Date	September 29, 2004	Court	Tokyo High Court
Case number	2002 (Ne) 1413		Intellectual Property Fourth Division
– A case in which the court determined that the act of disclosing the purchase prices of goods to general consumers would not constitute an act of unfair competition prescribed in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act.			

Reference: Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act

Number of related rights, etc.:

Summary of the Judgment

1. The appellant is a stock company engaged in the manufacturing, sale, etc. of medicines, etc. as a business while the appellees are a stock company engaged in the sale of medicines, cosmetics, etc. at drug stores, etc. and the representative thereof. The appellant concluded the Basic Transaction Agreement, etc. with the appellee company and has been continuously selling medicines and other goods released by the appellant (the "appellant's goods") under said agreement, etc.

The appellee company held sales under the title "cost price sales" in order to sell the appellant's goods to consumers at purchase prices at its drug stores by using flyers that compared the regular prices and the purchase prices of the appellant's goods.

The appellant notified the appellee company that the appellant would cancel the aforementioned Basic Transaction Agreement, etc. and filed an action seeking damages and injunction against the act of disclosing the purchase prices by alleging that purchase prices are trade secrets and that the act of holding cost price sales by disclosing such prices constitutes an act of unfair competition that violates Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act.

In the prior instance, the court dismissed all of the appellant's claims by holding that the appellees' act of disclosing the purchase prices would not constitute an act of unfair competition or any other illegal act.

2. In this judgment rendered in the appeal instance, the court also determined that the appellee company's act does not constitute an act of unfair competition prescribed in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act. The court held as follows.

(1) Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act specifies that the term "unfair competition" means "the act of using or disclosing Trade Secrets disclosed by the company that owns them (as the "Owner") for the purpose of

achieving unfair competition or any other wrongful gain, or causing damage to the Owner." In other words, this provision is applicable to the case where the person to whom the owner of a trade secret "disclosed" the trade secret commits an act of disclosing or otherwise wrongfully handling the relevant trade secret for the purpose of unfair competition, etc.

(2) An examination of this point reveals that information about sales prices (purchase prices) agreed between the appellee company and the appellant was not "disclosed" to the appellee company. Thus, it is clear that even if the appellee company discloses such information to general consumers, it would not constitute an act that falls under Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act. The same stance was taken by the court of prior instance. This stance can be upheld as a reasonable determination.

In short, as held above, what the appellee company disclosed to general consumers was the purchase prices of the appellant's goods to be sold by the appellee company, in other words, the sales prices of the appellant's goods agreed between the appellant and the appellee company. Needless to say, the sales prices constitute an important element of a sales agreement and are determined based on a consensus between the parties to the agreement. In this case as well, the appellant and the appellee company, who served as the wholesaler and a purchaser, agreed on the sales prices (the wholesale prices from the viewpoint of the appellant and the purchase prices from the viewpoint of the appellee company), generating information about purchase prices that is owned by both parties. Thus, it is clear that such information is not something that the appellant had owned and disclosed to the appellee company.

(3) As explained above, it has to be said that this is a case that cannot be controlled by Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act. Without having to examine whether other criteria are satisfied in order to determine whether the purchase prices can be regarded as trade secrets, the appellee company's act of disclosing the purchase prices does not constitute an act of unfair competition specified in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act.

2002 (Ne) 1413 Appeal Case of Demanding Payment of Damages, etc. under the Unfair Competition Prevention Act

Judgment rendered on September 29, 2004, Date of conclusion of oral argument: July 7, 2004

(Court of prior instance: Judgment of the Tokyo District Court 2001 (Wa) 10472 of February 5, 2002)

Judgment

Appellant (Plaintiff): Taisho Pharmaceutical Co., Ltd.

Appellee (Defendant): Daikoku Co., Ltd.

Appellee (Defendant): Y

Main text

1. This appeal shall be dismissed except for the parts related to paragraph 2 (1) and (2).

2. (1) While the judgment in prior instance dismissed the claim for delivery of movables, a part of the judgment that dismissed the claim for the delivery of the movables specified in the Attached Movables List shall be revoked.

(2) Daikoku Co., Ltd. shall deliver the movables specified in the Attached Movables List to the appellant.

(3) While a part of the judgment in prior instance dismissed any other claims of the appellant for delivery of movables, such part of the judgment lost effect due to the appellant's withdrawal of the claims in this instance.

3. The appellant shall bear the court costs for the first and second instances.

4. This judgment can be provisionally executed as far as paragraph 2 (2) is concerned.

Facts and reasons

No. 1 Judicial decisions sought by the appellant

1. The judgment in prior instance shall be revoked.

2. Each of the appellees shall pay 100 million yen to the appellant and the amount accrued thereon at the rate of 5% per annum for the period from June 3, 2001 (the date following the date of the service of a statement of claim), to the date of completion of the payment.

3. The appellees shall not disclose, to any person other than the appellant or the appellees, the purchase prices of the goods manufactured and sold by the appellant.

4. Daikoku Co., Ltd. shall deliver the movables specified in the Attached Movables List to the appellant.

5. Daikoku Co., Ltd. shall pay the appellant 53,953,005 yen and the amount accrued at the rate of 6% per annum on the 39,851,834 yen-part thereof for the period from May 22, 2001, and on the 14,101,171 yen-part thereof for the period from May 23, 2001, to the date of completion of the payment.

No. 2 Term used in this judgment

The term "purchase price" is used herein separately in the following three ways.

(a) Purchase price: The purchase price specified in a supply agreement, in other words, the contractual purchase price. From the viewpoint of the appellant, it can be called "wholesale price." From the viewpoint of the appellees, it can be called "purchase price." If simply stated as "purchase price" or "wholesale price," it has such meaning as defined above.

(b) Substantive purchase price: The substantive purchase price calculated based on the contractual purchase price in consideration of any discount, rebate, added goods, etc. If the term is used in this sense, it would be specified to that effect.

(c) [Purchase price]: If the term is used without clarifying the definition (either (a) or (b) as specified above), the term would be indicated as "[purchase price]." This indication method will be used in the cited evidence as well. This indication method is also used in a document titled "*Futourenbai ni kansuru dokusen kinshihoujou no kangaekata*" (Guidelines Concerning Unjust Low Price Sales Under the Antimonopoly Act) issued by the General Secretariat of the Japan Fair Trade Commission.

No. 3 Outline of the case

1. Outline of this case

The appellant is a stock company engaged in the manufacturing, sale, etc. of medicines, etc. as a business.

On the other hand, Appellee Daikoku Co., Ltd. ("Appellee Daikoku") is a stock company engaged in the sale of medicines, cosmetics, etc. at drug stores, etc. The defendants in the prior instance, i.e., Kabushiki Kaisha Gurēpu Daikoku, Kabushiki Kaisha Ebisu Daikoku, Kabushiki Kaisha Ēsu Daikoku, and Yugen Kaisha Īefu (collectively the "Four Premerger Companies") were also engaged in the same business.

The appellant concluded the Basic Transaction Agreement and the Support VAN Agreement with Appellee Daikoku and the Four Premerger Companies respectively and

has been continuously selling medicines and other goods released by the appellant (the "appellant's goods") under said agreements. From January to May 2001, Appellee Daikoku held sales under the title "cost price sale" in order to sell the appellant's goods to consumers at purchase prices at its drug stores in Nara Prefecture, Hiroshima Prefecture, Okayama Prefecture, Ehime Prefecture, Tokushima Prefecture, and Kumamoto Prefecture by using flyers that compared the regular prices and the purchase prices of the appellant's goods (purchase prices of some goods did not reflect the actual purchase prices) ("Cost Price Sale(s)"; this term will be used in the cited allegations of the appellant as well).

In response, the appellant notified Appellee Daikoku and the Four Premerger Companies that the appellant would cancel the aforementioned Basic Transaction Agreement and Support VAN Agreement.

Then, the appellant [i] alleged against Appellee Daikoku and its representative, Appellee Y ("Appellee Y"), that their act of holding Cost Price Sales by disclosing purchase prices, which are trade secrets, constitutes an act of unfair competition that violates Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act and also an act of tort (such as a violation of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the "Antimonopoly Act") and a violation of the Act against the Unjustifiable Premiums and Misleading Representations (the "Premiums and Representations Act")) or an act of nonperformance of the Basic Transaction Agreement and demanded payment of damages (joint payment of 100 million yen), [ii] sought an injunction against Appellee Daikoku, Appellee Y, and the Four Premerger Companies for their act of disclosing the purchase prices, and [iii] alleged that the appellant canceled the Support VAN Agreement concluded with Appellee Daikoku and each of the Four Premerger Companies due to the loss of trusting relationships as a result of the act of Appellee Daikoku, etc. and demanded delivery of the movables specified in items 1 to 5 of the Attached Movables List and payment of contractual settlement money. (While it is not necessarily the same as the widely accepted concept of "settlement money," the term "settlement money" is used in this judgment to refer to the contractual settlement money specified in the Support VAN Agreement. As such settlement money, the appellant demanded payment of 39,662,834 yen from Appellee Daikoku, 1,206,171 yen from Gurēpu Daikoku, 12,895,000 yen from Ēsu Daikoku, 189,000 yen from Īefu, and none from Ebisu Daikoku.)

The court of prior instance dismissed all of the claims of the appellant by holding that [i] in view of the facts that the act of Appellee Daikoku of disclosing purchase prices does not constitute an act of unfair competition, that Cost Price Sales of Appellee

Daikoku do not violate the Antimonopoly Act and the Premiums and Representations Act and that, since it cannot go so far as to say that the act of Appellee Daikoku constitutes an act of tort, the claim for payment of damages for an act of tort and the claim for payment of damages for nonperformance are groundless, that [ii] the claim for an injunction against the act of disclosing purchase prices is also groundless, and that [iii] the claim for return of movables and the claim for payment of settlement money are groundless because the Support VAN Agreement cannot be considered to have been canceled due to nonperformance of Appellee Daikoku, etc.

The appellant was dissatisfied with all the judgment in prior instance and filed an appeal. During the pendency of this trial, the Four Premerger Companies were absorbed and merged into Appellee Daikoku (registered as of January 16, 2003). Their statuses as the parties to this lawsuit have been taken over by Appellee Daikoku.

In the prior instance, the appellant demanded that Appellee Daikoku should return the aforementioned movables to the appellant. Since then, Appellee Daikoku has been voluntarily returning movables to the appellant. Currently, the movables yet to be returned are as stated in the Attached Movables List. Thus, the appellant withdrew such part of its claim for return of movables made in the prior instance that is outside the scope of the claim for return of the movables stated in the Attached Movables List (in other words, a part of its claim concerning the already returned movables).

2. Facts undisputed by the parties

(1) Parties concerned, etc.

The appellant is a stock company engaged in the manufacturing, sale, etc. of medicines, etc. as a business.

Appellee Daikoku is a stock company engaged in the sale, etc. of medicines, cosmetics, etc. at drug stores, etc. Appellee Y is the representative of Appellee Daikoku and the owner thereof in substance, who owns most of its shares, and also is the representative of the Four Premerger Companies respectively, excluding Ebisu Daikoku, and the owner thereof in substance, who owns most of the shares of or equity interest in the aforementioned Four Premerger Companies.

(2) Conclusion of the Basic Transaction Agreement and the Support VAN Agreement, etc.

The appellant concluded the Basic Transaction Agreement with Appellee Daikoku and each of the Four Premerger Companies and has been continuously selling the appellant's goods to them.

The appellant concluded the Support VAN Agreement with each of the drug stores, etc. of Appellee Daikoku and the Four Premerger Companies so that they can use the

Support VAN System planned and developed by the appellant to support the sales activities of its business partner retailers. Based on the Support VAN Agreement, the appellant leased POS register terminals (including accessories), optional devices (including accessories) and other devices and equipment, etc. to Appellee Daikoku and the Four Premerger Companies. As of the time of the conclusion of oral argument in this instance, the movables such as devices and equipment that have not been returned to the appellant are specified in the Attached Movables List (16 portable terminals, 7 Barlabe devices, and 30 manuals).

Article 5, paragraph (1) of the Support VAN Agreement specifies that Appellee Daikoku and the Four Premerger Companies shall maintain the secrecy of Data Otsu and Materials Otsu defined in Article 2 of said Agreement that were obtained under said Agreement and shall not disclose, transfer, lend, license any of the data, materials or any reproduction thereof to a third party for any reason. Article 15 of said Agreement specifies that either party to the Agreement may cancel said Agreement if the other party failed to fulfill any of its obligations under said Agreement, the Basic Transaction Agreement, or any other agreement concluded between the two parties or if the other party violates any provision of the Support VAN Agreement. Article 16 of said Agreement specifies that, when said Agreement is terminated, Appellee Daikoku and the Four Premerger Companies shall immediately return to the appellant the equipment and manuals leased by the appellant. Article 16, paragraph (5) of said Agreement specifies that, if said Agreement is terminated for any reason not attributable to the appellant, Appellee Daikoku and the Four Premerger Companies shall pay settlement money for each piece of equipment installed under said Agreement. As described below, one of the issues discussed in this case is whether the appellees are required to pay settlement money. If they are required to pay such money, the total amount of settlement money would be 53,953,005 yen. The breakdown calculated based on the formula specified in said provision is as follows: 39,662,834 yen from Appellee Daikoku, 1,206,171 yen from premerger Gurēpu Daikoku, 12,895,000 yen from premerger Ēsu Daikoku, and 189,000 yen from premerger Īefu.

(3) Acts of the appellees

Appellee Daikoku conducted the aforementioned Cost Price Sales, regarding which the appellant alleged as stated in [1] to [21] of the attached ["Cost Price Sale" List] (the "Attached List"). (Since inspection, etc. is restricted for the evidence that indicates the purchase prices agreed between the appellant and Appellee Daikoku under Article 92 of the Code of Civil Procedure, the aforementioned purchase prices are not specifically stated in the list. Instead, the list only shows a relation between the purchase prices and

the sales prices determined by Appellee Daikoku by using signs such as "★," "A," "B," and "■.") Among those allegations, regarding the allegations stated in [1] to [12] and in [14] to [17], there is no dispute between the parties concerned with regard to the fact that the appellant's goods that correspond to the sections marked with the aforementioned signs were retailed at the prices indicated by those signs respectively.

