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I. Introduction.

This case is one of first impression on issues arising from allegations by shippers (AFI and DNB), that their private commercial information relating to the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered by AFI/DNB to Barsan International, Inc. (“Barsan” or “Barsan Int’l”), a common carrier, was knowingly disclosed by Barsan to a competitor, without AFI/DNB’s consent, to the detriment or prejudice of AFI/DNB in violation of 46 USC §41103. In fact, the allegations by AFI/DNB are that this unlawful disclosure gave rise to a competitor which otherwise would not have been successful but for the information that was disclosed by Barsan. Therefore, it is a case with significant impact on the shipping industry. The Administrative Law Judge’s (ALJ) Initial Decision (ID), if allowed to stand, would have a chilling effect on shippers who generally, by necessity, are required to routinely disclose to ocean freight forwarders and non-vessel operating common carriers the type of information protected by 46 USC §41103.

The ID is extremely shortsighted, and evidences a misunderstanding of the issues, and/or an unexplainable bias on the part of the ALJ. The ID adopts wholly new and unprecedented theories that if they go unchallenged, will have a serious deleterious impact on how the FMC will regulate OTIs in their relationship with shippers. In particular, the ALJ appears to be arguing that Impexia’s acts are normal competition and of benefit to consumers, and that these customers are not “the property” of AFI/DNB. *See* ID at 69. AFI/DNB has never claimed that they have any proprietary interest in their customers, but rather that Impexia received protected information in violation of 46 USC §41103, and that this information placed Impexia in an unfair competitive position *vis a vis* Complainants---i.e., was detrimental to Complainants. The ALJ’s theme in its ID is akin to declaring that the unlawful importation of counterfeit goods are healthy

since consumers benefit from cheaper goods, completely ignoring the underlying illegalities of why the goods are cheaper, and the devastating economic impact of these practices on the corresponding industries which are lawfully providing the goods and services, in this case Complainants.

The ID in this proceeding contains layers upon layers of error giving the sense of advocacy on the part of the ALJ rather than impartial even-handed adjudication which is required by the Administrative Procedure Act. Among its many shortcomings, the ID is arbitrary and capricious; the ID blatantly fails to consider an analysis at all of circumstantial evidence, an absolute necessity in a case of this type, on central issues which are contrary to Respondents' positions; and, in some instances, the ID reaches conclusions of fact on key issues with no factual support whatsoever in the record.

The ID completely ignores, or gives little regard, to the circumstantial evidence arguments posited by Complainants as to how the information related to air and ocean shipments correlate to provide Impexia business profiles which they could not otherwise develop relating to "the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered" by AFI/DNB to Barsan. Furthermore, the ID blatantly and repeatedly ignores established Federal Maritime Commission regulations and law in its legal conclusions, especially with regard to issues related to the element of "knowledge" contained in 46 USC §41103. Lastly, but most importantly, the ALJ, when weighing testimony evidence (Respondents' declarations) in this case, gives no weight to credibility issues raised wherein Respondents blatantly admit to lying to the U.S. Immigration and Naturalization Service, and where other evidence underscores Respondents' emphasis on expediency at the cost of truthfulness.

II. **The ALJ Erred By Relying on Evidence and Affidavits Generated From Ugur Aksu and Cuneyt Karadagli Without Any Consideration of Character and the Lack of Credibility Based on Prior False Utterances Made to Federal Officials, and Others.**

The ALJ clearly concluded that Ugur Aksu, the President of Barsan Int'l, a person upon whose testimony the ALJ relied extensively, was either lying to the Commission in this proceeding, or had lied to the U.S. Immigration and Naturalization Services on information submitted to that agency. The ALJ states:

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). Emphasis supplied. ID at 82.

There are several salient points to be made from this holding. While the ALJ states that these matters affect the credibility of Ugur Aksu, the ALJ never in his ID identifies anywhere where this credibility is put into doubt notwithstanding that Ugur Aksu's declarations are quoted and relied upon throughout the ID. The ALJ never explains where Ugur Aksu's credibility was adversely affected. Additionally, also implicitly involved in this falsehood, as will be explained below, is Mr. Cuneyt Karadagli, the President of Impexia, whose actions with this matter also would have to be characterized as either lying to the Commission about his employment with Barsan, or on the other hand participating in a deception involving the U.S. Immigration Services.

Again, the ALJ repeatedly relied on either direct statements from Mr. Karadagli, or on declarations obtained from third parties by Mr. Karadagli, and never indicated any reservations about the veracity of either Mr. Karadagli or Mr. Aksu. Curiously, while the lies alluded to matters relating to moral turpitude which Commission staff would likely use as support for not granting a license to an applicant for an ocean transportation intermediary license, the ALJ never

again cited credibility as an issue while reviewing Ugur Aksu's or Cuneyt Karadagli's declarations, or declarations which had been obtained by Mr. Karadagli from third parties. This is so, even when Mr. Karadagli's veracity was directly challenged by third parties who would not sign an affidavit propounded by Mr. Karadagli for this proceeding. Mr. Ekrem Benli, the owner of Delta Om Company, one of AFI/DNB's customers which was approached by 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). There were obvious credibility issues present, but the ALJ erroneously failed to address these in any way in accepting the Affidavits at face value, and even then, misconstruing the inferences to be made from these as will be explained below. The admission by Mr. Aksu of lying to the United States Immigration and Naturalization Services is not a small matter since these activities, if prosecuted, could lead to serious criminal sanctions. The review of a federal agency such as the Commission when receiving communications from these individuals must be sharpened, yet the ID contains nothing in evaluating this information emanating from these individuals, both Presidents of their respective companies.

The above involvement by Cuneyt Karadagli is not an isolated lapse of character on the record, and underscores Mr. Karadagli's propensity for eliciting others to lie on his behalf. When reviewing the belated produced e-mails with reference to the previously produced documents, Complainants found that the name of Alfredo Checo appeared in e-mails between Jimmy Karadagli and Leticia Colvin, Subject: Truck Insurance (or Truck Insurance House of Water LLC¹), dated September 27 and 28, 2010 respectively. These e-mails apparently show

¹ House of Water was another company owned by Cuneyt Karadagli. See Cuneyt Karadagli's Declaration ¶5 (AFI/DNB App. 241)).

that Alfredo Checo was a truck driver of House of Water. (BAR00941-00945 (AFI/DNB App. 2315-2319)). This fact was also demonstrated by the truck insurance statement. (BAR002018 (AFI/DNB App.2320)). However, when Mr. Cuneyt Karadagli applied for a home mortgage, Alfredo Checo appeared as a general Manager of House of Water in the Employment Letter for Cuneyt Karadagli which verified his employment. (Letter to Wells Fargo Home Mortgage, Dated September 3, 2010, BAR001118 (AFI/DNB App.2321)). Again, this is consistent with the previous discussion relating to statements made to the U.S. Immigration and Naturalization Services, and further underscores character issues with respect to Cuneyt Karadagli, which the ALJ never even considered once when evaluating statements from Mr. Karadagli, or of statements obtained from others. *See* Complainants' Motion for Submission of Supplemental Evidence at 8.

As noted in the Complainants' Brief, based on the preliminary review of the late-provided materials which were in English, it was found that the payroll records clearly indicate that Cuneyt Karadagli, the President of Impexia, was shown as an employee of Barsan Int'l, and was being paid more than any other employee of Barsan. (AFI/DNB App. 2163-2171). Additionally, see the email from Burcin Karadagli, AFI/DNB App. 2220-2221 wherein she expressed thanks to Ugur Aksu, President of Barsan Int'l, for assisting with the payroll scam relating to Cuneyt Karadagli, which clearly establishes Mr. Karadagli as a conspirator with Ugur Aksu in making the false utterances to federal officials. Upon further review, and receipt of additional discovery resulting from Complainants' Motion to produce, it was ascertained that the payroll scam was indeed involved with providing false information to the Immigration and Naturalization Service on behalf of Cuneyt Karadagli, or perhaps another unnamed person. This was not immediately clear when the Complainants' opening Brief was

filed since the pertinent e-mails were not provided at that time. On January 12, 2009, Burcin wrote to the Berger Law Firm, Immigration counsel: "My husband Cuneyt also can be on the payroll if it is ok!! How much the payroll amount should be! Please advise" BAR011027 (AFI/DNB App. 2255). What further underscores Mr. Karadagli's involvement with Mr. Ugur Aksu in the lies which were conveyed to federal officials, on February 5, 2009, Burcin Karadagli instructed Cuneyt Karadagli to return the salary to Barsan Int'l by issuing a check to Barsan after the payroll documents had been presented to the government authorities. (E-mail from Burcin Karadagli to Cuneyt Karadagli dated February 5, 2009, BAR010896; AFI/DNB App. 2256-2257). The lies evident from these communications related to: a) that Cuneyt Karadagli was employed by Barsan Int'l, and b) that Cuneyt Karadagli was paid a particular fictitious amount to meet the standards their Immigration attorney would dictate. It is not clear what the final effect of the above exercise was, but Cuneyt Karadagli did, indeed, receive his permanent resident card on February 9, 2009. (The public records of the U.S. Citizenship and Immigration Services provides this information on its website for Receipt No. SRC0806650964, the receipt no. issued to Cuneyt Karadagli (AFI/DNB App.2312-2314)). *See* Complainants' Brief at 1-3; Complainants' Motion for Submission of Supplemental Evidence at 3-7; Complainants' Reply to Barsan Respondents' Reply Brief at 3,5,21; Complainants' Reply to Complaints' Impexia's Opposition to Complainants' Brief at 4,10,11).

On the other hand, Ugur Aksu, Barsan's President, provided a declaration filed with its Appendix that states:

75. In early 2009, more than a year before Impexia was formed, Barsan Int'l sought to obtain a H-1 B 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-1 B 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.

(BGL/Barsan App. at 13; ID at 80)

Again, it is beyond our capabilities to ascertain why Barsan (Ugur Aksu) lied to U.S. Immigration and Naturalization Services, which is the trouble when evaluating witnesses with serious credibility issues as in this case. What is clear is that the President of Barsan admits to lying to a U.S. federal agency for reasons of expediently accomplishing commercial objectives even if such acts in achieving this might otherwise constitute an unlawful act. What is also clear is that the ALJ never indicates that he is applying this credibility standard in his analysis, other than his casual mentioning that this adversely affected Ugur Aksu's credibility at the end of the ID in his discussion of Miscellaneous matters, long after the ALJ had already made serious findings related to this case relying on testimony from Uger Aksu, and Cuneyt Karadagli. ID at 82. That debility of character never entered the ID analysis when evaluating acts and statements of either Mr. Aksu or Mr. Karadagli. That is a clear error. The record is replete with evidence indicating that Respondents had no problem in creating falsehoods to achieve their objectives.

