

Right of Publicity	Date	December 26, 2022	Court	Intellectual Property High Court, Second Division
	Case number	2022 (Ne) 10059		
<p>- A case in which a contract provision imposing a non-competition obligation after the termination of an exclusive talent management agreement concluded between a music promoter and artists was determined to be invalid as it runs counter to the public policy due to the restriction of the freedom of choice of occupation or freedom of business activity.</p> <p>- A case in which the court determined that members of a music group (a rock band) have a right of publicity and moral rights of performer (a right of attribution) with respect to a group name.</p>				

Case type: Compensation for damages

Result: Modification of the prior instance judgment

References: Article 90-2 of the Copyright Act, Articles 90, 709 and 710 of the Civil Code, and Article 22, paragraph (1) of the Constitution of Japan

(Judgment of the prior instance) Tokyo District Court, 2019 (Wa) 35186, rendered on April 28, 2022

Summary of the Judgment

1. X1, X2, X3 and X4 (collectively, "X1, etc.") concluded an exclusive talent management agreement (the "Exclusive Management Agreement") with Company Y, a music promoter, and engaged in band activities using the Group Name. After the termination of the agreement, X1, etc. attempted to continue the band activities using the group name in question (the "Group Name"); however, Company Y and the company's representative Y2 sent letters to related parties informing such matters as that the band was prohibited under the Exclusive Management Agreement from entering into any agreement for performance without consent from Company Y for six months from the termination of the agreement, but Company Y has never provided such consent, and that Company Y is the holder of the trademark right concerning the Group Name but Company Y has never allowed X1, etc. to use the Group Name (collectively, the "Notices"). X1, etc. instituted a lawsuit against Company Y and Y2 demanding the payment of the damages in amount of 990,000 yen and delay damages for each of them, jointly and severally, based on the allegation that the Notices and other acts taken by Company Y and Y2 constitute a tort of infringement of their right of business activity, right of publicity, freedom of business activity, right of honor, and moral rights of

performer (a right of attribution).

2. In the judgment in the prior instance, the court found that the portion of the Notices claiming that Company Y is the holder of the trademark right and that Company Y is in the position to grant license to use the Group Name are not true, and that Company Y and Y2 infringed the right of business activity of X1, etc. by sending the Notices. The court partially granted the claims of X1, etc. to the extent of the payment of 220,000 yen and delay damages accrued thereon. Both sides filed an appeal against this decision.

3. In the judgment of the appellate instance, on the basis of the findings that [i] the non-competition clause under the Exclusive Management Agreement (the "Provision") is invalid, and that [ii] Company Y has no authority to restrict X1, etc. from using the Group Name as the right of publicity and moral rights of performer (a right of attribution) with respect to the Group Name are attributed to X1, etc. and there is no agreement to justify the restriction on the exercise of these rights by X1, etc. after the termination of the Exclusive Management Agreement, the court determined that the Notices sent by Company Y and Y2 constitute a tort of unfairly obstructing the band activities using the Group Name by X1, etc., and modified the judgment in the prior instance as it was reasonable to grant the claims of X1, etc. in their entirety.

(1) Non-competition clause

The Provision materially restricts the activities of X1, etc. as artists for six months from the termination of the Exclusive Management Agreement, prohibiting them from doing activities utilizing skills and experience gained by themselves and restricting the freedom of choice of occupation and freedom of business activity. Consequently, this Provision should be held invalid as it runs counter to the public policy if the restriction imposed by the Provision is found to be unreasonable. In addition, the reasonableness should be determined based on the comprehensive assessment of the purpose of the Provision, the interest of Company Y protected by the Provision, disadvantage to X1, etc. and other situations.

Company Y and Y2 allege that the objective of the Provision is to secure the recovery of initial investment; however, it is the performance of X1, etc. that appeals to their customers (fans), not the performance of other artists affiliated with Company Y. Therefore, restricting the performance activities of X1, etc. by the Provision alone would not generate income for Company Y and help to achieve the purpose of recovering initial investment, and the restriction on activities of X1, etc. by the Provision is considered to have no relationship with the recovery of initial investment made by Company Y. ... Consequently, without the need to examine other matters, the court finds that the restriction by the Provision has no reasonable grounds and the

Provision is invalid as it runs counter to public policy.

(2) Use of the Group Name

A. Right of publicity

As a name, portrait, etc. of an individual (hereinafter referred to as "portrait, etc.") represents the personality of the individual, it is understood that any individual has a right to exclude the unauthorized use of portrait, etc. by third parties as a right derived from personal rights. Portrait, etc. can promote the sale of goods by attracting consumers, and a right to exclusively use this capacity to attract consumers (a right of publicity) stems from the commercial value of the portrait, etc. itself. Therefore, this right of publicity can be understood to form a part of rights derived from the personal rights explained above. Further, it is also understood that, in the case of a group name representing a group of performers, if the group name can easily associate a specific person as the information identifying the group of which the person is a member, an individual member is entitled to exercise a right of publicity with respect to the group name based on his/her personal rights, like the case of a stage name or pen name.

In light of past activities of the Group, the court finds that the Group has a certain degree of capacity to attract consumers. ... the court presumes that the Group Name could easily associate X1, etc. with the information identifying the group of which they are members. Accordingly, X1, etc. are entitled to exercise their right of publicity with respect to the Group Name.

Meanwhile, a right of publicity is a right based on personal rights and it is difficult to understand it as a right transferrable to Company Y. Even based on the comprehensive review of the provisions contained in the Exclusive Management Agreement, the court cannot find that Company Y had an authority to exercise the right of publicity with respect to the Group Name after the termination of the Exclusive Management Agreement.

B. Moral rights of performer (a right of attribution)

This is also the case for a right of attribution (Article 90-2 of the Copyright Act), which is a part of moral rights of performer. After the termination of the Exclusive Management Agreement, a right of attribution, i.e., a right to determine whether to mention the Group Name at the time of performance of the Group, which is a part of moral rights of performer that only belong to the performer, cannot be attributed to Company Y. Therefore, Company Y is also not entitled to exercise this right of attribution with respect to the Group Name.

Judgment rendered on December 26, 2022

2022 (Ne) 10059, Appeal case of seeking compensation for damages

(Court of prior instance: Tokyo District Court, 2019 (Wa) 35186

Date of conclusion of oral argument: October 31, 2022

Judgment

Indication of the parties: As stated in the List of Parties attached to this judgment

Main text

1. Based on the appeal from the first-instance Plaintiffs, the judgment in the prior instance is modified as follows.
2. The first-instance Defendants shall, jointly and severally, pay to first-instance Plaintiff X1 990,000 yen and an amount accrued thereon at the rate of 5% per annum, for the period from January 17, 2020 until the completion of payment in the case of the first-instance Defendant company, and for the period from January 23, 2020 until the completion of payment in the case of first-instance Defendant Y.
3. The first-instance Defendants shall, jointly and severally, pay to first-instance Plaintiff X2 990,000 yen and an amount accrued thereon at the rate of 5% per annum, for the period from January 17, 2020 until the completion of payment in the case of the first-instance Defendant company, and for the period from January 23, 2020 until the completion of payment in the case of first-instance Defendant Y.
4. The first-instance Defendants shall, jointly and severally, pay to first-instance Plaintiff X3 990,000 yen and an amount accrued thereon at the rate of 5% per annum, for the period from January 17, 2020 until the completion of payment in the case of the first-instance Defendant company, and for the period from January 23, 2020 until the completion of payment in the case of first-instance Defendant Y.
5. The first-instance Defendants shall, jointly and severally, pay to first-instance Plaintiff X4 990,000 yen and an amount accrued thereon at the rate of 5% per annum, for the period from January 17, 2020 until the completion of payment in the case of the first-instance Defendant company, and for the period from January 23, 2020 until the completion of payment in the case of first-instance Defendant Y.
6. The appeal from the first-instance Defendants shall be dismissed in its entirety.
7. The first-instance Defendants shall bear the court costs for the first and second instances.