Furthermore, Appellee Daikoku decided to sell Daikoku Gold Members (any person can become a member if he/she has spent more money than a certain amount, and during a sales period, any person can become a member without such restrictions in terms of the amount of money they have spent) the appellant's goods at purchase prices at any time and sold the appellant's goods at purchase prices to those members without limiting the period.

A comprehensive examination of the flyers (Exhibit Ko 162-3) reveals that, in the aforementioned Cost Price Sales, the purchase prices of 146 major products of the appellant were disclosed and that the purchase prices for 22 of them were different from their official purchase prices (which may hereinafter be non-judgmentally indicated as the "actual purchase prices" as well but refers to the same thing). Among those 146 products, the indicated purchase prices of 15 products (10.3%) were lower than their official purchase prices (among which, the purchase prices of 9 products were 20 to 30% lower than their official purchase prices). The cumulative total number of such products was as large as 59. These products were sold at prices even lower than their purchase prices. Among the aforementioned 22 products, the indicated purchase prices (the sales prices of Appellee Daikoku) of 7 products were higher than their official purchase prices. The cumulative total number of such products was as large as 14. Among the aforementioned 146 products, the purchase prices of 124 products were the same as their official purchase prices and were sold at exact purchase prices. (Unless otherwise specified, the term Cost Price Sale will be used, including the cases where goods were sold at official purchase prices, as well as the cases of "cost price sale " or "purchase price sale," in which goods were actually sold at prices that were objectively different from their purchase prices. It should be noted that the aforementioned sales include some sales disputed by Appellee Daikoku as to whether those sales can be regarded as Cost Price Sales but exclude Cost Price Sales alleged by the appellant as stated in [1] and [14] because no flyers therefor can be found.)

For every sale, Appellee Daikoku distributed 200,000 to 300,000 copies of flyers, which were sufficient to cover all the households in the area around the relevant store where the sale would be held.

In flyers to be distributed to general consumers in Okayama City, Appellee Daikoku

stated as follows (date unknown): "Thanks to the cooperation of Taisho Pharmaceutical Co., Ltd., which is famous for the catchphrase "*Faito Ippatsu*!," Taisho Pharmaceutical's products will be sold at purchase prices." However, in fact, the appellant did not cooperate with Appellee Daikoku for Cost Price Sales.

(4) Notice of cancellation from the appellant

The appellant sent Appellee Daikoku and the Four Premerger Companies a notice of cancellation dated May 20, 2001 (cancellation without any prior notice due to the loss of trusting relationships; the "Cancellation Notice") and immediately canceled the aforementioned Basic Transaction Agreement and Support VAN Agreement. This cancellation notice was received by Appellee Daikoku, Ebisu Daikoku, and Īefu on May 21, 2001, and by Gurēpu Daikoku and Ēsu Daikoku on May 24, 2001, respectively.

(5) Procedures followed by the Japan Fair Trade Commission

Regarding the Cost Price Sales, no decision was made by the Japan Fair Trade Commission against the appellees based on the report from the appellant.

A retailer of medicines in Hiroshima City sent the Japan Fair Trade Commission a report about an unjustly low-priced sale with a flyer attached thereto in order to prove that Appellee Daikoku sold goods at purchase prices. The Japan Fair Trade Commission sent a notice dated October 1, 2001 in response to the aforementioned report, stating that, after examining this case, the Commission decided not to take any action under the Antimonopoly Act, but that it had spotted an act that could lead to a violation of the Antimonopoly Act and gave a warning to the parties concerned in order to prevent such act from leading to a violation of said Act (Exhibit Ko 88).

3. Outline of the appellant's claims and allegations clarified in this instance ([Claim A1] and [Claim A2] have a relationship of selective joinder in relation to Appellee Daikoku)

[Claim A1] Claim for payment of damages under Article 709 of the Civil Code or Article 4 of the Unfair Competition Prevention Act (demanded joint payment of 100 million yen from the appellees)

(1) Summary of the facts that provide grounds for the illegality

(1-1) Violation of Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act (Disclosure of trade secrets, i.e., purchase prices)

(1-2) Applicability of Article 19 of the Antimonopoly Act and the former part or latter part of paragraph (6) of Notice No. 15 of the Japan Fair Trade Commission dated June 18, 1982 (the "General Designation") (unjustly low-priced sale)

(1-3) Violation of business practices or business practice law (disclosure of purchase prices, unjustly low-priced sale)

(1-4) Illegality of comprehensive evaluation of the appellees' acts

(2) Act of joint tort by the appellees
(3) Damage and causation
(3-1) Damage suffered by the appellant due to the decreased sales
(3-2) Estimation under Article 5 of the Unfair Competition Prevention Act based on the profits gained by Appellee Daikoku
(3-3) Solatium payable to the appellant
[Claim A2] Claim for payment of damages for nonperformance (demanded payment of 100 million yen from Appellee Daikoku)
(1) Details of nonperformance
(1-1) Violation of the Basic Transaction Agreement
(1-2) Violation of the Support VAN Agreement
(1-3) Violation of the obligation of good faith specified in the continuous transaction agreement (loss of trusting relationships)
(1-4) Violation of business practices and any obligation specified in the business practice law
(2) Damage and causation
[Claim B] Claim for an injunction against the disclosure of purchase prices under Article 3 of the Unfair Competition Prevention Act (demanded an injunction against the appellees)
[Claim C] Claim for return of movables upon termination of the Support VAN Agreement (demanded that Appellee Daikoku should return the movables specified in the Attached Movables List)
[Claim D] Claim for payment of settlement money upon termination of the Support VAN Agreement (demanded payment of 53,953,005 yen from Appellee Daikoku)
4. Issues
Issues related to [Claim A1]
(1) Whether purchase prices can be regarded as trade secrets under the Unfair Competition Prevention Act
(2) Whether Cost Price Sales of Appellee Daikoku fall under the former part or latter part of paragraph (6) of the General Designation (unjustly low-priced sale)
(3) Whether an act of disclosing purchase prices and Cost Price Sales violates business practices or business practice law
(4) Whether comprehensive evaluation is illegal or not
(5) Whether an act of Appellee Y constitutes an act of joint tort
(6) Whether the appellant suffered damage and whether any causation existed or not
Issues related to [Claim A2]

(1) Whether the Basic Transaction Agreement was violated or not
(2) Whether the Support VAN Agreement was violated or not
(3) Whether the obligation of good faith specified in the continuous transaction agreement was violated or not (loss of trusting relationships)
(4) Whether business practices or any obligation specified in the business practice law were violated or not
(5) Whether the appellant suffered damage and whether any causation existed or not
Issues related to [Claim B]
Whether the grounds existed for seeking an injunction, such as the occurrence of an act of unfair competition
Issues related to [Claim C] and [Claim D]
Whether there are attributable reasons for cancellation of the Support VAN Agreement

(omitted)

No. 4 Court decision
1. [Claim A1] Claim for payment of damages under Article 709 of the Civil Code or Article 4 of the Unfair Competition Prevention Act (demanded joint payment of 100 million yen from the appellees)
(1) Issue (1) Whether purchase prices can be regarded as trade secrets under the Unfair Competition Prevention Act
(1-1) Regarding the Cost Price Sales conducted by Appellee Daikoku, there is no dispute between the parties concerned with regard to the fact that, as far as Sales [1] to [12] and Sales [14] to [17] in the Attached List are concerned, some of the appellant's goods that correspond to the sections marked with signs were retailed at the prices indicated by those signs.

An examination of the disputed Sale [13] in the Attached List shows that, according to Exhibit Ko 24, it can be found that some of the appellant's goods were retailed at the prices indicated by signs at the store during the period specified in [13]. In comparison with the undisputed Sale [14], it can be found that Sale [13] and Sale [14] are identical in terms of the store and the sale period (while the front side of Exhibit Ko 24 states "Sale period: Saturday, April 28 to Monday, May 28," the back side states that the period of the Cost Price Sale is "limited to the period from April 28 to May 5") and that, while there was a flyer (Exhibit Ko 24) for Sale [13], there is no evidence such as a flyer to prove Sale [14] and no detailed information about the goods sold in Sale [14]. In view of these facts, it can be found that Sale [14] is a Cost Price Sale that is identical

with Sale [13] and that the details of Sale [14] are the same as those stated in [13] in the Attached List (thus, regarding Sale [13] and Sale [14], the undisputed sale, i.e., Sale [14] should be considered as the relevant Cost Price Sale, but the details of Sale [14] should be deemed to be the same as those stated in [13]).

Next, regarding Sales [18] to [21] in the Attached List, which can be proven by the evidence (flyers), namely Exhibits Ko 22, 31, 13, and 32, these flyers do not state the sales periods. Even if the content of these flyers is carefully examined, these sales cannot be found to be Cost Price Sales that were scheduled to be held or were actually held. These flyers merely state, in an abstract manner, that a Cost Price Sale would be held during a certain "sale period." These flyers can be interpreted to be announcing that Cost Price Sales would be held on the next occasion. In conclusion, the evidence is not sufficient to provide the grounds to prove that the Cost Price Sales specified in [18] to [21] were actually held.

Moreover, regarding Sale [11], while there are two supporting flyers, Exhibits Ko 20 and 21, the contents of both flyers are identical except for the difference in the magnification ratio and reduction ratio. Thus, it can be considered that those flyers prove that only one Cost Price Sale, namely Sale [11], was held.

Regarding Sale [1], while there is no dispute with regard to the fact that Sale [1] was held as a Cost Price Sale, no information can be found about the goods, prices, etc. related to the sale.

On these grounds, it can be found that, in principle, 15 sales, more specifically, Sales [2] to [12], [14] to [17] (the details of Sale [14] should be considered to be those stated in [13]), should be examined as Cost Price Sales conducted by Appellee Daikoku in this case.

(1-2) In the Cost Price Sales found above, as stated in [2] to [12] and [14] (the same as [13] in substance) to [17] in the Attached List, Appellee Daikoku can be found to have disclosed to general consumers the prices, indicated as "purchase prices" in the flyers, of the appellant's goods purchased by Appellee Daikoku from the appellant, in other words, the sales prices of the appellant's goods agreed between Appellee Daikoku and the appellant, by distributing those flyers providing such price information in writing.

The appellant alleged that such act of disclosure constitutes an act of unfair competition specified in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act. This point is examined below.

(1-3) Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act specifies that the term "unfair competition" means "the act of using or disclosing Trade Secrets disclosed by the company that owns them (hereinafter referred to as the

"Owner") for the purpose of achieving unfair competition or any other wrongful gain, or causing damage to the Owner." In other words, this provision is applicable to the case where the person to whom the owner of a trade secret "disclosed" the trade secret commits an act of disclosing or otherwise wrongfully handling the relevant trade secret for the purpose of unfair competition, etc.

An examination of this point reveals that information about sales prices (purchase prices) agreed between Appellee Daikoku and the appellant was not "disclosed" to Appellee Daikoku. Even if Appellee Daikoku discloses such information to general consumers, it would not constitute an act that falls under Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act. The same stance was taken by the court of prior instance. This stance can be upheld as a reasonable determination.

In short, as held above, what Appellee Daikoku disclosed to general consumers was the purchase prices of the appellant's goods to be sold by Appellee Daikoku, in other words, the sales prices of the appellant's goods agreed between the appellant and Appellee Daikoku. Needless to say, the sales prices constitute an important element of a sales agreement and are determined based on a consensus between the parties to the agreement. In this case as well, the appellant and Appellee Daikoku, who served as the wholesaler and a purchaser, agreed on the sales prices (the wholesale prices from the viewpoint of the appellant and the purchase prices from the viewpoint of Appellee Daikoku), generating information about purchase prices that is owned by both parties. Thus, it is clear that such information is not something that the appellant had owned and disclosed to Appellee Daikoku.

According to the Basic Transaction Agreement (Exhibit Ko 1) concluded between the appellant and Appellee Daikoku, Article 1 thereof specifies that "the prices at which Ko (Note in the judgment: Appellant) sells goods to Otsu (Note in the judgment: Appellee Daikoku) shall be determined by Ko in advance." According to this provision, it is possible to presume that they have adopted business practices wherein the appellant determines prices and proposes them to Appellee Daikoku and Appellee Daikoku considers whether to accept the prices and decides to purchase goods at those prices if the prices are acceptable or refuses to purchase goods if the prices are unacceptable. However, even if Appellee Daikoku purchased goods in this way in this case, such business practices would not change the fact that a sales agreement was concluded based on Appellee Daikoku's intention to agree on the prices determined by the appellant. Therefore, it is correct to say that the sales agreement was established based on a consensus between the two parties and that the sales prices (purchase prices), which constitute one of the elements of the agreement, were consequently established.

Thus, even if the appellant determined the sales prices, proposed them to Appellee Daikoku, and came to conclude a sales agreement, the prices determined by the appellant in advance cannot be considered as sales prices, which constitute one of the elements of a sales agreement. Those predetermined prices should be considered as the scheduled prices for goods sold by the appellant. This interpretation should stay the same even if the aforementioned scheduled prices are applied based on the premise that there is no room for negotiations for discounts, etc., resulting in the situation where the sales prices specified in the signed sales agreement coincide with the prices (scheduled prices) determined by the appellant in advance. In this case, Appellee Daikoku did not disclose the fact that cost prices applied to Cost Price Sales are the same as the prices predetermined by the appellant. Also, Appellee Daikoku did not disclose the competing shops' purchase prices (sales prices) disclosed by the appellant.

As explained above, it has to be said that this is a case that cannot be controlled by Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act. Without having to examine whether other criteria are satisfied in order to determine whether the purchase prices can be regarded as trade secrets, Appellee Daikoku's act of disclosing the purchase prices does not constitute an act of unfair competition specified in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act.

(2) Issue (2) Whether Cost Price Sales of Appellee Daikoku fall under the former part or latter part of paragraph (6) of the General Designation (unjustly low-priced sale)

(2-1) As held above, in this case, 15 sales, or specifically Sales [2] to [12] and Sales [14] (the same as [13] in substance) to [17] specified in the Attached List, can be examined as Cost Price Sales held by Appellee Daikoku in principle.

