UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LINKCO, INC., a Delaware corporation,	)	
	)	
Plaintiff,	)	
	)	Case No. 99 C 7774
v.	)	
	)	Judge William J. Hibbler
FUJITSU CO., LTD., a Japanese corporation,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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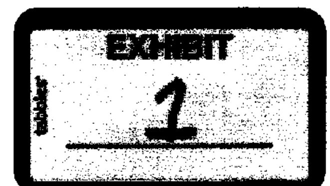

INTRODUCTION

This case has virtually nothing to do with Illinois and should not proceed here. The lawsuit arises out of plaintiff LinkCo's association with a Japanese businessman (Kiyoto Kanda) and establishment of a Japanese subsidiary (headed by Kanda) toward the pursuit of a business opportunity in Japan, and the alleged misappropriation of trade secrets by Fujitsu Limited, a Japanese corporation. None of the conduct alleged to form the basis for LinkCo's claims occurred in Illinois. The product now offered by Fujitsu Limited that allegedly utilizes LinkCo's trade secrets – DisclosureVision — was designed by Fujitsu Limited in Japan, developed in Japan, brought to market in Japan, and serves as a basis for the reporting and publishing of information by companies listed on Japanese stock exchanges. An exercise of personal jurisdiction over Fujitsu Limited in this case would offend principles of due process. For that reason alone, this action should be dismissed.

Moreover, the doctrine of forum non conveniens also compels dismissal. The likely witnesses in this case are predominantly Japanese nationals who live in Japan, work in Japan, and for whom Japanese is their native language. Virtually all of the documents reflecting the development of DisclosureVision are, not surprisingly, written in Japanese and found in Japan. The factual basis for dismissal on forum non conveniens grounds is overwhelming.

STATEMENT OF FACTS[1]

LinkCo and Kanda

LinkCo is a Delaware corporation which at all relevant times was based in Massachusetts. (Complaint ¶ 2). According to published records of the Illinois Secretary of

[1] For purposes of this motion only, the allegations of the Complaint are taken to be true.

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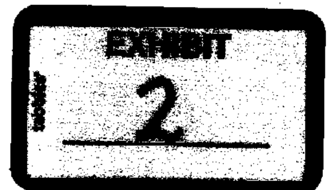
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINKCO, INC., Plaintiff, -against- FUJITSU LTD., Defendant.	00 Civ. 7242 (SAS) **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES**



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I. INTRODUCTION

This case involves plaintiff LinkCo, Inc.'s ("LinkCo") claim that Fujitsu Limited, a Japanese company, misappropriated a trade secret through its collaboration with a Japanese national named Kiyoto Kanda, who was the principal of a Tokyo-based consulting firm called K and A, Inc. According to LinkCo, Fujitsu's relationship with Kanda – who set up and worked at one time for LinkCo's Japanese subsidiary, LinkCo Japan – enabled Fujitsu to enter the "corporate disclosure" business by introducing a set of products and system integration services under the brand name "DisclosureVision." LinkCo alleges that DisclosureVision is a copy of LinkCo's trade secret.

LinkCo seeks punitive damages "in excess of $200 million" on several of its tort claims in this action – on top of the $66 to $76 million it apparently will seek in compensatory damages.[1] Fujitsu submits that punitive damages are not available to LinkCo in this case at all, because Japanese law is applicable to the question of whether punitive damages are available and does not permit their recovery. Japan embraces the policy of limiting the recovery in tort cases to compensatory damages, and Japan has a far stronger interest in the application of its law on this question than does New York, primarily because Japan is the locus of virtually all of Fujitsu's alleged misconduct in this case. Fujitsu is, of course, domiciled in Japan and its interactions with Kanda (the alleged "source" of LinkCo's trade secret) overwhelmingly occurred in Japan, where Fujitsu designed, developed, and marketed DisclosureVision exclusively for the Japanese market.

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[1] See Declaration of Paul E. Veith, herein "Veith Decl.," ¶ 10, and Complaint, ¶ 60, attached to Veith Decl. as Exhibit 1. The source materials for the statements in Defendant's Motion to Strike Punitive Damages are found either in the body of the declarations of Toru Shibata, Yuichi Sakai, Hideki Kamijyo, or Takeshi Ito, or in the body and/or exhibits to the declaration of Paul E. Veith. All five declarations are being submitted with this motion. Whenever a cited source is an exhibit to the Veith declaration, the citation indicates the source document and the exhibit number. For example, when the Complaint is cited, it will be cited: "(Complaint, ¶__/Veith Decl. Exh. 1)."

II. LEGAL STANDARDS

The determination of whether punitive damages are available to LinkCo is driven by choice-of-law analysis. Because this Court sits in New York, it must apply the choice-of-law principles developed by New York state courts. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941).[2] Under New York law, courts resolve choice-of-law questions on an issue-by-issue basis, when necessary. For example, the determination that New York law applies to a given cause of action and therefore to the measure of compensatory damages under that cause of action does not necessarily mean that New York law will apply to the question of whether punitive damages are available to the plaintiff under that cause of action. See James v. Powell, 279 N.Y.S.2d 10, 18 (N.Y. 1967) ("An award of punitive damages . . . depends upon the Object or purpose of the wrongdoing and on this issue we should look to the 'law of the jurisdiction with the strongest interest in the resolution of the particular issue presented.'") (citations omitted); Knieremen v. Bache Halsey Stuart Shields Inc., 427 N.Y.S.2d 10, 14-15 (1st Dep't 1980) (separately analyzing three choice-of-law issues and finding that Louisiana law was applicable on punitive damages question and barred recovery of punitive damages).