Facts and reasons

Unless otherwise instructed in this judgement, the abbreviations of terms and their meanings are as defined in the judgment in the prior instance. The term "attachment" in

the judgment in the prior instance is replaced with "attachment to the judgment in the prior instance."

No. 1 Object of the claim

1. Object of the claim of the first-instance Plaintiffs

Same as paragraphs 1 through 5 and 7 of the main text.

2. Object of the claim of the first-instance Defendants

(1) The portion of the judgment in the prior instance dismissing the claims of the first-instance Defendants shall be revoked.

(2) With respect to the portion to be revoked as referred to in the preceding paragraph, all claims of the first-instance Plaintiffs shall be revoked.

(3) The court costs for both the first and second instances shall be borne by the first-instance Plaintiffs.

No. 2 Outline of the case

1. Summary of the case

The first-instance Plaintiffs concluded the Exclusive Talent Management Agreement with the first-instance Defendant company, under which they were engaged in music performance activities as members of a band named "A" (hereinafter the "Group Name"). After the termination of this agreement, they attempted to continue music performance activities using the Group Name; however, the first-instance Defendant company or first-instance Defendant Y delivered or transmitted a letter or email to related parties to inform them of the following facts: [i] that the agreement prohibits the band from executing any performance agreement without consent from the first-instance Defendant company for six months from the termination of the agreement, but the company has never provided any such consent; and [ii] that the company is the sole holder of a trademark right concerning the Group Name but it has never allowed the first-instance Plaintiffs to use the Group Name (hereinafter collectively the "Notices"). The first-instance Plaintiffs instituted a litigation against first-instance Defendant Y and first-instance Defendant company, claiming that they are liable, jointly and severally, to pay damages in amount of 990,000 yen for each of the first-instance Plaintiffs and the delay damages accrued thereon at 5% per annum, which is the rate stipulated under the Civil Code before the revision by Act No. 44 of 2017, for the period from the day immediately after the day of service of complaint to each of the first-instance Defendants, which is the day after the day when the tort took place, to the completion of the full payment, pursuant to Article 709 of the Civil Code for first-instance Defendant Y and pursuant to Article 709 of the Civil Code or Article 350 of the Companies Act for the first-instance Defendant company, on the grounds of tort

by way of infringement of their right of business, right of publicity, freedom of business activity, right of honor and moral rights of performer (a right of attribution).

In the judgment in the prior instance, the court granted the first-instance Plaintiffs' claim to the extent of demanding the first-instance Defendants to make payments, jointly and severally, of damages in amount of 200,000 yen and 20,000 yen as attorneys' fees as well as delay damages accrued thereon, and dismissed the other claims, on the basis of the finding that the text in Notices 1 through 4 claiming that the first-instance Defendant company is the owner of the trademark right and that the company is in a position to grant a license to use the Group Name was not true, and the first-instance Defendants infringed the right of business of the first-instance Plaintiffs by the first-instance Defendant company sending the Notices based on a strong intention of first-instance Defendant Y.

Both the first-instance Plaintiffs and first-instance Defendants instituted an appeal against the portion of the judgment in the prior instance deciding against each party, respectively.

2. Basic facts (meaning facts not disputed by the parties and facts found from evidence (the evidence numbers shown in this judgment include branch numbers, unless otherwise indicated) and the entire import of oral arguments; hereinafter collectively "basic facts").

Except as corrected as follows, the court cites the basic facts as described in "No. 2 Outline of the case" of "Facts and reasons" in the judgment in the prior instance.

(1) The text "exclusive agency agreement" in page 4, line 7 of the judgment in the prior instance is replaced with "exclusive management and agency agreement"; the text "and it was finally renewed on January 1, 2018" in page 4, line 10 is replaced with "and the final renewal was made between the first-instance Plaintiffs and the first-instance Defendant company on January 1, 2018"; the text "the final renewal version of the agreement is referred to as the "Exclusive Management Agreement" in page 4, line 11 is replaced with "the exclusive agency and management agreement concluded between the first-instance Plaintiffs, who are the member of the Group, and the first-instance Defendant company is referred to as the 'Exclusive Management Agreement'"; the text "In the Exclusive Management Agreement (meaning the Exclusive Talent Management Agreement (Exhibit Ko 4); hereinafter referred to as the "Agreement")" in page 4, lines 13 and 14 is replaced with "an agreement concluded between the first-instance Plaintiffs and the first-instance Defendant company upon the final renewal of the Exclusive Management Agreement (meaning the Exclusive Talent Management Agreement dated January 1, 2018 (Exhibit Ko 4); hereinafter referred to as the "Agreement")".

(2) The phrase starting from "The Defendant company requested" and ending with "but the Plaintiffs refused it." in page 4, lines 20 through 22 of the judgment in the prior instance is replaced with "The first-instance Defendant company requested the first-instance Plaintiffs to hold a meeting to discuss such issues as whether to go ahead with the live performance scheduled in or after October 2019 and the recording of an album scheduled to be released in November 2019, the compensation for damages in case of cancellation, and arrangements for closing the fan clubs; however, the first-instance Plaintiffs refused to hold discussion concerning the compensation for damages saying that they had never made a legally binding agreement with the first-instance Defendant company with respect to the live performance or release of albums." In addition, the term "Exhibit Ko 5 and" is inserted prior to the "Exhibits Otsu 6 through 9" at the end of page 4, line 23.

(3) The term "SUKIYAKI Inc." in page 5, lines 5 and 6 of the judgment in the prior instance is replaced with "SKIYAKI Inc. (hereinafter referred to as "SKIYAKI")"; the term "Kabushiki Kaisha Ong" in page 5, line 11 is replaced with "Kabushiki Kaisha Ong (hereinafter referred to as "Ong")"; the term "Exit Tunes Kabushiki Kaisha" in page 5, lines 15 and 16 is replaced with "Exit Tunes Kabushiki Kaisha (hereinafter referred to as "Exit Tunes")"; and the term "Exhibit Ko 30" in page 5, lines 17 and 18 is replaced with "Exhibits Ko 6 and 30."

(4) The term "the same company" in page 6, line 6 of the judgment in the prior instance is replaced with "AZMIX, Inc."; and the term "eplus Inc." in page 6, lines 9 and 10 is replaced with "eplus Inc. (hereinafter referred to as "eplus")".

3. Issues

- (1) Whether first-instance Defendant Y made the Request (Issue 1)
- (2) Whether each of the Notices and Request constitutes a tort (Issue 2)
- (3) Existence and amount of damages suffered by the first-instance Plaintiffs (Issue 3)

(omitted)

No. 3 Judgment of this court

1. According to the evidence below and the entire import of oral arguments, in addition to the basic facts, the following facts can be found.

(1) Provisions of the Agreement

The Agreement dated January 1, 2018 contains the following provisions, as well as the name and seal of first-instance Defendant Y as the representative director of the first-instance Defendant company, the indication of "music performer group 'A'" and

the signatures and seals of the first-instance Plaintiffs as artists (Exhibit Ko. 4).

"Yugen Kaisha Sirene (hereinafter referred to as the 'Agent') and the artist group 'A' (constituted by artists X1, X2, X3 and X4; hereinafter collectively referred to as the 'Artist') hereby enter into this exclusive agency agreement (hereinafter referred to as the 'Agreement') as follows:

Article 1. Artist retains Agent as its sole and exclusive agent in accordance with the provisions of this Agreement as an artist and shall not make or negotiate for any performance (hereinafter referred to as 'performance activities') for any party other than Agent.

Article 2. The 'performance activities' as referred to in the preceding paragraph is as follows:

- (i) appearance in and performance for television or radio programs and movies;
- (ii) appearance in and performance for commercial films and commercial music;
- (iii) appearance in and performance for records (meaning CDs, MDs and any other sound recordings and their reproductions) and videogram (DVDs, VHSs, LDs, blue ray discs and any other sound and footage, as well as recordings of footage and their reproductions);
- (iv) appearance in and performance for entertainment programs, concerts and events;
- (v) appearance in and writing of published materials and books, including publication thereof;
- (vi) activities as authors (in accordance with the rules of the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC));
- (vii) appearance, and the use of names and portrait with respect to merchandise relating to Artist;
- (viii) appearance, and the use of names and portrait with respect to fan clubs and websites relating to Artist; and
- (ix) any and all entertainment activities incidental to the foregoing items.

