

Date	December 23, 1983	Court	Osaka District Court
Case number	1981 (Wa) 7770		

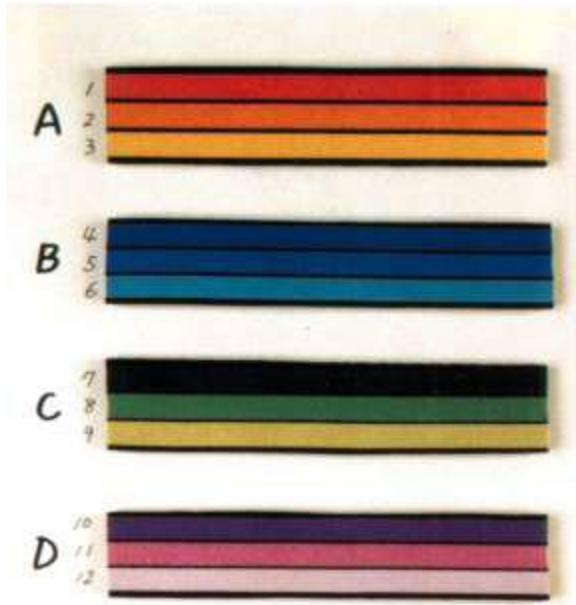
– A case in which the court determined that the color lines used by the plaintiff for the wetsuits have the function to indicate the source of the plaintiff's goods based on a finding that if a selection of a color or multiple colors for certain goods is novel and has never been observed before in such goods, and if the repeated and continuous use of said color or colors by a certain company for its goods has resulted in having consumers associate the goods for which said color or colors are used with said company that has been using them, and a combination of certain goods and those certain color or colors has come to function as an indication of the goods of the company, such combination of said goods and said color or colors could be regarded as an "indication of another person's goods" as specified in Article 1, paragraph (1), item (i) of the Unfair Competition Prevention Act (Act No. 14 of 1934; "Former Unfair Competition Prevention Act") prior to the replacement by the current Unfair Competition Prevention Act (Act No. 47 of 1993).

References: Article 1, paragraph (1), item (i) of the Unfair Competition Prevention Act (Act No. 14 of 1934) prior to the replacement by the Unfair Competition Prevention Act (Act No. 47 of 1993)

Number of related rights, etc.: None

#### Summary of the Judgment

The plaintiff is a company engaged in the business of manufacturing and selling wetsuits and has been manufacturing and selling wetsuits using the four types of lines mentioned in A through D below ("Lines") for the design (the "Plaintiff's Products").



Defendant 1 has been manufacturing and selling wetsuits using line A' and line B' shown below for the design, Defendant 2 has been purchasing the abovementioned wetsuits from Defendant 1 and selling them as a business, and Defendant 3 has been having a non-party company manufacture and deliver wetsuits using line A'' and line B'' shown below and selling them as a business.



In this judgment, the court made the following findings and determinations and issued the following orders for each defendant by finding that the Plaintiff's Products have the function to indicate the source of goods and are well-known and that the defendants' products are misleading consumers or causing confusion with respect to the Plaintiff's Products: [a] against Defendant 1, an injunction against the manufacture and sale of Defendant 1's products, i.e., the wetsuits using the lines; [b] against

Defendant 2, an injunction against the sale of the abovementioned products; [c] against Defendant 3, an injunction against the sale of the non-party company's products, i.e., the wetsuits using the lines; and [d] payment of damages in an amount equivalent to the attorney's fees against the defendants.

Every person should be permitted to choose and use any colors. However, if a selection of a color or multiple colors for certain goods is novel and has never been observed before in such goods, it is impossible to deny the possibility that the repeated and continuous use of said color or colors by a certain company for its goods would result in having consumers associate the goods for which said color or colors are used with said company that has been using them. In this way, if a combination of certain goods and a certain color or colors comes to function as an indication of the goods of a certain company, such combination of said goods and said color or colors could be regarded as an "indication of another person's goods" as specified in Article 1, paragraph (1), item (i) of the Former Unfair Competition Prevention Act.

It may be said that types of the Plaintiff's Products using the Lines in certain areas had acquired the function of indicating the source of the plaintiff's goods by the end of August 1980 at the latest, in which the peak of the general consumers' demand for wetsuits in said year may be considered to have already passed, and had become widely known among rival companies, retailers, and general consumers in view of the following facts: [a] until the launch of the Plaintiff's Products in May 1978, there had been no wetsuits using color lines such as the Lines; [b] the sales of the plaintiff's products using the Lines had steadily increased since then; [c] the plaintiff had published many advertisements in various specialized magazines in the field of marine sports by the end of 1980, and the Plaintiff's Products were introduced in some feature articles published in said magazines several times, each of which had a large circulation between 80,000 and 350,000 per month and a large sales area throughout Japan; [d] the Lines used for the Plaintiff's Products are vivid and attract attention; and [e], although imported suits with Line A were temporarily sold in small numbers from May 1978 until the end of October 1980, since said suits were subsequently removed from the market after the issuance of the plaintiff's warning, the plaintiff may be considered to have been exclusively and continuously using the Lines for the plaintiff's wetsuits during the aforementioned period.

Judgment rendered on December 23, 1983

1981(Wa) 7770

### Judgment

(Indication of the parties is omitted)

### Main Text

1. Defendant Taiyo Sensui Kabushiki Kaisha may not manufacture and sell any wetsuits using Line A' or Line B' specified in attached List 3 [1] in any of the areas indicated in red as described in attached List 1 [1] to [25].
2. Defendant Kabushiki Kaisha Tabata may not sell any wetsuits referred to in the preceding paragraph.
3. Defendant Kabushiki Kaisha Makoto Sangyo may not sell any wetsuits using Line A" or Line B" specified in attached List 3 [2] in any of the areas indicated in red as described in attached List 1 [1] to [25].
4. Defendant Taiyo Sensui Kabushiki Kaisha and Defendant Kabushiki Kaisha Tabata shall each pay 150,000 yen to the plaintiff.
5. Defendant Kabushiki Kaisha Makoto Sangyo shall pay 150,000 yen to the plaintiff.
6. All of the plaintiff's claims against the defendants, except for the claims set forth above, shall be dismissed.
7. The court costs shall be divided into three, one to be borne by the plaintiff, and the other two by the defendants.
8. This judgment may be provisionally executed as far as such part of the judgment that pertains to the plaintiff's claims upheld by the court is concerned.

### Facts

#### No.1 Judgment sought by parties

##### I. Objects of claims

1. Defendant Taiyo Sensui Kabushiki Kaisha and Defendant Kabushiki Kaisha Tabata may not manufacture and sell any wetsuits using Line A', Line B', Line C', or Line D' specified in attached List 3 [1] in any of the areas of the wetsuits described in attached List 1 [1] to [25].
2. Defendant Kabushiki Kaisha Makoto Sangyo may not manufacture and sell any wetsuits using Line A", Line B", Line C", or Line D" specified in attached List 3 [2] in any of the areas of the wetsuits described in attached List 1 [1] to [25].
3. The defendants shall each pay 600,000 yen to the plaintiff.
4. The court costs shall be borne by the defendants.