[2] Under New York choice-of-law analysis for tort claims, the law of the jurisdiction where the tort occurs usually controls the determination of liability. Schultz v. Boy Scouts of Am., Inc., 491 N.Y.S.2d 90, 95-96 (N.Y. 1985) (stating that the place of the tort will usually have a predominant, if not exclusive, interest in conduct-regulating rules). If this standard were applied strictly here, Japanese law would likely apply to liability issues for all of plaintiff's causes of action, because the conduct LinkCo complains of is conduct that took place predominantly, if not exclusively, in Japan. But if there is no *conflict* of laws to resolve and/or if the parties agree, a federal court will typically apply the forum's law. See Seven-Up Bottling Co. (Bangkok), Ltd. v. Pepsico, Inc., 686 F. Supp. 1015, 1022 (S.D.N.Y. 1988); In re Arbitration between Allstate Ins. Co. & Stolarz, 597 N.Y.S.2d 904, 905 (N.Y. 1993); Elson v. Defren, 726 N.Y.S.2d 407, 411 (1st Dep't 2001); J. Aron & Co. v. Chown, 647 N.Y.S.2d 8, 8 (1st Dep't 1996). In the summary judgment briefing in this case, the parties both cited New York law as being applicable to the liability question for LinkCo's claim of trade secret misappropriation. As a result, the Court appropriately applied New York law without engaging in any choice-of-law analysis. Fujitsu made it clear, however, that its agreement that New York law should apply to the issues being litigated in the summary judgment motion should not be construed as an agreement that New York law applied to all issues in the case. In its brief, Fujitsu stated: "[i]t appears that there may be at least one important difference between Japanese and New York law that does not affect the current motion: punitive damages are not available under Japanese law. Fujitsu reserves the right to seek application of Japanese law on the issue of the availability of punitive damages, if necessary." (Mem. In Support Of Defendant's Motion For Partial Summ. Judgment., p. 9, n.8).

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The "particular issue presented" by this motion is whether punitive damages are available to LinkCo. There *is* a conflict between New York's law and Japan's law on this point, and the parties do not agree on which jurisdiction's law should apply. Thus, a "conflicts" issue has been isolated, and the Court should (1) identify the policies embraced in the conflicting laws, and (2) "examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied." Dym v. Gordon, 262 N.Y.S.2d 463, 466 (N.Y. 1965). This "interest analysis" will result in the Court applying the "law of the jurisdiction with the strongest interest in the resolution of the particular issue presented." Dobelle v. Nat'l R.R. Passenger Corp., 628 F. Supp. 1518, 1528 (S.D.N.Y. 1986).

In conducting "interest analysis," courts applying New York law have considered several factors, including (1) plaintiff's domicile, (2) defendant's place of business, (3) the place where the alleged "misconduct" occurred, and (4) the basic policies underlying the field of law. Dobelle, 628 F. Supp. at 1528.[3] As will be noted below, these various factors have been accorded more or less weight depending on the issue on which choice-of-law analysis is being conducted, because the Court is to consider only those "facts and contacts. . . which relate to the purpose of the particular law in conflict." Miller v. Miller, 290 N.Y.S.2d 734, 737 (N.Y. 1968), quoted in Saxe v. Thompson Medical Co., 1987 WL 7362, at *1 (S.D.N.Y. Feb. 20, 1987).

Courts engaging in "interest analysis" under New York law on the punitive damages question have consistently applied the law of the jurisdiction in which a corporate defendant's alleged misconduct occurred. Dickerson v. USAir, Inc., 2001 WL 12009, at *9 (S.D.N.Y. Jan. 4, 2001) (applying punitive damages law of Washington where the majority of

[3] Dobelle also lists the "location of the accident" as a factor. Id. at 1528. Obviously, there is no "accident" alleged in the case at bar, which involves allegations of intentional wrongful conduct.

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defendant's misconduct occurred, including its managerial decisions, rather than law of place of accident); Wang v. Marziani, 885 F. Supp. 74, 77-78 (S.D.N.Y. 1995) (applying punitive damages law of Pennsylvania where defendant drove at excessive speed causing accident, rather than law of New York where plaintiff was domiciled); Saxe, 1987 WL 7362, at *1 & n.1 (S.D.N.Y. 1987) (applying punitive damages law of New York where testing, advertising and merchandising of allegedly defective product occurred, rather than law of Connecticut where plaintiff ingested product); Dobelle, 628 F. Supp. at 1529 (applying punitive damages law of Pennsylvania where majority of actions leading up to the accident occurred, rather than law of the place of accident, which was fortuitous); Bosio v. Norbay Secs., 599 F. Supp. 1563, 1572 (E.D.N.Y. 1985) (applying New York punitive damages law to breach of fiduciary duty claim when securities brokerage firm and a broker-dealer allegedly committed wrongful acts in New York, including conversion, and the account involved was maintained in New York); Beasock v. Dioguardi Ents., Inc., 472 N.Y.S.2d 798, 801 (4th Dep't 1984) (applying punitive damages law of jurisdictions where defendants designed, manufactured, and approved product, rather than law of New York where product exploded); Knieremen, 427 N.Y.S.2d at *13 (applying punitive damages law of Louisiana when "all of the acts that would warrant punitive damages were restricted to Louisiana," rather than law of New York where corporate defendant was domiciled). Where it was not possible to pinpoint a single jurisdiction as the location for all of the alleged misconduct, courts have opted for the jurisdiction where the majority of the defendant's alleged misconduct occurred. See Dickerson, 2001 WL 12009, at *9; Dobelle, 628 F. Supp. at 1529.