Article 3. During the term of this Agreement, Agent shall handle all management businesses relating to Artist and make efforts for its successful entertainment activities."

"Article 5. During the term of this Agreement, Agent may use and develop, at no costs and at its sole discretion, Artist's stage names, real names, photographs, portrait, handwriting, biography, sound and any other moral rights for the purpose of advertisement and promotion.

Article 6. Any and all copyright-related rights (including copyrights including rights of reproduction, assignment, distribution, performance or screen presentation, right to make materials transmittable for public, neighboring rights, and rights to demand

royalty for derivative works, lease fees and compensation for private recording, as well as ownership) of Artist with respect to original masters, films, etc. produced during the term of this Agreement, as well as any rights concerning Artist, including trademark, intellectual property rights and merchandising right, shall be attributed to Agent."

"Article 9. The parties shall comply with the following rules during and after the termination of this Agreement.

(1) The term of this Agreement is two years from January 1, 2018.

(2) This Agreement is automatically extended for another two-year period unless either party notifies the other party of its intention to terminate this Agreement no later than three months prior to the expiration of this Agreement.

...

(5) The artists may not enter into any agreement relating to performance, such as a management agreement, with a third party without prior consent from Agent for six months from the termination of this Agreement."

(2) Past activities of the Group

A. (A) On August 1, 2010, first-instance Plaintiffs X1 and X2 as well as D and E concluded the Exclusive Talent Management Agreement with the first-instance Defendant company as a group of artists, "A" (Exhibits Otsu 28 and 37).

(B) On May 20, 2012, E left the Group. On July 14, 2014, first-instance Plaintiffs X3 and X4 joined the Group. On April 26, 2017, a drummer D left the Group (Exhibits Ko 2 and 106 and Exhibit Otsu 37).

(C) First-instance Plaintiffs X1 and X2 have been members of the Group since August 1, 2010, and first-instance Plaintiffs X3 and X4 since July 14, 2012.

(D) The first-instance Plaintiffs are members of the Group, namely, a vocalist X2' (first-instance Plaintiff X2), guitarists X3' (first-instance Plaintiff X3) and X4' (first-instance Plaintiff X4) and a basist X1' (first-instance Plaintiff X1)(Exhibits Ko 2 and 106 and Exhibits Otsu 6 and 37).

B. (A) The Group released nine singles from December 2010 until it discontinued activities before terminating the exclusive management agreement in question (the "Exclusive Management Agreement") (see C. below). The seventh single ranked 17th, and the eighth single came to 8th on Oricon weekly chart. The Group also released one single for streaming only, three albums, three mini albums, one best album and two concept albums (Exhibit Ko 60).

(B) The Group held a solo live event on December 5, 2010. In 2011 and also between 2013 and 2018, the Group held solo concerts including tours several times a year (Exhibit Ko 61).

(C) During the period mentioned in (A) above, the Group appeared on the front page or back cover of Cure, a specialized magazine featuring visual-kei movement indie bands, four times in total. The Group and its members came out on front pages of free magazines such as SHIBUYA-REX "VR-Virtual Realty-," Motto, Gab and ZEAL LINK, and magazines such as SEVEN, Vijuttoke and Club Zy.Mag (Exhibit Ko 62).

(D) The Group's music piece was used as a closing theme of "Akko ni Omakase," a television program of TBS Television, for the April of 2016. The Group also made appearances on TV and radio programs (Exhibit Ko 62).

C. After the concert held at Osaka Nanba Hatch on October 28, 2018, the Group suspended its activities as a group for one year. During this break period, the members did their own activities as solo artists, respectively (Exhibit Ko 3 and Exhibit Otsu 6).

E. At the time when the Group suspended its activity, the number of fan club members was 928 (Exhibit Ko 35).

F. The first-instance Defendant company paid annual fees for 2016 through 2019 in amount ranging between 1,200,000 and 2,200,000 yen to the first-instance Plaintiffs, respectively (Exhibit Otsu 12).

(3) Background to termination of the Exclusive Management Agreement

A. The first-instance Plaintiffs sent a notification dated April 9 or 10 of 2019 to the first-instance Defendant company, through their attorney-at-law, to terminate the Exclusive Management Agreement on July 13, 2019 pursuant to Article 9(2) of the Exclusive Talent Management Agreement dated July 14, 2012. Article 9(2) of the Exclusive Talent Management Agreement dated July 14, 2012 is the same as Article 9(2) of the Agreement; however, the first-instance Plaintiffs and the first-instance Defendants forgot the existence of the Agreement and understood the notification as an intention to terminate the Exclusive Management Agreement without renewal, on the premises that the term of the Exclusive Management Agreement expires on July 13, 2019 according to the provision of the Exclusive Talent Management Agreement dated July 14, 2012 (which provides that the agreement is effective for three years from this date) (Exhibits Ko 2 and 5 and Exhibit Otsu 22).

B. On April 12, 2019, at the conversation with employees of the first-instance Defendant company, who were in charge of the Group's activities, about the notification mentioned in A. above, first-instance Defendant Y said that he was upset about the way in which the Group sent the notification, he would never let them use the Group Name, and he would make them pay compensation (Exhibits Ko 22 and 82 and Exhibit Otsu 32).

C. First-instance Defendant Y held a meeting with the first-instance Plaintiffs at the

office of the first-instance Defendant company on April 21, 2019. After the meeting, first-instance Defendant Y talked only with first-instance Plaintiff X3 and said such things as that he understands the good reason for refusing the renewal but the process is wrong, that all of the process is against the agreement, that his only answer is "no more jobs for you," that he spent one million yen to get a contract for a cover page for restarting the band activities from October, and that the members should confirm the agreement with lawyers as the members are misunderstanding the agreement to a great extent (Exhibit Ko 23 and Exhibits 31 and 37).

D. The first-instance Plaintiffs sent a letter dated April 24, 2019 to the first-instance Defendant company, through their attorney-at-law, about activities after the termination of the agreement on July 13, 2019. In this letter, the plaintiffs informed that they would perform their solo activities which were fixed between July and September of 2019 but requested the cancellation of other performances, and also informed that they have no intention to produce any albums during the six-month period after the termination of the Exclusive Management Agreement (Exhibit Otsu 7).

E. The first-instance Defendant company sent a letter to the first-instance Plaintiffs on June 12, 2019 through its attorney-at-law informing that the company was planning to release the Group's album on November 2019 and started the recording for that purpose on April 23, 2019, and also that the company was planning a comeback stage and solo tour after October 25, 2019 and had already started promotion for that purpose, and demanding them to hold a meeting so that they can discuss compensation for damages. The company also requested the first-instance Plaintiffs to postpone the announcement of closing the fan club as it would take time to do so (Exhibit Otsu 8).

F. The first-instance Plaintiffs sent response letters on June 14 and July 9, 2019 to the first-instance Defendant company through their attorney-at-law, raising an objection that first-instance Defendant Y obstructed the entertainment activities of first-instance Plaintiff X4 by cancelling his slated performance at an event on August 9, 2019 by contacting the sponsor without consent of first-instance Plaintiff X4 (Exhibits Otsu 9 and 10).

G. On June 2, 2019, first-instance Plaintiff X1 sent a LINE message to an employee of SKIYAKI that he wanted to ask SKIYAKI to create a new website after the termination of the Exclusive Management Agreement; however, the employee answered that first-instance Plaintiff X1 should consult the lawyer as the first-instance Defendant company would obstruct the plan and therefore its consent is needed (Exhibit Ko 55).

H. The Exclusive Management Agreement was terminated on July 13, 2019 based on the agreement between the first-instance Plaintiffs and the first-instance Defendant

company. First-instance Plaintiffs X1, X2 and X4 performed their solo performance activities under the management of the first-instance Defendant company even after the termination of the Exclusive Management Agreement until the beginning of September 2019 (Exhibit Ko 48 and Exhibit Otsu 37).