If these sales are examined from the perspective of how many products were sold as the appellant's goods, it can be found as follows. (The information presented above as undisputed facts can be summarized that there is no dispute between the parties concerned with regard to the fact that the information can be regarded as the result of a quick calculation of the data presented in the flyers (Exhibits Ko 13 to 32) including the sales whose nature as Cost Price Sales has been disputed. If corrections (the deletion of four flyers, namely Exhibits Ko 22, 31, 13, and 32, which correspond to Sales [18] to [21] specified in the Attached List, and an adjustment of the result of a calculation that wrongly took into consideration two flyers (Exhibits Ko 20 and 21) for a single sale (Sale [11])) are made, only the cumulative total number of products would be corrected.)

In other words, in the Cost Price Sales in this case, the purchase prices of 146 major products of the appellant were indicated, among which the purchase prices of 22

products were different from their actual purchase prices. Among these 146 products, the indicated purchase prices of the 15 products (10.3%) (as shown in the red cells marked with "A" in the Attached List) were lower than their actual purchase prices (among which, the purchase prices of 9 products were lower than their actual purchase prices by 20 to 30%). The cumulative total number of such products was as large as 45. These products were sold at prices lower than their purchase prices. Among the aforementioned 22 products, the indicated purchase prices of 7 products (4.8%) were higher than their actual purchase prices (as shown in the blue cells marked with "B" in the Attached List). The cumulative number of such products was as large as 10. Among the aforementioned 146 products, the indicated purchase prices of the rest of them, i.e., 124 products, were the same as their actual purchase prices. These products were sold at exact purchase prices (those marked with ★ in the Attached List).

(2-2) Article 2, paragraph (9) of the Antimonopoly Act specifies that "the term 'unfair transaction method' used herein means any of the act specified in the following items that could interfere with fair competition and is designated by the Japan Fair Trade Commission." Item (ii) of said paragraph specifies "transaction conducted at an unfair price."

Based on the aforementioned provisions, the Japan Fair Trade Commission specifies in paragraph (6) of the General Designation that the term "unfair transaction method" refers to "continuously supplying goods or services at a price considerably lower than the supply costs without any justifiable reasons or otherwise supplying unjustly low-priced goods or services, thereby increasing other enterprises' risk of suffering difficulties in their business activities."

An analysis of paragraph (6) of the General Designation shows that the former part can be interpreted as "increasing other enterprises' risk of suffering difficulties in their business activities by continuously supplying goods or services at a price considerably lower than the supply costs without any justifiable reasons," while the latter part can be interpreted as "increasing other enterprises' risk of suffering difficulties in their business activities by otherwise supplying unjustly low-priced goods or services." It can be interpreted that the former part tries to specify a typical act that constitutes an unjustly low-priced sale as clearly as possible, whereas the latter part allows a case-by-case examination in order to determine whether a certain act should be prohibited in light of the objective of the relevant law even though the act does not fall under the former part of said paragraph.

(2-3) Whether Cost Price Sales in this case fall under either the former or the latter part of paragraph (6) of the General Designation

(2-3-1) First, the requirement concerning "price" is examined below.
(a) The requirement concerning "price" specified in the former part of paragraph (6) of the General Designation is "price considerably lower than the supply costs."

Regarding this point, the Japan Fair Trade Commission issued a document titled "*Futourenbai ni kansuru dokusen kinshihoujou no kangaekata* (Guidelines Concerning Unjust Low Price Sales Under the Antimonopoly Act)" (Exhibit Ko 132; the "1984 Guidelines") dated November 20, 1984. The 1984 Guidelines state that "The phrase 'price considerably lower than the supply costs' exemplifies a typical unjustly low-priced sale. Since it means a price considerably lower than the total sales costs, the aforementioned 'price considerably lower than the supply costs' can be interpreted to mean a price lower than [purchase price] in regular retail transactions. In this way, [purchase price] is used as a standard in practice. In this context, [purchase price] means the [purchase price] of the goods sold at an unjustly low price by an enterprise that holds the unjustly low-priced sale in question. The term [purchase price] should be interpreted not as an official purchase price but as a substantive purchase price (the actual amount of payment for the goods) calculated in consideration of various factors of an actual transaction of the goods such as a discount, rebate, and added goods."
(b) In response, the appellant alleged as follows: the 1984 Guidelines are guidelines established not by the Japan Fair Trade Commission but by the General Secretariat of the Japan Fair Trade Commission and are not interpretation criteria to begin with, and can be considered to be practical enforcement guidelines established by the Secretariat as an administrative agency; the 1984 Guidelines state that a case-by-case examination is necessary to deal with each case; while the 1984 Guidelines state that "purchase price" can be used as a standard, such statement is inaccurate from the perspective of the overall purpose of the 1984 Guidelines ; the Secretariat issued guidelines titled "Unjustly Low-priced Sales and Discriminative Prices, etc. Related to the Distribution of Alcoholic Drinks" on November 24, 2000 (amended on April 2, 2001), and "Unjustly Low-priced Sales and Discriminative Prices, etc. Related to the Distribution of Gasoline" on December 14, 2001, and stated in these guidelines that, even in the case where "goods are sold at a price higher than the substantive purchase price (on the premise that the price is lower than the total sales costs)," such sale should be "restricted as an unjustly low-priced sale as long as such sale increases other enterprises' risk of suffering difficulties in their business activities," thus making the enforcement criteria for the regulations concerning unjustly low-priced sales increasingly specific; and the phrase "considerably lower" does not mean "significantly lower" but means "clearly lower." The appellant also alleged that it is self-evident that when the retailers sell goods

at purchase prices, said purchase prices are usually "considerably lower than the supply costs" because none of the sales costs are taken into consideration.

(c) At the beginning of the 1984 Guidelines (Exhibit Ko 132), it is stated that there are many cases where the investigated enterprises commit an illegal act without knowing the restrictions on unjustly low-priced sales and that not a few reports requiring investigation seem to have been prepared without knowing much about the purpose and details of the restrictions on unjustly low-priced sales. Then, it continues that "the 'Guidelines Concerning Unjust Low Price Sales Under the Antimonopoly Act' take the aforementioned situation into consideration and are designed to be applied to retailers, summarizing the principles of unjustly low-priced sales with the aim of increasing the enterprises' and public awareness of unjustly low-priced sales and preventing illegal acts."

In addition, in view of various factors such as the content of the 1984 Guidelines and the roles of the Secretariat of the Japan Fair Trade Commission, it is clear that the purpose of the 1984 Guidelines is to explain the General Designation in an easily understandable manner and announce it to the public in order to increase the enterprises' and public awareness of unjustly low-priced sales and to prevent illegal acts. In view of the fact that the Secretariat (the General Secretariat since 1996) conducts activities in accordance with the 1984 Guidelines, the 1984 Guidelines can be considered to be an important clue for understanding the General Designation unless the content of the 1984 Guidelines is unreasonable and out of line with the relevant law. At least, it can be said that retailers should feel confident that they would not commit any illegal act as long as they comply with the standard specified in the 1984 Guidelines. Therefore, also in the case of examining whether an act of tort, etc. is illegal in substance, whether the act complies with the 1984 Guidelines or not should be considered to be an important determination factor.

An examination of the aforementioned information about the requirements concerning "price" in the 1984 Guidelines shows that it is reasonable to consider the "supply costs" in paragraph (6) of the General Designation as the "total sales costs." The appellant also does not intend to dispute this point. Regarding the statement "price considerably lower than the supply costs (total sales costs)," it is not necessarily clear what it means to be "considerably lower." Thus, from the perspective of examination clarity, it is reasonable, in practice, for the 1984 Guidelines to adopt a "price lower than the substantive purchase price" as a standard. Such standard can be considered to be reasonable from the perspective of enterprises as well because it would increase the predictability of what would constitute a violation. Therefore, the aforementioned

content of the 1984 Guidelines cannot be considered to be against the spirit of the relevant law or otherwise unreasonable.

The appellant made an allegation by quoting the guidelines that were issued after the publication of the 1984 Guidelines. However, it should be interpreted that those guidelines did not abolish the 1984 Guidelines, which is applicable to retailing business in general, but merely added guidelines for some specific fields including "alcoholic drinks" and "gasoline." Thus, it should be found that these guidelines did not negate the 1984 Guidelines.

Furthermore, the appellant alleged that "considerably lower" does not mean "significantly lower" but means "clearly lower." While the term "considerably" generally means "clearly" as well, there are no materials that are sufficient to prove that said term is used in the meaning alleged by the appellant as a legal term (one of the examples that can be found in laws would be Article 2, etc. of the Judge Impeachment Act). Thus, there is no evidence to deny interpretation of the phrase "considerably lower" as stated in the 1984 Guidelines. Therefore, the interpretation alleged by the appellant is unacceptable. According to the documents submitted by the appellant, Exhibit Ko 104 (Shigekazu Imamura, "*Chūkai keizaihou [joukan*]" (Annotated economic law [first volume]), authored by Akio Sasai) states that "the term 'price considerably lower' means a price much lower than the total sales costs." Exhibit Ko 122 (Hisashi Tanaka, former Manager, Secretariat and Planning Division, Japan Fair Trade Commission, "*Fukousei na torihiki houhou --- Shin ippan shitei no kaisetsu*" (Unfair transaction methods --- Explanation of the new General Designation)) states that "the term 'considerably lower' means 'considerably lower than the supply costs'" (Exhibit Ko 160, p. 55). Exhibit Ko 130 (Akira Negishi, Masayuki Funada "*Dokusen kinshihou gaisetsu*" (Outline of the Antimonopoly Act)) states that the term "low price" used in the latter part can be interpreted to include "the case where the price is slightly lower even if it is not 'considerably' lower."

(d) Thus, when a decision is made about whether a certain price can be regarded as "price considerably lower than the supply costs" as specified in the former part of the paragraph (6) of the General Designation, it is reasonable to adopt the 1984 Guidelines , which use a price "lower than the substantive purchase price" as a standard.

(e) As explained above, based on the presumption that the 1984 Guidelines issued by the Japan Fair Trade Commission (Secretariat) can be considered to be a reasonable standard for administrative enforcement, if the meaning of paragraph (6) of the General Designation is examined, it can be said that "price considerably lower than the supply costs" means a price lower than the price (substantive purchase price) calculated based

on the actual purchase price in consideration of any discount, rebate, added goods, etc. If there are no such factors to take into consideration, such price can be interpreted to be a price lower than the actual purchase price.

Regarding this point, the appellant alleged that "supply costs" means the total of the aforementioned purchase price and the general costs such as sales costs and management costs. This allegation of the appellant is reasonable so far as to present a general theory that retailers have to pay sales-related costs in addition to the purchase price when retailing goods. However, such allegation would be unreasonable if it means that the sales costs and management costs, etc. calculated based on the statistical data about all the enterprises in the relevant field should be added to the purchase price of each of the products sold in the Cost Price Sales since the Cost Price Sales were held by many of the regional stores of Appellee Daikoku, which is based on Osaka City, widely spread throughout the western Japan. Regarding the sales costs and the management costs shouldered by each store to hold a Cost Price Sale, the appellant failed to provide specific allegation and proof with regard to the amount of each cost item. Given such insufficient allegation and proof, it has to be said that the sales costs, the management costs, etc. cannot be taken into consideration in the following examination. As explained above, every retailer has to shoulder sales costs and management costs. Thus, if a retailer sells goods at a purchase price or the amount calculated by adding a small amount to the purchase price, the goods can only be said to have been sold at a "price lower than supply costs" and cannot be considered to have been sold at a "considerably lower price."

If Cost Price Sales in this case are examined based on the understanding described above, it can be said as follows. As held above, in Sales [2] to [12] and Sales [14] (the same as [13] in substance) to [17] in the Attached List, the appellant's goods that correspond to the sections marked with signs in the List were sold at the prices indicated by those signs. The examination in this instance concerning substantive purchase prices was not able to find sufficient evidence to prove the existence of rebates. However, there is no dispute between the parties concerned about the existence of a practice of adding goods for the purpose of sales promotion to the extent stated in Note (5) of the Attached List. According to the evidence (Exhibits Otsu 3, 4), the appellant can be found to have been conducting negotiations called "*torikumi*" (arrangement) with business partners including Appellee Daikoku. Based on this fact, it can be presumed that goods were added not only to the aforementioned undisputed goods but also to other goods. However, since it is impossible to determine when goods were added to which supplies, it can be interpreted that some of the goods sold by Appellee Daikoku at

"purchase price" were actually sold at prices higher than substantive purchase prices. Nevertheless, it was impossible to find on a case-by-case basis which goods were sold at prices higher than substantive purchase prices and how much higher than substantive purchase prices (Appellee Daikoku itself was unable to provide allegations concerning specific sales).

In view of these facts, among Sales [2] to [12] and Sales [14] (the same as [13] in substance) to [17], the 124 products marked with "★," which indicates that the goods were sold at the actual (contractual) purchase prices, cannot be considered to have been sold at a "price lower than the substantive purchase price." In light of the interpretation presented in the aforementioned holding, it cannot go so far as to say that those goods were sold at a "price considerably lower than the supply costs."

Next, among Sales [2] to [12] and Sales [14] (the same as [13] in substance) to [17], the blue cells marked with "B" show the sales where flyers for the sales indicated the "purchase prices" of goods, which were higher than the actual purchase prices. In those sales, goods were sold at such higher "purchase prices." It is clear that such prices are not "lower than the actual purchase prices" and none of them can be considered to be a "price considerably lower than the supply costs."

Moreover, among Sales [2] to [12] and Sales [14] (the same as [13] in substance) to [17], the red cells marked with "A" show the sales where flyers for the sales indicated the "purchase prices" of goods, which were lower than the actual purchase prices. In those sales, goods were sold at such lower "purchase prices." Thus, each of these goods (15 products; the cumulative total is 45 products) must be considered to have been sold at a "price lower than the substantive purchase price" (as described above, there is no sufficient evidence to prove the substantive purchase price that is lower than the indicated purchase price in each case). It has to be said that such price satisfies the requirement of "a price considerably lower than the supply costs."

(2-3-2) Next, the meaning of the requirement, "continuously," is examined below.