5. A declaration for a provisional execution shall be issued.

II. Defendants' response to the claims

1. The plaintiff's claims shall be dismissed.
2. The court costs shall be borne by the plaintiff.

No. 2 Statements of claims

- I. The plaintiff is a company primarily engaged in the manufacture and sale of wetsuits (cold protection, waterproof outfit for diving and surfing; hereinafter "suits").
- II.1. Since May 1978, the plaintiff has been engaged in the manufacture and sale of suits using Line A to Line D (hereinafter individually "Line A," etc.; collectively the "Lines") each consisting of three color stripes as described in attached List 2 in any of the areas specified in attached List 1 (hereinafter the "plaintiff's products").

(omitted)

- III.1. Since around February 1981, one of the defendant companies, Taiyo Sensui Kabushiki Kaisha (hereinafter "Defendant Taiyo Sensui"), has been, as a business, engaged in the manufacture and sale of suits using Line A' or Line B' (hereinafter individually "Line A'," etc.; Lines A' to D' are collectively referred to as the "Tabata Lines") described in attached List 2 [1]. Another defendant company, Kabushiki Kaisha Tabata (hereinafter "Defendant Tabata"), has been purchasing said suits and engaged in sale thereof as a business (hereinafter the "Tabata Products").
2. Since April 1981, another defendant company, Kabushiki Kaisha Makoto Sangyo ("Defendant Makoto Sangyo"), has been engaged in the manufacture and sale of Comet Gore-Tex Suits (hereinafter the "Makoto Products") using Line A" or Line B" (hereinafter individually "Line A"," etc.; Lines A" to D" are collectively referred to as the "Makoto Lines") described in attached List 2 [2].

(omitted)

Reasons

- I. There is a consensus among the parties concerned about the facts stated in I. (Plaintiff's business) of the section "Ground for the claims." Based on a comprehensive evaluation of the following evidence that is all undisputed by the parties, i.e., Exhibits

Ko No. 17-1 and No. 17-2, and Object of Observation Ko No. 1, which was proved to be a photograph of the Lines, and Object of Observation Ko No. 2, which was proved to be a photograph of the plaintiff's products, based on the testimony of Witness C (the first examination of the witness), the facts described in II., 1. (the plaintiff has been engaged in the manufacture and sale of the plaintiff's products using the Lines) of the section "Statements of claims" may be recognized.

II. The following section examines whether the plaintiff's products using the Lines may be considered to be well known and function as an indication of the source of the plaintiff's goods.

1. The following facts may be recognized based on a comprehensive evaluation of the following evidence that is all undisputed by the parties, i.e., Exhibits Ko No. 4-1 and No. 4-2, No. 5-1 and No. 5-2, and No. 6-1 and No. 6-2, Exhibits Ko No. 8-1 to No. 8-5, Exhibit Ko No. 9, Exhibits Ko No. 1-1 to No. 1-4, Exhibits Ko No. 11-1 and No. 11-2, and Exhibits Ko No. 13-1 and No. 13-2, which are considered to have been authentically established based on the testimony of Witness C (the first examination of the witness), Object of Observation Otsu No. 2, which may be considered, based on the testimonies of Witness D and Witness E (the parts that are found to be unacceptable as described below shall be excluded from both testimonies) and said testimony of Witness C, to be a photograph of Piping Hot wetsuits that Defendant Tabata imported from Australia and sold in Japan at around the beginning of 1979.

(1) In May 1978, the plaintiff publicly announced color suits using the Lines. Until then, the color of most wetsuits was usually black, which was the color of the rubber material, although some wetsuit companies had sold various color suits to which pieces of fabric of various colors were bonded since around 1970.

(2) As of 1977, the use of color suits was rarer in Japan than in western countries, which were pioneers in the world of marine sports. The plaintiff tried to develop fashionable color suits. In the autumn of 1977, the plaintiff made up the Lines to be used for suits and commissioned a non-party company, TORAY TEXTILES Inc., to manufacture the fabric for the Lines and commissioned another non-party company, Yamamoto Corporation, Co., Ltd., to bond said fabric to sponge rubber. Then, the plaintiff purchased those products from Yamamoto and manufactured the plaintiff's products.

(3) As shown in attached List 2, Line A to Line D consist of stripes of three similar colors with any of the following colors used in the middle stripe (hereinafter the "middle stripe color(s)": yellowish red, blue, yellowish green, or reddish purple. The three colors in each line are selected in the following manner. One of the middle stripe colors is used for the middle stripe. A darker color with lower luminosity is used for a

stripe next to the middle stripe. For the remaining stripe on the other side of the middle, a color lighter than the middle stripe color with higher luminosity is used. In the industrial circles, this method of color selection is called "fading colors," or, in other words, the darkest color with the lowest luminosity is selected for the stripe on either side as a base color, then a lighter color with higher luminosity will be selected for the middle stripe, and a further lighter color will be selected for the stripe on the other side. Until the launch of the plaintiff's products, there had been no wetsuits using such three-fading-color stripes.

(4) In 1978, the plaintiff named the Lines as "Tropical Line" and used the Lines in various areas of wetsuits as described in attached List 1 [1] to [25] (hereinafter "Area 1," etc.) to manufacture the plaintiff's products. The plaintiff prepared catalogs of those products and distributed them to about 50 business partners throughout Japan from Hokkaido to Okinawa and published an advertisement in Magazine 1, in which types of the plaintiff's products using the Lines in Area 8 and Area 12 were presented. The sales of the plaintiff's products contributed to a slight increase in the total sales of the plaintiff's goods as a whole in 1978.

(5) In 1979, the plaintiff distributed catalogs of types of the plaintiff's products using the Lines in Area 1 to Area 25 to about 100 distributors throughout Japan, published advertisements of the plaintiff's products using the Lines in Magazines 2 to 5, and 7. In Magazine 7, types of the plaintiff's products using the Lines in Area 1 and Area 17 were presented.

In Magazine 6, the plaintiff published an article introducing the plaintiff's products as described in II., 4., (1) (i) of the section "Statements of claims" and types of the plaintiff's products using the Lines in Area 9, Area 14, Area 10, and Area X.

Magazine 7 carried a feature article titled "Let's put on a color suit and become a cool diver!" and introduced types of the plaintiff's products using the Lines in Area 1 and Area 17.

In 1979, the sales of the plaintiff's products increased by about 20% from the level in 1978. At the end of 1979, the plaintiff's products were delivered to two stores, namely, Seibu Department Store in Ikebukuro in Tokyo and Sports World 33 in Kobe.

(6) In 1980, the plaintiff distributed catalogs of types of the plaintiff's products using the Lines in Area 1 to Area 25 to about 150 distributors throughout Japan and also published advertisements of the plaintiff's products using the Lines in many specialized magazines. Magazine 12 carried a wetsuit-related feature article titled "The fashionability of wetsuits matters in the 1980s." and showed types of the plaintiff's products using the Lines in Area 1, Areas 1 and 3, Area 8, Area 12, Area 17, and Areas

18 and 19.

