IN THE UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 96-56565

HARRY C. BATCHELDER, JR., Individually and Derivatively On Behalf of HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR COMPANY, INC.

Plaintiff and Appellant,

vs.

NOBUHIKO KAWAMOTO, et al.

Defendants and Appellees,

and

HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR COMPANY, INC.

Nominal Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE RONALD S.W. LEW
CASE NO. CV-96-1291-RSWL (BWRx)

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CORPORATE DISCLOSURE STATEMENT (FEDERAL RULES OF APPELLATE PROCEDURE RULE 26.1)

There are no subsidiaries or affiliates of Appellee American Honda Motor Company, Inc. Honda Motor Company, Ltd. is the parent company of American Honda Motor Company, Inc.

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STATEMENT OF JURISDICTION

Appellees agree with the Statement of Jurisdiction in the Opening Brief.

STATEMENT OF ISSUES

1. Given uncontroverted expert testimony that a holder of American Depository Receipts ("ADR") is, under governing Japanese law, not a shareholder and therefore may not prosecute a derivative action, may plaintiff, who holds ADRs and not shares of Honda Motor Company ("Honda Japan"), sue derivatively on Honda Japan's behalf?

2. Given uncontroverted expert testimony that Japanese law does not permit so-called "double derivative" actions, does the fact that plaintiff has filed his lawsuit in the United States entitle him to pursue "double derivative" claims on behalf of a wholly-owned American subsidiary of Honda Japan?

3. Given the explicit mandate in Japanese law that derivative actions must be filed at the company headquarters in Japan — a rule so fundamental that Japanese courts must refuse enforcement of judgments obtained elsewhere — can plaintiff nonetheless bring his action in the United States?

4. Did the trial court act within its discretion in dismissing the case under the doctrines of forum non conveniens and international comity in light of the following facts, among others: Japanese law governs this case; the only properly joined defendants are all subject to the jurisdiction of the Japanese courts; much of the evidence and all of the applicable law is written in Japanese; Japanese law mandates that the Tokyo District Court has exclusive jurisdiction of the matter; and the shareholder base of Honda Japan is overwhelmingly Japanese?

5. Since Honda Japan is exempt from Section 14(a) of the Securities Exchange Act because it is a "foreign private issuer," did the trial court correctly dismiss plaintiff's claim arising under that statute?

INTRODUCTION AND SUMMARY OF ARGUMENT

What's wrong with this picture?

Plaintiff, a resident of New York, and his lawyers, based in San Diego, claim the right to prosecute a derivative suit on behalf of Honda Japan in Los Angeles. But:

- Defendant Honda Japan is a Japanese corporation.

- 98.2% of Honda Japan's shareholders, holding 83% of its shares, are Japanese.
- Plaintiff holds no shares of Honda Japan, but holds instead American Depository Receipts ("ADRs"), which he has chosen not to convert into Honda Japan shares.
- Plaintiff has sued 37 directors of one of Japan's largest companies. All are Japanese citizens, no more than five are even alleged to have any contacts with California, all but four reside outside the United States, and all speak Japanese as their primary language.
- The District Court will not have personal jurisdiction over most of the Japanese directors, but all of them are subject to the jurisdiction of the Japanese courts.
- Plaintiff's claims concern conduct in Japan by the Japanese director-defendants acting subject to Japanese law.
- Honda Japan's corporate records, including minutes of board of directors meetings, are maintained at the company headquarters in Tokyo and are nearly all in the Japanese language.
- Plaintiff admits that Japanese law governs his substantive claims against the Japanese defendants.

- The Japanese law governing this case is written in Japanese, and there are no standard English translations of crucial aspects of it.
- The Japanese law that requires shareholder derivative actions to be filed in the corporation's home district in Japan is so strong that any waiver of the law is void and a judgment obtained elsewhere is unenforceable in Japan.
- Even plaintiff's one claim that arises purely under federal law — a proxy claim under Section 14(a) of the Securities Exchange Act — seeks to rescind the election of the Japanese directors of a Japanese company by a body of shareholders that is overwhelmingly Japanese.

So, to paraphrase a popular song, what's California got to do with it?

In fact, even less than meets the eye. Plaintiff claims a California nexus on the basis of alleged wrongdoing by certain directors and employees of American Honda Motor Company ("American Honda"), a California corporation. But this isn't nearly enough to allow the litigation to proceed, because: (1) plaintiff has no equity interest in American Honda — his interest, such as it is, is solely in Honda Japan; (2) since plaintiff's rights against American Honda's directors in a suit on behalf of American Honda flow solely from his equity interest in Honda Japan, those rights are governed by Japanese

law; (3) therefore, plaintiff may not sue on behalf of American Honda: the equitable device of the double derivative suit, recognized in some American jurisdictions, is not part of the law of Japan.

Without this tenuous link, there is no conceivable basis for pursuing this case in Los Angeles, and plaintiff appears to concede as much. But even if the link were somehow viable, it would still not be enough. Well-settled principles of law in every area affecting this case compel the result the trial court reached — dismissal.

Japanese law governs the central questions in this appeal for three independent reasons. First, the Deposit Agreement under which plaintiff holds his ADRs provides that shareholder rights "shall be governed by the laws of Japan." Second, under the internal affairs doctrine, shareholder rights are governed by the laws of the jurisdiction where the corporation was incorporated — here, Japan. Third, under a classic choice of law analysis, the interests of Japan in applying its law to a claim made on behalf of a Japanese corporation with respect to alleged wrongdoing occurring largely in Japan is far greater than the interest of California in entertaining a lawsuit by a New York resident purporting to act on behalf of a California corporation in which he holds no shares.

Most of this appeal concerns the three broad questions that follow.

Who can sue? Can plaintiff, as the holder of ADRs rather than shares of Honda Japan stock, i.e., of a contract right rather than an interest in securities, bring *any* kind of derivative lawsuit against *anyone*? The trial court correctly ruled that under Japanese law, as established in the trial court by the uncontroverted testimony of Japanese law scholars, the answer is plainly "no." Japanese law permits only a shareholder to bring a derivative action, and Plaintiff holds ADRs.

In the face of a consensus of expert opinion on Japanese law, plaintiff is forced to argue that California law governs this question. The trial court correctly rejected this argument, because a proper choice-of-law analysis compels the conclusion that Japanese law applies and precludes this litigation.

Whom can the plaintiff sue? Japanese law strictly limits the field of potential defendants in a derivative suit to *only* the directors, auditors, liquidators and promoters of the corporation *in which the plaintiff owns shares*. The trial court properly recognized that apart from restricting the right to sue derivatively to shareholders and not permitting double derivative suits, Japanese law also would not permit a suit *against the former employees, directors and agents of American Honda*.

Although plaintiff argues that California law governs because he seeks to assert California law claims on behalf of American Honda, the

argument misses the point: Japanese law precludes him from suing *the parties* he has named as defendants, so there is no California law claim left to assert.

Where can plaintiff sue? This question would arise only if anything were to remain of this litigation following decision of the preceding issues. The trial court properly concluded that if the litigation could proceed at all, it would have to proceed in Japan. There are three distinct reasons, two of which invoked the trial court's discretion.

First, Japanese law explicitly imposes exclusive jurisdiction requirements in certain types of cases, the shareholder derivative suit among them. A shareholder of a Japanese company *must* file his derivative suit in the Japanese district court having jurisdiction over the corporation's home office — here, Tokyo. The requirement is substantive and jurisdictional. For important policy reasons, Japanese courts *must* dismiss or transfer a derivative suit brought anywhere else in Japan, and *cannot* recognize a judgment obtained elsewhere.

In addition, principles of forum non conveniens and principles of international comity each separately call for trial in Japan, and the trial court acted well within its discretion in dismissing the action on these grounds.

The Section 14(a) claim. There is one additional claim that is easily dispatched. Plaintiff sought to create a federal law connection to the litigation by asserting a claim under Section 14(a) of the Securities Exchange Act based

on Honda Japan's alleged dissemination of false proxy materials. But the applicable SEC rules expressly exempt "foreign private issuers" from that statute, and the trial court correctly found that this exemption extended to all the conduct on which plaintiff bases his claim.

If there were a truth-in-litigation law, this case would have to be labelled "Made In Japan." The components that plaintiff claims to be American-made are legally defective and cannot serve as the basis for preserving the litigation. This Court should therefore affirm the judgment of dismissal.

STATEMENT OF THE CASE

A. Nature Of The Case.

Honda Motor Company, Ltd. ("Honda Japan") was incorporated under the laws of Japan. (I ER 1:¶8(a).)[1] It is the sole shareholder of American Honda Motor Company, Inc. ("American Honda"), a California corporation. Honda Japan's directors are involved in the day-to-day operation and

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[1] Citations to the Excerpts of the Record ("ER") are stated by Volume, Tab, and page, paragraph or exhibit number as follows: "__ ER Tab:Page (or Paragraph or Exhibit) No. " Citations to the Supplemental Excerpts of Record ("SER") are stated by volume and page as follows: "___ SER ___."

management of Honda Japan's business and have ultimate responsibility for the administration of Honda Japan's affairs. (I ER 1:¶9(a).)

Shares of Honda Japan common stock are listed on the Tokyo Stock Exchange and each of the seven other stock exchanges located in Japan. (I ER 1:¶8(d).) Plaintiff, a resident of New York, does not own stock in Honda Japan. Rather, he holds American Depository Receipts ("ADRs"), each representing 10 shares of Honda stock. (I ER 1:¶7.) These are issued by Morgan Guaranty Trust Company of New York, as depositary (I ER 1:¶8(d)) and are governed by a Deposit Agreement among Honda Japan, Morgan Guaranty and the ADR holders. (I ER 57:Ex. A.)

