'l and BGL deny Proposed Finding of Fact No. 61. Although Isik Onur suggested in his email that Burcin Karadagli could sign the shipper's letter of instruction (SLI) for her husband, she never did. *See* Barsan Proposed Findings of Fact 59. Indeed no SLI was required. *Id.*

(BGL/Barsan Resp. DNB/AFI Prop. FF 61.)

Impexia responds: "Denied. The email above is not the same translation. (AFI/DNB App. 2199.)" (Impexia Resp. DNB/AFI Prop. FF 61.)

In their proposed findings of fact, DNB/AFI set forth what purports to be an English translation of the December 6, 2010, email, but refer to DNB/AFI App. at 2176, a copy of the email that is written in Turkish. DNB/AFI do not refer to an English translation of the December 6, 2010, email. Impexia states that AFI/DNB App. at 2199 is a translation of the December 6, 2010, email submitted by DNB/AFI as part of its appendix, but that this translation differs from the purported translation in DNB/AFI's brief:

Cuneyt, I received the documents but the schedule B # for these materials is not written down, can you learn this from the persons who have sold it to you and convey it. This information is required when the customs entry is made from the USA, that is to say it will be required for the cut off tomorrow.

I will have the SLi 1 signed by Burcin, it is not a problem but your customer might need the original invoice. Is there anybody in Turkey who could supply this original invoice to the company? Or, it might be necessary to send it from here.

(AFI/DNB App. at 2199.) DNB/AFI do not explain why the translation of the email in their brief is different from the translation at page 2199 of their appendix.

BGL/Barsan address the December 6, 2010, email in their proposed findings of fact.

59. DNB/AFI has argued that Impexia and Barsan Int'l were related companies based upon the fact that at one time it was suggested that Burcin Karadagli, Mr. Karadagli's wife, sign an Impexia shipper's letter of instruction. *Id.* at 48 (Barsan App. 8). In fact no such letter of instruction was ever required. *Id.*

DNB/AFI Response: Deny. Barsan Respondents mis-interpret the fact that Cuneyt Karadagli instructed Barsan's officer(s) to have Burcin Karadagli to sign an Impexia shipper's letter of instruction. It is not relevant whether Burcin Karadagli signed the shipper's letter of instruction or the shipper's letter of instruction is required. See Complainants' Motion for Submission of Supplemental Evidence at 8-19. See also Complainants' Reply to Barsan Respondents' Opposition.

60. Even if it had been, the fact that it was suggested on one occasion that, for convenience, Ms. Karadagli sign something for her husband does not establish that Impexia and Barsan Int'l are related entities with a common interest. *Id.* at 48 (Barsan App. 8-9).

DNB/AFI Response: Deny. See Response to Proposed Finding of Fact No. 59.

(See DNB/AFI Resp. to BGL/Barsan Prop. FF 59-60.)

The burden of proof/persuasion is on DNB/AFI to negate the existence of Impexia and BGL/Barsan as separate entities. The burden is not on Impexia and/or BGL/Barsan to prove that

Impexia and BGL/Barsan are separate entities. Burcin Karadagli's statement that she was "the VP of Finance" does not by itself establish that she was an officer or director of Barsan Int'l and the fact that she is the wife of Cuneyt Karadagli and that on one occasion she may have been permitted to sign an Impexia shipper's letter of instruction does not establish that she was an officer or director of Impexia. DNB/AFI have not identified evidence that would support a finding that Impexia and BGL/Barsan have common ownership and control and the evidence in the record does not establish that BGL/Barsan Int'l and Impexia have common or overlapping ownership, officers, or directors. *Compare Rose Int'l*, 29 S.R.R. at 169. The fact that on one occasion for an Impexia shipment, a Barsan Int'l employee stated that Burcin Karadagli could sign an Impexia shipper's letter of instruction may suggest that she did other work for Impexia while working for Barsan Int'l, but assuming this is true, this does not establish that Impexia and BGL/Barsan have overlapping ownership, officers, directors, or personnel.

Rose Int'l (2) Failure to maintain corporate minutes or adequate corporate records and failure to follow corporate formalities.

DNB/AFI do not propose a finding of fact on the issue of whether Impexia and BGL/Barsan failed to maintain corporate minutes or adequate corporate records and failed to follow corporate formalities. In their proposed findings of fact, BGL/Barsan state: "At all times BGL and Barsan Int'l have complied with their respective corporate obligations." (BGL/Barsan Prop. FF 5 (citations to record omitted).) DNB/AFI respond: "Deny. The only evidence cited for this allegation is Ugur Aksu Declaration, which does not have any evidentiary support." (DNB/AFI Resp. to BGL/Barsan Prop. FF 5.) DNB/AFI do not cite to any evidence that would rebut this evidence

The burden of proof/persuasion is on DNB/AFI to negate the existence of Impexia and BGL/Barsan as separate entities. The burden is not on Impexia and/or BGL/Barsan to prove that Impexia and BGL/Barsan are separate entities. DNB/AFI have not identified any evidence that would support a finding that Impexia, BGL, and/or Barsan Int'l failed to maintain corporate minutes or adequate corporate records or failed to follow corporate formalities. *Compare Rose Int'l*, 29 S.R.R. at 169-170.

Rose Int'l (3) Commingling of funds and other assets.

DNB/AFI do not propose a finding of fact on the issue of commingling of funds and other assets of Impexia and BGL/Barsan. In their proposed findings of fact, BGL/Barsan state: "Barsan Int'l and BGL have never commingled funds with Impexia." (BGL/Barsan Prop. FF 76.) BGL/Barsan rely on the Ugur Aksu Declaration dated May 14, 2013, for evidentiary support. (Barsan App. 10.) DNB/AFI respond: "Complainants deny Proposed Finding of Fact No. 76. Ugur Aksu's Declaration lacks credibility and/or evidentiary support." (BGL/AFI Resp. to BGL/Barsan Prop. FF 76.) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof/persuasion is on DNB/AFI to negate the existence of Impexia and BGL/Barsan as separate entities. The burden is not on Impexia and/or BGL/Barsan to prove that Impexia and BGL/Barsan are separate entities. DNB/AFI has not identified any evidence that would

support a finding that Impexia and BGL/Barsan have commingled funds and other assets. *Compare Rose Int'l*, 29 S.R.R. at 170.

Rose Int'l (4) Inadequate capitalization.

DNB/AFI do not propose a finding of fact on the issue of inadequate capitalization of Impexia and BGL/Barsan. In their proposed findings of fact, BGL/Barsan state: “Neither Barsan Int’l nor BGL are inadequately capitalized” (BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI respond: “Deny. Ugur Aksu’s affidavit lacks credibility and/or evidentiary support.” (DNB/AFI Resp. to BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof/persuasion is on DNB/AFI to negate the existence of Impexia and BGL/Barsan as separate entities. The burden is not on Impexia and/or BGL/Barsan to prove that Impexia and BGL/Barsan are separate entities. DNB/AFI have not identified any evidence that would support a finding that Impexia, BGL, or Barsan Int’l was undercapitalized. *Compare Rose Int'l*, 29 S.R.R. at 170.

Rose Int'l (5) Diversion of the corporation’s funds or assets to non-corporate uses.

DNB/AFI do not propose a finding of fact on the issue whether Impexia and BGL/Barsan diverted corporation funds or assets to non-corporate uses. In their proposed findings of fact, BGL/Barsan state: “Neither Barsan Int’l nor BGL . . . have . . . diverted corporate funds or assets to non-corporate uses. . . .” (BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI respond: “Deny. Ugur Aksu’s affidavit lacks credibility and/or evidentiary support.” (DNB/AFI Resp. to BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof/persuasion is on DNB/AFI to negate the existence of Impexia and BGL/Barsan as separate entities. The burden is not on Impexia and/or BGL/Barsan to prove that Impexia and BGL/Barsan are separate entities. DNB/AFI have not identified any evidence that would support a finding that Impexia funds or assets were diverted for BGL/Barsan Int’l purposes or other non-corporate uses or BGL/Barsan Int’l funds or assets were diverted for Impexia purposes or other non-corporate uses.

Rose Int'l (6) Use of the same office or business location by the corporation and its shareholders.

DNB/AFI do propose findings of fact that relate to *Rose Int'l* factor (6): “Impexia’s commercial invoices and Impexia’s previous website shows an address identical to Barsan Int’l’s address” (DNB/AFI Prop. FF 62); Cuneyt Karadagli’s other companies used Barsan Int’l’s address (DNB/AFI Prop. FF 63); and Barsan Int’l officers were aware that Impexia used Barsan Int’l’s address because the Impexia address was included in emails that Cuneyt Karadagli sent to Barsan Int’l officers. (DNB/AFI Prop. FF 64.) Impexia admits that it used Barsan Int’l’s address. (Impexia

Resp. to DNB/AFI Prop. FF 64.) BGL/Barsan Int'l deny that they knew Impexia used the Barsan Int'l address until DNB/AFI notified them of their claims in this proceeding. BGL/Barsan state that they never gave Cuneyt Karadagli permission to use Barsan Int'l's address.

As reflected in the Declaration of Ugur Aksu, Mr. Karadagli rented space from a third a [*sic*] party for one of his prior companies above Barsan's warehouse in or around 2009. *See* Barsan Proposed Finding of Fact 29. Barsan had no involvement in that decision. *Id.* at 30. The address of that office space was 1709 Zink Place, Unit #3. Barsan Int'l's address was 1709 Zink Place, Unit #5. After Mr. Aksu learned that DNB/AFI were accusing Barsan Int'l of disclosing propriety information to Impexia, he spoke with Cuneyt Karadagli who told him that after House of Water had gone out of business, Mr. Karadagli had posted the 1709 [Zink] Place Unit #5 address on Impexia's website and in the signature line of his business emails. *Id.* at 35. Mr. Karadagli said that he did so for convenience because his wife worked at that address and could bring home mail sent there. *Id.* Barsan Int'l never gave Impexia permission to use its address on Impexia's website or in his signature line on his emails. *Id.* at 37. No Barsan employees noticed that Barsan's address was on Mr. Karadagli's signature line on email sent to them. *Id.* at 36. This is not surprising as the script in the signature line is very small.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 64.)

Whether or not BGL/Barsan were aware of it, the evidence establishes that Impexia used the Barsan Int'l address, 17-09 Zink Place Unit 5, as its mailing address on its invoices and in emails.

Rose Int'l (8) The amount of business discretion displayed by the allegedly dominated corporation.

DNB/AFI do not propose a finding of fact on the amount of business discretion displayed by Impexia, the allegedly dominated corporation. In their proposed findings of fact, BGL/Barsan state: "Barsan Int'l and BGL never directed the activities of Impexia or of Cuneyt Karadagli." (BGL/Barsan Prop. FF 77.) BGL/Barsan rely on the Ugur Aksu Declaration dated May 14, 2013, for evidentiary support. (Barsan App. 10.) DNB/AFI respond: "Complainants deny Proposed Finding of Fact No. 77. Ugur Aksu's Declaration lacks credibility and/or evidentiary support." (BGL/AFI Resp. to BGL/Barsan Prop. FF 77.) DNB/AFI do not cite to any evidence that would rebut the declaration.

The burden of proof/persuasion is on DNB/AFI to negate the existence of Impexia and BGL/Barsan as separate entities. The burden is not on Impexia and/or BGL/Barsan to prove that Impexia and BGL/Barsan are separate entities. DNB/AFI have not identified any evidence that would support a finding that a BGL/Barsan dominated Impexia's operations. *Compare Rose Int'l*, 29 S.R.R. at 170-171 (discussed as seventh factor).

Rose Int'l (9) Whether the corporations are treated as independent profit centers.

DNB/AFI do not propose a finding of fact on the issue of whether Impexia and BGL/Barsan are independent profit centers. In their proposed findings of fact, BGL/Barsan state: “Each company [BGL and Barsan Int’l] is – and always has been – an independent profit center.” (BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI respond: “Deny. Ugur Aksu’s affidavit lacks credibility and/or evidentiary support.” (DNB/AFI Resp. to BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI do not cite to any evidence that would rebut this evidence.

Asserting a claim that seems to be related to *Rose Int'l* factor 9, in their Complaint, DNB/AFI allege that BGL, Barsan Int’l, and Impexia implemented a scheme of “providing NVOCC services at little to no profit for the purposes of exploiting, receiving and soliciting information obtained through NVOCC business, and by unlawfully competing with their customers by setting up another company, i.e. Impexia in this case, to make unlawful profits.” (Complaint ¶ 33.) DNB/AFI do not set forth any argument or cite to any evidence or propose any findings of fact on which to base a finding that BGL/Barsan provided NVOCC services to Impexia (or any other shipper) for little or no profit.

The burden of proof/persuasion is on DNB/AFI to negate the existence of Impexia and BGL/Barsan as separate entities. The burden is not on Impexia and/or BGL/Barsan to prove that Impexia and BGL/Barsan are separate entities. DNB/AFI have not identified any evidence that would support a finding that Impexia and BGL/Barsan Int’l are not treated as independent profit centers. *Compare Rose Int'l*, 29 S.R.R. at 171 (discussed as eighth factor).

DNB/AFI have not identified any evidence or proposed findings of fact on *Rose Int'l* factors 2, 3, 4, 5, 8, or 9. The evidence in the record on *Rose Int'l* factors 1, 6, and 7 does not establish by a preponderance of the evidence that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int’l. The fact that Burcin Karadagli is the wife of Cuneyt Karadagli and on one occasion it was suggested that she sign a shipper’s letter of instruction for Impexia does not establish that Impexia operated as BGL/Barsan’s alter ego. Even if Barsan Int’l knew or should have known from the emails that Impexia used Barsan Int’l’s address, this awareness does not establish that Impexia operated as BGL/Barsan’s alter ego. DNB/AFI have not identified evidence that would meet the factors of any other Commission proceeding to prove by a preponderance of the evidence that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int’l.

3. DNB/AFI’s other claims of connections do not establish by a preponderance of the evidence that Impexia and BGL/Barsan should be treated as one entity.

As set forth above, the Complaint alleges a number of facts that DNB/AFI contend establish the claimed relationship between BGL/Barsan and Impexia and that they contend support a finding that Impexia is a “mere corporate shell” of BGL/Barsan.

Cuneyt Karadagli, the owner of Impexia is the husband of Ms. Burcin Karadagli, Accounting Manager of Barsan Int'l;

Impexia used the same address as Barsan Int'l, then stopped using it when Respondents learned that DNB/AFI contacted BGL/Barsan with their claims;

Barsan Int'l's officers' are identified as friends on Cuneyt Karadagli's Facebook page.

(Complaint at 5-6.)

In their Motion for Submission of Supplemental Evidence, DNB/AFI contend:

As has been pointed out by Complainants in their Opening Brief, there has been a dearth of direct evidence with regard to the disclosures of Complainants business information to Impexia. This can be attributed to many factors, including discovery difficulties, such as the one giving rise to this Motion. However, there has been some credible evidence adduced that such information was disclosed to Impexia in February, 2009, and again in 2011. However, as has been posited in Complainants opening Brief, there is ample circumstantial evidence (a preponderance of evidence), that a multitude of disclosures were made between Barsan Int'l and Impexia between the February 2, 2009⁸¹ date and April 14, 2011, the date this Complaint was filed, which resulted in the creation of a competitor predator feeding on Complainants^[1] customers. The evidence provided in subject disk made available only on April 3, 2013, provides further and more convincing circumstantial evidence that, in fact, unlawful disclosures were made by the Barsan Respondents to Impexia.

(DNB/AFI Mot. Supp. Evid. at 3.)

Additional documents obtained from the recently provided disk demonstrate that the Barsan Int'l relationship with Cuneyt Karadagli companies involved more than just a carrier to shipper relationship, and, in fact strongly indicate that there may have been other monetary interests involved, which would provide additional support for a finding that Barsan Int'l had additional interests in Impexia which would result in creating an environment whereby Barsan Int'l would assist Impexia, by either directly providing Complainants' business information to Cuneyt Karadagli, or by allowing others such as Burcin Karadagli to do so freely with Barsan Int'l's full knowledge and consent.