Furthermore, Magazine 13 introduced, together with other companies' products, types of the plaintiff's products using the Lines in Area 1, Area 17, and Areas 18 and 19 under the title "Colorful Wetsuits."

Within 1980, the sales of the plaintiff's products increased by about 30%.

(7) From November 1978 to July 1980, a non-party company, Yamamoto Corporation, Co., Ltd., exported a small amount of the Lines to a non-party company, Dive 'N' Surf Torquay in Australia with the plaintiff's consent. From around the beginning of 1979, Defendant Tabata started importing wetsuits named "Piping Hot" using Line A from said non-party company and selling them. In the autumn of 1979, the plaintiff orally warned said defendant not to sell any wetsuits using the identical line. After a while, most of said Piping Hot products were removed from stores. Other than this incident, there have been no signs that any wetsuits using the Lines or any similar lines were distributed in the wetsuit market.

Since the aforementioned facts are found, in light of the facts [i] that the amount of the Lines being exported to a non-party company, Dive 'N' Surf Torquay, was small as described above, [ii] that the advertisements of the wetsuits of Defendant Tabata published in Magazine 6 issued in 1979 and Magazine 13 issued in 1980 did not present any wetsuits using Line A, and [iii] that a separate volume of the magazine "Surfing Life" issued in May 1, 1980 contained an advertisement on Piping Hot products, but did not present any wetsuits using said line (Exhibit Ko No. 5-1, Exhibit Ko No. 6-2, Exhibits Ko No. 13-1 and No. 13-2, and undisputed Exhibit Ko No. 12 as mentioned above), and in light of the testimony of Witness C (the first examination of the witness), it is difficult to accept such part of the testimonies of Witness D and Witness E that was not in line with the facts found above, in particular, such part that describes the situation as if Defendant Tabata had imported and sold many Piping Hot wetsuits using Line A.

2. Based on the facts mentioned above, the following section examines whether the plaintiff's products may be considered to be well known and function as an indication of the source of the plaintiff's goods.

(1) Every person should be permitted to choose and use any colors. However, if a selection of a color or multiple colors for certain goods is novel and has never been observed in such goods, it is impossible to deny the possibility that, if a certain company repeatedly and continuously uses said color or colors for its goods, consumers would associate the goods of said color or colors with said company that has been using such color or colors. In this way, if a combination of certain goods and a certain color or colors comes to function as an indication of the goods of a certain company, such



combination of said goods and said color or colors should be regarded as an "indication of another person's goods" as specified in Article 1, paragraph (1), item (i) of the Unfair Competition Prevention Act.

(2) If this interpretation is applied to this case, it may be said that types of the plaintiff's products using the Lines in Area 1 to Area 25 had acquired the function of indicating the source of the plaintiff's goods by the end of August 1980 at the latest, in which the peak of the general consumers' demand for wetsuits in said year may be considered to have already passed, and had become widely known among rival companies, retailers, and general consumers in view of the facts, as found above, [i] that until the launch of the plaintiff's products in May 1978, there had been no wetsuits using lines, like Line A to Line D, which consist of stripes of three similar colors with the middle stripe colored in any of yellowish red, blue, yellowish green, or reddish purple, sandwiched by two other colors in such way that the three colors fade from one side of the line to the other, or, in other words, consisting of three-fading-color stripes starting from the darkest color with the lowest luminosity used for the stripe on either side to a lighter color used for the stripe on the other side, [ii] that the sales of the plaintiff's products using the Lines had steadily increased since then, [iii] that the plaintiff had published many advertisements in various specialized magazines in the field of marine sports by the end of 1980, and introduced the plaintiff's products in some feature articles published in said magazines several times, each of which have a large circulation between 80,000 and 350,000 per month and a large sales area throughout Japan (Exhibits Ko No. 8-1 to No. 8-5 as described above), [iv] that the Lines used for the plaintiff's products are vivid and attract attention (Exhibits Ko No. 1-1 to No. 1-4, Exhibits Ko No. 4-1 and No. 4-2, No. 5-1 and No. 5-2, and No. 6-1 and No. 6-2, Objects of Observation Ko No.1 and No. 2), and [v] that, although imported suits with Line A were temporarily sold in small numbers from May 1978 until the end of October 1980, since said suits were subsequently removed from the market after the issuance of the plaintiff's warning, the plaintiff may be considered to have been exclusively and continuously using the Lines for the plaintiff's wetsuits for the aforementioned period.

(3) Defendant Taiyo Sensui and Defendant Tabata alleged that, even before May 1978, color suits with lines were sold by (A) Kinugawa Pacific Co., Ltd., (B) Kabushiki Kaisha Victory, and (C) Defendant Taiyo Sensui. Although there is the aforementioned supporting evidence, namely, the testimonies of Witness D and Witness E, the testimony of Witness F, and Exhibits Otsu No. 1-1 to No. 1-3, which may be considered to have been authentically established based on the statement of the representative of Defendant Makoto Sangyo and the aforementioned testimonies, and Exhibits Otsu No. 2-1 and No.

2-2, No. 3-1 to No. 3-3, No. 4-1 to No. 4-3, and No. 5-1 and No. 5-2, which are undisputed, based on a comprehensive evaluation of the aforementioned evidence obtained in paper or in person, it may be said [i] that some of the products of the company mentioned in (A) above are dark blue suits using yellow or red single-color stripes in the sleeves, body sides, and both sides of the legs or using a stripe pattern for the entire body part, [ii] that some of the products of the company mentioned in (B) above are suits using color lines called "rainbow lines" consisting of stripes of red, green, yellow, orange, and blue (Object of Observation Otsu No. 1, which may be considered to be a photograph of a sample of the colors of the color lines used by a non-party company, Kabushiki Kaisha Victory based on the testimony of Witness D) provided as a short line, horizontally, and repetitively on the yellow lines, which are placed vertically on both sides of suits, or suits using rainbow lines vertically on both sides thereof, or red suits using black-and-white combination lines on both sides thereof, and [iii] that some of the products of the company mentioned in (C) above are suits using three vertical-stripe lines with the middle stripe colored in yellow sandwiched by two lime green stripes in the areas of the shoulders, arms, body, and both sides of the legs or suits using red-white-dark blue combination lines. None of the lines used in the aforementioned products has the feature of the Lines found above, more specifically, a line consisting of stripes of three similar colors with the middle stripe colored in any of yellowish red, blue, yellowish green, or reddish purple. Therefore, it is clear that, even if the plaintiff's products are placed among other goods using similar line patterns, it is obvious that the plaintiff's products would give viewers a special impression different from other goods. For this reason, the existence of the aforementioned other companies' products does not make the plaintiff's products lose their source-indicating function as described above.

