Unfair Competition	Date	January 27, 2022	Court	Intellectual Property High Court, Third Division
	Case number	2021(Ne)10018		
- A case in which the court found the establishment of a misleading indication on quality and an act to damage credit. - A case in which the court calculated the damage as set forth in Article 5, paragraph (2) of the Unfair Competition Prevention Act concerning unfair competition related to a misleading indication on quality and an act to damage credit.				

Case type: Injunction

Results: Modification of the prior instance judgment

References: Article 2, paragraph (1), items (xx) and (xxi), and Article 5, paragraph (2) of the Unfair Competition Prevention Act

Judgment in prior instance: Tokyo District Court, 2018 (Wa) 3789, rendered on February 9, 2021

Summary of the Judgment

1. In this case, the Appellant, who sells oligosaccharide-containing foods (the "Plaintiff's Goods") under the name of "Kaiteki-Origo," alleged against the Appellee, who sells oligosaccharide-containing foods (the "Defendant's Goods") under the name of "Hagukumi-Origo," that the Appellee [i] used an indication that is likely to mislead as to the quality of the Defendant's Goods (Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act) and [ii] made a false allegation that harms the business reputation of the Appellant, who is in a competitive relationship with the Appellee (item (xxi) of said paragraph), and thereby infringed business interests of the Appellant. Based on this allegation, the Appellant demanded the injunction against the misleading indication on quality and an act to damage credit and the payment of compensation for damages of 1,118,443,444 yen.

2. The court of prior instance found a misleading indication on quality by the Appellee, but did not find an act to damage credit by the Appellee's employees, and then calculated the amount of the marginal profit related to the sale of the Defendant's Goods during the period when the misleading indication on quality was being used as 611,926,912 yen based on Article 5, paragraph (2) of the Unfair Competition Prevention Act. The court of prior instance upheld the Appellant's claim to the extent of demanding compensation for damages of 18,357,803 yen by determining the percentage of rebuttal of presumption to be 97% and dismissed the remaining claims.

Dissatisfied with the judgment in prior instance for the part that dismissed the claim for injunction, etc. against the act to damage credit and the determination related to the amount of damages, the Appellant filed this appeal.

3. In this judgment, the court found the act to damage credit by the Appellee's employees in addition to a misleading indication on quality by the Appellee, and then calculated the amount of damages to the Appellant caused by these acts, modified the judgment in prior instance, and upheld the Appellant's claim to demand compensation for damages of 68,900,853 yen (concerning the claim for injunction against the act to damage credit, etc., the court dismissed it by determining that it cannot be said that there is the probability that the act to damage credit may be committed again in the future).

The outline of the determination in this judgment related to the parts different from the determination in the judgment in prior instance is stated below.

(1) Existence of the act to damage credit

A. It should be said that the statements of the Appellant's employees at the examination of witnesses during this trial were supported by objective materials, and unnatural and unreasonable points cannot be found in the details of the statements, and therefore, the overall statements can be trusted.

B. According to the statements, etc. of the Appellant's employees, it is found that the Appellee's employees explained at an event for affiliate marketers that the Plaintiff's Goods do not use 100% oligosaccharide, but the Defendant's Goods use 100% oligosaccharide and therefore, the Defendant's Goods are better than the Plaintiff's Goods. The oligosaccharide combination ratio in the Plaintiff's Goods at that time was approximately 70% and the ratio in the Defendant's Goods was approximately 53%. Based on this fact, it is obvious that the aforementioned explanation was a false allegation from an overall perspective. Therefore, it can be said that the explanation gave the impression that the Plaintiff's Goods have lesser quality than the Defendant's Goods as oligosaccharide-containing foods.

(2) Damages

A. Damages from a misleading indication on quality

(A) It is not reasonable to deduct the accounts receivable of the Appellee from the amount of sales since none of the Defendant's Goods related to the accounts receivable has been returned.

(B) From among bills, etc. related to delivery charges, payment charges, and advertisement fees that the Appellee submitted to this court, for the bills in which expenses related to the Defendant's Goods and expenses related to goods other than the

Defendant's Goods together, the amount obtained by multiplying by the sales percentage of the Defendant's Goods within the Appellee is to be recorded.
(C) The amount of the marginal profit of the Appellee for the period when the misleading indication on quality was being used, namely from July 2014 until November 2018, is 733,061,980 yen.
(D) In consideration of the facts that characteristics other than the purity of oligosaccharides were also featured in the advertisements of the Defendant's Goods, that the market share of the Plaintiff's Goods was approximately 24.4%, that the misleading indication on quality was being used continuously for 4 years and 4 months, that the Plaintiff's Goods and the Defendant's Goods were in a direct competitive relationship, and other matters, it is reasonable to determine that the percentage of rebuttal of presumption is 91%.
(E) The amount of damages to the Appellant caused by the misleading indication on quality is 65,975,573 yen.
B. Damages from the act to damage credit
(A) For the period from October 2016 when the act to damage credit was conducted until November 2018 when the misleading indication on quality was being used, it cannot be denied that the act to damage credit had an impact on the sale of the Plaintiff's Products in combination with the misleading indication on quality. Therefore, it is found that the business interests of the Appellant were infringed.
(B) The amount of the marginal profit of the Appellee during the aforementioned period should be calculated in the same way as A. above and it is 292,528,485 yen.
(C) It cannot be denied that the act to damage credit may have had a certain impact on the sales volumes of the Plaintiff's Goods and the Defendant's Goods. On the other hand, in consideration of the facts that it was only on the day of the event that the act to damage credit was conducted and that the number of audience members who listened to the explanation of the Appellee's employees was approximately a few dozen at most, it is reasonable to determine that the percentage of the rebuttal of presumption is 99%.
(D) The amount of damages to the Appellant caused by the act to damage credit is 2,925,280 yen.

Judgment rendered on January 27, 2022
2021 (Ne) 10018, Appeal case of seeking injunction against the act of unfair competition (Court of prior instance: Tokyo District Court, 2018 (Wa) 3789)
Date of conclusion of oral argument: October 4, 2021

Judgment

Appellant: Kitanotatsujin Corporation

Appellee: Kabushiki Kaisha Hagukumi Plus

Main text

1. The judgment in prior instance shall be modified as follows.
2. The Appellee shall pay to the Appellant 68,900,853 yen and the amount accrued on the following portions thereof at the rate of 5% per annum for the period from the dates respectively specified until the completion of the payment: 61,489,064 yen from March 23, 2018; 1,135,474 yen from March 31, 2018; 977,076 yen from April 30, 2018; 840,022 yen for the period from May 31, 2018; 844,013 yen from June 30, 2018; 791,905 yen from July 31, 2018; 800,580 yen from August 31, 2018; 587,597 yen from September 30, 2018; 779,577 yen from October 31, 2018; and 655,545 yen from November 30, 2018.
3. The remaining claims of the Appellant shall be dismissed.
4. Court costs in the first and second instances shall be divided into one hundred portions and ninety-four portions thereof shall be borne by the Appellee and the rest shall be borne by the Appellant.
5. This judgment may be enforced provisionally only for the second paragraph.

Facts and reasons

No. 1 Object of the appeal

1. The judgment in prior instance shall be modified as follows.
2. The Appellee shall not make or circulate false allegations stated in the Attachment "List of Acts of Damaging Credit" concerning goods stated in the Attachment "List of Articles" to customers of the Appellee or other third parties.
3. The Appellee shall pay to the Appellant 1,118,443,444 yen and an amount accrued thereon at the rate of 5% per annum for the period from March 23, 2018 until the completion of the payment.

No. 2 Outline of the case

1. Outline of the case

(1) In this case, the Appellant alleged against the Appellee that the Appellee [i] used an indication that is likely to be misleading as to the quality of the goods stated in the Attachment "List of Articles" (these goods of the defendant in the first instance (the Appellee) are hereinafter referred to as the "Defendant's Goods") (Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act (hereinafter referred to as the "UCP Act")) and [ii] made false allegations that harm the business reputation of the Appellant, who is in a competitive relationship with the Appellee (Article 2, paragraph (1), item (xxi) of the UCP Act), and thereby infringed the business interests of the Appellant, and the Appellant made the following claims:

A. based on Article 3, paragraph (1) of the UCP Act, a demand to seek injunction against the act of indicating the matters stated in the Attachment "List of Misleading Indications" (hereinafter referred to as the "Indications") in documents, etc. used for advertisements or transactions of the Defendant's Goods;

B. based on Article 3, paragraph (2) of the UCP Act, a demand to seek deletion of the Indications in documents, etc. used for advertisements or transactions of the Defendant's Goods;

C. based on Article 3, paragraph (1) of the UCP Act, a demand to seek injunction against the act of making or circulating the false allegations stated in the Attachment "List of Acts of Damaging Credit" (hereinafter referred to as the "False Allegations") concerning the Defendant's Goods to customers of the Appellee or other third parties;

D. based on Article 3, paragraph (2) of the UCP Act, a demand to seek collection of the part of the Indications and the part of the False Allegations from among documents stated in 1. and 2. in the Attachment "List of Documents" (hereinafter referred to in accordance with the number in said list as "Document 1" and "Document 2," and collectively referred to as the "Documents") that the Appellee has distributed; and

E. based on Article 4 of the UCP Act and Article 709 of the Civil Code, a demand to seek payment of 1,118,443,444 yen, which is the total sum of damages that the Appellant suffered from the Appellee's act of making misleading indications on quality and acts of damaging credit, and delay damages accrued thereon at the rate of 5% per annum as specified by the Civil Code (before the amendment by Act No. 44 of 2017; the same applies hereinafter) for the period from March 23, 2018 (the day following the day on which the complaint was served) until the completion of the payment.

