Unfair Competition	Date	February 19, 2025	Court	Intellectual Property High Court, Third Division
	Case number	2023 (Ne) 10061		
- A case in which the court determined that the indications used in advertisements for a product (dryer) sold by the Appellee are not found to constitute "misleading indications as to quality" under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act.				

Case type: Injunction
Result: Appeal dismissed
References: Article 2, paragraph (1), item (xx) and Article 3 of the Unfair Competition Prevention Act
Judgment of the prior instance: Tokyo District Court, 2022 (Wa) 14148

Summary of the Judgment

1. The Appellant (the Plaintiff in first instance: X) is a company engaged in manufacturing, etc. of electric home appliances, and the Appellee (the Defendant in first instance: Y) is a company engaged in manufacturing, export, and sales, etc. of electric home appliances. Both X and Y sell hair dryers (hereinafter referred to as "dryers").

In the present case, X alleged that the indications used in advertisements for a specific dryer sold by Y (hereinafter this dryer is referred to as "Y's Product" and these indications are referred to as "Y's Indications") are used in a way that is likely to mislead as to the quality of Y's Product (hereinafter referred to as "misleading indications as to quality"), and that the act of using these indications constitutes unfair competition under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act, and sought against Y an injunction against the act of indication and deletion of the indications based on Article 3 of the Unfair Competition Prevention Act.

Before filing the present lawsuit, X conducted verification experiments respectively regarding Y's Indications (hereinafter referred to as the "Verification Experiments upon Filing the Action"), and argued that Y's Indications constitute misleading indications as to quality based on the results of the Verification Experiments upon Filing the Action.

2. The court of prior instance dismissed all of X's claims, holding that none of the reports on Verification Experiments upon Filing the Action are considered to be sufficient for supporting that Y's Indications are misleading as to the quality of Y's Product, and that there is also no other evidence supporting this. Y did not disclose data,

etc. that support Y's Indications in the prior instance stage, and X argued that Y's such response to the lawsuit violates the obligation to clarify specific circumstances (Article 6 of the Unfair Competition Prevention Act) and the obligation to clarify reasons upon active denial (Article 79 of the Rules of Civil Procedure). However, the court of prior instance determined as follows in a comment additionally made in light of the case: [i] the subject with respect to which allegations should be made and proof should be shown in the present case has been specifically indicated in Y's Indications to the extent that allows for comparative consideration for determining whether an infringement is established, and it cannot be said that "the specific circumstances surrounding the things or process that constitute the alleged infringement"(Article 6 of the Unfair Competition Prevention Act) are unclear; and [ii] in order to be able to request the other party for clarification of specific circumstances on the ground of the obligation to clarify specific circumstances, it is understood that, from the perspective of deterring abusive and exploratory filing of suits, etc., it is necessary to back up the action, etc. as much as to be able to say that doing so is tentatively reasonable, while taking into account the nature and details, etc. of the case, but X's Verification Experiments upon Filing the Action are inappropriate as experiments for verification and confirmation of Y's Indications in terms of the experiment methods, and it is difficult to say, given the doubt as to the respective results, that the aforementioned backup is provided, and therefore that it cannot be said that Y's response can be deemed to be in violation of the obligation to clarify specific circumstances.

3. X was dissatisfied with the judgment in prior instance and filed an appeal, and before filing the appeal, X conducted new verification experiments (hereinafter referred to as the "Verification Experiments upon Filing the Appeal") regarding Y's Indications.

In the appellate instance, Y submitted backup evidence supporting that Y's Indications are based on experiments. This evidence includes documents such as operating procedure manuals and experiment result verification materials concerning the experiments (hereinafter referred to as "experiment result reports, etc."), which are alleged by Y as showing that Y's Indications are based on experiments.

4. In the present judgment, the court determined that Y's Indications are not found to constitute misleading indications as to quality as described below, and dismissed the appeal, holding that the judgment in prior instance is reasonable in its conclusion.

(1) A. If a lawsuit is filed for seeking compensation for loss or damage or an injunction based on the Unfair Competition Prevention Act, on an allegation that a person's act of indication constitutes a misleading indication as to quality as referred to in Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act, it should be

construed that the burden of allegation and proof regarding the fact that the act of indication constitutes a misleading indication as to quality lies with the person that has filed the lawsuit (the plaintiff in first instance). However, if that indication makes consumers recognize that it is based on specific experiments, etc. but there is no material, etc. to support that indication, the act of indication is construed to constitute a misleading indication as to quality, and unless the person that conducted the act of indication (the defendant in first instance) submits materials, etc. to support that indication, there is room to construe that the allegation and proof of the misleading indication as to quality by the plaintiff in first instance have succeeded. In the present case, Y submitted the experiment result reports, etc., while X submitted the results of the Verification Experiments upon Filing the Action and Verification Experiments upon Filing the Appeal, so the question of whether Y's Indications are found to constitute misleading indications as to quality is examined by taking these materials, etc. into consideration.

B. Y's Indications are published on Y's web page and catalog, and their purpose is to indicate to general consumers the effects that will be produced by using Y's Product and to motive them to buy it. However, the effects shown in Y's Indications are effects produced by a function which the user cannot visually recognize, and the degrees of the effects are not subject to a uniquely determined measurement method, and could greatly vary depending on the conditions, such as the use environment, the method of use, and differences among individuals. Y's Indications also provide precautions to the effect that the effects may vary depending on the individual. Then, general consumers who see such Y's Indications may understand the specific numerical values and experiment results as merely indicating the degrees of the effects and the presence of scientific basis that supports those data, and they are not considered to hold much interest in whether those data are strictly accurate. In light of such contents and nature, etc. of Y's Indications, if the contents of Y's Indications are found to lack strict accuracy, Y's Indications should not immediately be determined to constitute misleading indications as to quality; if the contents of Y's Indications are found to be based on reasonable scientific basis, Y's Indications should not be found to constitute misleading indications as to quality.

(2) According to the experiment result reports, etc. submitted by Y as evidence, Y is found to have conducted experiments on Y's Indications based on operating procedure manuals prepared within Y's company, and prepared experiment result verification materials based on them. In light of the specific contents of the experiment result reports, etc. relating to the individual experiments implemented by Y on Y's Indications, it can

be said that all of Y's Indications indicate performance or effects of Y's Product within the scope of the results of the experiments that were implemented by Y based on the operating procedure manuals.

It cannot be said that the Verification Experiments upon Filing the Action and the Verification Experiments upon Filing the Appeal conducted by X are all sufficient for showing that the experiments implemented by Y do not support Y's Indications, and it also cannot be construed that they are sufficient for finding that Y's Indications constitute misleading indications as to quality.

(3) Although Y's Indications use statements and photographs that were used in advertisements for a model that was released before Y's Product (the previous model), they will not constitute misleading indications as to quality under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act as long as the contents of the indications do not mislead general consumers as to the quality of Y's Product, and therefore it cannot be said that they constitute misleading indications as to quality solely on the basis that they include the same contents as advertising indications for the previous model.

Indications that were used in advertisements for the previous model which were also used in Y's Indications include contents such as graphs showing the results of experiments conducted for the previous model. However, when they are examined individually and specifically, there are circumstances where the used indications indicate the same results as the results of experiments for Y's Product, and also circumstances where the used indication shows numerical values that represent lower performance than the results of experiments using Y's Product, and the used indication does not encourage general consumers to buy the product by misleading them into believing that it has performance which it actually does not have. Therefore, in the present case, Y's Indications are not found to constitute misleading indications as to quality on the basis that they use indications of the results of experiments that were conducted for the previous model.

Also, in regard to other indications, Y's Indications are not found to constitute misleading indications as to quality on the basis that they use indications that were used in advertisements for the previous model.

Judgment rendered on February 19, 2025
2023 (Ne) 10061, Appeal case of seeking injunction against an act of unfair competition
(Court of prior instance: Tokyo District Court, 2022 (Wa) 14148)
Date of conclusion of oral argument: November 21, 2024

Judgment

Appellant: Dyson KK

Appellee: Panasonic Corporation

Main text

1. This appeal shall be dismissed.
2. The cost of the appeal shall be borne by the Appellant.

Facts and reasons

(Hereinafter, abbreviations, etc. are those used in the judgment in prior instance, unless otherwise specified.)

No. 1 Object of the appeal

1. The judgment in prior instance shall be revoked.
2. The Appellee must not use any of the indications stated in Attachment 2 "List of the Appellee's Indications" in advertisements for the product stated in Attachment 1 "List of the Appellee's Product," or in trade documents or communications related to that product, and in the Appellee's business-related website and other advertising materials.
3. The Appellee shall delete the indications stated in Attachment 2 "List of the Appellee's Indications" used in advertisements for the product stated in Attachment 1 "List of the Appellee's Product," or in trade documents or communications related to that product, and in the Appellee's business-related website and other advertising materials.

No. 2 Background

1. In the present case, the Appellant (the Plaintiff in prior instance), which is a company whose purpose is to import, manufacture, sell, lease, or otherwise handle electrical appliances and apparatus and which sells products including hair dryers (hereinafter simply referred to as "dryers"), alleges as follows: the indications stated in Attachment 2 "List of the Appellee's Indications" (hereinafter the indications are respectively referred to as "Appellee's Indication 1-1" or the like as stated in that list; further, Appellee's Indications 1-1 and 1-2 are collectively referred to as "Appellee's Indication 1," Appellee's Indications 2-1 and 2-2 are collectively referred to as "Appellee's

Indication 2," Appellee's Indications 3-1, 3-2, and 3-3 are collectively referred to as "Appellee's Indication 3," and Appellee's Indications 5-1 and 5-2 are collectively referred to as "Appellee's Indication 5;" and these indications and Appellee's Indication 4 are collectively referred to as the "Appellee's Indications") used in advertisements for the dryer with model number EH-NA0G sold by the Appellee (the Defendant in prior instance) (the product stated in Attachment 1 "List of the Appellee's Product"; hereinafter referred to as the "Appellee's Product") are used in a way that is likely to mislead as to the quality of the Appellee's Product, and this act of indication constitutes unfair competition under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act. Based on this allegation, the Appellant seeks against the Appellee an injunction against the act of indication (Article 3, paragraph (1) of the same Act) and deletion of the indications (paragraph (2) of that Article) based on that Article.

As the court of prior instance dismissed all of the Appellant's claims, the Appellant was dissatisfied with the judgment and filed an appeal.

2. Basic facts

(1) Parties

The Appellant is an affiliated company of Dyson Technology Limited, a UK company engaged in manufacturing, export, and sale, etc. of electric home appliances, including hair dryers, and it is a stock company that imports products of Dyson Technology Limited and conducts sale, etc. of those products within Japan.

The Appellee is a stock company engaged in manufacturing, export, and sale, etc. of electric home appliances, including hair dryers, in Japan.