(4) Also, the defendants alleged that a non-party company, Mizuno Corporation, had been selling products using lines identical or similar to the Lines. It is true that, according to the undisputed Exhibits Otsu No. 6-1 and No. 6-2, the product catalogs of Mizuno issued in 1979 presented such products as those using various color lines consisting of two or more stripes for the outer sides of both arms and legs or using color lines for both upper arms that are connected by the same line horizontally placed in the area of the upper chest. However, the structures of these lines may not be considered to have the aforementioned feature of the Lines, i.e., a line consisting of stripes of three fading similar colors. In this respect, these lines are different from the Lines of the plaintiff. Moreover, since these products are sportswear designed to be used on the ground, they are clearly different from the plaintiff's products, i.e., wetsuits, in terms of

the places where products are used.

(5) Next, the defendants alleged that the Lines may not be considered to be the essential feature of the plaintiff's products and that other features such as the color and shape of the suit body give a unique impression to viewers. According to Exhibits Ko No. 1-1 to No. 1-4 and Object of Observation Ko No. 1 as mentioned above, it is found that the Lines have vivid colors that attract viewers' attention, which would become even more noticeable if they are placed against the background of black color or an opposite color. The plaintiff used the Lines in Area 1 to Area 25 as shown in attached List 1 in an easily noticeable manner, which is considered to be natural from the perspective of the purpose of development of the Lines. For this reason, the Lines of the plaintiff's products may be considered to have the function of indicating the source of goods independently from the color and shape of the suit body.

(6) As described in (3) to (5) above, it is impossible to accept the defendants' allegation that the plaintiff's products using the Lines may not be considered to be well known or to have the function of indicating the source of goods.

III. There is a consensus among the parties concerned about the facts that Defendant Taiyo Sensui manufactured and sold color suits using three-color lines as a business, that Defendant Tabata purchased them and sold them as a business, and that Defendant Makoto Sangyo sold Comet Gore-Tex Suits as a business. The following facts may be found based on a comprehensive evaluation of the following evidence: Exhibits Ko No. 2, No. 3, and No. 10, which are all undisputed, Object of Observation Ko No. 3, which is undisputed among Defendant Taiyo Sensui, Defendant Tabata, and the plaintiff regarding the point that said color suits are products of Defendant Taiyo Sensui, Object of Observation Ko No. 4, which is undisputed between Defendant Makoto Sangyo and the plaintiff regarding the point that said Comet Gore-Tex Suits are products of Defendant Makoto Sangyo, Objects of Observation Otsu No. 3 and No. 4, which are both undisputed among Defendant Taiyo Sensui, Defendant Tabata, and the plaintiff regarding the point that the color lines are those Defendant Taiyo Sensui purchased from a non-party company, Sedo Kagaku Kogyo Kabushiki Kaisha, and used, Exhibit Hei No. 1, which is undisputed between Defendant Makoto Sangyo and the plaintiff regarding the point that the brochures were published by Defendant Makoto Sangyo in the fiscal year 1980, Objects of Observation Hei No. 1 and No. 2 and the aforementioned Exhibits Ko No. 17-1 and No. 17-2, which are all undisputed about the point that the color lines are those that Defendant Makoto Sangyo purchased from a non-party company, Kabushiki Kaisha Tousen, and used, the testimony of Witness D, and the statement made by the representative of Defendant Makoto Sangyo.

1. From November 1980, Defendant Taiyo Sensui started manufacturing and selling, as a business, Tabata suits using Line A' and Line B' described in attached List 3 [1] with the background black color remaining on both sides in a width slightly broader than the width of each stripe of the three-stripe line. Defendant Tabata purchased them and sold them as a business. Said lines are used in the following areas of Tabata suits: Areas 1 and 2, Areas 1 and 3, Area 2, Area 12, and Area 17.

However, said defendants have never manufactured or sold wetsuits using Line C' or Line D' described in attached List 3 [1].

2. From April 1981, Defendant Makoto Sangyo started having a non-party company, Kabushiki Kaisha Tousen, manufacture the Makoto Products using Line A" and Line B" described in attached List 3 [2] under the product name "Comet Gore-Tex Suits" and deliver them to the Defendant Makoto Sangyo, and started selling them as a business. The Makoto Products include types of the products using Line A" and Line B" in Areas 12 and 13 with two lines used in Area 12 and types of the products using Line A" and Line B" in Areas 19 and 21 with two lines used in Area 21.

However, said defendant has never manufactured or sold wetsuits using Line C" or Line D".

In view of these facts found above, there is no evidence sufficient to influence the aforementioned findings.

IV. Based on the facts found in II. and III. above, the following section compares the plaintiff's products using the Lines with the Tabata Products and the Makoto Products.

1. First, a comparison is made between types of the plaintiff's products using Line A and Line B and types of the Tabata Products using Line A' and Line B'.

(1) Lines A and B and Lines A' and B' are identical in terms of the width of each of the three stripes and similar to the width of the black line in between the stripes.

(2) Line A and Line A' are both apparently three-color stripes with the middle stripe colored in a yellow-red color sandwiched by two other colors in such way that the three colors fade from a dark color (yellowish red) to a pale color (deep yellow or yellow-red). Line A and Line A' are similar not only in the respect that the line is colored in bright colors but also in the respect that two out of the three colors used in Line A are identical with those used in Line A' in terms of the general names of colors specified in the JIS Standards. Line A and Line A' also seem to be similar in that the three color stripes are placed in the order from low to high luminosity. On these grounds, Line A and Line A' may be considered to be similar color lines.

(3) Line B and Line B' are both apparently three-color stripes with the middle stripe colored in blue sandwiched by two other colors in such way that the three colors fade

from a dark color (vivid blue or purplish blue) to a pale color (dull blue). Line B and Line B' are similar not only in the respect that the line is colored in bright colors but also in the respect that two out of the three colors used in Line B are identical with those used in Line B' in terms of the general names of colors specified in the JIS Standards. Line B and Line B' also seem to be similar in that the three color stripes are placed in the order from low to high luminosity. On these grounds, Line B and Line B' may be considered to be similar color lines.

(4) The relevant types of the plaintiff's products are the same as the relevant types of the Tabata Products in that both products use color lines in Area 1, Area 2, Area 3, Area 12, and Area 17 in an easily noticeable manner.

(5) Therefore, the relevant types of the Tabata Products should be found to be similar to types of the plaintiff's products that use Line A and Line B in the aforementioned areas and found to have misled consumers or caused confusion with said plaintiff's products.

2. A comparison is made between types of the plaintiff's products that use Line A and Line B and types of the Makoto Products that use Line A" and Line B".

(1) Lines A and B and Lines A" and B" are identical in terms of the width of each of the three stripes and similar to the width of the black line in between the stripes.

(2) Line A and Line A" are both apparently three-color stripes with the middle stripe colored in a yellow-red color sandwiched by two other colors in such way that the three colors fade from a dark color (yellowish red) to a pale color (deep yellow or yellow-red). Line A and Line A" are similar not only in the respect that the line is colored in bright colors but also in the respect that the colors used in Line A are identical with those used in Line A" in terms of the general names of colors specified in the JIS Standards. Line A and Line A" also seem to be similar in that the three color stripes are placed in the order from low to high luminosity. On these grounds, Line A and Line A" may be considered to be similar color lines.