The aforementioned 1984 Guidelines (Exhibit Ko 132) state that "the term 'continuously' means that unjustly low-priced goods have been sold for a long period of time or that such sale can be objectively predicted based on the business policy of a distributor who is holding an unjustly low-priced sale, but such sale is not required to be held every day." In this respect, the 1984 Guidelines are acceptable as a reasonable standard. As pointed out in the 1984 Guidelines, it can be interpreted that the requirement, "continuously," was established based on the understanding that, if an unjustly low-priced sale was held for only a very short period of time or only once, its effect would be negligible from the perspective of fair competition.

A free competitive economy is premised on the principles that the market has the function of adjusting demands and that enterprises are entitled to set prices in accordance with the demands in the market. Voluntary price reduction competition among enterprises is the key to a successful efficiency competition supported and promoted by the competition policy. However, unjustly low-priced sales are restricted because a negative influence on a fair competition environment is anticipated, such that an act of supplying goods or services at prices considerably lower than the supply costs would prevent the prices from reflecting reasonable corporate effort and competition process and would make it difficult for competitors to continue business activities (Judgment of the First Petty Bench of the Supreme Court of December 14, 1989, Minshu Vol. 43, No. 12, at 2078).

Appellee Daikoku has adopted a style of operating a chain of drug stores retailing medicines, etc. throughout Japan. In light of the fact (the entire import of the oral argument) that Appellee Daikoku sells self-medication products over the counter, it can be found that the Cost Price Sales in this case were held at the stores stated in the Attached List: [i] Fukuyama Ekimae Store (in Fukuyama City, Hiroshima Prefecture), [ii] Matsuyama Gintengai Store (in Matsuyama City), [iii] Kumamoto Shinshigai Store (in Kumamoto City), [iv] Okayama Omotecho Store (in Okayama City), [v] Nara Saidaiji Store (in Nara City), [vi] Tokushima Ekimae Store (in Tokushima City), and [vii] Hiroshima Hon-Dori Store (in Hiroshima City) (undisputed by the parties concerned). Thus, it can be presumed that the effect of a Cost Price Sale in each of the stores was more strongly felt by drug stores and pharmacies near the relevant store and that the effect would be limited to being felt by the competitors in the same city at most or sometimes by those in the neighboring cities under certain circumstances. The appellant also provided an allegation and proof to the effect that the effect would be felt by the competitors in the city where each of the aforementioned stores of Appellee Daikoku exists. The scope of the effect of a Cost Price Sale held in each of the stores specified in [i] to [vii] above cannot be considered to overlap with each other. For example, even if the competitors around the store specified in [i] would be affected by the Cost Price Sale held by the store specified in [i], those competitors would not be affected by a Cost Price Sale held by any other store specified in [ii] to [vii].

In view of these facts concerning this case and the objective, etc. of the aforementioned restrictions on unjustly low-priced sales, it would be reasonable to examine the details of Cost Price Sales at each store to determine whether Cost Price Sales can be considered to have been held "continuously" or can be considered to have "increased other enterprises' risk of suffering difficulties in their business activities."

The details of Cost Price Sales at each store are as follows according to the Attached List: [i] Fukuyama Ekimae Store: [1] one day on January 30, 2001, [8] three days from April 10 to April 12, 2001, and [16] nine days from April 28 to May 6, 2001 (three times, 13 days in total): [ii] Matsuyama Gintengai Store: [2] three days from March 9 to March 11, 2001, [7] three days from March 27 to March 29, 2001, and [11] five days from April 21 to April 25, 2001 (three times, 11 days in total); [iii] Kumamoto Shinshigai Store: [3] three days from March 9 to March 11, 2001, [6] three days from March 27 to March 29, 2001, and [12] nine days from April 21 to April 29, 2001 (three times, 15 days in total),; [iv] Okayama Omotecho Store: [4] unknown number of days from the unknown date to March 23, 2001, [10] five days from April 21 to April 25, 2001, and [17] nine days from April 28 to May 6, 2001 (three times, while the total number of days is unknown, it can be presumed to be somewhere around 15 to 20 days at most in light of the lengths of a series of sales); [v] Nara Saidaiji Store: [5] three days from March 27 to March 29, 2001 (once, three days); [vi] Tokushima Ekimae Store: [9] three days from April 10 to April 12, 2001 and [14] eight days from April 28 to May 5, 2001 (twice, 11 days in total); and [vii] Hiroshima Hon-Dori Store: [15] nine days from April 28 to May 6, 2001 (once, nine days) (as described above, while the details of Sale [1] is unknown, since there is no dispute between the parties concerned to the effect that Sale [1] was held as a Cost Price Sale, it is possible to take Sale [1] into consideration as long as the numbers of times and days of the sale are concerned).

In light of the facts mentioned above, the Cost Price Sales held at each store cannot be considered to be held "continuously" as specified in the former part of paragraph (6) of the General Designation. Even if an examination is made regarding the Cost Price Sales held by all the stores mentioned above as a whole, not on the basis of each store, it would be still difficult to find that the Cost Price Sales were held "continuously."

The appellant alleged that Cost Price Sales would have continued if the appellant had not canceled the agreements. It is true that, in light of the facts held above and the entire import of the oral argument, if the appellant had not taken a series of measures such as the cancellation of the agreements, Appellee Daikoku could have been able to continue Cost Price Sales for another one month or two (the continuation of the sales for such additional period would not affect the aforementioned determination at all) in the same manner and scale. Due to the lack of sufficient allegations and proof provided by Appellee Daikoku with regard to a specific store opening plan and sales plan, it is impossible to prove, based on evidence, that Appellee Daikoku could have been able to continue Cost Price Sales even longer, for two to six months for example. (Even if the sale period is prolonged to such extent, it would not immediately affect the

aforementioned determination if the details of the Cost Price Sales found above are taken into consideration. However, this issue should be examined more carefully.) Regarding this point, according to Exhibit Ko 139 and the entire import of the oral argument, as alleged by the appellant, it is found that about one year after the Cost Price Sales (immediately after the rendering of the judgment in prior instance that dismissed the appellant's allegation about the illegality of the Cost Price Sales), flyers that were seemingly similar to those distributed in the Cost Price Sales were distributed and a special sale was held. However, this special sale was held only once by one store and the aforementioned flyers are clearly different from those distributed in the Cost Price Sales in such details that the aforementioned flyers did not state purchase prices despite containing some goods that might be sold at prices lower than purchase prices. Therefore, this special sale cannot be regarded as a part of the Cost Price Sales.

Moreover, as held above, based on the presumption that the requirement concerning "price" can be satisfied only by the sales shown in the red cells marked with "A" in the Attached List, it is even harder to find that the "continuity" requirement is satisfied.

As held above, there is no dispute between the parties concerned about the fact that Appellee Daikoku has a gold member system that allows members to purchase goods at purchase prices at any time regardless of the sales periods. Even based on all of the evidence submitted to this case, it is impossible to prove the details of the gold member system such as the number of members and the sales of goods to the members. Thus, there is no information about the ratio of the sales of goods at purchase prices to the gold members to the total sales of Appellee Daikoku during the non-sales periods. Therefore, the existence of this system does not immediately provide sufficient evidence to prove the fulfillment of the "continuity" requirement.

The appellant pointed out that there were some cases where the Japan Fair Trade Commission sent a warning against an unjustly low-priced sale. However, such warning of the Japan Fair Trade Commission is something that is given to instruct an allegedly violating party when there is no sufficient evidence to prove that there was a violation that deserves legal countermeasures (Exhibit Ko 130). Such warning merely means that they suspected a violation and does not mean that they were able to find a violation. Moreover, those example cases, which are different from this particular case, do not immediately provide grounds to find that the "continuity" requirement is fulfilled.

(2-3-3) It would be reasonable to interpret that the requirement "increasing other enterprises' risk of suffering difficulties in their business activities" is also applicable to the former part of paragraph (6) of the General Designation (the aforementioned Judgment of the First Petty Bench of the Supreme Court). In light of the understanding

presented in the holding concerning the latter part of paragraph (6) of the General Designation specified in (2-4) below, the Cost Price Sales cannot be considered to satisfy the aforementioned requirement specified in the former part (while the appellant alleged as if the aforementioned requirement were applicable only to the latter part, such allegation of the appellant is unacceptable.)

(2-3-4) On these grounds, the Cost Price Sales cannot be considered to fall under the former part of paragraph (6) of the General Designation.

(2-4) Whether the Cost Price Sales fall under the latter part of paragraph (6) of the General Designation

(2-4-1) The latter part of paragraph (6) of the General Designation uses the term "low price" when referring to a price and does not impose the "continuity" requirement. Thus, it is necessary to examine whether the requirement "increasing other enterprises' risk of suffering difficulties in their business activities" is satisfied or not on a case-by-case basis.

As mentioned above, the former part tries to specify a typical act that constitutes an unjustly low-priced sale as clearly as possible, whereas the latter part allows a case-by-case examination in order to determine whether a certain act should be prohibited in light of the objective of the relevant law even though the act does not fall under the former part of said paragraph. It is reasonable to interpret that the latter part makes paragraph (6) of the General Designation applicable to some cases that need to be restricted due to certain circumstances. (The raison d'être of the latter part and the scope of applicability have been disputed since the establishment of paragraph (6) of the General Designation. A document submitted by the appellant (Exhibit Ko 160) presents an interpretation that the application of the latter part is rare.)

(2-4-2) Based on a comprehensive evaluation of various factors related to this case, we will examine, in the following section, the issue of whether the requirement "increasing other enterprises' risk of suffering difficulties in their business activities" is fulfilled or not.

(a) According to the aforementioned undisputed facts, the evidence (Exhibits Ko 33, 44, 45, 94, 128-1, 128-2, 140-1 to 140-322, 145 to 149, 157, and 166, Otsu 1-1, 1-2, 2 to 5, 6-1 to 6-5, and 7-1 to 7-3), and the entire import of the oral argument, the following facts can be found.

(a-1) In 1974, Appellee Y succeeded to the business of "Daikoku Yakkyoku" founded by his father. Appellee Y transformed the business into a stock company in December 1988 and named the company "Appellee Daikoku." Subsequently, Appellee Daikoku established the Four Premerger Companies one after another over a period from 1990 to

1999. The stores of Appellee Daikoku and the Four Premerger Companies were initially established mostly around Osaka City. In 2001, Appellee Daikoku opened a total of 14 stores in the Chugoku/Shikoku region, the Kyushu region, Okinawa, and the Hokuriku region. For example, the Tokushima Ekimae Store and the Okayama Omotecho Store were opened on around February 19, 2001 and around March 14, 2001 respectively. As of May 2001, Appellee Daikoku had 34 stores in total, including 21 stores in Osaka City. The annual sales of Appellee Daikoku and the Four Premerger Companies as a whole were about 26 billion yen. (Appellee Daikoku also sells various goods such as cosmetics, miscellaneous daily goods, and household goods. Medicines are only a part of it, and the appellant alleged that the sales of medicines account for about 40% of the total annual sales of Appellee Daikoku.) At that time, the goods sold by the appellant to Appellee Daikoku and the Four Premerger Companies were worth about 850 million yen per year. Among about 30,000 companies (52,000 stores) throughout Japan doing business with the appellant, the appellant's sales to Appellee Daikoku and the Four Premerger Companies were ranked at about 20 to 30th from the top.

(a-2) While many other pharmaceutical companies use wholesalers to distribute their medicines to retailers, the appellant has adopted the sales policy of directly selling its goods to retailers (direct transactions). The appellant has adopted a system called "stockholder store system," which uses different wholesale prices (the scheduled sales prices determined by the appellant in advance as mentioned in the aforementioned holding) set by the appellant depending on whether a retailer has signed up as a stockholder store. Consequently, under this price system, the prices offered to stockholder stores are said to be about 20% lower than those offered to non-stockholder stores, while the price gap varies depending on the product. Appellee Daikoku belonged to the former group. Under this price system, the prices offered to all of the stockholder stores are the same, and the prices offered to all of the non-stockholder stores are the same as well. This means that no price discrimination exists among stockholder stores or among non-stockholder stores. While the appellant does not have a rebate system, the appellant has a business practice called "*torikumi*" (arrangement), in which transactional conditions may be determined for each product. Some arrangements are carried out nationwide, while other arrangements are not necessarily adopted by all of the stores but adopted by a specific store. In the case of "arrangement," the appellant does not pay money to a business partner, but makes arrangements such as discounts and special transactional conditions. The aforementioned wholesale price system between the appellant and retailers is not known to general consumers but is well known among retailers.

(a-3) The appellant's goods sold in the Cost Price Sales are examined below. According to data about FY2000, the appellant's goods as a whole took up the largest share (17.8%) of the domestic market for medicines targeted to general consumers. Among the appellant's goods sold in the Cost Price Sales, the products "Lipovitan" in the market of energy drinks, "Pabron" in the market of combination cold remedies, "RiUP" in the market or haircare products, and "Damarin" in the market of athlete's foot remedies boasted the largest domestic market shares respectively.

Some of the stores of Appellee Daikoku disclosed the purchase prices of some products of Hisamitsu Pharmaceutical Co., Inc. and sold them at those purchase prices. Other than that, the products sold in the Cost Price Sales were the appellant's goods.

The Cost Price Sales were held in newly opened stores. The Osaka version of Yukan Fuji (Exhibit Ko 44) reported that an unknown person representing Appellee Daikoku, who can be presumed to be an executive officer, explained that "Since most of our stores are located in Osaka City and are mostly unknown in the Kyushu, Chugoku, and Shikoku regions, we would like to raise the public awareness of our company's name by selling products of a leading manufacturer, Taisho Pharmaceutical Co., Ltd., at cost prices."

When Appellee Daikoku sold medicines at a store, 200,000 to 300,000 copies of newspaper flyers were printed and distributed in the area in which the store was located. The store was decorated with hanging advertisements. Store staff wearing *Happi* (a traditional Japanese piece of clothing) distributed flyers in front of the store, repeatedly saying "Special sale!" in a loud voice. In this way, a sales promotion campaign attracted the attention of a large number of people.

(a-4) In the cities in which the stores of Appellee Daikoku specified in [i] to [vii] above, which held the Cost Price Sales, are located respectively, the following number of pharmacy shops also had business relationships with the appellant: [i] 181 shops in Fukuyama City, Hiroshima Prefecture, [ii] 159 shops in Matsuyama City, [iii] 225 shops in Kumamoto City, [iv] 266 shops in Okayama City, [v] 120 shops in Nara City, [vi] 124 shops in Tokushima City, and [vii] 443 shops in Hiroshima City (the actual number of such shops that are in competitive relationships with the stores of Appellee Daikoku will be slightly larger than the numbers mentioned above in consideration of the possibility that some other shops sell the appellant's goods without direct transactions with the appellant). About 70% of these shops had annual sales of 100 million yen or lower.

