Unfair competition	Date	July 4, 2024	Court	Intellectual Property High Court, Third Division
	Case number	2023(Ne)10112		

- A case where the court found that the indication by the Appellant concerning goods sold by the Appellant that was posted on a website falls under a misleading indication regarding the quality as set forth in Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act and the indication harmed the Appellee's business interests, and the court determined that Article 5, paragraph (2) of said Act is applied to the amount of damage to the Appellee but that the presumption pursuant to said paragraph is partially rebutted based on the circumstances found in this case, and therefore, it is reasonable to find that the percentage of the rebuttal of the presumption is 50%, and the court partially upheld the Appellee's claim against the Appellant for compensation for damage based on Article 4 of said Act, but the amount upheld was reduced from that upheld by the court of prior instance.

Case type: Claim for compensation

Results: Modification of the prior instance judgment

References: Article 2, paragraph (1), items (xx), Article 4, and Article 5, paragraph (2) of the Unfair Competition Prevention Act

(Judgment in prior instance) Tokyo District Court, 2022 (Wa) 2551

Summary of the Judgment

1. The Appellee (the first-instance Plaintiff: X) is a company engaging in the manufacture and sale, etc. of food-waste disposers and the Appellant (the first-instance Defendant: Y) is a company engaging in the sale and outsourcing manufacture of food-waste disposers, etc.

X has been selling professional-use food-waste disposers under the name of "Gomiser" since 1992.

Y became a distribution agent of the aforementioned food-waste disposers (X's Goods) that were sold by X around 1996. After the distribution agent agreement between X and Y was terminated around 2019, Y started to sell professional-use food-waste disposers manufactured by another company (Y's Goods) under the name "Gomiser." Then, Y posted the indication regarding Y's Goods, and on that occasion, [i] posted photographs of X's Goods, [ii] posted an indication that its manufacturer is X, and [iii] posted larger sales results for Y's Goods than the actual results.

In this case, X argued that Y's act of posting an advertising indication with the

aforementioned details falls under an act of making an indication that misleads people regarding the quality of goods as set forth in Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act and this caused business damage to X, and that the amount of damage to X is presumed to be the marginal profit to Y through the sales of Y's Goods pursuant to Article 5, paragraph (2) of said Act. Based on the above, X claimed compensation for damage pursuant to paragraph (4) of said Article against Y.

The judgment in prior instance upheld X's claim, and Y filed an appeal. The judgment in prior instance did not state in the indication of Y's argument that the presumption under Article 5, paragraph (2) of the Unfair Competition Prevention Act is to be rebutted, and did not make a determination as to whether the presumption under said paragraph is rebutted or not.

2. In this judgment, the court determined as follows: Y's advertising indication falls under a misleading indication regarding the quality set forth in Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act and this harmed X's business interests and caused damage; Article 5, paragraph (2) of said Act is applied to X's damage; and the amount of profits that Y obtained from Y's Indication during the period when the indication was posted (the amount of marginal profit from the sales of Y's Goods) is presumed to be the amount of damage; however, part of the presumption is rebutted and the percentage of the rebuttal of the presumption is 50%.

(1) Concerning machines like food-waste disposers, etc., whether machines have the performance that they should originally have depends on the manufacturer. In addition, since they are expensive goods, consumers may search the internet, etc. concerning X, identify the fact that X has manufactured and sold food-waste disposers for a long time, and thereby, trust the quality of Y's Goods for which X is indicated as the manufacturer. The indication of larger sales results than the actual results emphasizes that such sales results originated from the alleged fact that Y's Goods are superior to other products of the same kind. Therefore, Y's posting of information described in [i] through [iii] in 1. above may mislead consumers in their decision as to whether to purchase goods or not and the relevant indication by Y falls under a misleading indication regarding the quality.