This evidence is presented here for reasons of establishing lack of credibility on the part of Respondent witnesses as will be discussed herein in other sections since the ALJ did not do so. It is pertinent to the matters at hand for various reasons. First, due to the obvious attempts by Respondents, as has been demonstrated, to obfuscate information requested in discovery, this is a case which requires Complainants' allegations to be proven by circumstantial evidence. Credibility is a critical issue in this case, and no consideration was given to this by the ALJ. Due to the nature of this proceeding, consisting mainly of written testimony, the prior acts relating to the Immigration incident are first probative of the close personal/business relationship between

Cuneyt Karadagli and Barsan Int'l which demonstrates Barsan Int'l's interest to have Impexia succeed. Complainants submit that the Immigration incident underscoring the personal/business relationship between Cuneyt Karadagli, President of Impexia, and Barsan Int'l would make it more probable that Barsan Int'l had a bigger interest in Impexia's success than just as a carrier to shipper, and that it clearly desired Impexia to succeed in its business endeavors, even though Respondents repeatedly deny this. Notwithstanding Mr. Karadgli's statements wherein he attempts to distance himself from Barsan, by stating that Impexia last used Barsan's services in November, 2010 (Impexia App. 004-005), the ALJ finds that Impexia's business was derived from the so-called marketing letters which were issued in December, 2010 and January, 2011 (Impexia APP 042-050), dates clearly after November, 2010. In those letters Mr. Karadagli makes the following statement: "Since we have contracts with DHL Global Forwarding, National Air Cargo, Barsan Global Logistics to those geographies we are able to quote very aggressively time wise & financial wise." Emphasis supplied. Again, Mr. Karadagli is lying but it is difficult to ascertain from these inconsistencies whether he was lying to his potential customers or the Commission in his affidavit. In the Karadagli declaration he states that he terminated doing business with Barsan in November, 2010, and in December, 2010 and January, 2011, he is promoting his business relationship with Barsan Respondents. The ALJ had no problem with these inconsistencies, and gave Mr. Karadagli and Barsan the benefit of the doubt over and over again.

It is Complainants' contention, based on the circumstantial record, that Impexia's business plan included Barsan's full participation, completely contrary to the position taken by Respondents only after Complainants approached the owner of Barsan Global Logistics in Turkey about their suspicions that information was being disclosed. It is Complainants' view

supported by the record that this is a fact which is more likely than not. At this meeting the owner of Barsan Global Logistics even offered to settle the matter. *See* Baris Devrim Bal, Affidavit, ¶ 26, AFI/DNB App. 2227-2236.

The marketing letters to customers show that the business plan included Barsan's favorable ocean contracts, as well as favorable DHL Global Forwarding, and National Air Cargo contracts. This explains the e-mail dated November 23, 2010, wherein Burcin Karadagli states that Sevgi Cebe, Barsan's Vice-President, will negotiate favorable ocean and air transportation rates for Impexia. BAR009798 (AFI/DNB App. 2277-2278). It should be noted that Burcin Karadagli advised Cuneyt Karadagli that she would forward whatever he needed to Sevgi Cebe, and Ugur Aksu, and that all of them would try to increase that traffic. Please note that the traffic referred to was to Afghanistan, a trade area which had never been handled by Barsan Respondents until AFI/DNB became their customer. During this period of time, Impexia was using Barsan Int'l's address which was in Cuneyt Karadagli's signature section of his e-mails. Also on November 23, 2010, Burcin Karadagli emailed Cuneyt Karadagli advising that Sevgi Cebe would attempt to obtain best pricing for Afghanistan and Dubai air and ocean shipments and that Barsan Int'l would do whatever was necessary for Impexia. (BAR010165 (AFI/DNB App. 2279-2280)). The intention for Barsan Int'l to assist Impexia in a competing market with AFI/DNB was clearly communicated. In the meantime AFI/DNB's commercial information freely flowed from Barsan Int'l to Impexia. The ALJ never considers any of this when reaching facile benign conclusions on the events described herein. *See* Complainants' Motion for Submission of Supplemental Evidence at 14.

However, again going to the credibility issue, the ALJ failed to note that Impexia and Barsan had initially failed to provide discovery, and when they did provide it after a Motion to

Compel, e-mails were provided but one in particular indicated clearly that the Barsan/Impexia Respondents manipulated the translations so that the Barsan name did not appear in the translation. AFI/DNB App. 339-341. AFI/DNB App. 341 is an e-mail which Cuneyt Karadagli sent to gulsen.ozdemir@emtains.com, Subject: Procurement from USA to Afghanistan, Iraq, Pakistan and Turkey, Dated December 8, 2010. The original e-mail was in Turkish. AFI/DNB App. 340 is the corresponding English translation which omitted reference to Barsan Global Logistik. (Exhibit 15 to Cuneyt Karadagli's Declaration in Support of Motion to Dismiss (AFI/DNB App. 340)). The incorrect translation in the pertinent part states:

“For air transportations we work with DHL Global Forwarding and National Air Cargo, while for ocean and inland freights we have advantageous contracts for regions we operate in.” (AFI/DNB 340)).

The correct translation should have been:

“We have price advantageous contracts with DHL Global Forwarding and National Air Cargo for air transportation and with Barsan Global Logistics² for ocean and land transportation for regions we operate in.” (AFI/DNB App.2322). It is telling that the reference to Barsan was completely omitted in the translation provided by Impexia. Given the credibility issues which permeate this case, it was a clear error by the ALJ to routinely accept all representations at face value which emanated from the Impexia and Barsan Respondents. *See* Complainants' Motion for Submission of Supplemental Evidence at 21-22.

In this context, and given all the other circumstantial and direct evidence in this case, it is reasonable to conclude that Respondent Impexia intentionally altered the e-mail translations. It is difficult to conclude that a translator would omit a reference to a Barsan company in the

² The Commission web-site electronic files do not show that Barsan Global Logistics was either a licensed or registered NVOCC; the only Barsan company licensed was Barsan Int'l; therefore, this reference is actually to services to be provided by Barsan Int'l.

translation. The more reasonable conclusion is that Impexia wished to put distance between Impexia and Barsan so that the Burcin Karadagli communications could not be imputed to Barsan Respondents, in particular when the record shows that both Burcin and Cuneyt Karadagli executed an indemnification agreement in favor of the Barsan Respondents. Additionally, Barsan's complicity with Impexia is underscored by this e-mail, denied by the Respondents, and ignored completely by the ALJ. Advantageous contracts with NVOCCs are not casual occurrences in this industry. There is implicit in this type of arrangement that the parties were well aware of each other's capabilities, business plans, and objectives.

Again, the ALJ failed to consider these facts, and to apply any meaningful credibility test to these parties which the record shows they were consistent liars. The ALJ only focused on the marketing letters to conclude that these were the reasons for Impexia's miraculous success, and missed the obvious evidence that the letters evidenced a strong on-going connection between Impexia and Barsan, and that they were inconsistent with other statements made by Respondents.

This evidence goes to the final fact to be proved in this case that Barsan Int'l, in order to ensure Impexia's success, would become either directly or indirectly through Burcin Karadagli a knowing and willing participant in disclosing Complainants' business information protected by the Shipping Act of 1998, as amended. Equally important, is the fact that the ALJ gave full credibility to statements made by Cuneyt Karadagli and Ugur Aksu, without any consideration to the moral fiber of these individuals and their propensity to make statements, whether true or not, to achieve their commercial goals. This extrinsic evidence is permissible for purposes of establishing a witness's character for untruthfulness. *See* FRE, Rule 608.

The case at hand involves the same lack of integrity as demonstrated by the Immigration statements of untruthfulness uttered by the Impexia and Barsan Respondents. Respondents in this case found it convenient to unlawfully misuse proprietary information generated by Complainants' ocean and air shipments handled by the Barsan Respondents for the benefit of all Respondents, and then have the temerity to deny this even though all evidence circumstantially points in that direction. All of the Respondents' statements and averments made by Cuneyt Karadagli, and Ugur Aksu denying these acts should have been weighed as to their truthfulness or untruthfulness by the ALJ which was not evidenced in the ID. Complainants hereby request that the Commission upon reviewing the ALJ's ID take this credibility factor into consideration since the ALJ ignored it completely. Lying to federal agencies should not be so lightly considered.

III. The ALJ Erred by Failing to Properly Address the Issue of Jurisdiction in the Circumstance Where Information Tendered to Barsan was for Both Ocean and Air Transport, and the ALJ Further Erred by Mis-characterizing Ocean Shipments for Air Shipments.

In addressing the issue raised by Respondent Barsan that the Commission lacked jurisdiction over the subject matter in that the information provided to Impexia by Burcin Karadagli ("Burcin"), a senior manager of Barsan, the ALJ determined that 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 (AFI/DNB App. 482-488) was protected by section 10(b)(13) without reservations. ID at 65.

The ALJ facilely reaches the conclusion that "for purposes of this decision" Burcin did provide protected information pursuant to section 10 (b) (13) to Impexia in 2009, and that the air information provided in 2009 was sufficiently related to Complainants' shipments by water. The ALJ stated:

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 2, 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). ID at 66.

The ALJ states that in view of his decision to be given in this case, he does not have to answer "these questions." "These questions" related to his immediate prior discussion which dealt with the basic issues of whether air shipments under any circumstance would cause a jurisdiction problem under section 10(b) (13). What would obviously appear to be a positive outcome to Complainants in the above holding by the ALJ, the outcome is clearly qualified by the introductory phrase, "Given the ultimate resolution of this proceeding. . . .", and "[f]or purposes of this decision I assume. . . ." that the air transport information provided by Burcin to Impexia was protected by section 10 (b) (13). Obviously, the ALJ already knew where it was taking this "ultimate resolution", and anything posited by Complainants with regard to jurisdiction would, in fact, become moot and of no consequence, and was completely disregarded. Therefore, Complainants request that the Commission deal directly with the jurisdiction issue since an "assumption" by an ALJ is of little legal consequence, especially since Complainants have severe reservations as to "the ultimate resolution of this proceeding" as it was ultimately resolved by the ALJ. It is Complainants' position that the ALJ erred in not reaching a decision on this threshold question, notwithstanding what the ALJ thought the ultimate resolution would be. In that regard we summarize our prior position on this point which was raised extensively in Complainants Brief and Reply to Barsan Respondents' Opposition to Complainants' Brief. *See* Complainants' Brief at 8-13; Complainants' Reply to Barsan Respondents' Opposition to

Complainants' Brief at 11-16. Additionally, this discussion will underscore errors of fact detrimental to Complainants made by the ALJ in reaching his conclusions.

Before presenting a summary of the Complainants' position on jurisdiction to the Commission, Complainants submit that the ID contains factual errors because the ALJ finds that the February 22, 2011 e-mail, (AFI/DNB App. 482-488) is the only disclosure of protected information which is an ocean shipment. *See* ID at 65. The ID fails to find that the disclosures made on April 29, 2009 (AFI/DNB App. 387-405) and June 26, 2009 (AFI/DNB App. 458-481), also involved information on ocean shipments.