According to "*Heisei 11 nendo chosa: Chūshō kigyō no keiei shihyō*" (FY1999 survey: Management indexes of small and midsize companies) (Exhibit Ko 128-2)

edited by The Small and Medium Enterprise Agency, a survey conducted on small and midsize companies, more specifically, the companies and sole proprietors whose capital or original capital is 10 million yen or lower with 50 or fewer employees, revealed that, as far as the retailing business of medicines is concerned, the ratio of sales/management cost to the sales was 28.8%, the ratio of total profits to the sales was 31.5%, and the ratio of operating profits to the sales was 2.7% in the business year starting from April in FY1998 (the financial results ending in March 1999).

(b) The requirement specified in paragraph (6) of the General Designation only requires the "risk" of causing difficulties in the business activities of other enterprises. However, in order to determine whether this requirement is satisfied or not, it is important to take into consideration the actual effect of the Cost Price Sales on the pharmacy shops that were in competitive relationships with the stores of Appellee Daikoku. The details of such effect are examined below.

(b-1) According to the documents stating the opinions and comments of the owners of drug stores and pharmacy shops after the rendering of the judgment in prior instance (Exhibits Ko 140-1 to 140-322), many owners criticized the act of Appellee Daikoku of disclosing "purchase prices (cost prices)" and held Cost Price Sales and complained that, after Appellee Daikoku's disclosure of purchase prices, although those were the prices offered by the appellant to Appellee Daikoku, the owners came to receive criticism from consumers, who compared the prices with those offered by Appellee Daikoku, to the effect that their shops offer unreasonably high prices or gain an excessive amount of profits and that the owners started having difficulties in conducting business and suffering sales losses, which have caused financial troubles to their business.

In the documents (Exhibits Ko 148 and 149) recording the interviews conducted by the attorney of the appellant on June 7, 2002, with two owners of pharmacy shops in the area 500 meters or 700 meters away from the aforementioned Okayama Omotecho Store of Appellee Daikoku specified in [iv] above, their experiences are described in a relatively specific manner. For example, after the opening of the shop of Appellee Daikoku, the number of their customers was about 80% and their sales were about 75% of the level prior to the opening of the store. They received criticism from customers that the prices offered by Appellee Daikoku were lower (Exhibit Ko 148). After the Cost Price Sales by Appellee Daikoku, they suffered a decrease in the number of customers, more specifically, the number of their customers was about 80% and their sales were about 70% of the level prior to the Cost Price Sales. After the Cost Price Sales, they experienced a decline in sales on average. In particular, they experienced a considerable decrease in the sales of the appellant's goods (Exhibit Ko 149).

However, the aforementioned documents (Exhibits Ko 140-1 to 140-322) provide only abstract information due partly to the nature of the documents. It has to be said that the documents provide little empirical data about the damage and influence supported by specific evidence. Relatively specific information was provided only about the price-related complaints from consumers as described above. While many shop owners talked about sales declines, no specific objective information was conveyed. Moreover, the aforementioned documents were prepared in around March 2002, in other words, about one year after the Cost Price Sales. Even if the complaints about sales declines and management difficulties were made based on facts, most of the complaints cannot be considered to have been attributable to the Cost Price Sales because the Cost Price Sales, where the aforementioned stores disclosed purchase prices and sold goods at those prices, were held before early May 2001 as found above. There is no allegation or proof to the effect that a similar sale was conducted afterward. While Appellee Daikoku have also held discount sales since then, according to the aforementioned documents, goods were sold at low prices "close to the purchase prices" (higher than the purchase prices). Some shop owners stated that difficulties had been caused by Appellee Daikoku's act of selling, at low prices, various goods manufactured by companies other than the appellant. In other words, even if the complaints about sales declines and management difficulties were made based on facts, it could be presumed that those problems were attributable not to the effect of the Cost Price Sales, which were limited in terms of the number of times of sales and the total number of days of sales as held above, but to discount sales held by Appellee Daikoku over a year or so, which had a price advantage over other shops.

Furthermore, according to the aforementioned documents (Exhibits Ko 140-1 to 140-322) and the aforementioned voluntary questioning statements (Exhibits Ko 148 and 149), the entire import of the oral argument (the appellant's allegation in particular), and the publicly known information about social and economic situations, it can be found that, around the time from 2001 to 2002 under the economic circumstances characterized by a long-term decline in consumer spending and the worsening deflation, sales had been on the decline in the medicine retailing business. The business environment got even worse as a result of a series of opening of volume retailers and discount stores, which increased the intensity of the competition among business owners in the same market. It can be easily presumed that these general economic factors influenced the management of the aforementioned drug stores and pharmacy shops.

As described above, as of the time when the Cost Price Sales were held, while it can

be easily presumed that the sales of the shops around the aforementioned stores decreased, there is no sufficient evidence to prove that the Cost Price Sales had a causal relationship with the damage, interference, or influence, etc. stated in the aforementioned documents, etc. (Exhibit Ko 140-1 to 140-322, 148, and 149).

As mentioned above, there are two different price systems for the wholesale prices determined by the appellant. The prices offered to stockholder stores are said to be about 20% lower than those offered to non-stockholder stores, while the price gap varies depending on the product (Exhibit Otsu 2). Appellee Daikoku had been a stockholder store. Due to the existence of 20% difference, it is clear that non-stockholder stores were unable to win a price competition with Appellee Daikoku, who can reduce costs more easily, even when Appellee Daikoku held a sale that was undoubtedly legal. Thus, it is likely that some of the complaints about management difficulties stated in the aforementioned documents (Exhibits Ko 140-1 to 140-322) were attributable to the unavoidable consequences of the adoption of the aforementioned price systems. (Since it is impossible to impose geographical restrictions on the location of a drug store that is scheduled to be established, the trading areas of regular pharmacy shops sometimes overlap with each other. If such overlap occurs between a stockholder store and a non-stockholder store, there is a significant gap between the two stores in terms of price competitiveness as described above. Exhibit Otsu 1-1, which can be considered to be a document sent by the appellant to notify the shops about the changes in product codes and cost prices due to a product renewal of "Taisho Kampo Ichoyaku," proposed a specific price, 2,380 yen, which was slightly lower than the regular price, 2,600 yen, by stating that "we propose to sell the medicine (48 inclusions) at 2,380 yen to secure profits.").

(b-2) Based on the allegation and proof submitted by the appellant concerning the damage (Exhibits Ko 157 and 167, Otsu 2), the following section will examine whether it is possible to estimate the amount of damage caused to the shops that were in competitive relationships with the stores of Appellee Daikoku.

According to the data presented in the aforementioned evidence, the sales of the appellant's goods by shops other than Appellee Daikoku's stores during the period from March 9 to the end of May 2001 in each of the cities specified in [i] to [vii] above decreased from the previous year. A comparison between the year-on-year decrease in the sales of all medicines, etc. at retail stores in the Kinki, Chugoku, Shikoku, and Kyushu blocks respectively and the year-on-year decrease in the sales of the aforementioned appellant's goods show that the ratio of decrease was larger for the latter.

A comparison between the year-on-year decrease in the sales of the appellant's goods by shops other than Appellee Daikoku during the period from March 9 to the end of May 2001 in each of the cities specified in [i] to [vii] above and the year-on-year decrease in the sales of the appellant's goods by shops other than Appellee Daikoku during the period from December 15, 2000 to March 8, 2001 in the same cities shows that the ratio of decrease was larger for the former in all of the cities.

However, the evaluation method proposed by the appellant is not acceptable at all because the aforementioned evaluation method was defective in many respects such as the facts that sales of all the medicines at retail stores in the Kinki, Chugoku, Shikoku, and Kyushu blocks respectively include the sales of Appellee Daikoku and should not be used in a comparison, that no comparison was made with areas where no Cost Price Sale was held, that a determination was made based solely on the results of a year-on-year comparison without taking into consideration a long term trend in the past, that it is inappropriate to make a simple comparison between the period from March 9 to the end of May 2001 and the period from December 15, 2000 to March 8, 2001 without taking seasonal variations into consideration, and that it is unreasonable to consider the Cost Price Sales to be the only cause of variation without examining whether there any cause of variation other than the Cost Price Sales. Therefore, it has to be said that there is no sufficient evidence to prove that the damage suffered by the shops that had competitive relationships with the stores of Appellee Daikoku was attributable to the Cost Price Sales.

(b-3) There is no other evidence sufficient to prove that the Cost Price Sales caused some drug stores and pharmacy shops that had competitive relationships with the aforementioned stores of Appellee Daikoku to go out of business.

(c) Any case that falls under the latter part of paragraph (6) of the General Designation is not required to satisfy the three requirements, i.e. "price considerably lower than the supply costs," "continuously," and "without any justifiable reasons." These requirements are not only a part of the conditions that could "increase other enterprises' risk of suffering difficulties in their business activities" but also are particularly important factors that should be taken into consideration to determine whether the requirement "increasing other enterprises' risk of suffering difficulties in their business activities" is satisfied or not since the aforementioned two requirements, "price considerably lower than the supply costs" and "continuously," are especially important elements of the typical cases presented in the former part of paragraph (6) of the General Designation.

If the sales prices in the Cost Price Sales found above are examined, most of the prices that should be examined are listed in the ★-marked sections of the

aforementioned list, which indicate that goods were sold at exact purchase prices. Thus, while it is impossible to deny that these goods were sold at "prices lower than the supply costs," it cannot be said that they were sold at "prices considerably lower than the supply costs" as found above. Next, regarding the prices specified in the sections marked with "B" in the aforementioned list, the evidence submitted to this case is not sufficient enough to determine whether those prices, which are higher than the actual purchase prices, are "lower than the supply costs." Regarding the prices specified in the sections marked with "A" in the aforementioned list, those prices can be considered to be not only "low prices" but also prices "considerably lower than the supply costs." As described above, since the prices of most products in this case cannot be said to be "considerably lower than the supply costs," the likelihood of "increasing other enterprises' risk of suffering difficulties in their business activities" should be considered to be relatively low.

The number of times and days of the Cost Price Sales, which are as found above, do not satisfy the "continuity" criteria as held above. Therefore, the likelihood of "increasing other enterprises' risk of suffering difficulties in their business activities" should be considered to be very low.

(d) Based on a comprehensive evaluation of the aforementioned factors, the Cost Price Sales cannot be found to have caused difficulties to the business activities of the shops that had competitive relationships with Appellee Daikoku and therefore cannot be considered to satisfy the requirement "increasing other enterprises' risk of suffering difficulties in their business activities." Therefore, without having to examine any other factors, it should be concluded that the Cost Price Sales do not fall under the latter part of paragraph (6) of the General Designation.

To make sure, all the related points alleged by the appellant regarding unjustness are examined below. The details about the disclosure of purchase prices and the sale of goods at purchase prices are as held above. From the perspective of unjustness, the following facts can be found according to the facts found above and the entire import of the oral argument. The Cost Price Sales were held during a period of several months immediately after the opening of the first store of Appellee Daikoku in each of the cities specified in [i] to [vii] above. As found above, the purpose of those sales was to raise the public awareness of the name of Appellee Daikoku, which was not widely known to general consumers in the Kyushu, Chugoku, and Shikoku regions, except for the stores in Nara City. While a careful examination is necessary, in light of the business scale, etc. of Appellee Daikoku, it is not impossible to consider that the low-priced sales were necessary and justifiable to a certain extent especially in consideration of the fact that

those sales were held at the time when Appellee Daikoku was trying to enter new markets in the aforementioned regions. As far as the Cost Price Sales are concerned, there is no dispute between the parties concerned with regard to the facts that, among the 15 products that were sold at prices lower than the supply costs, nine products were sold at prices 20 to 30% lower than the actual purchase prices and that, regarding those low prices, the purchase prices disclosed by Appellee Daikoku were mistaken. Appellee Daikoku admitted that four products were sold at prices lower than the purchase prices in order to compete with other shops. However, according to all the evidence submitted to this case, it cannot be found that Appellee Daikoku intentionally indicated purchase prices that were lower than the actual purchase prices and sold goods at those prices. It would be even more difficult to find that Appellee Daikoku had an intention to deceive consumers with regard to the sale of all the aforementioned 15 products. Therefore, those sales can be considered to be unjust only to a limited extent. Regarding the appellant's allegations about unjustness specified in [ii] to [iv] in (2) (2-5) concerning [Claim A1] in No. 3, 5 above and the appellant's allegation concerning an increase in other enterprises' risk of suffering difficulties in their business activities and the damage suffered by the appellant, in light of the facts found in Issue (4) below and the facts already held in detail, none of those allegations is acceptable. Thus, the Cost Price Sales cannot be considered to satisfy the "unjustly" requirement specified in the latter part of paragraph (6) of the General Designation.

(2-5) Determination by the Japan Fair Trade Commission

According to the aforementioned facts undisputed by the parties concerned, a company engaged in the retailing of medicines in Hiroshima City reported unjustly low-priced sales to the Japan Fair Trade Commission. The report was attached with flyers that show that Appellee Daikoku sold goods at purchase prices. The Japan Fair Trade Commission conducted an examination and decided not to take measures under the Antimonopoly Act. However, the Commission found an act that could result in a violation of the Antimonopoly Act and issued a notice to the people concerned in order to prevent such violation.

In order to request careful consideration from the perspective of prevention, a "notice" is issued against an act that cannot be regarded as a violation of the Antimonopoly Act and is therefore not subject to any legal action, but could lead to a violation (Exhibit Ko 130). Thus, according to the facts mentioned above, it can be found that the Japan Fair Trade Commission examined the Cost Price Sales (according to Exhibits Ko 88 and 18, it is found that the examination was for Sale [15] stated in the attached list) and found that they do not constitute a violation of the Antimonopoly Act.

(2-6) As described above, the Cost Price Sales cannot be considered to fall under the former or the latter part of paragraph (6) of the General Designation (unjustly low-priced sale). Thus, the claim for payment of damages on these grounds are groundless.