(2) Appellee's Product (Exhibits Ko 3, 32, and 39, and Exhibit Otsu 57)

The Appellee has been selling multiple types of dryers with a function to blow out fine water particles called "nanoe" since around 2005 at the latest. The dryer with model number EH-NA9E (hereinafter, dryers may be specified only by model numbers), which was released in 2020, has a structure to blow out nanoe.

In around the fall of 2019, the Appellee released a dryer equipped with a mechanism called "nanoe MOISTURE+ device," which blows out "nanoe MOISTURE+" that generate more moisture than conventional nanoe (hereinafter, nanoe that is not nanoe MOISTURE+ may be called "conventional nanoe"). As dryers with a function to blow out nanoe MOISTURE+, the Appellee released EH-NA0E, which is the former model of the Appellee's Product, (hereinafter referred to as "previous model") in the fall of 2020, and EH-NA0G, which is the Appellee's Product, in the fall of 2021. The airflow rate of the Appellee's Product is 1.5 m^3 per minute, and that of the previous model is 1.3 m^3 per minute (both are airflow rates in the turbo mode (strong airflow)).

The Appellee's dryers with a function to blow out nanoe, including those that blow out nanoe MOISTURE+, have a nanoe outlet separate from the hair-drying air outlet.

The operating instructions for the Appellee's Product (Exhibit Ko 32) contain the following explanation about nanoe MOISTURE+: "nanoe MOISTURE+ are 'nanoe' ion particles wrapped in water with increased moisture which makes them highly penetrative in hair. nanoe MOISTURE+ are generated by collecting the available moisture in the air, so depending on the usage environment, nanoe MOISTURE+ may not be generated. In environments of low temperature and low humidity, moisture in the air becomes difficult to collect. When this occurs, negative ions are generated."

(3) Appellee's Indications (Exhibits Ko 2 and 3)

In order to promote the Appellee's Product, the Appellee created on its website a page explaining the performance and functions of the Appellee's Product (the Appellee's web page), and posted the Appellee's Indications on this web page. In addition, the Appellee distributed copies of a catalog containing the same contents as the Appellee's web page at stores, etc. The contents of the Appellee's Indications are as follows.

A. Appellee's Indication 1

Appellee's Indication 1 is as stated in 1. in Attachment 2 "List of the Appellee's Indications," and is comprised of Appellee's Indication 1-1 which states "nanoe MOISTURE+ moisturize hair 1.9 times better" and Appellee's Indication 1-2 which is an explanation on the increased moisture content of hair using a figure and characters.

With regard to the statement "moisturizes hair 1.9 times better" in Appellee's Indication 1-1, there is a statement to the same effect also in the figure of Appellee's Indication 1-2, and both of them have the statement "(Increased moisture content of hair, compared with a Panasonic product installed with conventional nanoe)" indicated near them.

The figure of Appellee's Indication 1-2 is a bar graph on the increased moisture content of hair, comparing EH-NE6B, which is a dryer with a structure to blow out negative ions, EH-NA9E, which is a dryer with a structure to blow out nanoe, and the Appellee's Product, which is a dryer with a structure to blow out nanoe MOISTURE+. On the vertical axis, numerical values from 0.1 to 0.3 are indicated as "increase in moisture content," but without the indication of the unit. The bars indicate the following values: 0.000 for EH-NE6B; 0.136 for EH-NA9E; and 0.263 for the Appellee's Product. An arrow is drawn from the upper left corner of the bar for EH-NA9E toward the upper left corner of the bar for the Appellee's Product, indicating that "1.9 times" is a comparison between 0.136 for EH-NA9E and 0.263 for the Appellee's Product. The following sentences are indicated to the right-hand side of the figure: "nanoe

MOISTURE+ find their way through the tiny gaps between cuticles and moisturize not only the surface of the hair but also deep inside it, making the moisture penetrate the hair. Creating a feeling as if the hair is coated with a veil of water to the tips."; "[Model trial method] The hair was treated according to the conditions shown below, and the moisture content measured with an FT-NIR immediately after the hair had been dried"; "[Sample] nanoe / Panasonic's EH-NA9E, released in 2020; nanoe MOISTURE+ / EH-NA0G"; "[Conditions] 1) The hair was soaked in water; 2) It was dried with a hair dryer (distance: 10 cm; warm air / TURBO)"; "● Panasonic survey"; "● Results may vary from person to person."

B. Appellee's Indication 2

Appellee's Indication 2 is as stated in 2. in Attachment 2 "List of the Appellee's Indications." Appellee's Indication 2-1 is comprised of the statement "Amount of moisture generated compared to a conventional device: 18 times," and in Appellee's Indication 2-2, an illustration showing nanoe generated from a nanoe device and an illustration showing nanoe MOISTURE+ generated from a nanoe device are placed side by side, and above these illustrations is the statement of Appellee's Indication 2-1. In addition, Appellee's Indication 2-2 contains the statement "nanoe MOISTURE+ are nanoe designed to be absorbed even better by the hair. The method of generation has been changed to produce 18 times the amount of moisture generated by conventional nanoe." When combined with these contents of Appellee's Indication 2-2, Appellee's Indication 2-1 is understood to be an indication meaning that the amount of moisture generated from the nanoe device of a dryer that generates nanoe MOISTURE+ is 18 times the amount of moisture generated from the nanoe device of a dryer that generates conventional nanoe.

C. Appellee's Indication 3

Appellee's Indication 3 is as stated in 3. in Attachment 2 "List of the Appellee's Indications." Appellee's Indication 3-1 is the statement "Prevents hair color fading" and Appellee's Indication 3-2 is the statement "Color does not fade easily." Appellee's Indication 3-3 is comprised of the statement "Preventive effect against hair color fading" and a graph showing this effect. On the graph, the vertical axis is labeled "Color changes (color variation) in dyed hair" and indicates numerical values in increments of 0.5 from 0 at the top to 2 at the bottom, but without the indication of the unit. On the left-hand side of these values, the statement "Color does not fade easily" is indicated together with an up arrow, and the statement "Color fades easily" is indicated together with a down arrow. The horizontal axis is labeled "No. of times hair washed and dried" and indicates the numerical values 10, 20, and 30 from left to right. The graph shows a

line relating to the Appellee's Product and a line relating to a dryer that does not emit ions, with the former line drawn above the latter line, and the former line is accompanied by the statement "Color does not fade easily" (Appellee's Indication 3-2).

D. Appellee's Indication 4

Appellee's Indication 4 is as stated in 4. in Attachment 2 "List of the Appellee's Indications." On its right-hand side, there are the following statements: "New Hair Dryer nanocare with nanoe MOISTURE+ & minerals boosts cuticle adhesion, helping to prevent friction damage from brushing etc. Continued use will give you smooth, finger-combable hair."; "[Model trial method] Test where bunches of hair that have been washed then dried with a dryer (for approx. 1 min 30 sec) are combed approximately 1,000 times at increased speeds."; "● Panasonic survey"; and "● Effects may vary depending on the colorant and the individual." On the left-hand side of that indication, there is an image which is a magnified photograph of the tip part of hair (hair tip) for the case with "nanoe MOISTURE+ & minerals" and an image which is a magnified photograph of the tip part of hair for the case "without ions." The statement "A lovely hair tip with no damage" is indicated above the former image, and the statement "The hair tip has been damaged and split" is shown above the latter image. As described by the statement accompanying each image, the image for the case with "nanoe MOISTURE+ & minerals" is a photograph of the tip part of hair with no damage, and the image for the case "without ions" is a photograph of a damaged and split hair tip. Meanwhile, these images are photographs taken with a scanning electron microscope (SEM) in an experiment conducted by using EH-NA9A (a model that emits nanoe that is not nanoe MOISTURE+) which was released in 2018, and they were also used in advertising indications for EH-NA0B released in 2019 and the previous model released in 2020 (Exhibits Otsu 51, 53-1 to 53-3, 55, and 56, and the entire import of oral arguments).

E. Appellee's Indication 5

Appellee's Indication 5 is as stated in 5. in Attachment 2 "List of the Appellee's Indications." Appellee's Indication 5-2 comprises a bar graph on "The difference in the ratio of split ends" and the vertical axis indicates numbers 40, 30, 20, 10, and 0 from top to bottom, but without the indication of the unit. The graph shows a bar for a dryer that emits nanoe MOISTURE+ and a bar for a dryer that does not emit ions, with the numerical value 3.0 indicated for the former and 30.7 indicated for the latter. An arrow is drawn from the upper right corner of the latter bar toward the upper left corner of the former bar, and the statement "Prevention of friction damage" (Appellee's Indication 5-1) is indicated. It is understood to be a graph showing that the dryer that emits nanoe

MOISTURE+ prevents friction damage more and accounts for a lower ratio of split ends. To the right-hand side of the graph, the following was originally stated as "[Trial method]": "Comparison of cuticle maintenance when using a Hair Dryer nanocare with nanoe MOISTURE+ or using a non-ionic hair dryer. Bunches of bleached hair were repeatedly washed, dried with a hair dryer and combed. The hair was rebleached every 60th cycle, and the process was carried out for a total of 180 cycles. The number of cuticles was measured and the maintenance ratio calculated. The cuticle maintenance ratios of the hairs were compared." However, after the present lawsuit was filed, the Appellee changed the contents of Appellee's Indication 5 to those with these statements deleted (Exhibit Otsu 10, the entire import of oral arguments).

(4) Verification experiments conducted by the Appellant regarding the Appellee's Indications

A. Before filing the present lawsuit, the Appellant conducted verification experiments regarding the Appellee's Indications as follows.