As to Burcin Karadagli's April 29, 2009, disclosure, the ALJ finds the kind of information protected by section 10(b)(13), but finds that the cargo was transported by air, not water. ID at 60. Complainants contended:

IMPEXIA00083---00100, includes an e-mail demonstrating that on April 29, 2009, 5:27 PM, Burcin Kradagli forwarded AFI/DNB's Ocean Shipment information to Jimmy Karadagli, with proprietary products and supplier information (Suppliers: Grainger, Franklin Electric Co.). (AFI/DNB App. 387-405)." Complainants' Brief at 15. The subject email Burcin Karadagli forwarded to Cuneyt Karadagli on April 29, 2009 is sent from Isik Onur of Barsan Int'l to AFI. (AFI/DNB App. 387 with the attachments (AFI/DNB388-405).

The e-mail forwarded was copied below:

Hello Ms Handan,

Attached, please find the onhand information of the freight having arrived at our warehouse today.

I suppose that you will instruct a full container delivery from Mersin next week, on the spreadsheet Istanbul Ocean appears, too.

Will there be any deliveries by Istanbul Ocean forthcoming, the Istanbul Ocean freight appearing on the spreadsheet may be delivered on partial basis, can you inform us pleased?

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. 387).

The ALJ finds that one page of the attachment is a copy of check to CMA-CGM for maritime container DVRU1325493 (AFI/DNB App. 394). ID at 60. This email disclosed with the attachments further proves Complainants' position that Barsan Int'l handled AFI/DNB's ocean and air shipments. The information disclosed from ocean or air cannot be separated as will be discussed herein. Therefore, the ocean shipments and air shipments must be considered together. More importantly, this email refers to the spreadsheet (AFI/DNB App. 2119-2132). (AFI/DNB App. 2119-2162) is a database shared with the Barsan Int'l Respondents. *See* Devrim Bal Affidavit ¶, AFI/DNB App. 2228-2230)³. These officers and staff had access to this spreadsheet which contained detailed information for both air and ocean shipments related to suppliers, product descriptions, and AFI Catalogue numbers shared with Barsan Int'l. The information for both air and ocean was crisscrossed to develop products and services destined for particular destinations, projects and overseas customers. *See* Complainants' Brief at 9. Notwithstanding that these documents refer to both air and ocean, the ALJ found that the documents referenced only air, and that the e-mail itself did not contain any protected information. However, the above noted email, packing lists and invoice clearly connected specific products to specific suppliers with which Complainants dealt for both ocean and air shipments. (AFI/DNB387-405).

The emails and attachments disclosed on June 26 2009 are also ocean shipments. (AFI/DNB App. 458-481). The ALJ finds the information, including Barsan Int'l bills of lading and DNB's commercial invoices disclosed, is protected by section 10(b)(13), but does not mention whether it is shipped by ocean. ID at 63-64, while throughout the ID the ALJ is eager

³ AFI/DNB App. 2119-2132 are hard copies of the data base/spreadsheet. Complainants hereby re-submit the Excel spreadsheet in its original electronic format.

to point out the air shipments. In addition, the ALJ notices that Pages 459-478 do not involve DNB/AFI shipments. ID at 63. Those attachments are Barsan Int'l's other shippers' information included in a Barsan ocean consolidation. What is of note here is that the ALJ, while very emphatic throughout the ID in pointing out that certain examples were air shipments, he makes no mention of the fact that this material provided by Barsan to Impexia involved ocean shipments. The other point made by the ALJ which is worthy of mention is that the information involved other shippers' protected information as well. What the ALJ did not conclude, which begs to be found, is that this is now an established pattern by Barsan of providing shipper protected information to Impexia. In a circumstantial case this is an important conclusion since, as is the case here, Respondents were not forthcoming in discovery, and the information they provided is sketchy at best. However, in a circumstantial sense, the very fact that information was being routinely passed on to Impexia is significant, whether it is air or ocean, and whether or not all of this information pertained only to Complainants. The important conclusion is that Barsan⁴ was involved in this process with Impexia, and this process included Complainants' protected information. Complainants shall address in more detail the legal consequences of the protected information submitted by Barsan, but at this juncture it is the intent to solely deal with the jurisdiction issue of the transactions in question being both air and ocean shipments.

As provided in detail in Complainants' Brief, which the ALJ did not consider at all, is the fact that air shipments comprise some of the transactions during the period in question. It is also clear that ocean shipments were accomplished during the same period to the same projects

⁴ While the ALJ has taken great pains to identify the purveyor of this protected information as Burcin Karadagli as an individual, it is Complainants' objective herein in this brief to demonstrate that Burcin's acts are attributable to Barsan and were knowingly undertaken by Barsan pursuant to the Commission's standards in imputing knowledge to a regulated entity. See Section V herein.

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

Complainants submit that the ocean/air distinction does not make a difference since the marketing picture created by Barsan and Impexia from Complainants' information and documentation is really a composite of information from both air and ocean shipments. There were basically three scenarios which generated both air and ocean shipments, but which only together would form the basis from which Impexia could implement its unlawful activities. (*See Devrim Bal, Affidavit, AFI/DNB App. 2228-2230*). These scenarios were:

Scenario 1: AFI/DNB would send a shipment containing product samples (for example, lighting fixtures) directly to its customer by air, identifying the customer by name. Then, upon product review and approval, Complainants organized a larger ocean shipment from DNB to GMG DIS TICARET LTD STI ("GMG"), a related company in Turkey, to be sold to its customer in Afghanistan or Iraq. Therefore, Barsan Int'l/Impexia could correlate that the products which were shipped by ocean to GMG were, in fact, to be sold and shipped to the same customer identified in a corresponding air waybill shipping the identical products but which included specific customer, project, contact person, and contact information. Therefore, between the more complete product, including pricing and manufacturer/catalogue information identified in the ocean shipments to GMG, Barsan/Impexia could identify the buyer of said products from the sample shipments on the air waybills. Therefore, the composite information obtained from both the ocean and air shipments became the whole picture for a party wishing to emulate Complainants' business. The information on each of the ocean and air bills of lading and shipping documents were, therefore, necessary for Impexia to form its marketing strategy and enter a field that would have taken years to penetrate.

Scenario 2: Complainants would send a container load of products (for example, lighting fixtures) by ocean to GMG, Complainants' related company in Turkey, for sale to a project in Afghanistan. Then it could happen that Complainants were informed by their customer that some materials were damaged during shipment and they desperately needed replacements for damaged items. Then, an air shipment would be organized through Barsan Int'l directly to AFI/DNB's customer. Again Barsan/Impexia could easily determine what products went to what customers by correlating the information on both air and ocean shipments.

Scenario 3: When a project was late, Complainants would require that Barsan Int'l officers split the material into two separate shipments (one shipment by air and the remainder by ocean). The air shipment was sent directly to Complainant's customer at the job site in Afghanistan or Iraq so that while the construction workers were occupied installing the first part of the material, the remainder could get to the site by ocean to save money on shipping costs. Again, this was a method by which Barsan/Impexia could create through the related air/ocean transactions composite pictures of suppliers, products, catalogue descriptions, projects, customers, and on-site customer contract information.

See Complainants' Brief at 10-11.

In support of the above scenarios, Complainants submitted examples of Shipper's Letter of Instructions for shipments related to the above scenarios directed to the following consignees by either air couriers or air carriers to Afghanistan and Iraq which disclose Customer names, project identification, contact person, contact information, and products shipped, and pricing: (AFI/DNB App.1376, 1389,1430,1448, 1468). Complainants also submitted examples of ocean shipments consigned to GMG (ocean bills of lading and commercial invoices) wherein the products are described in detail, including catalogue numbers for the products shipped: (AFI/DNB App. 1234-1236, 1237-1240, 1248-1250, 1254-1256,1280-1282). *See Complainants' Brief at 8-13.* The point is that the ALJ did not consider this information at all in his review of either the ocean/air jurisdiction issue, or for that matter, when considering the circumstantial evidence in this case. The latter will be subsequently discussed.

Complainants hereby request that the Commission find that it has jurisdiction to consider air and ocean shipments with regard to 46 USC §41103 when, as is the case here, the information disclosed involves both modes of transport to the same customers and the composite of

information from the documentation of both modes of transport complement to provide a complete picture of the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to Barsan.

IV. The ALJ has Erroneously Found That The Preponderance of The Evidence Burden was Not Met by Complainants Against Barsan Through Persuasive Circumstantial Evidence.

One only needs to juxtapose a sequence of events, which the ALJ did not do, to easily conclude that events that followed from one seminal event, and subsequent disclosures of information, circumstantially result in reasonable conclusions that Impexia received information protected by 46 USC §41103 from Barsan.

The ALJ repeatedly takes isolated facts, for example, in the above cited material relating to Ugur Aksu's lying to the U.S. Immigration and Naturalization Service, and in litany fashion ends it with the cant: "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).**" ID at 82. Emphasis supplied. Of course, it does not. The ALJ takes each singular strand of facts presented by Complainants, and makes the same robotic conclusion throughout the ID. However, the ALJ never considers the record as a whole, as the law requires, to determine whether a case was sufficiently presented by circumstantial evidence by Complainants to meet the preponderance of the evidence standard. In other words, the ALJ never properly reviewed the case from a circumstantial evidence perspective. This is error.

For starters, it is important to note the reasons for having to deal with this case on a circumstantial evidence basis. After the Complainants' opening Brief was filed, it became evident from late-filed evidence by the Barsan Respondents that many anomalies existed in the discovery provided. The following is pertinent:

1) Certain e-mails appear to have been altered. See BAR012879 (AFI/DNB App. 2264), and BAR015086 (AFI/DNB App. 2265);

2) The material lacks all metadata, even though repeatedly requested, so it is impossible, among other things, to see who is included in the dissemination of e-mails and documents, a key issue in this case;

3) No attachments were produced with some of the e-mails where attachments were indicated;

4) In some cases the bates stamp numbers of Respondents' production are skipped; for instance, the bates stamp numbers from BAR009891 to BAR009920 are missing;

5) Cuneyt Karadagli and other Barsan's officers communicated via e-mails all the time discussing setting up/dissolving a company, immigration issues, working conditions, etc.; however, there are no e-mails related to setting up Impexia or any of Barsan officers' commentary of any sort when Cuneyt Karadagli all of a sudden goes from a failed business man to a major success in a highly technical industry. This could possibly mean that many of the missing e-mails relate directly to this topic;

6) The documents produced on April 3, 2013, as late-filed discovery after repeated requests by Complainants, lack normal and consistent sequencing. For example, sometimes there are 10-15 e-mails on a certain day, and that trend continues for a couple of days, and suddenly there are 10-15 days with no communications whatsoever; this is clearly not normal.

See Complainants' Motion for Submission of Supplemental Evidence at 19-20.