(DNB/AFI Mot. Supp. Evid. at 8.)

⁸ Impexia was incorporated March 11, 2010. Disclosures to Impexia could not have occurred before that date.

DNB/AFI do not set forth any authority for why the Commission should analyze this evidence using a test other than the *Rose Int'l* factors or, assuming the evidence is true, the fact that one corporation assists another corporation means they should be treated as one corporation. Their argument seems to be that when a party seeking to pierce the corporate veil to treat two corporations as one cannot or does not have evidence on the factors articulated in *Rose Int'l*, the trier of fact should look at a mass of facts and, without applying any analysis, simply conclude that the two corporations should be treated as one. The evidence on which DNB/AFI rely does not prove by a preponderance of the evidence that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l.

DNB/AFI have not identified evidence of the kind on which the Commission relied to breach corporate veils in the cases cited above. Therefore, DNB/AFI have not proved by a preponderance of the evidence that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l.

4. Section 10(b)(13) does not control the activities of an entity that is not a common carrier, marine terminal operator, or ocean freight forwarder.

a. The parties' arguments.

DNB/AFI argue that the fact that the Shipping Act is a remedial statute supports a finding of jurisdiction over an entity that is not a common carrier, marine terminal operator, or ocean freight forwarder on a claim that the entity violated section 10(b)(13).

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 interpretation⁹ is the application of the law in the spirit of the policy that motivated Congress to act. . . .

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

⁹ The Commission stated “touchstone of statutory construction.” *In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries – Petition for Declaratory Order*, FMC No. 06-08, Order at 10 (FMC Feb. 15, 2008) (*Unlicensed Persons*, FMC No. 06-08).

competitor [of DNB/AFI], 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] Docket No. 06-08 . . . :

The Shipping Acts of 1916 and 1984, as amended, have long been recognized as [remedial statutes].¹⁰ 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. 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.¹¹

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.’” 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).

(DNB/AFI Brief at 7-8 (some citations omitted).)

DNB/AFI set forth a lengthy expansion of this argument later in their brief.

The plain language of [section 10(b)(13)], 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

¹⁰ DNB/AFI omitted more than one page of the Commission’s Order between this sentence and the next sentence they quote without indicating the omission. *See Unlicensed Persons*, FMC No. 06-08, Order at 10-12.

¹¹ *Unlicensed Persons*, FMC No. 06-08, Order at 12.

– 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.

(DNB/AFI Brief at 51-53.)

Impexia argues that the Commission does not have jurisdiction over it since it is “a non-shipping entity.” (Impexia Opp. Brief at 3.)

Whether the Shipping Act is remedial or not, the Commission’s jurisdiction is limited and not without boundaries; it is confined to the authority Congress has delegated to the agency. That delegation of power has never extended to jurisdiction over non-shipping entities. Moreover, the statute under which Complainants assert their claims plainly shows that its focus is to regulate only the conduct of “common carriers, marine terminal operators, and ocean freight forwarders,” and Impexia is none of those.

(Impexia Opp. Brief at 3.)

Impexia continues:

Impexia is not, nor has it ever been, engaged in the business of providing ocean freight forwarding and/or NVOCC services, nor does it hold itself out to the public as an “ocean common carrier.” Rather, Impexia is merely a procurement firm based in the United States that specializes in acquiring a variety of U.S.-designed and manufactured products, including, but not limited to, electrical, mechanical, plumbing, fire protection, and industrial products, as well as building materials for its overseas customers. Impexia is not an [OTI] licensed with the FMC. In the course of sourcing products for its customers, Impexia hires shipping entities, e.g., ocean freight forwarders/NVOCCs, to transport products overseas. Consequently, Impexia is not a “person” subject to the Shipping Act, and the Commission lacks personal jurisdiction over it. Impexia should therefore be dismissed from this action

(*Id.* at 6-7 (citations to record omitted).)

b. Discussion.

DNB/AFI quote extensively from the Commission's decision in *Unlicensed Persons*, FMC No. 06-08, a proceeding that evolved from an opinion letter issued by the Commission's General Counsel. Landstar Global Logistics, Inc. (Landstar), a licensed NVOCC, requested an opinion from the Commission's General Counsel on the lawfulness of an NVOCC using unlicensed and unbonded persons as agents to provide NVOCC and ocean freight forwarding services unlicensed agents to assist with certain aspects of its OTI services. "[T]he General Counsel concluded that Landstar had described a *bona fide* agency arrangement and, therefore, that the unlicensed, unbonded agents could lawfully provide OTI services on it's the behalf." *Unlicensed Persons*, FMC No. 06-08, Order at 24.

Team Ocean Services, Inc. (Team Ocean), an OTI licensed as both an OFF and NVOCC, filed a petition that would reaffirm the conclusions of the General Counsel. The petitioner proposed "to use written agency agreements which 'would permit the agent to hold out, and to provide ocean transportation services as an OTI on behalf of and in the name of Team Ocean.'" *Id.* at 2. Landstar filed comments in support of Team Ocean.

In its decision denying the petition, the Commission noted that section 19 of the Act prohibits a person from acting as an OTI without a license issued by the Commission and without furnishing a bond. 46 U.S.C. §§ 40901(a) and 40902. The Commission then stated:

When Congress determined that "no person may act" as an OTI without being properly licensed and bonded, that proscription was intended to prohibit any person from providing OTI services unless that person had obtained a license from the Commission and furnished an appropriate bond or other surety. The presumption underlying the Petition, however, is that only an entity holding out in its own name as a common carrier requires a license pursuant to Section 19, while an "agent," that provides the same OTI services to the public in the name of its principal, is not subject to licensing or bonding. The Commission, however, is not aware of any legislative history or case law that would indicate Congress intended to distinguish between persons who "act" as OTIs, on the one hand, and persons who provide OTI services on the other. Such an interpretation would require the former to be licensed and bonded, while the latter would operate unregulated, neither licensed nor bonded. Whether an entity is holding out to provide OTI services in its own right or is doing so on behalf of another, the harm to the public of introducing unknown, unlicensed and unbonded entities into the transportation supply chain is the same.

Id. at 8-9 (citation to record and footnote omitted). Relying on the language quoted by DNB/AFI (set out above), the Commission "denie[d] the Petition and will continue to require OTI services to be performed only by licensed OTIs." *Id.* at 25.

Landstar filed a petition for review of the Commission's order with the United States Court of Appeals for the District of Columbia Circuit, arguing that the order contravened the text of the

Act. The court vacated the Commission's order, finding fault with the Commission's reliance on its finding of the broader "spirit and basic policy" of the Act and use of the absurdity doctrine.

The court addressed the statutory question of whether agents of OTIs that are not themselves OTIs must obtain licenses from the Commission. The court summarized the proceeding before the Commission and the Commission's decision, including the legal principles on which DNB/AFI rely in this proceeding. It stated:

The Commission justified its extension of § 19's licensing requirement to agents by finding the text of the statute less important than what the Commission said was the statute's broader "spirit and basic policy." In effect, the Commission appealed to this "spirit" to interpret "act as an ocean transportation intermediary" to encompass persons who do not act as Ocean Transportation Intermediaries. But agencies cannot distort statutory language in this manner.

In explaining its counterintuitive gloss on the text, the Commission noted that it was "not aware of any legislative history or case law that would indicate Congress intended to distinguish between persons who 'act' as [OTIs], on the one hand, and persons who provide [OTI] services on the other." It should go without saying, however, that the absence of disproof in the legislative history hardly constitutes proof. The statute means what it says.

The Commission also stated that agents must be subject to licensing so as to further the "remedial purposes" of § 19. The purpose of § 19, the Commission explained, was to protect the public from unknown or unscrupulous [OTI] service providers. If § 19 were not "broadly construed" to encompass agents, this would "eviscerate" and "defeat the statute's clear and evident purpose." As the Supreme Court has repeatedly explained, however, neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes. Moreover, even accepting the Commission on its own terms, declining to require the licensing of agents does not "eviscerate" or "defeat" the statute's remedial purposes. As the FMC's General Counsel concluded and as Commissioner Dye explained, common law agency principles provide members of the public with adequate safeguards in their dealings with agents: If an agent breaches a contract or commits a tort, the disclosed NVOCC principal in whose name the agent acts is subject to liability. See RESTATEMENT (THIRD) OF AGENCY §§ 6.01, 7.03; 46 C.F.R. § 515.4(b)(2) (Ocean Transportation Intermediaries "strictly responsible for the acts or omissions of any of its . . . agents rendered in connection with the conduct of its business"). Therefore, the Commission's suggestion that the plain reading of the statute's text undermines its purpose rings hollow.

In a similar vein, the Commission said it would be "absurd" to require NVOCCs to be licensed, but to excuse the agents from that licensing requirement. A statutory outcome is absurd if it defies rationality. The absurdity doctrine is

inapposite here: Exempting agents from § 19 may be debatable policy, but it is hardly irrational. Declining to subject agents to the licensing requirement encourages Ocean Transportation Intermediaries to incorporate agency arrangements into their business models and arguably promotes efficiency and innovation in the Ocean Transportation Intermediary industry. Indeed, the Commission admits there are no “legal or policy reasons to prohibit” licensed Ocean Transportation Intermediaries from contracting with unlicensed vendors to perform trucking and similar services. Order at 19-20.

Landstar Exp. America, Inc. v. Federal Maritime Comm’n, 569 F.3d 493, 498-499 (D.C. Cir. 2009).¹² The court concluded that “the agency cannot rewrite a statute just to serve a perceived statutory ‘spirit.’” *Id.* at 500. In so doing, the court rejected the legal theory on which DNB/AFI rely in this proceeding.

Section 10(b)(13) is written to govern the activities of entities regulated by the Commission: Common carriers, marine terminal operators, and ocean freight forwarders. Congress recognized that it is likely these regulated entities would receive information from shippers that the shippers would not want the entity to share. Section 10(b)(13) prohibits common carriers, marine terminal operators, and ocean freight forwarders from disclosing, offering, soliciting, or receiving the information in certain circumstances. The Act governs activities of an entity operating as a common carrier or ocean freight forwarder as defined by the Act whether or not the entity is licensed by the Commission. Section 10(b)(13) does not govern the activities of entities not operating as common carriers, marine terminal operators, or ocean freight forwarders.

Impexia was not operating as a common carrier, marine terminal operator, or ocean freight forwarder. Assuming Impexia received information about DNB/AFI that Barsan Int’l disclosed in violation of section 10(b)(13), DNB/AFI’s allegation is that Impexia then *used* that information to the detriment of DNB/AFI. Section 10(b)(13) does not address the disclosure or use of information by an entity other than a common carrier, marine terminal operator, or ocean transportation intermediary to which protected information has been improperly disclosed or give the Commission jurisdiction over an entity not operating as a common carrier, marine terminal operator, or ocean freight forwarder that receives protected information.

The administrative law judge’s decision in *Mitsui v. Global Link*, FMC No. 09-01 (ALJ June 22, 2010) (Memorandum and Order on Motion to Dismiss), on which DNB/AFI bases part of its claim (DNB/AFI Brief at 52-53) is inapposite. *Global Link* was the shipper of cargo transported by Mitsui. Mitsui alleged that *Global Link* violated section 10(a)(1) of the Act, which provides:

¹² The court also noted that before the court, “the attorneys for the Commission have radically shifted away from the rationale employed by the Commission [in the Commission decision].” *Id.* at 499.

A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a) (emphasis added).

First, it is noted that DNB/AFI misstate the facts in *Mitsui*. DNB/AFI state: “Respondent Global Link . . . asserted that the Commission lacked personal jurisdiction over [it] in that the Complainant failed to allege a theory of piercing the corporate veil.” (DNB/AFI Brief at 52.) Global Link filed an “Answer to Mitsui’s complaint admitting that it ‘historically’ engaged in the split routing practice to reduce its costs,” not a motion to dismiss. *Mitsui v. Global Link*, FMC No. 09-01, Order at 6 (ALJ June 22, 2010) (Memorandum and Order on Motion to Dismiss). Global Link did not contend that the Commission lacked jurisdiction over it. (*Mitsui v. Global Link*, FMC No. 09-01, Global Link’s Verified Answer, etc., filed June 17, 2009.)

It was not Global Link, but Olympus Respondents and CJR Respondents – Global Link’s co-respondents that owned Global Link during the period it was alleged to have violated section 10(a)(1), but had since sold their interests – that filed motions arguing that Mitsui’s Complaint should be dismissed for failure to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b). The issue was whether Mitsui’s complaint sufficiently alleged violations by Olympus Respondents and CJR Respondents. *Id.* at 21. The administrative law judge found that the complaint was sufficient. *Id.* at 22. The Commission affirmed. *Mitsui v. Global Link*, FMC No. 09-01, Order at 34 (FMC Aug. 1, 2011) (Order Denying, etc.). The Commission noted that “[i]n this proceeding, no party has pled any basis for keeping Olympus Respondents or CJR Respondents in the proceeding based on a theory of piercing the corporate veil.” *Id.*

Second, the statutes have different focuses. Section 10(a)(1) regulates the activities of any person who obtains or attempts to obtain ocean transportation of property. That includes all shippers as defined by the Shipping Act (46 U.S.C. § 40102(22)) – which includes a proprietary shipper that is not an entity otherwise regulated by the Commission as well as a regulated entity (such as an NVOCC) that is a shipper in its relationship with an ocean common carrier, 46 U.S.C. § 40102(16)(B) – and prohibits those shippers from “obtain[ing] ocean transportation for property at less than the rates or charges that would otherwise apply.” 46 U.S.C. § 41102(a). Global Link was the shipper within the meaning of the Act in that case and subject to the restrictions of section 10(a)(1). The issue for Olympus Respondents and CJR Respondents – Global Link’s co-respondents that owned Global Link during the period it was alleged to have violated section 10(a)(1) – was whether “the split-routing scheme was carried out ‘with the full knowledge and participation of . . . Olympus Partners. . . , CJR . . . and Rosenberg.’ Global Link has stated that Respondents . . . each possessed knowledge of Global Link’s ‘split routing.’” *Mitsui v. Global Link*, FMC No. 09-01, Order at 34 (FMC Aug. 1, 2011) (Order Denying, etc.). *Mitsui v. Global Link* does not provide support for an argument that “common carrier, marine terminal operator, or ocean freight forwarder” in section 10(b)(13) should be read as “[a] person” as in section 10(a)(1).

C. Conclusion Regarding Impexia.

DNB/AFI have the burden of establishing Commission jurisdiction over Impexia. DNB/AFI have not established by a preponderance of the evidence that Impexia is a common carrier, marine terminal operator, or ocean freight forwarder subject to Commission jurisdiction for an alleged violation of section 10(b)(13). DNB/AFI have abandoned the claim alleged in their Complaint that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l. If this claim is not considered to have been abandoned, DNB/AFI have not proved by a preponderance of the evidence that Impexia is a corporate shell or alter ego of BGL and/or Barsan Int'l.

DNB/AFI have not established that the Commission has jurisdiction over Impexia for the alleged violations of section 10(b)(13). Therefore, the claims against Impexia are dismissed with prejudice.

V. CONCLUSIONS OF LAW ON DNB/AFI'S CLAIMS AGAINST BGL.

A. Introduction and Additional Background.

DNB/AFI's Complaint does not allege that BGL is a common carrier, marine terminal operator, or ocean freight forwarder. Their Complaint against BGL is based on a theory that BGL and Barsan Int'l functioned as one entity.

Upon information and belief, Barsan Int'l is so organized and controlled, and its affairs are so conducted as to make it a mere sham, agent, or adjunct of BGL, that its separate existence as a distinct corporate entity should be ignored, and the two corporations should be regarded as a single corporate unit." BGL presents Barsan Int'l to the shipping public as a division of BGL, and Barsan Int'l's bills of lading, invoices and other documents carry the BGL logo.