(2) The court of prior instance found that there was an act of making misleading indications on quality by the Appellee for part of the misleading indications on quality

alleged by the Appellant and upheld the Appellant's demand from among the demands indicated in (1) E. above to the extent of payment of 18,357,803 yen and delay damages. However, concerning the demands indicated in (1) A. through D. above, the court did not find that the Appellee would be likely to commit the same acts of misleading indications on quality in the future, dismissed the demand related to the part of the Indications from among the demands indicated in A. and B. and the demand indicated in D., and concerning the acts of damaging credit as alleged by the Appellant, the court did not find the acts of damaging credit by the Appellee and dismissed the demand related to the part of the False Allegations from among the demands indicated in (1) C. and D. above and also dismissed the demand on the grounds of acts of damaging credit from among the demands indicated in E.

(3) Dissatisfied with the judgment in prior instance regarding the demands indicated in (1) C. and E. above, the Appellant filed this appeal. Substantial issues in this instance are whether there were acts of damaging credit by the Appellee and the amount of damages to the Appellant.

2. Basic facts, issues, and allegations of the parties on the issues

Concerning the basic facts, issues, and allegations of the parties on the issues, the judgment in prior instance is altered as follows and supplementary allegations in this instance were added as stated in 3. below, and the remaining parts are as indicated in No. 2, 1. and 2. in the "Facts and reasons" section in the judgment in prior instance (from line 14, page 3 through line 7, page 14 of the judgment in prior instance) and therefore, they are cited.

(1) The term "記載した [indicated]" in line 15, page 4 of the judgment in prior instance is altered to "記載させた [indicated]".

(2) After the term "書面 [a document]" in line 25, page 5 of the judgment in prior instance, the term "（以下「本件通知書」という。）[(hereinafter referred to as "Notification")]" is added.

(3) After the phrase "被告が現に行った表示 [indication that the Defendant actually made]" in line 17, page 7 of the judgment in prior instance, the phrase "（「１００％高純度のオリゴ糖」及び「１００％高純度」以外の本件表示） [(Indications other than "100%, high purity oligosaccharide" and "100% high purity")] is added.

(4) The part from the beginning of line 7 to the end of line 8, page 8 of the judgment in prior instance is deleted.

(5) The phrase "被告の本件表示行為 [the Defendant's act of making the Indication]" in line 23, page 10 of the judgment in prior instance is altered to "被告表示をしたこと [implementation of the Defendant's Indication]".

(6) The phrase "前記第２の１(4) [No. 2, 1., (4) above]" in line 13, page 11 of the judgment in prior instance is altered to "前記第２の１(3) [No. 2, 1., (3) above]."
(7) At the end of line 5, page 14 of the judgment in prior instance, the phrase "また，被控訴人は，将来，現にしている表示のほか「１００％高純度のオリゴ糖」，「１００％高純度」という表示をする蓋然性があるから，本件表示の差止めを求める必要性がある。[In addition, it is probable that the Appellee will make the indications of "100% high purity oligosaccharide" and "100% high purity" in the future, in addition to indications that are currently made, and therefore, it is necessary to demand an injunction against the Indication.]" is added.

(omitted)

No. 3 Judgment of this court
1. Issue [i] (Whether the Appellee committed the act of making misleading indications on quality)

This court also determined the same as the court of prior instance that the Appellee is found to have intentionally sold the Defendant's Goods with indications that were misleading concerning the quality of the Defendant's Goods for the period from July 2014 through November 2018.

The reason for the decision is as indicated in No. 3, 1. and 2. in the "Facts and reasons" section in the judgment in prior instance (from line 14, page 9 through line 12, page 22 of the judgment in prior instance) and therefore they are cited, except for the following alterations of the judgment in prior instance.
(1) The term "それぞれに [respectively]" in line 22, page 14 of the judgment in prior instance is altered to "それぞれが [each of them]".
(2) The phrase "その説明等の後に，[after the explanation, etc.,]" in line 23, page 15 of the judgment in prior instance is altered to "上記サイトには，[in the aforementioned website,]".
(3) The term "通り [passing through]" in line 3, page 16 of the judgment in prior instance is altered to "巡り [spreading]".
(4) The phrase "甲１０，１３ [Exhibits Ko 10 and 13]" in line 8, page 16 of the judgment in prior instance is altered to "甲１０，１３，３０ [Exhibits Ko 10, 13 and 30]".
(5) After the phrase "'オリゴ糖 １００パーセント' [Oligosaccharide 100%]" in line 13 through line 14, page 19 of the judgment in prior instance, the phrase "'オリゴ糖１００' ['Oligosaccharide 100']" is added.

(6) The following phrase is added after the end of line 15, page 20 of the judgment in prior instance.

"そして，前記第２の１(2)によれば，本件行為１ないし７には，いずれも上記(1)において検討した被告商品の品質について誤認させるような表示が含まれるものと認められる（以下，これらの表示を「本件品質誤認表示」という。）。
[In addition, according to No. 2, 1. (2) above, it is found that all of Acts 1 through 7 include indications that are misleading as to the quality of the Defendant's Goods as examined in (1) above (hereinafter these indications are collectively referred to as "Misleading Indications on Quality.")]".

(7) The phrase "被告表示 [the Defendant's Indications]" in line 19 through line 20, page 20 of the judgment in prior instance is altered to "本件品質誤認表示 [the Misleading Indications on Quality]".

(8) The phrase "被告商品の [the Defendant's Goods]" in line 1, page 21 through the phrase "ということがある。）[may be referred to as ... in some cases.)]" in line 3, page 21 of the judgment in prior instance is altered to "本件品質誤認表示 [the Misleading Indications on Quality]".

(9) All of the phrases "被告表示 [the Defendant's Indication]" in line 14, line 17, and line 20, page 21 and the phrase "上記の行為 [the aforementioned act]" in line 21, page 21 of the judgment in prior instance are altered to "本件品質誤認表示 [the Misleading Indications on Quality]".

(10) The part from the phrase "他方， [On the other hand,]" in line 25, page 21 through the end of line 12, page 22 in the judgment in prior instance is deleted.

2. Issue [ii] (Whether the Appellee committed the acts of damaging credit)

Different from the court of prior instance, this court determines that the statements of the Appellee's employee in the event in question (the "Event") fall under acts of damaging the Appellant's credit. The grounds for the decision are as stated below (the phrase from the line 14, page 22 through line 11, page 25 of the judgment in prior instance is altered as follows.).

(1) Statements of the Appellee's employee in the Event

A. Facts found in this case

According to P's written statement (Exhibits Ko 54 and 85) and the results of P's examination of a witness in this instance, as well as the evidence listed at the end of each sentence and the entire import of oral arguments, the following facts are found.

(A) The Event was held and hosted by "A8.net," an affiliate program service provider operated by FAN Communications, Inc., on October 8, 2016, and corporations, or advertisers, gave explanations, etc. of their goods to affiliate marketers in their

individual booths. In the Event, 76 booths in total, including those of the Appellant and the Appellee, were set up and the total number of affiliate marketers who visited on that day was 2,087. (Exhibits Ko 20 and 21-1 and Exhibit Otsu 47)

(B) P, who belonged to the Sales and Marketing Department at that time that mainly engaged in surveying other companies' trends, etc., participated in the Event along with other employees. P participated in the Event as an affiliate marketer in order to also investigate the details that other companies only explain to affiliate marketers. (Exhibits Ko 56, 57, and 59)

(C) When P visited the Appellee's booth to hear the briefing related to the Defendant's Goods that are competing with the goods of the plaintiff in the first instance (the Appellant (hereinafter referred to as the "Plaintiff's Goods"), the Appellee's employee gave an explanation of the Defendant's Goods to affiliate marketers. In the explanation, the Appellee's employee mentioned the name of the Plaintiff's Goods, "Kaiteki Origo" and explained as follows: the Plaintiff's Goods are not made of 100% oligosaccharide; however, the Defendant's Goods are made of 100% oligosaccharide and therefore they are good products; the Plaintiff's Goods are slightly lower in sugar content; and the Defendant's Goods are for pregnant women and infants. (Concerning the Appellee's booth, Exhibit Otsu 94)

Then, P went close to the Appellee's employee to hear the story in more detail and asked the Appellee's employee to explain the difference between the Plaintiff's Goods and the Defendant's Goods in more detail. In response to the request, the Appellee's employee explained as follows: the Plaintiff's Goods are not made of 100% oligosaccharide, but the Defendant's Goods are made of 100% oligosaccharide and the Defendant's Goods are better; sales of the Plaintiff's Goods are ranked at the top by narrowing its category, but any goods can be the top in sales by narrowing the category.