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III. THE COURT SHOULD APPLY JAPAN'S LAW AND PRECLUDE LINKCO FROM SEEKING PUNITIVE DAMAGES IN THIS CASE

A. Plaintiff's Domicile

LinkCo is a Delaware corporation that was founded in Massachusetts in 1995 and moved to Illinois in 1999. (Complaint, ¶ 2/Veith Decl. Exh. 1). LinkCo has no basis to argue that New York law should apply on the basis of its domicile, because it is not now and never has been domiciled in New York. In any event, "the interest of plaintiff's domicile has little relevance since punitive damages are designed to punish a defendant, not to compensate a plaintiff." Dobelle, 628 F. Supp. at 1528-29.

B. Defendant's Domicile

Fujitsu is a company domiciled in Japan. (Complaint, ¶ 3/Veith Decl. Exh. 1; Shibata Decl. ¶ 2). While plaintiff's domicile may have little relevance to the choice-of-law determination regarding punitive damages, the defendant's domicile "is . . . of some moment in relation to the purpose of the rule." Saxe, 1987 WL 7362, at *1. A defendant's domicile should be accorded some weight because the purpose underlying an award of punitive damages is to punish and deter, and any jurisdiction – Japan included – will have a strong interest in determining the method of punishing and deterring its own corporate citizens.

C. Location Of The "Misconduct"

In order to determine the location of Fujitsu's alleged misconduct, the Court should consider two questions: (1) what *is* the allegedly tortious conduct?, and (2) *where*, as between Japan and New York, did it occur? The first question can be answered, in part, by examining LinkCo's Complaint. LinkCo alleges trade secret misappropriation, conversion, unfair competition, and tortious interference with contractual relations. (Complaint ¶¶ 50-

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84/Veith Decl. Exh. 1). LinkCo alleges a common set of facts for all of its causes of action, which facts are set forth in paragraphs 6-49 of the Complaint. As the Court is aware, the only trade secret at issue in this case is a 26-element "combination" of "concepts, technologies, and strategies," identified by LinkCo's liability expert, Bruce Webster. (Webster Report, pp. 4-5, 16-18/Veith Decl. Exh. 4; Webster Dep., pp. 53, 72-73, 109, 198/Veith Decl. Exh. 5).

LinkCo alleges Fujitsu engaged in conduct rendering it liable for misappropriating and converting that "combination" trade secret.[4] There are two possibilities as to where the conduct amounting to misappropriation or conversion of a trade secret "occurs": the place where information is appropriated, and the place where the information is used. Courts in this district have found the place of usage to be determinative as to where trade secret misappropriation occurs. See CCS Int'l, Ltd. v. ECI Telesystems, Ltd., 1998 WL 512951, at *11 (S.D.N.Y. Aug. 18, 1998)(finding it likely Israeli law governs misappropriation claim when appropriation occurred in a number of places, one of which was New York, but use of information to develop system in competition with plaintiff's took place in Israel); Blimpie Int'l, Inc. v. ICA Menyforetagen AB, 1997 WL 143907, at *7 (S.D.N.Y. Mar. 25, 1997) (determining the law of Sweden likely applies because trade secrets used in market there); also Frink Am., Inc. v. Champion Road Mach. Ltd., 48 F. Supp. 2d 198, 205 (E.D.N.Y. 1999) (applying the law of the locus of the market where defendant, using the plaintiff's trade secrets, introduced a similar product in direct competition with plaintiff, instead of the law of the locus of appropriation). Whether the Court focuses its inquiry on the location of the alleged *appropriation* of trade secret

[4] There is no discernible difference between the conduct forming the basis for LinkCo's trade secret misappropriation claim and its conversion claim. In addition to the fact that LinkCo relies on the same factual allegations for each count (Complaint, ¶¶ 1-49, 50, 61/Veith Decl. Exh. 1), LinkCo expressly alleges that the object of Fujitsu's conversion was LinkCo's "trade secret and confidential information." (Id. ¶¶ 65-66).

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information, or the location of the alleged *use* of that information, the result of that inquiry points toward Japan.

1. Place Of Appropriation

To determine the locus of the alleged "appropriation," the Court must examine the place of Fujitsu's interaction with Kiyoto Kanda, because LinkCo contends that Fujitsu relied upon LinkCo proprietary information "in the development effort that resulted in their (sic) new corporate disclosure system;" and "that Kiyoto Kanda was the source providing the intellectual property to them (sic)." (Webster Report at 47/Veith Decl. Exh. 4). The overwhelming majority of Fujitsu's contacts with Kanda occurred in Japan, as is evident from several points gleaned from the record in this case, which cannot be disputed:

- Kanda's place of business and residence was in Japan at all times during his relationship with Fujitsu. (Kamijyo Decl. ¶ 15).
- Kanda was one of three LinkCo representatives who attended a meeting with LinkCo on September 10, 1997 at Fujitsu Research Institute in Tokyo, Japan. (Ito Decl. ¶ 7).
- A short time following the September 10 meeting, Kanda called Fujitsu's Takeshi Ito and subsequently met Ito and Fumihiko Otsuki for lunch in Tokyo, Japan. (Ito Decl. ¶ 8). Ito testified that he met or communicated with Kanda in Japan on several occasions in the following months in Japan, and LinkCo's expert relies heavily on these meetings in his Report, which he characterizes as "secret meetings" that began "just a few weeks after the September 10, 1997 meeting." (Webster Report at 40, 46/Veith Decl. Exh. 4).
- LinkCo's expert purports to document some of Kanda's interactions with Fujitsu in Exhibit 10 to his report – those interactions began in July/August 1997 (when Kanda was seeking to arrange a meeting between Fujitsu and LinkCo) and continued through March 2000, a period of nearly three years. (Webster Report at 77-84/Veith Decl. Exh. 4). Of the 109 "documented interactions" during this time period cited, just four make reference to events or communications that took place in New York (all of which are described below), six make reference to trips Kanda made to other countries in Asia (Id. at 79-80), and the balance of the "interactions" appear to reflect communications or meetings that took place in Japan.

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- LinkCo's expert's "documented interactions" exhibit makes reference to several consulting agreements between Fujitsu and K and A, Inc. (Kanda's firm), all of which were negotiated and entered into in Japan. (Webster Report at 79, 80, 84/Veith Decl. Exh. 4; Shibata Decl. ¶ 12).

- Approximately 45 of the "documented interactions" refer to communications to which Kanda and Kazunori Atobe were parties. Atobe is a Fujitsu engineer who was involved in the development of DisclosureVision, and, during the time of his work on DisclosureVision, Atobe did not have any occasion to travel outside Japan. (Atobe Dep. at 85, 100/Veith Decl. Exh. 2).

- Among the "documented interactions" listed by LinkCo's expert are lectures or seminars Kanda conducted on Fujitsu's behalf at various points in 1999 and 2000 regarding the corporate disclosure/investor relations field, in an effort to promote DisclosureVision. Those lectures and seminars all occurred in Japan. (Kamijyo Decl. ¶ 20).

As can be readily determined from the points listed above, Kanda's "interactions" with Fujitsu in Japan spanned nearly three years. In contrast, the interaction between Kanda and Fujitsu that occurred in New York was very limited in time and in scope:

- between December 7 and 14, 1997, Fujitsu's Takeshi Ito and Fumihiko Otsuki visited New York on business, some of it related to the corporate disclosure field and some of it unrelated. Kanda joined Ito and Otsuki at a meeting with Professor Ajit Kambil of New York University, who was introduced to Fujitsu as an expert on the EDGAR system and who later was engaged to do a research project on Fujitsu's behalf (Ito Decl. ¶¶10-12).[5]

- between February 25 and March 8, 1998, Otsuki visited New York on business, some of it related to the corporate disclosure field and some of it unrelated. On February 26, 1998, Kanda joined Otsuki for (a) an introduction to Professor Sato of the Japan/U.S. Research Center on Business and Economy at N.Y.U. (b) a meeting with Professor Kambil (to discuss the research project that had been proposed) and (c) a meeting at the offices of Document Technologies, a vendor of software for public corporations using the EDGAR system (Otsuki Dep. at 55-57, 63-68/Veith Decl. Exh. 6; Business Trip Report/Veith Decl. Exh. 7).

- between June 21 and June 27, 1998, Otsuki and Hideki Kamijyo visited New York on business, and were accompanied to several meetings by Kanda. The three met with Professor Kambil to discuss the ongoing research, and also visited

[5] Between December 1 and December 5, 1997, a group of Fujitsu employees who were working on the Ministry of Finance ("MOF") EDINET project made an investigatory visit to New York. The MOF group visited Professor Kambil on December 1, but Kanda was not present for that meeting or for any other meeting with the MOF group on the trip. (Sakai Decl. ¶ 10).

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Bowne (the financial printing company), and met at Fujitsu's offices in New York during the trip. (Kamijyo Decl. ¶16; Otsuki Dep. at 106-10/Veith Decl. Exh. 6).

Apart from the meetings described above, there is no indication in the record that any of Fujitsu's interactions with Kanda took place in New York, and there is no evidence in the record that Kanda communicated LinkCo's trade secret information to Fujitsu employees during any of the New York trips. Because (a) Kanda is alleged to be "the source" who transmitted LinkCo's trade secret information to Fujitsu, and (b) the overwhelming majority of his "interactions" with Fujitsu occurred in Japan (and few occurred in New York), this Court should conclude that the locus of Fujitsu's alleged "appropriation" activity was Japan, not New York.

2. <u>Place Of Use</u>

More importantly, to the extent Fujitsu is alleged to have "used" LinkCo's trade secret information, it has done so entirely in Japan, not New York. According to LinkCo's Complaint, Fujitsu's DisclosureVision package "is a copy of the very technology developed by LinkCo" and Fujitsu was able "to create and market the DisclosureVision software" by obtaining "LinkCo's trade secret and confidential information." (Complaint, ¶¶ 45, 48, 58/Veith Decl. Exh. 1). LinkCo's expert concluded that Fujitsu used LinkCo's trade secret by "conceiving, designing, and promoting publicly [DisclosureVision]." (Webster Report at 4/Veith Decl. Exh. 4). Without question, DisclosureVision was conceived, designed, and promoted by Fujitsu exclusively in Japan:

- Hideki Kamijyo, a Fujitsu systems engineer involved in the development of DisclosureVision, has testified that all the conceptual and detailed design work for the applications developed for DisclosureVision was performed by Fujitsu employees working in Japan. (Kamijyo Decl. ¶8).