(Complaint ¶ 9.) The burden is on DNB/AFI to prove by a preponderance of the evidence that Barsan Int'l is "a mere sham, agent, or adjunct of BGL" and that they should be regarded as a single corporate unit.

B. DNB/AFI Have Not Established That BGL Is Subject to Commission Jurisdiction.

1. DNB/AFI have not proved that BGL operated as a common carrier, marine terminal operator, or ocean freight forwarder.

DNB/AFI do not allege in their Complaint and do not argue in their brief that BGL operated as a common carrier, marine terminal operator, or ocean freight forwarder. BGL/Barsan propose the following finding of fact: "BGL is not an NVOCC or licensed by the . . . Commission and does not provide transportation or ocean freight forwarder services in the United States trades. Kamil Barlin Declaration at 2, May 14, 2013, attached as Exhibit B (Barsan App. 20)." (BGL/Barsan Prop.

FF 4.) DNB/AFI respond: “Deny. The only evidence cited for this allegation is Ugur Aksu Declaration, which does not have any evidentiary support.” (DNB/AFI Resp. BGL/Barsan Prop. FF 4.) DNB/AFI do not cite to any evidence that would rebut this evidence.

If DNB/AFI believe that BGL operated as a common carrier, marine terminal operator, or ocean freight forwarder, it was incumbent upon them to allege it in their Complaint, then prove it by a preponderance of the evidence. BGL does not have the burden of proving that it is not a common carrier, marine terminal operator, or ocean freight forwarder. DNB/AFI have not identified any evidence that would support a finding that BGL operated as a common carrier, marine terminal operator, or ocean freight forwarder. Therefore, I find that BGL has not operated as a common carrier, marine terminal operator, or ocean freight forwarder.

2. DNB/AFI have not proved that BGL and Barsan Int’l should be regarded as a single corporate unit.

a. DNB/AFI have abandoned their claim that Barsan Int’l is a mere sham, agent, or adjunct of BGL and BGL and Barsan Int’l should be regarded as a single corporate unit.

As noted above, the words and phrases “corporate shell,” “sham,” “pierce,” “veil,” and “alter ego” do not appear in DNB/AFI’s opening brief. DNB/AFI have not presented any argument in their brief on the merits to support the allegation in their Complaint that Barsan Int’l is a mere sham, agent, or adjunct of BGL and BGL and that Barsan Int’l should be regarded as a single corporate unit, and DNB/AFI have not proposed findings of fact or identified evidence that would support this allegation. Therefore, I find that DNB/AFI have abandoned their claim that Barsan Int’l is a mere sham, agent, or adjunct of BGL and BGL and Barsan Int’l should be regarded as a single corporate unit. *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d at 1326.

b. If the claim that BGL and Barsan Int’l should be regarded as a single corporate unit is not considered to have been abandoned, DNB/AFI have not proved by a preponderance of the evidence that BGL and Barsan Int’l should be regarded as a single corporate unit.

Even though DNB/AFI do not argue that BGL and Barsan Int’l should be treated as one entity, in their brief in response, BGL/Barsan Int’l address this claim in their brief.

DNB/AFI generically refer to Barsan or the Barsan Respondents in their Complaint and in their Brief as if they are the same legal entities. They are not. Thus, in order to state a claim against BGL, Complainants must establish that BGL disclosed proprietary information while it was acting as a common carrier or ocean freight forwarder or that BGL and Barsan Int’l are alter egos of another. They cannot do so.

The undisputed evidence demonstrates that BGL and Barsan Int'l are separate legal entities. One of the entities is a Turkish corporation located in Turkey (BGL); the other a New York corporation located in the United States (Barsan Int'l). Even more significantly, BGL is not an NVOCC or ocean freight forwarder and never provided transportation services in the United States trades for DNB/AFI. Further, there is no evidence that BGL and Barsan Int'l: 1) failed to comply with their respective corporate obligations; 2) improperly commingled funds or other assets; 3) failed to maintain corporate minutes or adequate corporate records; or 4) in any way failed to follow corporate formalities. Further, Barsan Int'l and BGL are not inadequately capitalized; nor have they diverted corporate funds or assets to non-corporate uses, failed to exercise independent business discretion, or failed to act as independent profit centers.

The only allegation DNB/AFI makes in regard to BGL is that its logo appears on the Barsan Int'l bill of lading and that the Contract Carrier Agreement that Barsan Int'l signed with DNB refers to Barsan Int'l as being a division of BGL. A review of that contract, however, makes clear that the contract was executed solely by Barsan Int'l. In addition, the contract defines "Barsan," which is providing the services under the contract, as Barsan Int'l. Thus, there is no legitimate basis for concluding that DNB/AFI thought it was contracting with BGL. Further, there is no legitimate dispute that all of the actions at issue in this case were taken by Barsan Int'l and that BGL played no role whatsoever in providing services subject to the Shipping Act for the Complainants. Therefore, there can be no finding of a Shipping Act violation against BGL in this proceeding.

(BGL/Barsan Brief at 12-13.) DNB/AFI do not respond to this argument in their reply brief.

In *Rose Int'l*, the Commission described the evidence supporting its determination that the OSSI/OMNI corporate veil should be pierced. *Rose Int'l*, 29 S.R.R. at 169-171. Each of these factors is addressed below.

Rose Int'l (1) The nature of the ownership and control.

Rose Int'l (7) Overlapping ownership, officers, directors and personnel.

DNB/AFI propose the following finding of fact:

[Barsan Int'l] is BGL's subsidiary and is a corporation organized and existing pursuant to the laws of the State of New York with its principal place of business at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410. Barsan Int'l is licensed as [an NVOCC] in the waterborne foreign commerce of the United States and as a freight forwarder (FMC License No. 004656NF, Org No. 015750), pursuant to the Shipping Act and 46 C.F.R. § 515.21 et al. and 46 C.F.R. Part 520 of the Federal Maritime Commission Regulations. Barsan's surety bonds (Bond Nos. 571625 and 571626) were issued by Washington International Insurance Company).

(DNB/AFI Prop. FF 4.) As evidentiary support, DNB/AFI cite to their Verified Complaint that has identical wording. BGL/Barsan respond: “Complainants cite no evidence to support their assertions, instead simply relying upon allegations contained in their Complaint. Such allegations do not constitute evidence and therefore lack any evidentiary basis.” (BGL/Barsan Resp. to DNB/AFI Prop. FF 4.)

First, DNB/AFI’s Verified Complaint is an affidavit and is competent evidence. Second, in their Answer to the Complaint, BGL/Barsan admit paragraph 4. (BGL/Barsan Answer ¶ 4.) Third, on April 15, 2013, the parties filed their Stipulations of Uncontested Facts signed by counsel for each party, including BGL/Barsan. Among the seven stipulations, one finds the following: “Respondent Barsan Int’l is BGL’s subsidiary and is a corporation organized and existing pursuant to the laws of the State of New York with its principal place of business at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410.” (Stipulations of Uncontested Facts ¶ 4.) Fourth, in paragraph 3 of his declaration filed with BGL/Barsan’s proposed findings of fact, Ugur Aksu, the president of Barsan Int’l, states that BGL “is the corporate parent of Barsan Int’l.” (Barsan App. at 1.) Having admitted this fact in their Answer, in the Stipulation, and in Aksu’s declaration, BGL/Barsan Int’l’s failure to admit that Barsan Int’l is BGL’s subsidiary in response to DNB/AFI’s proposed findings of fact is frivolous in the extreme. The evidence of record establishes that Barsan Int’l is a subsidiary of BGL.

DNB/AFI propose a finding of fact that Ugur Aksu serves as president for both Barsan Global Logistics Corp. (the third (non-party) entity in the Barsan family identified in the Complaint) and Barsan, Int’l. (DNB/AFI Prop. FF 8.) BGL/Barsan admit this fact. (BGL/Barsan Resp. to DNB/AFI Prop. FF 8.) DNB/AFI do not identify evidence on whether Ugur Aksu is also the president of BGL. I assume for the purposes of this Initial Decision that Ugur Aksu is also president of BGL.

DNB/AFI propose a finding of fact that “BGL presents Barsan Int’l to the shipping public as BGL’s U.S. office, and Barsan Int’l presents itself to the shipping public as a division of BGL, and Barsan Int’l’s bills of lading, invoices and other documents carry the BGL logo,” citing to paragraph 4 of their Verified Complaint. (DNB/AFI Prop. FF 9.) BGL/Barsan respond:

Barsan Int’l and BGL deny that BGL presents Barsan Int’l to the shipping public as BGL’s U.S. office, and submits that no evidence is submitted to support such an allegation. To the extent that the Complainants are relying upon the allegations of their Complaint and/or Wikipedia pages to support such an assertion, it does not constitute valid evidence.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 9.)

First, DNB/AFI’s Verified Complaint is an affidavit and is competent evidence. Second, in their Answer to the Complaint, BGL/Barsan admit “that Barsan’s bills of lading and invoices carry the BGL logo.” (BGL/Barsan Answer ¶ 9.) Having admitted this fact in their Answer, BGL/Barsan Int’l are not permitted to deny it now. Barsan Int’l bills of lading carry the BGL logo (DNB/AFI

App. 19) and Barsan Int'l invoices carry the BGL logo and state that Barsan Int'l is "[a] division of Barsan Global Lojistik A.S." (DNB/AFI App. 20.) The evidence of record establishes that Barsan Int'l is a division of BGL and uses the BGL logo on its bills of lading.

The burden of proof is on DNB/AFI to negate the existence of BGL and Barsan Int'l as separate entities. The burden is not on BGL and Barsan Int'l to prove that BGL and Barsan Int'l are separate entities. For the purposes of this Initial Decision, I find that the evidence in the record proves by a preponderance of the evidence that BGL and Barsan Int'l have common or overlapping ownership, officers, or directors. *Compare Rose Int'l*, 29 S.R.R. at 169.

Rose Int'l (2) Failure to maintain corporate minutes or adequate corporate records and failure to follow corporate formalities.

DNB/AFI do not propose a finding of fact on the issue of whether BGL and Barsan Int'l failed to maintain corporate minutes or adequate corporate records and failed to follow corporate formalities. In their proposed findings of fact, BGL/Barsan state: "At all times BGL and Barsan Int'l have complied with their respective corporate obligations." (BGL/Barsan Prop. FF 5 (citations to record omitted).) DNB/AFI respond: "Deny. The only evidence cited for this allegation is Ugur Aksu Declaration, which does not have any evidentiary support." (DNB/AFI Resp. to BGL/Barsan Prop. FF 5.) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof is on DNB/AFI to negate the existence of BGL and Barsan Int'l as separate entities. The burden is not on BGL and Barsan Int'l to prove that BGL and Barsan Int'l are separate entities. DNB/AFI have not identified any evidence that would support a finding that BGL or Barsan Int'l failed to maintain corporate minutes or adequate corporate records or failed to follow corporate formalities. *Compare Rose Int'l*, 29 S.R.R. at 169-170.

Rose Int'l (3) Commingling of funds and other assets.

DNB/AFI do not propose a finding of fact on the issue of commingling of funds and other assets of BGL and Barsan Int'l. In their proposed findings of fact, BGL/Barsan state: "Barsan Int'l or BGL have not improperly commingled funds or other assets . . ." (BGL/Barsan Prop. FF 5 (citations to record omitted).) DNB/AFI respond: "Deny. The only evidence cited for this allegation is Ugur Aksu Declaration, which does not have any evidentiary support." (DNB/AFI Resp. to BGL/Barsan Prop. FF 5.) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof is on DNB/AFI to negate the existence of BGL and Barsan Int'l as separate entities. The burden is not on BGL and Barsan Int'l to prove that BGL and Barsan Int'l are separate entities. DNB/AFI have not identified any evidence that would support a finding that BGL and Barsan Int'l have commingled funds and other assets. *Compare Rose Int'l*, 29 S.R.R. at 170.

Rose Int'l (4) Inadequate capitalization.

DNB/AFI do not propose a finding of fact on the issue of inadequate capitalization of BGL and/or Barsan Int'l. In their proposed findings of fact, BGL/Barsan state: "Neither Barsan Int'l nor BGL are inadequately capitalized . . ." (BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI respond: "Deny. Ugur Aksu's affidavit lacks credibility and/or evidentiary support." (DNB/AFI Resp. to BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof is on DNB/AFI to negate the existence of BGL and Barsan Int'l as separate entities. The burden is not on BGL and Barsan Int'l to prove that BGL and Barsan Int'l are separate entities. DNB/AFI have not identified any evidence that would support a finding that BGL and Barsan Int'l are inadequately capitalized. *Compare Rose Int'l*, 29 S.R.R. at 170.

Rose Int'l (5) Diversion of the corporation's funds or assets to non-corporate uses.

DNB/AFI do not propose a finding of fact on the issue whether BGL and Barsan Int'l diverted corporation funds or assets to non-corporate uses. In their proposed findings of fact, BGL/Barsan state: "Neither Barsan Int'l nor BGL . . . have . . . diverted corporate funds or assets to non-corporate uses. . ." (BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI respond: "Deny. Ugur Aksu's affidavit lacks credibility and/or evidentiary support." (DNB/AFI Resp. to BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof is on DNB/AFI to negate the existence of BGL and Barsan Int'l as separate entities. The burden is not on BGL and Barsan Int'l to prove that BGL and Barsan Int'l are separate entities. DNB/AFI have not identified any evidence that would support a finding that BGL and Barsan Int'l diverted corporate funds or assets to non-corporate uses. *Compare Rose Int'l*, 29 S.R.R. at 170.

Rose Int'l (6) Use of the same office or business location by the corporation and its shareholders.

As noted above, respondent Barsan Int'l and its affiliate Barsan Global Logistics Corp. are both located at 17-09 Zink Place Unit 5, Fair Lawn, NJ, 07410. DNB/AFI do not identify a United States address for BGL. Because Barsan Int'l and Barsan Global Logistics Corp. are both subsidiaries of BGL, I assume for the purposes of this Initial Decision that BGL also uses this address.

Rose Int'l (8) The amount of business discretion displayed by the allegedly dominated corporation.

DNB/AFI do not propose a finding of fact on the amount of business discretion displayed by the allegedly dominated corporation. In their proposed findings of fact, BGL/Barsan state:

“Neither Barsan Int’l nor BGL . . . failed to exercise business discretion.” (BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI respond: “Deny. Ugur Aksu’s affidavit lacks credibility and/or evidentiary support.” (DNB/AFI Resp. to BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof is on DNB/AFI to negate the existence of BGL and Barsan Int’l as separate entities. The burden is not on BGL and Barsan Int’l to prove that BGL and Barsan Int’l are separate entities. DNB/AFI have not identified any evidence that would support a finding that Barsan Int’l failed to exercise business discretion because it was dominated by BGL. *Compare Rose Int’l*, 29 S.R.R. at 170.

Rose Int’l (9) Whether the corporations are treated as independent profit centers.

DNB/AFI do not propose a finding of fact on the issue of whether BGL and Barsan Int’l are independent profit centers. In their proposed findings of fact, BGL/Barsan state: “Each company [BGL and Barsan Int’l] is – and always has been – an independent profit center.” (BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI respond: “Deny. Ugur Aksu’s affidavit lacks credibility and/or evidentiary support.” (DNB/AFI Resp. to BGL/Barsan Prop. FF 6 (citations to record omitted).) DNB/AFI do not cite to any evidence that would rebut this evidence.

The burden of proof is on DNB/AFI to negate the existence of BGL and Barsan Int’l as separate entities. The burden is not on BGL and Barsan Int’l to prove that BGL and Barsan Int’l are separate entities. DNB/AFI have not identified any evidence that would support a finding that BGL and Barsan Int’l are not treated as independent profit centers. *Compare Rose Int’l*, 29 S.R.R. at 170.