While the aforementioned conversations were exchanged, there were five to ten affiliate marketers around the Appellee's booth.

(D) P submitted the report in question (the "Report") to the Appellant on October 17, 2016, as a report of participation in the Event. In the field for "comment" in the Report, the following was indicated. (Exhibits Ko 56 and 57)

"The employee seemed to have a strong rivalry with our company and changed his expressions only when I mentioned our company's name. When I asked the difference with 'Kaiteki Origo,' the employee bared his hostility, saying as follows: 'They are not made of 100% oligosaccharide (laughing), but our product has very high purity.' 'Our product is made of 100% oligosaccharide and is highly effective, particularly with babies and pregnant women. It is the selling point of our product.' "Kaiteki Origo' is

said to be ranked at the top in sales, but any product can be ranked at the top in sales if the category is narrowed down.' and 'The customer range of 'Kaiteki Origo' is broad and I wonder about their effects.'"

(E) Subsequently, the Appellant's representative, who received a report on the details that P stated in the Report, sent the Notification to the Appellee dated November 2, 2016. In the Notification, the following was indicated. (Exhibit Ko 3)

"We obtained information that your company indicated a false allegation concerning our company's goods at A8 Festival 2016 held at Shibuya Hikarie on October 8, 2016 that 'Kaiteki Origo is not made of 100% oligosaccharide, but Hagukumi Origo is a good product and is made of 100% oligosaccharide,' etc."

(F) The Appellee, who received the Notification, sent the written reply in question (the "Written Reply") to the Appellant dated November 16, 2016. In the Written Reply, the following was indicated. (Exhibit Ko 4-1)

"First, concerning the statement of our employee at Shibuya Hikarie on October 8, 2016 that you questioned, we found that some of our employees made the statements as you pointed out. It was not accurate that Hagukumi Origo is made of 100% oligosaccharide and it was inappropriate to compare our products with your products on this assumption. We apologize for it in this letter and swear to prevent its recurrence."

(G) In Nihon Ryutsu Sangyo Shimbun dated March 1, 2018, an article stating that the Appellant filed this litigation (hereinafter referred to as the "Article") was posted. In the Article, the comments of a person in charge from the Appellee (hereinafter referred to as the "Comments"), such as "It is true that some of our new employees made statements, such as 'our goods are made of 100% oligosaccharide,' etc., at an event for affiliate marketers," etc., were introduced. (Exhibit Ko 45)

B. Examination

(A) According to the facts found in this case (C) of A. above, it is found that, in the Event, the Appellee's employee mentioned the name of the Plaintiff's Goods, which is a competing product of the Defendant's Goods, and explained that the Plaintiff's Goods are not made of 100% oligosaccharide, but the Defendant's Goods are made of 100% oligosaccharide and therefore, the Defendant's Goods are better products (hereinafter the explanation is referred to as the "Explanation"). As examined in 1. (Issue [i]) above, the oligosaccharide combination ratio in the Plaintiff's Goods as of the time of the Event was approximately 70% and the oligosaccharide combination ratio in the Defendant's Goods was approximately 53%. Based on this fact, in the Explanation, the part that the oligosaccharide combination ratio in the Plaintiff's Goods is not 100% was not false;

however, the Plaintiff's Goods and the Defendant's Goods were compared on the assumption that the oligosaccharide combination ratio in the Defendant's Goods was 100% and it was explained that the Defendant's Goods had a higher oligosaccharide combination ratio than the Plaintiff's Goods. Therefore, it is obvious that the Explanation was a false allegation from an overall perspective.

In addition, based on the fact that the major selling points of both the Plaintiff's Goods and Defendant's Goods are that both products are oligosaccharide-containing foods and have a high oligosaccharide combination ratio, it can be said that the Explanation gave the impression that the Plaintiff's Goods had a lower oligosaccharide combination ratio than the Defendant's Goods and the Plaintiff's Goods had lower quality than the Defendant's Goods as oligosaccharide-containing foods.

Based on the above, the details of the Explanation should be said to be a false allegation that damages the business credit of the Appellant, who is in a relationship of competition with the Appellee.

(B) In addition, as indicated in facts found in this case (A) and (C) of A. above, many affiliate marketers visited the Event and there were 5 to 10 affiliate marketers around the Appellee's booth while the Explanation was given. Based on this fact, it can be said that the Explanation was given in the situation where affiliate marketers in addition to P could hear it.

(C) Based on the above, it is reasonable to find that the Explanation falls under an "act of making or circulating false allegations that harm the business reputation of a business competitor" (Article 2, paragraph (1), item (xxi) of the UCP Act) (hereinafter referred to as the " Acts of Damaging Credit").

C. Credibility of P's statements

The Appellee alleged that P's statements are not credible; however, as indicated below, P's statement related to the Explanation is supported by objective materials ((A) through (C)) and it should be said that there are no unnatural and unreasonable points in the details of the relevant statement ((D)). Therefore, it can be credible from the whole perspective.

(A) Support by the Report

a. As indicated in facts found in this case (D) of A. above, based on the fact that the Report states that the Appellee's employee gave the Explanation, P's statement is supported objectively by the Report.

b. The Appellee alleged concerning the Report that, based on the purpose, etc. for which P participated in the Event, it lacks objectiveness and fairness.

However, according to facts found in this case (B) of A. above, it should be said

that P participated in the Event to investigate the trends of other companies with the purpose of investigating what explanations, etc. were given in the booths of other companies, but not with the purpose of investigating whether explanations, etc. with problems, such as including false details, etc. were given. In addition, looking at the statements in the emails sent upon the submission of the Report (Exhibit Ko 56) and the details of the Report, P only seems to have intended to report the impression that P felt concerning the presence of the Appellee's rivalry against the Appellant, but is not considered to have intended to report that false details were included in the Explanation. Taking into account these circumstances, setting aside the parts presenting P's subjective impression, such as "changed his expression," "bared his hostility," etc., it is reasonable to consider that the parts related to the details of the Appellee's employee's statements themselves were recorded objectively.

Based on the above, it should be said that the Report does not lack objectiveness and fairness as material supporting P's statement related to the Explanation.

Consequently, the aforementioned allegation of the Appellee cannot be accepted.

(B) Support by the Notification and the Written Reply

a. According to the details of the Notification and the Written Reply as indicated in facts found in this case (E) and (F) of A. above, it is obvious that the phrase "the statements as you pointed out" in the part "we found that some of our employees made the statements as you pointed out." in the Written Reply is made in response to the part "'Kaiteki Origo is not made of 100% oligosaccharide, but Hagukumi Origo is a good product and is made of 100% oligosaccharide,' etc.'" in the Notification. This is supported by the fact that there is a statement to admit that it was inappropriate that the Appellee's employee gave an explanation by comparing the Plaintiff's Goods and the Defendant's Goods on the assumption that the oligosaccharide combination ratio of the Defendant's Goods was 100%, such as "it was inappropriate to compare our products with your products on this assumption," etc., in the Written Reply. Then, it is reasonable to find that in the Written Reply, which is a reply to the Notification, it is admitted that there was the Explanation. Consequently, the Notification and the Written Reply objectively support P's statement.

b. In this regard, the Appellee alleged that the Written Reply does not admit any fact, but it only put a priority on avoiding conflict and took action to apologize first temporarily.

However, as found above, the Written Reply admitted the factual relationship indicated in the Notification without denying or having any reservations, and then, it expressed an apology and swore to prevent recurrence. If such a written reply is sent to

the other party, it is easily assumed that the written reply will be used as strong evidence for the fact that the Appellee admitted the facts in an event where a conflict develops into a legal conflict, such as a litigation, etc., subsequently. In light of the fact that the creator of the Written Reply is a lawyer, it must be said that the aforementioned allegation of the Appellee is unnatural. Then, even if the Appellee created the Written Reply by putting a priority on avoiding conflict, it should be considered that the Appellee admitted the details, etc. of the Explanation and attempted to resolve any conflict at an early stage.

Consequently, the aforementioned allegation of the Appellee cannot be accepted.