(3) Line B and Line B" are both apparently three-color stripes with the middle stripe colored in blue sandwiched by two other colors in such way that the three colors fade from a dark color (vivid blue or purplish blue) to a pale color (dull blue). Line B and Line B" are similar not only in the respect that the line is colored in bright colors but also in the respect that the colors used in Line B are identical with those used in Line B" in terms of the general names of colors specified in the JIS Standards. Line B and Line B" also seem to be similar in that the three color stripes are placed in the order from low to high luminosity. On these grounds, Line B and Line B" may be considered to be similar color lines.

(4) The relevant types of the plaintiff's products are the same as the relevant types of the

Makoto Products in that both products use color lines in Area 12, Area 13, Area 19, and Area 21 in an easily noticeable manner.

(5) Therefore, the relevant types of the Makoto Products should be found to be similar to types of the plaintiff's products that use Line A and Line B in the aforementioned areas and found to have misled consumers or caused confusion with said plaintiff's products.

3. These Tabata Products use color lines, Line A' and Line B', with the background black color remaining on both sides in a width slightly broader than the width of each stripe of the three-stripe line. In this sense, Lines A' and B' are found different from Lines A and B. However, the role of said black areas on both sides of the line may not be regarded as adding black stripes to Line A' and Line B' respectively to create five-stripe lines, but should be regarded as making Line A' and Line B' look brighter (Exhibits Ko No. 1, No. 2, and No. 10, Object of Observation Ko No. 3 as mentioned above). Therefore, said difference does not influence the conclusions regarding the similarity as described in 2. above.

4. The defendants alleged that, since the plaintiff's products, the Tabata Products, and the Makoto Products carry their respective trademarks and look distinctive in terms of the color combination, shape, etc. of any part other than the color lines, said products of the defendants do not mislead consumers or cause confusion. However, based on a comprehensive evaluation of the following evidence, i.e., Exhibits Ko No. 1-1 to No. 1-4, No. 2, No. 3, Exhibit Hei No. 1, Objects of Observation Ko No. 2 to No. 4, the testimony of Witness C (the first examination of the witness) and Witness D, and the statement of the representative of Defendant Makoto Sangyo as mentioned above, it may be found [i] that some types of the plaintiff's products carry one or more of the marks, i.e., the "TANK," "SUNFAN," and a seal-shaped mark, while other types of the plaintiff's products do not carry these marks, [ii] that some types of the products of Defendant Taiyo Sensui and Defendant Tabata do not carry their marks, [iii] that the Makoto Products carry the Comet mark, which is a trademark of Defendant Makoto Sangyo for windsurfing goods, and [iv] that these products differ from each other in terms of their shape, colors, and color combination apart from the color-line part. However, it may be found that, if these products are observed as a whole, the aforementioned differences are not so noticeable in comparison with the aforementioned common color lines, which strongly attract attention from consumers due to their vivid colors and metallic luster and that, in the case of the defendants' products, as is the case with the plaintiff's products, said lines are used in an easily noticeable manner regardless of what fabric and shape are adopted for the body of the suits. Given these,

the differences among these products in terms of shape, colors, and color combination observed in such part of the suits other than color lines and the fact that trademarks are affixed to these products are not sufficient enough to allow the Lines to function to prevent misleading of consumers and confusion between the plaintiff's products and the defendants' products.

V. Therefore, Defendant Taiyo Sensui's act of manufacturing and selling wetsuits using Line A' and Line B' in Area 1, Area 2, Area 3, Area 12, and Area 17, Defendant Tabata's act of selling those wetsuits, and Defendant Makoto Sangyo's act of selling types of the Makoto Products using Line A" and Line B" in Area 12, Area 13, Area 19, and Area 21 could cause damage to the business of the plaintiff. Although there is no sufficient evidence to prove that the defendants have manufactured and sold or simply sold wetsuits using said lines in any areas other than the aforementioned areas out of those described in attached List 1, it should be considered that there is a risk that the defendants may manufacture and sell or simply sell products using the respective lines in such areas on the grounds that it is obvious, in light of the entire import of oral argument of this action, that the defendants could easily change the areas to use said lines and that the defendants are disputing the plaintiff's allegation that their act of manufacturing and selling products using said lines have misled consumers and caused confusion with the plaintiff's products using Line A and Line B.

Therefore, the plaintiff has the right to seek an injunction against Defendant Taiyo Sensui's act of manufacturing and selling wetsuits using Line A' and Line B' in Area 1 to Area 25, an injunction against Defendant Tabata's act of selling said products, and an injunction against Defendant Makoto Sangyo's act of selling wetsuits using Lines A" and B" in said areas.

(omitted)

VII. As described above, the plaintiff's claims made in this action are acceptable to the extent that the plaintiff seeks an injunction against Defendant Taiyo Sensui's act of manufacturing and selling wetsuits using Line A' or Line B', which are shown in attached List 3 [1], in such areas of the wetsuits that are indicated in red in attached List 1 [1] to [25], an injunction against Defendant Tabata's act of selling said wetsuits, and an injunction against Defendant Makoto Sangyo's act of selling wetsuits using Line A" and Line B", which are shown in attached List 3 [2], in such areas of the wetsuits that are indicated in red in attached List 1 [1] to [25] and that the plaintiff demands payment of 150,000 yen as damages from Defendant Taiyo Sensui and Defendant Tabata

respectively, and 150,000 yen as damages from Defendant Makoto Sangyo. Any other part of the plaintiff's claims shall be found unacceptable and dismissed. The judgment shall be rendered in the form of the main text by applying Articles 89, 92, and 93 of the Code of Civil Procedure to the payment of the court costs and applying Article 196 of said Code to the declaration of provisional execution.