DNB/AFI have not identified any evidence or proposed findings of fact on *Rose Int’l* factors 2, 3, 4, 5, 8, or 9. The evidence in the record on *Rose Int’l* factors 1, 6, and 7 does not establish by a preponderance of the evidence that Barsan Int’l is so organized and controlled, and its affairs are so conducted as to make it a mere sham, agent, or adjunct of BGL, that BGL’s and Barsan Int’l’s separate existence as distinct corporate entities should be ignored, and the two corporations should be regarded as a single corporate unit. DNB/AFI have not identified evidence that would meet the factors of any other Commission proceeding to prove by a preponderance of the evidence that Barsan Int’l is a mere sham, agent, or adjunct of BGL.

3. Section 10(b)(13) does not control the activities of an entity that is not a common carrier, marine terminal operator, or ocean freight forwarder.

To the extent DNB/AFI contend that section 10(b)(13) controls BGL’s activities even though BGL is not a common carrier, marine terminal operator, or ocean freight forwarder, for the reasons stated regarding Impexia in Part IV.B.4 above, the claim is denied.

C. Conclusion Regarding BGL.

DNB/AFI have the burden of establishing Commission jurisdiction over BGL. DNB/AFI have not established by a preponderance of the evidence that BGL is a common carrier, marine terminal operator, or ocean freight forwarder subject to Commission jurisdiction for an alleged violation of section 10(b)(13). DNB/AFI have abandoned their claim that Barsan Int'l is so organized and controlled and its affairs are so conducted as to make it a mere sham, agent, or adjunct of BGL, that BGL's and Barsan Int'l's separate existence as distinct corporate entities should be ignored and the two corporations should be regarded as a single corporate unit, as they alleged in their Complaint. If this claim is not considered to have been abandoned, DNB/AFI have not proved by a preponderance of the evidence that Barsan Int'l is so organized and controlled, and its affairs are so conducted as to make it a mere sham, agent, or adjunct of BGL, so that BGL's and Barsan Int'l's separate existence as distinct corporate entities should be ignored and the two corporations should be regarded as a single corporate unit.

DNB/AFI have not established that the Commission has jurisdiction over BGL for the alleged violations of section 10(b)(13). Therefore, the claims against BGL are dismissed with prejudice.

VI. CONCLUSIONS OF LAW ON DNB/AFI'S CLAIMS AGAINST BARSAN INT'L.

A. Introduction and Additional Background.

1. The Commission has jurisdiction over the claims against Barsan Int'l.

The Commission licenses Barsan Int'l as an NVOCC and as an ocean freight forwarder. DNB/AFI's Complaint alleges that when transporting cargo for DNB/AFI, Barsan Int'l learned proprietary information about DNB/AFI's customers, operations, and products and that this information is protected by section 10(b)(13). DNB/AFI allege that beginning in February 2009, Barsan Int'l knowingly disclosed protected information to Cuneyt Karadagli. DNB/AFI allege that Cuneyt Karadagli and Barsan Int'l formed Impexia as an alter ego¹³ in 2010 for Impexia to use the protected information to take advantage of DNB/AFI's expertise and steal DNB's customers. DNB/AFI argue that they have suffered a total of \$11,676,474 in damages directly resulting from the violation of the Shipping Act.

The Commission licenses Barsan Int'l as an NVOCC and as an ocean freight forwarder. Therefore (in contrast to BGL and Impexia), as a common carrier and ocean freight forwarder within the meaning of the Shipping Act, Barsan Int'l is governed by the requirements of section 10(b)(13). The Complaint alleges that Barsan Int'l knowingly disclosed information in violation of section

¹³ As found above, DNB/AFI have not proved by a preponderance of the evidence that Barsan Int'l formed Impexia as an alter ego.

10(b)(13). Therefore, the Complaint states a claim and the Commission has personal jurisdiction over Barsan Int'l to adjudicate these claims.

DNB/AFI are the “proponent[s] of the rule or order”; therefore, to prevail, they have the burden of proving by a preponderance of the evidence that Barsan Int'l violated section 10(b)(13), and if they prove a violation or violations, the burden of establishing their actual injury caused by the proven violations. 5 U.S.C. § 556(d); *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715; *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267; *Steadman v. SEC*, 450 U.S. at 102; *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. at 13. DNB/AFI may prove their claims with direct and/or circumstantial evidence, but findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. at 1180.

2. Relationship between Barsan Int'l and DNB/AFI.

On January 15, 2009, DNB and Barsan Int'l executed a Contract Carrier Agreement, and from January 2009 to March 2011, Barsan Int'l transported cargo pursuant to the agreement. Barsan Int'l transported some cargo by air and some cargo by water. In the course of handling these shipments, it was necessary for Barsan Int'l to obtain commercial invoices, packing lists, and other documents that include information about DNB's customers, products, suppliers, prices, and quantities. This information is protected by section 10(b)(13).

3. Burcin Karadagli and Cuneyt Karadagli.

Burcin Karadagli was employed by Barsan Int'l from 2001 to April 2011, working as an accounting clerk from 2001 to 2004 and as an Accounting Manager/Accounting Operations Supervisor from 2004 to April 2011. Barsan Int'l fired Burcin Karadagli on April 21, 2011, shortly after DNB/AFI told Barsan Int'l of its claim that Barsan Int'l disclosed information to Impexia. (BGL/Barsan Prop. FF 41.)

Burcin Karadagli is the wife of Cuneyt Karadagli. Cuneyt Karadagli incorporated Impexia on March 10, 2010. Before incorporating Impexia, Cuneyt Karadagli was involved in two other companies – House of Water and Source Concept – that used Barsan Int'l to transport cargo by water between the United States and foreign ports.

4. DNB/AFI and Impexia Methods of Operation.

a. DNB/AFI.

DNB/AFI claim that they have “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.” (DNB/AFI Brief at 22.) They contend that because of differences between United States standards for electrical products and standards in the rest of the world, “[s]elling U.S.

standard Electrical products outside of the U.S. is a very difficult, cumbersome and tedious process” (*id.*) that requires an experienced sourcing and engineering staff.

DNB/AFI claim that their typical sales transaction requires the following steps.

- a) Complainants study the Bill of Material for the intended project if there is one or study the project’s 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.

(*Id.* at 23; DNB/AFI App. at 2245-2246.)

b. Impexia.

Impexia, the entity to which DNB/AFI allege Barsan Int’l disclosed proprietary information in violation of section 10(b)(13), claims that it operates using a much less complex process. Impexia states that its involvement with customers begins at the equivalent of DNB/AFI step (g) – when “the buying phase of the process begins.” (Impexia Brief at 23.) Impexia states that a customer will contact Impexia and identify the specific product the customer needs. The customer’s product list may or may not include information on the manufacturer of the product. Impexia will then contact vendors and obtain price quotes, typically forwarding the request it received from its customer to

the manufacturer or distributor. Impexia will add additional fees for packing, shipping, and Impexia's mark-up. Impexia then submits the final quote to the customer for acceptance or rejection. (*Id.* at 24-26; Impexia App. at 12-13.) Cuneyt Karadagli does not claim to have the product knowledge or technical expertise claimed by DNB/AFI. DNB/AFI contend that Cuneyt Karadagli does not have the knowledge or experience to conduct this business without use of DNB/AFI's protected information, and without using that protected information unlawfully provided by Barsan Int'l, could not have operated Impexia successfully.

B. DNB/AFI Have Not Proved by a Preponderance of the Evidence That Barsan Int'l Knowingly Disclosed DNB/AFI Information in Violation of Section 10(b)(13).

To prove that Barsan Int'l, a corporation, violated section 10(b)(13), DNB/AFI must prove by a preponderance of the evidence that Barsan Int'l knowingly disclosed protected information.

The only way to communicate actual [knowledge] to a corporation is through its agents. Thus, a corporation is held responsible for the knowledge acquired by its agents while acting within the scope of their employment. Whether the corporate officer or agent was possessed of actual knowledge of facts is ordinarily [a question] of fact for the jury. Whether the knowledge of, or notice to, an officer of a corporation is to be imputed to the corporation is a question of law for the court. 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 834, at 138 (rev. perm. ed. 1975).

American Standard Credit, Inc. v. National Cement Co., 643 F.2d 248, 270 (5th Cir. 1981).

"[T]he general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation." 3 W. Fletcher, *supra*, § 790, at 12. . . .

"[K]nowledge acquired or possessed by an officer or agent of a corporation otherwise than in the course of his employment, or in relation to a matter which is not within the scope of his authority, is not notice to the corporation. *Id.* § 793, at 20. But "[a]n agent may also be put in such a position of general authority, in such a managerial or directing situation – as in the case of the chief officer of a corporation or of an individual – that notice to him will be notice to his principal because it must be deemed within his authority to receive it, even though he never personally acts in respect of the matters to which the notice relates." *Id.* at 21.

American Standard v. National Cement, 643 F.2d at 270 n.16.

Examining the specific evidence presented by DNB/AFI and considering the evidence as a whole, DNB/AFI have not established that Barsan Int'l knowingly disclosed information in violation of section 10(b)(13).

1. DNB/AFI's Complaint.

In their Complaint, DNB/AFI allege:

24. AFI and DNB first became aware of Barsan Int'l's and Impexia's scheme around December 2010 when AFI and DNB bid a project with their customer Ceytun Construction Co., ("Ceytun"), Kandahar, Afghanistan, by quoting \$250,000, and Ceytun informed AFI and DNB that Impexia quoted \$200,000 for this project and also enclosed a copy of Impexia's invoice. Ceytun was a long time customer of AFI and DNB. See See [sic] Exhibit 3., Impexia's Prior Web-sites and Impexia Invoice. The Impexia invoice demonstrates that Impexia was sharing the same business address with Barsan Int'l, and also carries the alleged owner's, Mr, Karadagli, signature. AFI and DNB raised the issue of illegality of BGL, Barsan Int'l and Impexia's practice to Ceytun. As a result of Respondents' actions, DNB and AFI have lost this business.
25. Upon information and belief, Barsan Int'l knowingly disclosed and Impexia received information concerning the nature, kind, quantity, destination, shipper, consignee, and routing of the property tendered relating to Ceytun, Complainants' customer without the consent of DNB and/or AFI and used that information to the detriment and disadvantage to DNB and/or AFI, and inappropriately disclosed that information to Impeixa [sic] as a competitor of DNB and AFI.

(Complaint ¶ 25.) DNB/AFI propose the following finding of fact:

Complainants first became aware of Barsan Respondents and Impexia's scheme around December 2010 when Complainants bid a project with their customer Ceytun . . . , Kandahar, Afghanistan. Complainants quoted \$250,000 for the project and Ceytun informed AFI and DNB that Impexia quoted \$200,000 for this project and also enclosed a copy of Impexia's invoice. (Complaint. (AFI/DNB App. 7).

(DNB/AFI Prop. FF 43.) Although they characterize these events in December 2010 as their first awareness of "Barsan Int'l's and Impexia's scheme," their only mention of Ceytun in their opening brief is in their damages section as the third example of an Impexia sale that DNB/AFI allege Impexia underbid DNB/AFI on a sale.

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.

(DNB/AFI Brief at 49-50.)¹⁴ An unidentified person, presumably a DNB/AFI official, annotated the Impexia invoice by hand indicating that Impexia sold the Square D load center for \$575.00 and the grounding bars for \$11.00 on April 1, 2011, and that in "September 2010" DNB/AFI sold the load center to Ceytun for \$651.38 and the grounding bar for \$11.25. (DNB/AFI App. at 2107.) A DNB invoice to Ceytun indicates DNB/AFI's load center sale to Ceytun took place September 22, 2010. (DNB/AFI App. at 2108.)

At the time DNB/AFI drafted their Complaint, DNB/AFI identified Impexia's sale to Ceytun as the seminal event that resulted in this proceeding; therefore, it is surprising that it is not addressed in DNB/AFI's opening brief. As set forth above, arguments not raised in the opening brief may be treated as abandoned. *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d at 1326.

In its reply to Impexia's brief, DNB/AFI set forth an extensive argument claimed to demonstrate how Impexia's sale of load centers to Ceytun proves that Barsan Int'l gave information about DNB/AFI's sale to Ceytun. (DNB/AFI Reply to Impexia Brief at 5-10.) These events occurred in and around December 2010 and appear to be the events to which the Complaint refers. Since DNB/AFI made the argument in a reply brief, neither Barsan Int'l nor Impexia had an opportunity to reply to it. Although the argument could be considered abandoned, it will be addressed.

The core of DNB/AFI's argument seems to be based on the following time line:

- AFI received an inquiry for Square D panel boards (identified as load centers in the invoices) from Ceytun on November 9, 2010 with generic item descriptions and brand names;
- AFI worked on the inquiry to choose the specific panel enclosures, interiors, circuit breakers, required accessories, and then forwarded the inquiry to our supplier, Most Electric, from Mississippi, for a Square D brand for a quote;
- AFI received and then forwarded its quote to Ceytun Construction on November 24, 2010;

¹⁴ In their brief, DNB/AFI confusingly put the sentences about the grounding bar sold to Ceytun in the next paragraph concerning another sale to 77 Construction. An examination of the invoices makes it clear that Impexia sold the grounding bars to Ceytun, not 77 Construction.

- Ceytun acknowledged and responded with a request for freight charges to Afghanistan;
- DNB/AFI discussed shipment of the load centers with Barsan Int'l in November 2010;
- Barsan Int'l had transported load centers for DNB/AFI in the past; therefore, information was in the hands of Barsan Int'l;
- Impexia submitted an offer to Ceytun on December 9, 2010.

DNB/AFI argue that the only way Cuneyt Karadagli/Impexia could have gotten sufficient information to make a quote that quickly would be if Barsan Int'l disclosed DNB/AFI's information to Impexia. (DNB/AFI Reply to Impexia Brief at 8-9.)

DNB/AFI omit from their time line the fact that DNB/AFI sold load centers to Ceytun pursuant to an invoice dated September 22, 2010 (DNB/AFI App. at 2108); therefore, Ceytun knew DNB/AFI's price and product information at least by that date. Furthermore, Ceytun knew DNB/AFI's price and had other information about load centers contained in DNB/AFI's November 24, 2010, quote to Ceytun.

Impexia's claim throughout this proceeding is that its customers tell it what products they want and then Impexia tries to find them. (Impexia Brief at 23-26; Impexia App. at 12-13.) In an affidavit supplied by Impexia, a Ceytun board member states that the previous country manager for Ceytun contacted Impexia in December 2010 to assist Ceytun with acquiring products from the United States. When doing business with Impexia, Ceytun tells Impexia what materials it requires and provides product information. Impexia then uses that information to get price quotations. (Impexia App. at 27-28.)¹⁵ DNB/AFI did not offer an affidavit or declaration from a Ceytun employee. DNB/AFI's contention that the "only plausible explanation" of how Cuneyt Karadagli got the information about the Square D load centers is that Barsan Int'l gave it to him in violation of section 10(b)(13) is not supported by the evidence in the record; that is, Ceytun's statement of how it did business with Impexia and evidence of Ceytun's knowledge of the product. I find that it is at least as likely that Ceytun gave Impexia the product information as it is that Barsan Int'l gave Impexia the product information. I note that Ceytun gave DNB/AFI a copy of Impexia's proposal, so it is known that Ceytun will provide information provided by one potential seller of products to another. DNB/AFI have not proved by a preponderance of the evidence that Barsan Int'l gave

¹⁵ In their reply brief, DNB/AFI state: "It is convenient for Impexia to have named Niyazi Berberoglu as the contact at Ceytun who sent Impexia inquiries because Niyazi Berberoglu died several months ago in Afghanistan in a mine explosion." (DNB/AFI Reply to Impexia Brief at 7.) DNB/AFI do not explain why Niyazi Berberoglu's death is convenient for Impexia or what implication they think should be drawn from their statement. The fact remains that Impexia dealt with Niyazi Berberoglu at Ceytun in December 2010. (See DNB/AFI App. at 2564 (December 9, 2010 email from Berberoglu to Cuneyt Karadagli about Square D panels).)