(C) Support by the Comments

a. As indicated in facts found in this case (G) of A. above, the Comments admitted that the Appellee's employee made the statements including such phrase as "100% oligosaccharide." Based on the facts that the Notification and the Written Reply were exchanged in November of the year before the year in which the Article was posted, it is reasonable to consider that the Appellee made the Comments after agreeing with the allegation of the Appellant that there was the Explanation and that, the same as in the Written Reply, the Appellee made comments to admit that there was the Explanation. Then, it can be said that the Comments support P's statement objectively.

b. The Appellee alleged concerning the Comments that acts of damaging credit cannot be found based on the details of the Comments and that the Appellee only put a priority on avoiding any conflict in the same way as in the Written Reply; however, in light of the examinations above, none of these allegations can be accepted.

(D) Reasonableness, etc. of the details of P's statements

a. It should be said that P's statements in the examination of a witness concretely explain the status of the entire Event, the status of the area surrounding the Appellee's booth, the interactions, etc. with the Appellee's employee, etc. and that there are no unnatural and unreasonable points in the details.

b. The Appellee alleged that P participated in the Event as part of business of the Appellant and that it is highly possible that P intentionally collected information advantageous to the Appellant.

However, based on P's purpose of participation as examined in (A) above, it should be said that it is difficult to consider that P would dare to arbitrarily collect the information as pointed out by the Appellee.

Consequently, the aforementioned allegation of the Appellee cannot be accepted.

c. In addition, the Appellee alleged that the number of affiliate marketers, etc. who were around the Appellee's booth alleged in P's statements in the examination of a witness

was different from that in the written statement and that the details of P's statements had unnatural points.

However, P stated that the number of affiliate marketers who were around the Appellee's booth was approximately 5 to 10 in the examination of a witness (Witness P [pages 4, 6, and 7]) and the number was indicated to be around several to 10 persons in the written statement (Exhibit Ko 85). Therefore, it cannot be said that P made a statement different from the content of the written statement. In addition, it cannot be said that the details of the aforementioned statement by P related to the number of affiliate marketers have any unnatural or unreasonable points in light of the number of visitors on that day and the layout of the booths and pathways, etc. Furthermore, P's statement related to the Explanation concretely explained the conditions where the Appellee's employee gave the Explanation and the details of the interactions with the Appellee's employee, and therefore, it should be said that there are no unnatural and unreasonable points with the details of P's relevant statement.

Consequently, the aforementioned allegation of the Appellee cannot be accepted.

D. Summary

Based on the above, it can be said that the statements of the Appellee's employee in the Event held on October 8, 2016 (the Explanation) fall under acts of damaging the Appellant's credit (the Acts of Damaging Credit).

(2) Distribution of the Documents on June 3, 2017 and September 23, 2017 (Act 5)

A. This court also determines in the same way as the court of prior instance that even if the Appellee distributed the Documents, it would not fall under an act of damaging the Appellant's credit.

The reason for the decision is as stated in No. 3, 3. (2) of the "Facts and reasons" section (from line 21, page 24 through line 7, page 25 of the judgment in prior instance) and it is cited except for altering the phrase "原告商品の品質が劣っていることを述べるものとはいえず，[it cannot be said that it suggests that the quality of the Plaintiff's Goods is lesser]" in line 4 through line 5, page 25 of the judgment in prior instance to "原告商品を名指しして被告商品と対比し，原告商品の品質が劣っているなどと述べるものではないことを考慮すると，[in consideration of the fact that it is not stating that the quality of Plaintiff's Goods is lesser by pointing to the Plaintiff's Goods and comparing them with the Defendant's Goods]."

B. In this regard, the Appellant alleged that it was only the Appellant who sold high-purity oligosaccharide foods competing with the Defendant's Goods from among advertisers who participated in the event where the Documents were distributed; and if the perspective of the affiliate marketers is used as the standard, the "competitors'

goods," etc. in the Documents cannot be considered to be other than the Plaintiff's Goods.

However, as explained by the judgment in prior instance that is cited after alteration as mentioned above (from line 21, page 24 through line 7, page 25 of the judgment in prior instance), the Documents have no statements pointing to the Plaintiff's Goods and comparing them with the Defendant's Goods. In addition, the goods that affiliate marketers introduce on their website, etc. are not limited to the goods exhibited in events, but it can be said that it is normal that similar goods are broadly introduced. In consideration of these circumstances, even if it was only the Plaintiff's Goods that were goods competing with the Defendant's Goods in the event, it cannot necessarily be said that affiliate marketers, to whom the Documents were distributed in the event, recognize that the "competitor's goods" as used in the Documents refer to the Plaintiff's Goods.

Consequently, the aforementioned allegation of the Appellant cannot be accepted.

3. Issue [iii] (Whether the Appellant's allegation violates the principle of good faith)

This court also determines in the same way as the court of prior instance that the allegation of the Appellant does not violate the principle of good faith.

The reason for the decision is as indicated in No. 3, 4. of the "Facts and reasons" section in the judgment in prior instance (from line 12, page 25 through line 3, page 26 of the judgment in prior instance) and therefore it is cited.

4. Issue [iv] (Occurrence of damages and the amount of damages)

No. 3, 5. of the "Facts and reasons" section in the judgment in prior instance (from line 5, page 26 through line 2, page 33 of the judgment in prior instance) is altered as follows.

(1) Damages from the Misleading Indications on Quality

A. Calculation method

(A) As examined above, the Appellee made the Misleading Indications on Quality for the period from July 2014 through November 2018 (hereinafter referred to as "Subject Period [i]"); both the Plaintiff's Goods and the Defendant's Goods are foods containing oligosaccharide; and the Plaintiff's Goods have market share to an extent. Based on the above, it is found that the Appellant's business interests were infringed by the Appellee's Misleading Indications on Quality.

(B) In addition, based on Article 5, paragraph (2) of the UCP Act, the amount of interest that the Appellee received from the Misleading Indications on Quality in the Subject Period [i] is presumed to be the amount of damages to the Appellant. The amount of interest that the infringer received from the infringing act as specified in said provisions refers to the amount of interest obtained by deducting the expenses that are additionally

required directly in relation to the selling, etc. of articles from the sales related to the selling of said articles consisting of the infringing act, and it is understood that the full amount of said interest is presumed to be damages.

(C) Based on the above, the amount of damages to the Appellant from the Misleading Indications on Quality is examined below.

B. Sales of the Defendant's Goods

(A) According to the evidence (Exhibit Otsu 34) and the entire import of oral arguments, it is found that the sales amount (excluding the amount equivalent to the consumption tax) of the Defendant's Goods that were sold during Subject Period [i] was 1,105,731,572 yen in total as stated in the field for "Sales amount (excluding tax)" in the Attachment "Amount of Damages Calculation Sheet [i]."

(B) The Appellant alleged that the amount equivalent to the consumption tax should be added to the sales amount indicated in (A) above.

In the Consumption Tax Basic Directive (Exhibit Ko 65) that the Appellant cited, it is stated that the consumption tax is to be imposed exceptionally on the "compensation for damages that the intangible property right holder receives from the party at fault, if the intangible property right is infringed" as "those for which the substance is found to fall under compensation for the transfer, etc. of assets." However, it cannot be said that compensation for damages on the grounds of the presence of an act of unfair competition immediately falls under said exceptional case. In addition, in this case, there are no materials, etc. that suggest that the consumption tax may be imposed if the Appellant receives compensation for damages from the Appellee. It should be said then that it is not reasonable to add the amount equivalent to the consumption tax to the sales amount indicated in (A) above when calculating the amount of damages to the Appellant (as indicated in the field for "Amount equivalent to the consumption tax" in the Attachment "Amount of Damages Calculation Table [i]").

Consequently, the aforementioned allegation of the Appellant cannot be accepted.

(C) The Appellee alleged that 22,516,179 yen of accounts receivable should be deducted from the sales amount indicated in (A) above.

It is found that none of the Defendant's Goods related to the aforementioned accounts receivable have been returned (statement of the Appellee in this instance). Therefore, the Appellee still has the right to demand the trading value against purchasers. Based on the fact that the circumstances related to the treatment of the aforementioned accounts receivable by the Appellee are not clear, the possibility cannot be denied that the Appellee may be able to demand the aforementioned accounts receivable from customers. Then, it should be said that it is not reasonable to deduct

the aforementioned accounts receivable from the sales amount indicated in (A) above when calculating the amount of damages to the Appellant (as indicated in the field for "Accounts receivable" in the Attachment "Amount of Damages Calculation Table [i]").

Consequently, the aforementioned allegation of the Appellee cannot be accepted.

(D) Based on the above, it is reasonable to determine that the sales amount of the Defendant's Goods that were sold during Subject Period [i] is 1,105,731,572 yen in total as indicated in the field for "Sales" in the Attachment "Amount of Damages Calculation Table [i]."