Plaintiff seeks, purportedly for the benefit of Honda Japan and American Honda, to recover for injury resulting from the criminal activity of American Honda's former employees. (I ER 1:¶¶25, 46.) Plaintiff alleges that all "losses" occasioned by the American Honda employees' wrongdoing could have been avoided or remedied if Honda Japan's and American Honda's directors, employees and agents had fulfilled their respective fiduciary duties to the companies. (I ER 1:¶¶47-82.)

B. The Expert Evidence On Japanese Law and Forum Non Conveniens

While on these issues Defendants offered five declarants to plaintiff's nine, the balance of expertise was entirely on defendants' side.[2] Five of plaintiff's nine declarants have no academic credentials; those who have them either fail to opine on the core issues or agree with the opinions of defendant's experts.

1. Defendants' Experts

a. *Professor Masahiro Kitazawa* (I ER 54), President of and a Professor of Law at Chukyo University in Nagoya, Japan and Professor Emeritus in the Faculty of Law at Nagoya University, and Japan's leading

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[2] With one exception, the plaintiff's other declarants do not purport to opine on the meaning or application of Japanese law. Professor William V. Rapp (II ER 67) (who is not a lawyer) discusses the history and commercial aspects of ADRs; plaintiff (III ER 75), his status and experience as an ADR holder; and Spencer A. Burkholz (II ER 68) (one of plaintiff's attorneys), his attendance at a status conference in Maryland in the multi-district American Honda litigation. The declaration of Kevin P. Roddy (II ER 69), another of plaintiff's attorneys, does discuss Japanese legal procedure, but that declaration is based not on any claimed expertise on Roddy's part, for he has none, but on the hearsay statements — not even reproduced verbatim, but paraphrased by Roddy — that Japanese attorneys allegedly made to him while Roddy was in Japan.

corporate law scholar, has been heavily involved in the study of the Japanese shareholder derivative action since 1950. He authored the derivative litigation section of the most widely used reference book on corporation law in Japan, and the most recent edition of his text book *Corporate Law* (4th ed. 1994) addresses the 1993 amendments to the Japanese shareholder derivative law.

b. *Professor Dan F. Henderson* (I ER 52) is a Professor of Law at Hastings and was for 29 years Professor of Law and Director of the Asian Law Program at the University of Washington Law School. He has been immersed in Japanese law and culture for over half a century as an associate member of the Japanese bar, as a lecturer on Japanese law, and as the co-author (together with the late Chief Justice of The Supreme Court of Japan) of *Civil Procedure in Japan* (1985), a source upon which Plaintiff himself has relied. (*See* II ER 69:Ex. D, pp. 439-442).

(c) *Fumio Koma* (I ER 55, III ER 86), who has practiced law for 20 years in Japan and the United States and is a partner in a leading Japanese law firm, has special expertise in the field of derivative suits: he (1) served as legal counsel to a Japanese Mission investigating derivative suits in the United States; (2) has lectured widely on derivative suits; and (3) recently published a leading book on the subject, *Derivative Suits - Issues and Solutions* (1994).

(d) *Michael K. Young* (I ER 61, III ER 84) is the Fuyo Professor of Japanese Law and Legal Institutions and Director of the Center for Japanese Legal Studies at Columbia University. He has been a student of Japanese language, law and culture for nearly thirty years. Professor Young served for more than three years in the State Department as Deputy Legal Advisor for East Asian and Pacific Affairs, as a Deputy Undersecretary and as the Ambassador for Trade and Environmental Affairs, and he taught law in Japan. He has written about the Japanese legal system in both Japanese and English.

(e) *Professor Hans Smit* (III ER 85), Stanley H. Fuld Professor of Law and the Director of the Parker School of Foreign and Comparative Law at Columbia University a member of the Columbia Faculty since 1960, teaches and has written on international law, conflict of laws and international litigation. He is a co-author of the most widely-used case book on the subject, *International Law* (3d ed. 1993). He has served on commissions which drafted proposed statutory forum non conveniens rules, one of which was judicially adopted in New York.

2. Plaintiff's Expert Witnesses

Only four declarants are academics. Of these four, two (Professors Arthur Miller and Marie Anchordoguy) *have no expertise in either Japanese law or procedure*. Dr. Anchordoguy, a non-lawyer, simply translated "English and Japanese documents related to the issue of shareholder derivative actions in Japan." (II ER 70:p. 3.) Professor Miller, a well-known television personality, purports to opine on whether "dismissal of this action under the doctrine of forum non conveniens in favor of litigation in Japan is appropriate." (I ER 66:¶2.) His declaration is essentially an additional legal brief for plaintiff, complete with case citations.

Of the remaining two academics, Professor Carl J. Green's declaration, filed by a different Milberg Weiss client against a different Japanese company in a lawsuit which was dismissed, was largely cribbed from the joint declaration of two Japanese practitioners. Only Professor Zentaro Kitagawa, far and away plaintiff's most distinguished declarant, has the credentials to give an authoritative opinion on Japanese law — but he has chosen, or been asked by plaintiff, not to do so.

Plaintiff's remaining five experts are all practicing attorneys who either agree with or do not controvert defendants' experts as to current Japanese

substantive law. Messrs. Yanagida and Akai (like Professor Green, retreads from that earlier Milberg, Weiss case) confirm that a Japanese court will not enforce a judgment against Japanese directors in a shareholder derivative suit brought outside Japan. (III ER 77:¶6) Messrs. Hirakawa (II ER 71) and Sakata (II ER 72) confirm that the prevailing view is that only a registered shareholder can bring a derivative action under Japanese law. (II ER 71:p. 5; II ER 72:¶4.) Koji Takeuchi (III ER 74), who discusses only Japanese procedure, shows that Japan is an adequate, alternative forum for purposes of forum non conveniens.

In short, as more fully discussed below, plaintiff's expert witnesses either (a) agree with defendants' experts; (b) fail to controvert their opinions; or (c) express unhappiness with current Japanese law — that is, they admit this is the way things are, but they want to see things change.

LEGAL DISCUSSION

I.

WHO CAN SUE?

UNDER JAPANESE LAW, WHICH GOVERNS THIS CASE, ONLY SHAREHOLDERS — NOT PERSONS WHO, LIKE PLAINTIFF, HOLD ONLY ADRs — CAN BRING A DERIVATIVE SUIT.

Plaintiff's action stumbles at the very outset because he holds ADRs rather than shares of Honda Japan. The court below, applying Japanese law, held that plaintiff, as the holder of ADRs, "is not a shareholder and lacks standing to bring a derivative action" on behalf of Honda Japan. (III ER 90:p. 3.)

In the United States, the shareholder derivative action is a suit in equity, a creature of judge-made law. *Brusso v. Running Springs County Club, Inc.*, 228 Cal.App.3d 92, 104-05, 278 Cal.Rptr. 758, 764 (1991). In Japan, it exists only as it is embodied in a statutory enactment. Japanese law confers only "specific rights and powers. Potential rights which are not granted in the Code are not conferred" and cannot be created by the judiciary. (I ER 52:¶11 Henderson Decl.)

In his effort to keep a Japan-centered lawsuit in the United States, plaintiff posits a "false conflict" in which there is no difference between foreign and domestic law (*see Gianaculas v. Trans World Airlines, Inc.*, 761 F.2d 1391, 1393 (9th Cir. 1985)), presumably in hopes of persuading this Court that it doesn't matter whose law applies. (AOB 11-14.)

But it does matter. To show why, we first demonstrate that, contrary to Plaintiff's argument, Japanese law does not permit an ADR holder to sue derivatively. We then demonstrate why that law governs this case and requires dismissal.

These purely legal questions are reviewed de novo. Fed. R. Civ. P. 44.1, *Salve Regine College v. Russell*, 499 U.S. 225, 231-233, 111 S.Ct. 1217, 1221-1222, 113 L.Ed.2d 190.

A. Japanese Law Does Not Empower ADR Holders To Bring A Derivative Action.

Article 267 of the Japanese Commercial Code, which establishes the derivative remedy, states:

> 1. Any shareholder who has held a share continuously at least for the last six months may

> demand, in writing, that the stock company institute an action to enforce the liability of directors.
>
> 2. If the stock company has failed to institute such action within thirty days from the date on which the demand referred to in the preceding paragraph was made, the shareholder referred to in the preceding paragraph may institute such action on behalf of the company.

Shoho (Commercial Code), Law No. 48 of 1899 [Shoho] Art. 267.

There is no dispute that plaintiff holds American Depository Receipts and not shares in Japan Honda. (*See* I ER 57:¶4 (Irino Decl.).) There is also no dispute that only a "shareholder" can bring a derivative suit. Even plaintiff emphasizes that Japan's derivative action law "confers derivative standing on '[a]ny shareholder.'" (AOB 11.)

The uncontradicted scholarly opinion interpreting Article 267(1) makes plain that only shareholders appearing on Honda Japan's shareholders' register may institute a derivative action under this provision. As an ADR holder,

plaintiff is not among them.[3] Professor Kitazawa, for example, declares that "ADR holders are not the shareholders of record" under Japanese law and therefore "are not allowed to make the demand and then institute a derivative action."[4] (I ER 54:¶20 (Kitazawa Decl.).) According to Professor Kitazawa:

> The law on this point is undisputed; I know of no case or scholarly opinion that argues otherwise.

Id.; *see also* I ER 52:¶¶3a, 9-10 (Henderson Decl.).) Indeed, Plaintiff was unable to present any "case or scholarly opinion that argues otherwise." To the contrary, his practicing-attorney experts conceded the point (II ER 71:¶4a (Hirakawa Decl.); II ER 72:¶4 (Sakata Decl.)), and his Japanese-law scholar, Professor Kitagawa, did not opine on the subject.

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[3] Upon purchasing ADRs, appellant became subject to the Deposit Agreement, which governs the respective rights and obligations of Honda Japan, the depositary (Morgan Guaranty), and the ADR holders. (I ER 57:¶5, Ex. A (Irino Decl.).) The agreement grants ADR holders certain rights, but not the right to institute a derivative action. At least one court has suggested that the only method by which an ADR holder can pursue derivative litigation is to make a demand upon the depository institution, which may then, as shareholder of record, pursue the matter. *Rothenberg v. United Brands Co.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,045, at 91,693 (S.D.N.Y. May 11, 1977), *aff'd*, 573 F.2d 1295 (2d Cir. 1977).