(3) Issue (3) Whether an act of disclosing purchase prices and Cost Price Sales violates business practices or business practice law

(3-1) The appellant alleged that business practices or business practice law require non-disclosure of purchase prices (wholesale prices) to any third party other than the parties involved in the transaction, i.e., the appellant and Appellee Daikoku in this case.

(a) As found above, the prices disclosed by Appellee Daikoku to consumers are purchase prices in the sense of the sales prices agreed between the appellant and Appellee Daikoku under a sales agreement. As described above, since the appellant did not disclose purchase prices (sales prices) per se, the requirement specified in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act is not satisfied. However, after the conclusion of a sales agreement, since the information about the aforementioned purchase prices (sales prices) are shared by Appellee Daikoku and appellant as the parties to the agreement, if the aforementioned purchase prices can be considered to be trade secrets, it could provide grounds for the illegality of Appellee Daikoku's act of disclosing purchase prices as long as there are business practices or business practice law that require non-disclosure of purchase prices to any third party other than the appellant and Appellee Daikoku as the parties to the agreement.

(b) If further examination is conducted, according to the evidence (Exhibits Ko 140-1 to 140-322), and the entire import of the oral argument, it is found that, in the world of business, since distributors (retailers) usually do not disclose purchase prices, many retailers in the same market found Appellee Daikoku's act of such disclosure in this case as unusual.

However, according to the aforementioned evidence which provides the understanding and interpretation of the owners of shops selling medicines, etc., many shop owners stated that the distributors (retailers) of medicines, etc. do not disclose purchase prices because the disclosure of purchase prices to consumers would draw criticisms that their sales prices are too expensive or that they gain excessive profit, which would make their operations more difficult. Many shop owners also stated that such pressure for discount would prevent them from gaining the scheduled amount of profits and staying in business or would, at least, make it more difficult for them to stay in business. Thus, it can be found that the idea of voluntarily disclosing purchase prices was beyond ordinary thinking. According to the aforementioned evidence, only a few

persons stated that the act of disclosing purchase prices can be considered to be an act of disloyalty against manufacturers. However, they failed to clarify the reasons. More importantly, the aforementioned majority opinion seems to have a basis in the idea that purchase prices should be kept as secret information of retailers themselves or should be treated as trade secrets. In the aforementioned evidence, many people stated to this effect.

In summary, the aforementioned evidence indicates that the general understanding of distributors (retailers) is that purchase prices are a type of information that should be protected as secrets in order to secure profits and that the disclosure of such information to consumers would make them go out of business or, at least, make it more difficult for them to stay in business. Thus, distributors (retailers) can be considered to find no benefit in voluntarily disclosing purchase prices since the distributors (retailers) are avoiding such disclosure to protect their profits and keeping purchase prices secret for their benefit. Thus, even if there is such consensus among distributors (retailers), it would be nothing but an economic principle to pursue their interest. It is clear that no business practices or business practice law existed to impose a legal prohibition on such disclosure.

According to the aforementioned evidence, distributors (retailers) seem to be concerned that the disclosure of purchase prices would cause trouble to competitors. However, the troubled parties would be competitors and not the appellant, which is a manufacturer. The appellant also does not seem to be alleging that such business practices or business practice law existed. In consideration of the facts that distributors (retailers) competing in the same market do not conclude any agreements and that purchase prices vary from one distributor to another (as found above, even in the case of the appellant, there are two price systems), even if a distributor discloses its own purchase prices, it would not mean that it discloses purchase prices of competitors. Thus, if it is correct to recognize the existence of the aforementioned understanding among distributors (retailers), it would be nothing but a shared view that distributors should be considerate of competitors and refrain from disclosing purchase prices because the disclosure may result in suggesting the purchase prices of competitors. Thus, it is clear that such understanding would not have any legal effect as business practices or business practice law.

(c) Since the appellant made an allegation based on the written reply from the president of the Tokyo Chamber of Commerce and Industry sent in response to an inquiry from the appellant (Exhibit Ko 158-1), the opinion stated in the reply is the same as the opinion stated in the appellant's opinion inquiry statement. Even if said opinion is the

same in substance as the understanding of the distributors stated in the aforementioned holding, said opinion is unacceptable due to the reasons held in (b) above.

(3-2) The appellant alleged that the Cost Price Sales are against business morals, business practices, and business practice law.

According to the evidence (Exhibit Ko 140-1 to 140-322, and 145 to 146), most distributors (retailers) replied that Cost Price Sales are against business morals and expressed anger about them.

However, free price competition should be permitted in principle. Certain restrictions are imposed under the Antimonopoly Act in order to maintain fair competition. In light of the fact that the Cost Price Sales do not violate the Antimonopoly Act and the circumstances described in connection with Issue (2) above, there is no sufficient evidence to prove that the Cost Price Sales go so far as to violate business morals, etc. and constitutes an illegal act despite the fact that they do not violate the Antimonopoly Act, while it is emotionally understandable that distributors who have a price disadvantage against Appellee Daikoku expressed their deep anger by presenting such opinions as mentioned above.

Thus, the appellant's allegation is unacceptable.

(4) Issue (4) Illegality of comprehensive evaluation

The appellant alleged that the illegality of the Cost Price Sales can be proven based on a comprehensive overall evaluation of the above-examined facts that provide grounds for the illegality as well as other related facts.

In light of the facts concerning the act of disclosing purchase prices and the illegality of Cost Price Sales as held above, it can be said that, in the case of the behaviors specified in (a) to (h) as alleged by the appellant above, the acts that provide grounds for those allegations were not illegal. Even if these behaviors are examined in a comprehensive manner, the act of Appellee Daikoku cannot be considered to be illegal.

In the allegation stated above, the appellant mentioned that the appellant was falsely indicated as a cooperator in the flyers for sales in which purchase prices were indicated. Appellee Daikoku admitted that a flyer distributed in Okayama City stated that, "Thanks to the cooperation of Taisho Pharmaceutical Co., Ltd., which is famous for the catchphrase '*Faito Ippatsu*!,' Taisho Pharmaceutical's products will be sold at purchase prices," with the awareness that no cooperation was provided by the appellant in reality.

While the aforementioned act of Appellee Daikoku implied a special business relationship with the appellant to consumers, there was no such special relationship between the two parties. (Appellee Daikoku signed up as a stockholder store member of the appellant. This arrangement could be considered to be a special relationship.

However, Appellee Daikoku has no other relationships with the appellant.) The flyer only stated that "Goods will be sold at purchase prices" without any other information, and thus did not mislead consumers into believing that goods would be sold at even more advantageous sales prices. Moreover, this flyer was distributed by one store for one sale. There is no evidence to prove that Appellee Daikoku was trying to mislead consumers by providing false information through the flyer. Therefore, the aforementioned act of Appellee Daikoku cannot be found to be an illegal act that immediately constitutes an act of tort, etc.

The appellant alleged that the appellant suffered damage on its distribution network and brand image and value. However, there is no clear evidence to prove such damage specifically. Thus, the appellant's allegation on this point is also unacceptable.

Also, the appellant alleged that Appellee Daikoku selectively disclosed purchase prices of only the appellant's goods and sold them at purchase prices. However, as held above, such act does not immediately constitute unjust discriminatory handling.

In the aforementioned allegation, the appellant criticized the fact that Appellee Daikoku used the word "regular prices" in flyers. However, in light of social norms, it is very unlikely that the use of the word "regular prices" is generally interpreted to be suggesting that the appellant is conducting a particularly problematic act. Thus, the use of this word cannot be considered to immediately constitute an illegal act committed by Appellee Daikoku (according to Exhibits Otsu 1-1 and 1-2, when communicating with distributors, the appellant itself used the word "regular prices" in order to refer to suggested retail prices).

Additionally, the appellant alleged that, when the appellant requested Appellee Daikoku to stop selling goods by disclosing their purchase prices, Appellee Daikoku demanded payment of compensation for the discontinuation. This allegation can be interpreted to be the same as the allegation that β of Appellee Daikoku requested the appellant to pay compensation for the discontinuation. According to the evidence (Exhibits Otsu 3 and 4), the two parties were negotiating various transactional conditions at that time. It can be presumed that, in the aforementioned negotiation process, the payment of compensation was requested in exchange for the acceptance of a request for discontinuation. As held above, the Cost Price Sales themselves cannot be considered to be illegal. Therefore, the aforementioned act of β, which is a mere proposal from one party involved in the negotiation, cannot be considered to be immediately illegal.

On these grounds, even if various detailed allegations made by the appellant are taken into consideration, the appellant's allegation that comprehensive evaluation is

illegal is totally unacceptable.

(5) Issue (5) Whether an act of Appellant Y constitutes an act of joint tort

As held above, Appellee Daikoku's act does not constitute a violation of the Unfair Competition Prevention Act or an act of tort. In light of said holding, Appellant Y's act does not constitute an act of tort either. Thus, the appellant's allegation that Appellant Y's act constitutes an act of joint tort is groundless.

(6) Issue (6) Damage suffered by the appellant and causation

As held above, in this case, neither a violation of the Unfair Competition Prevention Act nor an act of tort can be found. Thus, it is not necessary to examine whether the appellant suffered damage and whether there is a causation.

As held above, regarding tangible damage, since many defects can be found in the evaluation methods used in the underlying evidence (Exhibits Ko 157 and 167, Otsu 2), the Cost Price Sales held by Appellee Daikoku cannot be found to have caused the damage alleged by the appellant. As held above, there is no sufficient evidence to specifically prove any other damage.

2. [Claim A2] Claim for payment of damages for nonperformance (demanded payment of 100 million yen from Appellee Daikoku)

(1) Issue (1) Whether the Basic Transaction Agreement was violated or not

(1-1) According to the evidence (Exhibits Ko 1 to 5), Article 3 of the Basic Transaction Agreement concluded between the appellant and Appellee Daikoku and the Four Premerger Companies specifies as follows:

"Article 3 Otsu (Note in the judgment: Appellee Daikoku and the Four Premerger Companies) shall try to make a recommendation at the time of sale and sell the goods to consumers. Ko (Note in the judgment: Appellant) shall support the sales activities of Otsu by negotiating with Otsu about the display, sales method, etc. of goods if necessary, and thereby contribute to increasing mutual benefits and maintaining smooth transactions."

(1-2) The appellant alleged that the first sentence of Article 3 specifies (A) the obligation of Appellee Daikoku, etc. to make a recommendation at the time of sale and (B) the obligation to sell goods directly to consumers, and that the former part of the second sentence specifies the appellant's obligation to negotiate with Appellee Daikoku, etc., and the latter part of the second sentence specifies (C) the obligation to increase mutual benefits, and (D) the obligation to maintain smooth transactions.

The appellant alleged that the Cost Price Sales held by Appellee Daikoku violate (C) the obligation to increase mutual benefits and (D) the obligation to maintain smooth transactions, that the Cost Price Sales violate (B) the obligation to sell goods directly to

consumers because the Cost Price Sales leave ample room, due to their structural nature, for purchasers other than end-consumers to buy the appellant's goods, that the Cost Price Sales violate (A) the obligation of Appellee Daikoku, etc. to make a recommendation at the time of sale because the Cost Price Sales can be considered to be an act of tarnishing the brand of the appellant and the brand of appellant's goods and lowering the reputation of the appellant among consumers and also an act of decreasing the competitive advantage of the appellant in the market. Furthermore, the appellant alleged that, while the first sentence of Article 3 specifies the obligation to sell goods as a commercial transaction, since the Cost Price Sales did not aim to make profits by selling the appellant's goods and could be considered to be a mere act of attracting customers, i.e., an "act of advertisement," the Cost Price Sales violate said Article.

(1-3) First, the appellant's allegation concerning (C) the obligation to increase mutual benefits and (D) the obligation to maintain smooth transactions of Appellee Daikoku is examined below.

The second sentence of Article 3 specifies that "Ko (Appellant) shall support the sales activities of Otsu by negotiating with Otsu about the display, sales method, etc. of goods if necessary, and thereby contribute to increasing mutual benefits and maintaining smooth transaction." The subject in this sentence is consistently Ko (Appellant). Therefore, it is clear that the subject of the sentence "support the sales activities of Otsu by negotiating with Otsu about the display, sales method, etc. of goods if necessary, and thereby contribute to increasing mutual benefits and maintaining smooth transaction" is Ko (Appellant). If the structure of the second sentence is interpreted in the ordinary way of interpreting a Japanese sentence, it can be interpreted that the main part is "Ko shall support the sales activities of Otsu," that the phrase "by negotiating with Otsu about the display, sales method, etc. of goods if necessary" indicates the means or methods of "supporting the sales activities of Otsu," and that the phrase, which starts with "thereby," "contribute to increasing mutual benefits and maintaining smooth transaction" indicates the goal or target that Ko (Appellant) should try to achieve by "supporting the sales activities of Otsu." Thus, the contractual obligation specified in the second sentence can be summarized that "Ko shall support the sales activities of Otsu." The phrase "contribute to increasing mutual benefits and maintaining smooth transaction" can be interpreted to be an advisory provision and cannot be considered to be able to impose a specific obligation. In consideration of the aforementioned finding concerning the subject of the sentence, it is difficult to interpret that the second sentence imposes a specific obligation.

Furthermore, in light of the facts mentioned in the aforementioned holding such as

the fact that the Cost Price Sales cannot be considered to be illegal, the Cost Price Sales cannot be found to be a violation of the second sentence of Article 3.

(1-4) Next, the appellant's allegation "(B) the obligation to sell goods directly to consumers" is examined below. It is true that the first sentence of Article 3 specifies that "Otsu (Appellee Daikoku, etc.) … shall sell the goods to consumers." In view of the facts that the literal meaning of the word "consumers" is unclear, that it is impossible to immediately understand from the contractual provision why the sales destination of the goods of Otsu (Appellee Daikoku, etc.) is restricted to "consumers" as alleged by the appellant if such allegation is true, that, if the contractual provision restricting the sales destination to "consumers" is important and entitles the non-violating party to cancel the agreement in the case of nonperformance and demand payment of damages, the agreement should have clearly defined the meaning of the term "consumers" and adopted the wording "Otsu shall not sell goods to any parties other than consumers" (in legal writing, the word "shall" ("surumonotosuru" in the original Japanese text) is used to write an advisory provision or a provision that imposes a small obligation), the provision "Otsu shall sell the goods to consumers" in this case cannot be considered to impose a specific obligation as alleged by the appellant. There is no evidence to prove that Appellee Daikoku, etc. sold goods to distributors, etc. or that Appellee Daikoku, etc. intended to sell goods to distributors, etc. The allegation that the aforementioned obligation can be considered to have been violated due to the facts that the goods could have been sold to distributors because the goods were sold at purchase prices and that such sale could have damaged the appellant's policy of direct sale is unreasonable and totally unacceptable.