(4) Situations concerning the petition for provisional disposition

A. On August 3, 2019, the first-instance Plaintiffs filed a petition for provisional disposition with the Tokyo District Court, seeking an order to prohibit the first-instance Defendants from obstructing their use of the Group Name and to confirm that there is no non-competition obligation under the provision in question. At the hearing held for the provisional disposition, the attorney for the first-instance Defendant company stated that the Exclusive Management Agreement only relates to band activities and does not restrict the first-instance Plaintiffs from doing solo performance activities (Exhibits 10, 20 and 48).

B. On October 9, 2019, the Tokyo District Court rendered a decision to dismiss the petition (the "Decision to Dismiss") on the basis of the findings that Article 6 of the Agreement provides that the right to use the Group Name is attributed to the first-instance Defendant company and that the unavailability of the Group Name would not make the Group's activities practically impossible. Meanwhile, the first-instance Plaintiffs withdrew the petition with respect to the portion other than the request for the prohibition of obstructing their use of the Group Name on October 2, 2019, before the Decision to Dismiss was rendered. The first-instance Plaintiffs filed an immediate appeal against the Decision to Dismiss (Exhibits Ko 10 and 41).

C. The Tokyo High Court, in the appeal against the decision, revoked the Decision to Dismiss and rendered a decision to prohibit the first-instance Defendant company from obstructing the use of the Group Name by the first-instance Plaintiffs on July 10, 2020, based on the finding that the first-instance Plaintiffs were entitled to use the Group Name as they had a right of publicity with respect to the Group Name, whereas the first-instance Defendant company was not entitled to use the Group Name (Exhibit Ko 41).

(5) Status of activities of the Group after the termination of the Exclusive Management Agreement

A. On August 10, 2019, the first-instance Plaintiffs announced that they would hold concert tours of the Group titled "ReBIRTH" at Akabane ReNy alpha on October 27, at Nagoya ReNY limited on November 1, Osaka amHALL on November 8, 2019, and started selling tickets. For the above-mentioned concerts, first-instance Plaintiff X1 made a reservation of Akabane ReNy alpha and Nagoya ReNY limited on June 28, 2019 (Exhibit Ko 111 and Exhibit Otsu 29).

B. As the first-instance Plaintiffs thought that Notices 1 through 4 from the first-instance Defendants would cause serious trouble for related parties such as live music clubs and that doing activities in the name of the Group would be extremely difficult, they decided to use another name. On September 27, 2019, they announced three concerts in the name of "A", on a website with the same domain name as previously used for the Group's official website (A.jp; hereinafter the "Domain Name"), namely, "A' 2019 Tour 'ReBIRTH'" (hereinafter these three concerts are individually or collectively referred to as the "Concert" or "Concerts"). The dates and venues for the Concerts were the same as the concert mentioned in A. above. In this announcement, in addition to the four first-instance Plaintiffs, a drummer F' (F; hereinafter referred to as "F") or G (G; hereinafter referred to as "G") was mentioned as a member of A' performing at the Concerts (Exhibits Ko 3, 73, 76, 101 and 102 and Exhibit Otsu 13).

C. On the same day, first-instance Plaintiff X1 posted a message on a twitter account "X1'(A)""@redacted" saying "We have something to tell our fans," attaching an image with the message "We decided to use a different name, 'A', for the ReBIRTH tour at Tokyo, Nagoya and Osaka. We are reluctant to say that due to circumstances we cannot say the reason. It is a pity but we made this decision as the success of live performances is our priority." (Exhibit Otsu 14)

D. One of the first-instance Plaintiffs sent an email on October 28, 2019 to "VISUNAVI" and "ViSULOG," information sites for visual-kei music, asking them to post an article on their concert tours for the next year, but there was no response and the article was not released on the websites (Exhibits Ko 37, 38 and 126).

E. The first-instance Plaintiffs held three Concerts announced as mentioned in A. above in the group name of A' in 2019, and 15 solo concerts titled "A' 2020 TOUR 'ReGENERATION'" in 2020. In addition to the first-instance Plaintiffs, F, G, H or some other person participated in the concerts as a drummer. The first-instance Plaintiffs also performed at a concert event, held a concert by way of web-streaming and participated in 14 talk shows in the name of A' during the period from December 2019 to June 2020. In addition, they produced merchandises of A' and sold them at such events as solo concerts (Exhibits Ko 59, 66, 72, 84, 90, 101, 102, 107, 108 and 125, Exhibits Otsu 15, 16, 34, 35 and 41).

F. The first-instance Plaintiffs started the production of a new album before September 2019 and made a recording in late September. However, as of September 28, 2019, they could not fix the release date as they could not use the Group Name and shooting of a music video was delayed. After that, they had completed the mix down for the album before November 12, 2019, but as of January 14, 2020, they exchanged messages

including that they wanted to release the album using the Group Name but needed to wait for the court decision (a decision for the appeal against the case on provisional disposition)(Exhibits Ko 63 and 130 to 132).

G. On April 1, 2020, first-instance Plaintiff X1 was told by a manager of a group which was a co-sponsor of the event on July 8 featuring the Group, that the Group's performance is cancelled, as the manager was urged by first-instance Defendant Y to do so. The event was cancelled due to the declaration of a state of emergency in relation to the spread of COVID-19 (Exhibit Ko 40 and Exhibit Otsu 38).

H. On April 14, 2020, the first-instance Plaintiffs publicized an article titled "A music video of 'STELLA', a song from a new release album 'ReGENERATION' after comeback of A, will be released!" on the website using the Domain Name. The article said: "The band came back as 'A' on October 27, 2019 after one-year break, and then from July 14, 2020, came back in full force as 'A'. Six new songs played at the concert will be released as the album 'ReGENERATION'!" (Exhibit Otsu 17).

I. On August 21, 2020, the Group held a free concert by way of web-streaming from Akabane ReNY alpha. An announcement of the concert dated July 28, 2020, which was publicized on the website using the Domain Name, states "2019/10/27 'ReBIRTH' was the concert for our restart, but unfortunately we had to change our band name." (Exhibit Otsu 18)

J. The Group released the album "ReGENERATION" on October 3, 2020. The sales turnover of this album for the period from this day to November 2, 2020 was 472,230 yen (Exhibit Ko 80).

K. On June 26, July 14 and October 24 of 2020 and April 24, 2022, first-instance Plaintiff X1 sent emails to an employee of "VISUNAVI" website asking for the publication of articles announcing the Group's concerts, the restart of activities using the Group Name and release of music videos, but none of these articles was published on the website (Exhibits Ko 126 and 127).

L.(A) The first-instance Plaintiff X1 filed a trademark application for a mark constituted by the Group Name represented in standard characters, while designating Class 41 "musical performance" and other services, on April 9, 2019. With the consent from the other first-instance Plaintiffs, the first-instance Plaintiff X1 obtained the examiner's decision to grant registration on October 9, 2020 (Exhibits Ko 46, 47 and 67).

(B) The first-instance Defendant company filed an opposition to the registration, on the grounds that it is liable to be cancelled pursuant to Article 43-2, item (i) of the Trademark Act as it runs counter to the public policy as the application was filed in violation of the Exclusive Management Agreement and therefore falls under Article 4,

paragraph (1), item (vii) of the Trademark. However, the Japanese Patent Office rendered a decision to maintain the registration on October 14, 2021 (Exhibit Ko 97).

(C) Meanwhile, first-instance Plaintiff X1 also filed a trademark application for a mark constituted by the Group Name represented in standard characters, while designating Class 9 "recorded audio compact discs" as designated goods, but the examiner issued a decision to refuse registration as the mark would be recognized as merely representing the group name of a famous rock band, and when used for the designated goods mentioned above, it would only create a perception for traders and consumers that singers or performers of songs contained in the disc are members of the Group (Exhibits Otsu 23, 26 and 27).

(6) Acts of the first-instance Defendants after the termination of the Exclusive Management Agreement

A. On July 14, 2019, in connection with the posting of an article on "ViSULOG", a visual-kei music information website, announcing the Group will resume activities after the termination of the Exclusive Management Agreement with the first-instance Defendant company, first-instance Defendant Y requested B, a representative of Fakestar Co., Ltd. that operates the website and who is not a party to this litigation to "drop the news for the time being as we are still discussing the trademark issues" in a rather strong tone over the phone (the "Request"). Upon this Request, B deleted the news from the website (Exhibits Ko 56 and 73).