(A) Regarding Appellee's Indication 1, a verification experiment by Fourier transform near-infrared spectroscopy (the FT-NIR method) (Exhibit Ko 5-3, "2,"; hereinafter referred to as "Verification Experiment 1-1 upon Filing the Action") and a verification experiment by Karl Fischer titration (the KF method) (Exhibit Ko 5-3, "3,"; hereinafter referred to as "Verification Experiment 1-2 upon Filing the Action," and Verification Experiments 1-1 and 1-2 upon Filing the Action are collectively referred to as "Verification Experiment 1 upon Filing the Action")

(B) Regarding Appellee's Indication 2, a moisture content measuring test (Exhibit Ko 4; hereinafter referred to as "Verification Experiment 2 upon Filing the Action")

(C) Regarding Appellee's Indication 3, a verification experiment on color changes in hair (Exhibit Ko 6; hereinafter referred to as "Verification Experiment 3 upon Filing the Action")

(D) Regarding Appellee's Indication 4, a verification experiment on hair tip conditions (Exhibit Ko 7; hereinafter referred to as "Verification Experiment 4 upon Filing the Action")

(E) Regarding Appellee's Indication 5, a verification experiment for analyzing the ratio of split ends (Exhibit Ko 8; hereinafter referred to as "Verification Experiment 5 upon Filing the Action," and Verification Experiments 1 through 5 upon Filing the Action are collectively referred to as the "Verification Experiments upon Filing the Action")

B. After the judgment in prior instance, in which the court determined that the Verification Experiments upon Filing the Action were unreliable, was handed down, the Appellant reviewed the test conditions, revised them as needed, and conducted

additional verification experiments as follows.
(A) Regarding Appellee's Indication 1, a verification experiment for evaluating the moisture content in hair (Exhibit Ko 34; hereinafter referred to as "Verification Experiment 1 upon Filing the Appeal")
(B) Regarding Appellee's Indication 2, a moisture content measuring test (Exhibits Ko 37-1 and 37-2; hereinafter referred to as "Verification Experiment 2 upon Filing the Appeal")
(C) Regarding Appellee's Indication 3, a verification experiment on color changes in hair (Exhibit Ko 29; hereinafter referred to as "Verification Experiment 3 upon Filing the Appeal")
(D) Regarding Appellee's Indications 4 and 5, a verification experiment for analyzing split ends (Exhibit Ko 33; hereinafter referred to as "Verification Experiment 4 upon Filing the Appeal," and Verification Experiments 1 through 4 upon Filing the Appeal are collectively referred to as the "Verification Experiments upon Filing the Appeal")
(5) Experiment result report, etc. attached to Exhibit Otsu 57

As backup evidence supporting that the Appellee's Indications are based on experiments, the Appellee submitted Exhibit Otsu 57 in the present instance. Exhibit Otsu 57 is the Appellee's in-house approval document (approval request) seeking approval for voluntary disclosure of attachments of Exhibit Otsu 57, which include trade secrets, in order to respond to the proceedings in the present instance. As attachments of Exhibit Otsu 57, documents which are alleged by the Appellee as showing that the Appellee's Indications are based on experiments are attached. Specifically, Attachment 1 of Exhibit Otsu 57 is operating procedure manuals, Attachment 2 is experiment result verification material, Attachment 3 is confirmation of evidence for appeal (hereinafter referred to as the "appeal evidence sheet") (hereinafter, these Attachments 1 through 3 of Exhibit Otsu 57 are collectively referred to as the "experiment result reports, etc. attached to Exhibit Otsu 57").

3. Issues

Whether the Appellee's Indications are misleading as to quality

No. 3 Judgment of this court

This court also determines that all of the Appellant's claims are groundless and should be dismissed. The reasons are as follows.

1. Regarding the determination framework

According to Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act, an act of using an indication in documents or communications used for

an advertisement for goods in a way that is likely to mislead as to the quality of the goods (a misleading indication as to quality) constitutes unfair competition. If a lawsuit is filed for seeking compensation for loss or damage or an injunction based on the Unfair Competition Prevention Act, on an allegation that a person's act of indication constitutes a misleading indication as to quality as referred to in Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act, it should be construed that the burden of allegation and proof regarding the fact that the act of indication constitutes a misleading indication as to quality lies with the plaintiff in first instance that has filed the lawsuit. However, if that indication makes consumers recognize that it is based on specific experiments, etc. but there is no material, etc. to support that indication, the act of indication is construed to constitute a misleading indication as to quality, and unless the person that conducted the act of indication (the defendant in first instance) submits materials, etc. to support that indication, there is room to construe that the allegation and proof of the misleading indication as to quality by the plaintiff in first instance have succeeded. When looking at the present case, the Appellee's Indications are found to make consumers recognize that they are based on specific experiments, etc., so unless the Appellee that has used the Appellee's Indications (the defendant in first instance) submits materials, etc. to support the Appellee's Indications, there is room to construe that the Appellee's Indications constitute misleading indications as to quality. Nevertheless, by the time of conclusion of the oral proceedings of the present case, the Appellee submitted the experiment result reports, etc. attached to Exhibit Otsu 57 to support the fact that the Appellee's Indications are based on experiment results and therefore are not misleading indications as to quality, while the Appellant submitted the results of the Verification Experiments upon Filing the Action and the Verification Experiments upon Filing the Appeal, etc. to support the fact that the Appellee's Indications constitute misleading indications as to quality. Therefore, the question of whether the Appellee's Indications are found to constitute misleading indications as to quality is examined by taking these materials, etc. into consideration.

Meanwhile, the Appellee's Indications are published on the Appellee's web page and catalog, and their purpose is to indicate to general consumers the effects that will be produced by using the Appellee's Product and to motive them to buy it. However, the effects shown in the Appellee's Indications are effects that nanoe MOISTURE+ have on hair, which the user cannot visually recognize, and due to their nature, the degrees of the effects are not subject to a uniquely determined measurement method, and could greatly vary depending on the conditions, such as the use environment, the method of use, and differences among individuals. The Appellee's Indications also provide

precautions to the effect that the effects may vary depending on the individual. Then, even if general consumers who see such Appellee's Indications may hold interest in the effects shown in the Appellee's Indications, they may understand the specific numerical values and experiment results as merely indicating the degrees of the effects and the presence of scientific basis that supports those data, and they are not considered to hold much interest in whether those data are strictly accurate. In light of such contents and nature, etc. of the Appellee's Indications, if the contents of the Appellee's Indications are found to lack strict accuracy, the Appellee's Indications should not immediately be determined to constitute misleading indications as to quality; if the contents of the Appellee's Indications are found to be based on reasonable scientific basis, the Appellee's Indications should not be found to constitute misleading indications as to quality.

2. Regarding the experiment result reports, etc. attached to Exhibit Otsu 57

(1) Regarding the procedure of the Appellee's in-house experiment, etc.

According to evidence (Exhibits Otsu 40, 45, 57, and 58) and the entire import of oral arguments, the following facts are found regarding the Appellee's implementation of experiments and preparation of experiment result reports, etc.

A. Preparation of an operating procedure manual

When the Appellee conducts experiments, it prepares an operating procedure manual, which is a document that standardizes (manualizes) the experimental procedure, for the purpose of ensuring and guaranteeing the reproducibility and scientific validity of experiments and experiment results.

When preparing an operating procedure manual, in order to achieve the abovementioned purpose, multiple persons with different years of service and experience bring together their knowledge and jointly engage in the preparation. Specifically, the technology development department normally sets up a team of three people, consisting of one establisher (a section chief or a higher-rank executive), one reviewer (a supervisor or a higher-rank executive), and one drafter by their years of service and position in descending order, and the team conducts work relating to preparation of the operating procedure manual under the directions and supervision of the establisher. In the end, the establisher, the reviewer, and the drafter each affixes their seal. When preparing the operating procedure manual, the team investigates whether there are any criteria or standards to be relied on under the initiative of the drafter, and if there are criteria or standards, such as International Organization for Standardization (ISO) Standards or Japanese Industrial Standards (JIS), that can be relied on overall in establishing the measuring method, etc., they prepare the operating

procedure manual in compliance with those criteria or standards. On the other hand, if there are criteria or standards that can be relied on only partially, or if there are no such criteria or standards, the team refers to documents and scientific papers that are published by universities or specialized institutions, etc. and are widely recognized as being valid in the relevant specialized field, or refers to information on the actual status of customers in the market, among other information, and in the end, they adopt a method that is considered to be scientifically valid based on the establisher's determination.

In addition to the criteria or standards, etc. above, if the establisher, etc. determines that involvement of an outside expert is required in preparing the operating procedure manual, in light of the contents of those criteria or standards, etc., the team confirms the opinion of an outside expert who has expertise in the experiment or evaluation method, and sometimes acquires a written opinion from such expert, to prepare the operating procedure manual.

The operating procedure manual has spaces for entering information in two rows, "operating procedure" and "key points of the operation." By using characters and photographs, the team states or indicates the items to be prepared, the preparation for an experiment, the experimental procedure, etc. in the space for "operating procedure," and the key points in conducting the experiment in the space for "key points of the operation," incorporating ideas to ensure that scientifically valid experiment results can be obtained by conducting an experiment in accordance with the operating procedure manual. As the contents of the operating procedure manual are for ensuring and guaranteeing the reproducibility and scientific validity of experiments and experiment results, they are basically not revised once they are established, but if a minor change occurs, the relevant content is revised, and if a change that is not minor occurs, a new operating procedure manual is prepared.

B. Implementation of an experiment

When implementing an experiment that is stated in an operating procedure manual, one selected experimenter implements the experiment in accordance with the operating procedure manual. In order to guarantee that the experiment is accurately implemented in accordance with the operating procedure manual, the section chief or the supervisor conducts timely checks by, for example, observing the experiment being implemented, and holding an ex-post facto interview on the implementation of the experiment.

C. Experiment result verification material

Experiment result verification material refers to material on verification of the results of an experiment implemented based on the operating procedure manual. It is

prepared for the purpose of recording information including who verified the experiment results when and how, and what kind of verification results were obtained as a result.

The experimenter creates graphs and conducts statistical processing, etc. based on the results obtained through the implementation of the experiment and prepares the experiment result verification material. After that, the experimenter checks that the spaces for "purpose," "approach," "results," "conclusion," and others in the experiment result verification material are free of defects, such as omissions or calculation errors, and also compares the contents with those of experiment result verification material that was prepared in the past for the same type of experiment, and checks that the results of the experiment implemented this time are reproducible and scientifically valid, before circulating the experiment result verification material to the section chief. Then, the section chief checks the same items, and in some cases, returns the experiment result verification material to the experimenter, giving an order to redo statistical analysis or implement an additional experiment, after which the experimenter and the section chief both affix their seals to the experiment result verification material. Meanwhile, there are also cases in which the supervisor is also involved and the check is conducted in the order of the experimenter, the supervisor, and the section chief.

D. Appeal evidence sheet

An appeal evidence sheet is a sheet that summarizes the evidence (reasonable basis) that supports advertising indications. It is prepared for the purpose of determining whether the obtained evidence is scientifically valid and sufficient for the advertising indications, and then determining whether or not those advertising indications can be used. The marketing department considers advertising indications they want to use in selling a product, and in response, the technology development department and the technology management department make multifaceted and ultimate determination on whether it is possible to use those advertising indications. The results of the consideration, etc. are summarized into an appeal evidence sheet.

Specifically, first, the technology development department sets up a team of three people or more, consisting of one department manager (a department chief or a higher-rank executive), one or more checkers (executives such as a section chief or a supervisor), and one preparer by their years of service and position in descending order. In the same manner as for the operating procedure manual, the preparer, the checkers, and the department manager, either in this order or jointly, draft, review, check, etc. the appeal evidence sheet (Exhibit Otsu 58 at p. 5).

After that, the appeal evidence sheet is further circulated to the technology

management department, and three indication managers in this department check the sheet. These indication managers are served by supervisors or higher-rank executives in the technology management department who have technical knowledge as well as knowledge of the Act against Unjustifiable Premiums and Misleading Representations and other related laws and regulations. Based on in-house regulations, such as product design management criteria and provisions on indication management measures, the indication managers check matters including whether the contents of the experiment and the experiment results are appropriate, whether the experiment results comply with the contents of the appeal, whether the contents of the appeal have any problem in relation to the Act against Unjustifiable Premiums and Misleading Representations and other related laws and regulations, and whether the experiment method, which had been valid at the time of preparation of the operating procedure manual, is still valid in light of the scientific knowledge at the time of preparation of the appeal evidence sheet. If they determine that there is a problem, they conduct an in-house investigation or return the appeal evidence sheet to the technology development department, giving an order to take measures for correction.