[4] Plaintiff is not, however, without remedies. As plaintiff concedes, he can become a shareholder simply by exchanging his ADRs for shares of Honda Japan. II SER 19. By choosing to continue to hold ADRs, plaintiff must accept the limitations accompanying his status.

Nonetheless, plaintiff insists that Japanese law can be disregarded because it is "unclear." (AOB 12 n.12.) In fact, there is nothing unclear about it. The most plaintiff's own witnesses could muster was simply a personal desire to see the law develop differently. (*See* II ER 72:¶4 (Sakata Decl.).)

Nor is it relevant if for some purposes (like federal reporting requirements) "ADRs are the equivalent of shares of a foreign corporation." (AOB 12.) On the issue of who can bring a derivative suit — where Japanese law governs — an ADR holder is not the same as a shareholder. Plaintiff's apparent contention that the language in his Deposit Agreement modifies Japanese law (AOB 14 n.17) is not viable. The Deposit Agreement is not a Japanese statute. Besides, the language plaintiff relies on — an out-of-context excerpt from a lengthy amendment to the ADR — is definitional and does not purport to grant any rights. Indeed, it is part of a section that *imposes obligations* on persons defined as "beneficial owners."

Since Japanese law prohibits this action, application of that law required dismissal. As shown below, the trial court correctly applied Japanese law on this question.

B. The Trial Court Properly Applied Japanese Law.

1. The Deposit Agreement Provides That Japanese Law Governs Shareholder Rights.

Plaintiff's Deposit Agreement draws an explicit distinction between (a) rights afforded to "holders of Stock and other Deposited Securities," which "shall be governed by the laws of Japan," and (b) the "Deposit Agreement and the Receipts and all rights hereunder," which are governed by New York law. (I ER 57:Ex. A, p. 47 (Irino Decl.).) As the Deposit Agreement confers no right to sue derivatively, the only source of such a right is the Japanese Commercial Code, which confers that right only on a shareholder. Plaintiff has voluntarily subjected himself to Japanese law regarding his right to sue derivatively, since "ADR holders are deemed to have agreed to all terms in the deposit agreement by their acceptance and holding of ADRs." American Depositary Receipts, Securities Act of 1933, Exchange Act Release Nos. 33-6984, 34-29226, 1991 SEC LEXIS 936, *39 n. 63 (May 23, 1991) (attached to Roddy Decl., II ER 69:Ex. G, p. 20).

In short, the Deposit Agreement contains a classic choice-of-law provision. Courts ordinarily apply the law designated by such provisions unless

there is a compelling reason not to do so. *See, e.g., General Signal v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1505-06 (9th Cir. 1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996); *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304 (2d Cir. 1994). Plaintiff has not identified any reason, much less a compelling one, not to follow that provision here.

2. The Internal Affairs Doctrine Requires Application Of Japanese Law.

The use of Japanese law to determine plaintiff's right to sue, which is required by the Deposit Agreement's explicit choice of law provision, is also compelled by ordinary choice-of-law principles. This is because plaintiff's status derives solely from his relationship with Honda Japan; he holds no shares of American Honda, of which Honda Japan is the sole shareholder.

Under the internal affairs doctrine, the rights and obligations of a company, its directors and its shareholders with respect to matters of corporate governance are regulated by the laws of the state of incorporation. As the Supreme Court said in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 90, 107 S.Ct. 1637, 1650, 95 L.Ed.2d 67 (1987), "except in the rarest

situations," a corporation "is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation."

A legion of authorities upholds this view. *First National City Bank v. Banco Para El Comercio*, 462 U.S. 611, 621, 103 S.Ct. 2591, 2597, 77 L.Ed.2d 46 (1983) (internal affairs doctrine "achieves the need for certainty and predictability of result . . . and protect[s] the justified expectations of parties with interests in the corporation"); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1527 (9th Cir. 1985); *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 471, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992) ("Hong Kong's overriding interest in the internal affairs of corporations domiciled there would in most cases require application of its law"); *Southern Sierras Power Co. v. Railroad Comm'n*, 205 Cal. 479, 483, 271 P. 747, 748 (1928) (disputes concerning internal corporate affairs "must be settled by the courts of the state creating the corporation"); *see* Cal. Corp. Code § 2116 (West 1990); Restatement (Second) Conflict of Laws § 302 cmt. e (1971).

"Internal affairs" include the determination of whether a particular person may bring a shareholder derivative suit. *Drachman v. Harvey*, 453 F.2d 722, 726 n.9, 730 (2d Cir. 1971) (affirming dismissal of state law claims since California, the state of incorporation, did not allow derivative suits by persons

other than shareholders of record); *Levine v. Milton*, 219 A.2d 145, 147 (Del. Ch. 1966) (right of stockholder of Panamanian corporation to bring double derivative action governed by Panamanian law); *Norton v. National Research Found.*, 141 F.R.D. 510, 512 (D.Kan. 1992) ("plaintiffs' status as shareholder is tested by the law of the corporation's state of incorporation"); *Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 605 (S.D.Fla. 1991) ("question of whether a Plaintiff is a stockholder within the meaning of Rule 23.1 is determined under the applicable state [of incorporation's] substantive law"); *Hausman v. Buckley*, 299 F.2d 696, 705-06 (2d Cir.) (dismissing derivative action that was not brought in accordance with the law of Venezuela, where corporation was incorporated), *cert. denied*, 369 U.S. 885, 82 S.Ct. 1157, 8 L.Ed.2d 286 (1962).

3. The Presence Of A Meritless Federal Claim Does Not Change The Need To Apply Japanese Law.

Plaintiff concedes much of the foregoing in acknowledging that Japanese law provides "the substantive law to adjudicate [Honda Japan's] claims against the Director Defendants for breaches of duties owed to" Honda Japan. (AOB 9.) He insists, however, that Federal Rule of Civil Procedure 23.1 or

California Corporations Code section 800 governs the question of whether he can bring claims under California or federal law. (AOB 10.) Not so. Plaintiff has no claims governed by California law, since he cannot sue on behalf of American Honda. Plaintiff has no viable federal claim. (Section IV, below.)

Under recent Supreme Court authority, the law of the place of incorporation ordinarily governs standing for purposes of *all* claims. In *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101, 111 S.Ct. 1711, 1719, 114 L.Ed.2d 152 (1991), for example, the Supreme Court held that the law of the state of incorporation must be applied in a derivative action arising under a federal statute to "determine *who* has the power to control corporate litigation." *See also Burks v. Lasker*, 441 U.S. 471, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979) (law of state of incorporation governs question of authority of independent directors to terminate derivative action arising under federal statutes). Accordingly, Japanese law controls the issue of standing here.

Plaintiff's contrary position entirely relies on cases that pre-date *Kamen*. (*See* AOB 10 n.10.) Inasmuch as *Kamen* significantly *narrowed* the circumstances under which federal standing requirements can be applied to federal claims in cases that are otherwise governed by non-federal law, plaintiff's authorities are suspect. *See Country Nat. Bank v. Mayer*, 788 F. Supp. 1136, 1140 n.4 (E.D.Cal. 1992) (stating that "[i]n light of *Kamen*,"

Ninth Circuit precedent relied on in *Johnson v. Hui*, 752 F. Supp. 909 (N.D. Cal. 1990) (cited at AOB 10 n.10), "likely was erroneously decided").[5]

II.

WHOM CAN PLAINTIFF SUE?

JAPANESE LAW, WHICH GOVERNS THIS CASE, DOES NOT PERMIT THE ASSERTION OF "DOUBLE DERIVATIVE" CLAIMS.

The requirement that only shareholders can bring a derivative action is not the only barrier plaintiff must surmount. Japanese law does not permit even shareholders — let alone ADR holders — to seek *double* derivative relief, and Japanese law must govern here. Here, Plaintiff does not even pretend that Japanese and California law are the same; he ignores Japanese law entirely.

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[5] At most, federal law (rather than Japanese law) would determine his right to sue *only* as to claims that arise *under United States federal law.* Thus, in *Drachman v. Harvey*, 453 F.2d 722, 727 (2d cir. 1971) (cited at AOB 10), the Court of Appeals held that state law governs standing with respect to substantive state law claims, but "[f]ederal law must be consulted to decide whether there is standing to sue under [a federal claim]."

Again, we first explain the contours of Japanese law, and then demonstrate why it, rather than California law, applies.

These, too, are purely legal questions that the Court reviews de novo. Fed. R. Civ. P. 44.1; *Salve Regina College v. Russell*, 499 U.S. at 231-233.

A. Japanese Law Does Not Permit Plaintiff To Sue The Defendants He Has Sued Here.

1. Japanese Law Does Not Permit Double Derivative Actions.

The expert testimony below was unequivocal: "The Japanese Corporate Law does not allow double derivative actions, nor has any court ever interpreted the law otherwise." (I ER 54:¶24 (Kitazawa Decl.); *see also* I ER 55:¶19 (Koma Decl.) ("[n]o Japanese court has allowed a shareholder of a parent corporation to pursue alleged liabilities of the directors of a subsidiary"); I ER 52:¶31 (Henderson Decl.).) Indeed, not only is there no basis in code, commentary or case law for double derivative suits in Japan, there is no scholarly support for permitting them. (I ER 54:¶24 (Kitazawa Decl.); I ER 55:¶20 (Koma Decl.).)

