
Hughes Hubbard & Reed

U.S. Legal News for Japanese Companies - April 2024 Edition

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April 24, 2024 - This newsletter reports on U.S. legal matters relevant to Japanese companies. This edition covers U.S. court cases and cross-border transactions from the winter of 2023-24. Among other things, we discuss a lawsuit against Sumitomo Pharma's U.S. subsidiary, Idemitsu Kosan's and Mitsubishi Corporation's plans to participate in a clean ammonia production project in Louisiana, the indictment of a Japanese national on charges of trafficking nuclear materials, and Nippon Steel's ongoing efforts to acquire U.S. Steel.

Shareholder Litigation

- [Sumitomo Pharma's U.S. Subsidiary Defeats Lawsuit over Proxy Statement](#)

The Japanese keiretsu system often causes confusion in U.S. litigation. Companies in a keiretsu often have similar names, interlocking business relationships, and cross-shareholdings, but they are typically treated as separate legal entities under U.S. law. For example, a federal court in New York recently confirmed that a law firm's representation of other group companies did not create a conflict of interest in the context of a corporate acquisition.¹

Zappia v. Myovant Sciences Ltd. arose from Sumitovant Biopharma Ltd.'s acquisition of Myovant Sciences Ltd. In connection with the acquisition, Myovant issued a proxy statement in which it noted that the law firm representing its special committee, Skadden Arps Slate Meagher & Flom LLP, was free of conflicts and independent from Sumitovant. Subsequent to the merger, plaintiff Joseph Zappia brought a class action on behalf of Myovant's shareholders, claiming that the proxy statement contained false or misleading statements or omissions in violation of U.S. securities law. In particular, Mr. Zappia alleged that Skadden had conflicts and lacked independence because it represented Sumitomo Bank and other companies in the Sumitomo Group.

The court rejected this contention, citing the rule in the Second Circuit that "corporate 'affiliates should not be considered a single entity for conflicts purposes based solely on the fact that one entity is a wholly-owned subsidiary of the other, at least when the subsidiary is not otherwise operationally integrated with the parent company.'"² The court noted that none of the group companies was alleged to be wholly owned subsidiaries of Sumitovant or operationally integrated with it. The fact that some of the companies had informal business relationships with Sumitovant or indirectly

owned Sumitovant stock, did not create a conflict. Accordingly, the court found that Mr. Zappia could not plausibly allege a violation of U.S. securities law and dismissed his case with prejudice.

- [Renesas Sued in Delaware for Allegedly Missed Post-Closing Payments](#)

On March 6, 2024, plaintiff Shareholder Representative Services LLC, representing former shareholders of Celeno Communications, an Israeli software company, unsealed a lawsuit in Delaware Chancery Court against Renesas Electronics Corporation. Plaintiff accuses Renesas of failing to make two post-closing payments in connection with Renesas's December 2021 acquisition of Celeno. The purchase price was approximately \$315 million with payment to be made incrementally in cash following certain milestones. The amount being sought in the litigation remains redacted in the unsealed documents.³

[Federal Trade Commission Settlement](#)

- [Kubota Agrees to \\$2 Million Penalty for False Made-in-USA Claims](#)

On January 26, 2024, the U.S. Federal Trade Commission (FTC) announced that tractor maker Kubota North America Corporation agreed to pay a \$2 million civil penalty for falsely labeling some of its replacement parts "Made in USA" – the largest penalty to date in a Made-in-USA case.⁴ The FTC's complaint alleged that Kubota had labeled thousands of replacement parts for its tractors and other agricultural equipment as "Made in USA," even though they were made entirely overseas.⁵ In addition to the monetary penalty, the stipulated order imposes certain restrictions on Kubota, including that it may not make unqualified U.S.-origin claims for any product unless it can show that the product's final assembly or processing, and all significant processing, takes place in the U.S. and that all or virtually all ingredients or components of the product are made and sourced in the U.S.⁶

[Pharma Litigation](#)

- [Daiichi Sankyo Europe Settles New York Litigation](#)

On January 3, 2024, Daiichi Sankyo Europe (DSE) and Esperion Therapeutics, Inc. announced a \$125 million settlement to resolve a New York lawsuit filed by Esperion.⁷ The lawsuit arose out of a 2019 agreement in which Esperion granted DSE exclusive commercialization rights in Europe to Esperion's bempedoic acid drugs. Bempedoic acid is a non-statin therapy used to lower LDL cholesterol. Following the grant of rights, a large outcomes trial showed that bempedoic acid reduced the risk of nonfatal myocardial infarctions compared to placebo, leading Esperion to expect that the European Medicines Agency (EMA) would approve new indications for its drugs. Esperion claimed, and DSE denied, that this triggered an additional \$300 million payment for the commercialization rights. Ultimately, the parties agreed that DSE would instead pay \$100 million to Esperion in mid-January and an additional \$25 million to Esperion in the quarter immediately following the EMA's decision.⁸

- [Takeda Faces Additional "Pay-for-Delay" Allegations](#)

As reported in [our last newsletter \(December 26, 2023\)](#), Takeda has recently been accused of entering into illegal "pay-for-delay" agreements with manufacturers of generic drugs. On January 29, 2024, CVS Pharmacy, Inc. sued Takeda in Massachusetts federal district court alleging that CVS paid higher prices than it should have for brand and generic Amitiza because of a manufacturer's agreement to delay the launch of its generic alternative.⁹ The allegations are largely the same as found in *Premiera Blue Cross v. Takeda Pharm. Co.*,¹⁰ and *Walgreen Co. v. Takeda Pharm. Co.*,¹¹ both discussed in our last newsletter.