Even if the marketing department considers that they want to continue using the contents of appeal that were used in the advertisement for a former model again in the advertisement for the new model, the technology development department and the technology management department conduct verification as needed.

E. Launch of advertising indications

If it is determined, after undergoing the processes above, that advertising indications can be used, those advertising indications are launched.

(2) Regarding the preparation process of the experiment result reports, etc. attached to Exhibit Otsu 57

A. According to Exhibits Otsu 57 and 58, it is found that operating procedure manuals specifying experiment procedures were prepared with regard to the Appellee's Indications as follows. In other words, the following were prepared: for Appellee's Indication 1—Exhibit Otsu 57, Attachment 1 Operating Procedure Manual "Evaluation of the Increased Moisture Content of Hair" (pages 1/4 to 4/4) (Exhibit Otsu 57 at pp. 3 to 6); for Appellee's Indication 2—Exhibit Otsu 57, Attachment 1 Operating Procedure Manual "Nanoemoisture Content Evaluation Method" (pages 1/8 to 8/8) (Exhibit Otsu 57 at pp. 7 to 14); for Appellee's Indication 3—Exhibit Otsu 57, Attachment 1 Operating Procedure Manual "Color Fading Evaluation (Hair Dryer)" (pages 1/7 to 7/7) (Exhibit Otsu 57 at pp. 15 to 21); and for Appellee's Indications 4 and 5—Exhibit Otsu 57, Attachment 1 Operating Procedure Manual "Evaluation of the Ratios of Split Ends"

(pages 1/5 to 5/5) (Exhibit Otsu 57 at pp. 22 to 26).

According to Exhibits Otsu 57 and 58, it is found that experiments were conducted within the Appellee's company based on the operating procedure manuals and that experiment result verification materials (Exhibit Otsu 57, Attachment 2) were prepared based on them, as follows. For Appellee's Indication 1, an experiment was conducted by November 10, 2020, at the latest, and based on it, Exhibit Otsu 57, Attachment 2 "Verification of the Possibility of EH-NA0G Increasing the Moisture Content of Hair" (Exhibit Otsu 57 at p. 28) was prepared on the same date. For Appellee's Indication 2, an experiment was conducted by January 20, 2021, at the latest, and based on it, Exhibit Otsu 57, Attachment 2 "Amount of Moisture Generated by EH-NA0G nanoe" (Exhibit Otsu 57 at p. 29) was prepared on the same date. For Appellee's Indication 3, an experiment using the previous model (EH-NA0E) was conducted by March 5, 2020, at the latest, and based on it, Exhibit Otsu 57, Attachment 2 "Verification of the Preventive Effect of nanoe MOISTURE+ & Minerals Against Color Fading" (Exhibit Otsu 57 at pp. 35 and 36) was prepared on the same date, and an experiment using the Appellee's Product (EH-NA0G) was further conducted by January 14, 2021, and based on it, Exhibit Otsu 57, Attachment 2 "Verification of the Preventive Effect of nanoe MOISTURE+ & Minerals Against Coloring Fading" (Exhibit Otsu 57 at pp. 30 to 32) was prepared on the same date. For Appellee's Indications 4 and 5, an experiment was conducted by November 13, 2020, at the latest, and based on it, Exhibit Otsu 57, Attachment 2 "Verification of the Preventive Effect of EH-NA0G Against Damage from Brushing" (Exhibit Otsu 57 at p. 33) was prepared on the same date.

According to Exhibits Otsu 57 and 58, it is found that the appeal evidence sheet for the Appellee's Indications was once again reviewed with respect to the validity of the methods and results of the respective experiments mentioned above, by the team including the department manager and checkers, and the contents of the indications were determined, after which the sheet was also checked by the indication managers, and the seals of the respective staff members were affixed to the sheet on July 30, 2021 and August 2, 2021.

B. Against this argument, the Appellant counterargues as follows as mentioned in No. 2, 4. [The Appellant's arguments] (2) A. (A) above. While the date of preparation of the appeal evidence sheet in Attachment 3 of Exhibit Otsu 57 is August 2, 2021, a press release on the Appellee's Product was published on July 16, 2021, and this press release showed a graph on the preventive effect against hair color fading. In addition, "nanoe MOISTURE+ moisturize hair 1.9 times better" was indicated on the product page of the Appellee's Product by July 18, 2021, at the latest. In this way, Appellee's Indication

3 was used on July 16, 2021 and Appellee's Indication 1 on July 18, 2021. Further, the details page showing the features of the earlier mentioned product on the product page is also considered to have been launched on the same date, which means that the Appellee's Indications were launched on the same date at the latest. Thus, the contents of a written statement by Section Chief A of the Hair Care Technology Development Section, Beauty Product Department, Beauty and Personal Care Business Division of the Appellee (hereinafter referred to as "Written Statement A1") contradict the abovementioned facts and are not credible; hence, the contents of Exhibit Otsu 57 are not credible either, and the experiment reports, etc. attached to Exhibit Otsu 57 cannot back up the Appellee's Indications.

However, the dates of experiments on the Appellee's Indications stated in Exhibit Otsu 57 are all before July 16, 2021, and there is no fact that the abovementioned use of indications in the press release and on the product page took place before the dates on which the experiments on the Appellee's Indications were allegedly conducted. Further, as mentioned above, in light of the contents of the operating procedure manuals in Attachment 1 and the experiment result verification materials in Attachment 2 of Exhibit Otsu 57, it is found that the experiments stated in the experiment result verification materials were actually conducted based on the operating procedure manuals. Indeed, the date on which the seals of the preparer, checkers, and department manager were affixed on the appeal evidence sheet in Attachment 3 of Exhibit Otsu 57 is July 30, 2021, and the date on which the seals of confirmation were affixed by the indication managers is August 2, 2021, with both dates being later than the date of the abovementioned use of indications in the press release and on the product page. However, this fact cannot serve as the basis for construing that all contents of Written Statement A1 lack credibility, or for finding that the experiments stated in Attachment 2 of Exhibit Otsu 57 had not been implemented. As mentioned above, in light of the contents and results of the experiments stated in the experiment result verification materials in Attachment 2 of Exhibit Otsu 57, it is found that the Appellee's Indications were used based on those experiments, and as mentioned later, the abovementioned experiments were conducted by methods that are found to be scientifically reasonable, so the experiment result reports, etc. attached to Exhibit Otsu 57 are found to constitute a backup that supports the Appellee's Indications. Even if the fact that the press release was published on July 16 and 18, 2021 or the fact that the dates on which seals were affixed to the appeal evidence sheet in Attachment 3 of Exhibit Otsu 57 are July 30 and August 2, 2021 were in violation of the Appellee's in-house procedure, the Appellee's Indications are found to have been used based on experiments, etc. that serve as a

scientifically reasonable support, as mentioned later, so the determination to the effect that the Appellee's Indications do not constitute misleading indications as to quality will not be affected by the abovementioned violation of procedure. Accordingly, the Appellant's abovementioned argument cannot be accepted.

In addition, the Appellant argues that, as mentioned in No. 2, 4. [The Appellant's arguments] (2) A. (B) above, the abovementioned appeal evidence sheet was prepared after the launch of the Appellee's Indications, which means that the Appellee did not possess a backup as of the time when the Appellee's Indications were launched, so even if Written Statement A1 is found to be credible, the Appellee's Indications lack a backup and constitute misleading indications as to quality. However, due to the same reason as that mentioned earlier, the fact that the abovementioned appeal evidence sheet was prepared after the abovementioned use of indications in the press release and on the product page does not immediately serve as the basis for concluding that the contents of the Appellee's Indications lack support, or that the Appellee's Indications constitute misleading indications as to quality. Accordingly, the Appellant's abovementioned argument cannot be accepted.

3. Regarding whether it is appropriate to use advertising indications for the previous model in the Appellee's Indications

(1) Regarding advertising indications used in an advertisement of the previous model (Exhibits Ko 5-2 and 39)

A. An advertisement of the previous model (Exhibit Ko 39) contains the following advertising indications.

(A) At a place with the heading "Penetrates and moisturizes the hair," there are the sentences "'nanoe' MOISTURE+ find their way through the tiny gaps between cuticles and moisturize not only the surface of the hair but also deep inside it, achieving increased moisture content of hair of 1.9 times. Creating a feeling as if the hair is coated with a veil of water to the tips." Below them, there is a bar graph titled "Increased moisture content of hair," comparing EH-NE6B with a structure that emits negative ions, EH-NA9B with a structure that emits nanoe, and the previous model with a structure that emits nanoe MOISTURE+. On the vertical axis, numerical values from 0.1 to 0.3 are indicated, but without an explanation as to what these numerical values indicate or the indication of the unit. The bars indicate the following values: 0.000 for EH-NE6B; 0.136 for EH-NA9B; and 0.263 for the previous model. A dotted-line arrow is drawn from the upper left corner of the bar for EH-NA9B toward the upper left corner of the bar for the previous model. Above the graph, there is the statement "Moisturizes hair (increased moisture content of hair) 1.9 times better (compared with a conventional

Panasonic product)," and to the right-hand side of the graph, the following sentences are indicated: "[Model trial method] The hair was treated according to the conditions shown below, and the moisture content measured with an FT-NIR immediately after the hair had been dried"; "[Sample] negative ions / Panasonic's EH-NE6B, released in 2019; "nanoe" / Panasonic's EH-NA9B, released in 2019; "nanoe" MOISTURE+ / EH-NA0E"; "[Conditions] 1) The hair was soaked in water; 2) It was dried with a hair dryer (distance: 10 cm; warm air / TURBO)"; "● Panasonic survey"; "● Results may vary from person to person."

When compared to Appellee's Indication 1, the abovementioned statements are found to be almost the same, except that the model number of the Appellee's Product is replaced with the model number of the previous model, and that the model number of the nanoe model differs.

(B) At a place with the heading "What is 'nanoe' MOISTURE+?", there is the statement "Amount of moisture generated compared to a conventional device: 18 times," and an illustration showing nanoe blown out from a nanoe device and an illustration showing nanoe MOISTURE+ blown out from a nanoe device are placed side by side. The abovementioned statement is the same as Appellee's Indication 2-1, and the abovementioned illustrations placed side by side are the same as those comprised in Appellee's Indication 2-2.

(C) At a place with the heading "Prevents hair color fading," there is almost the same graph as the one comprised in Appellee's Indication 3-3 (however, the graph with the statement "Color does not fade easily" is indicated as one relating to the previous model).