C. Deduction of costs

There is no dispute between the parties that the costs of the Defendant's Goods that were sold during Subject Period [i] (including the costs of acquiring packaging materials, including spoons, cardboard boxes for packaging, etc. in addition to oligosaccharide powder, which is a raw material) is 166,701,728 yen in total as indicated in the field for "Costs" in the Attachment "Amount of Damages Calculation Table [i]" and, therefore, the costs should be deducted from the sales indicated in B. above (the amount in each month is found based on Exhibit Otsu 39).

D. Deduction of shipping costs, payment fees, and advertisement costs

(A) Outline

a. According to the evidence (Exhibit Otsu 99) and the entire import of oral arguments, it is found that the Appellee sells goods by mail order through the internet and the Defendant's Goods show certain sales performance among the overall sales of the Appellee. Given the above, it can be said that spending on shipping costs, payment fees, and advertising costs is required when the Appellee sells the Defendant's Goods. Then, if these costs are found to be related to the selling of the Defendant's Goods, it can be said that they fall under the costs to be deducted from the sales indicated in B. above.

b. In addition, according to the evidence (Exhibit Ko 67) and the entire import of oral arguments, it is found that the Appellee sold multiple goods in addition to the Defendant's Goods during Subject Period [i] and there are bills, etc. related to the aforementioned costs that the Appellee submitted in this instance (Exhibits Otsu 86, 88, 89, 91 through 93, 97 and 98) in which the costs related to the Defendant's Goods and the costs related to goods other than the Defendant's Goods are indicated without distinction. Since it is not clear which of these are costs related to the Defendant's Goods, these costs cannot be deducted from the sales indicated in B. above, in principle.

However, in consideration of the selling conditions of goods and the sales performance, etc. of the Defendant's Goods by the Appellee as described in a. above, if no deduction is allowed because whether the spending on the aforementioned costs is

related to the Defendant's Goods cannot be identified even though there are objective materials on the spending, it does not correspond to the actual status of the selling of the Defendant's Goods by the Appellee, and it is said to be unreasonable.

Then, if the costs related to the Defendant's Goods and the costs related to goods other than the Defendant's Goods are indicated without distinction in the objective materials submitted by the Appellee, in order to reflect the actual status, such as the selling conditions of goods and sales performance, etc. of the Defendant's Goods by the Appellee, etc., as much as possible to the calculation of the amount of damages to the Appellant, it is reasonable to include the amount obtained by multiplying the amount indicated in the objective materials or a calculation statement in which the Appellee compiled said materials (Exhibits Otsu 85, 87 and 90) by the sales ratio of the Defendant's Goods of 13.9% (the ratio indicated in the field for "Composition ratio" in Exhibit Otsu 99-1) from among the overall sales of the Appellee during Subject Period [i] as the costs to be deducted from the sales indicated in B. above (as described in (D), d. below, a different value of sales ratio is used for the case of Logicad).

c. All of Exhibits Otsu 36 through 38 that the Appellee submitted as supporting materials for the aforementioned costs in the court of prior instance are only calculation statements that the Appellee created using spreadsheet software. Based on the fact that the Appellant is disputing their credibility, these materials cannot be immediately deemed to support the Appellee's allegation.

d. Based on the above, each cost is examined below.

(B) Shipping costs

a. According to the evidence (Exhibits Otsu 85 and 86) and the entire import of oral arguments, it is found that Exhibit Otsu 86 is a bill related to shipping costs, etc. during Subject Period [i] created by TM Logistics Kabushiki Kaisha and that Exhibit Otsu 85 is a calculation statement that the Appellee extracted and compiled expense items related to shipping (slip issuance fees, shipping operation costs, mail service fees, etc.) from among expense items indicated in Exhibit Otsu 86. According to the details stated in Exhibit Otsu 86, it is presumed that Exhibit Otsu 86 includes shipping costs related to the Defendant's Goods; however, it is reasonable to deem that shipping costs related to goods other than the Defendant's Goods are included without distinction.

Therefore, concerning the shipping costs, it is reasonable to include the amount obtained by multiplying the amount indicated in the field for "Total monthly amount (yen, including tax)" in Exhibit Otsu 85 by 13.9% as the costs to be deducted from the sales indicated in B. above.

b. Based on the above, it is reasonable to determine that the amount of shipping costs

to be deducted from the sales indicated in B. above is 36,593,900 yen (any fraction of less than one yen is rounded down in the calculation during the period when each of the damages occurred; the same applies hereinafter) as indicated in the field for "Shipping costs" in the Attachment "Amount of Damages Calculation Table [i]."

(C) Payment fees

a. According to the evidence (Exhibits Otsu 87 through 89) and the entire import of oral arguments, it is found that Exhibit Otsu 88 is a bill created by Densan System Co., Ltd. for fees handling the settlement at convenience stores and postal transfers during Subject Period [i], Exhibit Otsu 89 is a statement created by ZEUS Co., Ltd. for fees handling credit-card transactions during Subject Period [i], and Exhibits Otsu 87-1 and 87-2 are calculation statements created by the Appellee based on the content of Exhibits Otsu 88 and 89, respectively. According to the details stated in Exhibits Otsu 88 and 89, it is presumed that Exhibits Otsu 88 and 89 include payment fees related to the Defendant's Goods; however, it is reasonable to deem that payment fees related to goods other than the Defendant's Goods are included without distinction.

Therefore, concerning the payment fees, it is reasonable to include the amount obtained by multiplying the amount indicated in the field for "Total monthly fees (yen, including tax)" in Exhibit Otsu 87-1 and the amount indicated in the field for "Total monthly purchase (yen, including tax)" in Exhibit Otsu 87-2 by 13.9% as the costs to be deducted from the sales indicated in B. above.

b. Based on the above, it is reasonable to determine that the amount of payment fees to be deducted from the sales indicated in B. above is 17,171,600 yen in total and 18,664, 724 yen in total, respectively, as indicated in the fields for "Payment fees (Densan System)" and "Payment fees (Zeus)" in the Attachment "Amount of Damages Calculation Table [i]."

(D) Advertising costs

a. A8.net

(a) According to the evidence (Exhibits Otsu 90-1 and Otsu 91) and the entire import of oral arguments, it is found that Exhibit Otsu 91 is a bill created by FAN Communications, Inc. for advertising costs during Subject Period [i] and Exhibit Otsu 90-1 is a calculation statement in which the Appellee extracted and compiled expense items of "Pay-for-performance" with the indication of "PGID: 001" in the field for Remarks and expense items of "Pay-for-performance commission" from among expense items indicated in Exhibit Otsu 91. In addition, according to the evidence (Exhibits Otsu 91 and 96) and the entire import of oral arguments, it is found that, although advertising costs related to goods other than the Defendant's Goods are also included in Exhibit

Otsu 91 without distinction, expense items of "Pay-for-performance" with the indication of "PGID: 001" in the field for Remarks in Exhibit Otsu 91 fall under advertising costs for the Defendant's Goods. On the other hand, concerning expense items of "Pay-for-performance commission," the details thereof and whether they have a relationship with the Defendant's Goods are not clear.

Consequently, concerning the advertising costs with A8.net, it is reasonable to include the total amount of expense items with the indication of "PGID 001" in the field for "Details" from the amount indicated in the field of "Total advertising fees (yen, including tax) in Exhibit Otsu 90-1 as the costs to be deducted from the sales indicated in B. above.

(b) Based on the above, the amount of advertising costs with A8.net to be deducted from sales indicated in B. above is 46,721,936 yen in total as indicated in the field for "Advertising costs (A8.net)" in the Attachment "Amount of Damages Calculation Table [i]."

b. Yahoo!

(a) According to the evidence (Exhibit Otsu 93) and the entire import of oral arguments, it is found that Exhibit Otsu 93 is part of the advertising and promotion costs of the Appellee's financial statements and company names to which advertising and promotion costs are paid and the amount paid as advertising and promotion costs every month are indicated, and that Yahoo! is included in the company names to which advertising and promotion costs are paid. However, based only on the content of said financial statements, even the details of the advertising and promotion costs are unknown, and it is difficult to say that they are objective materials that directly support the costs to be deducted from the sales indicated in B. above. Therefore, it is impossible to calculate the amount to be deducted based on Exhibit Otsu 93.

(b) According to the evidence (Exhibit Otsu 98) and the entire import of oral arguments, it is found that Exhibit Otsu 98 is a usage history of four Yahoo accounts that the Appellee used during Subject Period [i]; account names are "【Ｈ】はぐくみ商品／はぐくみプラス【公式】：５４４４９７ [【H】Hagukumi products / Hagukumi Plus【Official】: 544497]" (Exhibit Otsu 98-1), "【ＨＯ－０１】はぐくみオリゴ記事：１０７５９０６ [【HO-01】Articles of Hagukumi Origo: 1075906]" (Exhibit Otsu 98-2), "【ＨＯ－０２】オリゴ糖: ５４４８８３ [【HO-02】Oligosaccharide: 544883]" (Exhibit Otsu 98-3), and "【ＨＯ－０３】オリゴ糖／代理店【運用】：５４４７０１ [【HO-03】Oligosaccharide / Agent【Operation】: 544701]" (Exhibit Otsu 98-4); campaign names are indicated as "【ＨＯ】オリゴ糖 [【HO】Oligosaccharide]," "【ＨＯ】ブランド名 [【HO】Brand name]," and "【ＨＯ】便系 [【HO】Related to feces]";

and advertising costs that the Appellee paid are indicated in the field for "Total costs." Based on these account names and campaign names, it is reasonable to deem that all the amounts indicated in the field for "Total costs" in Exhibit Otsu 98 are advertising costs related to the Defendant's Goods.