[Intellectual Property Litigation](#)

- [Nike May Proceed with Trademark Claims against BAPE](#)

On March 4, 2024, a New York federal court ruled that Nike could proceed with its lawsuit against USAPE LLC – also known as A Bathing Ape or BAPE – accusing the Japanese fashion brand of copying the Nike Airforce 1 and Air Jordan sneakers and infringing its trademarks. BAPE had moved to dismiss on the grounds that Nike’s certificates of registration failed to identify which components of its shoes were distinct enough to constitute a source identifier or trade dress entitled to protection. In denying the motion, the court stated: “Nike’s registrations contain detailed written descriptions as well as diagrams that specifically denote which parts of the trade dress are being claimed as distinctive.”¹²

Nuclear Materials Trafficking Charges

- Alleged Yakuza Leader Indicted in U.S.

On February 21, 2024, U.S. law enforcement authorities announced an indictment charging Takeshi Ebisawa, the alleged leader of a Japan-based international crime syndicate, with conspiring to traffic nuclear materials. The indictment alleges that Mr. Ebisawa showed samples of nuclear materials to a U.S. undercover agent in Thailand. With the assistance of Thai authorities, the samples were seized, tested and allegedly found to contain uranium and weapons-grade plutonium. If convicted, Mr. Ebisawa, 60, could be sentenced to life in prison.¹³

Cross-Border Transactions

- Sekisui House to Become One of the U.S.’s Largest Homebuilders

On April 19, 2024, Sekisui House, Ltd. announced that it had completed the acquisition of M.D.C. Holdings, Inc. in an all-cash transaction with an equity value of \$4.9 billion. The acquisition makes Sekisui House the fifth largest homebuilder in the U.S.¹⁴

- Ammonia Procurement / Idemitsu Kosan and Mitsubishi Corporation

On February 27, 2024, Idemitsu Kosan Co., Ltd. and Mitsubishi Corporation announced that they have agreed, along with Switzerland-based Proman, to participate in the development of a proposed clean ammonia production project in Lake Charles, Louisiana. Once completed, the project is expected to produce approximately 1.2 million tons of clean ammonia annually.¹⁵

- Carlyle Group Launches \$800 Million Sale of Tokiwa

According to press reports, the Carlyle Group was to begin accepting non-binding bids for cosmetics supplier Tokiwa Corporation in mid-March. Sources say the deal could be valued at \$800 million or more.¹⁶

- Nippon Steel’s Proposed Acquisition of U.S. Steel

Nippon Steel is continuing its efforts to acquire Pittsburgh-based U.S. Steel for \$14.9 billion. On April 12, 2024, U.S. Steel announced that its shareholders had approved the proposed merger,¹⁷ which will still need approval from regulators, including the U.S. Committee on Foreign Investment in the United States (CFIUS). Nippon Steel has attempted to assure various U.S. stakeholders that the deal will “advance American priorities,” result in “greater quality,”¹⁸ and preserve America jobs and facilities.¹⁹ But certain U.S. lawmakers continue to oppose the deal on national security grounds,²⁰ and President Biden has repeatedly stated that it is “vital for [U.S. Steel] to remain an American steel company that is domestically owned and operated.”²¹

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2. *Id.* at *3. ↵

3. *Shareholder Representative Services LLC v. Renesas Electronics Corp.*, No. 2023-1106-EMD, Am. Compl. (Del. Ch. Mar. 6, 2024). ↵
4. Press Release, Federal Trade Commission, *FTC Action Leads to \$2 Million Penalty Against Kubota for False Made in USA Claims* (Jan. 26, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-action-leads-2-million-penalty-against-kubota-false-made-usa-claims>. ↵
5. *United States v. Kubota North America Corp.*, No. 3:24-cv-00159-S, Compl. (N.D. Tex. Jan. 22, 2024). ↵
6. *United States v. Kubota North America Corp.*, No. 3:24-cv-00159-S, Order (N.D. Tex. Jan. 25, 2024). ↵
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9. *CVS Pharmacy, Inc. v. Takeda Pharm. Co.*, No. 1:24-cv-10223-MJJ, Compl. (D. Mass. Jan. 29, 2024). ↵
10. *Premiera Blue Cross v. Takeda Pharm. Co.*, No. 1:23-cv-12918-MJJ, Compl. (D. Mass. Nov. 30, 2023). ↵
11. *Walgreen Co. v. Takeda Pharm. Co.*, 1:23-cv-13061-MJJ, Compl. (D. Mass. Dec. 13, 2023). ↵
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15. Press Release, Idemitsu Kosan Co., Ltd., *Consideration of Clean Ammonia Production Project in Lake Charles, U.S.* (Feb. 27, 2024), <https://www.idemitsu.com/en/news/2023/240227.html>; Press release, Mitsubishi Corporation, *Clean Ammonia Production Project in Lake Charles, U.S.A.* (Feb. 27, 2024), <https://www.mitsubishicorp.com/jp/en/pr/archive/2024/html/0000053066.html>. ↵
16. Reuters, *Carlisle Launches Sale of Japanese Cosmetics Supplier Tokiwa in \$800 Million Deal, Sources Says* (Mar. 6, 2024), <https://www.reuters.com/markets/deals/carlisle-launches-sale-japanese-cosmetics-supplier-tokiwa-800-million-deal-2024-03-06/>. ↵
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