None of plaintiff's declarants disputed the statements of defendants' experts that Article 267 precludes a derivative action against the directors of a subsidiary of the corporation in which plaintiff owns shares or (except in limited circumstances not present in this case) against third parties. (I ER 54:¶¶3, 23-24 (Kitazawa Decl.); I ER 52:¶¶29-31 (Henderson Decl.); I ER 55:¶¶3A, 18-21 (Koma Decl.).) Nor did plaintiff cite any code section, legal commentary or judicial decision suggesting that Japanese law would permit either a "double derivative" action or an action against a party not specified in one of the governing statutes. Plaintiff merely asserted that "[t]here is no reasoned basis" to believe a Japanese court would give Article 267 "the crabbed reading that is urged." (II SER 323:1-4). Yet, as detailed below, the Honda Defendants' unrebutted expert declarations provided just that "reasoned basis."

2. Japanese Law Precludes Derivative Claims Against Anyone But Honda Japan's Personnel And Therefore Precludes Derivative Claims Against American Honda Personnel.

In authorizing shareholder derivative suits, the Japanese Diet expressly limited the class of permissible defendants to those identified by statute. (I ER 54:¶22 (Kitazawa Decl.); I ER 55:¶¶3A, 18 (Koma Decl.); I ER 52:¶30 (Henderson Decl.).) The Japanese Commercial Code allows derivative actions against *only* the directors, auditors, liquidators and promoters of the corporation *in which the shareholders own shares* and two carefully defined categories of third parties not relevant to this case. (I ER 54:¶23 (Kitazawa Decl.); I ER 52:¶29 (Henderson Decl.).) There is *no* other statutory provision allowing a derivative action against *any* other class of defendants; and there is no instance in Japanese jurisprudence in which a shareholder has been permitted to maintain a derivative action against anyone outside this exclusive list.

Japanese law, therefore, does not permit any shareholder (let alone plaintiff, as a holder of ADRs) to assert claims against any current or former American Honda officer or director or against any third party.

B. The Court Should Apply Japanese Law In Determining Whether Plaintiff May Maintain Double Derivative Claims.

Every court to address the issue has held that the *only relevant inquiry* is whether the derivative suit is permitted under the laws of the *jurisdiction of incorporation* of the corporation *in which the plaintiff holds his shares.*

In *Kostolany v. Davis*, No. 13299, 1995 Del. Ch. LEXIS 135, at 2 - 3 (Del. Ch. Nov. 7, 1995), for example, a parent corporation was incorporated in the Netherlands while its wholly-owned subsidiaries were incorporated in Delaware. The plaintiff in *Kostolany* held a direct interest only in the Dutch parent, but he purported to sue not only derivatively on behalf of the parent but double derivatively on behalf of the two subsidiaries. The Delaware Chancery Court held that Dutch, not Delaware, law governed the question of whether plaintiff could sue derivatively *on behalf of any of the three corporations*, stating:

> Delaware does have a strong interest in protecting minority stockholders of Delaware corporations. However, plaintiff is a stockholder of the Dutch parent, not of the Delaware subsidiaries.
>
> *Id.* at *8.

Because Dutch law did not recognize derivative suits, the court dismissed the entire action. *Id.* at *10.

Other courts faced with similar questions have likewise regularly dismissed lawsuits on the authority of the laws of the place of incorporation of the parent company. *E.g., Brown v. Ferro Corp.*, 763 F.2d 798, 802-03 (6th Cir.) (dismissing derivative action that did not comply with requirements of state of incorporation), *cert. denied*, 474 U.S. 947, 106 S.Ct. 344, 88 L.Ed.2d 291 (1985); *Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co.*, 189 U.S. 221, 230, 23 S.Ct. 517, 518, 47 L.Ed. 782 (1903) ("[b]y subscribing to stock in a foreign corporation, defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation"); *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 537, 3 S.Ct. 363, 370, 27 L.Ed. 1020, (1883) (same); *Fleeger v. Clarkson Co.*, 86 F.R.D. 388, 393 (N.D.Tex. 1980) ("plaintiff voluntarily purchased shares in a Canadian corporation which put him on notice that his rights as a shareholder would be construed according to Canadian law"); *Hausman v. Buckley*, 299 F.2d 696, 705-06 (2d Cir.), *cert. denied*, 369 U.S. 885, 82 S.Ct. 1157, 8 L.Ed.2d 286 (1962); *Levine v. Milton*, 219 A.2d 145 (Del. Ch. 1966).

Plaintiff's solitary authority is not to the contrary, for *it does not even address the choice of law question*. Plaintiff claims Judge Lew "inexplicably

ignored the Delaware court's learned analysis in *Sternberg [v. O'Neil*, 550 A.2d 1105 (Del. 1988)]." (AOB 19). But in fact *Sternberg* is irrelevant because the *only* issue before the court was whether Delaware had *personal jurisdiction* over the out-of-state parent company directors. Although the plaintiff filed his lawsuit as a double derivative action on behalf of an Ohio parent and its Delaware subsidiary, his right to do so, or what law governed any such right, was not at issue.

Notwithstanding the absence of supporting authority, plaintiff urges that, despite Japanese law to the contrary, he should nonetheless be allowed to pursue a double derivative suit because: (1) double derivative suits have long been recognized in some jurisdictions; (2) California has an interest in the adjudication of this matter; and (3) California law is applicable to the claims brought on behalf of American Honda against the American Honda Defendants and the Japanese directors of Honda Japan. (AOB 15-19.) But:

- California has *never* recognized double derivative suits, and one decision strongly suggests California law does *not* allow such suits. *Gaillard v. Natomas Co.*, 173 Cal.App.3d 410, 419, 219 Cal.Rptr. 74, 79-80 (1985) (no double derivative action in California because Corporations Code section 800 requires contemporaneous ownership of

shares in corporation on behalf of which suit brought); *see Brown v. Tenney*, 155 Ill.App.3d 605, 608, 508 N.E.2d 347, 350 (1988) (holding California does not allow double derivative suits, citing *Gaillard*), *aff'd*, 125 Ill.2d 348, 532 N.E.2d 270 (1988).

- Once the lawsuit is stripped of plaintiff's impermissible claims against all but Honda Japan's directors, California has no substantial interest in the outcome of this litigation.
- Plaintiff does not and cannot cite any authority that would suggest that the duties of a *parent* company's directors towards its subsidiary are measured by the laws of the subsidiary's state of incorporation.

Permitting plaintiff to assert claims on behalf of American Honda would impermissibly expand the statutorily-restricted categories of proper derivative defendants specified by Japanese law. As the *Kostolany* court observed: "This court's duty is to apply existing, not to develop new, Dutch law." *Kostolany v. Davis,* 1995 Del. Ch. LEXIS 135, at *10.

III.

WHERE CAN PLAINTIFF SUE?

EVEN IF PLAINTIFF WERE OTHERWISE ENTITLED UNDER JAPANESE LAW TO BRING THIS SUIT, HE MUST BRING IT IN JAPAN.

Beyond the obstacles discussed above, Plaintiff faces yet additional hurdles: Japanese law requires derivative actions to be brought in Japan, and as a matter of choice of law this Court must apply that substantive provision of Japan's Commercial Code. The same result obtains under principles of international comity and the doctrine of forum non conveniens, and the Court below properly exercised its discretion in dismissing the action on those grounds as well.

There is no dispute that application of the exclusive jurisdiction limitation on choice of law grounds is reviewed de novo as a question of law and that a forum non conveniens dismissal is reviewed for abuse of discretion. (AOB 1-2.) However, contrary to plaintiff's assertion, recognition of international comity is reviewed under the abuse of discretion standard. *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191 (3d Cir. 1994);

see also Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 999 (2d Cir.), *cert. denied,* 510 U.S. 945, 114 S.Ct. 386, 126 L.Ed.2d 334 (1993).

A. Choice of Law Principles Require Application Of Japan's Exclusive Jurisdiction Statute.

1. Japan's Exclusive Jurisdiction Statute Is Substantive.

Under Japanese law, any action to enforce a director's liability to a corporation — whether initiated by the corporation itself or filed by a shareholder derivatively on behalf of the corporation — can be brought *only* in the district court having jurisdiction over the corporation's head office. Shoho (Commercial Code), Law No. 48 of 1899 [Shoho] Art. 268(1). (I ER 54:¶¶4, 26-27 (Kitazawa Decl.); I ER 55:¶¶3B, 22-29 (Koma Decl.); I ER 52:¶¶3b, 11-17 (Henderson Decl.); I ER 61:¶¶5, 14-19 (Young Decl.).)

Japan's exclusive jurisdiction statute does not merely express a procedural preference. Numerous factors show it reflects paramount policy concerns:

- Japanese courts are absolutely bound, without motion being made and *without discretion*, to transfer or dismiss an action to ensure that it is

heard by the proper court. (I ER 55:¶22 (Koma Decl.); I ER 52:¶15 (Henderson Decl.); I ER 61:¶14 (Young Decl.).)

- Article 268(1) may not be waived. (I ER 54:¶27 (Kitazawa Decl.); I ER 52:¶15 (Henderson Decl.).)
- A foreign judgment obtained in contravention of this provision will not be recognized or enforced by Japanese courts. (I ER 52:¶¶26-28 (Henderson Decl.); I ER 54:¶27 (Kitazawa Decl.); I ER 55:¶¶3D, 32-34 (Koma Decl.); I ER 61:¶14 (Young Decl.).) *Thus, a judgment in the present case would be a nullity in Japan.* (I ER 55:¶¶32-34 (Koma Decl.); I ER 52:¶¶26-28 (Henderson Decl.); I ER 61:¶14 (Young Decl.).)
- The exclusive jurisdiction limitation appears in Japan's Commercial Code, not its Code of Civil Procedure, where procedural provisions usually are codified. (I ER 52:¶14 (Henderson Decl.).)