(2) Both X's Goods and Y's Goods are food-waste disposers. Their sales destinations and sales areas are partially the same. The considerable number of units of X's Goods were sold for a long time and X's Goods had acquired a market share to a certain extent. Therefore, it is found that Y's misleading indication regarding the quality had an impact on the sales of X's Goods and Y's Goods, harmed X's business interests, and caused damage. Article 5, paragraph (2) of the Unfair Competition Prevention Act is applied to X's damage and the amount of profit that Y received from the indication is presumed

to be the amount of damage to X for the period when the indication falling under a misleading indication regarding the quality was posted.
(3) Concerning the argument on the rebuttal of the presumption under Article 5, paragraph (2) of the Unfair Competition Prevention Act that was made by Y in the second instance, X filed a claim to dismiss the argument without prejudice since it falls under allegations or evidence presented after its time. However, it is not found that Y did not argue the rebuttal of the presumption or that Y withdrew the argument on the rebuttal of the presumption in the court of prior instance. Therefore, the aforementioned argument by Y in the second instance is not found to fall under allegations or evidence presented after its time. In addition, it is not found that the aforementioned argument by Y delayed the conclusion of the litigation. Consequently, the aforementioned claim by X related to allegations or evidence presented after its time is groundless.
(4) In the case of the unfair competition under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act, if there are multiple competitors in the market and there are no misleading indications regarding the quality by the infringer, it is difficult to find a typical relationship where the sales of a specific infringed person alone increase, and therefore, rebuttal of the presumption should be approved more widely than in the case of other categories of unfair competition. As grounds for rebuttal of the presumption, the following circumstances or other reasons why actual damage to the infringed person is less than the profits that the infringer obtained should be taken into consideration: (a) there are differences in the business form between the infringer and the infringed person (non-identity of the market); (b) existence of competing products in the market and the market share of the infringed person; (c) the infringer's marketing efforts (brand force, advertisements, etc.); and (d) performance of the infringing product (functions, designs, or performances other than a misleading indication regarding the quality). There are no argument and evidence on specific details.

In this case, Y's marketing efforts are also found to have contributed to the sales of Y's Goods. However, it is not found that the relevant sales were achieved only by the misleading indication regarding the quality. There are no argument and evidence on specific details of Y's marketing efforts, other than some actions, and the counterpart in Y's marketing efforts may have checked the information posted on Y's website when making a decision on the purchase of Y's Goods. Therefore, it does not mean that the misleading indication regarding the quality had no impact on sales. In addition, it is not found that there are no argument and evidence on grounds for rebuttal of the presumption other than those related to the aforementioned marketing efforts. Based on the aforementioned circumstances together, it is reasonable to find that the percentage

of rebuttal of the presumption is 50%.

Judgment rendered on July 4, 2024
2023(Ne)10112, Appeal case of seeking compensation (Court of prior instance: Tokyo District Court 2022(Wa)2551)
Date of conclusion of oral argument: May 16, 2024

Judgment

Appellant: Kabushiki Kaisha AIC

Appellee: Esukii Kouki Kabushiki Kaisha

Main text

1. The judgment in prior instance shall be modified as follows.
(1) The Appellant shall pay to the Appellee 68,014,010 yen and the amount accrued at the rate of 3% per annum on the portion of 34,949,960 yen for the period from February 2, 2022, and on the portion of 33,064,050 yen for the period from May 27, 2023, respectively, until the completion of the payment.
(2) The remaining claims of the Appellee shall be dismissed with prejudice on the merits.
2. Court costs in the first and second instances shall be divided into four and the Appellant shall bear three-fourths of the costs and the Appellee shall bear the rest.
3. This judgment may be enforced provisionally only for Paragraph 1. (1).

Facts and reasons

No. 1 Object of the claim

1. The judgment in prior instance shall be rescinded.
2. The Appellee's claims shall be dismissed with prejudice on the merits.

No. 2 Outline of the case (Unless particularly noted, the same abbreviations used in the judgment in prior instance shall be used herein.)

1. This is a case where the Appellee, who manufactures and sells food-waste disposers, argued that an indication posted on the website (the Appellant's website) concerning a professional-use food-waste disposer sold by the Appellant is misleading regarding the quality, that the act of making that indication falls under unfair competition set forth in Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act, and the Appellee's business interests were harmed by the act, and the Appellee made a claim against the Appellant based on Article 4 of said Act to seek payment of 91,643,940 yen, which is part of the amount of damages totaling 136,056,823 yen, and payment of delay damage accrued at the rate of 3% per annum as prescribed by the Civil Code on the portion of 49,280,000 yen for the period from February 2, 2022 (the day following the

act of unfair competition), and on the portion of 42,363,940 yen for the period from May 27, 2023 (the day following the date on which a written petition for change of appeal dated May 23, 2023 was delivered to the Appellant), respectively, until the completion of the payment (partial claim).