Impexia the information about Square D load centers that Impexia used to prepare its December 9, 2010, quote for Ceytun.

2. Arguments in DNB/AFI's brief.

a. Direct evidence that DNB/AFI contend proves Barsan Int'l disclosed information to Impexia in violation of section 10(b)(13).

DNB/AFI argue that several emails that Burcin Karadagli, Barsan Int'l's accounting manager, sent to her husband Cuneyt Karadagli between February 2009 and June 2009,¹⁶ establish that Barsan Int'l knowingly disclosed DNB/AFI information in violation of section 10(b)(13). Some of these emails included email strings that originated as correspondence between Barsan Int'l officials and DNB or AFI and concerned shipments that Barsan Int'l was transporting for DNB/AFI. They contend that another disclosure by email occurred February 22, 2011.

(1) Burcin Karadagli provided information of the kind protected by section 10(b)(13) to Cuneyt Karadagli.

(a) February 2, 2009, email (AFI/DNB App. at 378-380).

AFI/DNB contend that their Appendix includes "an e-mail, demonstrating that on February 2, 2009, 3:55PM, Barsan sent DNB's website and AFI/DNB proforma invoice to Cuneyt Karadagli." (AFI/DNB Prop. FF 29.) This email originated with Burcin Karadagli – this email does not forward to Cuneyt Karadagli an email string between Barsan Int'l and DNB/AFI. The pro forma invoice to which DNB/AFI refer is dated May 27, 2009, and refers to a product being shipped by air to Agility Logistics, a customer in Turkey. (AFI/DNB App. at 380.) BGL/Barsan contend that this is

an air shipment to . . . a freight forwarder. . . . Because this is an air shipment and not an ocean shipment, Barsan Int'l was not acting as an ocean common carrier or ocean freight forwarder in regard to this shipment. The allegations, therefore, do not fall within the scope of the . . . Commission and do not constitute Shipping Act violations.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 29.)¹⁷

¹⁶ Most of the emails were sent before Cuneyt Karadagli incorporated Impexia.

¹⁷ Impexia responded to DNB/AFI's proposed findings of fact on each of the emails with the statement "Impexia objects to the Complainants' characterization of the email to which it refers in paragraph [X], and refers to said email for the contents thereof." (Impexia Resp. DNB/AFI Prop. FF 29-39.)

The parties seem to assume that the invoice was attached to email. No party explains how or why an invoice dated May 27, 2009, would have been attached to an email sent February 2, 2009. Since no party suggests otherwise, for the purposes of this decision, I assume that the invoice was attached to the email.

No Barsan Int'l employees are copied on the February 2, 2009, email to Cuneyt Karadagli. The only information in the email provides the web site address for DNB and states "the web site of our new customer." The web site address is not "information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier"; therefore, it is not protected by section 10(b)(13). The invoice contains information on the consignee, a cargo description, and the number of items – "information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier." Therefore, it is the kind of information protected by section 10(b)(13). The cargo was transported by air, not water.

DNB/AFI's opening brief and reply briefs do not contend that Agility Logistics became a customer of Impexia nor do they explain what specific use, if any, they contend that Impexia made of the information about the product identified in the invoice.

(b) February 27, 2009, email (AFI/DNB App. at 381-386).

DNB/AFI contend that their Appendix includes "an e-mail, demonstrating that on February 27, 2009, 2:18 PM, Barsan sent AFI/DNB shipping information, commercial invoice to 77 Insaat¹⁸ to Cuneyt Karadagli." (AFI/DNB Prop. FF 30.) Burcin Karadagli forwarded an email thread that began January 28, 2009, with an email from DNB to Barsan Int'l asking for a rate to ship three oil drum pump kits to Baghdad, Iraq. BGL/Barsan argue that the proposed finding

references air shipments that were flown from the United States by air to Baghdad. Because this is an air shipment and not an ocean shipment, Barsan Int'l was not acting as an ocean common carrier or an ocean freight forwarder in regard to this shipment. The allegations, therefore, do not fall within the scope of the . . . Commission and do not constitute Shipping Act violations.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 30.)

No Barsan Int'l employees are copied on the email to Cuneyt Karadagli. Barsan Int'l quoted a rate for a shipment by air that DNB appears to have used for the shipment. The emails provide the weight and dimensions of the shipments, but provide no information about the manufacturer. (AFI/DNB App. at 381-385.) The invoice identifies the consignee, destination, description, price,

¹⁸ According to DNB/AFI, 77 Insaat and 77 Construction, mentioned later, are the same company. (DNB/AFI Prop. FF 54.)

and other “information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier.” (AFI/DNB App. at 386.) Therefore, the information in the email and the invoice is the kind of information protected by section 10(b)(13). The cargo was transported by air, not water.

DNB/AFI identify 77 Insaat/77 Construction as one of the customers allegedly “taken” from DNB/AFI by Impexia. (DNB/AFI Brief at 21.) As discussed in greater detail later, the former business development manager for 77 Construction states that he had known Cuneyt Karadagli since 2001 and that he requested quotes from Impexia for various products for 77 Construction projects. (Impexia App. at 15.) DNB/AFI’s opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the oil drum pump kits in the invoice.

(c) April 29, 2009, email (AFI/DNB App. at 387-405).

AFI/DNB contend that their Appendix includes “an e-mail, demonstrating that on April 29, 2009, 5:27 PM, Barsan disclosed AFI/DNB’s Ocean Shipment information with products, supplier information (Supplier Grainger) to Cuneyt Karadagli.” (AFI/DNB Prop. FF 31.) On April 29, 2009, a Barsan Int’l official sent an email to several DNB/AFI employees with information about cargo that had arrived at the warehouse that day and attached documents describing the cargo. The email states: “Further, I also suppose that you will instruct an Istanbul Airfreight delivery for this week only, is there any ADANA Airfreight delivery?” (AFI/DNB App. at 387.) Burcin Karadagli forwarded the email to Cuneyt Karadagli that day with a message stating, “The Company AFI which I had mentioned is known as AFI Elektrik.” (AFI/DNB App. at 387.) BGL/Barsan argue:

Although a payment to an ocean carrier is included in the mass of documents referenced, it does not appear that the goods moved by ocean. If one looks at DNB/AFI Appendix 407, which involves an air shipment, there is a reference to “on hand” numbers for certain shipments. The on hand numbers referenced there are the same on hand numbers that appear in the Appendix on pages 398, 399, 400, 401, 404 and 405. Those shipments therefore moved by air. Barsan Int’l therefore was not acting as an ocean common carrier or an ocean freight forwarder in regard to these shipments. Accordingly, the allegations do not fall within the scope of the Federal Maritime Commission and do not constitute Shipping Act violations.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 31.)

No Barsan Int’l employees are copied on the email to Cuneyt Karadagli. The emails themselves do not contain protected information. Five pairs of Barsan Int’l Receiving Reports (consigned to AFI) and invoices were attached to the email. The five Receiving Reports identify the eventual consignee of the property. Four of the five invoices provide information about the property, identifying the consignee and/or purchaser as complainant AFI or its affiliate GMG, destination, description, price, and other “information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier.”

(AFI/DNB App. at 386.) Therefore, it is the kind of information protected by section 10(b)(13). The cargo was transported by air, not water. The fifth invoice (from Franklin Electric Co.) is illegible and provides no information. (AFI/DNB App. at 395-405.)

DNB/AFI do not allege that either AFI or GMG was “taken” by Impexia as customers. DNB/AFI’s opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the products identified in the invoice.

A copy of a check to CMA-CGM for maritime container DVRU1325493 was apparently included with the attachments to the email. The significance of this check is not clear, since the property described in the invoices was shipped by air. The check does not contain protected information.

(d) May 1, 2009, email (AFI/DNB App. at 406-417).

AFI/DNB contend that their Appendix includes “an e-mail, demonstrating that on May 1, 2009, 10:07 AM, Barsan forwarded AFI/DNB commercial invoice and shipper’s letter of instructions to Cuneyt Karadagli.” (AFI/DNB Prop. FF 32.) On April 30, 2009, an AFI employee sent an email to a Barsan Int’l official about property that “must be at Barsan by today” for loading on a plane the next day. The email thread culminated in an email from an AFI employee to a Barsan Int’l official with an invoice and shippers’s letter of instruction attached. Burcin Karadagli sent the email thread to Cuneyt Karadagli on May 1, 2009. BGL/Barsan argue:

Proposed Finding of Fact No. 32 references an air shipment. Because this is an air shipment and not an ocean shipment, Barsan Int’l was not acting as an ocean common carrier or an ocean freight forwarder in regard to this shipment. The allegations, therefore, do not fall within the scope of the Federal Maritime Commission and do not constitute Shipping Act violations.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 32.)

No Barsan Int’l employees are copied on the email to Cuneyt Karadagli. The email text and the attachments identify the consignee (AFI affiliate GMG), destination, description, price, and other “information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier.” Therefore, it is the kind of information protected by section 10(b)(13). The cargo was transported by air, not water.

DNB/AFI do not allege that AFI affiliate GMG was “taken” by Impexia as customers. DNB/AFI’s opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the products identified in the invoice.

(e) May 18, 2009, email (AFI/DNB App. at 418-422).

AFI/DNB contend that their Appendix includes “an e-mail, demonstrating that on May 18, 2009, Barsan forwarded AFI/DNB shipping/products information to Cuneyt Karadagli.” (AFI/DNB Prop. FF 33.) On May 18, 2009, Burcin Karadagli forwarded an email thread to Cuneyt Karadagli. DNB/AFI do not cite to an English translation of the email, although the email does state in English “UPS Airfreight Consolidated Service (Door to Airport) - \$1000 (only Service available, consigned only to Military),” (DNB/AFI App. at 419), and no invoice or other shipping document is attached. BGL/Barsan argue:

Proposed Finding of Fact No. 33 consists of 4 pages, none of which have been translated. Even without translation it is apparent, however, that shipment at issue was an air shipment and not an ocean shipment, and that Barsan Int’l was not acting as an ocean common carrier or an ocean freight forwarder in regard to this shipment. The allegations, therefore, do not fall within the scope of the Federal Maritime Commission and do not constitute Shipping Act violations.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 33.)

No Barsan Int’l employees are copied on the email to Cuneyt Karadagli. The documents do not provide evidence of “information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier.” Therefore, it is not the kind of information protected by section 10(b)(13).

(f) May 22, 2009, email (AFI/DNB App. at 423-442).

AFI/DNB contend that their Appendix includes “an e-mail, demonstrating that on May 22, 2009, 10:21 AM, Barsan forwarded AFI/DNB shipping information, communication, commercial invoice, shipper’s letter of instruction to Cuneyt Karadagli (AIR Yuklemesi).” (AFI/DNB Prop. FF 34.) The emails do not set forth protected information. The shipper’s letter of instruction identifies the consignee and the invoices identify products, product information, and pricing of cargo for an air freight shipment. BGL/Barsan argue:

Proposed Finding of Fact No. 34 references 14 pages of documents that are in Turkish and have not been translated.¹⁹ From the caption of the first page, however, it is apparent that this is an air shipment and not an ocean shipment and that Barsan Int’l was not acting as an ocean common carrier or an ocean freight forwarder in regard to this shipment. The allegations, therefore, do not fall within the scope of the Federal Maritime Commission and do not constitute Shipping Act violations.

¹⁹ BGL/Barsan state that there is no translation into English for this set of documents and for the documents included with the June 1, 2009, and June 3, 2009, emails. BGL/Barsan’s statement is incorrect.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 34.)

No Barsan Int'l employees are copied on the email to Cuneyt Karadagli. The email text and the attachments identify the consignee (AFI affiliate GMG), destination, description, price, and other "information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier." Therefore, it is the kind of information protected by section 10(b)(13). The cargo was transported by air, not water.

DNB/AFI do not allege that GMG was "taken" by Impexia as a customer. DNB/AFI's opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the products identified in the invoice.

(g) June 1, 2009, email (AFI/DNB App. at 443-451).

AFI/DNB contend that their Appendix includes "an e-mail, demonstrating that on June 1, 2009, 9:36 AM, Barsan forwarded AFI/DNB commercial invoice (Including Item Number, Description, Unit Price, etc.) and shipper's letter of instructions to Cuneyt Karadagli." (AFI/DNB Prop. FF 35.) On June 1, 2009, an AFI employee sent three emails to a Barsan Int'l official with information about an air freight shipment. An invoice and a shipper's letter of instruction were attached to the email. On June 1, 2009, Burcin Karadagli forwarded the email and attachments to Cuneyt Karadagli. BGL/Barsan argue:

Proposed Finding of Fact No. 35 references 7 pages that are in Turkish and have not been translated. From the caption of the first page, however, it is apparent that this is an air shipment and not an ocean shipment and that Barsan was not acting as ocean common carrier or an ocean freight forwarder in regard to this shipment. The allegations, therefore, do not fall within the scope of the Federal Maritime Commission and do not constitute Shipping Act violations.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 35.)

No Barsan Int'l employees are copied on the email to Cuneyt Karadagli. The email text and the attachments identify the consignee (complainant AFI), destination, description, price, and other "information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier." Therefore, it is the kind of information protected by section 10(b)(13). The cargo was transported by air, not water.

DNB/AFI do not allege that AFI was "taken" by Impexia as a customer. DNB/AFI's opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the products identified in the invoice.

(h) June 3, 2009, email (AFI/DNB App. at 452-457).

AFI/DNB contend that their Appendix includes “an e-mail, demonstrating that on June 3, 2009, 8:36AM, Barsan sent AFI/DNB shipping documents, commercial invoices, to Cuneyt Karadagli.” (AFI/DNB Prop. FF 36.) On June 2, 2009, a Barsan Int’l official sent an email and attachments to AFI employees about an air freight shipment. On June 3, 2009, Burcin Karadagli forwarded the email and attachments to Cuneyt Karadagli. BGL/Barsan argue:

Proposed Finding of Fact No. 36 references 5 pages which are in Turkish and have not been translated. The pages cited contain an airway bill, however, reflecting that this is an air shipment and not an ocean shipment and that Barsan Int’l was not acting as an ocean common carrier or an ocean freight forwarder in regard to this shipment. The allegations, therefore, do not fall within the scope of the Federal Maritime Commission and do not constitute Shipping Act violations.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 35.)

No Barsan Int’l employees are copied on the email to Cuneyt Karadagli. The email text and the attachments identify the consignee as complainant AFI, destination, description, price, and other “information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier.” Therefore, it is the kind of information protected by section 10(b)(13). The cargo was transported by air, not water.

DNB/AFI do not allege that AFI was “taken” by Impexia as a customer. DNB/AFI’s opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the products identified in the invoice.

(i) June 26, 2009, email (AFI/DNB App. at 458-481).

AFI/DNB contend that their Appendix includes “an e-mail, demonstrating that on June 26, 2009, 8:09 AM, Barsan forwarded Cuneyt Karadagli, DNB/AFI Bill of Lading and commercial invoice and other Barsan Customers’ shipping information.” (AFI/DNB Prop. FF 37.) On June 26, 2009, Burcin Karadagli sent an email and attachments to Cuneyt Karadagli. Other than a reference to EO.180.09, no information is provided in the email. (DNB/AFI App. at 458.) Pages 459 through 478 do not involve DNB/AFI shipments. Pages 479-481 are what is apparently a Barsan Int’l bill of lading for a DNB shipment and a DNB invoice identifying products and pricing for cargo. BGL/Barsan argue:

Proposed Finding of Fact No. 37 references 23 pages. Most of the information contained therein is unrelated to DNB/AFI and therefore of no relevance to this action. Although DNB/AFI fail to distinguish them, the 23 pages of documents include reference to one master bill of lading issued by Turkon. There were 8 separate house bills of lading issued by Barsan Int’l for the goods in the Turkon shipment. There were also two other Barsan Int’l house bills of lading for different

shipments on the same voyage. One of these house bills of lading was unrelated to DNB/AFI but the other house bill of lading does relate to DNB/AFI. AFI/DNB App. 479-481 are the DNB/AFI related documents. The bill of lading, (App. 479), went to DNB's affiliate, GMG Dis Ticaret Ltd Sti. App. 479. AFI/DNB App. 480-81 is a DNB invoice. That invoice does not contain any customer or project information.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 37.)