The substantive policies furthered by Article 268(1) include enabling the corporation to monitor the action and allowing the corporation and other shareholders to intervene by ensuring that the action is conducted in a forum convenient to the greatest number of interested parties. (I ER 54:¶26(c) (Kitazawa Decl.); I ER 55:¶23 (Koma Decl.); I ER 52:¶16 (Henderson Decl.);

I ER 61:¶¶15-16, 18 (Young Decl.).) The exclusive jurisdiction provision also avoids the risk of inconsistent judgments being entered in different courts (I ER 52:¶17 (Henderson Decl.); I ER 55:¶25 (Koma Decl.)) and assures directors that the risk of personal liability on account of performance of their duties will be resolved in a single forum applying a relatively foreseeable body of law. (I ER 55:¶24 (Koma Decl.).)

2. United States Courts Ordinarily Defer To Exclusive Jurisdiction Laws.

United States courts defer to such exclusive jurisdiction provisions, considering them to be substantive for choice-of-law purposes. In *Fleeger v. Clarkson Co.*, 86 F.R.D. 388 (N.D. Tex. 1980), for example, the court dismissed a shareholder derivative suit filed on behalf of a Canadian corporation, enforcing a Canadian law requiring that all such suits be brought in the Supreme Court of Ontario. Finding the limitation substantive, the Court applied a "well-recognized conflicts principle" that "if the statute that creates a right . . . also places limitations upon the exercise of that right, then this Court must also apply those limitations when it enforces the right." *Id.* at 394. This principle has been applied in a variety of contexts to find limitations on the

exercise of statutory rights substantive in nature and therefore enforceable. *See, e.g., Hausman v. Buckley*, 299 F.2d at 701 (Venezuelan law requiring the holding of a shareholders' meeting before bringing a derivative suit deemed substantive because "the condition imposed by Venezuelan [sic] law on the right to enforce corporate claims goes to the substance of that right"); *Lujan v. Regents of the Univ. of Cal.*, 69 F.3d 1511, 1517 (10th Cir. 1995) ("where a statute of limitations does not merely bar the remedy for the violation of a right but limits or conditions the right itself, courts have treated the statute as substantive").

Appellant's sole authority is *Randall v. Arabian Am. Oil Co.*, 778 F.2d 1146, 1150 (5th Cir. 1985). This authority cannot carry the day. Whether an exclusive jurisdiction provision is to be applied turns on the question of whether that provision is substantive or procedural. *Fleeger*, 86 F.R.D. at 394. The Supreme Court has explained that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes." *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965). Thus, when the court in *Randall* declined to apply an exclusive jurisdiction provision of Saudi Arabian labor law in a tort action against an American corporation, it did so only after determining that "the Saudi exclusive jurisdiction provision can fairly be characterized as procedural in nature and not part of the substantive" law of

Saudi Arabia. *Randall,* 778 F.2d at 1152. Consequently, *Randall* provides no authority on the issue of whether Japan's Article 268(1) — an integral part of and limitation on the substantive right to sue derivatively which directly implicates matters of internal affairs — controls here. *Fleeger* is the applicable authority, since it involved a shareholder derivative suit case involving an exclusive jurisdiction provision where the court found the provision substantive.

3. California Corporations Code Section 2116 Does Not Override Japanese Commercial Code Article 268(1).

Faced with substantive law provisions requiring this lawsuit to be brought, if at all, in the city in which Honda Japan is headquartered, plaintiff contends California Corporations Code section 2116 permits the action to proceed in California. But section 2116 is merely a choice of law provision (directing the use of Japanese law in this case), not a provision conferring jurisdiction on California courts — let alone federal courts.[6]

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[6] Section 2116 reads, in pertinent part: "The directors of a foreign corporation . . . are liable to the corporation, its shareholders [and others for] . . . violation of official duty according to any applicable laws of the state or place of incorporation . . . ."

Section 2116 allows shareholders, creditors and other named persons to sue the directors of a foreign corporation "according to any applicable laws of the state or place of incorporation." It "creates no substantive rights or independent cause of action" under California law. *Burt v. Danforth*, 742 F.Supp. 1043, 1052 (E.D. Mo. 1990) (emphasis omitted) (rejecting claim that section 2116 creates a new substantive cause of action that may be pursued in federal court). It certainly does not purport to create a substantive right to sue derivatively, nor does it nullify any limitations on that right as conferred by the law of the state of incorporation. *See, e.g.*, 3 H. Marsh & R. Finkle, *Marsh's California Corporation Law* §26.15, at 2114 (3d ed. Supp. 1996) ("Section 2116 . . . provides for the jurisdiction of the California courts *in an action based upon the law of the state of incorporation* against the directors of a foreign corporation") (emphasis added).

B. The Trial Court Properly Exercised Its Discretion In Ruling That The Action Should Be Dismissed As A Matter Of International Comity.

Even if Judge Lew was not obliged to apply Article 268(1), dismissal was appropriate because he properly exercised his discretion under the principle of international comity. Plaintiff's only argument against dismissal under international comity is the fact that there is no present judicial proceeding in Japan. (AOB 33-34.) But no such barrier has ever been recognized.

International comity "is the recognition which one nation allows within its territory to the *legislative, executive or judicial* acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895) (emphasis added). Thus, the principle of international comity encompasses not only deference to foreign judicial proceedings, but also respect for the capacity of foreign legal systems to decide cases involving foreign acts, foreign actors and foreign law. *Hilton*, 159 U.S. at 164; *Mars Inc. v. Nippon Conlux Kabushiki-Kaisha*, 825 F.Supp 73 (D.Del. 1993) (court declined to exercise jurisdiction over action alleging infringement of Japanese patent on ground of international comity where no foreign judicial proceedings pending), *aff'd*, 24 F.3d 1368 (Fed. Cir. 1994). "Comity should be withheld *only* when its acceptance would

be contrary or prejudicial to the interest of the nation called upon to give it effect." *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017, 92 S.Ct. 1294, 31 L.Ed.2d 479 (1972) (emphasis added); *see Fleeger*, *supra*, 86 F.R.D. at 392.

Stripped of legal irrelevancies, this case was brought on behalf of, and concerns the internal operations of, only Honda Japan, a Japanese corporation.[7] The vast majority of Honda Japan directors and shareholders are Japanese citizens resident in Japan. Japan's Commercial Code creates a comprehensive, unified and finely-balanced system of laws to regulate the activities of its corporations, corporate directors and statutory auditors, and to govern derivative actions brought on behalf of its corporations:

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[7] In applying the doctrines of international comity and *forum non conveniens*, the trial court properly disregarded parties resident in the U.S. against whom no claim can be stated, as well as the federal proxy claim, which cannot be brought against Honda Japan. *See Scottish Air Int'l, Inc. v. British Caledonian Group*, 81 F.3d 1224, 1234-35 (2d Cir. 1996) (court must determine what claims likely are cognizable before deciding forum non conveniens issue); see also *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 954–55 (1st Cir. 1991) (district court properly could ignore federal securities claim that likely lacked merit in dismissing the action under *forum non conveniens*), *cert. denied*, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 418 (1992) ; *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1032 (3d Cir. 1980) (in dismissing action, court properly ignored American law claim "which may have little chance of success"); *Yang v. M/V Minas Leo*, 1993 U.S. Dist. LEXIS 18301 at *18 n.10 (N.D. Cal. Dec. 22, 1993) (disregarding improperly joined defendants in dismissing action), *aff'd*, 1996 U.S. App. LEXIS 2235 (9th Cir. Jan. 26, 1996).

> "[P]rosecution of a derivative suit in a U.S. court or other foreign country would be completely contrary to the constructed statutory framework for controlling the behavior of directors of Japanese corporations."

(I ER 61:¶17 (Young Decl.); *see* I ER 54:¶¶4, 26-27 (Kitazawa Decl.); I ER 55:¶¶25-27 (Koma Decl.).) "[T]he interest of [a foreign country] in having controversies relating to one of its major corporations decided at home is substantial." *DeYoung v. Beddome*, 707 F.Supp. 132, 139 (S.D.N.Y. 1989) (dismissing derivative action involving foreign corporation under doctrine of international comity); *see also Scottish Air Int'l, Inc. v. British Caledonian Group*, 81 F.3d 1224, 1234 (2d Cir. 1996) (United States had less interest than Great Britain over who sat on Board of Directors of British company); *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 953 (1st Cir. 1991) (action for securities fraud against Canadian corporation involved "interpreting primarily Canadian law and applying it to matters principally of concern to Canada and Canadians").

Just as "general concerns respecting international comity counsel against exercising jurisdiction over a matter involving a Japanese patent, Japanese law, and acts of a Japanese defendant in Japan," *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368 1376 (Fed Cir. 1994), they equally counsel

against entertaining a derivative suit involving a Japanese parent corporation, Japanese law, and actions of Japanese directors in Japan.

C. The Trial Court Properly Exercised Its Discretion To Dismiss Under The Doctrine Of Forum Non Conveniens.

Overwhelming evidence supported the trial court's exercise of discretion in dismissing this action on the ground of forum non conveniens. Ignoring much of this evidence, plaintiff criticizes the ruling principally because the trial court did not, according to plaintiff, sufficiently detail its decision-making process. This might be a valid criticism in a close case with hotly disputed facts in which the trial court gave no hint of its reasoning, but not here. The evidence here was so one-sidedly in favor of the motion that it would probably have been an abuse of discretion to deny the motion. Moreover, both the transcripts of the hearings below (III ER 96) and the trial court's order (III ER 90), while not lengthy, showed that Judge Lew properly discharged his responsibilities in balancing the relevant factors.

Judge Lew also incorporated into his order "the reasons stated in the Honda defendants' papers in support of dismissal under the doctrine of forum non conveniens." (III ER 90:p. 4.) This is an appropriate technique. In

Alaelua v. I.N.S., 45 F.3d 1379 (9th Cir. 1995), this Court held that incorporation by reference by the Board of Immigration Appeals of the findings of an Immigration Judge allowed the Court of Appeals to review the Board's decision under an abuse of discretion standard, since the Board "gave individualized consideration to the particular case, but chose to use the IJ's words rather than its own." *Id.* at 1382. This is precisely how Judge Lew handled the matter.