The judgment in prior instance held all the Appellee's claims and the Appellant, who was dissatisfied with the judgment in prior instance, filed an appeal.

2. Basic facts are as stated in No. 2, 2. of the "Facts and reasons" in the judgment in prior instance (page 2, line 13 through page 4, line 17 in the judgment in prior instance) and therefore they are cited.

3. Issues

(1) Whether the indication falls under a misleading indication regarding the quality (Issue 1)

(2) Whether the Appellant's act was intentional (Issue 2)

(3) Whether there is damage to the Appellee and the amount of damage (Issue 3)

No. 3 Judgment of this court

Different from the judgment in prior instance, this court upheld the Appellee's claim to the extent of seeking payment of 68,014,010 yen and the amount accrued at the rate of 3% per annum on the portion of 34,949,960 yen for the period from February 2, 2022, and on the portion of 33,064,050 yen for the period from May 27, 2023, respectively, until the completion of the payment, as there are grounds to that extent, and determined that the remaining claims are groundless and should be dismissed with prejudice on the merits. The grounds are as stated below.

1. Issue 1 (Whether the indication falls under a misleading indication regarding the quality)

The determination on Issue 1 is corrected as stated in (1) below, and the determination on the Appellant's argument in this instance is added as stated in (2) below. The determination is as stated in No. 3, 1. of the "Facts and reasons" in the judgment in prior instance (page 8, line 23 through page 12, line 18 in the judgment in prior instance) and therefore it is cited.

(1) Correction of the judgment in prior instance

A. The following is added as a new line after the end of page 9, line 9 in the judgment in prior instance.

"The indication of 'Food-waste disposer, Gomiser, Manufacturer: Esukii Kouki Kabushiki Kaisha' as stated in (5) A. [iii] in the basic facts gives recognition of the fact to consumers that the Appellant's Goods are manufactured by the Appellee.

During the period when the aforementioned indication was posted (from May 8, 2019 until August 30, 2021), the Appellant was not selling the food-waste disposer manufactured by the Appellee. The food-waste disposer that the Appellant was selling during this period was manufactured by Technowave Ltd. (the Appellant's Goods), so the content of the indication was factually inaccurate.

Concerning machines like food-waste disposers, etc., whether machines have the performance that they should originally have, the amount of failures, and other matters depend on the manufacturer.

In addition, a food-waste disposer is an expensive good, with a price of approximately one million yen for a small machine and several ten millions of yen for a large machine (Exhibits Ko 38-1 and 38-2, Exhibits Otsu 73 through 76, and the entire import of oral arguments). Accordingly, it is considered that consumers make careful consideration when purchasing a food-waste disposer and they also take into account whether its manufacturer has a history of manufacturing food-waste disposers. It would be possible that consumers who recognized the indication above may search the internet or otherwise identify the fact that a food-waste disposer named 'Gomiser' manufactured by the Appellee has been sold for a long time and they may trust the quality of the Appellant's Goods for which the Appellee is indicated as the manufacturer.

Based on the above, the indication that the manufacturer of the Appellant's Goods is the Appellee may mislead consumers when trying to make a reasonable decision as to whether to purchase the goods. Therefore, it is found that it falls under an indication that causes misidentification regarding the quality of the Appellant's Goods, which is a food-waste disposer."

B. The term "In addition" is added at the beginning of page 9, line 10 in the judgment in prior instance.

(2) Determination on the Appellant's supplementary argument in this instance

As stated in (Appellant's supplementary argument in this instance) in No. 2, 4. (1) [Argument of the Appellant] above, the Appellant argues that, in light of actual status and circumstances in this case, the Appellant's Indication does not mislead consumers regarding the quality.