No Barsan Int'l employees are copied on the email to Cuneyt Karadagli. As Barsan Int'l claims, most of the documents pertain to shipments by shippers other than DNB/AFI. The DNB/AFI shipment identifies the consignee (AFI affiliate GMG), destination, description, price, and other "information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier." Therefore, it is the kind of information protected by section 10(b)(13).

DNB/AFI do not allege that GMG was "taken" by Impexia as a customer. DNB/AFI's opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the products identified in the invoice.

(j) February 22, 2011, email (AFI/DNB App. at 482-488).

AFI/DNB contend that their Appendix includes "an e-mail demonstrating that on February 22, 2011, Barsan forwarded AFI/DNB proprietary business information to Cuneyt Karadagli. The aforementioned forwarded e-mail was from Isik Onur to Burcin Karadagli Dated January 14, 2011, sending DNB/AFI's bill of lading and a commercial invoice with proprietary information." (AFI/DNB Prop. FF 38.) On February 22, 2011, Burcin Karadagli sent an email and attachments to Cuneyt Karadagli. The attachments include a Barsan Int'l bill of lading for a DNB shipment and a DNB invoice identifying products and pricing for cargo. BGL/Barsan argue:

Barsan Int'l and BGL deny Proposed Finding of Fact No. 38. The email in question does reflect that after Burcin Karadagli received the Barsan Int'l bill of lading and the DNB invoice she forwarded it to her husband. The DNB invoice does not contain any customer or project information.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 38.)

No Barsan Int'l employees are copied on the email to Cuneyt Karadagli. The attachments identify the consignee (AFI affiliate GMG), destination, description, price, and other "information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier." Therefore, it is the kind of information protected by section 10(b)(13).

DNB/AFI do not allege that GMG was “taken” by Impexia as a customer. DNB/AFI’s opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the products identified in the invoice.

(k) March 24, 2010, email (AFI/DNB App. at 672-684).

AFI/DNB contend that their Appendix includes “an e-mail demonstrating that Barsan forwarded other customer’s information to Cuneyt Karadagli on March 24, 2010.” (AFI/DNB Prop. FF 39.) BGL/Barsan argue: “The shipment at issue does not involve DNB/AFI or disclosure of information in regard to DNB/AFI. Accordingly, the Proposed Finding of Fact has no relevance to this action.” (BGL/Barsan Resp. to DNB/AFI Prop. FF 39.)

No Barsan Int’l employees are copied on the email to Cuneyt Karadagli. The email string that she forwarded to Cuneyt Karadagli begins March 9, 2010, with an email from a Barsan Int’l official to a representative of a Barsan Int’l customer requesting contact information followed less than one hour later of a second email requesting contact information. Invoices for that customer were attached to a later email. The email to Cuneyt Karadagli indicates that there were three attachments, but the attachments are not in the record. While this email proves that Burcin Karadagli sent at least one email with information about another customer (not DNB/AFI) to Cuneyt Karadagli, it does not prove that Barsan Int’l knowingly sent information to Cuneyt Karadagli. DNB/AFI’s opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information identified in the invoice that caused any actual injury to DNB/AFI.

(2) Is information concerning the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to a common carrier as defined by the Shipping Act for a shipment by air protected by section 10(b)(13) of the Act?

The information about the nature, kind, quantity, destination, consignee, or routing of property for the shipment by water included in the February 22, 2011, email is protected by section 10(b)(13). Although the information provided in the February 2, 2009, February 27, 2009, April 29, 2009, May 1, 2009, May 22, 2009, June 1, 2009, and June 3, 2009, emails is the kind of “information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to a common carrier” protected by section 10(b)(13), in each of those cases, the information concerned a shipment by air, not water. BGL/Barsan argue:

[T]he disclosure [of protected information] must have occurred in regard to property tendered or delivered to a common carrier who transports goods by water. Air shipments would not be tendered to common carriers as defined by the Shipping Act. Thus, the purported transmission of proprietary information derived from an air shipment does not fall within the scope of the Shipping Act or the within the Commission’s jurisdiction.

(BGL/Barsan Brief at 23.) DNB/AFI argue that the information about the air shipments and the ocean shipments must be considered together.

[T]he ocean information was vital to provide product, supplier and pricing information, but the air documentation would provide customer and project information. Therefore, the ocean transportation information was vital to achieve the composite marketing picture. With only the air transport information, without the ocean information, the full picture was not possible.

(DNB/AFI Reply to BGL/Barsan at 14.)

Information about property tendered or delivered for transportation by an air common carrier is not information concerning property tendered or delivered to a common carrier operating as a common carrier as defined by the Shipping Act. While the common carrier assumes responsibility for the transportation of the property, the carrier is not using for all or part of that transportation a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(6). No party states whether there is a statute equivalent to section 10(b)(13) that prohibits an air common carrier from disclosing information concerning the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to the air common carrier. If there is no such statute, the question becomes whether section 10(b)(13) prohibits a common carrier meeting the definition of the Shipping Act that also handles shipments by air from disclosing the information about property received for transportation by air. If there is such a statute, the question becomes whether the Commission has jurisdiction to enforce that statute and/or whether a violation of that statute also violates section 10(b)(13).

Given the ultimate resolution of this proceeding, I do not find it necessary to answer these questions. For the purposes of this decision, I assume that information about the nature, kind, quantity, destination, consignee, or routing of property that Barsan Int'l acquired while handling DNB/AFI's shipments by air is sufficiently related to DNB/AFI's shipments by water to be protected by section 10(b)(13). Therefore, I find that the information disclosed by Burcin Karadagli in the February 2, 2009, February 27, 2009, April 29, 2009, May 1, 2009, May 22, 2009, June 1, 2009, and June 3, 2009, emails is protected by section 10(b)(13).

- (3) DNB/AFI have not proved by a preponderance of the evidence that Barsan Int'l knowingly disclosed the information in the February 2, 2009, February 27, 2009, April 29, 2009, May 1, 2009, May 22, 2009, June 1, 2009, June 3, 2009, and February 22, 2011, emails.**

Burcin Karadagli knowingly disclosed information when she sent emails with protected information to her husband Cuneyt Karadagli. The fact that Burcin Karadagli knowingly disclosed the information does not necessarily mean that Barsan Int'l knowingly disclosed the information. To prove that Barsan Int'l violated section 10(b)(13), DNB/AFI must prove by a preponderance of the evidence that *Barsan Int'l*, not Burcin Karadagli, knowingly disclosed the information.

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

- (4) **If Barsan Int'l is found to have constructive knowledge that Burcin Karadagli sent the emails in violation of section 10(b)(13), DNB/AFI have not shown actual injury resulting from the violations.**

Even if it is assumed that Burcin Karadagli's sending of the emails to Cuneyt Karadagli may be attributable to Barsan Int'l and that Barsan Int'l violated section 10(b)(13) of the Act, there is no presumption of actual injury resulting from a violation of the Act. A complainant must prove damage proximately caused by the violation. *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, *supra*.

The only DNB/AFI customer allegedly "taken" by Impexia identified in the emails from Burcin Karadagli to Cuneyt Karadagli is 77 Insaat/77 Construction. As noted above and discussed more fully below, the former business development manager for 77 Construction states that he had known Cuneyt Karadagli since 2001 and that he requested quotes from Impexia for various products for 77 Construction projects, not that Impexia approached 77 Construction with knowledge of the products 77 Construction needed. (Impexia App. at 15.) Therefore, DNB/AFI has not proved by a preponderance of the evidence that Cuneyt Karadagli's receipt of this information (the alleged violation of the act) resulted in Impexia "taking" this customer from DNB/AFI.

DNB/AFI's opening brief and reply briefs do not explain what specific use, if any, they contend that Impexia made of the information about the product and supplier information contained in the emails that Burcin Karadagli sent to Cuneyt Karadagli or how the claimed violation caused injury to DNB/AFI.

Even if it is assumed that Barsan Int'l knowingly disclosed the information in the emails sent by Burcin Karadagli and that information about air shipments is protected by section 10(b)(13), DNB/AFI have not identified any actual injury that resulted from Impexia's receipt of the information in the emails.

b. Circumstantial evidence that DNB/AFI contend proves Barsan Int'l disclosed information to Impexia in violation of section 10(b)(13).

DNB/AFI also contend that they have presented circumstantial evidence that supports a conclusion that Barsan Int'l knowingly disclosed additional protected information to Cuneyt Karadagli/Impexia. They contend that the disclosures continued until April 2011 when Barsan Int'l learned that DNB/AFI had filed their Complaint with the Commission. DNB/AFI recognize that other than the emails from Burcin Karadagli to Cuneyt Karadagli:

[T]here 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.

(DNB/AFI Brief at 17.) DNB/AFI argue:

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.

(DNB/AFI Brief at 18.)

DNB/AFI rely on four main categories of what they contend is circumstantial evidence proving that Barsan Int'l knowingly disclosed protected information to Cuneyt Karadagli/Impexia: (1) DNB/AFI contend that the fact that "a listing of Impexia's leading customers is a mirror image of Complainants' customers" could have only resulted if Barsan Int'l gave Impexia information protected by section 10(b)(13); (2) DNB/AFI's contend that their investment in money and time establishing their business in contrast to Cuneyt Karadagli/Impexia's immediate success with essentially a one-person operation could have only resulted if Barsan Int'l gave Impexia information protected by section 10(b)(13); (3) Impexia's use of products from Harger Lightning & Grounding could only have resulted from use of information supplied by Barsan Int'l; and (4) Cuneyt Karadagli does not have the knowledge or experience to operate Impexia without help from Barsan Int'l. (DNB/AFI Brief at 21-26.)

1. DNB/AFI contend that the fact that “a listing of Impexia’s leading customers is a mirror image of Complainants’ customers” could have only resulted if Barsan Int’l gave Impexia information protected by section 10(b)(13) and identifies eight of its customers in it brief.

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 . . . 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.

(DNB/AFI Brief at 21.) DNB/AFI included documents regarding a ninth customer – Ceytun, alleged in their Complaint ¶¶ 24-25 to be the first company of whose business with Impexia DNB/AFI became aware – in its appendix.

It first must be noted that DNB/AFI do not “own” their customers. DNB/AFI do not cite to evidence proving they have agreements with their customers that preclude the customers from purchasing products from other suppliers once DNB/AFI have gone through their process of identifying products for the customers. Their customers are free to purchase products they need from whomever they see fit.

In its appendix, Impexia included affidavits from current or former employees of most of the customers DNB/AFI alleges were “taken” by Impexia explaining the beginning of the business relationship between Impexia and the customer. DNB/AFI have had an opportunity to respond to Impexia’s submissions.

Metag – In a declaration supplied by Impexia, a civil engineer for Metag says that he learned about Impexia from chain of emails forwarded to him by Metag’s regional general manager. He then reached out to Impexia to assist Metag with the acquisition of products from the United States. (Impexia App. at 29.) In a statement submitted by DNB/AFI, this engineer confirms the accuracy of the statement submitted by Impexia. (DNB/AFI Supp. App. at 2336.) In an affidavit supplied by DNB/AFI, another Metag employee, the purchasing manager, says he came across Impexia through “site people.” He states: “I have always been reluctant to work with [Impexia] since I do

not know their financial capabilities and have no reassurance that, unlike, AFI, they will be in business in the future. Furthermore, I am not sure of their capabilities in terms of banking tools, which might be necessary in our projects.” He also states: “Metag has worked with Impexia for inquiries originated by the site.” (DNB/AFI Supp. App. at 2328.) The evidence in the record does not support DNB/AFI’s contention that Impexia learned about Metag from information unlawfully disclosed by Barsan Int’l.

77 Insaat (77 Construction) – In a declaration supplied by Impexia, the former business development manager for 77 Construction states that he has known Cuneyt Karadagli since 2001. He requested quotes from Impexia for various products for 77 Construction projects at Camp Bastion beginning in June 2010. He states that the first products supplied by Impexia were a plastic hand washing station, metal doors, overhead doors for hangers, and mechanical goods. 77 Construction would communicate to Impexia the product information required and Impexia would use the product information to provide competitive quotes. (Impexia App. at 15-16.) In a declaration supplied by DNB/AFI, a procurement manager for 77 Construction states that he began receiving solicitations from Impexia in the summer of 2010. The former business development manager who signed the declaration submitted by Impexia recommended Impexia to the procurement manager. The procurement manager states that except for a few small orders, 77 Construction initially did not purchase from Impexia because of Impexia’s financial terms. Because of Cuneyt Karadagli’s lack of technical background, Impexia was often not competent enough to support 77 Construction’s projects, but 77 Construction used Impexia’s services when it needed “to cut down the price of our other vendors since their operation is made of one man cutting down on the cost of engineering and technical services. When I was 100% sure of what is needed, I went to Impexia for a price quote.” (DNB/AFI Supp. App. at 2327.) The evidence in the record does not support DNB/AFI’s contention that Impexia learned about 77 Construction from information unlawfully disclosed by Barsan Int’l.

Feka Ins. – No party supplied a statement by a Feka employee regarding the beginning of the Impexia - Feka relationship and other than alleging that it is one of the companies that Impexia allegedly took from DNB/AFI, Feka is not mentioned in the parties’ briefs. Impexia included a copy of an email to Feka soliciting its business and stating that Impexia “found your name on a website that provides the name of the companies have done jobs for the US DoD.” (Impexia App. at 50.) The evidence in the record does not support DNB/AFI’s contention that Impexia learned about Feka from information unlawfully disclosed by Barsan Int’l.

Epik Ins. – In an affidavit supplied by Impexia, a procurement specialist says Epik’s relationship with Impexia began in January 2011 after it received Impexia’s marketing emails. In all instances, Epik tells Impexia what materials it requires and provides product information. Impexia then uses that information to get price quotations. (Impexia App. at 25-26.) DNB/AFI included a declaration from an Epik employee in its supplemental appendix, but the declaration does not mention its relationship with Impexia. (DNB/AFI Supp. App. at 2334.) The evidence in the record does not support DNB/AFI’s contention that Impexia learned about Epik from information unlawfully disclosed by Barsan Int’l.

Ayken Elk – In an affidavit supplied by Impexia, an Ayken electrical engineer states that Ayken learned about Impexia from Cakmaklar Pano. Ayken tells Impexia what materials it requires and provides product information. Impexia then uses that information to get price quotations. At times, Impexia coordinates conference calls between Ayken and the manufacturer or distributor to ensure that the proper products are being purchased. (Impexia App. at 21-22.) DNB/AFI included a declaration from an Ayken employee in its supplemental appendix, but the declaration does not mention its relationship with Impexia. (DNB/AFI Supp. App. at 2335.) The evidence in the record does not support DNB/AFI’s contention that Impexia learned about Ayken from information unlawfully disclosed by Barsan Int’l.

Yenigun Ins. – In an affidavit supplied by Impexia, the procurement department manager for Yenigun states that Yenigun learned about Impexia through its working relationship with Ayken. Yenigun began using Impexia at that time. Yenigun tells Impexia what materials it requires and provides product information. Impexia then uses that information to get price quotations. (Impexia App. at 23-24.) DNB/AFI did not offer an affidavit or declaration from a Yenigun employee. The evidence in the record does not support DNB/AFI’s contention that Impexia learned about Yenigun from information unlawfully disclosed by Barsan Int’l.