As indicated in the above section, it is apparent that Barsan Respondents altered the e-mails before producing them, or in the case of attachments, just flatly refused to produce them. As noted above, the two e-mails with the bates stamp numbers BAR012879 (AFI/DNB App. 2264) and BAR015086 (AFI/DNB App. 2265) respectively should have been identical. However, Barsan's Int'l President, Ugur Aksu was deleted from the Cc line on the e-mail (BAR012879) (AFI/DNB App. 2264). It can be reasonably inferred that Barsan's Int'l had some interest in the House of Water and intentionally concealed this fact when producing the said e-mail.

There were several e-mails containing attachments but no attachments were produced or the e-mails did not have any content. For example, the e-mail sent from Cuneyt Karadagli to

Burcin Kardagli dated January 13, 2011, Subject: Barsan Document, but no document was produced. (BAR009138 (AFI/DNB App. 2310)), and the e-mail was empty of content. The e-mail dated February 12, 2009, Subject: Contract, but no contract was produced and no content is in the e-mail. BAR010053 is an e-mail dated April 11, 2011, Subject: FW. (AFI/DNB App. 2311). This e-mail is empty. Given that this date is one immediately after Complainants gave notice to Barsan Respondents' owner in Turkey of their suspicions of their unlawful act, this e-mail should contain some critical contents. But nothing was produced.

The e-mails between Ugur Aksu and Burcin Karadagli dated January 17 and 18, 2011 respectively, contained the following: a) Subject: David Frenkel Invoices, discussing some payment arrangements with Frenkel Immigration Lawyers and; b) that Barsan Int'l would make three payments to the lawyer in January, February and March respectively for the total amount of \$3,500. (BAR009050 and 009051 (AFI/DNB App. 2260-2263)). There was a reference to the invoice as an attachment to the e-mail from Burcin Karadagli to Ugur Aksu dated January 17, 2011, but no invoice was produced. (BAR009051 (AFI/DNB App. 2261, 2263)).

In addition, Barsan Respondents' documents bate stamp numbers did not correspond to the name, i.e. the starting page number, and are confusing and misleading. For example, the documents referred to above, BAR009491-009495 (AFI/DNB App.2315-2319)), are located in the actual file name BAR009267.pdf pages 225. *See* Complainants' Motion for Submission of Supplemental Evidence at 19-21.

In any case, due to the nature and paucity of documentation provided by Respondents, and the fact that certain Respondents are given to misrepresent facts, this is a case which can only be viewed through circumstantial evidence. Complainants have provided ample circumstantial evidence which relate to the elements of the subject violations.

The beginning of the violation period. The initial trumpet blast that trouble was brewing provided by Barsan (Burcin) to Impexia was by e-mail dated February 2, 2009 stating that: “<http://dnbexports.com/> THE WEB SITE OF OUR NEW CUSTOMER” (AFI/DNB App. 378-379) with AFI/DNB’s proforma invoice attached. Then to complete the full introduction, Burcin on April 29, 2009 by e-mail states: “**The Company AFI which I had mentioned is known as AFI Elektrik.**” (AFI/DNB App. 387). These are the dates which commemorate the germination of the Impexia seed, although Impexia was not to be formed until March, 2010, well after there was ample opportunity to create the full picture of Complainants’ activities flowing through Barsan. These dates mark the beginning of the flow of information from Barsan to Impexia that results in Impexia achieving successes where successes had been previously elusive to the principal of Impexia, Cuneyt Karadagli, while involved in other failed businesses. Barsan was well aware of these failures since Cuneyt Karadagli’s companies were well in arrears with Barsan on warehouse and other charges.

It is important to provide the status of Mr. Cuneyt Karadagli’s business effort immediately preceding those dates (February 2, 2009 and April 29, 2009). Prior to these dates, Mr. Cuneyt Karadagli was clearly in a bad financial situation. Before Impexia was set up in March, 2010, Mr. Karadagli describes his prior business experience, which is summarized as follows:

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

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

Again, the following unfortunate undisputed facts which the ALJ ignored underscore that Mr. Cuneyt Karadagli's financial fortunes with his prior endeavors were on the verge of collapse by March, 2010, the date Impexia was established, and these facts undermine conclusions made by the ALJ with regard to various important points which will be discussed herein. The following documents and information illustrate the precarious financial status of Mr. Karadagli's business life at that time. Further, this financial status was well known to Barsan (which will be discussed later herein when discussing Barsan's "knowledge" element in the violations subject of this proceeding). Finally, more importantly, at this time Mr. Karadagli's financial status undermines the ALJ's conclusion that Impexia's successes were attributable to Impexia claims of long standing relationships as the reason for its obtaining that business. The following facts, not considered by the ALJ, while are personal to some degree, are nevertheless necessary to discuss, to properly analyze the various issues in this case, especially with regard to circumstantial evidence issues, which the ALJ did not do:

- a. BAR002057 shows that before Impexia was set up, Mr. Karadagli's previous companies made a monthly payment in the amount of \$100 to Barsan to retire a long existing debt. (AFI/DNB App. 710).
- b. BAR002144, is an email of October 14, 2009, indicating that it was difficult for Source Concept, one of Mr. Karadagli's previous company, to pay \$350 to Barsan Int'l. (AFI/DNB App. 711-714).
- c. BAR002146, is an email of May 22, 2009, indicating that Source Concept, one of Mr. Karadagli's companies would deposit \$100 each Friday and that Source Concept had a problem in the deposit of a \$200 check. (AFI/DNB App. 715-718).
- d. BAR002161, is an email of May 14, 2009 from Urgur Aksu, Barsan's President to Burcin Karadagli, demonstrating that Source Concept had not made any payment to Barsan Int'l for more than a year. (AFI/DNB App. 719-758).
- e. BAR002221 is an email of February 10, 2009, indicating that Burcin Karadagli would pay \$100 every month from her paychecks to Barsan Int'l for her husband's companies' outstanding debts. (AFI/DNB App. 759-760).

f. BAR002225 is an email of August 17, 2009, showing that Mr. and Mrs. Karadagli faced some problems with payments of a car insurance and lease. (AFI/DNB App. 761-762).

g. BAR002960 is an email dated May 18, 2010, indicating that Mr. and Mrs. Karadagli could not pay \$150 school fees for their children. (AFI/DNB App. 763-770).

h. BARSAN000027, demonstrates that Barsan Int'l had an interest in Impexia's success in that Impexia was the only one of Mr. Karadagli's undertakings with Barsan that was paying off. Only after Impexia was started in March, 2010, was Barsan Int'l paid other than token amounts by House of Water and Source Concept, and by May, 2011, all invoices had been paid off. Barsan Int'l's monetary interest in the successes of Impexia is clear. (AFI/DNB App. 642-644)). This point will be discussed again, as noted above, during the "knowing" element discussion relating to Barsan's violation of 46 USC §41103.
See Complainants' Brief at 28-29.

Central to the ALJ's analysis that Impexia's hard work and clever business model was the source of its successes, is the ALJ's reliance on various Affidavits provided by or obtained by Mr. Karadagli to bolster his dubious rationale for his claims of success. The ALJ states:

"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). . . ." ID at 72.

The ALJ relies on a declaration provided by Impexia from a former business development manager identified above for the above conclusion as to how Impexia acquired business from 77 Construction, a long time customer of Complainants. The ALJ states as a basis for his conclusion that "the former business development manager for 77 Construction states that he has known Cuneyt Karadagli since 2001." Impexia App. at 15-16. ID at 70.

The real question which the ALJ never bothered to ask was why Cuneyt Karadagli, with such a wonderful connection, and such dire economic need since early in 2009, did not seek business until June, 2010 from this long-time acquaintance employed at 77 Construction. The salient fact is that this wonderful reunion did not occur until after the beginning of the receipt of

AFI/DNB's business information which commenced on those fateful days of February 2, 2009/February 27, 2009/April 29, 2009, when the current of information began to flow to Mr. Cuneyt Karadagli, which became the basis for the formation of Impexia, and surely the catalyst for contacting that old acquaintance. The most likely conclusion would then be that Mr. Karadagli at that early date may have known where his long-time acquaintance was employed, but had not yet received the vital information necessary from Barsan (AFI/DNB's information) that would link that acquaintance to this new opportunity. The ALJ too readily embraced the Impexia rationale without questioning the timing of the contact with the old acquaintance. In view of the dire economic circumstances of Mr. Karadagli's companies and personal finances from May, 2009, and perhaps earlier, until June, 2010, a logical question which the ALJ did not bother to ask was why Mr. Karadagli had not sought business from this acquaintance at 77 Construction until June, 2010. In view of the flow of information from Barsan from early 2009 until February 22, 2011 which is in the record as direct evidence, it can easily be concluded that Mr. Karadagli could not undertake a coherent reunion with this long-time acquaintance, no matter what his financial needs were, until he had been sufficiently exposed to AFI/DNB's business model and the specifics of that model---i.e., the information protected by 46 USC §41103. See below when AFI shipped 77 Construction materials through Barsan to support the conclusion circumstantially that Impexia did not know enough to contact his old acquaintance until AFI provided that information to Barsan. Therefore, the timing demonstrates that it is more likely than not that Impexia's access to protected information/material relating to 77 Construction was what triggered the long overdue reunion between Cuneyt Karadagli and his acquaintance at that firm.

The following are summaries of the ALJ's findings based on Affidavits provided by Cuneyt Karadagli from various individuals from companies from which Impexia allegedly obtained business, which were Complainants' clients which had been previously serviced through Barsan. It is clear from the review of these that the ALJ arbitrarily, without any review and consideration of circumstantial evidence, found that "[t]he evidence in the record does not support DNB/AFI's contention that Impexia learned about (name of company) from information unlawfully disclosed by Barsan Int'l." The ALJ's customary cant was again stamped on the ID without consideration of the circumstantial evidence that would rationally lead to a different conclusion. The following is pertinent:

77 Insaat (77 Construction) As noted above, the former business development manager for 77 Construction states that he has known Cuneyt Karadagli since 2001 and that he requested quotes from Impexia for various products for 77 Construction projects at Camp Bastion beginning in June, 2010. *See ID.* at 70.

Complainants' Comments. In addition to AFI/DNB's aforementioned positions regarding 77 Construction, it should also be noted that AFI/DNB had provided in depth information (protected information) on this customer for multiple shipments via Shippers Letter of Instructions/other shipping documents (AFI/ DNB App. 1376, 1412, 1413,1437,1438,1505) with detailed information on the customer prior to June, 2010, the date that the former business development manager for 77 Constructions alleged that he requested quotes from Impexia for various products relating to projects at Camp Bastion in Afghanistan. While the above information was provided to Barsan prior to June, 2010, protected information continued to be provided to Barsan after that date. Therefore, it is more likely than not, considering the clear record that has been established of Barsan providing information and documents of Complainants' customers, that Barsan provided protected information to Impexia related to this customer prior to Impexia contacting this firm, as well as after that date.

Metag. Mr. Guney Guner provided an affidavit that he only learned of Impexia after July, 2010, after he was employed, through a chain of e-mails provided to him without further explanation of the content of the e-mails. Impexia App. at 29. See ID at 69-70.