(D) At a place with the heading "Helps to prevent friction damage and reduces the number of split ends," there is an image which is a magnified photograph of the tip part of hair for the case with "'nanoe' MOISTURE+" and an image which is a magnified photograph of the tip part of hair for the case "without ions." These images are the same as those used in Appellee's Indication 4, and as mentioned in No. 2, 2. (3) D. above, they are both photographs that were taken in an experiment conducted by using EH-NA9A. In addition, at the abovementioned place, the same figure as that in Appellee's Indication 5-2 is shown as a bar graph on "The difference in the ratio of split ends."

B. In a web page on the previous model (Exhibit Ko 5-2) on the Appellee's website, there are the graph mentioned in A. (A) above, sentences to the same effect as those mentioned in A. (A) above, and the statement and illustrations mentioned in A. (B) above.

(2) Regarding use of advertising indications for the previous model in the Appellee's

Indications

As mentioned in No. 2, 4. [The Appellant's arguments] (3) above, the Appellant argues that the Appellee's Indications use advertising indications for the previous model, and that, on this basis, the Appellee's Indications constitute misleading indications as to quality. However, even if the Appellee's Indications are of the same contents or include the same contents as advertising indications for the previous model, they will not constitute misleading indications as to quality under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act as long as the contents of the indications do not mislead general consumers as to the quality of the Appellee's Product, and therefore it cannot be said that they constitute misleading indications as to quality solely on the basis that they are of the same contents or include the same contents as advertising indications for the previous model. The question of whether use of indications of the same contents as advertising indications for the previous model for indications in an advertisement for the Appellee's Product constitutes a misleading indication as to quality will be examined individually for the Appellee's Indications, as mentioned later.

In addition, as mentioned in No. 2, 4. [The Appellant's arguments] (3) above, the Appellant argues that the fact that advertising indications for the previous model are used in the Appellee's Indications indicates that the Appellee has not conducted experiments regarding the Appellee's Indications by using the Appellee's Product. However, it cannot immediately be found that the Appellee has not conducted experiments regarding the Appellee's Indications by using the Appellee's Product on the basis that the Appellee's Indications include the same contents as advertising indications for the previous model. Also, in the present case, the Appellee is found to have implemented experiments by using the Appellee's Product and a comparable product, according to Exhibits Otsu 57 and 58, as mentioned in 2. (2) above. Therefore, the Appellant's abovementioned argument cannot be accepted.

4. Whether the Appellee's Indications constitute misleading indications as to quality

In the section below, the question of whether or not the Appellee's Indications constitute misleading indications as to quality will be examined, based on the experiment reports, etc. attached to Exhibit Otsu 57, the Verification Experiments upon Filing the Action, and the Verification Experiments upon Filing the Appeal.

(1) Whether Appellee's Indication 1 constitutes a misleading indication as to quality

A. Experiment implemented by the Appellee regarding Appellee's Indication 1

The experiment implemented by the Appellee regarding Appellee's Indication 1 (hereinafter referred to as "Appellee's Experiment 1") was conducted based on Exhibit

Otsu 57, Attachment 1 Operating Procedure Manual "Evaluation of the Increased Moisture Content of Hair" (pages 1/4 to 4/4) (Exhibit Otsu 57 at pp. 3 to 6). [redacted]

B. Regarding Verification Experiment 1 upon Filing the Action and Verification Experiment 1 upon Filing the Appeal (Exhibits Ko 5-3 and 34)

(A) In Verification Experiment 1 upon Filing the Action, a group using the Appellee's Product was specified as a sample group and a group using EH-NA9E was specified as a control group. For each group, five bunches of hair were soaked in 37°C water for 15 minutes, their moisture was removed with a paper towel, and they were dried by blowing air onto them with the relevant dryer for 2 minutes at a position 10 cm away from the air outlet of the dryer. For the bunches of hair in each group, the hair spectrum was measured before wetting the hair and after drying the hair, by using the FT-NIR method, and data that was considered to correspond to moisture was calculated from that spectrum. In addition, the increase in moisture content was measured for five different bunches of hair in each group before wetting the hair and after drying the hair, by using the KF method.

Regarding the results of Verification Experiment 1 upon Filing the Action, the report on Verification Experiment 1 upon Filing the Action (Exhibit Ko 5-3) states that, when measured by the FT-NIR method, the moisture content increased in hair dried using the Appellee's Product, whereas there was no significant change in the moisture content of hair before and after drying using EH-NA9E. The report states, however, that as the FT-NIR method is "a semiquantitative method that analyzes individual materials, it cannot measure the amount of change in the moisture content of hair before and after drying. It is not appropriate to consider the direct results of measurement using the FT-NIR method to be equal to the actual moisture content of hair, without adopting any other quantitative method" (Exhibit Ko 5-3 at p. 16). On the other hand, with regard to the experiment by the KF method, the report on Verification Experiment 1 upon Filing the Action states that "a decrease in the moisture content of hair was observed for both" the Appellee's Product and EH-NA9E (Exhibit Ko 5-3 at p. 16), and that "the moisture content of hair decreased more notably" for EH-NA9E compared to the Appellee's Product (Exhibit Ko 5-3 at p. 16).

(B) In Verification Experiment 1 upon Filing the Appeal, the same test environment was set for the FT-NIR method and the KF method (temperature: 23 to 24°C; humidity: 52 to 54% RH), and for each method, 10 bunches of hair were used. The bunches of hair were soaked in water for 15 minutes, their moisture was removed with tissue paper, and

they were dried by blowing air onto them with the dryer for 1.5 minutes at a position 10 cm away from the air outlet of the dryer.

C. Discussion

(A) As mentioned in A. above, the Appellee is found to have implemented Appellee's Experiment 1 based on the operating procedure manual for the evaluation of the increased moisture content of hair prepared by the Appellee. The actual procedure of Appellee's Experiment 1 is not found to have deviated from the contents of the operating procedure manual, and the contents of the experiment are not found to lack reasonableness either.

[redacted] When this result and Appellee's Indication 1 are compared, it can be said that the statement "nanoe MOISTURE+ moisturize hair 1.9 times better " is in line with the results of the experiment.

The bar graph comprised in Appellee's Indication 1-2 uses advertising indications for the previous model (3. (1) A. (A) above). It indicates that the increase in moisture content is 0.136 for EH-NA9E and 0.263 for the Appellee's Product, which differs from the increases in moisture content for EH-NA9E and the Appellee's Product measured as the results of Appellee's Experiment 1. However, it can be said that the most important content of Appellee's Indication 1 is the indication of the increase rate, which is that the increase in moisture content of hair in the case of using the Appellee's Product was 1.9 times that of using EH-NA9E, and as mentioned above, this numerical value of the increase rate is in line with that in Appellee's Experiment 1. Therefore, it cannot be said that Appellee's Indication 1 misleads general consumers into believing that the Appellee's Product has effects that actually cannot be obtained, and it also cannot be said that Appellee's Indication 1 is misleading as to functions or performance of the Appellee's Product.

Thus, it can be said that Appellee's Indication 1 indicates effects of the Appellee's Product within the scope of the results of Appellee's Experiment 1 that was implemented by the Appellee based on the operating procedure manual.

(B) In Verification Experiment 1 upon Filing the Action, the air from the dryer was blown onto the hair for 2 minutes (120 seconds), whereas in Verification Experiment 1 upon Filing the Appeal, the air from the dryer was blown onto the hair for 1.5 minutes (90 seconds).

According to the results of an experiment using the KF method stated in Exhibit Otsu 43, if wetted hair is dried by blowing air from the dryer onto it, the moisture

content of the hair reaches the level before the hair was wetted in approximately 70 seconds. In light of this experimental result, it can be said that, in both Verification Experiment 1 upon Filing the Action and Verification Experiment 1 upon Filing the Appeal, the air from the dryer was continued to be blown onto the hair even after its moisture content reached the level before the hair was wetted for the experiment. Thus, even if such Verification Experiment 1 upon Filing the Action or Verification Experiment 1 upon Filing the Appeal produces a result that the moisture content of hair is low, it should not be construed based on this result that the increased moisture content of hair in the case of drying hair with the Appellee's Product is lower than the numerical value indicated in Appellee's Indication 1, or that the increase rate in the case of comparing the increased moisture content of hair for the Appellee's Product with that for EH-NA9E is lower than the numerical value indicated in Appellee's Indication 1.

Accordingly, it cannot be said that Verification Experiment 1 upon Filing the Action and Verification Experiment 1 upon Filing the Appeal are sufficient for showing that Appellee's Experiment 1 does not support Appellee's Indication 1, and it also cannot be construed that they are sufficient for finding that Appellee's Indication 1 constitutes a misleading indication as to quality.

D. Determination on the Appellant's arguments

(A) As mentioned in No. 2, 4. [The Appellant's arguments] (1) B. (A) above, the Appellant argues that Appellee's Indication 1 is misleading as to quality, because the FT-NIR method is inappropriate as an experiment to support Appellee's Indication 1 and the result of an experiment by the KF method, which is a more appropriate experimental method, shows a decrease in the moisture content both in the sample group and the control group.

However, Exhibit Ko 34 (material on Verification Experiment 1 upon Filing the Appeal), which is evidence submitted by the Appellant and which serves as the basis for the Appellant's abovementioned argument, also states that an analysis on the moisture content in hair using the FT-NIR method has been reported (p. 11). Exhibit Ko 34 states that it is erroneous to use the FT-NIR method for an experiment to support Appellee's Indication 1 due to reasons including the following: the FT-NIR method utilizes near-infrared light transmission, and while the characteristic of the spectrum used for measurement is the difference in the absorption of light at wavelengths that are close to each other, in order to measure this absorption, most of the light needs to have passed through the hair, but if there is an area in the target where absorption is too strong, light does not pass through that area and spectral information cannot be obtained, and as hair strongly absorbs infrared light, the hair cannot be sampled uniformly, and

because the FT-NIR method reacts more strongly on the surface of the hair than the inside of the hair, the same information cannot be obtained for the inside and surface of the hair. However, Cited Document [10] ("Nondestructive Analysis of Water Structure and Content in Animal Tissues by FT-NIR Spectroscopy with Light-Fiber Optics. Part I: Human Hair" Applied Spectroscopy, Volume 46, Number 5, 1992) of Exhibit Ko 34 concludes, after conducting an experiment, that the study "has demonstrated" that the FT-NIR method "can be used as a nondestructive probe for monitoring moisture and water structure in human hair" (Exhibit Ko 34, Cited Document [10], 4th page, left column; 8th page of its translation), and the document does not discuss that the FT-NIR method cannot measure moisture inside hair. Even if none of the documents, etc. submitted by the Appellant as evidence state that the moisture of hair that has been wetted and then dried was measured by the FT-NIR method, this does not lead to an interpretation that the moisture of hair that has been wetted and then dried cannot be measured by the FT-NIR method. Other contents of Exhibit Ko 34 stating that the FT-NIR method is inappropriate either have insufficient basis or are insufficient for finding that use of the FT-NIR method in an experiment to support Appellee's Indication 1 is inappropriate. Also, no other evidence supporting the Appellant's abovementioned argument can be found.