(1-5) The appellant's allegation "(A) the obligation of Appellee Daikoku, etc. to make a recommendation at the time of sale" is examined below.

The first sentence of Article 3 specifies that "Otsu (Appellee Daikoku, etc.) shall try to make a recommendation at the time of sale." The wording and the meaning of this phrase should be interpreted as an advisory provision requiring the "effort" to make a recommendation at the time of sale. This provision cannot be interpreted to be imposing a specific obligation, i.e., the obligation to make a recommendation at the time of sale, as alleged by the appellant. Therefore, the appellant's allegation is unacceptable.

(1-6) The appellant also alleged that the first sentence of Article 3 specifies obligation to sell goods as a commercial transaction. However, the appellant itself cannot identify the words and phrases in the provision that can provide grounds for such allegation. Consequently, the first sentence of Article 3 cannot be interpreted to impose such legal obligation. Thus, the appellant's allegation has to be said to be unacceptable.

(1-7) In conclusion, the appellant's allegation that the Basic Transaction Agreement was violated is groundless.

(2) Issue (2) whether the Support VAN Agreement was violated or not

(2-1) According to the evidence (Exhibits Ko 46 to 83, and 12 [including the branch number]), Article 5 of the Support VAN Agreement concluded between the appellant and Appellee Daikoku and the Four Premerger Companies specifies as follows. Article 2, which specifies definitions, is also quoted below.

"Article 5 (Secrecy)

1. (i) Ko (Note the judgment: the lipid, etc.) shall keep the secrecy of the content of the Agreement and Data Otsu and Materials Otsu that Ko obtained under the Agreement and shall not disclose, assign, lend, or license the content of the Agreement, the data, the materials, or any reproduction thereof to any third party for any reason.

Ko shall shoulder the same secrecy obligation for manuals concerning the system or any other documents ("manuals, etc."), information and software contained in storage media such as floppy disks lent or provided by Otsu (Note in the judgment: Appellant) in connection with the Agreement, and know-how, plans or any other information related to the System that Ko came to know under the Agreement.

(ii) (omitted)

2. Otsu shall keep the secrecy of Data Ko and shall not disclose, assign, lend, or license Data Ko, without making any change thereto, to any third party without Ko's consent."

"Article 2 (Definitions)

The definitions of the terms used in this agreement are as follows.

(i) Data Ko: Data concerning the supplies, sales, payments, stocks, etc. input from Ko's terminals

(ii) Data Otsu: Data prepared by Otsu by processing Data Ko or processing Data Ko and other data, including data in the form of files

(iii) Materials Otsu: Data list such as monthly sales reports containing the output produced based on Data Otsu

(2-2) In light of the aforementioned provisions, the purchase prices in this case cannot be interpreted to fall under Data Ko. It can be interpreted that the appellant is alleging that purchase prices fall under Article 5, paragraph (1), item (i) of the Support VAN Agreement, "Data Otsu obtained under the Agreement," and that Appellee Daikoku's act of disclosing the purchase prices constitutes violation of the secrecy obligation specified in said provision.

(2-3) According to the aforementioned evidence, in the preface of the Support VAN Agreement, it is stated that "Appellee Daikoku (Ko) and the appellant (Otsu) agreed on

the following matters and concluded the Support VAN Agreement (the "Agreement") concerning the information processing, etc. by use of the Support VAN (the "System") planned and developed by Otsu during the operation period of the System." The Agreement can be found to specify the matters concerning information processing, etc. during the operation period of the Support VAN. As mentioned above, Appellee Daikoku has the secrecy obligation for "Data Otsu obtained under the Agreement."

When a sales agreement is concluded in order to purchase goods for stocking purposes, despite the fact that the scheduled sales prices determined by the appellant are notified to Appellee Daikoku in advance or that said prices constitute a part of Data Otsu, the purchase prices should be considered to be established based on a consensus between the two parties, as long as the sales agreement has been eventually established, as held above. Thus, the two prices should be differentiated from each other. Also, purchase prices are a set of information established based on a sales agreement. Such information cannot be considered to have been "obtained based on the Support VAN Agreement (the "Agreement")," which specifies matters concerning information processing, etc. conducted during the operation period of the Support VAN. Thus, the purchase prices disclosed by Appellee Daikoku to consumers cannot be considered to be Data Otsu, which must be protected based on the secrecy obligation.

Therefore, the appellant's allegation is unacceptable.

(3) Issue (3) Whether the obligation of good faith specified in the continuous transaction agreement was violated or not (loss of trusting relationships)

The appellant alleged the following acts have constituted a violation of the obligation of good faith (loss of trusting relationships): (A) the disclosure of the purchase prices (wholesale prices) of the appellant's goods, (B) discriminatory disclosure and sale, (C) misleading advertisement, (D) sale of the appellant's goods at purchase prices (wholesale prices) or lower, (E) misuse of the appellant's brand, (F) rejection of the appellant's request for discontinuation of Cost Price Sales, (G) request for payment of compensation (money) from the appellant for discontinuation of Cost Price Sales, and (H) tarnishment of the brand of the appellant from the viewpoint of consumers.

However, as already held above or in light of the interpretation already held above, the aforementioned factors are not sufficient to constitute a violation of the obligation of good faith (loss of trusting relationships). Thus the appellant's allegation is unacceptable. The appellant alleged that the parties having a continuous transaction relationship based on the good faith principle like the one in this case have implicitly agreed to shoulder the obligation to keep purchase prices secret. However, in light of the aforementioned

factors found in relation to the agreement, there is no evidence to prove that such implicit agreement existed as alleged by the plaintiff. Regarding the allegation stated in (G) above, all of the evidence submitted to this case is insufficient to prove such part of the allegation that companies other than the appellant have complied with Appellee Daikoku's request for monetary compensation in order to be excluded from the Cost Price Sales.

(4) Issue (4) Whether business practices or business practice law were violated or not

As held above, the appellant's allegation is unacceptable.

(5) Issue (5) Damage suffered by the appellant and causation

Without having to make a determination regarding this point, the appellant's claim for payment of damages for nonperformance is groundless. The holding concerning the claim for payment of damages for an act of tort, etc. would also apply to the issue of damage and causation as alleged by the appellant.

3. [Claim B] Claim for an injunction against the disclosure of purchase prices under Article 3 of the Unfair Competition Prevention Act (claim against the appellees)

As held above, in this case, it is clear that the appellant's claim for an injunction is groundless because an act of unfair competition cannot be found to exist.

4. [Claim C] Claim for return of movables upon termination of the Support VAN Agreement (claim against Appellee Daikoku)

In this instance, Appellee Daikoku admitted that the Support VAN Agreement was terminated and that Appellee Daikoku is obliged to return the movables specified in the Attached Movables List. The statement made by Appellee Daikoku regarding this point in this lawsuit shows that Appellee Daikoku merely admitted that the legal effect of terminating the agreement was produced by a reason that is different from the reasons alleged by the appellant and that, consequently, Appellee Daikoku is obliged to return movables. Appellee Daikoku did not mention anything about when and why the agreement was terminated. Therefore, this court adopted Appellee Daikoku's admission as it is and used it as a basis for making a determination.

On these grounds, this court revokes a part of the judgment in prior instance that is related to the aforementioned point (excluding the voluntarily returned movables for which the claim was withdrawn) and orders Appellee Daikoku to return the movables specified in the Attached Movables List.

5. [Claim D] Claim for payment of settlement money upon termination of the Support VAN Agreement (demanded payment of 53,953,005 yen from Appellee Daikoku)

The issue lies in whether there were attributable reasons for the termination of the Support VAN Agreement.

There is no dispute between the parties concerned with regard to the facts that the appellant sent Appellee Daikoku and the Four Premerger Companies a notice of cancellation dated May 20, 2001 (cancellation without any prior notice due to the loss of trusting relationships) to notify its intention to immediately cancel the Basic Transaction Agreement and the Support VAN Agreement and that this cancellation notice arrived at Appellee Daikoku, etc. on May 21 or 22, 2001.

The appellant alleged that the cancellation of the Basic Transaction Agreement terminated the business relationship between the appellant and Appellee Daikoku, etc., eliminated in the purpose of using the Support VAN and made it impossible to maintain the Support VAN Agreement and that Appellee Daikoku's act of holding Cost Price Sales falls under the cancellation clause of the Support VAN Agreement or destroyed the trusting relationships between the parties to the agreement and even provided reasonable grounds for cancellation of the agreement and that the agreement was terminated as a result of the cancellation of the agreement by the appellant.

However, in light of the fact held above, it should be said that none of the reasons for cancellation alleged by the appellant can be considered to be the grounds for cancellation of the agreement. Thus, the aforementioned cancellation by the appellant can be considered to be groundless and have no cancellation effect.

According to the evidence (Exhibits Otsu 2 to 4) and the entire import of the oral argument, it can be found that, after sending a cancellation notice, the appellant partially terminated the functions of the Support VAN Agreement on the premise that the cancellation took effect after sending a cancellation notice and subsequently started collecting devices used under said agreement, that those devices, which were used for transactions with the appellant, could be used for transactions with other manufacturers as well and were considered by distributors to be useful and necessary for comprehensive sales management, that Appellee Daikoku and the Four Premerger Companies faced the termination of the functions of the Support VAN Agreement and experienced difficulties in their operations such as sales management, and consequently, gave up the Support VAN Agreement and introduced their own systems, and that, as a result, Appellee Daikoku and the Four Premerger Companies accepted that the Support VAN Agreement lost effect, while disputing the grounds for cancellation and the effect thereof, and started returning to the appellant the portable terminals, Barlabe (barcode issuing machines), and Support VAN manuals, which they had possessed based on the Support Van Agreement.

On these grounds, there is no dispute between the parties concerned about the termination of the Support VAN Agreement, but the termination is attributable to the

cancellation by the appellant without any reasons and also to the aforementioned act conducted on the premise of such cancellation. Thus, this case should not be considered to be "the case where the Support VAN Agreement was terminated for any reason other than the reasons attributable to the appellant" as specified in Article 16, item (v) of the Support VAN Agreement. Therefore, the appellant's claim for payment of settlement money made based on said Article is groundless.

6. Summary

As found above, this lawsuit was filed under unusual circumstances where, regarding the sales of goods at purchase prices, a rapidly growing mass retailer was not in direct conflict with local retailers as a result of the territorial expansion of the mass retailer, but in conflict with the major manufacturer that had been distributing its products through retailers. Under these circumstances, enterprises are facing complex issues such as lawsuits and provisional dispositions, etc. even at present. No one can predict how the situation will change in the future. In order to prevent the recurrence and spread of unnecessary disputes, this court would like to make the following statement.

Purchase prices, which are the amounts specified in a sales agreement, are determined based on a consensus between the parties concerned. Since purchase prices cannot be considered to have been "disclosed" as specified in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act, it is impossible to restrict disclosure of purchase prices under the Unfair Competition Prevention Act, which allows either party to prohibit such disclosure without a particular agreement between the parties concerned. However, in the course of business activities, it is possible to imagine a situation where it is reasonable and necessary to limit negative consequences caused by the disclosure of purchase prices. This judgment does not deny the effect of an agreement that obliges the parties concerned to keep the secrecy of purchase prices under certain circumstances to the extent that does not violate the Antimonopoly Act and other laws and regulations. However, in this case, the Basic Transaction Agreement does not impose the secrecy obligation concerning purchase prices. The same can be said about the Support VAN Agreement. There is no sufficient evidence to prove that the secrecy obligation can be deemed to exist from the perspective of business practices and business practice law. Thus, on the premise of the conditions (including supplementary duties) agreed between the parties concerned in this case, the disclosure of purchase prices cannot be considered to be illegal.

Furthermore, it is clear that purchase prices do not include sales costs. However, at the time of the Cost Price Sales, as held above, in view of the facts that the standard "the

prices in question must be lower than the substantive purchase prices" has long been publicized and used in connection with the former part of paragraph (6) of the General Designation and that said standard can be considered to be reasonable to a certain extent, said criteria can be considered to have been established as a legal norm in a sense. In light of the allegation and proof held above, the court reached the conclusion as held above that the sale of goods at "exact purchase prices" does not violate this standard. However, due to the future changes in the public understanding of fair transactions and also in the interpretation and enforcement of paragraph (6) of the General Designation, it would be quite possible that the sale at "exact purchase prices," which can be considered to be a borderline case, is considered to fall under paragraph (6) of the General Designation.

A determination as to whether the Cost Price Sales violated the Antimonopoly Act or not was made in consideration of the number of times of sales and the total number of days of sales (including the subsequent sales that might have continued for a while) and the effect on the competing distributors that can be found based on evidence. However, in the case where goods are sold repeatedly at exact purchase prices not including sales costs, if such sale has a considerable effect on competing distributors, such sale could be considered to fall under paragraph (6) of the General Designation. Therefore, it is a mistake to interpret, based on this judgment, that "an act of disclosing purchase prices and selling goods at those exact purchase prices" is basically permissible.

7. Conclusion

On these grounds, the judgment in prior instance can be considered to be reasonable. This appeal should be considered to be entirely groundless and shall be dismissed. In the judgment in prior instance, a claim for delivery of the movables specified in the Attached Movables List was dismissed. However, in this instance, Appellee Daikoku modified its allegation and recognized its obligation to deliver (return) the movables, consequently making this appeal well-grounded. Thus, this court revoked a part of the judgment in prior instance, i.e., the part that dismissed the claim for delivery of the movables, and ordered Appellee Daikoku to deliver (return) the aforementioned movables. (In this respect, Appellee Daikoku partially lost this lawsuit. However, in light of the facts held above, the proviso of Article 64 of the Code of Civil Procedure shall apply to the payment of court costs.) In the prior instance, a claim was made for the delivery of other movables specified in items 1 to 5 of the Attached Movables List excluding the aforementioned movables. Since the claimed movables were voluntarily returned in this instance, the appellant withdrew said claim. Consequently, a part of the

judgment in prior instance, i.e., the part that dismissed said claim, lost effect.