B. On July 16, 2019, first-instance Defendant Y asked I from Exit Tunes whether there is a contract between Exit Tunes and the Group, citing an email asking for the publication of the article mentioned in A. above that was sent from J from Exit Tunes to an Internet media service provider "BARKS." First-instance Defendant Y also sent an email saying that he will consult the lawyer about the responses taken by Exit Tunes with respect to the article on the Group (Exhibit Ko 29).

C. The first-instance Defendant company, on or around July 21, 2019, sent a letter to Ong, a company that operates a music CD shop Osaka ZEAL LINK, through its attorney-at-law, in respect of the arrangement of the Group's performance scheduled at a shop closing event of Osaka ZEAL LINK on August 6, 2019 and the notice of announcement of the event. In this letter, the first-instance Defendant company said that it holds a trademark right concerning the Group Name and copyright with respect to the photographs in question (the "Photographs") but would not permit the use of them, and that it demands the payment of compensation for damages in amount of 100,000 yen per day unless Ong deletes the Group Name and the Photographs from all related media (Notice 3). Later, the representative of Ong called first-instance Plaintiff X1 to

tell him about the content of the letter and said "Mr. Y threatened me" and "without doubt, what he did is the obstruction of business" (Exhibits Ko 64 and 65).

D. On or around July 23, 2019, first-instance Defendant Y talked with an employee from "Yumebanchi," a concert production service provider, to confirm the venues of the Group's concert tour and said that he needed to stop the concerts (Exhibit Ko 54).

E. The first-instance Defendant company sent a letter dated July 26, 2019 through its attorney-at-law, to Exit Tunes with regard to its publication on its Internet media service "BARKS" the news article on the termination of the Exclusive Management Agreement and the Group's concert schedules on July 14, 2019, the day immediately after the date of termination of the Exclusive Management Agreement. In this letter, the first-instance Defendant company notified that [i] it is the holder of the trademark right concerning the Group Name; [ii] the Group is prohibited from entering into any agreement for performance without consent from it for six months after the termination of the Exclusive Management Agreement; and [iii] it has never provided consent with respect to the use of the Group Name and logos and activities by the Group, and requested an explanation of the authority based on which Exit Tunes made the publication (Notice 4; Exhibit Ko 30).

F. The first-instance Defendant company sent a letter dated August 2 or 5, 2019 through its attorney-at-law, to the live music clubs, Akabane ReNY alpha, Nagoya ReNY limited and amHALL. In this letter, the first-instance Defendant company notified that [i] under the Exclusive Management Agreement, the Group is prohibited from entering into any agreement for performance without consent from it for six months after the termination of the agreement; [ii] it is the holder of the trademark right concerning the Group Name; and [iii] it has never provided consent with respect to the concerts and will not approve the use of the Group Name; and [iv] the clubs should cancel contracts concerning the concerts within three days after the delivery of the letter (Notice 1; Exhibits Ko 25 to 27).

G. The first-instance Defendant company sent an e-mail dated August 7, 2019 to SKIYAKI, an operator of the website of the first-instance Plaintiffs, and other related parties. In this email, the first-instance Defendant company notified that [i] it is the holder of the trademark with respect to the Group Name until December 31, 2019; [ii] under the Exclusive Management Agreement, the first-instance Plaintiffs are prohibited from entering into any agreement for performance without consent from it for six months after the termination of the agreement; and [iii] it has never provided consent with respect to the concerts announced by the first-instance Plaintiffs and will not approve the use of the Group Name (Notice 2; Exhibits Ko 28, 69 and 83).

H. The first-instance Defendant company, on receiving the Decision to Dismiss, sent a letter to the first-instance Plaintiffs dated October 9, 2019, through its attorney-at-law, demanding the compensation for damages in amount of 15,638,547 yen due to the default of obligation under the Exclusive Management Agreement, alleging that it suffered damages of 2,830,021 yen as record production expenses and concert cancellation fees and lost profits of 15,638,547 yen it would have gained if the Group had conducted the activities (Exhibit Ko 35).

I. In the letter dated October 9, 2019, the first-instance Defendant company notified, through its attorney-at-law, AZMIX that operates live music clubs including Akabane ReNY alpha of the content of the Decision to Dismiss, alleging that the first-instance Plaintiffs have "repeated behavior which is totally against the common sense and tried to have everything their own way, for example, abruptly withdrawing a petition which would turn out to be unsuccessful and announcing the name 'A' only for this concert" (Notice 5; Exhibit Ko 31).

J. The first-instance Defendant company sent a letter dated October 29, 2019 to AZMIX, through its attorney-at-law, informing that the performance of the first-instance Plaintiffs at the concert in Nagoya on November 1, 2019 breaches the Exclusive Management Agreement and the company will need to demand compensation for damages also from AZMIX (Notice 6; Exhibit Ko 33).

K. In the letter dated October 17, 2019, the first-instance Defendant company notified, through its attorney-at-law, eplus that was planning to provide ticket vending service for the Concerts that holding the Concerts breaches the Exclusive Management Agreement as the first-instance Plaintiffs are prohibited from doing live performance activities without consent from the first-instance Defendant company until January 13, 2020, and that it is the owner of the Group Name as between the parties to the agreement. The first-instance Defendant company demanded eplus not to sell tickets for the Concerts and alleged that the first-instance Plaintiffs have "repeated behavior which is totally against the common sense and tried to have everything their own way, for example, abruptly withdrawing a petition which would turn out to be unsuccessful and announcing the name 'A' only for this concert." A copy of the Exclusive Management Agreement was attached to this letter (Notice 7; Exhibit Ko 32).

L. On November 11, 2019, the first-instance Defendant company sent an email to related parties including AZMIX, informing that it demanded compensation for damages from the first-instance Plaintiffs after the Decision to Dismiss was rendered, that the Concerts were held in spite of the first-instance Defendant company's request for cancellation, that it was preparing for litigation against the first-instance Plaintiffs

and also that it would consider making a damage claim against live music clubs where the Concerts were performed (Notice 8; Exhibits Ko 34, 68 and 83).

2. Issue 1 (whether first-instance Defendant Y made the Request)

As mentioned in 1.(6)A. above, the court finds that first-instance Defendant Y made the Request, and B, a non-litigation party, decided to cease to publicize the article on the Group.

The first-instance Defendants allege that the statement of first-instance Defendant Y as mentioned in 1.(6)A. above does not relate to the first-instance Plaintiffs; however, the evidence (Exhibit Ko 56) indicates that this statement was made to B on the same day immediately after the publication of the article on the Group, and that B talked with first-instance Defendant Y recognizing that the topic relates to the Group based on the timing and contents of his statement and accordingly decided to drop the news article on the Group, so it is reasonable to find that the statement of first-instance Defendant Y as mentioned above related to the first-instance Plaintiffs.

3. Issue 2 (whether each of the Notices and Request constitutes a tort)

(1) Notices and Request

The Notices and Request are as described in 1.(6)A., C., E. through G. and I. through L. From the analysis of these, behavior of first-instance Defendant Y before the termination of the Exclusive Management Agreement as mentioned in 1.(3)B. and C. above and behavior of the first-instance Defendants after the termination of the Exclusive Management Agreement as mentioned in 1.(6) above in their totality, it is found as follows. First-instance Defendant Y recognized that [i] under the Provision, the first-instance Defendant company's consent was required for the first-instance Plaintiffs to perform any activity as the Group, for six months from the termination of the Exclusive Management Agreement, [ii] the first-instance Defendant company was the holder of a trademark right or an exclusive right to use the Group Name, and [iii] the first-instance Defendant company is the holder of the copyright in the Photographs. They had strong intention to block the first-instance Plaintiffs from doing activities as the Group or using the Group Name for the period from July 14, 2019, the day immediately after the termination of the Exclusive Management Agreement, to November 11, 2019, tried to suspend the first-instance Plaintiffs from making performance by informing their business partners or potential business partners of the matters described in [i] through [iii] above by way of a series of actions including the Notices and Request for that purpose, and tried to make business partners that are reluctant to follow the first-instance Defendants' request change their mind by even expressing intention to institute a damage claim.