Complainants' Comments. AFI/DNB had provided in depth protected information on this customer for multiple shipments via Shippers Letter of Instructions/other shipping documents (AFI/ DNB App.1386,1387,1442,1443,1469,1470,1498,1499,1543,1544, 1426, 1427, 1452, 1454,1471,1527,1532,1533,1535,1536,1541) with detailed information on the customer prior to July, 2010, the date that Mr. Guner became aware of Impexia, and continuing after that date. Therefore, it is more likely than not, considering the clear record that has been established of Barsan providing information and documents of Complainants' customers, that Barsan provided protected information to Impexia related to this customer. The ALJ never reviewed or considered this convincing circumstantial evidence that it was more likely than not that Impexia became aware of this customer and its special requirements from the information received from Barsan.

Feka Ins. 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 that have done jobs for the US DoD." Impexia App. at 50. ID. at 70. Impexia App. 50 is an email sent from Cuneyt Karadagli to Feka dated January 31, 2011.

Complainants' Comments. AFI/DNB had provided in depth information on this customer for multiple shipments via Shippers Letter of Instructions/other shipping documents (AFI/ DNB App. 1378, 1379, 1381, 1382, 1384,1385, 1392, 1395, 1396,1398, 1399, 1415, 1418, 1419) with detailed information on the customer prior to January 31, 2011, the date that Cuneyt Karadagli alleged that he sent the solicitation email to Feka. Therefore, it is more likely than not, considering the clear record that has been established of Barsan providing protected information and documents of Complainants' customers, that Barsan provided protected information to Impexia related to this customer. Impexia has taken a somewhat tenuous route in explaining its

marketing plan as a web based attack on these companies, most of which are Complainants' customers which upon review demonstrates that it is not likely that Impexia in reality utilized this web-based process. *See* Section V herein, "3. **The ALJ Fails to Address the Fluid Website Explanations.** Again, the ALJ failed to apply any credibility standard to statements from Cuneyt Karadagli as required based on the credibility issues raised by the U.S. Immigration and Naturalization Service incident and others previously discussed.

Ayken ELK. In an affidavit supplied by Impexia, an Ayken electrical engineer states that Ayken learned about Impexia from Cakmaklar Pano. Impexia App. at 21. ID at 71.

Complainants' Comments. Ayken is a subcontractor of Yenigun Ins. AFI/DNB had provided in depth information on this customer through Yenigun Ins. for multiple shipments via Shippers Letter of Instructions/other shipping documents with detailed information on the customer prior to March, 2010, the date that Impexia was set up. *See* discussion below on Yenigun. Therefore, it is more likely than not considering the clear record that has been established of Barsan providing information and documents of Complainants' customers that Barsan provided protected information to Impexia related to this customer. *See* the below discussion of Yenigun Ins.

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. ID. at 71.

Complainants' Comments. AFI/DNB had provided in depth information on this customer for multiple shipments via Shippers Letter of Instructions/other shipping documents (AFI/ DNB App.1389,1390,1421,1422,1448,1479,1480,1482,1484,1490,1494,1500,1501,1502, 1507,1510,1519,1520,1530,1531,1534,1539,1540,1545,1546) with detailed information on the customer prior to March 2010, the date that Impexia was set up and continuing after that date. Therefore, it is more likely than not considering the clear record that has been established of

Barsan providing information and documents of Complainants' customers that Barsan provided protected information to Impexia related to this customer.

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. (DNB/AFI Supp. App. at 2325-2326.) ID at 71.

Complainants' Comments. As the owner of Delta Om Muh stated, Delta Om Muh is a subcontractor for Metag. AFI/DNB had provided in depth information on this customer through Metag for multiple shipments via Shippers Letter of Instructions/other shipping documents with detailed information on the customer prior to the end of 2010, the date that Delta Om began receiving solicitations from Impexia. Therefore, it is more likely than not, considering the clear record that has been established of Barsan providing information and documents of Complainants' customers, that Barsan provided protected information to Impexia related to this customer.

In addition, the ALJ obstinately fails to consider the affidavit of the owner of Delta Om Company, Mr. Ekrem Benli, which describes how Impexia obtained those affidavits from its customers:

2 weeks ago I received an abrupt phone call from Mr. Cuneyt Karadagli asking me to sign a statement that he will dictate to me. I told him that I am surprised with his sudden call. He insisted that I certify that we have been introduced by Oktay Kasimoglu. When I told him that is not the case, he told me that it's not a big deal and I should just sign the documents that his lawyers drafted, because this is not an official document to be used in Turkey, it's just for use in USA there for there's nothing to worry about. Furthermore he told me that all other companies agreed to sign the document, so I might as well sign it. I felt uncomfortable with Cuneyt's persistence and refused to sign the affidavit. (Emphasis provided).

(Mr. Ekrem Benli Affidavit ¶15 (AFI/DNB App. 2325-2326))

The ALJ also very arbitrarily and capriciously fails to consider Impexia's allegation regarding how it started business with Delta but simply states that Impexia did not file an affidavit from Delta Om. Impexia in its Opposition to Complainants' Brief at 35, states: "Impexia secured business with Delta when Oktay Kasimoglu, an employee at Metag, passed on Impexia's information to his Delta company contact, Ilkay Gurel." Mr. Ekerm Benli's affidavit states that this was not true which further underscores that Respondent Impexia and its president, Cuneyt Karadagli, have complete disregard for the truth and the legal system of the United States. With Mr. Karadagli, everything appears to be about expediency rather than proper lawful business practices. Complainants' Reply to Respondent Impexia's Opposition to Complainants' Brief at 3-4. The ALJ missed this.

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. ID. at 71-72.

Complainants' Comments. Complainants included Ceytun as its customer in its Complaint and found Ceytun to be included in Impexia's customer list (AFI/DNB App. 489) and was included in Complainants' customer lists (AFI/DNB App. 490). *See* Complainants Brief at 12. In addition, the ALJ finds that 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. *See* ID at 54. The ALJ also notices that Complainants mentioned Ceytun in their damages section as the third example of an Impexia sale that DNB/AFI allege Impexia underbid DNB/AFI on a sale. *See* ID at 55. The ALJ also notes that in Complainants' Reply to Impexia's Opposition to Complainants' 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, but does not attribute any weight to this testimony. (DNB/AFI Reply to Impexia Brief at 5-10.) *See ID at 55.*

AFI/DNB had provided in depth information on this customer to Barsan for multiple shipments via Shippers Letter of Instructions/other shipping documents (AFI/ DNB App.1547, 1548,1552, 1553) with detailed information on the customer. Therefore, it is more likely than not, considering the clear record that has been established of Barsan providing information and documents of Complainants' customers that Barsan provided protected information to Impexia related to this customer.

Reasonable Inferences as to Disclosures. The ALJ completely ignored the legal consequences of circumstantial evidence. As the Complainants argued in their opening Brief, 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 2, 2009 date, the date that Barsan initially started providing Complainants' information to Mr. Cuneyt Karadagli, and March, 2011, the date when Complainants stopped utilizing Barsan, which resulted in the creation of a competitor predator feeding on Complainants customers. Circumstantial evidence has been defined as "that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present." *Paulino v. Harrison*, 542 F.3d 692, 700 n. 6 (9th Cir.2008) (quoting *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir.1950)); see also *United States v. McIntyre*, 997 F.2d 687, 702 n. 16 (10th Cir.1993); *Byrth v. United States*, 327 F.2d 917, 919-20 (8th Cir.1964), *cert. denied*, 377 U.S. 931, 84 S.Ct. 1333, 12 L.Ed.2d 295 (1964). Such evidence "requires an inferential step," *United States v. Ruiz*, 105 F.3d 1492, 1500 (1st Cir.1997), that is, a factual premise used to reason

deductively to a factual conclusion that represents a “preponderance of probabilities according to the common experience of mankind.” *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 74 (3d Cir.1996) (quoting *Bornstein v. Metro. Bottling Co.*, 26 N.J. 263, 139 A.2d 404, 411 (1958)); see also *United States v. Henderson*, 693 F.2d 1028, 1031 (11th Cir.1982). This inferential process distinguishes circumstantial evidence from mere speculation—the former yields a preponderant probability, the latter only a mere possibility. See *Fedorczyk*, 82 F.3d at 74; see also *Dept. of Econ. Dev. v. Arthur Andersen & Co.*, 924 F.Supp. 449, 474 (S.D.N.Y.1996) (“Circumstantial evidence is evidence that tends to prove a disputed fact whose existence follows inferentially from the existence of evidentiary facts; it is not merely evidence that is as consistent with the fact sought to be proved as with its opposite.”); see generally, Restatement (Second) of Torts § 433B (1965). See *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir.1991); *Williams v. Steuart Motor Co.*, 494 F.2d 1074, 1080 (D.C.Cir.1974) (breach “may be established by direct or circumstantial evidence or by a combination of the two kinds of evidence”); *Menovcik v. BASF Corp.*, 2010 WL 3518008, at (E.D.Mich. Sept. 8, 2010); *Platner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1994903, at *12 (N.D.Okla. May 18, 2010); *Rochester Midland Corp. v. Enerco Corp.*, 2009 WL 1561817, at *16 (W.D.Mich. June 1, 2009); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 2008 WL 2694750, at (S.D.Fla. July 8, 2008); see also *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1491 n. 7 (8th Cir.1992). See Complainants’ Brief at 18-20.

The Commission itself recently provided guidance on the usage of proper inferences under certain conditions which are appropriate to this case. The Commission’s Order Approving Initial Decision in Part, Reversing in Part, and Modifying in Part at FMC Docket 06-01, *Worldwide Relocations, Inc., et al.*-Possible violations of Sections 8, 10 and 19 of the Shipping

Act of 1984 and the Commission's Regulations at 46 C.F.R. 515.13, 515.21, and 520.3., Served March 15, 2012, applied that type of inference, and found it appropriate when there appears to be uniform evidence on one element for a given number of shipments for an entity but no evidence on that same element for a different shipment in a given time period. *Id.* at 12. This approach is applicable in this case, in that the ALJ concludes that disclosures were made of AFI/DNB's protected information for some shipments, but no evidence on that same element for different shipments in a given time period. Applying this rule to the subject proceeding, the reasonable inference should be that there were more disclosures by Barsan to Cuneyt Karadagli in that there appears to be uniform evidence on Barsan's disclosures for a given time period. The record is clear that protected information relating to AFI customers' transactions was provided from Barsan to Cuneyt Karadagli and Impexia in 2009, and again in February, 2011. The proper inference can follow that in a case such as this one, where, as has been demonstrated, Impexia ended up with a customer base substantially similar to AFI's, consistent with the circumstantial cases cited above that the inferences Complainants are seeking are proper and consistent with Commission case law. "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 Cmp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994). *See* ID at 7 and 8. However, while citing this case, the ALJ mysteriously failed to apply this rule to the subject proceeding.