Therefore, concerning the advertising costs with Yahoo!, it is reasonable to include the total sum of the amounts indicated in Exhibit Otsu 98 as the costs to be deducted from the sales indicated in B. above.

In addition, in Exhibit Otsu 98, the time and amount that the Appellee paid for the advertising costs with Yahoo! are not clear. It is also difficult to identify them based on other materials (Exhibits Otsu 38 and 90-4, and Otsu 93, etc.). However, in consideration of the fact that the advertising costs are the costs that arise continuously in association with business activities, 334,141 yen (the amount obtained by dividing the total amount of 17,709,490 yen in Exhibit Otsu 98 by Subject Period [i] of 53 months) is to be included every month by deeming that said amount was paid.

(c) Based on the above, it is reasonable to determine that the amount of advertising costs with Yahoo! to be deducted from the sales indicated in B. above is 17,709,473 yen in total as indicated in the field for "Advertising costs (Yahoo!)" in the Attachment "Amount of Damages Calculation Table [i]."

c. Google

(a) As examined in b. above, the amount to be deducted cannot be calculated based on Exhibit Otsu 93.

(b) According to the evidence (Exhibit Otsu 97) and the entire import of oral arguments, it is found that Exhibit Otsu 97 is an extraction of Google accounts with the account names of "００＿はぐくみプラス／公式 [00_Hagukumi Plus / Official]" or "０１＿はぐくみオリゴ／記事 [01_Hagukumi Origo / Article]" that the Appellee used during Subject Period [i]. In addition to these account names, based on the fact that the campaign names indicated in Exhibit Otsu 97 do not suggest that goods other than the Defendant's Goods are included, it is reasonable to deem that all the amounts indicated in the field for "Costs" in Exhibit Otsu 97 are advertising costs related to the Defendant's Goods.

Therefore, concerning advertising costs with Google, it is reasonable to include 62,431,004 yen, the total of the amounts indicated in Exhibit Otsu 97, as the costs to be deducted from the sales indicated in B. above.

In addition, based on the fact that said amount is different by only one yen from the total sum of the amount indicated in Exhibit Otsu 90-5, which is a calculation statement created by the Appellee, it is reasonable to find the time when the advertising costs were

paid and the amount are as indicated in Exhibit Otsu 90-5 (however, the aforementioned one yen should be deducted from the spending amount in July 2014 upon inclusion).
(c) Based on the above, it is reasonable to determine that the amount of advertising costs with Google to be deducted from the sales indicated in B. above is 62,431,004 yen in total as indicated in the field for "Advertising costs (Google)" in the Attachment "Amount of Damages Calculation Table [i]."
d. Logicad
(a) According to the evidence (Exhibits Otsu 90-2 and Otsu 92) and the entire import of oral arguments, it is found that Exhibit Otsu 92 is a bill created by SoldOut, Inc. related to the advertisement costs during Subject Period [i]; in Exhibit Otsu 92, "Ｌｏｇｉｃａｄ／ＣＰＭ課金 [Logicad/CPM charge]" as a product name and "オリゴ糖用アカウント [Account for oligosaccharide]" as remarks are indicated; and Exhibit Otsu 90-2 is a calculation statement created by the Appellee based on the content of Exhibit Otsu 92, excluding portions in October and November 2014. According to the details stated in Exhibit Otsu 92, it is presumed that Exhibit Otsu 92 includes advertising costs related to the Defendant's Goods; however, it is reasonable to deem that advertising costs related to goods other than the Defendant's Goods are included without distinction.

Then, concerning the advertising costs with Logicad, calculation should be made for the amount obtained by multiplying the total amount from January 2015 through July 2016, which is objectively supported by Exhibit Otsu 92, by the sales ratio of the Defendant's Goods among the overall sales of the Appellee. However, as different from other advertising costs, based on the fact that the period when the Appellee paid the advertising costs with Logicad is limited to the aforementioned period, it is reasonable to determine that the sales ratio to be multiplied is the mean value of the sales ratio during the aforementioned period, 34.93% (mean value of the ratio indicated in the field for "Composition ratio" in Exhibit Otsu 99-2).

Therefore, concerning the advertising costs with Logicad, it is reasonable to include the amount obtained by multiplying the amount indicated in the field for "Total advertising costs (yen, including tax)" in Exhibit Otsu 90-2 (however, excluding the portions in October and November 2014) by 34.93% as the costs to be deducted from the sales indicated in B. above.
(b) Based on the above, the amount of advertising costs with Logicad to be deducted from the sales indicated in B. above is 6,675,227 yen in total as indicated in the field for "Advertising costs (Logicad)" in the Attachment "Amount of Damages Calculation Table [i]."

e. Lalune

(a) According to the evidence (Exhibits Otsu 90-3 and Otsu 92) and the entire import of oral arguments, it is found that Exhibit Otsu 92 is a bill created by SoldOut, Inc. related to the advertising costs during Subject Period [i]; in Exhibit Otsu 92, "ラルーン／ＬａｌｕｎｅＡｄｓ [Lalune/LaluneAds]" is indicated as the product name; and Exhibit Otsu 90-3 is a calculation statement created by the Appellee based on the content of Exhibit Otsu 92.

(b) However, based only on the content of Exhibit Otsu 92 as indicated above, concerning the amount indicated as "Lalune," the details of the expense items and whether they have a relationship with the Defendant's Goods are not clear. Then, it should be said that the advertising costs with Lalune alleged by the Appellee lack support by objective materials.

(c) Based on the above, it should be said that the advertising costs with Lalune cannot be deducted from the sales indicated in B. above (as indicated in the field for "Advertising costs (Lalune)" in the Attachment "Amount of Damages Calculation Table [i]").

E. Deduction of outsourcing costs of telemarketing center

(A) According to the evidence (Exhibit Otsu 50) and the entire import of oral arguments, it is found that the Appellee outsourced selling through a telemarketing center to KIZUNA co., ltd. and pays outsourcing fees based on call handling hours, etc.; however, the details of the operation of the telemarketing center and the amount of costs required during Subject Period [i] are not clear.

(B) Then, it should be said that it is not reasonable to deduct the aforementioned outsourcing fees from the sales indicated in B. above (as indicated in the field for "Outsourcing fees" in the Attachment "Amount of Damages Calculation Table [i]").

F. Deduction of system usage fees

(A) According to the evidence (Exhibit Otsu 49) and the entire import of oral arguments, it is found that the Appellee used the settlement system for payment for goods when selling the Defendant's Goods on their e-commerce site and pays system usage fees based on the number of settlements; however, the amount of system usage fees required during Subject Period [i] has not been proved.

(B) Then, it should be said it is not reasonable to deduct the aforementioned system usage fees from the sales indicated in B. above (as indicated in the field for "System usage fees" in the Attachment "Amount of Damages Calculation Table [i]").

G. Other

The Appellee alleged concerning the costs to be deducted from the sales indicated

in B. above in addition to the above; however, none of them can be accepted.

H. The amount of interest that the Appellee received

Based on the examination above, the amount of interest that the Appellee received from selling the Defendant's Goods during Subject Period [i] is 733,061,980 yen in total as indicated in the field for "Marginal profit" in the Attachment "Amount of Damages Calculation Table [i]."

I. Reason for rebuttal of presumption and percentage of rebuttal

(A) Framework of decision

The presumption of the amount of damages pursuant to Article 5, paragraph (2) of the UCP Act is construed to be rebutted in cases where any circumstances are found to deny the possibility that the infringed person could have received the interest received by the infringer if there were no act of infringement.

(B) Examination

a. The reasons for rebuttal related to the Misleading Indications on Quality are as indicated from the beginning of line 13, page 29 through the end of line 9, page 21 of the judgment in prior instance and, therefore, they are cited.

b. According to the circumstances described in a. above, it cannot be said that there is a very strong correlation between increases in sales amount of the Defendant's Goods by the Appellee's Misleading Indications on Quality, decreases in the sales amounts of other oligosaccharide-containing foods, and decreases in the sales amount of the Plaintiff's Goods.