- Kamijyo has testified that the programming for the applications developed for DisclosureVision was performed by Fujitsu employees, employees of Fujitsu subsidiaries, or sub-contractors working in Japan. (Kamijyo Decl. ¶9).

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- Kamijyo has testified that the testing for the applications developed for DisclosureVision was performed by Fujitsu employees, employees of Fujitsu subsidiaries, or sub-contractors working in Japan. (Kamijyo Decl. ¶10).

- Kamijyo has testified that all of the marketing activity in support of the applications developed for DisclosureVision was performed in Japan. (Kamijyo Decl. ¶11).

- Toru Shibata, Kamijyo's supervisor and a manager who was responsible for key decisions regarding DisclosureVision, has testified that all of the Fujitsu employees who worked on the DisclosureVision project worked in Japan, that all of the decisions he made as a manager on the DisclosureVision project were made in Japan, and that all of his reporting to supervisors took place in Japan. (Shibata Decl. ¶10).

- DisclosureVision encompassed applications designed exclusively for Japanese corporate users and certain system engineering services performed for specific Japanese institutions. (Kamijyo Decl. ¶¶11-12). It was not marketed outside of Japan.

3. <u>Place Of Unfair Competition</u>

In Count III of its Complaint, LinkCo alleges that "Fujitsu exploited and misappropriated LinkCo's proprietary and exclusive Technology, its trade secrets, and its confidential information to compete in the very markets LinkCo intended to compete in, at LinkCo's expense." (Complaint, ¶ 71/Decl. Exh. 1). The factual allegations incorporated in LinkCo's unfair competition claim are identical to the factual allegations incorporated in its trade secret and conversion claims. (Complaint ¶¶ 1-49, 50, 61, 69). Thus, the "conduct" that supports this claim is the same as the conduct that supports the other claims, and the question of where the unfair competition took place should be answered in the same way as the question of *where* Fujitsu is alleged to have "used" LinkCo's trade secret information. As indicated above, Fujitsu's DisclosureVision package offered products exclusively in the Japanese marketplace, not in New York or any of the United States. (Kamijyo Decl. ¶¶11-12).

4. Place Of Interference

In Count IV of its Complaint, LinkCo alleges that Fujitsu tortiously interfered with LinkCo's contractual relations with Kanda and Professor Kambil, and asserts that Fujitsu knew about Kanda and Professor Kambil's "covenants not to compete and agreement not to disclose LinkCo's trade secret and confidential information," and induced them to "breach their covenants not to compete and non-disclosure agreement with LinkCo." (Complaint, ¶¶ 77-78/Veith Decl. Exh. 1). Again, the factual allegations underlying this count are the same as those underlying the trade secret, conversion, and unfair competition counts.

As demonstrated above, Fujitsu's interactions with Kiyoto Kanda predominantly took place in Japan. As to those meetings that took place in New York in December 1997 and February and June of 1998, they came long after the time – according to LinkCo – that Fujitsu is alleged to have commenced its "secret" meetings with Kanda and to have begun receiving LinkCo confidential information. Webster Report at 46/Veith Decl. Exh. 4. Thus, LinkCo cannot credibly claim that the "interference" with Kanda's alleged contract with LinkCo occurred predominantly in New York.[6]

D. Policies Underlying Awards Of Punitive Damages

Under New York law, punitive damages are awarded in "singularly rare cases" where the "wrong complained of is morally culpable, or is actuated by evil and reprehensible motives." Knieriemen, 427 N.Y.S.2d at 13 (internal citations omitted). The purposes of the allowance of punitive damages are punishment of the defendant and deterrence of future

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[6] LinkCo also alleges in its Complaint that Fujitsu interfered with its contractual relations with Professor Kambil. (Complaint, ¶ 78/Veith Decl. Exh. 1). But there is (a) no evidence that anyone from Fujitsu knew that Professor Kambil was a party to a confidentiality agreement with LinkCo; (b) no evidence that Fujitsu met with Kambil for the purpose of obtaining any information about LinkCo, its products, or its business; and (c) no evidence that would support a finding that Fujitsu engaged in any conduct in New York that caused Kambil to breach an agreement with LinkCo. (Kambil Dep., pp. 83-85, 90-91, 103-04, 130-31, 152, 161, 164-65/Veith Decl. Exh. 3).

wrongdoing. See Beasock, 472 N.Y.S.2d at 800. Thus, "punitive damages awards are essentially conduct-regulating rather than loss-allocating." Saxe, 1987 WL 7362, at *1.