Accordingly, the Appellant's abovementioned argument cannot be accepted.

(B) As mentioned in No. 2, 4. [The Appellant's arguments] (1) B. (B) and (2) B. (A) above, the Appellant argues as follows: when premised on the understanding of general consumers, it should be construed that "dried" in Appellee's Indication 1 refers to the state after the moisture content of hair returns to that before the processing, and according to Exhibit Otsu 43, if measured by the KF method, in the case where the hair is dried by using the Appellee's Product, the increase in moisture content turns to minus when the drying time exceeds 70 seconds, and the dried state starts in approximately 70 seconds, so in verifying Appellee's Indication 1, it is sufficient to set a drying time of 70 seconds or longer; therefore, the verification experiments implemented by the Appellant (drying time: 120 seconds for Verification Experiment 1 upon Filing the Action, and 90 seconds for Verification Experiment 1 upon Filing the Appeal) are scientifically correct and also correct from consumers' viewpoint, while in contrast, Appellee's Experiment 1 lacks reasonableness.

However, even if, according to measurement by the KF method, the moisture content of wetted hair returns to the level before the hair was wetted when air is blown onto the wetted hair for approximately 70 seconds by using the Appellee's Product, if air continues to be blown onto the hair beyond 70 seconds, the moisture content of the

hair is considered to decrease below the moisture content before the hair was wetted. Therefore, it cannot be construed that it is sufficient to set a drying time (the time for blowing air from the dryer onto the hair) of 70 seconds or longer in verifying Appellee's Indication 1. The drying time of 120 seconds for Verification Experiment 1 upon Filing the Action and the drying time of 90 seconds for Verification Experiment 1 upon Filing the Appeal are both too long as the time for blowing air from the dryer onto the hair for verifying Appellee's Indication 1, and this can be considered to be the reason that the decrease in the moisture content of hair became large, so neither Verification Experiment 1 upon Filing the Action nor Verification Experiment 1 upon Filing the Appeal serves as sufficient basis for showing that Appellee's Indication 1 lacks scientific support.

Accordingly, the Appellant's abovementioned argument cannot be accepted.

(C) When the issue of the use of advertising indications for the previous model is examined with regard to Appellee's Indication 1, the result of Appellee's Experiment 1, which is that the increase in moisture content of hair in the case of using the Appellee's Product was 1.9 times that in the case of using EH-NA9E, is shown in Appellee's Indication 1, so Appellee's Indication 1 is not found to constitute "an indication that is likely to mislead as to the quality of the goods" under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act due to the use of advertising indications for the previous model.

E. Summary

According to the above, Appellee's Indication 1 is not found to constitute a misleading indication as to quality under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act.

(2) Whether Appellee's Indication 2 constitutes a misleading indication as to quality

A. Experiment implemented by the Appellee regarding Appellee's Indication 2

The experiment implemented by the Appellee regarding Appellee's Indication 2 (hereinafter referred to as "Appellee's Experiment 2") was conducted based on Exhibit Otsu 57, Attachment 1 Operating Procedure Manual "Nanoemoisture Content Evaluation Method" (pages 1/8 to 8/8) (Exhibit Otsu 57 at pp. 7 to 14).

B. Regarding Verification Experiment 2 upon Filing the Action and Verification Experiment 2 upon Filing the Appeal (Exhibits Ko 4, 37-1, and 37-2)

(A) In Verification Experiment 2 upon Filing the Action, water absorption changes in dry silica gel associated with water molecules emitted from the ion outlet were measured in a closed system with regard to the Appellee's Product and EH-NA9E, and

the measurement results were compared. Regarding the specific experimental method, the report on Verification Experiment 2 upon Filing the Action (Exhibit Ko 4) states as follows: "Dry silica gel left to stand overnight at 105°C was placed in a desiccator, air was blown from the ion outlets of Dryers A and B in a closed system (HOT mode, TURBO; a state in which the nanoe lamp is lit), and water absorption changes in the silica gel were observed." (Exhibit Ko 4 at p. 3); and "The air velocity within the chamber was unified at 2.6 ± 0.3 m/s. After air was blown from the ion outlet for respective numbers of hours (0 to 4 hours), weight changes in silica gel were measured, and they were converted into changes in the amount of moisture fed into the silica gel." (Exhibit Ko 4 at p. 3). In addition, a figure indicated in the abovementioned report "Fig.1" (Exhibit Ko 4 at p. 3) shows the configuration and layout of the experimental apparatuses used in Verification Experiment 2 upon Filing the Action, and for both the Appellee's Product and EH-NA9E, it is found that the outer circumference of the central part of the dryer is covered with a wrapping-film-like material, except for the air outlet, so as to wrap the ion outlet above the air outlet, and that the wrapping-film-like material covers that part to the desiccator inlet, while the ends of the covering wrapping-film-like material mentioned above are fixed or bonded to seal the dryers.

The abovementioned report states as follows as the conclusion of Verification Experiment 2 upon Filing the Action: "The absorption rate of silica gel associated with water particles from the ion outlets of Dryers A and B showed a clear difference as compared to the control. In addition, when Dryer A and Dryer B were compared, the difference in the absorption rate was revealed to be 1.21 to 1.36 times. In other words, the amount of moisture emitted from the ion outlet of Dryer A is presumed to be approximately 1.21 times to 1.36 times that emitted from the ion outlet of Dryer B." (Exhibit Ko 4 at p. 6) This "control" refers to " silica gel with no air blown into the desiccator," while "Dryer A" refers to the Appellee's Product and "Dryer B" refers to EH-NA9E.

(B) In Verification Experiment 2 upon Filing the Appeal, as a wrapping film, a film for guiding the air from the ion outlet was created by using a Tedler bag made of polyvinyl fluoride (PVF). Dry silica gel was placed inside two desiccators, the air blown out from the ion outlets of the Appellee's Product and EH-NA9E was guided with the PVF films, and absorption changes in the silica gel were observed. Although the dryer and the Tedler film were fixed by using adhesive tapes, etc. so that the gas inside the system does not leak outside, the system was not 100% sealed. (Exhibits Ko 37-1 and 37-2)

C. Discussion

(A) As mentioned in A. above, the Appellee is found to have implemented Appellee's

Experiment 2 based on the operating procedure manual for the nanoemoisture content evaluation method prepared by the Appellee. The actual procedure of Appellee's Experiment 2 is not found to have deviated from the contents of the operating procedure manual. In addition, in light of the contents of the operating procedure manual, [redacted]

Then, as mentioned in A. above, it was concluded as a result of Appellee's Experiment 2 that the number of particles generated significantly increased and the amount of moisture generated was more than 18 times larger for nanoe MOISTURE+ compared to that for conventional nanoe.

It can be said that the contents of Appellee's Indication 2 are in line with the abovementioned results of Appellee's Experiment 2, and that they indicate performance of the Appellee's Product within the scope of the results of Appellee's Experiment 2 that was implemented by the Appellee based on the operating procedure manual.

(B) The moisture absorbed by the silica gel used in Verification Experiment 2 upon Filing the Action and Verification Experiment 2 upon Filing the Appeal is considered to include moisture in the air inside the system, in addition to the moisture (nanoe) emitted from the ion outlet (nanoe device) of the dryer. As mentioned above, the dryer and the film are adhered together in the experiment, but the system is not completely sealed. Further, by sending air from the dryer, air outside the system is found to flow into the system also via the ion outlet, and the moisture contained in the air that flowed in is included in the moisture absorbed by the silica gel. It can be said that this fact does not change either in Verification Experiment 2 upon Filing the Action or Verification Experiment 2 upon Filing the Appeal.

The influence of the absorption of moisture other than nanoe by the silica gel cannot be disregarded for both the Appellee's Product and EH-NA9E. This is because, if moisture in the air accounts for a certain percentage of the moisture absorbed by the silica gel in both systems, the increase rate of the amount of absorption by silica gel in Verification Experiment 2 upon Filing the Action and Verification Experiment 2 upon Filing the Appeal will be smaller than the increase rate of the moisture emitted from the Appellee's Product as nanoe when comparing EH-NA9E and the Appellee's Product.

According to the circumstances above, it cannot be said that Verification Experiment 2 upon Filing the Action and Verification Experiment 2 upon Filing the Appeal are sufficient for showing that Appellee's Experiment 2 does not support

Appellee's Indication 2, and it also cannot be construed that they are sufficient for finding that Appellee's Indication 2 constitutes a misleading indication as to quality.

D. Determination on the Appellant's arguments

(A) As mentioned in No. 2, 4. [The Appellant's arguments] (1) C. (B) and (C) above, the Appellant argues that the methods and contents of Verification Experiment 2 upon Filing the Action and Verification Experiment 2 upon Filing the Appeal are reasonable.

However, even if the inlet tube formed by a film changed to an inflated state by switching on the dryer, the system is not found to have been completely sealed, and air from the ion outlet of the dryer is considered to enter the system; therefore, it is not found that air outside the system will not flow into the system.

In the abovementioned experiments, the Appellant set the silica gel placed in a desiccator with no air blown into it as the "control." However, as mentioned above, in the case of a desiccator to which air is blown from the ion outlet of the dryer, outside air is considered to enter the system from the ion outlet of the dryer, and the silica gel absorbs the moisture in the air which thus newly entered the system, whereas the control set by the Appellant does not take into consideration the moisture in the air which thus newly enters the system. Therefore, even if the control is set as in the abovementioned experiments, it will not be possible to appropriately measure the increase rate of the moisture (nanoe) emitted from the nanoe outlet of the dryer by measurement using silica gel.

Even if other contents argued by the Appellant are examined, the conclusion that there is the issue mentioned in C. (B) above in Verification Experiment 2 upon Filing the Action and Verification Experiment 2 upon Filing the Appeal is not affected.

Accordingly, the Appellant's abovementioned argument cannot be accepted.

Accordingly, the Appellant's abovementioned argument cannot be accepted.

(C) When the issue of the use of advertising indications for the previous model is examined with regard to Appellee's Indication 2, the result of Appellee's Experiment 2, which is that the amount of moisture generated by nanoe MOISTURE+ of the Appellee's Product was 18 times larger compared to that generated by conventional nanoe, is shown in Appellee's Indication 2, so Appellee's Indication 2 is not found to constitute "an indication that is likely to mislead as to the quality of the goods" under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act due to the use of advertising indications for the previous model.

E. Summary

According to the above, Appellee's Indication 2 is not found to constitute a

misleading indication as to quality under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act.