In any event, the "district court is accorded substantial flexibility in evaluating a *forum non conveniens* motion." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S.Ct. 1945, 1953, 100 L.Ed.2d 517 (1988). *See also Empresa Lineas Maritimas v. Schichau-Unterweser,* 955 F.2d 368, 373-74 (5th Cir. 1992) (court did not abuse its discretion though it failed "[to] set out the degree of deference that it accorded [plaintiff's] forum choice").

D. Plaintiff's Choice Of Forum Was Entitled To No Deference.

Plaintiff insists that he is entitled to the "strong presumption in favor of the plaintiff's choice of forum." (AOB 22.) He is wrong.

This is a derivative suit. Plaintiff is *not* a "real party in interest" — that party is *Honda Japan*. Because Honda Japan is a foreign corporation,

plaintiff's initial choice of an American forum is not entitled to deference. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 236, 102 S.Ct. 252, 255-56, 70 L.Ed.2d 419 (1981) (plaintiff's choice of forum deserves less deference "when plaintiff or real parties in interest are foreign"); *Koster v. American Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 522-24, 67 S.Ct. 828, 831, 91 L.Ed. 1067 (1947) (little deference is due a representative plaintiff's forum choice); *Pain v. United Technologies Corp.*, 637 F.2d 775, 798 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981) (little deference to local forum choice when suit is on behalf of foreign corporation). Any minimal deference that might otherwise be given to plaintiff's personal choice of a California forum is inappropriate here because Batchelder is a resident of New York, not California. *See, e.g., Sussman v. Bank of Israel*, 801 F.Supp. 1068, 1072 (S.D.N.Y. 1992), *aff'd per curiam*, 990 F.2d 71 (2d Cir. 1993) (in a New York court, California plaintiff was "foreign" plaintiff whose choice of forum was entitled to less deference).[8]

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[8] Plaintiff also argues that his forum choice is controlling because he is the only one who has brought a lawsuit. (AOB 23.) This argument is meritless. The Supreme Court announced no "only person to bring suit" exception in *Koster, supra,* and no subsequent case requires deference to a representative plaintiff's forum choice. Indeed, *Koster* was predicated on the fact that, in a derivative suit, "there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal

(continued...)

Moreover, having explicitly agreed in the Deposit Agreement that Japanese law controls issues of Honda Japan corporate governance, plaintiff cannot now claim surprise or prejudice when required to pursue matters of corporate governance in Japan. *Morrison Law Firm v. Clarion Co.*, 158 F.R.D. 285, 287 (S.D.N.Y. 1994) ("[t]he private interest of plaintiffs in suing in its home location is diluted because it chose to do business with Japanese firms and to seek their custom, making it logical that they be required to litigate there"); *DeYoung v. Beddome*, 707 F.Supp. at 139 (U.S. forum inappropriate where shareholders voluntarily invested in foreign corporation).

E. Japan Is An Adequate, Alternative Forum For Adjudication Of Plaintiff's Only Viable Claims — Those Asserted Against The Directors Of Honda Japan.

Plaintiff's argument depends on the presence in this case of California defendants who allegedly committed wrongful acts in the United States. Once Japanese law is applied, however, the only defendants left in this case are the

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[8] (...continued)
show of right go into their many home courts." 330 U.S. at 524; *accord DeYoung v. Beddome*, 707 F.Supp. 132, 138 (S.D.N.Y. 1989).

Japanese directors of Honda Japan. This was Judge Lew's conclusion (III ER 90:¶3 II SER 528-529) and the basis for his decision that "a derivative action against the directors of Honda Motor Company is more properly brought in Japan." (II SER 529.)[9]

Judge Lew's approach was correct. Disregarding irrelevant claims and improperly included defendants prevents a plaintiff from "skew[ing] the . . . analysis by joining claims that lack merit" or defendants against whom no claim could be stated. *Scottish Air Int'l, Inc. v. British Caledonian Group,* 81 F.3d at 1234-35; *Dahl v. United Technologies Corp.,* 632 F.2d 1027, 1032 (3d Cir. 1980) (if court fails to discount claims that "have little chance of success," the plaintiff could unfairly avoid dismissal on *forum non conveniens* grounds); *see also Hart v. General Motors Corp.*, 517 N.Y.S.2d 490 (N.Y. App. Div. 1987) (derivative suit dismissed on forum non conveniens grounds; court found underlying acts in forum state irrelevant to core question whether directors breached fiduciary duties), *appeal den.,* 70 N.Y.2d 608, 515 N.E.2d 910, 521 N.Y.S.2d 225 (1987); *Ernst v. Ernst,* 722 F.Supp. 61, 64-66 (S.D.N.Y. 1989) (court discounted underlying conduct — fraudulent

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[9] Specifically, Judge Lew held that "because Plaintiff's suit is limited to an action against the director[s] of Honda Motor Company, the *forum non conveniens* analysis is similarly limited." (III SER 96:16 (8/26/96 Hearing Transcript).)

conveyances in the United States — and focused on fact that contract was governed by French law and involved French inheritance laws); *cf. McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (for purposes of diversity jurisdiction, court must disregard joinder of California residents as defendants where no valid claim is stated against them).

Since the only viable claims in this action are against Honda Japan's directors, Japan clearly provides an alternative forum. "Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft*, 454 U.S. at 254 n.22. All of Honda Japan's directors are Japanese citizens (I ER 57:¶9) (Irino Decl.) and all are subject to the jurisdiction of the Japanese courts (I ER 55:¶30) (Koma Decl.); (I ER 57:¶10) (Irino Decl.) Thus, each *properly* named defendant is "amenable to process" in Japan. None of the authorities plaintiff cites for the rule that "each defendant" must be amenable to suit in the alternative forum (AOB 23) applies here because none involved *improperly-named* defendants against whom the plaintiff had no claim.

Japan is also an adequate forum, notwithstanding plaintiff's argument (AOB 28 n.30) that a Japanese court may dismiss his claims against the non-Honda Japan-director defendants or his suit entirely because an ADR holder has no right to sue derivatively. That possibility has no bearing on the adequacy of

the Japanese forum, because a U.S. court would have to apply the identical Japanese law and reach the identical result. (*See* III ER 85:¶14(b) (Smit Decl.), Section II, above.) Appellant implicitly conceded as much before Judge Lew. (II SER 340:3-6 ("[f]oreign law is implicated whether this case is tried in Los Angeles or Tokyo").) Nor does the possibility that application of governing law might result in rulings against Plaintiff provide any basis to find Japan an inadequate forum. *Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 702 (9th Cir. 1995) (although "scope of relief" not as broad as in U.S., Singapore allowed plaintiff some avenue for redress and was thus an adequate forum); *Piper Aircraft*, 454 U.S. at 254-55. (III ER 85:¶14(b) (Smit Decl.).)

F. Differences Between Japan And United States Do Not Render Japan An Inadequate Forum.

Plaintiff's argument that various practical features of the Japanese legal system render it an inadequate forum (AOB 27-28, 29) merits only a brief response, particularly in light of this Court's pronouncement that "[f]ederal courts have consistently found that Japan provides an adequate alternative

forum." *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 769 n.3 (9th Cir. 1991).

Alleged Hostility To Derivative Litigation. Plaintiff claims that Japanese courts are "apparent[ly] hostil[e] to derivative suits." (AOB 27.) Yet plaintiff admits that "[t]he Japanese shareholder derivative suit mechanism . . . 'is now *at the forefront* of Japanese corporate law.'" (II SER 320 n.11 (emphasis added).) Indeed, the number of derivative suits in Japan has increased dramatically since the 1993 amendments to the Japanese Commercial Code, and 174 suits were pending at year-end 1995. (III ER 86:¶¶4-6 (Koma Supp. Decl.); III ER 84:¶14 (Young Supp. Decl.).) The Tokyo District Court has established a specialized department of judges so that derivative suits can be "expeditiously handled by judges who have expertise in such areas." (III ER 86:¶20 (Koma Supp. Decl.).)[10]

Purportedly Onerous Security For Costs Provisions. Plaintiff claims he would have to post a "hefty bond" to pursue this litigation in Japan. (AOB 27.) But a Japanese court may require a plaintiff to post such security only if it

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[10] Among other notable judgments, in mid-1996 a director of a major Japanese company was ordered to pay over $1.24 billion yen (approximately $11,000,000) in a derivative action. (III ER 86:¶5 (Koma Supp. Decl.).) In mid-1993, the Japanese Supreme Court affirmed a 3.5 billion yen damage award in another derivative suit. (II ER 69:Ex. B, pp. 179-180 (Roddy Decl.).)

determines the action was brought in *bad faith* (III ER 86:¶11 (Koma Supp. Decl.)), and even in such instances the security amounts ordered are not exorbitant. (III ER 86:¶10 (Koma Supp. Decl.).) Moreover, American jurisdictions also have security for costs provisions for derivative litigation. *E.g.*, Cal. Corp. Code § 800 (West 1990). Finally, bonding and fee requirements do not render a forum inadequate for forum non conveniens purposes. *Nai-Chao v. Boeing Co.*, 555 F.Supp. 9, 16 (N.D.Cal. 1982), *aff'd*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983) (holding it would defy "the case law and common sense" to find that filing and other fees render Taiwan an inadequate forum).

Differences In Discovery And Evidentiary Practices. Plaintiff also claims that Japanese courts lack "meaningful discovery." (AOB 27.) But his own expert admits litigants in Japan are able to obtain meaningful and relevant evidence for use at trial. (III ER 74:¶17 (Takeuchi Decl.); *accord* III ER 86:¶¶12-17 (Koma Supp. Decl.).) This Court has held that Japan's more limited discovery procedures do not render that country an inadequate forum. *Lockman*, 930 F.2d at 768; *cf. Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1484 (9th Cir. 1987) (Singapore), *cert. denied*, 486 U.S. 1054, 108 S.Ct. 2819, 100 L.Ed.2d 921 (1988). Indeed, if American style discovery were the sine qua

non of adequacy, the United States would be the *only* adequate forum in the world.