Under Japanese law, awards of punitive damages in tort cases are not permitted. In 1997, the Supreme Court of Japan explained the policy against punitive damage awards in a case concerning the enforceability of a judgment obtained in California:

> It is evident that the system of punitive damages as provided by the Civil Code of the State of California (hereinafter, 'punitive damages') is designed to impose sanctions on the culprit and prevent similar acts in the future by ordering the culprit who had effected malicious acts to pay additional damages on top of the damages for the actual loss, and judging from the purposes, is similar to criminal sanctions such as fines in Japan.
>
> In contrast, the system of damages based upon tort in Japan assesses the actual loss in a pecuniary manner, forces the culprit to compensate this amount, and thus enables the recovery of the disadvantage suffered by the victim and restores the *status quo ante* (citation omitted), and is not intended for sanctions on the culprit or prevention of similar acts in the future, i.e., general prevention.
>
> Admittedly, there may be an effect of sanctions on the culprit or prevention of similar acts in the future by imposing a duty of compensation on the culprit, but this is a reflective and secondary effect of imposing the duty of compensation on the culprit, and the system is fundamentally different from the system of punitive damages whose goals are the sanctioning of the culprit and general deterrence.
>
> In Japan, sanctioning of the culprit and general deterrence is left to criminal or administrative sanctions. Thus, the system in which in tort cases, the victim is paid damages for the purpose of imposing sanction on the culprit and general deterrence in addition to damages for the actual loss should be regarded as against the basic principles or basic ideas of the system of compensation based upon tort in Japan.

LX062957

Unknown v. Yoshitake Katayama & Mansei Kogyo KK, 51 Minshu 2573 (Supreme Court of Japan, July 11, 1997).[7]

Obviously, the laws of Japan and of New York are fundamentally different on the question of whether an award of punitive damages – which aims to punish and deter – is appropriate in a tort case. Japan has an interest in punishing and deterring unlawful behavior by its corporate citizens, particularly where that behavior occurs on its soil. But Japan has made the choice that punishment and deterrence are to be achieved through "criminal and administrative sanctions," not awards of punitive damages in civil tort litigation. Japan therefore has a strong interest in the application of its law on punitive damages in this case, because it will result in the prevention of an award against Fujitsu that is contrary to the policies of the Japanese tort system.

New York, on the other hand, has comparatively little, if any, interest in the application of its law on punitive damages in this case. It has no particular interest in protecting LinkCo – which was never domiciled in New York. It has no particular interest in regulating the conduct of Fujitsu that gave rise to this action, insofar as an overwhelming majority of that conduct occurred more than 6,700 miles away in Japan. The fact that Fujitsu personnel traveled to New York on several occasions in the process of investigating the corporate disclosure field should not lead to a conclusion that New York has an interest in applying its law to this case. New York should have no interest in punishing and deterring the conduct of foreign visitors from companies like Fujitsu, where there is no evidence – to be distinguished from conclusory

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[7] The Supreme Court of Japan is Japan's highest court. The English home page of the Supreme Court of Japan can be accessed at "http://www.courts.go.jp/english/ehome.htm." A page that lists the "prominent decisions" of the Supreme Court of Japan can be accessed at: "http://courtdomino2.courts.go.jp/promjudg.nsf/View1?OpenView." The translated decision on the cited case can be accessed via a link on the "prominent decisions" page, and is attached as Exhibit 8 to the Veith Declaration.

LX062958

allegations – that Fujitsu came to New York for any illicit purpose, or that it sought or obtained any LinkCo confidential or "trade secret" information in New York.

In light of the demonstration that the plaintiff in this case is not and was not ever domiciled in New York, that the defendant is a Japanese company based in Tokyo, and that the overwhelming majority of the alleged misconduct giving rise to this case occurred in Japan, this Court "'should accord to [Japanese law] the recognition which comity between enlightened governments requires,'" and strike LinkCo's request for punitive damages. James, 279 N.Y.S.2d at 17.

LX062959

IV. CONCLUSION

For the foregoing reasons, the Court should enter an order striking plaintiff's request for punitive damages on the basis of a finding that the law of Japan applies to the question of whether punitive damages are available to LinkCo and precludes their recovery on all claims asserted in this case.

Dated: April 1, 2002

FUJITSU LIMITED

By:
One of its attorneys

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LX062960

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LINKCO, INC., a Delaware Corporation Plaintiff, v FUJITSU CO., LTD., Defendant.	)	Case No. 99 C 7774 Hon. William J. Hibbler

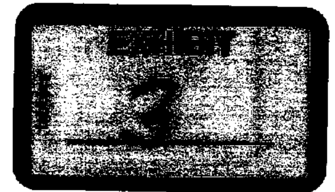
DECLARATION OF TORU SHIBATA

I, Toru Shibata, declare as follows:

1. I am employed by Fujitsu Limited as the Manager of Solution Development Department II, Systems Business Division I, System Engineering Group (the "Systems Group"). The statements made in this Declaration are based on personal knowledge or based on an understanding gained during the course of my work at Fujitsu Limited.

2. Since March of 1998, the Systems Group has been involved in developing a product relating to electronic reporting and disclosure of financial and other business information by public companies in Japan. The Systems Group has worked with other groups within Fujitsu Limited on this project.

3. Fujitsu Limited has developed and continues to develop a package of application programs and services called DisclosureVision. DisclosureVision was publicly announced in a March 31, 1999 press release. The packages of application programs and systems integration services that make up DisclosureVision are designed for and marketed to companies listed on Japanese stock exchanges, Japanese stock exchanges, companies engaged in the filing and disclosure business for Japanese companies, commercial information providers, and institutional or individual investors in Japanese companies.



4. Fujitsu Limited's Systems Group spent approximately 12 months developing IR-Station and IR-Tanshin Station, two application programs that form part of DisclosureVision's "IR Solution," a solution which supports the investor relation activities of companies listed on the Japanese stock exchanges. A team of approximately four Fujitsu employees and four employees of a Fujitsu sub-contractor (located in Japan) worked on the project. All of the work on the design, development, testing, and production of IR-Tanshin Station and IR-Station took place in Japan. The documentation relating to this project covers hundreds of pages and is largely technical in nature. Although I cannot be sure that I have seen all documentation concerning the project, virtually all of the documentation I have seen over the past 24 months which relates to this project has been written in Japanese.