However, supposing that [i] through [iii] as perceived by the first-instance Defendants are true, their behavior can be considered to be a legitimate exercise of rights as long as it does not exceed the reasonable extent. Therefore, the court examines whether the perception mentioned above can be considered to be true.

(2) Validity of the Provision

A. The perception mentioned in [i] of (1) above, "under the Provision, the first-instance Defendant company's consent was required for the first-instance Plaintiffs to perform any activity as the Group, for six months from the termination of the Exclusive Management Agreement" is premised on the validity of the Provision. Therefore, the court examines the validity of the Provision.

B. As mentioned in 1.(1) above, the Provision reads "The artists may not enter into any agreement relating to performance, such as a management agreement, with a third party without prior consent from Agent (i.e., the first-instance Defendant company) for six months from the termination of this Agreement." This provision substantially prohibits the first-instance Plaintiffs from entering into an agreement for performance with a party other than the first-instance Defendant company for six months after the termination of the Exclusive Management Agreement. The term "performance" within the meaning of the Exclusive Management Agreement is defined in Article 2 of the Agreement as mentioned in 1.(1) above and covers the appearance in commercial films, writing books, activities relating to character merchandises and activities relating to a fan club and fan site, in addition to musical performance activities, so it is considered to cover the first-instance Plaintiffs' activities as performers or artists in general.

C. The Exclusive Management Agreement was concluded between the first-instance Plaintiffs who are artists and the first-instance Defendant company for the management of the former by the latter. The provisions contained in the Exclusive Management Agreement are considered to be valid as agreed between the parties unless special circumstances exist. However, as mentioned in (2) of the basic facts and 1.(2) above, the Group had conducted activities in a vigorous way since December of 2010, such as releasing single CDs and albums, holding solo concerts and appearing on the front page of magazines. Specifically, since July 2012, all four members of the first-instance Plaintiffs had been engaged in band activities as the Group for a long time. Considering the above, the Provision materially restricts the first-instance Plaintiffs' activities as artists as mentioned above after the termination of the Exclusive Management Agreement, prohibiting them from doing activities utilizing skills and experience gained by themselves and restricting the freedom of choice of occupation and freedom of business activity. Consequently, this Provision should be held invalid as it runs

counter to the public policy if the restriction imposed by the Provision is found to be unreasonable. In addition, the reasonableness should be determined based on the comprehensive assessment of the purpose of the Provision, the interest of the first-instance Defendant company protected by the Provision, disadvantage to the first-instance Plaintiffs and other situations.

D. To review this case, the first-instance Defendants allege that the objective of the Provision is to secure the recovery of initial investment; however, it is the performance of the first-instance Plaintiffs that appeals to their customers (fans), not the performance of other artists affiliated with the first-instance Defendant company. Therefore, restricting the performance activities of the first-instance Plaintiffs by the Provision alone would not generate income for the first-instance Defendant company and help to achieve the purpose of recovering initial investment, and the restriction on activities of the first-instance Plaintiffs by the Provision is considered to have no relationship with the recovery of initial investment made by the first-instance Defendant company. In addition, even supposing that the first-instance Defendant company needs to recover its initial investment and the first-instance Plaintiffs are somewhat responsible for it, a financial settlement is possible by such way as distributing profits generating from their performance activities. Therefore, the need to recover initial investment as mentioned above is not a good cause for restricting the first-instance Plaintiffs' activities after the termination of the Exclusive Management Agreement. (Moreover, considering the fact that by July 13, 2019, the time when the Exclusive Management Agreement was cancelled by an agreement, about nine years had elapsed from August 1, 2010 when the agreement was concluded, and about seven years had elapsed from July 2012 when all of the first-instance Plaintiffs became members of the Group, and that the Exclusive Management Agreement had been renewed several times ((2) of the basic facts), it can be naturally understood that the first-instance Defendant company had already recovered its initial investment.)

Consequently, without the need to examine other matters, the court finds that the restriction by the Provision has no reasonable grounds and the Provision is invalid as it runs counter to public policy.

E. Therefore, the perception [i] in (1) above cannot hold true, as the Provision which serves the basis of the perception is invalid.

(3) Trademark right and Group Name

A. The court examines the perception [ii] of (1) above, namely, whether "the first-instance Defendant company was the holder of a trademark right or an exclusive right to use the Group Name."

B. First, there is no dispute among the parties that, at the time when the Request and Notices were made, the first-instance Defendants were not the holder of the trademark right concerning the Group Name.

C. Secondly, a so-called right of publicity could be examined as a ground for an exclusive right to use the Group Name.

As a name, portrait, etc. of an individual (hereinafter referred to as "portrait, etc.") represents the personality of the individual, it is understood that any individual has a right to exclude the unauthorized use of portrait, etc. by third parties as a right derived from personal rights. Portrait, etc. can promote the sale of goods by attracting consumers, and a right to exclusively use this capacity to attract consumers (a right of publicity) stems from the commercial value of the portrait, etc. itself. Therefore, this right of publicity can be understood to form a part of rights derived from the personal rights explained above (2009 (Ju) 2056, Judgment of the First Petty Bench of the Supreme Court, rendered on February 2, 2012, Minshu Vol. 66, No.2, at 89). Further, it is also understood that, in the case of a group name representing a group of performers, if the group name can easily associate a specific person as the information identifying the group of which the person is a member, an individual member is entitled to exercise a right of publicity with respect to the group name based on his/her personal rights, like the case of a stage name or pen name.

In this case, in light of past activities of the Group as mentioned in 1.(2) above, the court finds that the Group has a certain degree of capacity to attract consumers. And, in light of the facts including that [i] first-instance Plaintiffs acted as members of the Group for quite a long time, i.e., first-instance Plaintiffs X1 and X2 had been members of the Group from August 1, 2010, and first-instance Plaintiffs X3 and X4 since July 14, 2012, to July 13, 2019, when the Exclusive Management Agreement was terminated; [ii] the fact that the Group has four members, namely the first-instance Plaintiffs, as well as their portrait and stage names, were generally announced to the public, and all first-instance Plaintiffs were present at concerts, etc. of the Group; [iii] the portrait and stage names of the first-instance Plaintiffs were featured when the Group appeared on magazines and other media, as well as other circumstances of their activities as mentioned in 1.(2) above, the court presumes that the Group Name could easily associate the first-instance Plaintiffs with the information identifying the group of which they are members.

Accordingly, the first-instance Plaintiffs are entitled to exercise their right of publicity with respect to the Group Name.

Meanwhile, a right of publicity is a right based on personal rights and it is difficult

to understand it as a right transferrable to the first-instance Defendant company. In addition, there is no provision in the Agreement indicating that the first-instance Plaintiffs should assign the right of publicity to the first-instance Defendant company, or providing the ground for the restriction of the exercise of right of publicity by the first-instance Plaintiffs after the termination of the Exclusive Agency Agreement. Article 5 of the Agreement provides "During the term of this Agreement, Agent (i.e., the first-instance Defendant company) may use and develop, at no costs and at its sole discretion, Artist's (i.e., the first-instance Plaintiffs') stage names, real names, photographs, portrait, handwriting, biography, sound and any other moral rights for the purpose of advertisement and promotion," however, it is reasonably understood as a commitment of the first-instance Plaintiffs to the first-instance Defendant company not to exercise the right of publicity during the term of the Exclusive Management Agreement, and this provision cannot be considered as an agreement with respect to the exercise of the right of publicity after the termination of the Exclusive Management Agreement. In addition, Article 6 of the Agreement is in no way construed as attributing the ownership of right of publicity derived from personal rights to the first-instance Defendant company. Consequently, the first-instance Defendant company has no right or authority to exercise the right of publicity with respect to the Group Name after the termination of the Exclusive Management Agreement. Even considering the provisions contained in the Agreement and other factors in totality, it cannot be found that the first-instance Defendant company has a right to exclusively use the Group Name after the termination of the Exclusive Management Agreement.