On the other hand, however, in consideration of the facts that the Misleading Indications on Quality were made continuously for approximately four years and four months, and that both the Plaintiff's Goods and the Defendant's Goods are different from many other competitive products and they are goods with a selling point that the combination ratio of oligosaccharide is high, and therefore, they are more directly in a competitive relationship, it should be said that it is difficult to deny that the Misleading Indications on Quality had a certain impact on the sales amounts of the Plaintiff's Goods and the Defendant's Goods.

c. Taking into account the aforementioned circumstances together, it is reasonable to determine that the percentage of rebuttal of presumption when calculating the amount of damages from the Misleading Indications on Quality is 91%.

J. The amount of damages from the Misleading Indications on Quality

Based on the above, the amount of damages from the Misleading Indications on Quality is 65,975,573 yen in total as indicated in the field for "Amount after the rebuttal of presumption (9%)" in the Attachment "Amount of Damages Calculation Table [i]."

(2) Damages from the Acts of Damaging Credit

A. Calculation method

(A) As examined above, the Appellee committed the Acts of Damaging Credit on October 8, 2016. In consideration of the fact that the Acts of Damaging Credit were acts committed at the Event in which affiliate marketers participated, it cannot be denied that, according to subsequent articles posted on blogs, etc. of affiliate marketers, for the period until November 2018, when it is found that the Appellee was making the Misleading Indications on Quality (hereinafter referred to as "Subject Period [ii]"), the Acts of Damaging Credit had an impact on the sale of the Plaintiff's Goods along with the aforementioned Misleading Indications on Quality. Therefore, it is found that the business interests of the Appellant were infringed by the Appellee's Acts of Damaging Credit.

(B) In addition, based on Article 5, paragraph (2) of the UCP Act, the amount of interest that the Appellee received from the Acts of Damaging Credit during Subject Period [ii] is presumed to be the amount of damages to the Appellant.

B. The amount of interest that the Appellee received

The sales of the Appellee and the costs to be deducted during Subject Period [ii] should be calculated in the same way as examined in (1) above and the amounts are as indicated in the field of expense items in the Attachment "Amount of Damages Calculation Table [ii]." The advertising costs with Logicad are not paid during Subject Period [ii] (Exhibits Otsu 90-2 and Otsu 92).

Consequently, the amount of interest that the Appellee received from selling the Defendant's Goods during Subject Period [ii] is 292,528,485 yen in total as indicated in the field for "Marginal profit" in the Attachment "Amount of Damages Calculation Table [ii]."

C. Reasons for rebuttal of presumption and percentage of rebuttal

(A) As mentioned in A. above, in consideration of the fact that the Acts of Damaging Credit were acts committed at the Event in which affiliate marketers participated, the possibility cannot be denied that the sales amounts of the Plaintiff's Goods and the Defendant's Goods received a certain impact by affiliate marketers' subsequent acts of posting articles based on the details of the Acts of Damaging Credit on their blogs, etc.

On the other hand, however, taking into account the facts that the Acts of Damaging Credit were only committed on the day of the Event, that the number of persons who heard the Explanation by the Defendant's employee was approximately several dozen persons among over 2000 affiliate marketers who participated in the Event and that how much the details of the Acts of Damaging Credit were reflected in the articles of affiliate

marketers posted on their blogs, etc., is not clear, it is difficult to consider that the Acts of Damaging Credit immediately caused the aforementioned impact.
(B) Taking into account the aforementioned circumstances together, it is reasonable to determine that the percentage of rebuttal of presumption when calculating the amount of damages from the Acts of Damaging Credit is 99%.
D. Amount of damages from the Acts of Damaging Credit

Based on the above, the amount of damages from the Acts of Damaging Credit is 2,925,280 yen as indicated in the field for "Amount after the rebuttal of presumption (1%)" in the Attachment "Amount of Damages Calculation Table [ii]."
(3) Allegation of the Appellant
A. The Appellant alleged that it should be considered that the indications on promotional websites of affiliate marketers have major impacts on consumers and the fact that the Appellee advertises points other than being made of 100% oligosaccharide as features of the Defendant's Goods should not be used as a basis for rebuttal.

However, it is considered that consumers in the market of oligosaccharide-containing foods use not only the combination ratios of oligosaccharide but also other combined components and expected effects of overall goods as reference materials for making important decisions when selecting goods. Then, the fact that the Appellee advertises points other than being made of 100% oligosaccharide as features of the Defendant's Goods should be considered as reasons for rebuttal.

In addition, it cannot be denied that indications on promotional websites of affiliate marketers have a considerable impact on consumers; however, on the other hand, since those websites structurally make consumers who visit said websites purchase the Defendant's Goods via the Appellee's website, it should be said that it is not reasonable to value the impact of indications on the promotional websites of affiliate marketers excessively.

Consequently, the aforementioned allegation of the Appellant cannot be accepted.
B. The Appellant alleged that since 13 goods indicated in Exhibit Otsu 59 are not goods that may be substitutable in terms of features that consumers focus on, said 13 goods do not fall under competitive products of the Plaintiff's Goods.

However, it can be said that, in the market of oligosaccharide-containing foods, most of the goods list an intestinal regulating function as one of their major efficacies regardless of form of the goods (Exhibit Ko 72). In addition, it can be said that, in the aforementioned market, containing oligosaccharide, which is considered to be good for the human body, is a feature of goods that meets the needs of consumers seeking healthy goods. Therefore, it should be said that the aforementioned goods are competitive

products with features common to the Plaintiff's Goods.

Consequently, the aforementioned allegation of the Appellant cannot be accepted.

C. The Appellant alleged that the results of the questionnaire that the Appellee implemented cannot be trusted.

However, said questionnaire was intended to broadly seek comments concerning the Defendant's Goods and it cannot be said that there is no unjust bias in the target persons and the details of questions, etc. Based on these facts, it is obvious that the questionnaire may serve as material to learn purchasers' motives for purchasing the Defendant's Goods.

Consequently, the aforementioned allegation of the Appellant cannot be accepted.

(4) Summary

Based on the aforementioned examination, the amount of damages to the Appellant in this case is found to be 68,900,853 yen as indicated in the Attachment "Amount of Damages Calculation Table [iii]."

In addition, concerning misleading indications on quality and acts of damaging credit under the UCP Act, a situation similar to the establishment of the right or the licensing by the right holder is unlikely to arise retroactively. Therefore, it should be said that it is not reasonable to add an amount equivalent to the consumption tax to said amount.

5. Issue [v] (Necessity of deletion, etc. of indication)

(1) Misleading Indications on Quality

A demand for injunction, etc. related to the Misleading Indications on Quality is not upheld as described from "他方，[On the other hand,]" in line 25, page 21 through the end of line 12, page 22 of the judgment in prior instance and, therefore, it is cited.

(2) Acts of Damaging Credit

A. As examined in 2. above, it can be said that the explanation by the Appellee's employee in the Event (the Explanation) damages the Appellant's credit.

However, it is found that the Explanation was given only once and there are no other circumstances where there is a probability that explanations to damage the credit of the Appellant will be given again in the future, such as the same explanation subsequently being given repetitively, in this case, etc.

B. Therefore, the Appellant's demand for injunction against making or circulating the False Allegations is groundless.

6. Conclusion

Based on the above, the demand of the Appellant should be upheld to the extent that the Appellee pays 68,900,853 yen and delay damages accrued thereon (delay damages

accrued at the rate of 5% per annum for the period from the day following the day on which the complaint was served, March 23, 2018, for the portion until February 2018 and for the period from the last day of every month for the portion of monthly payment thereafter) and the judgment in prior instance that differs from the above is not reasonable.

Consequently, the judgment in prior instance is altered and the judgment is rendered as indicated in the main text.