However, even if there is no big difference in the performance of the Appellee's Goods as a food-waste disposer compared to the Appellant's Goods and other goods of the same kind, it cannot be said on the basis of this fact that the indication of the Appellee as the manufacturer of the Appellant's Goods, which were manufactured by Technowave in reality, and the indication of larger sales results of the Appellant's Goods than the actual results do not fall under a misleading indication regarding the quality.

In other words, even if the Appellant's Goods have no major differences in performance from goods in the same kind of other companies, it is all the same that there is the possibility that consumers may take into account the history of the manufacturer of the Appellant's Goods or the sales results of the goods when deciding whether to purchase the Appellant's Goods as a food-waste disposer or not.

Even if the Appellant's marketing efforts contributed to the sale of the Appellee's Goods, this does not change the fact that the history where the Appellee's Goods manufactured by the Appellee had been sold for a long time was created and it is considered that consumers of food-waste disposers select goods to purchase also in consideration of said history. Therefore, the conclusion that the indication of the Appellee as the manufacturer of the Appellant's Goods falls under a misleading indication regarding the quality remains unchanged and the conclusion that the indication of larger sales results of the Appellant's Goods than the actual results falls under a misleading indication regarding the quality also remains unchanged.

Based on the fact that the Appellant indicated that the manufacturer of the Appellant's Goods is the Appellee on the Appellant's website for the period from May 8, 2019 through August 30, 2021, it is difficult to find that the Appellant did not indicate that the manufacturer of the Appellee's Goods is the Appellee on the body of the food-waste disposer and its website during the time when the Appellant was a distribution agent of the Appellee's Goods. In addition, even if the Appellant did not make that indication during the time when the Appellant was a distribution agent of the Appellee's Goods, this fact does not prove that the Appellant's Indication does not fall under a misleading indication regarding the quality.

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

2. Issue 2 (Whether the Appellant's act was intentional)

The Appellant continued to post the Appellant's Indication in (5) A. of the basic facts, which the Appellant had posted from the time when it was selling the Appellee's Goods as a distribution agent of the Appellee, even after the distribution agent agreement with the Appellee was terminated (the entire import of oral arguments). In a written trial refutation dated February 25, 2020 that it submitted in the trial proceedings related to a claim for invalidation of a trademark registration conducted with the Appellant, the Appellee pointed that the Appellee was indicated as the manufacturer of the Appellant's Goods, which were manufactured by Technowave in reality (Exhibit Ko 19), but the Appellant continued to post the indication in (5) A. [i] through [iv] of the basic facts on the Appellant's website even thereafter. Based on these facts, it can be found that the Appellant intentionally indicated false facts concerning the manufacturer

and sales performance of the Appellant's Goods as stated in (5) A. through C. of the basic facts.

The Appellant argues that the Appellant only forgot to delete the Appellant's Indication and it was unintentional, but in light of the details of the aforementioned explanation, the Appellant's argument cannot be accepted.

3. Issue 3 (Whether there is damage to the Appellee and the amount of damage)

(1) According to the basic facts, the evidence indicated below, and the entire import of oral arguments, the following facts are found.

A. The annual sales volume of the Appellee's Goods for the period from 1992, when the Appellee commercialized the Appellee's Goods and started its sale, until 2017 are as stated in the Attachment, "List of Sales Volume of the Appellee's Goods." (Exhibits Ko 34 and 35)

B. The sales volumes for all units of the professional-use food-waste disposer from FY2000 to FY2006 were 2,036 units (FY2000), 1,895 units (FY2001), 1,685 units (FY2002), 1,534 units (FY2003), 1,092 units (FY2004), 881 units (FY2005), and 610 units (FY2006; for the period from April to November 2006 only). (Exhibit Ko 28)

C. The Appellant's Goods were sold to nursery schools, homes for senior citizens, hospitals, food factories, public offices, restaurants, vessels, etc. (facilities to which the Appellant's Goods were delivered) and the sales area covers all of Japan and overseas. On the other hand, the Appellee's Goods were sold to nursery schools, homes for senior citizens, hospitals, food factories, employee canteens, parks, etc. (facilities to which the Appellee's Goods were delivered) and the sales area covers all of Japan and Mexico, etc. (Exhibits Ko 11 and 41, and Exhibits Otsu 4 and 5)

(2) Whether there is damage to the Appellee and whether Article 5, paragraph (2) of the Unfair Competition Prevention Act is applied

A. As stated in (5) A. through C. of the basic facts, the Appellant posted the misleading indication regarding the quality on the Appellant's website by indicating that the manufacturer of the Appellant's Goods is the Appellee for the period from May 8, 2019 until August 30, 2021, and larger sales results of the Appellant's Goods than the actual results for the period from May 8, 2019 until April 30, 2023.

