appropriate to dismissal, when all the situations are considered.

Thus, this judgment is a just one.

7. Commercial Law

Duskin's Stockholders Representative Suit
Osaka High Court, June 9, 2006
Case No. (*ne*) 568 of 2005
1214 HANREI TAIMUZU 115

Summary:

The Court found that the directors in the food company who later recognized the fact that the commodities which were not permitted to be used under the law which is called "*Syokuhin-eisei-hou*" had been sold had a duty to disclose that fact.

Reference:

Commercial Code Articles 267
Civil Code Articles 416, para1.

Facts:

Duskin, Inc. ("Duskin"), using the trade name of "mister Donut", sold the foods (which are called "Dai-Nikuman"), which included the additive of "TBHQ" (which was not permitted to be used under the law of sanitation of the foods in Japan). Duskin sold 13,140,000 "Dai-Nikuman" from about May, 2000 to December 20, 2000. On December 8, 2000, Z (who traded with Duskin) indicated that "Dai-Nikuman" included "TBHQ". Director A and director B, however, decided to continue to sell the stocks of "Dai-Nikuman", in spite of the recognition that they contained "TBHQ". Director B also paid Z ¥63,000,000 not to publish the fact that "Dai-Nikuman" included "TBHQ". On May 15, 2002, Duskin published that fact. The mass media reported that Duskin continued to sell the foods which included the additive that is not permitted to be used in Japan, hid that fact, and paid the hush money. As compensation for the reduction in

the sales of the shops which are members of "mister Donut", Duskin appropriated the loss of ¥10,561,000,000 in time for the closing of accounts.

Then X, who is a shareholder of Duskin (Plaintiff, Appellant, Appellee), claimed a payment of ¥10,624,000,000 (¥10,561,000,000 as a stockholders representative plus ¥63,000,000 as hush money) as compensation for damages against Y1-Y11, who are the representative director, auditor, and other directors of Duskin (Y1, Y3-Y11 are defendants and Apellee. Y2 is a defendant, Appellee, and Appellant), because they breached the duty of care and thereby caused damage to Duskin. Osaka District Court affirmed the responsibility of Y2, because, in spite of knowing the fact that "TBHQ" was included on December 29, 2000, he did not report it to the board of directors. In contrast, it denied the responsibility of Y1, other directors and the auditor, since they did not know that "Dai-Nikuman," which included "TBHQ", had been sold. X and Y2 appealed to the Osaka High Court against the decision.

This case mainly deals with when the directors and auditors knew the fact that "Dai-Nikuman", which included "TBHQ", had been sold, and if they should have published that fact.

Opinion:

Claim partly permitted on merit.

It is clear that the mass media and the public are sensitive to the scandals of the companies and often, on the large scale, featured the fact that the companies try to hide their scandals, which causes them to lose trust, considering the past cases. In this case, Duskin was suspected to pay hush money of ¥63,000,000 in order to positively try to hide the fact that "Dai-Nikuman" included "TBHQ". But Duskin, which is involved in the security of the foods, could sufficiently expect that there could be a risk of whether the company can continue to live or not, even if Duskin negatively continued to hide that fact.

Thus, the management clearly had to examine the way to minimize the damage from the company losing trust by serious wrong-doing. The directors of Duskin did not specifically discuss such a way and eventually decided not to positively publish the fact. The decision does not apply to the "business judgment rule".

It is not deniable that the breach of the duty of care of Y2 and Y1 and the decision not to publish the fact led to the worst consequence through the news report by the mass media. Therefore, Y1, Y2, other directors and the auditor should be responsible for expanding the damage by their duty of care.

Editorial Note:

Directors have a duty to establish a risk management system (so-called "internal control") in proportion to the scale and the attribution of the business that the companies manage. If they breach such a duty, they are responsible for neglecting it. In this case, both the district court and the high court held as follows; on the one hand, they could not find that Duskin had not established a compliance system to prevent the wrong-doing in advance when it sold "Dai-Nikuman". On the other hand, the courts examined whether the business judgment of the decision not to publish the fact by the directors who knew that "Dai-Nikuman" included "TBHQ" was allowed or not. As a result, the courts concluded that the directors breached the duty of care in this respect.

In some recent cases, the Japanese courts tend to find that the directors do not breach the duty to establish internal control systems. If there is no breach of such duty, the courts, in turn, examine whether there are the breaches of the other duties of care or not. In this case, the directors of Duskin are responsible for deciding not to positively publish the fact that "Dai-Nikuman" included "TBHQ", without discussing the way to minimize the damage from the company losing trust by serious wrong-doing. In Japan, the companies which produce and sell foods have been gradually asked to take some stern measures to ensure the security of the foods. In this sense, it seems to be valid that the directors should be responsible for their duties of care when they decide not to positively publish the fact that there is a breach of the law of sanitation of the foods ("*Syokuhi-eisei-hou*") as their business judgment.

8. Labor Law

X v. Sumitomo Light Metal Industries, Ltd.
Supreme Court 3rd P.B., April 11, 2006
Case No. (jyu) 1358, 1359 of 2002
915 RODO HANREI 51

Summary:

That a company receives full insurance money and pays part of it to a survivor based on consent made by/between them is not always to be described as being against public policy.

Reference:

Article 674 paragraph 1 of Commercial Law
Article 90 of Civil Law

Fact:

X1, X2 and X3 (plaintiff, koso appellant/koso respondent and jokoku appellant in case No. (jyu) 1358 of 2002,/jokoku respondent in case No. (jyu) 1359 of 2002) were spouses of employees who were employed by Y (defendant, koso respondent/koso appellant and jokoku respondent in case No. (jyu) 1358/jokoku appellant in case No. (jyu) 1359 of 2002). The employees died in 1994.

Y had fixed term group insurance agreements with each of nine life insurance companies. Under these group insurances, as a part of a benefit program for employees, insurance agreements were made by/between Y and each of the insurance companies, and the insured were employees and Y were supposed to receive insurance payments. Due to the deaths of the employees, Y received the insurance payments from each of the life insurance companies, which numbers were about JPY6 0 million per survivor. Based on a policy, numbers that X1, X2 and X3 got were about JPY10 million each, the breakdown of which were retirement payments including a lump sum for the survivors and a funeral subsidy.