Intellectual Property High Court, Third Division
Presiding judge: SHOJI Tamotsu
Judge: NAKADAIRA Ken
Judge: TSUNO Michinori

(Attachment)

List of Articles

Product name: はぐくみオリゴ [Hagukumi Origo]

General name: Oligosaccharide foods

Distributor: Appellee

(Attachment)

List of Acts of Damaging Credit

1. Act of announcing or circulating the details that "Kaiteki Origo sold by the Appellant is not made of 100% oligosaccharide; however, Hagukumi Origo sold by the Appellee is made of 100% oligosaccharide and is a good product" and "Kaiteki Origo has a lower sugar level and, therefore, Hagukumi Origo has better quality" and other details with the same purport

2. Act of announcing or circulating the details that "Hagukumi Origo sold by the Appellee is made of 100% oligosaccharide and can be differentiated from the products of other competitors" and other details with the same purport

(Attachment)

List of Misleading Indications

Indications on quality, such as "オリゴ糖１００％ [Oligosaccharide 100%]," "１００％オリゴ糖 [100% oligosaccharide]," "純粋１００％オリゴ糖 [Pure 100% oligosaccharide]," "純度１００％ [Purity 100%]," "１００％高純度のオリゴ糖 [100% high-purity oligosaccharide]," "オリゴ糖 １００ パーセント [Oligosaccharide 100 percent]," "オリゴ糖 １００ [Oligosaccharide 100]," "１００％高純度 [100% high-purity]," "天然由来１００％オリゴ糖 [Naturally derived 100% oligosaccharide]," "濃密な５種のオリゴ糖を独自ブレンドした自然由来１００％のはぐくみオリゴ [Rich in 5 kinds of uniquely-blended oligosaccharides; Naturally derived 100% Hagukumi Origo]," or other indications on quality with the same purport

(Attachment)

List of Documents

1. A document stating that "天然由来１００％オリゴ糖にこだわり抜いたものは『はぐくみオリゴ』だけ [Only 'Hagukumi Origo' pays full attention to naturally derived 100% oligosaccharide]" and a document stating that "オリゴ糖１００％ [Oligosaccharide 100%]," "オリゴ糖１００％で作っているため，他社商品と差別化ができ [since it is made of 100% oligosaccharide, it can be differentiated from the products of other companies]," "オリゴ糖１００％にこだわった商品です。その点で競合他社商品との差別化を伝えることが出来るかが成果をアップさせるポイントです [It is a product especially focusing on 100% oligosaccharide. In this regard, whether you can communicate the difference with the products of other competitors is a key point to increase your performance.]" that were distributed by the Appellee at the A8 Festival 2017 in Shibuya held at Shibuya Hikarie / Hikarie Hall on June 3, 2017

2. A document stating that "天然由来１００％オリゴ糖にこだわり抜いたものは『はぐくみオリゴ』だけ [Only 'Hagukumi Origo' pays full attention to naturally derived 100% oligosaccharide]" and a document stating that "オリゴ糖１００％ [Oligosaccharide 100%]," "オリゴ糖１００％で作っているため，他社商品と差別化ができ [since it is made of 100% oligosaccharide, it can be differentiated from the products of other companies]," "オリゴ糖１００％にこだわった商品です。その点で競合他社商品との差別化を伝えることが出来るかが成果をアップさせるポイントです [It is a product especially focusing on 100% oligosaccharide. In this regard, whether you can communicate the difference with the products of other competitors is a key point to increase your performance.]" that were distributed by the Appellee at the A8 Festival 2017 in Osaka held at Osaka Herbis Hall on September 23, 2017

(Attachment)

Amount of Damages Calculation Table [i]

	Jul. 2014 to Feb. 2018	Mar. 2018	Apr. 2018	May 2018	Jun. 2018	Jul. 2018	Aug. 2018	Sept. 2018	Oct. 2018	Nov. 2018	Total
Sales amount (excluding tax)	982,478,979	18,157,051	16,238,861	14,673,350	14,257,405	12,889,512	13,544,503	10,836,712	12,113,248	10,541,951	1,105,731,572
Amount equivalent to the consumption tax	0	0	0	0	0	0	0	0	0	0	0
Accounts receivable	0	0	0	0	0	0	0	0	0	0	0
Sales	982,478,979	18,157,051	16,238,861	14,673,350	14,257,405	12,889,512	13,544,503	10,836,712	12,113,248	10,541,951	1,105,731,572
Costs	-149,267,384	-2,561,725	-2,296,659	-2,076,884	-2,015,097	-1,782,309	-1,925,594	-1,534,572	-1,710,197	-1,531,307	-166,701,728
Shipping costs	-29,553,813	-945,075	-1,135,932	-971,635	-965,571	-721,238	-662,968	-560,264	-537,732	-539,672	-36,593,900
Payment fees (Densan System)	-12,428,787	-682,347	-533,124	-663,555	-581,837	-497,189	-445,880	-421,305	-440,462	-477,114	-17,171,600
Payment fees (Zeus)	-13,893,767	-621,632	-613,120	-608,825	-583,603	-533,809	-507,463	-423,237	-451,937	-427,331	-18,664,724
Advertising costs (A8.net)	-45,243,482	-215,709	-151,757	-217,253	-195,819	-53,913	-186,501	0	-210,606	-246,896	-46,721,936
Advertising costs (Yahoo!)	-14,702,204	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-17,709,473
Advertising costs (Google)	-51,770,317	-1,441,675	-1,403,360	-1,400,826	-1,141,193	-1,047,854	-1,476,153	-1,687,207	-632,393	-430,026	-62,431,004
Advertising costs (Logicad)	-6,675,227	0	0	0	0	0	0	0	0	0	-6,675,227
Advertising costs (Lalune)	0	0	0	0	0	0	0	0	0	0	0
Outsourcing costs	0	0	0	0	0	0	0	0	0	0	0
System usage fees	0	0	0	0	0	0	0	0	0	0	0
Marginal profit	658,943,998	11,354,747	9,770,768	8,400,231	8,440,144	7,919,059	8,005,803	5,875,986	7,795,780	6,555,464	733,061,980

Amount after the rebuttal of presumption (9%)	2,184,105	113,547	97,707	84,002	84,401	79,190	80,058	58,759	77,957	65,554	2,925,280

(Attachment)

Amount of Damages Calculation Table [ii]

	Oct. 2016 to Feb. 2018	Mar. 2018	Apr. 2018	May 2018	Jun. 2018	Jul. 2018	Aug. 2018	Sept. 2018	Oct. 2018	Nov. 2018	Total
Sales amount (excluding tax)	341,877,056	18,157,051	16,238,861	14,673,350	14,257,405	12,889,512	13,544,503	10,836,712	12,113,248	10,541,951	465,129,649
Amount equivalent to the consumption tax	0	0	0	0	0	0	0	0	0	0	0
Accounts receivable	0	0	0	0	0	0	0	0	0	0	0
Sales	341,877,056	18,157,051	16,238,861	14,673,350	14,257,405	12,889,512	13,544,503	10,836,712	12,113,248	10,541,951	465,129,649
Costs	-51,975,993	-2,561,725	-2,296,659	-2,076,884	-2,015,097	-1,782,309	-1,925,594	-1,534,572	-1,710,197	-1,531,307	-69,410,337
Shipping costs	-19,903,981	-945,075	-1,135,932	-971,635	-965,571	-721,238	-662,968	-560,264	-537,732	-539,672	-26,944,068
Payment fees (Densan System)	-8,724,787	-682,347	-533,124	-663,555	-581,837	-497,189	-445,880	-421,305	-440,462	-477,114	-13,467,600
Payment fees (Zeus)	-8,859,404	-621,632	-613,120	-608,825	-583,603	-533,809	-507,463	-423,237	-451,937	-427,331	-13,630,361
Advertising costs (A8.net)	-9,235,440	-215,709	-151,757	-217,253	-195,819	-53,913	-186,501	0	-210,606	-246,896	-10,713,894
Advertising costs (Yahoo!)	-5,680,397	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-334,141	-8,687,666
Advertising costs (Google)	-19,086,551	-1,441,675	-1,403,360	-1,400,826	-1,141,193	-1,047,854	-1,476,153	-1,687,207	-632,393	-430,026	-29,747,238
Advertising costs (Logicad)	0	0	0	0	0	0	0	0	0	0	0
Advertising costs (Lalune)	0	0	0	0	0	0	0	0	0	0	0
Outsourcing costs	0	0	0	0	0	0	0	0	0	0	0
System usage fees	0	0	0	0	0	0	0	0	0	0	0
Marginal profit	218,410,503	11,354,747	9,770,768	8,400,231	8,440,144	7,919,059	8,005,803	5,875,986	7,795,780	6,555,464	292,528,485

Amount after the rebuttal of presumption (1%)	2,184,105	113,547	97,707	84,002	84,401	79,190	80,058	58,759	77,957	65,554	2,925,280

(Attachment)

Amount of Damages Calculation Table [iii]

	Jul. 2014 to Feb. 2018	Mar. 2018	Apr. 2018	May 2018	Jun. 2018	Jul. 2018	Aug. 2018	Sept. 2018	Oct. 2018	Nov. 2018	Total
Amount of Damages from Misleading Indications on Quality	59,304,959	1,021,927	879,369	756,020	759,612	712,715	720,522	528,838	701,620	589,991	65,975,573

	Oct. 2016 to Feb. 2018	Mar. 2018	Apr. 2018	May 2018	Jun. 2018	Jul. 2018	Aug. 2018	Sept. 2018	Oct. 2018	Nov. 2018	Total
Amount of Damages from the Acts of Damaging Credit	2,184,105	113,547	97,707	84,002	84,401	79,190	80,058	58,759	77,957	65,554	2,925,280

	To Feb. 2018	Mar. 2018	Apr. 2018	May 2018	Jun. 2018	Jul. 2018	Aug. 2018	Sept. 2018	Oct. 2018	Nov. 2018	Total
Total amount	61,489,064	1,135,474	977,076	840,022	844,013	791,905	800,580	587,597	779,577	655,545	68,900,853