Both the Appellee's Goods and the Appellant's Goods are food-waste disposers and, as stated in (1) C. above, the Appellee's Goods and the Appellant's Goods were partially sold to the same types of places (or partially delivered to the same types of facilities) and partially in the same areas.

In addition, as stated in (1) A. above, the sales volume of the Appellee's Goods was as stated in Attachment, "List of Sales Volume of the Appellee's Goods," for the period

from 1992 to 2017, when a distribution agent agreement for the Appellee's Goods was concluded between the Appellee and the Appellant. The sales volumes of all units of the professional-use food-waste disposer as stated in (1) B. are figures for respective fiscal years and they are considered to be different in the start time and end time in each year from the Attachment, "List of Sales Volume of the Appellee's Goods." Even excluding this point, when deeming the value calculated by dividing the sales volume of the Appellee's Goods in 2000 by the sales volume of all professional-use food-waste disposers in 2000, as the market share of the Appellee's Goods in FY2000, it is approximately 13.2%. When calculating market shares from FY2001 through FY2005 in the same way, they are approximately 11.1%, approximately 10.6%, approximately 6.9%, approximately 8.9%, and approximately 9.4%, respectively. Then, it cannot be said that the sales volume of the Appellee's Goods was very large or the Appellee's Goods had a high market share, but it can be said that a considerable number of units were sold for a long period and the Appellee's Goods had acquired a market share to a certain extent.

Considering the aforementioned circumstances together, it is found that the misleading indication regarding the quality, in which the Appellant indicated the Appellee as the manufacturer of the Appellant's Goods and indicated larger sales results of the Appellant's Goods than the actual results, had an impact on the sales of the Appellant's Goods and the Appellee's Goods, and the Appellee's business interests were harmed and damage occurred.

Article 5, paragraph (2) of the Unfair Competition Prevention Act is applied to the damage to the Appellee caused by the Appellant's misleading indication regarding the quality. The amount of profit that the Appellant received from the Appellant's Indication during the period from May 8, 2019 through April 30, 2023 is presumed to be the amount of damage to the Appellee.

The amount of the Appellant's marginal profit during the aforementioned period is found to be 123,688,021 yen ((4) in the basic facts; the Appellee argues that the period when the damage occurred was from May 10, 2019 until April 30, 2023, but even if this period is adopted, the marginal profit is the aforementioned amount). The amount of the marginal profit is based on Exhibit Otsu 76. According to the sales date of the Appellant's Goods listed in Exhibit Otsu 76, from among the aforementioned marginal profit, the profit that occurred until February 2, 2022 (the start date of delay damage on the portion of 49,280,000 yen from among the Appellee's claimed amount) is 63,559,921 yen and the profit that occurred on February 3, 2022 and after is 60,128,100 yen.

B. The Appellant's argument

The Appellant argues that, as stated in No.2, 4. (3), [The Appellant's argument] A., since the Appellee did not argue or prove the sales performance of the Appellee's Goods after the end of transactions with the Appellant and it is unclear whether the Appellee has lost profits, such as decreases in sales, etc., the amount of damage is not presumed based on Article 5, paragraph (2) of the Unfair Competition Prevention Act.

However, even if the sales volume and sales amount of the Appellee's Goods after the termination of the distribution agent agreement between the Appellee and the Appellant are not clear, based on the circumstances described in A. above that are found in this case together, it can be found that the Appellee's business interests were harmed by the Appellant through posting the Appellant's Indication. The fact that the Appellee did not argue or prove the aforementioned sales volume and sales amount does not lead to a conclusion that it cannot be found that the Appellee's profits were harmed. No other circumstances that have an impact on the aforementioned findings are found.