(3) Whether Appellee's Indication 3 constitutes a misleading indication as to quality

A. Experiment implemented by the Appellee regarding Appellee's Indication 3

The experiment implemented by the Appellee regarding Appellee's Indication 3 (hereinafter referred to as "Appellee's Experiment 3") was conducted based on Exhibit Otsu 57, Attachment 1 Operating Procedure Manual "Color Fading Evaluation (Hair Dryer)" (pages 1/7 to 7/7) (Exhibit Otsu 57 at pp. 15 to 21).

B. Regarding Verification Experiment 3 upon Filing the Action and Verification Experiment 3 upon Filing the Appeal (Exhibits Ko 6 and 29)

(A) In Verification Experiment 3 upon Filing the Action, the Appellee's Product ("sample group") and EH-ND2B ("control group") were compared, and five bunches of hair were used for each group. The method was as follows: in order to color black hair evenly and brightly, the bunches of hair were bleached (bleach processed) by using a hair dye; then, the bunches of bleach processed hair were dyed red by using a hair dye, and their washing and drying were repeated 5 times, 15 times, and 30 times; and the hair color was measured by using a spectrophotometer to obtain color difference ΔE.

Regarding the results of Verification Experiment 3 upon Filing the Action, the report on that experiment (Exhibit Ko 6) states as follows: "The color change ΔE00 increased in line with an increase in the number of the washing/drying cycles. However, no statistically significant difference was observed in the color change value ΔE00 between the sample group and the control group after repeating the washing/drying cycles 5 times, 15 times, and 30 times." (Exhibit Ko 6 at p. 9)

(B) In Verification Experiment 3 upon Filing the Appeal, the Appellee's Product with its ion outlet blocked was used as a non-ionic dryer, 10 bunches of hair were used per group, and the bunches of hair were managed at a temperature of 23 ± 2°C and a humidity of 50 ± 5% RH. The method was as follows: bleach cream was applied to black hair and after leaving it to stand for 20 minutes, it was washed off, and the hair was colored with a dye; using this hair, washing and drying were repeated 5 times, 15 times, and 30 times; and photographs of the hair were taken, and the hair colors were measured by using a spectrophotometer to obtain color difference ΔE.

C. Discussion

(A) a. As mentioned in A. above, the Appellee is found to have implemented Appellee's Experiment 3 based on the operating procedure manual for the color fading evaluation (hair dryer) prepared by the Appellee. The actual procedure of Appellee's Experiment 3

is not found to have deviated from the contents of the operating procedure manual. In addition, in light of the contents of the operating procedure manual, Appellee's Experiment 3 is found to have used the Appellee's Product in a normal state and the Appellee's Product processed so as not to blow out nanoe MOISTURE+, repeated the washing and drying processing on bunches of gray hair that were colored with a hair dye for gray hair, and measured the color differences by using a color-difference meter, and no unreasonable points are found in such contents of the experiment.

In Appellee's Experiment 3, a result is found to have been obtained that the Appellee's Product significantly prevented color fading compared to the non-ionic dryer, that is, the Appellee's Product that does not emit nanoe MOISTURE+. This fact can also be read from the graph showing changes in the color difference in the case of repeating the washing and drying processing multiple times (Exhibit Otsu 57, Attachment 2 "Verification of the Preventive Effect of nanoe MOISTURE+ & Minerals Against Coloring Fading" (Exhibit Otsu 57 at p. 30)).

b. When the issue of whether Appellee's Indication 3 constitutes a misleading indication as to quality as a result of using advertising indications for the previous model is examined, according to A. above and No. 2, 2. (3) C. and No. 3, 3 (1) A. (C) above, the graph comprised in Appellee's Indication 3-3 is found to be the same as a graph that was used in advertising indications for the previous model, except for the part indicating the model name. Further, according to A. above, the graph that was used in advertising indications for the previous model was prepared based on the results of a color fading evaluation experiment conducted for the previous model, but the color fading evaluation experiment conducted for the previous model differs from Appellee's Experiment 3 in that it used non-gray hair that was colored by using a hair dye that was not for gray hair.

However, when the graph showing changes in the color difference prepared as a result of Appellee's Experiment 3 (Exhibit Otsu 57, Attachment 2 "Verification of the Preventive Effect of nanoe MOISTURE+ & Minerals Against Coloring Fading" Exhibit Otsu 57 at p. 30) and the graph showing changes in the color difference prepared as a result of the experiment on the previous model (Exhibit Otsu 57, Attachment 2 "Verification of the Preventive Effect of nanoe MOISTURE+ & Minerals Against Color Fading" (Exhibit Otsu 57 at p. 35)) are compared, they both indicate a result that color fading was significantly prevented compared to the case of using the non-ionic dryer, and there is no fact that the color difference (color fading) was smaller in the result for the previous model. The abovementioned experiments differ in terms of whether the dye used for the coloring was a hair dye for gray hair (Appellee's Experiment 3) or a

hair dye that is not for gray hair (the experiment on the previous model), but they are the same in that both dyes are for coloring hair. Also, both experiments indicate color differences in the case of using a non-ionic dryer, and it is not found that the extent of color fading in the case of using a non-ionic dryer greatly differs between when using a hair dye for gray hair and when using a hair dye that is not for gray hair.

Then, it can be found that the extent to which the Appellee's Product prevented color fading as compared to the non-ionic dryer in Appellee's Experiment 3 was at least the same level as the extent to which the previous model prevented color fading as compared to the non-ionic dryer in the experiment on the previous model.

In the graph in Appellee's Indication 3-3, numerical values are indicated on the vertical axis in increments of 0.5 from 0 to 2, the wording "Color changes (color variation) in dyed hair" is indicated, and there is a description to the effect that the color does not fade easily as the numerical value becomes smaller and that the color fades easily as the numerical value becomes larger. However, Appellee's Indication 3 has no explanation as to how the color difference was measured, and what meaning the numerical values in the abovementioned graph have. In addition, general consumers who see those advertising indications are considered to be mostly those who do not know and have no interest in the methods for measuring or calculating the color difference. In light of these circumstances, it is construed that general consumers who see the graph in Appellee's Indication 3-3 along with the abovementioned wording and description will understand the numerical values on the vertical axis of the graph to be indicating the extent to which the color of the hair dye fades, hold an impression that, to a considerable extent, the color does not fade easily when using the Appellee's Product compared to when using the non-ionic dryer, and have no interest in the strict numerical values of the color difference for each number of times the washing and drying processing was conducted. According to these circumstances, it cannot be found that Appellee's Indication 3 is a misleading indication as to quality on the basis that the color differences (Δ E) measured in Appellee's Experiment 3 differ from the numerical values shown in the graph in Appellee's Indication 3-3. Therefore, Appellee's Indication 3 is not regarded to constitute a misleading indication as to quality on the basis that the graph comprised in Appellee's Indication 3-3 is the same as a graph that was used in advertising indications for the previous model, except for the part indicating the model name.

c. According to a. and b. above, it can be said that the contents of Appellee's Indication 3 are in line with the results of Appellee's Experiment 3, and that Appellee's Indication 3 indicates performance of the Appellee's Product within the scope of the results of

Appellee's Experiment 3 that was implemented by the Appellee based on the operating procedure manual.

(B) a. In Verification Experiment 3 upon Filing the Action, EH-ND2B was used by the "control group," and this dryer has a different airflow rate from the Appellee's Product, but it cannot be said that Verification Experiment 3 upon Filing the Action lacks reasonableness as a verification experiment on such basis.

However, Appellee's Indication 3 shows that a dryer that emits nanoe MOISTURE+ has a preventive effect against hair color fading, and the fact that the graph on hair color is one example can be understood from the statement "Effects may vary depending on the colorant and the individual." In addition, considering that the colorant used in Verification Experiment 3 upon Filing the Action was a red hair dye that is not sold in Japan (Exhibits Otsu 25, 26, and 27-1 to 27-3, and the entire import of oral arguments), and that there are also individual differences in hair, it cannot immediately be said that Appellee's Indication 3 is an indication that misleads as to quality even if the same extent of difference as that in Appellee's Indication 3 did not occur in Verification Experiment 3 upon Filing the Action.

b. In Verification Experiment 3 upon Filing the Appeal, the Appellee's Product of which the ion outlet was blocked with a masking tape was used as a non-ionic dryer, but if the ion outlet is blocked with a masking tape, nanoe MOISTURE+ created by an internal mechanism of the dryer is expected to be emitted from the outlet for the air for drying hair, and it can be said that a state where nanoe MOISTURE+ are not emitted was not being created. Then, Verification Experiment 3 upon Filing the Appeal is not eligible as a verification experiment for Appellee's Indication 3, and it cannot be found that Appellee's Indication 3 constitutes a misleading indication as to quality based on the results of Verification Experiment 3 upon Filing the Appeal.

c. According to a. and b. above, it cannot be said that Verification Experiment 3 upon Filing the Action and Verification Experiment 3 upon Filing the Appeal are sufficient for finding that Appellee's Experiment 3 does not support Appellee's Indication 3, and it also cannot be construed that they are sufficient for finding that Appellee's Indication 3 constitutes a misleading indication as to quality.

D. Determination on the Appellant's arguments

(A) As mentioned in No. 2, 4. [The Appellant's arguments] (1) D. (B) above, the Appellant argues, with regard to Verification Experiment 3 upon Filing the Appeal, that, considering the fact that nanoe MOISTURE+ are a slight amount of fine moisture particles, it can be said that if the ion outlet is blocked, no nanoe MOISTURE+ will be emitted from the main outlet, or at least, the nanoe MOISTURE+ emitted from the main

outlet will all be evaporated or dispersed by the time it reaches the hair that is placed 10 cm away from the main outlet.

However, even if nanoe MOISTURE+ are fine particles that are small in size, it cannot be considered that nanoe MOISTURE+ will not be emitted from the normal air outlet if the ion outlet is blocked or that, even if they are emitted, they will be evaporated or dispersed and will not reach the hair because of the fact that the amount of nanoe MOISTURE+ is small. There is no sufficient evidence for finding these either.

Other contents argued by the Appellant regarding Verification Experiment 3 upon Filing the Action and Verification Experiment 3 upon Filing the Appeal either cannot be found in light of what has been discussed in C. (B) a. and b. above or are regarded to be sufficient for finding that Appellee's Indication 3 constitutes a misleading indication as to quality.

Accordingly, the Appellant's abovementioned argument cannot be accepted.

(B) As mentioned in No. 2, 4. [The Appellant's arguments] (2) B. (C) above, the Appellant argues as follows: [i] as Appellee's Experiment 3 used a hair dye for gray hair instead of a hair dye that is not for gray hair, its results do not serve as a backup for Appellee's Indication 3; and [ii] according to the results of a verification experiment conducted by the Appellant, the contents on Appellee's Experiment 3 stated in Exhibit Otsu 57 at p 30 are not credible.

However, regarding the argument in [i] above, as mentioned in C. (A) above, the fact that a hair dye for gray hair was used in Appellee's Experiment 3 does not serve as a basis for construing that Appellee's Experiment 3 does not support Appellee's Indication 3 or that Appellee's Indication 3 constitutes a misleading indication as to quality.