Delta Om Muh – Impexia did not file an affidavit or declaration signed by a representative of Delta Om. In a declaration supplied by DNB/AFI, the owner of Delta Om states that it has worked in Afghanistan since 2003, mostly as a subcontractor for Metag. Delta Om has purchased over one million dollars of electro-mechanical items from DNB/AFI, which provides good support and valuable services in finding appropriate suppliers of products. Toward the end of 2010, Delta Om began receiving solicitations from Impexia stating that Impexia could supply the same products more cheaply. Delta Om gave Impexia some small orders and found it had better prices, but determined that Cuneyt Karadagli does not have a basic understanding of electrical engineering. Delta Om continued to do business with Impexia, but only for simple emergency requirements. (DNB/AFI Supp. App. at 2325-2326.) The evidence in the record does not support DNB/AFI’s contention that Impexia learned about Delta Om from information unlawfully disclosed by Barsan Int’l.

Cakmaklar Pano – In an affidavit supplied by Impexia, the managing partner of Cakmaklar Pano states that its business relationship with Impexia began in February 2011 when a Metag employee told him about Impexia. Cakmaklar Pano tells Impexia what materials it requires and provides product information. Impexia then uses that information to get price quotations. (Impexia App. at 19-20.) DNB/AFI did not offer an affidavit or declaration from a Cakmaklar Pano employee. The evidence in the record does not support DNB/AFI’s contention that Impexia learned about Cakmaklar Pano from information unlawfully disclosed by Barsan Int’l.

Impexia also included an affidavit from Ceytun, the customer identified in DNB/AFI’s Complaint but not listed as one of the “taken” customers in DNB/AFI’s brief quoted above.

Ceytun – In an affidavit supplied by Impexia, a Ceytun board member states that the previous country manager for Ceytun contacted Impexia in December 2010 to assist Ceytun with

acquiring products from the United States. Ceytun tells Impexia what materials it requires and provides product information. Impexia then uses that information to get price quotations. (Impexia App. at 27-28.) DNB/AFI did not offer an affidavit or declaration from a Ceytun employee. The evidence in the record does not support DNB/AFI's contention that Impexia learned about Ceytun from information unlawfully disclosed by Barsan Int'l.

DNB/AFI contend that the statements submitted by Impexia should be disregarded.

Impexia's Proposed Findings of Fact and its Opposition to Complainants' Brief are basically based on Affidavits from Cuneyt Karadagli and various other parties, most of which are Complainants' customers handled by Barsan Respondents. Those affidavits provided by Impexia are cookie cutter statements, and are almost all identical. Cuneyt Karadagli, the president of Impexia, approached those persons and requested that they sign the Affidavits which he stated were drafted by Impexia's counsel. Mr. Ekerm Benli, the owner of Delta Om Company, one of the mutual customers of Complainants and Impexia, refused to sign the affidavit provided by Impexia. (Affidavit of Ekrem Benli, Delta Om Company 15, AFI/DNB App. 2325-2326). A similar response was provided by Mr. Ovali, a procurement official from 77 Construction. (Affidavit of Mr. Ermin Ovali 12, AFI/DNB App. 2327).

Given the questionable value of the affidavits proffered by Impexia, which form a substantial part of Impexia's proposed findings of fact and its opposition brief, Complainants' respectfully request that the Administrative Law Judge give these little or no effect.

(DNB/AFI Reply to Impexia Brief at 1.)

Several of the statements submitted by DNB/AFI describe Impexia's operations in ways similar to Impexia's statements. *See* discussions of Metag, 77 Construction, and Delta Om above. DNB/AFI's request to disregard the statements submitted by Impexia is denied.

To prove a violation of section 10(b)(13), DNB/AFI have the burden of proving by a preponderance of the evidence that Barsan Int'l knowingly disclosed information protected by section 10(b)(13). The evidence supports a finding that Impexia's relationship with the customers DNB/AFI allege were "taken" by Impexia developed from a long-term relationship between Cuneyt Karadagli and a representative of the customer (77 Construction), information from another Impexia customer (Ayken, Yenigun, Cakmaklar Pano), or Impexia's marketing emails (Metag, Epik, Delta Om). The Ceytun representative states that Ceytun contacted Impexia, but does not state how Ceytun learned about Impexia. Other than the Impexia solicitation email, no information is in the record about how Impexia and Feka established a relationship. The fact that Impexia and DNB/AFI have the same customers does not prove by a preponderance of the evidence that Cuneyt Karadagli/Impexia learned about their identities from information Barsan Int'l knowingly disclosed in violation of section 10(b)(13).

2. DNB/AFI's contend that when their investment in money and time establishing their business is contrasted with Cuneyt Karadagli/Impexia's immediate success with essentially a one-person operation, it should be concluded that Impexia's success could have only resulted if Barsan Int'l gave Impexia information protected by section 10(b)(13).

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. 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/50Hz. 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. 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.

(DNB/AFI Brief at 22-23.) DNB/AFI incorporates the eight-step typical transaction steps discussed above in this decision. See Part VI.A.4.a above.

Cuneyt Karadagli does not claim that he or Impexia has the technical expertise claimed by DNB/AFI. He does not claim that he could analyze project plans with the expertise of DNB/AFI personnel to identify products that will meet the needs of the projects. Cuneyt Karadagli does claim that Impexia's customers identify the products that they want and ask Impexia to obtain them. As set forth above, that claim that is substantiated by representatives of Metag, 77 Construction, Epik, Ayken, Yenigun, Delta Om, Cakmaklar Pano, and Ceytun. The evidence suggests that the success of Impexia's "one-person operation" comes from customers who tell Impexia the products they want, not information Impexia learned from Barsan Int'l. The fact that Impexia has been successful does not prove by a preponderance of the evidence that Barsan Int'l knowingly disclosed in violation of section 10(b)(13).

3. DNB/AFI describe a situation in which they allege Impexia took advantage of their extensive efforts and expense distributing products manufactured by that they contend could only have resulted if Barsan Int'l gave Impexia information protected by section 10(b)(13).

[The example] 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.

(DNB/AFI Brief at 24.) Metag, one of the customers that DNB/AFI allege Impexia took from them, allegedly sought offers for products needed for “Kandahar Milcon Pkg. 10-1 Project, Expeditionary Fighter Shelters” in Afghanistan. DNB/AFI contend that their sales representative spent days calculating what would be needed for the project and included Harger products in the sales offer. DNB/AFI allege that “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.” (*Id.* at 25.) It is not clear from DNB/AFI’s brief when this incident occurred. DNB/AFI do not state how Impexia got hold of this quote or how Barsan Int’l would have obtained the information in this quote to pass on to Impexia. DNB/AFI do not state that the information in this quote was “information concerning the nature, kind, quantity, destination, consignee, or routing of . . . property tendered or delivered to . . . common carrier [Barsan Int’l]” protected by section 10(b)(13).

Later in their brief, DNB/AFI describe five examples where Impexia underbid DNB/AFI for business with DNB/AFI customer. The first two examples are Impexia sales to Metag.

Impexia Invoice No. 2089940-1 dated January 5, 2012,²⁰ 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.

(DNB/AFI Brief at 48-49.)

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

²⁰ This is nearly one year after the DNB/AFI-Barsan Int’l relationship ended.

manufacturers' products. Impexia has only sold Complainants' manufacturer's products.²¹ 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.

(DNB/AFI Brief at 49.)

DNB/AFI included a copy of the Impexia invoice for each shipment. An unidentified person, presumably a DNB/AFI official, annotated the Impexia invoice by hand indicating that Impexia sold the Texas Fluorescent Exit Fixture for \$102.00 on January 5, 2012, and that DNB/AFI sold the same fixture to Metag on March 4, 2011, for \$132.64. (DNB/AFI Supp. App. at 2104.) As stated above, both Metag representatives state that Metag reached out to Impexia to assist Metag with the acquisition of products from the United States (Impexia App. at 29) and that "Metag has worked with Impexia for inquiries originated by the site." (DNB/AFI Supp. App. at 2328.) Metag had the product and pricing information from its March 4, 2011, purchase from DNB/AFI. DNB/AFI have not proved that Barsan Int'l, not Metag, gave the product and pricing information to Impexia. The fact that Impexia underbid DNB/AFI on these products does not prove by a preponderance of the evidence that the success is based on information Barsan Int'l knowingly disclosed in violation of section 10(b)(13).

The third example of alleged underbidding is the Impexia sale of Square D load centers to Ceytun alleged in the Complaint and discussed above in Part VI.B.1.

The fourth example of alleged underbidding is an Impexia sale to 77 Construction.

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).

(DNB/AFI Brief at 50.) As the 77 Construction procurement manager stated in the declaration filed by DNB/AFI, "to cut down the price of our other vendors since their operation is made of one man cutting down on the cost of engineering and technical services. When I was 100% sure of what is needed, I went to Impexia for a price quote." (DNB/AFI Supp. App. at 2327.) An unidentified

²¹ DNB/AFI do not claim that they are the exclusive seller for Harger or Texas Fluorescent.

person, presumably a DNB/AFI official, annotated the Impexia invoice by hand stating “We quoted exact same items same qtys. (actually we specified the product for 77 Construction) on May 21, 2012 our total \$1000.00 Impexia sold to 77 Construction 6 wks. later exact same items at \$759.00.” (DNB/AFI App. at 2110.) It appears that in this case, based on information received from DNB/AFI, the 77 Construction procurement manager was (as he stated in his declaration submitted by DNB/AFI) 100% sure of what was needed, then contacted Impexia for a quote that led to a purchase from Impexia. Several other facts should be noted. First, DNB/AFI state that they “never received the order.” (DNB/AFI Brief at 50; DNB/AFI App. at 2254.) If DNB/AFI never received the order, then Barsan Int’l did not carry a shipment of this property for DNB/AFI and it would not have had the information to disclose to Impexia. Second, the date of the DNB/AFI quote is more than one year after DNB/AFI commenced this proceeding and more than one year after the last shipment that Barsan Int’l transported for DNB/AFI. DNB/AFI do not explain how Barsan Int’l would have access to a DNB/AFI quote fourteen months after their relationship ended. Third, even if it is assumed that Barsan Int’l somehow had this information *and* disclosed it to Impexia, the Texas Fluorescent Fixtures do not fit within the category of “property tendered or delivered to . . . common carrier [Barsan Int’l]”; therefore, the information is not subject to the protection of section 10(b)(13). The fact that Impexia underbid DNB/AFI on this product does not prove by a preponderance of the evidence that Impexia’s success is based on information Barsan Int’l knowingly disclosed in violation of section 10(b)(13).

The fifth example of alleged underbidding is an Impexia sale to Delta Om.

Impexia Invoice to Delta Om dated December 02, 2011 is for Square D Safety Switches, and Impexia’s selling price for HU361 and HU362 were \$31[.]42 and \$54[.]62 respectively. Complainants’ prices to Metag on February 20, [2011], 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).

(DNB/AFI Brief at 50.) As noted above, however, a Metag employee states that he learned about Impexia through emails forwarded by another Metag employee. “Based on this introduction, in February, 2011, I reached out to Cuneyt Karadagli, the president of Impexia, to assist Metag with the acquisition of products from the United States. It was from that point that Metag and Impexia’s business relationship began.” (Impexia App. at 29.) In the declaration furnished by DNB/AFI, the Delta Om representative states that Delta Om gave Impexia some small orders and continued to do business with Impexia for simple emergency requirements. (DNB/AFI Supp. App. at 2325-2326.) An unidentified person, presumably a DNB/AFI official, annotated the Impexia invoice by hand indicating DNB/AFI prices in February 2011 and Impexia prices in December 2011. (DNB/AFI App. at 2112.) I find that it is at least as likely that Metag (or its subcontractor Delta Om) identified the product and the price to Impexia and that Impexia offered to sell the switches at a lower price

than it is that Barsan Int'l provided this information to Impexia and Impexia then took DNB/AFI's customer based on this information. The fact that Impexia underbid DNB/AFI on this product does not prove by a preponderance of the evidence that Impexia's success is based on information Barsan Int'l knowingly disclosed in violation of section 10(b)(13).

4. DNB/AFI contend that Impexia's shortcomings and reliance on their materials is demonstrated by email exchanges between Impexia, Metag, and World Electric Supply. The emails contain

references to products already vetted by Complainants and contained in their Catalogue. Jimmy Cuneyt [*sic*] of Impexia demonstrates he does not have in-depth product knowledge, from the emails attached hereto 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.

(*Id.* at 25.)

As noted above, Cuneyt Karadagli does not claim that he (or Impexia) has the technical expertise that DNB/AFI contends DNB/AFI has. Given the method in which the evidence indicates Impexia conducts its operations, a method confirmed by its customers, Cuneyt Karadagli's lack of in-depth knowledge is not circumstantial evidence that Barsan Int'l knowingly disclosed information protected by section 10(b)(13) to Cuneyt Karadagli/Impexia.

c. Miscellaneous arguments claimed to prove Barsan Int'l violated section 10(b)(13) of the Act.

In their opening brief and in their reply brief, DNB/AFI make other miscellaneous claims, some of which echo earlier arguments, that they contend demonstrate Barsan Int'l violated section 10(b)(13) of the Act.

DNB/AFI refer to Cuneyt Karadagli's lack of experience and expertise in selling electrical products coupled with the Karadaglis' perceived "economic hardships" and problems Cuneyt Karadagli had in paying for Barsan Int'l's services for his older companies to argue that Barsan Int'l was involved in a scheme with Impexia to take DNB/AFI business. DNB/AFI contend that Barsan Int'l was aware both of Cuneyt Karadagli's limited success operating businesses and his lack of economic resources. DNB/AFI allege that in contrast with his earlier financial problems, after Cuneyt Karadagli established Impexia, he was able to pay Barsan Int'l for transportation services provided to his older companies. DNB/AFI argue that Cuneyt Karadagli's ability to pay bills of his older companies means one of two things: (1) Barsan Int'l was assisting Cuneyt Karadagli by giving him information about DNB/AFI shipments; or (2) Barsan Int'l should have concluded from this "new fortune [that] had befallen Impexia" that someone in Barsan Int'l was giving Cuneyt Karadagli information about DNB/AFI's operations since his "accounts were suddenly brought current, and Impexia was generating new revenues." (DNB/AFI Brief at 26-30.)

As discussed above, the customers that Impexia had in common with DNB/AFI substantiate Impexia's claim that its business is directed at obtaining orders for products identified by its customers. This success does not prove by a preponderance of the evidence that the success is based on information protected by section 10(b)(13) about property transported for DNB/AFI by Barsan Int'l. Regarding the second prong of DNB/AFI's claim, section 10(b)(13) does not impose a duty on a common carrier to investigate whether one of its employees is disclosing protected information every time one of its shipper/customers pays delinquent bills. I further note that although the comparisons are not perfect because they involve different years, Barsan Int'l claims total revenue in excess of \$10,000,000 for the year 2011. (BGL/Barsan Prop. FF 51.) Although DNB/AFI, the party with the burden of persuasion in this proceeding, deny this proposed fact, they do not offer any evidence in rebuttal. (DNB/AFI Resp. BGL/Barsan Prop. FF 51.) The Barsan Int'l Customer Quick Report in the record indicates that Barsan Int'l invoiced Cuneyt Karadagli company Source Concept a total of \$8777.09 in the period January 1, 2008, through October 8, 2009. (BGL/Barsan App. at 16.) This is less than 0.1% of Barsan Int'l's 2011 revenue.

DNB/AFI's Request for Admission No. 7 to BGL/Barsan states: "Admit that AFI/DNB were Barsan Int'l's first customers to ship electrical equipment and complementary parts to Turkey/Great Middle East." DNB/AFI's Request for Admission No. 8 to BGL/Barsan states: "Admit that AFI/DNB were Barsan Int'l's only customers to ship electrical equipment and complementary parts to Turkey/Great Middle East before Impexia was set up." BGL/Barsan responded "Admit" to both requests. (DNB/AFI App. at 198.)

Barsan Int'l states that it responded incorrectly to the two requests for admission. In the response to DNB/AFI's proposed findings of fact, Barsan Int'l states that when shipping records were reviewed, it was discovered that Barsan Int'l had handled shipments of electrical equipment for other shippers before it handled shipments for DNB/AFI. (BGL/Barsan Resp. to DNB/AFI Prop. FF 22.) DNB/AFI contend that it is too late to correct this admission. (DNB/AFI Reply to BGL/Barsan Brief at 4.) DNB/AFI elaborate on this discrepancy later in their reply brief. They contend that the affidavit and chart BGL/Barsan submitted with their response to DNB/AFI proposed finding of facts number 12 and 13 are not properly supported.