D. This is also the case for a right of attribution which is a part of moral rights of performer (Article 90-2 of the Copyright Act). After the termination of the Exclusive Management Agreement, a right of attribution, i.e., a right to determine whether to mention the Group Name at the time of performance of the Group, which is a part of moral rights of performer that only belong to the performer, cannot be attributed to the first-instance Defendant company. Therefore, the first-instance Defendant company is also not entitled to exercise this right of attribution with respect to the Group Name.

E. Therefore, the court concludes the perception [ii] in (1) above does not hold true as the first-instance Defendant company has no trademark right, right of publicity, moral rights of performer (a right of attribution) and any other right to exclusively use the Group Name.

F. The first-instance Defendants allege that, with respect to the text in the Notices informing that the first-instance Plaintiffs are not entitled to use the Group Name, it meant to notify the recipients of the breach of the Exclusive Management Agreement

and also that the first-instance Plaintiffs and the first-instance Defendant company agreed in Article 6 of the Agreement that the first-instance Defendant company has an exclusive right to use the Group Name similar to a trademark right under the Trademark Act even if the mark is not registered.

However, from the wording of Article 6 that provides "Any and all copyright-related rights (omitted) of Artist (i.e., the first-instance Plaintiffs) with respect to original masters, films, etc. produced during the term of this Agreement, as well as any rights concerning Artist, including trademark, intellectual property rights and merchandising right, shall be attributed to Agent (i.e., the first-instance Defendant company)" and the fact that the objective of this Exclusive Management Agreement is the management of the first-instance Plaintiffs by the first-instance Defendant company, this Article 6 can be reasonably understood as an agreement that the first-instance Defendant company owns proprietary rights including copyright acquired during the term of the Exclusive Management Agreement for the convenience of its management duties during the same period; however, Article 6 does not contain any agreement with respect to the Group Name after the termination of the Exclusive Management Agreement.

From the above findings, it cannot be considered that Article 6 of the Agreement contains an agreement between the first-instance Plaintiffs and the first-instance Defendant company with respect to the use of the Group Name after the termination of the Exclusive Management Agreement, and even also considering other provisions of the Agreement, it cannot be found that the use by the first-instance Plaintiffs of the Group Name after the termination of the Exclusive Management Agreement breaches the same agreement.

Therefore, the allegation of the first-instance Defendants as mentioned above is unacceptable.

(4) Photographs

The court examines the perception [iii] in (1) above, "the first-instance Defendant company is the holder of the copyright in the Photographs."

The evidence (Exhibit Ko 133) indicates that a copyright license agreement was concluded between C, a non-litigation party, and first-instance Plaintiff X1 as the representative of Gloria Music on September 28, 2022, and that the purpose of this agreement is to confirm non-litigation party C's ownership of copyright with respect to the Photographs and to grant the use thereof to Gloria Music. Then, as it is reasonable to consider that the copyright in the Photographs belongs to non-litigation party C, the perception [iii] in (1) above, "the first-instance Defendant company is the holder of the copyright in the Photographs," is found to be untrue.

The license agreement mentioned above was concluded on September 28, 2022, which is about three years after the Notices were made, and there is no dispute as to its genuineness. This agreement is found to have been newly created by first-instance Plaintiff X1 to make clear the ownership of copyright in the Photographs as the ownership was disputed in this litigation, so there are no unnatural circumstances with respect to the reason for the creation and content thereof. This agreement indicates that the Photographs were taken by non-litigation party C and that non-litigation party C recognizes that C is the holder of the copyright in the Photographs. Considering that the copyright in the Photographs is initially vested in non-litigation party C, who is the photographer, and cannot be attributed to the first-instance Defendant company unless non-litigation party C transfers it to the first-instance Defendant company, and also that the first-instance Defendants did not clearly understand the treatment of ownership of copyright in the Photographs when concluding the contract with the photographer, it is reasonable to find that, as recognized by non-litigation party C, the copyright in the Photographs is attributed to non-litigation party C.

(5) Whether each of the Notices and Request constitute a tort

A. From the above findings, the court must conclude that the perception [i] through [iii] in (1) above is untrue. Then, as mentioned in A., C., E. through G. and J. through L. of 1.(6) above, all of the relevant actions taken by first-instance Defendant Y or the first-instance Defendant company, i.e., (a) making the Request to B, a non-litigation party, to drop the news article on the Group, implying a dispute with respect to a trademark; (b) notifying Ong of the first-instance Defendant company's intention that it would claim compensation for damages in amount of 100,000 yen per day unless Ong deletes the Group Name and Photographs (Notice 3); (c) notifying Exit Tunes of their allegation that the first-instance Defendant company is the holder of the trademark right concerning the Group Name and the first-instance Plaintiffs have no right to use the Group Name or make live performance (Notice 4); (d) urging a live music club which is the scheduled venue for the Concert to cancel the contract relating to the Concert, arguing that the first-instance Defendant company is the holder of the trademark right concerning the Group Name and the first-instance Plaintiffs have no right to use the Group Name or to make live performance (Notice 1); (e) notifying SKIYAKI and other related parties of their allegation that the first-instance Defendant company is the holder of the trademark and the first-instance Plaintiffs have no right to make live performance or use the Group Name (Notice 2); (f) notifying AZMIX of their allegation that implementing the Concert breaches the Exclusive Management Agreement and that it would seek compensation for damages also from AZMIX (Notice 6); (g) demanding

plus to suspend ticket vending service for the Concerts as implementing the Concerts breaches the Exclusive Management Agreement as the Group Name is attributed to the first-instance Defendant company as between the parties (Notice 7); and (h) notifying AZMIX and other related parties of the first-instance Defendant company's intention that it would institute a damage claim against the live music clubs that agreed to hold the Concerts (Notice 8), are based on the presumption that any of the perception [i] through [iii] in (1) above is true and correct, and are found to be the attempt to obstruct the first-instance Plaintiffs' activities using word and deed and explanation that are contrary to the truth. It can be easily inferred that these situations made the business partners of the first-instance Plaintiffs reluctant and discouraged them from doing businesses with the first-instance Plaintiffs, making it difficult for the first-instance Plaintiffs to proceed with business including concerts and performance. Consequently, the Request and Notices are found to infringe the right of business of the first-instance Plaintiffs as they unfairly obstruct their activities as artists.

B. Further, as mentioned in I. and K. of 1.(6) above, Notices 5 and 7 allege that the first-instance Plaintiffs have "repeated behavior which is totally against the common sense and tried to have everything their own way, for example, abruptly withdrawing a petition which would turn out to be unsuccessful and announcing the name 'A' only for this concert." This allegation criticizes that the first-instance Plaintiffs' behavior "is totally against the common sense and they have tried to have everything their own way" on the premises that the implementation of the Concerts breaches the Exclusive Management Agreement, and is found to degrade their social reputation and creditworthiness in business, and therefore dishonors or discredits them. However, the implementation of the Concerts by the first-instance Plaintiffs does not breach the Exclusive Management Agreement so the fact on which the abovementioned allegation is based is not true.

C. In addition, as the Notices notify the recipients of the breach by the first-instance Plaintiffs of the Exclusive Management Agreement, such depiction of the fact of breach of agreement would degrade the first-instance Plaintiffs' social reputation and can make their business partners reluctant to enter into business relationship with them, and therefore discredits the first-instance Plaintiffs in terms of business. Therefore, the Notices dishonor and discredit the first-instance Plaintiffs.

D. For first-instance Defendant Y, who is a representative and executive manager of the first-instance Defendant company which is a music agent, it is clear that there is no causal relationship between the recovery of initial investment, which is supposed to be the purpose of the Provision, and restricting the first-instance Plaintiffs from making

live performance. Therefore, the court finds that first-instance Defendant Y could have recognized that the Provision is invalid, and had or could have recognized that the first-instance Defendant company had not acquired any trademark right with respect to the Group Name or is not the holder of the right of publicity and other rights with respect to the Group Name and copyright in the Photographs.