G. Private Interest Factors Favored Dismissal.

In *Piper Aircraft*, 454 U.S. at 241 n.6, the Supreme Court outlined the "private interest" factors of forum non conveniens:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . ; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

As shown below, there is no balance to strike: other than the fact that plaintiff came to California to sue — a choice entitled to little if any deference — every factor decisively favors trial in Japan.

To begin with, although plaintiff places extravagant emphasis on the backdrop of this case — the United States bribery scheme currently being litigated in a multi-district litigation in Maryland — the only legitimate issue in this action is whether the *Japanese* directors of Honda Japan, acting *in Japan*, properly discharged their *Japanese legal duties* to their *Japanese corporation*.

In strikingly similar circumstances, the First Circuit in *Howe v. Goldcorp Inv., Ltd., supra,* affirmed the dismissal of a class action filed by an American resident on behalf of shareholders of a Canadian corporation, alleging breaches of fiduciary duty by certain officers and directors and the dissemination of false statements in violation of federal securities laws. 946 F.2d at 953. Holding that the "relevant events surrounding both plaintiff's 'misrepresentation' and 'breach of fiduciary duty' claims took place *in Canada*, not in the United States," the Court stated:

> The Canadian directors of Goldcorp, its officers, its investment advisors, and its lawyers, meeting, speaking, planning and acting *in Canada*, took (or failed to take) the actions that allegedly amounted to a failure to remain properly loyal to Goldcorp and its shareholders. . . . Given these facts, it is not surprising that most of the evidence is in Canada . . . .

946 F.2d at 951 (emphasis in original).

Here, the vast majority of documentary and testimonial evidence is not only in another country, but in another language. (*See* I ER 57:¶¶12, 14-16 (Irino Decl.).) Honda Japan's corporate records, including all board meeting records, are in Tokyo. (*Id.*, ¶14.) Only four Honda Japan directors reside in

the United States. (*Id.*, ¶9.) The primary language of all 37 director defendants is Japanese. (*Id.*)

By contrast to the obvious convenience of Japan, fact-finding and trial in California would be exceedingly difficult. Judge Lew lacked compulsory process to require nonparty witnesses who reside in Japan to appear at trial. *See* Fed. R. Civ. P. 45. How could the trier of fact evaluate the performance and decision-making of Honda Japan's Board of Directors without the means to compel the live testimony of current and former board members and their staff? *See Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 1001 (dismissing Rule 10b-5 action on forum non conveniens grounds because, *inter alia*, "where, as here, appellants have alleged fraud, live testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor"); *Scottish Air Int'l, Inc. v. British Caldonian Group*, 81 F.3d at 1233 (same).

Moreover, the trial of this complex action would require time-consuming, expensive and disruptive translation between Japanese and English. "[J]urors would be required to endure continual translations which would in effect double the length of trial." *Ernst v. Ernst*, 722 F.Supp. at 65 n.4. (*See* I ER 52:¶¶22-25 (Henderson Decl.).)

Finally, — as plaintiffs' own expert admitted, — "in no event" would any judgment rendered by the trial court "be recognized or enforced" or have any "*res judicata* or collateral estoppel effect in Japan." (I ER 55:¶¶32-34 (Koma Decl.); I ER 54:¶27 (Kitazawa Decl.); I ER 52:¶¶26-28 (Henderson Decl.); I ER 61:¶14 (Young Decl.); III ER 77:¶21 (Yanagida and Akai Decl.).) Thus, there is no dispute that this case, if tried to a judgment in California, would have to be relitigated in Japan (*see* III ER 86:¶¶23-24 (Koma Supp. Decl.)), making litigation of this action here an utter waste of the time and resources of both the parties' and the court. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) (enforceability of judgment is important private interest factor); *Del Fierro v. PepsiCo Int'l*, 897 F.Supp. 59, 64 (E.D.N.Y. 1995) (dismissing class action on forum non conveniens grounds in favor of a Philippines forum because, among other considerations, a New York judgment could not be enforced in the Philippines); 7C Charles A. Wright, A. Miller et al., Federal Practice & Procedure §1822, at 15 (1986) (for derivative action to be effective, "the judgment must be binding" on those sued).

H. Public Interest Factors Likewise Favored Dismissal.

Neither the United States nor California has more than a minimal interest in resolving a dispute concerning the discharge by Japanese directors of duties owed by them under Japanese law to a Japanese corporation overwhelmingly owned by Japanese shareholders. Any American interest in the impact of the bribery scheme on American Honda's United States dealer network is "adequately safeguarded by the actions [already] brought in the United States." (III ER 85:¶13 (Smit Decl.).)

Plaintiff nevertheless contends that courts have found it "in the public interest" to allow American shareholders "to proceed with shareholder derivative litigation on behalf of foreign companies having substantial U.S. operations," even if they must apply foreign law. (AOB 29.) But four of the five cases he cites involved neither a forum non conveniens motion nor claims based on foreign law. The fifth, *Thomson v. Palmieri*, 355 F.2d 64, 65 (2d Cir. 1966), was a derivative action on behalf of a British company that "carrie[d] on its air transport business largely from New York," and whose raising of initial capital in New York gave rise to the plaintiff's claims. By contrast, Honda Japan has no operations and conducts no business in the U.S. (*see* I ER 57:¶¶12, 13 (Irino Decl.)); the claims will be based on Japanese, not

U.S., law; and the claims do not arise from any activities by Honda Japan in the United States.

Japan's overriding interest in matters concerning the internal affairs of Honda Japan is beyond question. Indeed, the forum of incorporation "has an interest superior" to all other potential forums in deciding issues concerning directors' conduct of the internal affairs of corporations chartered under their law. *Hart v. General Motors Corp.*, 517 N.Y.S.2d at 494; *see Scottish Air*, 81 F.3d at 1234; *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 953. Moreover, the need for a United States court to untangle and apply unfamiliar foreign law similarly points toward dismissal. *Piper Aircraft*, 454 U.S. at 251, 260 n.29; *see also Timberlane Lumber Co. v. Bank of Amer., N.T. & S.A.*, 574 F.Supp. 1453, 1471 (N.D.Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985); *Panama Processes, S.A. v. Cities Serv. Co.*, 650 F.2d 408, 414-15 (2d Cir. 1981) (forum non conveniens dismissal upheld where court faced potential application of "unfamiliar principles of Brazilian law").

Plaintiff's assertion that Japanese law "is virtually the same as California law" is nonsense. (AOB 9 n.9.) The statement of appellant's non-lawyer expert that the "standards of directors' conduct in the U.S. and Japan are very similar" (II ER 70:¶6 (Anchordoguy Decl.)) is, according to Professor Young,

"extraordinary," given the fact that Japanese scholars cannot agree among themselves about the parameters of directors' duties. (III ER 84:¶9 (Young Supp. Decl.).)

Despite the rapid expansion of derivative actions in Japan, it is still an emerging field and an American court would have little guidance in understanding a difficult and developing area of Japanese law. (I ER 52:¶¶8, 21 (Henderson Decl.); I ER 61:¶¶21-22 (Young Decl.).) Although English translations of Japanese statutes exist, even Plaintiff's expert acknowledges that few of the aids used by Japanese judges to interpret those statutes — treatises, scholarly articles and court decisions — are available in English. (II ER 73:¶6 (Kitagawa Decl.); *accord* III ER 84:¶2-8 (Young Supp. Decl.); I ER 61:¶¶6D, 33-34 (Young Decl.); I ER 52:¶22 (Henderson Decl.) (available English language materials are "wholly inadequate").)

Relevant Japanese decisions, treatise sections and other scholarly commentaries would have to be translated, adding a layer of complexity and uncertainty to the adjudicative process. Moreover, accurately translating Japanese to English is extremely difficult — much more so than translating French or Spanish to English. (I ER 52:¶23 (Henderson Decl.); *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d at 1376.) Other courts have held that this important practical consideration "militates strongly in favor" of the

foreign forum. *Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 982-83 (2d Cir. 1993) (upholding dismissal under forum non conveniens based upon translation difficulties); *see also Ernst v. Ernst*, 722 F.Supp. at 65-66 & n.4 (English translations of French laws "often are deficient in nuance and subtlety," making application of French law impractical); *Mizokami Bros. of Ariz. v. Mobay Chem. Corp.*, 483 F.Supp. 201, 206 (W.D. Mo. 1980) (same regarding translation of Mexican Law), *aff'd*, 660 F.2d 712 (8th Cir. 1981).[11]

Finally, determination of the proper standards of director conduct would necessarily require reference to Japanese community standards of custom and conduct. Japan's Commercial Code reflects the balancing of various Japanese interests, cultural values, economic realities and policy concerns. (I ER 61:¶¶5, 23, 26 (Young Decl.).) Yet the risk is great that a United States jury would employ domestic standards for corporate duties and business practices inconsistent with Japanese standards. (I ER 61:¶¶24-26 (Young Decl.); *see Panama Processes*, 650 F.2d at 415 (upholding dismissal based, in part, on

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[11] *See also, Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 502 (2d Cir. 1966) (dismissing in favor of Japan in significant part on the ground that application of Japanese law likely to be necessary); *Del Monte Corp. v. Everett Steamship Corp., S.A.*, 402 F.Supp. 237, 243 (N.D.Cal. 1973) (dismissing in favor of either the Philippines or Japan where probability of application of Japanese law); *Transomnia G.m.b.H. v. M/S Toryu*, 311 F.Supp. 751, 753 (S.D.N.Y. 1970) (fact that Japanese law may be applied "is a highly relevant factor to be considered when determining convenience").

concern about the application of "unfamiliar principles of Brazilian law" to the internal affairs of a Brazilian corporation "in a changing Brazilian economic, political and industrial climate").)