It is unnecessary to determine whether DNB/AFI or some other entity was Barsan Int'l's first shipper of electrical equipment. The identity of the shipper of the first shipment of electrical equipment carried by Barsan Int'l is not relevant to this decision. Even if it is assumed that the Impexia shipment to 77 Construction contained the same product as a DNB/AFI shipment, this does not have a tendency to prove that Barsan Int'l disclosed protected information to Impexia, particularly given 77 Construction's explanation of its relationship with Impexia. Section 10(b)(13) does not impose a duty on a common carrier to keep track of the property contained in each shipment that it carries and investigate whether one of its employees has improperly disclosed information any time two shippers ship the same product.

DNB/AFI refer to documents relating to an Impexia sale and shipment to 77 Construction in December 2010.

[The Appendix] 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.^[22] (AFI/DNB App. 494-505). When Impexia sent this commercial invoice to a customer, kan [*sic*] 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 [*sic*], 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).

(DNB/AFI Brief at 30-31.)

As discussed above, the former business development manager for 77 Construction requested quotes from Impexia for various products for 77 Construction projects at Camp Bastion beginning in June 2010 and used Impexia's services when it needed "to cut down the price of our other vendors since their operation is made of one man cutting down on the cost of engineering and technical services. When I was 100% sure of what is needed, I went to Impexia for a price quote." (DNB/AFI Supp. App. at 2327.) The December 2010 Impexia sale does not prove that Barsan Int'l gave proprietary information to Impexia in violation of section 10(b)(13). DNB/AFI's contention about the size of the Barsan Int'l workspace appears directed at a claim that Burcin Karadagli could not have sent emails to Cuneyt Karadagli without the knowledge of every other Barsan Int'l employee in the room. This contention is without merit.

In an affidavit filed for this proceeding, Barsan Int'l official Ugur Aksu stated that "[o]n one occasion Burcin Karadagli asked whether she could go into the warehouse on a Sunday with [Cuneyt Karadagli] to move some carpets owned by Source Concept from the warehouse to a rental truck, a request that I granted." (BGL/Barsan App. at 10.) Aksu's email dated March 9, 2009, replying to Burcin Karadagli's request to enter the warehouse states: "No dear, you don't have to ask to anyone ok no problem [*sic*]." (DNB/AFI App. at 2224.) DNB/AFI contend that this email gave Cuneyt Karadagli blanket authority to enter the warehouse, so "[o]bviusly, in view of the blanket

²² I do not find where DNB/AFI direct the reader's attention to invoices or other documents that would substantiate their claim that the merchandise is identical to that sent by DNB/AFI or state to whom and when DNB/AFI sent the merchandise.

authority, 'you don't have to ask', makes the Affidavit stant [*sic*] an outright falsehood." (DNB/AFI Reply to BGL/Barsan Brief at 24.) DNB/AFI also contend there was a second occasion on which Cuneyt Karadagli was permitted to enter the warehouse. On Friday, August 27, 2010, Cuneyt Karadagli sent Aksu an email asking if Burcin Karadagli could have the keys to the warehouse Cuneyt Karadagli could pick up water from the warehouse on Saturday. Aksu replied, "If Burcin opens it, it's OK." (DNB/AFI App. at 2394.) DNB/AFI contends this permission "was superfluous since Aksu had already granted a blanket authority for these warehouse visits, and conveniently forgot this fact when signing the Affidavit." (DNB/AFI Reply to BGL/Barsan Brief at 24.) I find that this proves just the opposite: The facts that Cuneyt Karadagli asked for permission and that Aksu stated it would be permitted if Burcin opened the warehouse shows that neither Cuneyt Karadagli, Burcin Karadagli, nor Aksu thought Cuneyt Karadagli had blanket authority to enter the warehouse.

DNB/AFI contend that Barsan Int'l records indicate that Cuneyt Karadagli at one time was an employee of Barsan Int'l, but Barsan Int'l now denies Cuneyt Karadagli was its employee. (DNB/AFI Reply to BGL/Barsan Brief at 21-22.) The DNB/AFI appendix includes Barsan Int'l paperwork showing that Barsan Int'l hired Cuneyt Karadagli on January 1, 2009, and he received a paycheck on February 5, 2009. (DNB/AFI App. at 2162-2173.) In a declaration filed with its Appendix, Ugur Aksu, Barsan Int'l's president, states:

75. In early 2009, more than a year before Impexia was formed, Barsan Int'l sought to obtain a H-1B visa for a Barsan Int'l employee (not Cuneyt Karadagli or Burcin Karadagli) who would be acting in a supervisory capacity. I was informed that in order to help the applicant qualify for the H-1B visa, the applicant should report that he would be supervising a number of employees. Burcin Karadagli's husband, Cuneyt Karadagli, was identified in certain paperwork as one of the employees he would be supervising, despite the fact that Mr. Karadagli was not and has never been an employee of Barsan Int'l.

76. While I regret that Barsan Int'l allowed such a representation to be made, it was not done to financially benefit Mr. Karadagli or to provide him with assistance in obtaining desirable immigration status. It also does not reflect that the relationship between Barsan Int'l and Impexia was not an arm's length one.

(BGL/Barsan App. at 13.)²³ DNB/AFI also cite to a February 11, 2009, email that Burcin Karadagli sent to Aksu:

²³ Barsan Int'l moved to protect this information as a trade secret or other confidential research, development, or commercial information. The motion was denied. *DNB Exports v. Barsan Global Logistics*, FMC No. 11-07 (ALJ Jan. 25, 2014) (Order on Motions for Confidential Treatment of Merits Briefs and Materials Filed with Merits Briefs).

Subject: Payroll Run for Cuneyt Karadagli

Ugur, I repeatedly thank you for your interest and support.

Attached, report Run #8, salary payment of Cuneyt Karadagli.

Attached, report Run #10, Report showing stoppage of salary payments to Cuneyt Karadagli.

(DNB/AFI App. at 2221.)

In its opening brief filed shortly after receiving the payroll documents, DNB/AFI contend:

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.

In their reply to BGL/Barsan's brief, DNB/AFI contend:

Notwithstanding that Barsan the Payroll undisputedly demonstrates that Cuneyt Karadagli was an employee of Barsan Int'l, Ugur Aksu denied this fact and alleged instead that Cuneyt Karadagli was shown in the Barsan Int'l payroll because Barsan made the false representation to the U.S. immigration Services in order to obtain a desirable immigration status for another Barsan Int'l employee. In order to avoid liability in this proceeding, Barsan Respondents have now averred that Cuneyt Karadagli was not a Barsan Int'l's employee and that instead the Payroll item was a false representation submitted to the federal government. This could be left alone as is, but for the fact that Burcin Karadagli profusely thanked Ugur Aksu for his "interest and support" in the context of the Payroll Runs for Cuneyt Karadagli. What is that "thank you" about. No one from Impexia or Barsan has ventured to explain this. Therefore, Cuneyt Karadagli was either an employee of Barsan Int'l, which Ugur Aksu and Cuneyt Karadagli now claim he was not, or he was involved in a fraudulent and criminal scheme with Barsan Int'l with regard to knowingly presenting false information to a federal agency. What is clearly not the case, is Barsan Int'l's current stance that this false information was for the benefit of a third party, not Cuneyt Karadagli, which is a less likely possibility in view of Burcin Karadagli's effusive "thank you" to Ugur Aksu. In any case, none of the Respondents elected to address this inconsistency.

(DNB/AFI Reply to BGL/Barsan Brief at 21-22.) Other than stating that Cuneyt Karadagli was never an employee of Barsan Int'l, (Impexia Brief at 11; Impexia App. at 5), Impexia does not address this claim.

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

In his affidavit, Aksu states: "The shipping files were never with the cargo in the warehouse. Packing lists would move with the cargo, but upon receiving notice that the goods had arrived at the warehouse, we would immediately take the packing lists from the crates, and maintain them in our office." (BGL/Barsan App. at 10.) DNB/AFI contend that photographs taken in Barsan Int'l's warehouse prove that this statement is false and that Aksu is not "reliable or trustworthy." (DNB/AFI Reply to BGL/Barsan Brief at 25-26.) While the photographs show the mailing labels on the cargo, I do not see any packing lists in the photographs. (DNB/AFI App. at 2503-2517.) It is unlikely that Barsan Int'l could have operated successfully as a common carrier if it stripped the mailing identification from every package in its warehouse. I find that the photographs do not prove by a preponderance of the evidence that Barsan Int'l violated section 10(b)(13). DNB/AFI state that in "the picture of Complainants' cargo with shipping slips, which Isik Onur of Barsan Int'l sent to Complainants, demonstrates that Cuneyt Karadagli was working at Barsan's Warehouse. Mr. Devrim who knew Mr. Karadagli well has identified Mr. Karadagli in that photograph. (AFIDNB App. 2518)" (DNB/AFI Reply to BGL/Barsan Brief at 26.) Assuming the person in the photograph is Cuneyt Karadagli (the photograph is of the person's back and left side), it does not prove by a preponderance of the evidence that Barsan Int'l violated section 10(b)(13).

DNB/AFI argue that the occasion on which a Barsan Int'l employee emailed Cuneyt Karadagli suggesting that Burcin Karadagli sign an Impexia shipper's letter of instruction is an "illustration as to how overlapping and interlocking the Impexia activities were with Barsan Int'l activities." (DNB/AFI Brief at 31.) *See also* discussion above at 27-29. DNB/AFI contend that this demonstrates "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." (DNB/AFI Brief at 31.)

I find that this event does not prove by a preponderance of the evidence that Barsan Int'l and Impexia's activities were "overlapping and interlocking" or that Barsan Int'l knowingly disclosed DNB/AFI information protected by section 10(b)(13). DNB/AFI also cite to the fact that the shipment went to Camp Bastion in Afghanistan and state that DNB/AFI were "one of the first vendors to that project, and Barsan Int'l was fully aware of this." (DNB/AFI Brief at 32.) Section 10(b)(13) does not impose a duty on a common carrier to keep track of the property contained in each shipment that it carries and investigate whether one of its employees has improperly disclosed information when two shippers ship to the same location.

DNB/AFI contend that a news release supports their contention that Barsan Int'l disclosed information in violation of section 10(b)(13).

After signing the contract with Complainants, Barsan had a big newsrelease [*sic*] in Turkey [*sic*] with the picture [*sic*] of their warehouse stored with Complainants' cargo. This news release announced BGL's investment in the U.S. They mentioned Barsan shipments from the U.S. to China and Turkey [*sic*], but there is no mentioned [*sic*] of shipments to any other middle east country. (Newspaper, AFIDNB App. 2390-2393). More importantly, Barsan attributed their successful news release to Complainants' cargo. See Ugur Aksu's e-mail dated February [*sic*] 4, 2009. (AFIDNB App. 2390-2393). The statements in the newsrelease [*sic*] do not refer to any other business to the Middle East, or Great Middle East, or Afghanistan, or Iraq. Again, Aksu's Affidavit has a whole new refreshed memory, which appears somewhat lacking on many other counts, and perhaps this one as well.

(DNB Reply to BGL/Barsan Brief at 29.)

The news release does not mention DNB/AFI. DNB and Barsan Int'l executed their Contract Carrier Agreement on January 15, 2009. (DNB/AFI App. at 21-25.) Assuming the "devrim" to whom the email (dated February 4, 2009) was sent is DNB/AFI official Baris Devrim Bal, DNB/AFI do not explain how BGL's success described in the news release is attributed to the twenty-day business relationship between Barsan Int'l and DNB/AFI. Even if Aksu intended to reference DNB/AFI and attribute BGL's success to DNB/AFI, this does not have a tendency to prove that Barsan Int'l disclosed protected information to Impexia in violation of section 10(d)(13).

DNB/AFI contend that Barsan Int'l paid demurrage for Impexia shipments that were not handled by Barsan Int'l and contend that this proves an interwoven relationship of Barsan Int'l and Impexia. In response to Barsan Int'l's contention that "[i]t is not unusual for NVOCCs and freight forwarders to advance such charges to prevent their customers from incurring demurrage charges," DNB/AFI contend that Barsan Int'l "misconstrues the fact that the Impexia shipments in question were not handled by Barsan and Barsan Int'l had no interest as an NVOCC or forwarder with regard to those shipments." (DNB Reply to BGL/Barsan Brief at 29-30.) DNB/AFI refer to emails between Ugur Aksu at Barsan Int'l and Cuneyt Karadagli that are claimed to substantiate their contention. The emails concern House of Water shipments, not Impexia shipments, and refer to eleven containers and what appears to be a reference to a BGL invoice or shipment number: BGL/10/543.10. (DNB/AFI App. at 2268-2269.) With this reference number that apparently refers to a BGL and/or Barsan Int'l shipment or invoice, DNB/AFI do not explain how this is a shipment in which BGL/Barsan "had no interest."

In their interrogatories to BGL/Barsan, DNB/AFI asked:

Interrogatory No. 8: Identify and describe prior and current employees of BGL/Barsan Int'l who had/have access to the documents/information provided by DNB/AFI when Complainants utilized the services of Barsan to export its products.

RESPONSE: Barsan objects to Interrogatory No. 8 on the grounds that it is vague and ambiguous. Barsan is unsure what documents/information's DNB/ AFI is referencing. Notwithstanding this objection and without a waiver thereof, Barsan states that Ugur Aksu, Sevgi Cebe Tugsan Uresin, and Isik Onur would have had access to shipping information from DNB/AFI on a regular basis. Burcin Karadagli may also have been able to access computer files and possibly hard copies of files with such information.

(DNB/AFI App. at 200.) DNB/AFI proposed the following finding of fact, set forth with BGL/Barsan's response:

Barsan's officers had full access to the database of AFI/DNB's business information for the purposes of transporting AFI/DNB's cargo. The database included the products' descriptions, catalogue numbers, suppliers, etc.

Response: Barsan Int'l and BGL state that while operations staff had access to the DNB database, Burcin Karadagli, who is not in operations, did not have such access.

(BGL/Barsan Resp. to DNB/AFI Prop. FF 25.) DNB/AFI argue that this raises credibility issues with Barsan Int'l's submissions. (DNB/AFI Reply to BGL/Barsan Brief at 30-31.) Taking the evidence in the record as a whole, I conclude that the perceived differences in these two responses do not prove by a preponderance of the evidence that Barsan Int'l violated section 10(b)(13).

C. Conclusion regarding Barsan Int'l.

DNB/AFI have the burden of proving by a preponderance of the evidence that Barsan Int'l violated section 10(b)(13) of the Act by disclosing protected information. DNB/AFI have not met this burden. Therefore, the claims against Barsan Int'l are dismissed with prejudice.

ORDER

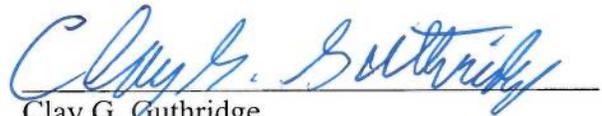
Upon consideration of the record herein and the arguments of the parties, and for the reasons set forth above, it is hereby

ORDERED that the Complaint against Barsan Global Lojistiks Ve Gumruk Musavirligi A.S. be **DISMISSED** with prejudice. It is

FURTHER ORDERED that the Complaint against Barsan International, Inc., be **DISMISSED** with prejudice. It is

FURTHER ORDERED that the Complaint against Impexia, Inc., be **DISMISSED** with prejudice. It is

FURTHER ORDERED that the crossclaims that Barsan Global Lojistiks Ve Gumruk Musavirligi A.S. and Barsan International, Inc., filed against Impexia, Inc., be **DISMISSED** as moot.



Clay G. Guthridge
Administrative Law Judge