Thus, the judgment shall be rendered in the form of the main text.

Tokyo High Court, 4th Intellectual Property Division

Presiding judge: TSUKAHARA Tomokatsu

Judge: TANAKA Masato

Judge: SATO Tatsubumi

[Attachment] Movables List

1. Potable terminals: 16
2. Barlabe (barcode issuing machines): 7
3. Support VAN manuals: 30

Attached list of "Cost Price Sales"

別紙【「原価セール」一覧表】

番号	〔1〕	〔2〕	〔3〕	〔4〕	〔5〕	〔6〕	〔7〕	〔8〕	〔9〕	〔10〕	〔11〕	〔12〕	〔13〕	〔14〕	〔15〕	〔16〕	〔17〕	〔18〕	〔19〕	〔20〕	〔21〕
店名（所在地）	福山駅前店（福山市）	松山銀天街店（松山市）	熊本新市街店（熊本市）	岡山表町店（岡山市）	奈良西大寺店（奈良市）	熊本新市街店（熊本市）	松山銀天街店（松山市）	福山駅前店（福山市）	徳島駅前店（徳島市）	岡山表町店（岡山市）	松山銀天街店（松山市）	熊本新市街店（熊本市）	徳島駅前店（徳島市）	徳島駅前店（徳島市）	広島本通店（広島市）	福山駅前店（福山市）	岡山表町店（岡山市）	徳島駅前店（徳島市）	熊本新市街店（熊本市）	奈良西大寺店（奈良市）	岡山表町店（岡山市）
セール期間（平成・年月日）	13. 1. 30	13. 3. 9 ~3. 11	13. 3. 9 ~3. 11	（不明）~ 13. 3. 23	13. 3. 27 ~ 3. 29	13. 3. 27 ~ 3. 29	13. 3. 27 ~3. 29	13. 4. 10 ~ 4. 12	13. 4. 10 ~ 4. 12	13. 4. 21 ~ 4. 25	13. 4. 21 ~ 4. 25	13. 4. 21 ~ 4. 29	13. 4. 28 ~ 5. 5	13. 4. 28 ~ 5. 5	13. 4. 28 ~ 5. 6	13. 4. 28 ~ 5. 6	13. 4. 28 ~ 5. 6	13. 4（詳細不明）	13. 5. 14 ~不明	不明	不明

商品名	希望小売価格	なし	甲25	甲26	甲27	甲28	甲29	甲19	甲15	甲23	甲17	甲20. 21	甲14	甲24	なし	甲18	甲16	甲30	甲22	甲31	甲13	甲32
アイリス 14mL	971		A	★	★	★	★	★	★	★	★	A	★	★		★	★	判読不能	★	★	★	★
アイリス40	1,200				★	★	★						★							★		
アイリスAG-Ⅱ	1,456					★	★	★														
アイリスCL-Ⅰ 30本	1000				A	A	A	A	A													
アイリスCL-Ⅰ 本才 30本	1,000										★	★	★	★		★	★	判読不能	★	★	★	★
アイリスNEOソフト	880									★												
アイリスNEOクール	880									★												
アイリスPro(リンク)	950									A		A								A		
アイリスビューティーS	700					★	★		★	★												
アイリスプラス	1,000					★	★	★														
アイリスフレッシュ 14ml	950					B																
アスクロン 40包	2,427				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
アーチスキン 10g	780				★	★	★	★	★	★	★	★						判読不能				
アフタシールS 10パッチ	1,300						★	★	★													
アルフェ・ミニ 50mL	190				★	★	★	★	★		★	A	A	A		A	A	★	A	A	A	★
エーベル 30mL×2本	1,200									★	★	★	★	★		★	★	★	★	★	★	★
エーベル 30mL×5本	2,900					★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
拡進アイリス	980									★												
口内炎パッチ大正A 10パッチ	1,200					★	★	★	★													
こどもアイリス 14ml	750					★	★															
こどもセンパア	630										★	★						★				
コーラック 35錠	670					★	★															
コーラック 60錠	980								★	★	★	★	★	★		★	★	★	★	★	★	★
コーラック 70錠	1,190					B	B															
コーラック 105錠	1,720					★	★															
コーラック 120錠	1,680								★	★	★	★	★	★		★	★		★	★	★	★
コーラック 180錠	2,380								★	★	★	★	★	★		★	★	★	★	★	★	★
コーラック 270錠	3,280								★	★	★	★	★	★		★	★	★	★	★	★	★
コーラック 350錠	5,180					A			A	A												
コーラックS 21錠	850				A	A	A	A														
コーラックS 63錠	2,450				A	A	A	A														
コーラック・ソフト 40錠	680								★	★	★	★	★			★	★	★	★	★	★	★
コーラック・ソフト 120錠	1,780								★	★	★	★	★			★	★	★	★	★	★	★
サモンエース 90カプセル	14,561						★															
サモンG 70錠	2,700				★	★	★	★		★	★	★	★	★		★	★	★	★	★	★	★
サモンG 130錠	4,600				★	★		★	★	★	★	★	★	★		★	★	★	★	★	★	★
サモンG 450錠	13,500				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
サモン 30mL	780				■	■					■	■	■	■		■	■	■	■	■	■	■
ゼナデー Ⅰ 50mL	800					★	★			★												
ゼナデー Ⅱ 50mL	1,000			A	★	★	★	★	★	★	★	A	★	★		★	★	★	★	A	★	★
ゼナデー ⅡDX 50mL	1,500									★												
ゼナデー Ⅲ 50mL	3,000									★			★							★		
センパア 8錠	1,000										★	★						★				
センパアS 12錠	1,170										★	★						★				
大正胃腸薬K 16包	1,380					★	★			★	★	★	★	★		★	★	★	★	★	★	★
大正胃腸薬K 38包	2,800					★	★	★	★	★	★	★	★	★				★	★	★		
大正胃腸薬K 50包	3,350		★	★	★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
大正胃腸薬K<錠剤> 70錠	1,380				★		★	★	★	★	★	★	★	★		★	★	★	★		★	★
大正胃腸薬K<錠剤> 110錠	1,900				★					★												
大正胃腸薬K<錠剤> 190錠	2,800		★		★			★	★	★												
大正胃腸薬K<錠剤> 230錠	3,350			★									★						★	★		
大正漢方胃腸薬 12包	970									★	★	★	★	★		★	★	★	★	★	★	★
大正漢方胃腸薬 32包	1,940									★			★							★		
大正漢方胃腸薬 48包	2,800									★	★	★	★	★		★	★	★	★	★	★	★
大正漢方胃腸薬<錠剤> 220錠	2,900									★			★	★		★	★		★	★	★	★
大正ロ内軟膏 5g	900							★	★													
大正トンプク<葛根・陳皮> 6包	675					★	★	★	★	★	★	★	★	★		★	★	判読不能	★	★	★	★
ダマリン液 15ml	1,942	★		★		★	★	★			B	B						判読不能				
ダマリンクリーム 15g	1,942	★		★		★	★	★	★		B	B						判読不能				
ダマリンiCハイ 80ml	2,300				★	★		★	★	★												
ダマリンアイススプレー 80mL	2,300									★	★	★	★	★		★	★	判読不能	★	★	★	★
ダマリンL 18g	2,300					★		★		★												
ダマリンL 20g	2,900				★				★		★	★	★	★		★	★	判読不能	★	★	★	★
ダマリンL液 15mL	2,300				★	★				★												
ダマリンL液 20mL	2,800				★	★	★	★	★	★	★	★	★	★		★	★	判読不能	★	★	★	★
ダマリンハウゲースプレー 60g	2,300									★	★	★		★		★	★	判読不能	★		★	★
TM-Cアイリス	780					★			★													
チロン顆粒 12包	1,165																			★		
チロン錠 24錠	971				★	★				★			★									
チロン錠 36錠	1,340		★	★	★	★	★	★	★	★	★	★	★	★		★	★	判読不能	★	★	★	★
チロンエース 8錠	550									★	★	★	★	★		★	★	判読不能	★	★	★	★
チロンエース 24錠	1,340					★	★	★	★	★	★	★	★	★		★	★	判読不能	★	★	★	★
チロンエース 40錠	1,780		★	★	★	★	★	★	★	★	★	★	★	★		★	★	判読不能	★	★	★	★
チロンエース 56錠	2,300									★	A	A	★	★		★	★	判読不能	★	★	★	★
パブロンうがい液 40mL	1,280					★	★	★		★	★	★	★	★		★	★	★	★	★	★	★
パブロンS 16包	2,820		A		A	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パブロンSカプセル 18カプセル	1,550				★																	
パブロンSカプセル 36カプセル	2,520				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パブロンS錠 55錠	1,450					★	★			★												
パブロンS錠 75錠	1,800									★	★	★	★	★		★	★	★	★	★	★	★
パブロンS錠 100錠	2,300			★																		
パブロンS錠 160錠	3,200		★		★	★	★	★	★	★	★	★	★	★		★	★	★	★	★		★
パブロンSゴールド錠 45錠	1,300				★		★	★	★	★	★	★	★					★				
パブロンSゴールド錠 65錠	1,700				★																	
パブロンSゴールド錠 90錠	2,200				★		★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パブロンSゴールド微粒 3包	680									★												
パブロンSゴールド微粒 6包	1,300				★																	
パブロンSゴールド微粒 10包	1,900					★	★	★														
パブロンSゴールド微粒 15包	2,500				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パブロンS小児液 60ml	970								B													
パブロンS小児液 120ml	1,650								★													
パブロンN 24カプセル	2,200					★		★														
パブロンN 30カプセル	2,600								★	★												
パブロンゴールド咳止め液 60ml	1,068					A																
パブロンゴールド＜幼包＞ 26包	2,700		A		A	★	A	A	★	★	A	A	A	★		★	★	A	★	A	★	★
パブロンゴールド＜幼包＞ 42包	3,700					★	★	★	★	★	A	A	★	★		★	★	★	★	★	★	★
パブロンゴールド錠 120錠	2,400				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パブロンゴールド錠 200錠	3,600		★	★	★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パブロンせきよく	1,380								★													
パブロンゴールドせきよく液小児用	1,280					★			★													
パブロン点鼻液30ml	1,070				★																	
パブロトローデ 24錠	780				★																	
パブロドロップ 24錠入り	580				★																	
パブロンのピスプレー 25ml	1,500					★	★	★	★													
パブロン鼻炎カプセルL 24カプセル	2,330				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パブロン鼻炎スプレー 30mL	1,380				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
パルスイート 顆粒20包+スティック100本	900									★	★	★						判読不能				
パルスイート 180g	900					★	★	★	★													
パルスイート 80本	900					★	★	★	★													
パルスイート ポケット120錠	800				★	★		★		★												
パルスイート ポケット180錠	900									★												
パルスイートカロリーゼロ 70本	1,100					★		★		★	★							判読不能				
パルスイートカロリーゼロ 160g	1,100					★		★		★	★							判読不能				
ビオ	900					★				★	★											
ビオスプレー	800					★	★	★	★	★	★							判読不能				
ビオスプレーミント	500									★												
ビオスプレーつけかえ用	800				★																	
ブリザエース軟膏 10g	1,100					★		★		★												
ブリザエース軟膏 15g	1,600								★		★	★	★	★		★	★	★	★	★	★	★
ブリザエース 10錠	1,600				★	★		★		★												
ブリザエース 20錠	3,000				★				★		★	★	★					★		★		
ブリザS 10錠	1,456				★	★	★	★	★	★	★	★	★					★		★		
ブリザS 30錠	3,883				★	★	★	★	★	★	★	A	★	★		★	★	★	★	★	★	★
ブリザSカプセル 20カプセル	1,942				★	★	★	★	★	★			★							★		
ブリザS軟膏 10g	971				★																	
ブリザS軟膏 20g	1,748				★	★			★	★												
ブリザS軟膏 30g	2,300				★	★	★	★		★	★	★	★	★		★	★	★	★	★	★	★
ブリザクリーンエース 40g	1,200					★	★	★		★			★							★		
ブレリアップスカルプシャンプー	1,200				★	★	★	★	★	★	★	★						判読不能				
ブレリアップヘアコンディショナー	1,200				★	★	★	★	★	★								判読不能				
ブレリアップマッサージトニック	1,200				★	★	★	★														
ブレリアップヘアフォーム(SH)	1,200				★	★		★														
ブレリアップヘアフォーム(VU)	1,200				★	★		★														
メンララA 60錠	870					★																
メンララA 120錠	1,380				★	★	★	★	★	★	★	★	★	★		★	★	判読不能	★	★	★	★
リアップ 60mL	5,500				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
リノックスEハイ 60カプセル	2,913					★																
リノックスEハイ 200カプセル	8,738					★		★	★	★	★	★	★	★		★	★	★	★	★	★	★
リポビタンD 100mL	148				★	★	★	★	★	★	★	★	★	★		★	★	★	★	★	★	★
リポビタンD2000 100ml	180				★																	
リポビタンDスーパー 100mL	250				★	★	★	★		★	★	B	★	★		★	★	★	★	★	★	B
リポビタンゴールド 50mL	300				★	★	★	★	★	★	★	A	B			★	★	★	★	★	★	★
リポビタンゴールド 50mL	非売品			◆	◆				◆													
リポビタンA	600						★	★	★													
リポビタン小児用	200					★	★	★														
レブリーソップ 8g	1,200					★			★													

（1） ★符号のものは，チラシに仕入価格が記載され，その価格で販売されたもの。
（2） 「A」と表示されセルの色が「赤」のものは，チラシに仕入価格より低い価格が仕入価格として記載され，その価格で販売されたもの。
（3） 「B」と表示されセルの色が「青」のものは，チラシに仕入価格より高い価格が仕入価格として記載され，その価格で販売されたもの。
（4） ■符号のものは，チラシに拡売策の結果の実質的仕入価格（仕入価格より低い）が記載され，その価格で販売されたもの。
（5） ◆符号のものは，販売促進用の添付品を販売したもの。