In sum, the private and public interest factors overwhelmingly favored dismissal under the forum non conveniens doctrine. (*See* I ER 61:¶35 (Young Decl.).) Judge Lew properly exercised his discretion in concluding that his court's interest in this action was "simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried" before him. *See Piper Aircraft*, 454 U.S. at 261.

IV.

THE COMPLAINT FAILS TO STATE A CLAIM UNDER SECTION 14(A) OF THE EXCHANGE ACT, BECAUSE HONDA JAPAN IS AN EXEMPT FOREIGN PRIVATE ISSUER.

The complaint alleges that Honda Japan disseminated false and misleading proxy materials in connection with its June 1995 shareholders' meeting, in violation of Section 14(a) of the Exchange Act and Rule 14a-9 thereunder. Judge Lew correctly dismissed this claim because Honda Japan is a "foreign

private issuer" and is therefore exempt from the requirements of this section.[12] (II SER 529).

Section 14(a) provides, in pertinent part, that "[i]t shall be unlawful for any person . . . in contravention of such rules and regulations as the Commission may prescribe . . . to solicit . . . any proxy . . . ." SEC Rule 3a12-3(b), 17 C.F.R. §240.3al2-3(b), in turn, provides that "[s]ecurities registered by a foreign private issuer, as defined in Rule 3b-4 . . . shall be exempt from section[] 14(a) . . . ." Since section 14(a) is essentially an enabling statute that authorizes the Securities Exchange Commission to set forth the rules and regulations governing the lawful issuance of proxy statements, an exemption from Section 14(a) is only meaningful if it provides an exemption from all the rules promulgated under section 14(a). To put it another way, since one violates Section 14(a) by "contraven[ing] such rules and regulations as the commission may prescribe," an exemption necessarily means that one *may* contravene those rules and regulations.

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[12] SEC Rule 3b-4, 17 C.F.R. § 240.3b-4, provides that a nongovernmental foreign corporation such as Honda Japan is a "foreign private issuer" *unless* 50% of its outstanding voting securities are held by U.S. residents *and* either (a) majority of executive officers or directors are U.S. citizens or residents or (b) more than 50% of its assets are located in the U.S. or (c) its business is administered principally in the U.S.

This is what the courts have consistently held. *Thouret v. Hudner*, [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,037 at 94,161 (S.D.N.Y. Jan 30, 1996) (Rule 3a12-3(b) gives foreign private issuers an "affirmative exemption from § 14(a)," including the anti-fraud rules prescribed by the Commission); *see also Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d. Cir.) (noting that under Rule 3a12-3 "[t]he Commission . . . has specifically exempted certain foreign issuers from the operation of Section[ ] 14 . . . of the Act"), *aff'd in part, rev'd in part on other grounds*, 405 F.2d 215 (*en banc* 1968), *cert. denied*, 395 U.S. 906, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969).

While plaintiff does not dispute that Honda Japan is a "foreign private issuer," he argues that it lost whatever protection the rule provides when it "voluntarily distributed" proxy materials to its shareholders and ADR holders.[13] (AOB 35-36.) This argument is entirely without support and

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[13] The relief sought for the alleged proxy violation is an order rescinding the election of 19 Honda directors. This attack on an election of directors, in the traditional manner of a proceeding in *quo warranto*, is an inappropriate effort to have an American court intrude into the internal affairs of a foreign corporation: "[A] court will not usually entertain a suit to annul by its decree an election, held outside its territory, of the directors of a foreign corporation." Restatement (Second) Conflict of Laws, § 313 cmt. c (1971). *E.g., State ex rel. Corrigan v. Great Northern-Chan Restaurant, Inc.*, 445 N.E.2d 732, 733-34 (Ohio Ct. App. 1982) (dismissing action challenging election of directors of foreign corporation); (continued...)

contravenes the plain language and intent of Section 14(a) and the "foreign private issuers" exemption. There are multiple reasons:

1. The plain language of the statute and the exemptive rule are incompatible with the distinction plaintiff proposes. Rule 3a12-3 flatly exempts a foreign private issuer from Section 14(a). The exemption is not conditioned on non-dissemination of proxy materials and its patent meaning is that foreign private issuers are exempt from prosecution for any act otherwise made illegal by Section 14(a). Moreover, Section 14(a) itself expressly excludes from its coverage all exempted securities, thus excluding foreign private issuers from the general anti-fraud provision in Rule 14a-9.

2. The exemptive rule would serve no purpose if, as plaintiff contends, it ceased to apply when a foreign private issuer elected to distribute proxy materials on a voluntary basis. By its terms, Section 14(a) and its implementing rules do not come into play at all until a proxy statement is disseminated; so without the sending of a proxy statement, there is no need for an exemption. The exemption would be a nullity if it applied only in cases where the statute and rules imposed no obligations or burdens from which an

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[13] (...continued)
see Rogers v. Guaranty Trust Co., 288 U.S. 123, 129, 53 S.Ct. 295, 297, 77 L.Ed. 652 (1933).

exemption could provide relief. It is elementary that statutes and rules must be construed to give them purpose and effect.

3. Plaintiff's only authority for the proposition that voluntary dissemination of proxy material vitiates the exemption is *Wilson v. Great Am. Indus., Inc.*, 979 F.2d 924 (2d Cir. 1992). But *Wilson* had nothing to do with any exemption. In *Wilson*, the defendants held enough shares to approve a proposed merger by a supermajority vote and therefore had no need to solicit proxies or send proxy materials to complete the transaction. Defendant nevertheless disseminated proxy materials. The court held that the proxy materials had to comply with Section 14(a) and the rules, even though the defendant could permissibly have voted its own shares to consummate the transaction without ever soliciting proxies. *Id.* at 931-32. Thus, the court ruled that the fact the solicitation was unnecessary did not excuse the defendants from compliance with the proxy statute or the proxy rules. Since there was no claim in *Wilson* that the defendants were entitled to any statutory exemption, the court's holding could not stand for the proposition that the voluntary dissemination of proxies by an *exempt* entity destroys an exemption.

Thouret, in contrast, squarely addresses the issue. It held that a foreign private issuer like Honda Japan did not lose the benefit of the Rule 3a12-3 exemption by voluntarily disseminating proxy materials claimed to violate Rule

14a-9. The court distinguished *Wilson* precisely because it did not involve any "affirmative exemption from §14(a)." [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,037 at 94,161.[14]

4. Plaintiff offers his views on the importance of enforcement of the proxy law. AOB at 37-38. But Congress charged the SEC with weighing countervailing policy considerations, and the SEC has done so.[15] To date, it has chosen to exempt the proxy materials of foreign private issuers like Honda Japan from all Section 14(a) requirements and all SEC rules under Section

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[14] Plaintiff may attempt, as he did below, to discredit *Thouret* on the ground that "it lacks *any* discussion of the repercussions of the exemption of a foreign issuer from liability under 14(a) and Rule 14a-9." (*See* II SER 342-343 n.38.) But the *Thouret* court had no reason to discuss "repercussions," since the language of the exemptive rule is crystal clear. It is for the SEC acting under its statutory rule-making powers, not the courts, to assess the "repercussions" of the agency's exemptive rule.

[15] The SEC's pronouncements also make clear that foreign private issuers' proxy solicitations are not governed by the U.S. securities laws. *E.g., Commodore Int'l Ltd.*, SEC No-Action Letter, 1992 SEC No-Act LEXIS 971 (October 2, 1992) (confirming to foreign private issuer that certain proposals otherwise required could be excluded from proxy materials in view of Rule 3a12-3(b) exemption); Adoption of Amendment to Rule 3a12-3 Exchange Act, Release No. 7868, 1966 SEC LEXIS 685, at *2 (April 21, 1966) ("the Commission decided not to adopt . . . subsection (d) of the proposed Rule 3a12-3, which *would have* under certain circumstances subjected solicitations in the United States by foreign issuers to the proxy rules under section 14 (a)") (emphasis added). Rules, Registration and Annual Report for Foreign Private Issuers, Exchange Act Release No. 16371, 1979 SEC LEXIS 220 (November 29, 1979), cited by plaintiff (AOB 37), reinforces rather than refutes the exemption's application here; it specifically reaffirmed the exemption from section 14(a) for securities issued by foreign private issuers and in no way limited the application of Rule 3a12-3's exemption.

14(a), in favor of regulation by the country of incorporation. Plaintiff is free to petition the SEC to withdraw or amend Rule 3a12-3 prospectively, but for purposes of this case the exemptive rule is controlling. Thus, Judge Lew's decision with regard to Section 14(a) and Rule 14a-9 must be affirmed.

CONCLUSION

This case has nothing to do with California. Yet plaintiff urges that this Court should hold that a district court in California *must* provide a forum for applying *Japanese law* to protect the interests of mostly *Japanese* shareholders of a *Japanese* corporation through the efforts of a *New York* resident who voluntarily elected to invest in the corporation, pursuant to a depository receipt agreement providing that *Japanese law* governs the rights of ADR holders and *New York* law governs other terms of the agreement.

Beyond the central and indisputable fact that Japanese law precludes plaintiff from bringing this case *anywhere*, every fact, every case and every

notion of common sense join in supporting the correctness of the trial court's decision to proceed no further.

The judgment should be affirmed.

Dated: March 17,1997

Respectfully submitted,

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STATEMENT OF RELATED CASES (NINTH CIRCUIT RULE 28-2.6)

There is no case pending before this Court which is related to the instant action.

Certificate of Compliance (Ninth Circuit Rule 32(e)3)

I certify that Appellees' brief is proportionally spaced (CG Times), and has a typeface of 14 points and contains 13,010 words.

Dated: March 17, 1997

Karen J. Jones

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Suite 544, Beverly Hills, California 90210.

On March 17, 1997, I served the foregoing document described as **APPELLEES' BRIEF** on the interested parties in this action

by placing the true copies thereof in sealed envelopes addressed as stated in the attached mailing list:

by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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Executed on March 17, 1997, at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

KAREN J. JONES

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