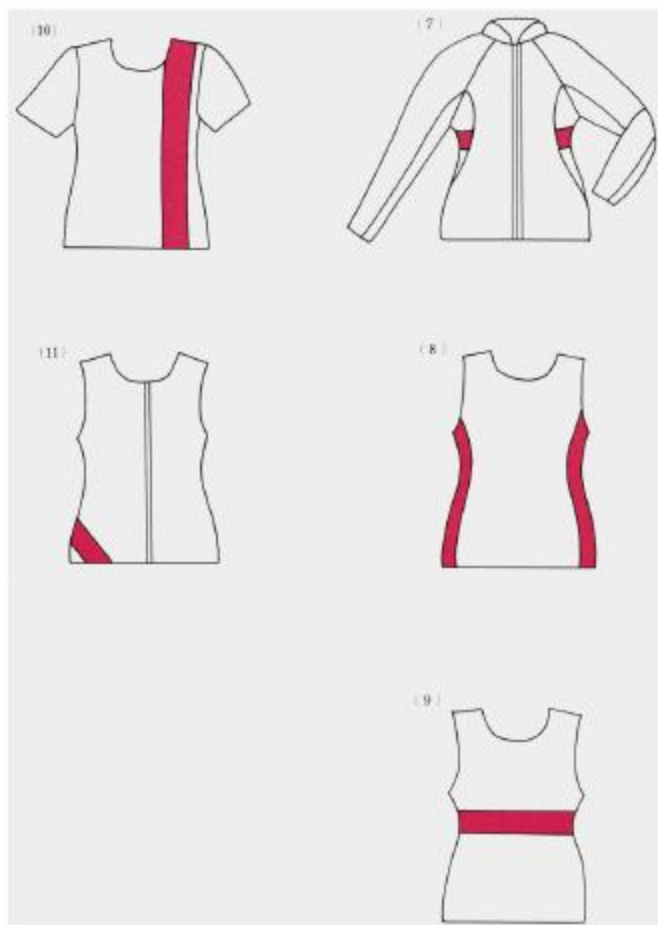
Osaka District Court

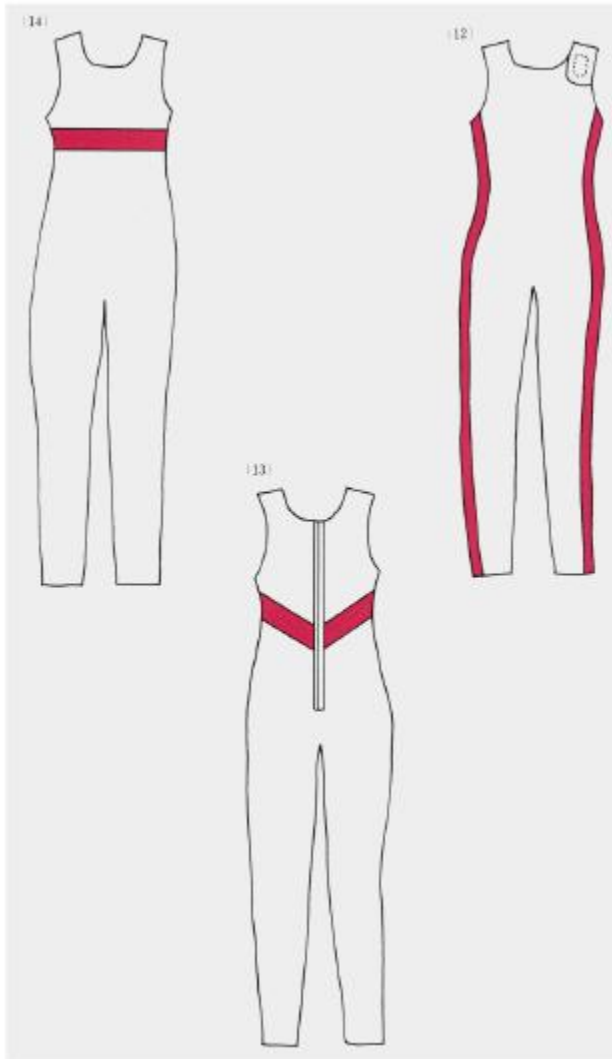
Judges: USHIO Hisaro, KAMATA Yoshikatsu, TOKUNAGA Kozo