In the case at hand, there are ample evidentiary facts (the "factual premises") from which inferences can be readily made that are probable (a "preponderance of probabilities"), and not merely possible, which meets the test of establishing circumstantial evidence as reasonable. The

two book ends previously discussed are direct evidence that Barsan Int'l commenced providing shipment and proprietary information in February, 2009, and the evidence herein further demonstrates that the disclosure activity continued through at least February, 2011. These "book-ends" provide the "inferential steps," that is, "the factual premises" which can be used to reason deductively to a factual conclusion that represents a "preponderance of probabilities according to the common experience of mankind" with regard to disclosures that occurred in the interim between those two sets of events in February, 2009 and February, 2011. The factual premise from which the inferences can flow is the ample demonstration on the record that Barsan did routinely disclose protected information to Impexia. The ALJ found as much, but only to the extent that this information was provided by Burcin Karadagli and cannot be imputed to Barsan. Complainants will address that issue in a subsequent section of these Exceptions to the Initial Decision.

The following is a discussion of further factual premises which are pertinent for purposes of additionally establishing a reasonable basis by which to reasonably infer certain facts relating to disclosures of vital information to Impexia and Barsan Int'l's participation in that process.

The most amazing fact is that a listing of Impexia's leading customers is a mirror image of Complainants' customers. As previously noted, this is an overwhelming coincidence that strains any credulous interpretation to the contrary. The client list provided by Impexia in discovery (AFI/DNB App. 489) lists nine (9) of Complainants' main customers, and the source for a large amount of the claimed damages. The amount generated by Impexia from sales to these AFI/DNB customers, from the inception of Impexia, March, 2010, through January 31, 2011, is \$3,842,475.85. See bank statements from Impexia which support this total at (Impexia Bank Statements from March 2010 to January 2012 (AFI/DNB App. 774-1024)). 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., Ceytun, and Delta OM Muh. 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 for which there is a factual basis to inferentially conclude that such disclosures were made based on the direct factual evidence that Barsan between February, 2009, and February, 2011, as the record clearly shows, did disclose this information to Cuneyt Kardagli and Impexia. To have us believe that this mirror image customer base is as a result of Cuneyt Karadagli's great skills as an entrepreneur is bending the inferential process to conclude a mere weak possibility rather than a very likely probability. It would be difficult to reasonably conclude from the facts in this case that the principals of Impexia could have overnight transported themselves from a business model of abject failure to eminent success in a field in which they had no experience, and whose customers substantially (admittedly, not completely) mirror the customers of Complainants. To best illustrate this graphically, one only has to think back that as late as May 18, 2010, Cuneyt Karadagli could not provide \$150 to pay for school fees for his children (BAR002960; AFI/DNB App. 763-770), and by 2011, Mr. Cuneyt Karadagli was expending \$3,000 for the jersey of a Turkish professional soccer player (AFI/DNB App772/773). One would have had to believe every self-serving word uttered by Ugur Aksu and Cuneyt Karadagli, and have completely ignored the credibility issues which are undisputed in this case, and have completely ignored credible and persuasive circumstantial evidence in this case to have reached those conclusions. In addition to not applying proper

credibility guidelines, the ALJ erred by not making a proper inquiry of the circumstantial evidence in this case which clearly indicates that the success of Impexia can only be gauged by the information made available from the shipping files maintained by Barsan for AFI's shipments. *See* Complainants' Brief at 21-30.

V. **The ALJ Erred By Misapplying a Corporate Agency Standard in the Analysis of Whether Burcin's Acts Should be Imputed to Barsan. Intl's Senior Manager's Acts are Imputed to Barsan Int'l as a Matter of Shipping Act Law, and Corporate Law; the ALJ Fails to Consider Commission Case Law for an Intermediary Regulated and Licensed by the Commission on the Element of Knowledge.**

The ALJ states: "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 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. ID at 53.

The ALJ then makes findings ostensibly based on the above corporate principles that Barsan Int'l did not knowingly disclose protected information. Basically, the ALJ is parking all blame on Burcin Karadagli's door step. The ALJ states:

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 e-mails. 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.* ID at 67.

We first note that the ALJ's analysis is not completely appropriate to be couched solely in terms of corporate agency law. We are not talking of Burcin Karadagli acquiring knowledge as the issue which is offensive. We are talking about receiving this knowledge of Complainants' business affairs and unlawfully disclosing that protected information to a competitor is violation of the Shipping Act. In this scenario, the question is not only an agency law or corporate question. The actual question, in the context of Commission regulations and underlying statutes is more akin to the issues as posited in the Commission "known" or "should have known" cases, discussed below, and in terms, of the "adverse interest" exception of apparent authority recently decided by the Commission in FMC Docket No. 09-01, *Mitsui O.S.K. Lines. Ltd. v. Globallink Logistics Inc., et al.* Order Adopting Initial Decision, served on January 30, 2014. In that case the Commission accepted the premise that "[a]s a general matter, the knowledge of an agent is imputed to its principal" as consistent with a comment to the RESTATEMENT (THIRD) OF AGENCY, that generally, "a principal is charged with notice of facts that an agent knows or has

reason to know.” The Commission further reviewed the adverse interest exception which states “that knowledge of an agent acquired in the course of the agency relationship is not imputed to the principal if the knowledge is acquired by the agent in a course of conduct that is entirely adverse to the principal.” Additionally, the Commission applied RESTATEMENT (THIRD) OF AGENCY § 5.03, Comment a. which provides that an agent generally must be found to have acted within the scope of his employment.” The Commission further reviewed and followed the principle that the acts of an agent who acts adversely to a principal pursuant to RESTATEMENT (THIRD) OF AGENCY § 5.04 may still be imputed to the principal. The RESTATEMENT (THIRD) OF AGENCY provides the following guidance concerning an agent acting adversely to a principal:

§ 5.04 An Agent Who Acts Adversely to a Principal

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

See FMC Docket 09-01 *Mitsui O.S.K. Lines. Ltd. v. Globalink Logistics Inc., et al.*, Order Adopting Initial Decision at 23-26, served on January 30, 2014.

The ALJ also fails to follow the Commission’s interpretation of “knowingly and willfully” in Shipping Act cases. The Commission has repeatedly interpreted “knowingly and willfully” relying on *United States v. Illinois Central Railroad Co.*, 303 US 239 (1938). In *Misclassification of Tissue Paper as Newsprint Paper*, 4 FMB 483 (1954), the Commission, citing the Supreme Court stated:

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

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

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

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

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

See Complainants’ Brief at 34 and 35.

It is Complainants’ contention that under either the corporate agent analysis or the “known or should have known” standards imposed on regulated ocean transportation intermediaries by the Shipping Act and the Commission’s regulations, the following facts support a finding that Barsan Int’l did knowingly disclose the information in the emails supplied by Burcin Karadagli to Cuneyt Karadagli, and that Burcin Karadagli was acting in Barsan’s interest when disclosing the protected information, and, if not, Barsan Int’l “ratified or knowingly retained a benefit from Burcin’s actions”; and, finally that Barsan knew or should have known that this information was being disclosed to the detriment of Complainants. The following is supportive of these conclusions:

1. It is clear that Burcin Karadagli was considered a senior manager within the Barsan framework with broad general authority in many areas of the Barsan enterprise for the following reasons:

a. Burcin Karadagli worked for Barsan Int'l 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.) ID at 14.

b. Burcin Karadagli was a senior person at Barsan Int'l. and held out to her peers as VP of Finance. See e-mail dated 3/9/2010, 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 .” (Email from Burcin Karadagli to Jimmy Karadagli, Dated March 9, 2010, Subject: I just sent her this e-mail (AFI/DNB App.2347-2348)). There is no repudiation of this by Sevgi Cebe. *See* Complainants’ Motion for Submission of Supplemental Evidence at 11-12; Complainants’ Reply to Respondent Impexia’s Opposition to Complainants’ Brief at 12-13; Complainants’ Reply to Barsan Respondents’ Opposition to Complainants’ Brief at 9.

c. Burcin Karadagli is also referred to as Accounting Manager, Registered Agent of Barsan Int'l’s Florida office, and as Human Resources manager (“HR Manager”). As the HR Manager, 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.” (Barsan Int'l Letter to United States Embassy Dated October 13, 2008, BAR010912 (AFI/DNB App. 2314)). It is apparent that Burcin Karadagli held out as a senior manager and an officer of Barsan or in any case held out as such to the world without contradiction from Barsan Int'l. *See* Complainants’ Motion for Submission of Supplemental Evidence at 12; Complainants’ Reply to Respondent Impexia’s Opposition to Complainants’ Brief at 18.

2. It is clear that Burcin Karadagli never abandoned Barsan’s interest when disclosing the protected information for the following reasons, and that Barsan implicitly ratified the disclosure process undertaken by Burcin Karadagli:

a) Impexia continued to ship cargo through Barsan from its inception until when it stopped dealing with Barsan presumably sometime in March, 2011, after Complainants met with Barsan Global Logistics in Turkey and complained about the disclosure of protected information. Barsan’s Invoices to Impexia Inc. (AFI/DNB App. 279-286).

b) In the marketing letters issued by Mr. Karadagli in December, 2010, and January, 2011, he makes the following statements which indicates that the Barsan interests were never abandoned: “Since we have contracts with DHL Global Forwarding, National Air Cargo, Barsan Global Logistics to those geographies we are able to quote very aggressively time wise & financial wise.” (Impexia App, 042-050); “We have price advantageous contracts with DHL Global Forwarding and National Air Cargo for air transportation and with Barsan Global

Logistics for ocean and land transportation for regions we operate in.” (AFI/DNB App.2322). *See* Complainants’ Motion for Submission of Supplemental Evidence at 21-22.

c) Sevgi Cebe, Barsan’s Vice-President, states it would negotiate favorable ocean and air transportation rates for Impexia. BAR009798 (AFI/DNB App. 2277-2278). Burcin Karadagli advised Cuneyt Karadagli that she would forward whatever he needed to Sevgi Cebe, and Ugur Aksu, and that all of them would try to increase that traffic. The traffic referred to was to Afghanistan, a trade area which had never been handled by Barsan. During this period of time, Impexia was using Barsan Int’l’s address which was in Cuneyt Karadagli’s signature section of his e-mails. Also on November 23, 2010, Burcin Karadagli emailed to Cuneyt Karadagli advising that Sevgi Cebe would attempt to obtain best pricing for Afghanistan and Dubai air and ocean shipments and that Barsan Int’l would do whatever was necessary for Impexia. Clearly Barsan interests were never abandoned, and Barsan was actively participating in the Impexia enterprise. (BAR010165 (AFI/DNB App. 2279-2280)). *See* Complainants’ Motion for Submission of Supplemental Evidence at 14.

d) On May 14, 2010, early in the Impexia experience, the president of Barsan Int’l Ugur Aksu sent information about business machines to Burcin Karadagli, and Burcin Karadagli immediately forwarded this information to Cuneyt Karadagli and informed her husband: “Everyone has been mobilized with every means available to help you; you must make use of this opportunity Jimmy!!” (Emphasis provided). This e-mail was clearly intended to suggest to Impexia to include the machines into its products line. BAR016074 (AFI/DNB App. 2273-2274). There are repeated instances that demonstrate that Barsan’s interest were never abandoned at any time during the period that disclosures were being provided to Impexia. *See* Complainants’ Motion for Submission of Supplemental Evidence at 13.

e) On September 15, 2010, Tugsan Uresin sent a referral for a US Army job in Afghanistan to Impexia. BAR009500 (AFI/DNB App. 2275-2276). The incidents go on and on that demonstrate that Barsan and Impexia’s fortunes were connected, and that at no time did Burcin Karadagli abandon Barsan’s interests. *See* Complainants’ Motion for Submission of Supplemental Evidence at 13 and 14.