Therefore, there is at least negligence on the part of the first-instance Defendants as to the Request and Notices 1 through 4 and 6 through 8 being untrue and the facts on which Notices 5 and 7 are based being untrue.

E. Therefore, it is reasonable to find that the Notices and Request infringe the right of business activity of and dishonor and discredit the first-instance Plaintiffs, and therefore constitute a tort against them.

In this regard, the first-instance Defendants assert that the actions in question are the justified exercise of rights and they are not negligent, taking into consideration the Decision to Dismiss. However, as mentioned in D. above, the first-instance Defendants could have recognized the invalidity of the Provision and did recognize, or at least could have easily recognized, that they are not the holder of the trademark right or copyright in the Photographs, and therefore it is clear that there was negligence on the part of the first-instance Defendants as to the Request and Notices. In addition, the Decision to Dismiss was rendered based on prima-facie evidence in the course of proceedings for preservation, but the Decision to Dismiss was revoked at the appeal instance and the first-instance Defendants were ordered to cease and desist from obstructing the use of the Group Name by the first-instance Plaintiffs (Basic facts (9) and (13) and 1.(4) above). Considering that the preservation proceedings aim to grant a provisional disposition based on prima-facie evidence, relying on the Decision to Dismiss by the first-instance Defendants does not mean the absence of the negligence.

F. In conclusion, it is reasonable to hold the first-instance Defendants, jointly and severally, liable for the tort mentioned above as first-instance Defendant Y delivered or transmitted, or had their attorney-at-law deliver or transmit the Notices or made the Request as the representative of the first-instance Defendant company.

4. Issue 3 (Existence and amount of damages suffered by the first-instance Plaintiffs)

(1) Pecuniary damage

A. From 1.(5) above, the court finds that the first-instance Plaintiffs were forced to avoid the use of the Group Name from October 27, 2019, when they made the performance using the name A', to July 14, 2020, when they announced the restart of their activities using the Group Name, as they were obstructed by the first-instance Defendants' Notices and Request from doing activities as the Group and using the

Group Name, and that the damages arising from the obstruction has causal relationship with the tort committed by the first-instance Defendants.

Further, the cost for production of merchandises using the name A' was necessary for the first-instance Plaintiffs to avoid the use of the Group Name and to do activities as A', so the cost of production of these merchandises possessed by the first-instance Plaintiffs at this point of time is the damage which has causal relationship with the tort of the first-instance Defendants. The evidence (Exhibit Ko 90) indicates that the first-instance Plaintiffs possess 27 T-shirts and 176 towels as A' merchandises and paid 1,040 yen per T-shirt and 500 yen per towel as purchasing costs and that the total amount of the costs is 116,080 yen ($1,040 \text{ yen} \times 27 + 500 \text{ yen} \times 176$).

Therefore, the amount of damages suffered by the first-instance Plaintiffs in respect of the merchandises is 116,080 yen (29,020 yen for each of the first-instance Plaintiffs).

B. Other damages

(A) From the evidence (Exhibit Ko 40), it can be found that the performance of the Group at an event scheduled on July 8, 2020 was cancelled by its sponsor as first-instance Defendant Y urged the sponsor to do so; however, the event was finally cancelled due to the declaration of a state of emergency in relation to the spread of COVID-19. Therefore, it is difficult to conclude that the tort in question immediately gave rise to the damage equivalent to the performance fees for the first-instance Plaintiffs. In addition, although the first-instance Plaintiffs allege that they had to postpone the release of an album by ten months due to the inability to use the Group Name, no evidence can be found to establish the initially scheduled release date, so it is impossible to identify the specific length of time postponed.

(B) That being said, the following facts can be found: [i] the first-instance Plaintiffs had to avoid using the Group Name for the period of eight months and 17 days from October 27, 2019 to July 13, 2020 due to the Request and Notices of the first-instance Defendants, [ii] based on 1.(5) and (6) above, during the same period, the first-instance Plaintiffs could not use the Group Name that had gained certain degree of recognition, and web news on the Group were blocked, leading to less appeal to consumers who know the Group and unsuccessful promotional activities for the Concerts, and [iii] as mentioned in (A) above, the release of a new album was delayed due to the inability to use the Group Name, although the definite length of term during which they were forced to postpone the release date is unknown. In light of the obstruction by the first-instance Defendants and damages suffered by the first-instance Plaintiffs due to the obstruction, it is reasonable to determine the pecuniary damage suffered by the first-instance Plaintiffs to be 100,000 yen per month for each of them during the period in which they

had to avoid using the Group Name (eight months and 17 days), which is 855,268 yen (100,000 yen × (eight months from October 27, 2019 to June 26, 2020 + (four days in June / 30 days + 13 days in July 2020 / 31 days))(a fraction less than one yen is rounded down).

Meanwhile, the first-instance Defendants allege that the Request would not have obstructed the first-instance Plaintiffs' activities as artists and that they suffered no damages due to the Notices as no fact exists which indicates that the sales decreased during the period in which they did not use the Group Name. However, as examined above, the Request and Notices affected the promotional activity for the Concerts and therefore obstructed the first-instance Plaintiffs' activities and caused damage for them. Consequently, the allegation of the first-instance Defendants is found to be unacceptable.

C. Therefore, the pecuniary damage suffered by the first-instance Plaintiffs is found to be 884,288 yen (29,020 yen + 855,268 yen) for each of them; however, they demand 700,000 yen each as a partial claim with respect to the pecuniary damage, so the court awards the damages within the limit of this amount.

(2) Mental damages

As mentioned in 3.(5) above, it is inferred that the first-instance Plaintiffs suffered mental damages as the Notices dishonored and discredited them, and, in addition, as found from 1.(5) and (6) above, they were forced to avoid using the Group Name, had to make efforts to avoid the Group Name for their live performance and promotional activities, and made significant efforts for the explanation and request for assistance from their business partners including live music clubs, for eight months and 17 days from October 27, 2019 to July 13, 2020, due to the Request and Notices. It is reasonable to find that the solatium for this damage is no less than 200,000 yen for each of the first-instance Plaintiffs.

(3) Attorney's fees

Considering the complexity of the case, the amount claimed, the amount awarded and other circumstances, the court finds that the reasonable attorney fees in causal relationship with the tort is 90,000 yen for each of the first-instance Plaintiffs.

(4) Total amount

The total amount of the above is 990,000 yen for each of the first-instance Plaintiffs.

5. Conclusion

Based on the above, whereas all claims raised by the first-instance Plaintiffs are well-grounded and should be granted in their entirety, the judgment in the prior instance partially granting the claims in amount of 220,000 yen and delay damages for each and

dismissing other claims is incorrect in part. As the appeal by the first-instance Plaintiffs is well-grounded in its entirety, the judgment in the prior instance is hereby modified based on the appeal. As the appeal by the first-instance Defendants is groundless in its entirety, the court dismisses it and renders the judgment as stated in the main text.

Intellectual Property High Court, Second Division

Presiding judge: HONDA Tomonari

Judge: ASAI Ken

Judge: KATSUMATA Kumiko

(Attachment)

List of parties

Appellant/Appellee (Plaintiff in first instance) X1
(hereinafter referred to as "first-instance Plaintiff X1")

Appellant/Appellee (Plaintiff in first instance) X2
(hereinafter referred to as "first-instance Plaintiff X2")

Appellant/Appellee (Plaintiff in first instance) X3
(hereinafter referred to as "first-instance Plaintiff X3")

Appellant/Appellee (Plaintiff in first instance) X4
(hereinafter referred to as "first-instance Plaintiff X4"; first-instance Plaintiffs X1, X2, X3 and X4 are collectively referred to as the "first-instance Plaintiffs")

(omitted)

Appellee/Appellant (Defendant in first instance) Yugen Kaisha Sirene
(hereinafter referred to as the "first-instance Defendant company")

Appellee/Appellant (Defendant in first instance) Y
(hereinafter referred to as "first-instance Defendant Y"; and the first-instance Defendant company and first-instance Defendant Y are collectively referred to as the "first-instance Defendants")

(omitted)