In addition, as stated in No. 2, 4. (3) [The Appellant's argument] B. above, the Appellant argues as follows: the Appellee's Goods have no customer attraction power; the indication on the Appellant's website does not decrease the sales performance of the Appellee; and even if sales of the Appellee's Goods decreased, it is an inevitable result of unilateral shipping suspension by the Appellee and there is no causal relationship with the Appellant's posting of the Appellant's Indication.

However, as stated in A. above, the Appellee's Goods had sales volume to a certain extent for a long period during the time when the Appellee and the Appellant concluded the distribution agent agreement and acquired a market share to a certain extent, and the Appellee's Goods had made such history. Based on these facts, it is found that sales of the Appellee's Goods received an impact from the act of the Appellant of indicating that the manufacturer of the Appellant's Goods is the Appellee and indicating larger sales results of the Appellant's Goods than the actual results and thereby misleading consumers concerning the manufacturer and sales performance of the Appellant's Goods. It is not understood that there is no causal relationship between them.

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

(3) Rebuttal of the presumption and grounds for rebuttal

A. In order to apply Article 5, paragraph (2) of the Unfair Competition Prevention Act, it is construed to be necessary that there are circumstances where the infringed person would have been able to obtain profits if there had been no unfair competition by the infringer. Therefore, if such circumstances are not found, the presumption pursuant to said paragraph is construed to be rebutted. In the case of the unfair competition under

Article 2, paragraph (1), item (xx) of said Act, if there are multiple competitors in the market and there are no misleading indications regarding the quality by the infringer, it is difficult to find a typical relationship where the sales of a specific infringed person alone increase, and therefore, rebuttal of the presumption should be approved more widely than in the case of other categories of unfair competition. As grounds for rebuttal of the presumption, the following circumstances or other reasons why actual damage to the infringed person is less than the profits that the infringer obtained should be taken into consideration: [i] there are differences in the business form between the infringer and the infringed person (non-identity of the market); [ii] existence of competing products in the market and the market share of the infringed person; [iii] the infringer's marketing efforts (brand force, advertisements, etc.); and [iv] performance of the infringing product (functions, designs, or performances other than a misleading indication regarding the quality).

B. Concerning damage to the Appellee caused by the indication in question, the Appellant argues that the presumption of damage pursuant to Article 5, paragraph (2) of the Unfair Competition Prevention Act is rebutted.

On the other hand, as stated in No. 2, 4. (3) [The Appellee's argument] C. (A) above, the Appellee filed a claim that the Appellant's argument on rebuttal of the presumption in this instance be dismissed without prejudice, by arguing that the Appellant withdrew the argument on rebuttal of the presumption of damage under Article 5, paragraph (2) of the Unfair Competition Prevention Act in the court of prior instance and its argument on the rebuttal of the presumption in this instance falls under allegations or evidence presented after its time.

Considering the above, the Appellant primarily denied that damage to the Appellee occurred and that even if any damage occurred, it was not caused by the act of the Appellant and denied the causal relationship through the court of prior instance and this instance. It is construed that the Appellant also argues that Article 5, paragraph (2) of the Unfair Competition Prevention Act is not applied. However, in the end of No. 1, 5. of a document titled "Briefs (and petition for clarification)" dated February 9, 2023, which the Appellant submitted in the court of prior instance, (page 6 of said document) there are statements that are construed that the Appellant argued the rebuttal of the presumption on the assumption that said paragraph is applied, such as that "whether it is 'grounds for defense' or 'positive denial,' it is a problem related to the argument on fulfillment of the statutory requirement and allocation of the burden of proof and, in either case, the Defendant intends to proactively argue and prove them." In the progress table prepared concerning discussions for preparatory proceedings in writing conducted

on December 12, 2022 in the court of prior instance, there is a statement of details stated by the Appellant (the Defendant in the first instance) that the facts argued in (4) of the briefs are grounds for denial of the occurrence of damage and are also grounds for rebuttal of the presumption under said paragraph (obvious facts to the court).