5. At this time, the DisclosureVision product is designed exclusively for the Japanese market. For example, IR-Station is a database application that stores and sorts data filed with Japan's Ministry of Finance or Japan's stock exchanges. IR-Tanshin Station is an application program that edits financial data into a format designed by the Tokyo Stock Exchange.

6. Because DisclosureVision is marketed exclusively in Japan, virtually all of the available technical and non-technical information concerning DisclosureVision is located in Japan and is written in the Japanese language.

7. To my knowledge, none of the Systems Group's work on the design, development, testing, or production of DisclosureVision was performed in the United States or in Illinois. To my knowledge, all of the work done on the design, development, and production on the project has been performed in Japan.

8. I live and work in Japan, and my native language is Japanese. This Declaration is being submitted in English for the convenience of the Court.

DEPO OF TORU SHIBATA EXH 2

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Dated this 22 day of March, 2000 at Tokyo, Japan

柴田 徹

Toru Shibata

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DEPO OF TORU SHIBATA EXH 20

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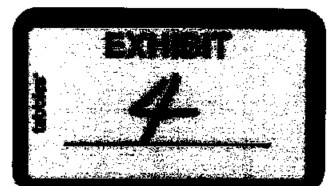
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINKCO, INC., Plaintiff,	00 Civ. 7242 (SAS)
-against-	**NAOYUKI AKIKUSA'S RESPONSE TO LINKCO'S WRITTEN INTERROGATORIES**
FUJITSU LTD., Defendant.	

Naoyuki Akikusa, by and through his attorneys, submits the following answers to the written interrogatories propounded by Plaintiff LinkCo, Inc., as modified by agreement of counsel. Defendant Fujitsu Limited, for whom Mr. Akikusa serves as President, is undertaking to answer certain of the interrogatories that seek information more appropriately provided by the corporation. A separate response to those interrogatories is being served simultaneously with these answers. In the following document, Mr. Akikusa's answers are in bold type; objections interposed by his counsel are in bold and italicized type.



at Fujitsu. In my opinion, the quoted statement is our corporate message intended to convey that Fujitsu Group can help customers achieve their highest goals. I do not know whether that slogan has been utilized in the sales and marketing of DisclosureVision products.

17. When and how did you first become aware that Fujitsu was intending to develop a corporate disclosure system? When and how did you learn that that system was intended to include the following features?

(a) That the system would permit electronic filing with the Ministry of Finance and/or with Japanese stock exchanges.
(b) That corporate information would be available in both English and Japanese.
(c) That a single centrally managed database would insure that all communication will use a single source of information.
(d) That the system would utilize the Internet to convey information to analysts, other companies, institutional and individual investor.
(e) That the system would utilize a relational database.
(f) That the system has a database combining information from accounting human resources, public relationships and other corporate departments.
(g) That the system would contain a YuhoStation and/or TanshinStation that reduces information to a formatted database that reorganizes the contents of the database to in a format that is highly searchable and suitable for drawing inferences with respect to the contents.
(h) That the system interfaces with companies ERP and accounting systems.

Fujitsu objects to this interrogatory on the basis that it is vague and ambiguous in its use of the term "corporate disclosure system" without defining that term.

A: I am not aware of the meaning of "corporate disclosure system" as used in the question, but assuming this means the DisclosureVision project, I first became aware of Fujitsu's work on the project around the time of its press release announcing DisclosureVision. Because I am not aware of any of the specific features of the DisclosureVision project , I do not know whether the specific features listed in (a) through (h) are features that were included in the DisclosureVision systems.

18. Identify any discussions that you have had since January, 1997 with either the Ministry of Finance and/or Tokyo Stock Exchange regarding issues relating to corporate disclosure. When did you have these discussions, who participated and what was said by each of the participants?

Fujitsu objects to this interrogatory on the basis that it is vague and ambiguous in its use of the term "corporate disclosure" without defining that term.

A: Even assuming "corporate disclosure" refers to the electronic filing of corporate reports with the Tokyo Stock Exchange and Ministry of Finance, I have had no discussions with representatives of the Tokyo Stock Exchange or Ministry of Finance since January 1997.

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[1) it in March '99 and they have dated through March 2001 did you
(2) say?

[3) MR. O'BRIEN: 2002, your llonor.

(4) THE COURT: Did you say March?
rsj MR. O'BRIEN: Yes, your Honor.

[6) ThE COURT: Even if you are right, that is three years
m of sales?

(8) MR. O'BRIEN: Yes, your Honor.

pj ThE COURT: March 99 to March 2002, three years.

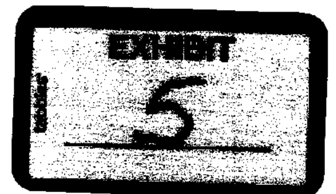
[10) MR. O'BRIEN: The stuff before the announcement wasn't
[ii) just samples or anything like that.The facts will show that
[12) at the time it was announced in March 1999 Fujitsu decided to
[13) fold into DisclosureVision as the middle segment, Digital

(14) Disclosure Solution, the systems that I talked about in my
[15) opening sold to theTokyo Stock Exchange, and that wasTD-Net,
[16] and there was a similar one sold to the Osaka Stock Exchange
[171 called EDNet. So those were systems that there had already
[18] been sales of at the time of the announcement.The facts will
[19) show that the reason they put those it Disclosure Vision was to
[20) sort of promote themselves regarding a track record.