3. From the following facts, Barsan knew or should have known of the disclosure of protected information and, is thereby, equally culpable of violating 46 USC §41103.

a) There was a definite change in fortune in Mr. Karadagli’s companies doing business with Barsan, who until Impexia was formed were always in debt to Barsan. BAR002057 shows that before Impexia was set up Mr. Karadagli’s previous companies made a monthly payment in the amount of \$100 to Barsan to retire a long existing debt. (AFI/DNB App. 710). BAR002144, is an email of October 14, 2009, indicating that it was difficult for Source Concept, one of Mr. Karadagli’s previous company, to pay \$350 to Barsan Int’l. (AFI/DNB App. 711-714). BAR002146, is an email of May 22, 2009, indicating that Source Concept, one of Mr. Karadagli’s companies would deposit \$100 each Friday and that Source Concept had a problem in the deposit of a \$200 check. (AFI/DNB App. 715-718). BAR002161, is an email of May 14, 2009 from Urgur Aksu, Barsan’s President to Burcin Karadagli, demonstrating that Source

Concept had not made any payment to Barsan Int'l for more than a year. (AFI/DNB App. 719-758). BAR002221 is an email of February 10, 2009, indicating that Burcin Karadagli would pay \$100 every month from her paychecks to Barsan Int'l for her husband's companies' outstanding debts. (AFI/DNB App. 759-760). Only after Impexia was started in March, 2010, was Barsan Int'l paid other than token amounts by House of Water and Source Concept, and by May, 2011, all invoices had been paid off. Barsan Int'l's monetary interest in the successes of Impexia is clear. (AFI/DNB App. 642-644)). These reversal in fortunes were surely noted by Barsan notwithstanding their denial of this. The ALJ did not put these facts under any scrutiny whatsoever. *See* Complainants' Brief at 28-29.

b) The shift in customer base and geographical areas served by Impexia should have been noticeable to Barsan immediately. DNB/AFI was Barsan Int'l's first shipper of electrical equipment. The ALJ illogically states that 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. The ALJ concludes that this does not have a tendency to prove that Barsan Int'l disclosed protected information to Impexia. The ALJ states that Section 10 (b) (13) does not impose a duty on a common carrier to keep track of the property contained in each shipment that it carries and investigate whether one of its employees has improperly disclosed information any time two shippers ship the same product. ID at 78. The ALJ makes no effort to address obligations under the "known or should have known" cases. These cases do impose due diligence standards. For example, In *Misclassification of Tissue Paper as Newsprint Paper*, 4 FMB 483 (1954), the Commission or its predecessor states: **"Diligent inquiry must be exercised by shippers and freight forwarders in order to measure up to the standards set by the Act."** Id. The ALJ, again accommodating the Barsan Respondents indicates that they have no such duty. This duty is actually heightened in the context of Impexia where the principal of the firm is the husband of its Accounting Manager. That is really a poor message to be sending to the shipping public.

c) Complainants' business was unique to Respondent Barsan Int'l. They were Barsan's first and only customers to ship electrical equipment and complementary parts to Turkey/and the Great Middle East, and in particular to Camp Bastion in Afghanistan and Camp Leatherneck in Iraq. Then all of a sudden Barsan Int'l handled Impexia's shipments identical to the business it had been handling for Complainants. 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 (AFI/DNB 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). This was an all hands evolution which should have sounded the trumpets with regard to the issues of this proceeding. The ALJ ignores them. *See* Baris Devrim Bal, Affidavit, AFI/DNB App. 2227-2236, Burak Bal Affidavit AFI/DNB App. 2237-2254; Complainants' Brief at 31-32.

In conclusion, it is Complainants' contention that the facts support a finding that Barsan Int'l did knowingly disclose the information in the emails supplied by Burcin Karadagli to Cuneyt Karadagli, and that Burcin Karadagli was acting in Barsan's interest when disclosing the protected information, and, if not, Barsan Int'l "ratified or knowingly retained a benefit from Burcin's actions"; and, finally that Barsan knew or should have known, and failed to make proper inquiry that this information was being disclosed to the detriment of Complainants.

VI. The Initial Decision Ignores the Facts of How Impexia Unlawfully Used Complainants' Information and Fails to Find the violations Caused Complainants' Actual Injuries.

The Initial Decision is in error by finding that even if it is assumed that Burcin Karadagli's sending of the emails to Mr. Karacagli may be attributable to Barsan Int'l and that Barsan Int'l violated section 10(b)(13), DNB/AFI have not identified any actual injury that resulted to Complainants from Impexia's receipt of the protected information. ID at 67.

In addition to the discussions in the above sections wherein Complainants extensively described *how* Impexia used Complainants' proprietary business information and what actual injuries Complainants suffered. *See* Complainants' Brief at 37-51, and Complainants' Reply to Respondent Impexia's Opposition to Complainants' Brief at 30-34.

1. The ALJ misconstrues Complainants' claims.

The records clearly shows that Impexia took Complainants' customers information, as well as the combination of suppliers, products, catalogue descriptions, projects, customers, and on-site customer contract information, etc. Complainants submitted three scenarios regarding how Barsan Int'l accessed information to **suppliers, products, catalogue descriptions, projects, customers, and on-site customer contract information.** *See* Complainants' Brief at 10-13. However, the ALJ fails to consider the three scenarios. Complainants extensively described their

operations as well as the unlikeness of Impexia's operation to succeed without stolen information. *See* Complainants' Brief at 37-45; Complainants' Reply to Respondent Impexia's Opposition to Complainants' Brief at 13-28.

The Complainants proved by a preponderance of evidence that the information which is protected by the Shipping Act related to ocean shipments, which disclosed Complainants' **customer, supplier, project, and, pricing information,** was transmitted to Impexia, and manipulated by that company to create a composite picture from all sources within its grasp, including information pertaining to both air and ocean shipments. *See* Complainants' Brief at 9. The third scenario was a method by which Barsan/Impexia could create through the related air/ocean transactions **composite pictures of suppliers, products, catalogue descriptions, projects, customers, and on-site customer contract information.** Complainants' Brief at 11.

The ALJ summarizes each and every one of Complainants' nine customers and accepts Impexia's statements and affidavits, without questions how Impexia contacted those customers without any consideration to how unlikely that process, as has been discussed previously herein. *See* ID at 69-72.

The ALJ fails to consider that Impexia, once equipped with all of Complainants' business information, Impexia could undersell the products. The overhead structure included a study of project product requests, and an approval process of the products selected. Impexia passes on what it calls a business model which is overhead free since, armed with all product information, including products in Complainants' catalogues which have been previously approved, Impexia would simply source the products from protected information received from Barsan, on how to buy and where to buy (either from Complainants' suppliers or their domestic distributors) the products approved through Complainants' R&D. Obviously, some customers were very happy to

provide technical support to Impexia because the expectation would be lower prices. The ALJ does not honor the fair competition principle and erroneously finds: “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.” ID at 69. The fallacy here is that Impexia would not even have an idea of projects and customers or products associated with those projects, except for the protected information it received. This is not an efficient business model; it is theft of protected trade secrets that bring Impexia into the arena.

The ALJ simply sustains Impexia’s allegations regarding how it got introduced to each and every Complainants’ customers. *See* ID at 69-72. The ALJ notices one of the examples Complainants gave, i.e. the discussion about impossibility to prepare a quote for Square D Panelboards \$222,238.20 on the same day when Impexia was allegedly introduced to Ceytun with the information given. (AFIDNB App. 2519)). *See* ID at 55-57. The ALJ stands in Impexia’s shoes and states that Ceytun knew DNB/AFI’s price and product information because AFI/DNB sold that product to Ceytun before and it was possible that Ceytun gave the information to Impexia. *See* ID at 56. Even if taking the ALJ’s assumption as ture, the ALJ again ignores the fact that if there were no disclosure of Complainants’ business information by Barsan Int’l, Impexia would not even know engouth to be at Ceytun’s doorstep. As previosuly stated, this is akin to rewarding the sale of counterfeit goods because they are cheaper to the consumer. But at what cost to an industry?

2. Impexia's Business Model is Impossible Without the Use of Complainants' Protected Information.

The ALJ finds that Burcin Karadagli disclosed Complainants' information protected by section 10(b)(13) and admits that Impexia's president has no prior experience in the industry, and has no technical background. The ALJ also recognizes Complainants' contention that Impexia used Complainants' information. *See* ID at 77. However, the ALJ fails to recognize the nature of this business and its reliance on technical expertise in the subject industry as how time consuming and expensive product approval is in the subject industry in the context of military project cargo. *See* ID at 73.

Complainants proved by the preponderance of evidence that Impexia did not create a unique business model and that Impexia's model was to use Complainants' proprietary information and to sell products which were approved for specific projects at Complainants' expense. This process is explained in detail in the record from outside parties in the industry, and were not even mentioned by the ALJ, much less considered. *See* Complainants' Reply to Respondent Impexia's Opposition to Complainants' Brief at 13-28. *See* Affidavit of Andy Thomas, Franklin Electric (AFI/DNB App. 2340); Affidavit of Anis A., Shahid American Falcon International, Inc. (AFI/DNB App. 2339); Affidavit of John O'Donnell, Electro-Mechanical Systems International (AFI/DNB App. 2337-2338).

3. Impexia's Claim that its Business Model is Different than Complainants' In that Impexia Does Not Deal Significantly with Electrical Products and That Complainants Only Deal in Electrical Products Is Erroneous on Both Counts.

The ALJ does not address Impexia's argument that Complainants deals with different products. Impexia submitted this argument by an Errata to Proposed Findings of Fact seven days after their final brief. *See* Complainants' Reply to Respondent Impexia's Opposition to Complainants' Brief at 18. Impexia's Errata ostensibly admits that it gained entrance to

Complainants' nine customers through unlawful means, but is pleading that this is not relevant because they sell different products to these customers. First of all, Impexia would not even have access to these customers but for the unlawfully disclosed information and documents, but more importantly, Impexia's lack of knowledge of this market is clearly evident. These customers purchase both electrical products as well as complementary products relevant to their projects. This is, in effect, AFI/DNB's business, and this is the business which Impexia has taken as a result of the unlawful disclosure by the Barsan Respondents. *See* Complainants' Reply to Impexia's Opposition to Complainants' Brief at 25. Complainants extensively replied to Impexia's argument at their Reply to Respondent Impexia's Opposition to Complainants' Brief at 18-28. The ALJ failed to consider this at all.