On the other hand, in the progress table prepared concerning discussions for preparatory proceedings in writing conducted on February 6, 2023 in the court of prior instance, there is a statement of details stated by the Appellant that since damage did not occur, no grounds for rebuttal is argued against the argument of the Appellee (the Plaintiff in the first instance) (obvious facts to the court).

In the document titled "Trial/hearing report (7)" that was submitted by the Appellee as evidence and that have allegedly been prepared by an agent of the Appellee in relation to the discussion on said date (Exhibit Ko 43), there is a statement indicating that the agent of the Appellant stated that the grounds for rebuttal would not be argued.

However, said progress tables are different from the trial/hearing report prepared on the date of oral argument or the date of preparatory proceedings and the statements of parties indicated therein do not have legal effect.

In addition, in any of said progress tables and the document in Exhibit Ko 43, there are no statements that the Appellant's agent stated to withdraw the argument on the grounds for rebuttal on said date and before.

Moreover, according to the statement in Exhibit Ko 43 above, the Appellant's agent stated that the Appellant desired to argue the grounds for rebuttal if the impression that damage had occurred was disclosed. The authorized judge told the Appellant's agent that it was not allowed to counter depending on the judge's impression. In response, the agent stated that if so, the grounds for rebuttal would not be argued.

Based on the above, it was found that the Appellant's agent had the idea that the Appellant desired to argue the grounds for rebuttal if damage was found to have occurred and it was clearly stated.

Furthermore, the aforementioned "briefs (petition for clarification)" dated February 9, 2023 was submitted after said discussion held on February 6, 2023.

Based on these circumstances together, even if the Appellant's agent made statements as stated in the document of Exhibit Ko 43 in the discussions for preparation proceedings in writing conducted on February 6, 2023, it cannot be said that the Appellant did not argue the rebuttal of the presumption of the damage pursuant to Article 5, paragraph (2) of the Unfair Competition Prevention Act or that the Appellant withdrew the argument on the rebuttal of the presumption in the court of prior instance.

Therefore, the argument on the rebuttal of the presumption made by the Appellant

in this instance is not found to fall under allegations or evidence presented after its time.

In addition, the Appellant argued the rebuttal of the presumption in the briefs dated April 11, 2024 (second instance No.2) and briefs dated May 9, 2024 (second instance No.3). Since oral arguments were concluded on the date of the second oral argument on May 16, 2024 (obvious facts to the court), it is not found that the conclusion of the litigation was delayed due to the argument on the rebuttal of the presumption in the aforementioned briefs.

Based on the above, the Appellee's claim seeking dismissal without prejudice of the Appellant's argument on the rebuttal of the presumption in this instance by alleging that it falls under allegations or evidence presented after its time is groundless, and therefore, it is dismissed without prejudice.

C. The Appellant argues as the grounds for the rebuttal as stated in B. [i] through [ix] of No.2, 4. (3) [The Appellant's argument] above (Arguments [i] through [ix]) (No. 1 of briefs dated April 11, 2024 (Second Instance No. 2)).

Considering the argument above, concerning Arguments [v] and [vi], it is first found that there are multiple competitors and that the Appellee's Goods acquired a market share to a certain extent in the market of the Appellant's Goods and Appellee's Goods, as stated in (2) A. above, but the relevant market share cannot be said to be high. Therefore, these circumstances are found to fall under the grounds for rebuttal of the presumption.

In addition, the Appellant's representative has connections with the nursery school industry. The Appellant used the connections during a period when the Appellant concluded a distribution agent agreement for the Appellee's Goods with the Appellee, exhibited the Appellee's Goods at training sessions, etc. related to nursery schools, and thus made marketing efforts to sell the Appellee's Goods to nursery schools. The Appellant is found to have been selling the Appellee's Goods to nursery schools (Exhibits Otsu 36, 39, and 71, and the entire import of oral arguments). The Appellant continued these marketing efforts even after the distribution agent agreement between the Appellee and the Appellant was terminated and the Appellant started to handle the Appellant's Goods manufactured by Technowave. The Appellant also exhibited the Appellant's Goods at training sessions, etc. related to nursery schools (Exhibits Otsu 40 through 44 and 71, and the entire import of oral arguments). According to these facts, it is assumed that nursery schools were included in sales destinations of the Appellant's Goods.