[21) THE COURT: So in the worst case it is three years of
(22) sales.

[23) MR. LEVINSON: But they come more than two years after
[24) the hypothetical announcement.

[251 ThE COURT: I realize that, but I am not so sure of



[1) the import of that argument.

[2) The fact question I had was projections. I know about
[3) the projections that I excluded, the ones that Fujitsu made
[4) about ten months after the alleged date of encryption. Were
[5] there any other projections though?

[6) MR. LEVINSON: Your Honor, there is, of course, the
m January '97 that we have talked to your Honor about that talks
[8) about the market size. But starting in July there are -
[9) ThE COURT: Of what year?

[10) MR. LEVINSON: [998.
[it] THE COURT: July '98?

[12) MR. LEVINSON: Ycs.There are documents that begin to
[13] be the early drafts of what become the business plan.
[14] THE COURT: I realize that.Your expert said it takes
[15) about six months to finalize all that. I remember all that.
[16] That was the so-called 10-month projcctions.They start to
[17] start it by June or July to make those.

[18) MR. LEVINSON: There is one dated in July, August,
[19) October.

(20) THE COURT: [understand that.Those are the Fujitsu
[21) projections we already talked about.

[22) MR. O'BRIEN: There are projections after that, too,
[23] your Honor.
[24] ThE COURT: Also Fujitsu?
[25) MR. O'BRIEN: Correct, your Honor.

[1] ThE COURT: So the earliest Fujitsu projections we
[2) have had are those that come out in October 1998, which) know
[3) your expert says they started to draft inJuneThere is
[4) nothing earlier than that, right, that Fujitsu had?

[5) MR. LEVINSON: Not as to sales that will be achieved.
[6) ThE COURT: Then what about LinkCo? Are there any
m LinkCo documents where the)' were projecting sales?
[8) MR. LEVINSON: Yes.
[9) ThE COURT: When are they?
[10) MR. LEVINSON: Those are in the '96-'97 time frame,

[li) before September 10th, the meeting between LinkCo and Fujitsu.
[12) THE COURT: Of 97?
[13) MR. LEVINSON: In other words, when we were developing

[14) the projects, we were making projections.
[IS) ThE COURT: Anything else, Mr. O'Brien?
[181 MR. O'BRIEN: No, your Honor.
[17] THE COURT: Do sales continue?
[18) MR. O'BRIEN: There haven't been any sales that we are

[19) aware of since March of 2002, your Honor.

[20) THE COURT: OK.We are going to continue now I will
[21) rule when I can. So the jury is coming in.

[22) MR. O'BRIEN: Your Honor, before the jury comes in, I
[23) would like to invoke Rule 615 and have Mr. Israel-Rosen
[24) excluded.

[25] ThE COURT: Yes. One representativeThat's it.The

[1) other should step out, Mr Levinson.
[2) (Jury present)

[3) THE COURT: Please be seated. Good morning everyone.

(4) THE JURY: Good morning.

[5) THE COURT: My clerk told me, to my great

[6) disappointment, that you don't want to work next Monday. Is
p'~ that unanimous or is there somebody I can lean on or pressure
[8) or convince? Aren't there one or two of you who are kind of
[9) holding out? The reason I say that is it is the best work day
[10) there isThere won't be any distractions, We can get more
[11) work done than usual. It is almost like you can get 2 for 1,
[12) and this trial is going to be long enough. It is not one of
[13) those major holidays. We aren't talking about Thanksgiving
[14) Day or Christmas Day or Easter Sunday which I wouldn't even
[15) ask you. It is kind of a minor blip on the calendar screen.
[18) I can accommodate you to help and start a half hour later or

[171 end a half hour early but I would sure hate to lose the day
[18) With that little caveat, would you reconsider it when you go
[19) back to the jury room? I see some nods.Thank you. Please
[20] reconsider.
[21) With that, Mr. Levinson.
[22) MR. LEVINSON: Yes. I have asked Professor Maimon to

[23) resume the witness stand.
[24) ODED MAIMON, resumed.
[25) ThE COURT: Mr. Maimon, I would ask you to speak up,

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A: This would be a very rough conversion.But all you need to do is basically add a zero. So it would be $10,000.

0: Add a zero?

A: No. I'm sorry. Delete two zeros.

0: 1 want to make sure I have this right, Mr. Karnijo The total sales for the IR Solution series you identified included 30 million yen for IR-FunctionSet and another one million yen for translation services, is that accurate?

A: Yes.

0: If you again do that sort of rough conversion that you just did, what is the approximate dollar value of those sales?

A: $300,000.

0: Mr. Kamijo, is Fujitsu still promoting any of the products that you mentioned here today that fall within the JR Solution series within DisclosureVision?

A: No.

0: Are any of those products — JR-Station, IR-TanshinStation, IR-FunctionSet — still available if you want to purchase them?

A: IR-FunctionSet and the translation service I believe can be purchased.

0: Did Mr. Kanda or Professor Kambil provide you with the ideas for the products you have mentioned within the IR Solution series?

A: No, they hadn't.

0: Are you familiar. sir. with the actual sales attributable
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[1] to the Digital Disclosure Solution system integration work from
[2] 1998 through the present?

[3] A: Yes.