4. Impexia's Commercial Invoice Clearly Demonstrates that Impexia Has been Using Complainants' Protected Information.

The ALJ fails to consider the documents submitted by Complainants demonstrating that Impexia has been using Complainants' protected information. As stated in Complainants' Reply to Respondent Impexia's Opposition to Complainants' Brief, notwithstanding that Impexia denies it is using Complainants' trade secrets, Impexia Invoice 2089912 dated October 27, 2011 (AFI/DNB App. 491-493) clearly demonstrates the point. Even six months after this proceeding was commenced, Impexia was still using Complainants' information and selling products by reference to AFI's Catalogue. This Invoice at Lines 28, 29, 30, 32, 34 references AFI's catalogue, which completely supports Complainants' contention that they had indeed gone through the expense of product approval, and Impexia shamelessly now refers to products it is selling directly from AFI/DNB's catalogue. This is in essence is what this lawsuit is about:

Line Number	Description
28	Conduit Outlet Boxes 4'' x 4'' x 2.5'' Junction Boxes with five 3/4'' Kos - CLASS 1 Division 1, <u>As (Afi Catalogue)</u>
29	Flexible Coupling EXGJH Explosion Proof 3/4'' As <u>(Afi Catalogue)</u>
30	APL Two-Lamp Flourescent Ex. Proof for use with threading Metal Conduit 120 v. As <u>(Afi Catalogue)</u>
32	Stopper Plug 3/4'' 747 Series As <u>(Afi Catalogue)</u> with Aln Key Slot
33	Adapter 737 Series Female 3/4'' and Male 1/2'' As <u>Afi Catalogue No. 737DM1M25</u>
34	Sealing Fitting for Close Turning 3/4'' As <u>(afi catalog) Catalogue Number EFY-75</u>

See Complainants' Motion for Submission of Supplemental Evidence at 28.

VI. The Initial Decision Erroneously Finds that There is no Actual Damages Resulting from the Disclosed Protected Information.

After the Initial Decision falsely concludes that Complainants' did not prove by preponderance of evidence that Barsan Int'l violated section 10(b)(13) and that DNB/AFI have not identified any actual injury that resulted from Impexia's receipt of the protected information. The ALJ does not consider Complainants' damages claims at all which were extensively discussed in Complainants' Brief and Reply to Respondent Impexia's Opposition to Complainants' Brief.

Given the ALJ has layers of layers of errors in the Initial Decisions, Complainants respectfully request the Commission to review and consider their damages claims in amount of \$11,676,474 as claimed in Complainants' Brief at 37-51, which include but are not limited to Complainants' lost profits of \$1,994,772.10 during 2011 and 2012, lost profit margin of \$2,700,000 during 2011 and 2012, the "head start" loss of \$6,981,702.35. See Complainants' Brief at 37-51. See Baris Devrim Bal, Affidavit (AFI/DNB App. 2227-2236), Burak Bal Affidavit (AFI/DNB App. 2237-2254), Impexia Bank Statements from March 2010 to January 2012, (AFI/DNB App.506-641), Impexia's Commercial Invoices Issued to AFI/DNB's

Customers (AFI/DNB 774-1024), AFI/DNB Margin (AFI/DNB1794-2076). The initial basis for the claims are very clear. They are based on the amounts deposited into Impexia's bank account which are comprised from Complainants' customers, which they would not have attained but for receipt of the protected information received from Barsan.

Therefore, Complainants urge the Commission to consider Complainants' damage case as a whole, and to find that the evidence establishes that all of Complainants' damage claims have been proven by a preponderance of evidence.

WHEREFORE, It is respectfully requested that the Federal Maritime Commission:

1. Reverse the challenged findings of the Initial Decision in this proceeding as identified herein in Attachment A, and adopt Complainants' recommended findings and analysis as set forth in these Exceptions.

Respectfully submitted,

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Dated in Washington, D.C., this eighteenth day of February, 2014

ATTACHMENT A
COMPLAINANT'S EXCEPTIONS TO INITIAL DECISION

- I. The Initial Decision is in error because it gives the sense of advocacy on the part of the ALJ rather than impartial even-handed adjudication which is required by the Administrative Procedure Act; among its many shortcomings, the ID is arbitrary and capricious; it relies on unsupported representations from Respondents as evidence “on the record” on issues vital to this case; it makes ultimate conclusions of fact which do not rationally flow from the Findings of Fact; it blatantly fails to consider at all evidence in the record on central issues which is contrary to Respondents’ positions; in some instances, the ID reaches conclusions of fact on key issues with no factual support whatsoever in the record. Furthermore, the ID blatantly and repeatedly ignores established Federal Maritime Commission regulations and law in its legal conclusions.
- II. The Initial Decision is in in error by finding that given the ultimate resolution of this proceeding, it is not necessary to answer the jurisdiction questions regarding whether 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). ID at 66.
- III. The Initial Decision is in error by finding that Barsan Int’l and Impexia made false representations to the Immigration and Naturalization Services, and that this adversely affected credibility, particularly that of Ugur Aksu, but the ALJ fails to analyze testimony by Ugur Aksu and Cuneyt Karadagli with any scrutiny with regard to credibility notwithstanding this finding and failed to consider other undisputed facts related to Respondents’ credibility. ID at 82.

- IV. The Initial Decision is in error by finding that marketing materials utilized by Impexia were the sources of business to Impexia and not disclosures made by Burcin Karadagli, but failed to consider that these letters were, in fact, inconsistent with statements from Respondents that Impexia and Barsan that there was no commercial connection between the companies when, in fact, the letters represented to customers that Impexia enjoyed ocean and inland contracts with Barsan Respondents. ID at 72.
- V. The Initial Decision is in error by finding that the emails disclosed by Burcin Karadagli on April 29, 2009, (AFI/DNB App. 387-405), themselves do not contain protected information; the Initial Decision is in further error by finding that the property described in the disclosed information on April 29, 2009, was shipped by air. ID at 59 and 60.
- VI. The Initial Decision is in error by failing to find that the emails and attachments disclosed on June 26 2009 are also ocean shipments (AFI/DNB App. 458-481). ID at 63 and 64.
- VII. The Initial Decision is in error by finding that Complainants have not proved by a preponderance of the evidence that Barsan Int'l knowingly disclosed DNB/AFI information after the ID finds that Burcin Karadagli knowingly disclosed AFI/DNB information when she sent emails with protected information to her husband Cuneyt Karadagli. ID at 66 and 67.
- VIII. The Initial Decision is in error by failing to consider credibility issues relating to Ugur Aksu, Cuneyt Karadagli, and Burcin Karadagli which arise from the payroll (AFI/DNB App. 2163-2171) and Immigration and Naturalization Service incidents. ID at 82.
- IX. The Initial Decision is in error by finding that 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 without considering Mr. Ekrem Benli's (the owner

of Delta Om Company) Affidavit, (Mr. Ekrem Benli Affidavit ¶15 (AFI/DNB App. 2325-2326)). ID at 71.

- X. The Initial Decision is in error by finding DNB/AFI have not proved that Burcin Karadagli is an officer 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. . . ." ID at 67.
- XI. The Initial Decision is in error by finding 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 with which to contact Ceytun. ID at 56.
- XII. The Initial Decision is in error by finding that 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 invoices that caused any actual injury to DNB/AFI. ID at 65.
- XIII. The Initial Decision is in error by finding that the May 18, 2009 e-mail (AFI/DNB 418-422) disclosed 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", and that therefore, it is not the kind of information protected by section 10(b)(13). ID at 61.
- XIV. The Initial Decision is in error by finding that while this email proves that Burcin Karadagli sent at least one email, among the emails disclosed on March 24, 2010, (AFI/DNB App. at 672-684), 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, and failed to consider the pattern of providing shipper information to Impexia. ID at 65.

- XV. The Initial Decision is in error by finding that 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. ID at 67.
- XVI. The Initial Decision is in error by finding that even if it is assumed that Burcin Karadagli's sending of the emails to Cuneyt Karaclagli may be attributable to Barsan Int'l and that Barsan Int'l violated section 10(b)(13) of the Act, DNB/AFI have not identified any actual injury that resulted from Impexia's receipt of the information in the emails. ID at 67.
- XVII. The Initial Decision is in error by accepting the credibility of Cuneyt Karadagli in concluding that the only DNB/AFI customer allegedly "taken" by Impexia identified in the emails from Burcin Karadagli to Cuneyt Karadagli is 77 Insaat/77 Construction and that the former business development manager 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. ID at 67.
- XVIII. The Initial Decision is in error by reasoning that DNB/AFI relied on ownership of their customers and that DNB/AFI require 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. ID at 69.
- XIX. The Initial Decision is in error by finding that the evidence in the record does not support DNB/AFI's contention that Impexia learned about Metag, 77 Construction, Feka, Epik, Ayken, Yenigun, Delta Om, Cakmaklar Pano, Ceytun from information unlawfully disclosed by Barsan Int'l. ID at 69-72.

- XX. The Initial Decision is in error by finding that 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, Cak:maklar Pano), or Impexia's marketing emails (Metag, Epik, Delta Om). The Initial Decision is in further error by finding that 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 section 10(b)(13). ID at 72.
- XXI. The Initial Decision is in error by finding that the evidence suggests that the success of Impexia's "one-person operation" comes from customers who tell Impexia the products they want, not information Impexia learned from Barsan Int'l. ID at 73.
- XXII. The Initial Decision is in error by finding that DNB/AFI have not proved that Barsan Int'l, not Metag, gave the product and pricing information to Impexia. ID at 75.
- XXIII. The Initial Decision is in error by finding that the fact that Impexia underbid DNB/AFI on those products 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). ID at 76.
- XXIV. The Initial Decision is in error by finding that Impexia's 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. The Initial Decision is also in error by reasoning that 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. ID at 78.

XXV. The ALJ erred by finding that it is unnecessary to determine whether DNB/AFI or some other entity was Barsan Int'l's first shipper of electrical equipment and that the identity of the shipper of the first shipment of electrical equipment carried by Barsan Int'l is not relevant to this decision. The Initial Decision is in further error by finding that that 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. The Initial Decision is in error by reasoning that section 10(b)(13) does not impose a duty on a common carrier to keep track of the property contained in each shipment that it carries and investigate whether one of its employees has improperly disclosed information any time two shippers ship the same product, especially in a circumstance when a spouse of an employee is a competitor to a current shipper customer. ID at 78.

XXVI. The Initial Decision is in error by finding that the December 2010 Impexia sale to 77 Construction does not tend to prove that Barsan Int'l gave proprietary information to Impexia in violation of section 10(b)(13). ID at 79.

Respectfully submitted,

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Dated in Washington, D.C., this eighteenth day of February, 2014

CERTIFICATE OF SERVICE

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

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