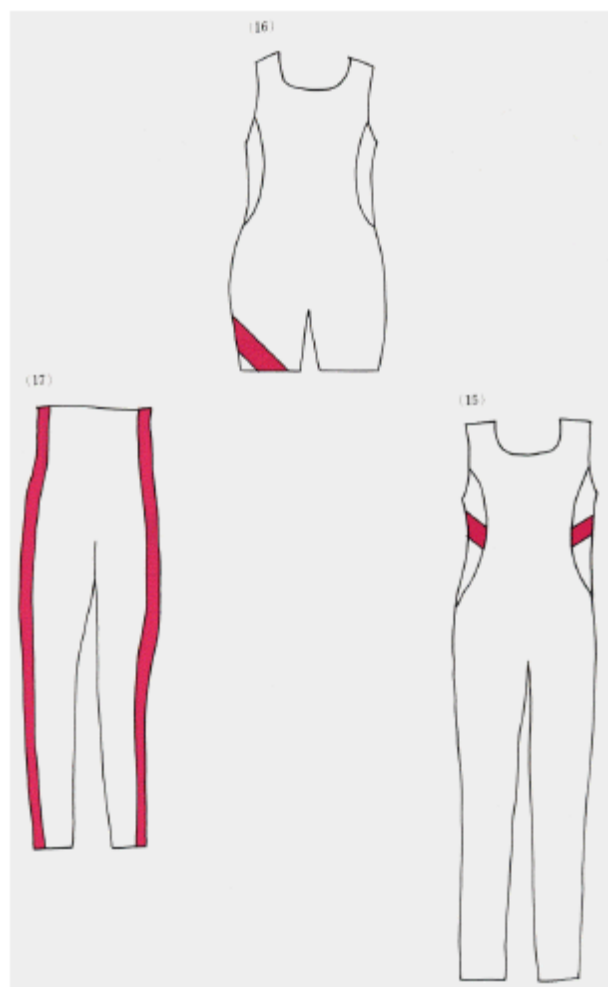


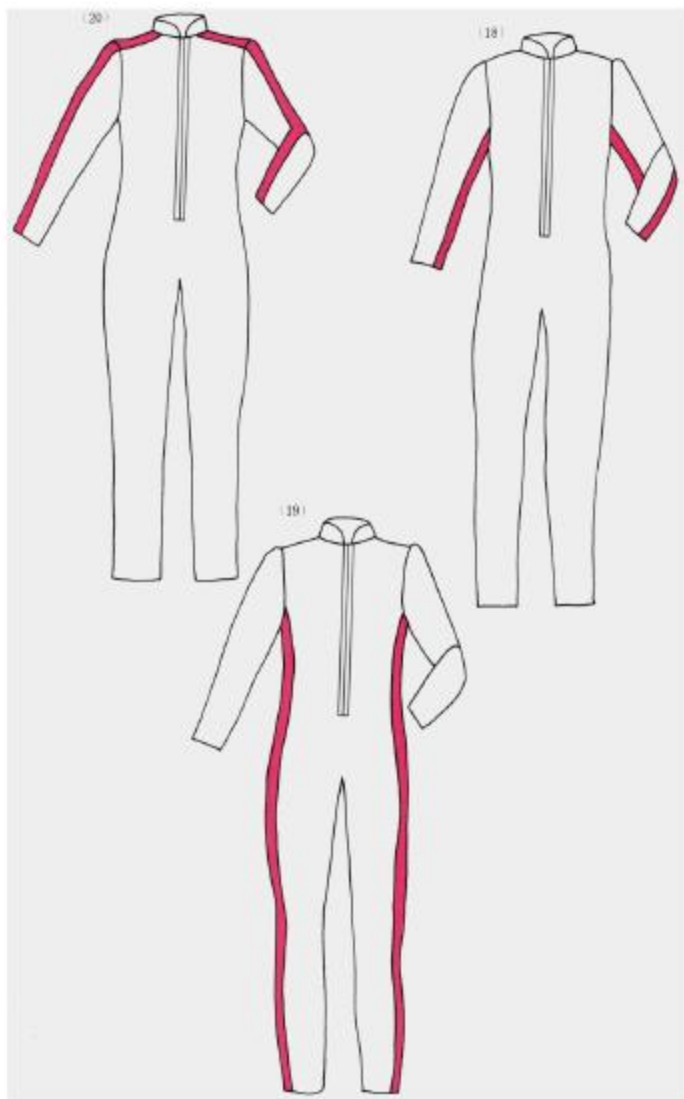
## List 1

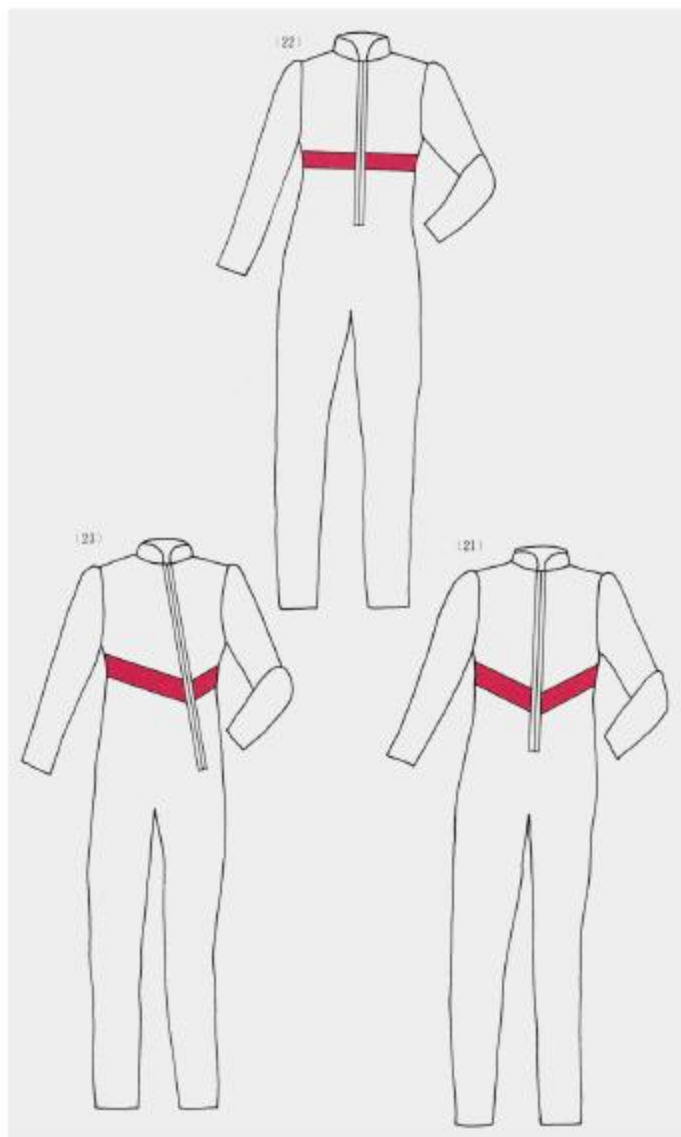


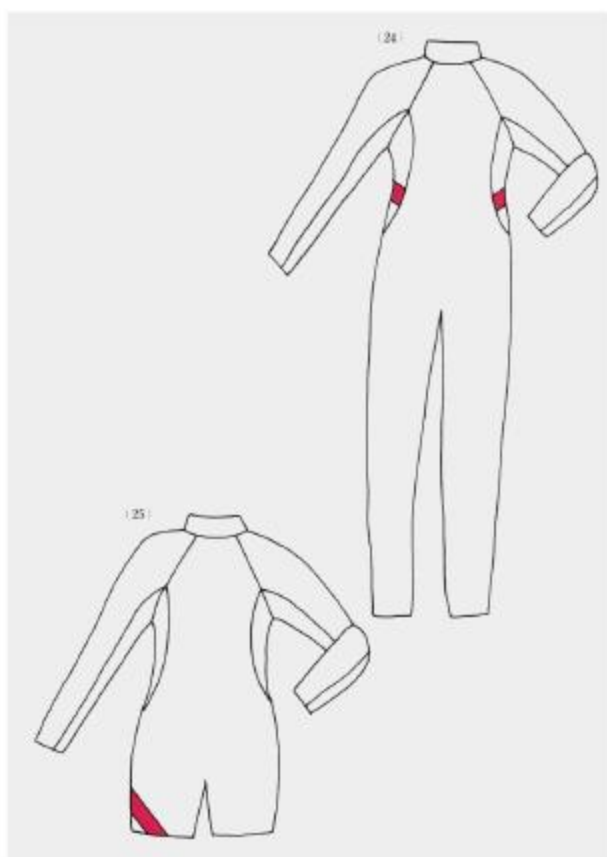












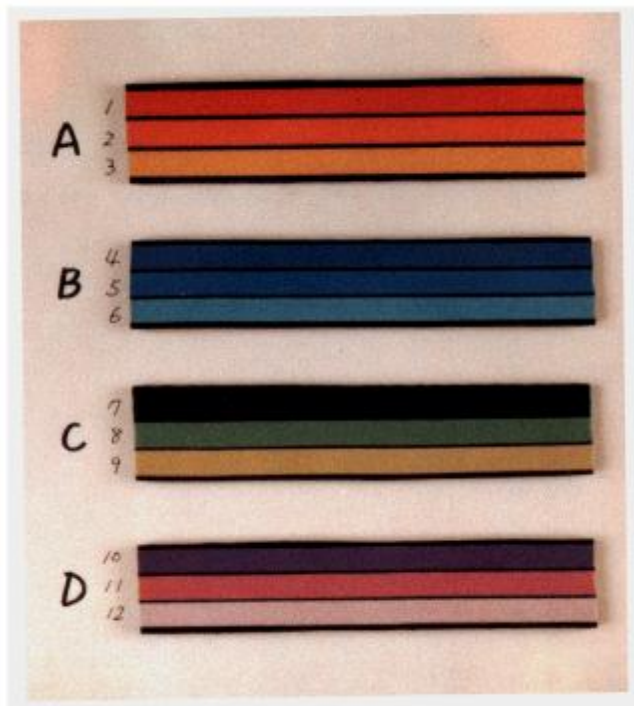
List 2

Description of the lines used by the plaintiff

The lines consist of the following color stripes shown in the photograph attached to the end of this document: 1 to 3 (A), 4 to 6 (B), 7 to 9 (C), and 10 to 12 (D). The width of each stripe is 9 mm. A black line with the width of 1 mm is inserted between the color stripes. The color of each stripe is stated below.