Based on the above, it is found that the Appellant's marketing efforts also contributed to the sales of the Appellant's Goods by the Appellant. However, it is not

found that the relevant sales were achieved only by the misleading indication regarding the quality (the Appellant's Indication). Therefore, these circumstances are found to fall under the grounds for rebuttal of the presumption.

However, concerning the Appellant's marketing efforts made for the sales of the Appellant's Goods, there are no argument and evidence on specific details besides the exhibition of the Appellant's Goods in training sessions, etc. related to nursery schools. Moreover, at nursery schools, etc. to which the Appellant made marketing efforts, there is the possibility that those customers may have checked the information on the Appellant's Goods posted on the Appellant's website and recognized the Appellant's Indication when considering whether to purchase the Appellant's Goods or not. Therefore, the fact that the Appellant made marketing efforts does not lead to a conclusion that the Appellant's Indication did not have any impact on the sales of the Appellant's Goods and the Appellee's Goods.

In addition, Arguments [i] through [iv] and Arguments [vii] through [ix] are not found to fall under the grounds for rebuttal, nor is it found that there are any argument and evidence for other grounds for rebuttal of the presumption of damage under Article 5, paragraph (2) of the Unfair Competition Prevention Act.

Based on the aforementioned circumstances together, it is reasonable to find that the percentage of rebuttal of the presumption in calculation of the amount of damage from the Appellant's Indication is 50%.

(4) As stated in (2) A. above, the amount of marginal profit of the Appellant for the period from May 8, 2019 until April 30, 2023 is 123,688,021 yen. From among this amount of marginal profit, the amount of damage until February 2, 2022 is 63,559,921 yen and that from February 3, 2022 is 60,128,100 yen. As stated in (3) C. above, it is reasonable to find that the percent of the rebuttal of the presumption in the calculation of the amount of damage from the Appellant's Indication is 50%. Therefore, the amount of damage to the Appellee due to the Appellant's Indication is 31,779,960 yen (below the decimal point is rounded off) for the portion until February 2, 2022, and 30,064,050 yen for the portion from February 3, 2022.

In addition, it is reasonable to find that the attorneys' fees having the corresponding causal relationship with the Appellant's misleading indication regarding the quality are 3,170,000 yen as those related to the misleading indication regarding the quality until February 2, 2022 and 3,000,000 yen as those related to the misleading indication regarding the quality from February 3, 2022.

Consequently, the Appellee is allowed to claim compensation for damage pursuant to Article 4 of the Unfair Competition Prevention Act against the Appellant at the

amount of 68,014,010 yen, and delay damage accrued at the rate of 3% per annum as prescribed by the Civil Code on the portion of 34,949,960 yen for the period from February 2, 2022, and on the portion of 33,064,050 yen for the period from May 27, 2023, respectively, until the completion of the payment.

4. The examination of other details of arguments of the parties does not affect the aforementioned findings and determinations in this instance (including the parts cited from the judgment in prior instance).

5. Conclusion

Based on the above, the Appellee's claims have grounds to the extent of claiming against the Appellant for the payment of 68,014,010 yen and the amount accrued at the rate of 3% per annum on the portion of 34,949,960 yen for the period from February 2, 2022, and on the portion of 33,064,050 yen for the period from May 27, 2023, respectively, until the completion of the payment, and that the remaining claims are groundless and should be dismissed with prejudice on the merits. The judgment in prior instance that is different from the above is unlawful and the appeal in this case has partial grounds.

Consequently, the judgment shall be rendered as indicated in the main text.

Intellectual Property High Court, Third Division
Presiding judge: SHOJI Tamotsu
Judge: IMAI Hiroaki
Judge: MIZUNO Masanori

Attachment

List of Sales Volume of the Appellee's Goods

Year	Sales Volume of the Appellee's Goods (unit)
1992	4
1993	13
1994	93
1995	98
1996	96
1997	131
1998	269
1999	284
2000	269
2001	211
2002	179
2003	106
2004	98
2005	83
2006	68
2007	58
2008	54
2009	58
2010	52
2011	70
2012	56
2013	78
2014	86
2015	78
2016	89
2017	74