No.	JIS Z8102	JIS Z8721	JIS Z8701		
	General names of colors	Hue Luminosity/Intensity	X	y	Y (%)
1	Yellowish red	7.6R 4.0/13.2	0.5833	0.3305	11.96
2	Yellow-red	4.9YR 5.8/12.7	0.5316	0.4135	27.74
3	Deep yellow	6.8Y 7.0/9.5	0.4372	0.4721	43.71
4	Vivid blue	6.5PB 2.9/14.0	0.1671	0.1170	6.30
5	Blue	5.3PB 4.1/12.1	0.1823	0.1679	12.93
6	Dull blue	1.8PB 6.1/5.7	0.2486	0.2649	31.22
7	Dark green	8.6G 3.2/6.6	0.2255	0.3842	7.73
8	Yellowish green	0.9G 5.7/7.6	0.2983	0.4399	26.74
9	Yellow-green	3.9GY 7.1/7.0	0.3720	0.4482	44.15
10	Bluish purple	2.3P 2.8/12.5	0.2460	0.1403	5.88
11	Reddish purple	2.4RP 4.7/10.2	0.3575	0.2389	17.07
12	Dull purple	9.1P 6.2/3.5	0.3151	0.2906	32.02





List 3

1. Description of the lines used by Defendant Taiyo Sensui and Defendant Tabata

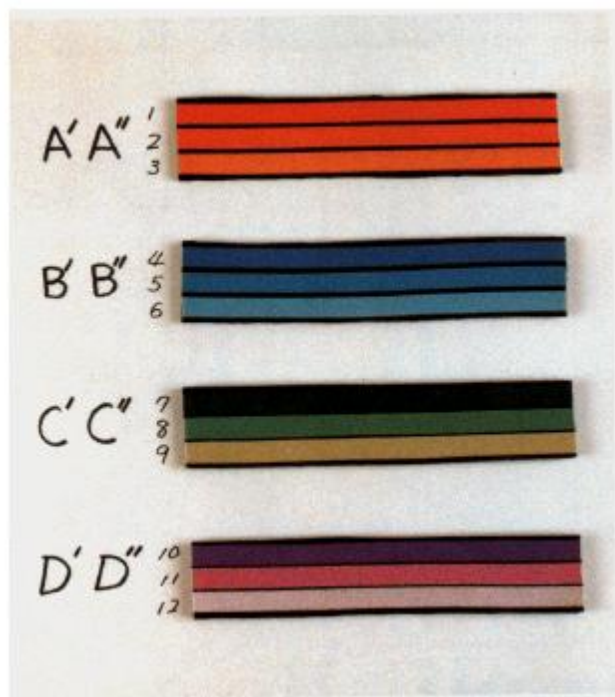
The lines consist of the following color stripes shown in the photograph attached to the end of this document: 1 to 3 (A'), 4 to 6 (B'), 7 to 9 (C'), and 10 to 12 (D'). The width of each stripe is 9 mm. A black line with the width of 2 mm is inserted between the color stripes. The color of each stripe is stated below.

No.	JIS Z8102	JIS Z8721	JIS Z8701		
	General names of colors	Hue Luminosity/Intensity	X	y	Y (%)
1	Yellowish red	7.1R 4.3/13.6	0.5716	0.3283	14.20
2	Yellowish red	0.8YR 5.0/13.1	0.5618	0.3755	20.19
3	Yellow-red	7.8YR 6.3/12.1	0.5098	0.4350	33.13
4	Purplish blue	7.6PB 3.5/12.8	0.1946	0.1444	9.17
5	Blue	6.0PB 4.5/10.7	0.2036	0.1862	15.46
6	Dull blue	2.8PB 6.0/6.6	0.2414	0.2533	29.71
7	Dark green	8.6G 3.2/6.6	0.2255	0.3842	7.73
8	Yellowish green	0.9G 5.7/7.6	0.3983	0.4399	26.74
9	Yellow-green	3.9GY 7.1/7.0	0.3720	0.4482	44.15
10	Bluish purple	2.3P 2.8/12.5	0.2460	0.1403	5.88
11	Reddish purple	2.4RP 4.7/10.2	0.3575	0.2389	17.07
12	Dull purple	9.1P 6.2/3.5	0.3151	0.2906	32.02

## 2. Description of the lines used by Defendant Makoto Sangyo

The lines consist of the following color stripes shown in the photograph attached to the end of this document: 1 to 3 (A"), 4 to 6 (B"), 7 to 9 (C"), and 10 to 12 (D"). The width of each stripe is 9 mm. A black line with the width of 2 mm is inserted between the color stripes. The color of each stripe is stated below.

No.	JIS Z8102	JIS Z8721	JIS Z8701		
	General names of colors	Hue Luminosity/Intensity	X	y	Y (%)
1	Yellowish red	7.2R 4.3/13.4	0.5716	0.3287	13.87
2	Yellowish red	0.8YR 5.0/13.0	0.5614	0.3748	20.10
3	Yellow-red	7.5YR 6.2/12.2	0.5134	0.4329	32.09
4	Purplish blue	7.2PB 3.4/11.6	0.1936	0.1499	8.36
5	Blue	5.5PB 4.3/10.1	0.2016	0.1896	14.28
6	Dull blue	2.2PB 5.9/5.9	0.2456	0.2601	28.62
7	Dark green	8.6G 3.2/6.6	0.2255	0.3842	7.73
8	Yellowish green	0.9G 5.7/7.6	0.3983	0.4399	26.74
9	Yellow-green	3.9GY 7.1/7.0	0.3720	0.4482	44.15
10	Bluish purple	2.3P 2.8/12.5	0.2460	0.1403	5.88
11	Reddish purple	2.4RP 4.7/10.2	0.3575	0.2389	17.07
12	Dull purple	9.1P 6.2/3.5	0.3151	0.2906	32.02



List of the magazines presenting the plaintiff's products

No.	Publication date	Names of magazines	Monthly circulation (in thousands)	Publishers
[1]	May 1978	"Popeye" Jun 1978	350	Heibon Shuppan Kabushiki Kaisha
[2]	Mar., May, Jul., Sep. 1979	"Diving World" Apr, Jun, Aug, Oct 1979	140	Kabushiki Kaisha Daibingu wārudo (Diving World)
[3]	May 1979	"Marine Diving" Jun 1979	90	Marine Art Center Co., Ltd.
[4]	Mar., Jun. 1979	"Surfing World" Apr, Jul 1979	80	Ōshan raifu (Ocean Life) Kabushiki Kaisha
[5]	Jun. 1979	"Sports Notes 16"		
[6]	Apr. 1979	"Surfing Life"	130	Marin Planning Co., Ltd.
[7]	Aug. 1979	"Marine Diving" Sep 1979	Same as [3]	Same as [3]
[8]	Jan., Apr., Jun., Aug., Oct., Dec. 1980	"Diving World" Feb, May, Jul, Sep, Nov 1980, Jan 1981	Same as [2]	Same as [2]
[9]	Jun., Aug. 1980	"Marine Diving" Jul, Sep 1980	Same as [3]	Same as [3]
[10]	Mar., May 1980	"Surfing World" Apr, Jun 1980	Same as [4]	Same as [4]
[11]	Mar., Apr., Jun., Aug., Oct., Dec.	"Surfing Life" Apr, May, Jul, Sep, Nov	Same as [6]	Same as [6]

	1980	1980, Jan 1981		
[12]	Feb. 1980	"Diving World" Mar 1980	Same as [2]	Same as [2]
[13]	May 1980	"Marine Diving" Jun 1980	Same as [3]	Same as [3]