In addition, regarding the argument in [ii] above, as mentioned in (A) above and C. (B) a. and b. above, the results of Verification Experiment 3 upon Filing the Action and Verification Experiment 3 upon Filing the Appeal do not serve as a basis for finding that Appellee's Indication 3 constitutes a misleading indication as to quality.

Accordingly, the Appellant's abovementioned argument cannot be accepted.

E. Summary

According to the above, Appellee's Indication 3 is not found to constitute a misleading indication as to quality under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act.

(4) Whether Appellee's Indications 4 and 5 constitute misleading indications as to quality

A. Experiment implemented by the Appellee regarding Appellee's Indications 4 and 5

The experiment implemented by the Appellee regarding Appellee's Indications 4 and 5 (hereinafter referred to as "Appellee's Experiment 4") was conducted based on the operating procedure manual for evaluation of the ratios of split ends (Exhibit Otsu 57, Attachment 1 Operating Procedure Manual "Evaluation of the Ratios of Split Ends" (pages 1/5 to 5/5) (Exhibit Otsu 57 at pp. 22 to 26).

B. Regarding Verification Experiments 4 and 5 upon Filing the Action and Verification Experiment 4 upon Filing the Appeal (Exhibits Ko 7, 8, and 33)

(A) In Verification Experiment 4 upon Filing the Action, the Appellee's Product ("sample group") and EH-ND2B ("control group") were compared, and five bunches of hair were used for each group. The method was as follows: first, in order to obtain damaged Asian hair, healthy hair was washed and dried 60 times and bleach processed, and this cycle was repeated three times so as to conduct the washing and drying 180 times and the bleach processing three times in total; the hair that was damaged in this manner was divided into a control group and a sample group and the original splitting rates of the hair in the sample group and the control group were measured; and after washing the hair, drying it for 1 minute and 30 seconds, and combing the hair 1,000 times, the hair tip splitting rates in the sample group and the control group were measured and compared. In Verification Experiment 4 upon Filing the Action, scanning electron microscopy (SEM) analysis was not conducted, and in order to measure hair tip splitting rates, a method was adopted to take out 200 strands of hair from each of the five bunches of hair in the sample group and the control group (a total of 1,000 strands of hair from each of the sample group and the control group), and to observe the hair tip splitting status with the naked eye. The report on Verification Experiment 4 upon Filing the Action (Exhibit Ko 7) has no statements on the number of hair strands in the bunches of hair used in Verification Experiment 4 upon Filing the Action, but the report on Verification Experiment 4 upon Filing the Appeal (Exhibit Ko 33) states that each bunch of hair used in Verification Experiment 4 upon Filing the Action consisted of approximately 2,000 strands of hair.

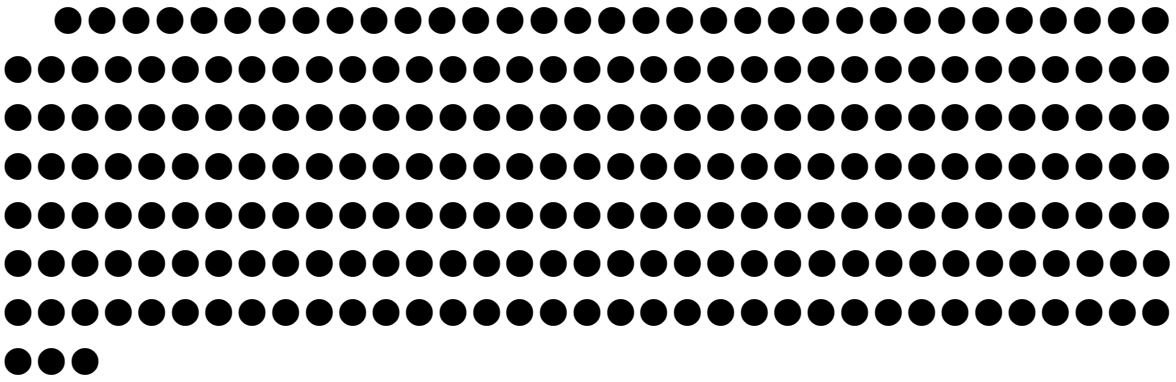
(B) In Verification Experiment 5 upon Filing the Action, the Appellee's Product (sample group) and EH-ND2B (control group) were compared, and five bunches of hair were used for each group. The method was as follows: each bunch of hair was bleach processed after completing the washing and drying cycles 60 times, and this process was repeated three times so as to conduct the washing and drying 180 times and the bleach processing three times in total; 200 strands of hair were selected from each bunch of hair in the sample group and the control group (a total of 1000 strands of hair from

each of the sample group and the control group); and the status of split ends at hair tips was observed by the eye, the number of split ends was counted, and the ratio of split ends was calculated.

(C) In Verification Experiment 4 upon Filing the Appeal, the Appellee's Product with its ion outlet blocked was used as a non-ionic dryer, and one bunch of hair was used for each of the sample group (the Appellee's Product) and the control group (the Appellee's Product with its ion outlet blocked). This bunch of hair consisted of approximately 2000 stands of hair. The procedure for conducting the washing and drying 180 times and the bleach processing three times in total for obtaining damaged hair is the same as that in Verification Experiment 4 upon Filing the Action. The bunches of hair thus processed were washed and dried for 1 minute and 30 seconds, 50 strands of hair were randomly selected from each bunch of hair, and SEM imaging was performed on those strands to observe the hair tip status.

C. Discussion

(A) a. As mentioned in A. above, the Appellee is found to have implemented Appellee's Experiment 4 based on the operating procedure manual for the evaluation of the ratios of split ends prepared by the Appellee. The actual procedure of Appellee's Experiment 4 is not found to have deviated from the contents of the operating procedure manual. In addition, in light of the contents of the operating procedure manual, Appellee's Experiment 4 is found to have washed hair, used the Appellee's Product and the Appellee's Product processed so as not to generate nanoe MOISTURE+, dried hair by using each dryer for 90 seconds per bunch of hair, brushed each bunch of hair 1,000 times with a specialized comb, performed SEM imaging, and counted the number of split ends to calculate the ratio of split ends, and no unreasonable points are found in such contents of the experiment.



In Appellee's Indication 4, there is an image which is a magnified photograph of the tip part of hair (hair tip) for the case with "nanoe MOISTURE+ & minerals" and an image which is a magnified photograph of the tip part of hair for the case "without

ions," and it can be said that these images are used for comparison. However, these images were taken in an experiment conducted by using EH-NA9A (3. (1) A. (D) above), and they are not photographs taken in Appellee's Experiment 4. In this respect, it can be said that Appellee's Indication 4 uses advertising indications for the previous model.

However, these images are a photograph showing that hair has no damage and no split ends and a photograph showing that hair has a damaged tip part (hair tip) with a split ends. If, when following the procedure in the abovementioned operating procedure, the hair with the central damage level in the case of using the Appellee's Product is hair with no damage and no split ends, and the hair with the central damage level in the case of using a non-ionic dryer (the Appellee's Product processed so as not to generate nanoe MOISTURE+) is hair with a damaged tip part and split ends, then, it is construed that the use of the images of Appellee's Indication 4 does not constitute a misleading indication as to quality even if the images are not photographs taken in Appellee's Experiment 4.

If the hair with the central damage level in the case of using EH-NA9A, which merely generates conventional nanoe, has no split ends, it is not unnatural for the hair with the central damage level in the case of using the Appellee's Product, which generates nanoe MOISTURE+, to have no split ends. Therefore, these images are also not found to show that the Appellee's Product has better performance than it actually has.

Accordingly, Appellee's Indication 4 is not regarded to constitute a misleading indication as to quality on the basis that the images comprised in Appellee's Indication 4 are not photographs taken in Appellee's Experiment 4.

[redacted] The graph shown in Appellee's Indication 5-2 is an advertising indication for the previous model (3. (1) A. (D) above), and it can be said that Appellee's Indication 5-2 uses advertising indications for the previous model.

[redacted] As Appellee's

Indication 5-2 uses a graph that has already been shown as an advertising indication for the previous model, it is found to indicate that the Appellee's Product at least has the same level of performance as the previous model, and it shows numerical values that represent lower performance than the numerical values measured in the experiment using the Appellee's Product; thus, Appellee's Indication 5-2 does not encourage general consumers to buy the product by misleading them into believing that it has performance which it actually does not have. Accordingly, Appellee's Indication 5-2 is not found to constitute a misleading indication as to quality under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act.

d. In Appellee's Indication 5, there were statements including "Bunches of bleached hair were repeatedly washed, dried with a hair dryer and combed. The hair was rebleached every 60th cycle, and the process was carried out for a total of 180 cycles." as "[Trial method]" on the right-hand side of the abovementioned bar graph for a certain period, and they were later deleted (No. 2, 2. (3) E. above). The contents of the abovementioned statements differ from the contents of the experiment actually conducted as Appellee's Experiment 4, but it is not found that the presence of the abovementioned statements misled general consumers who saw Appellee's Indication 5 as to the performance of the Appellee's Product that the ratio of split ends decreases as compared to a non-ionic dryer.

(B) a. Verification Experiments 4 and 5 upon Filing the Action used hair obtained by the following method: in order to obtain damaged Asian hair, healthy hair was washed and dried 60 times and bleach processed, and this cycle was repeated three times so as to conduct the washing and drying 180 times and the bleach processing three times in total. This method is in line with the contents of "[Trial method]" which originally existed in Appellee's Indication 5. However, as mentioned in (A) d. above, the abovementioned contents of "[Trial method]" differ from the contents of the experiment actually conducted as Appellee's Experiment 4, and the abovementioned method used in Verification Experiments 4 and 5 upon Filing the Action was not used in Appellee's Experiment 4. In addition, in Verification Experiments 4 and 5 upon Filing the Action, the status of split ends at hair tips was observed by the eye, the number of split ends was counted, and the ratio of split ends was calculated, whereas in Appellee's Experiment 4, the number of split ends was counted by SEM imaging, and it can be said that they differ in terms of the accuracy of determining the split ends. Moreover, each bunch of hair used in Verification Experiment 4 upon Filing the Action consisted of approximately 2,000 strands of hair, whereas each bunch of hair used in Appellee's Experiment 4 consisted of 100 strands of hair, which is fewer than each bunch of hair

used in Verification Experiment 4 upon Filing the Action. The damage given to the hair in each bunch of hair by the drying with a dryer and the combing is considered to be greater for the hair in each bunch of hair in Appellee's Experiment 4 which contains fewer hair strands.

As described above, it can be said that Verification Experiments 4 and 5 upon Filing the Action were conducted under different conditions from those of Appellee's Experiment 4. Therefore, even if the results obtained in Verification Experiments 4 and 5 upon Filing the Action differ from the results of Appellee's Experiment 4 and the contents of Appellee's Indications 4 and 5, it is not found that the experiment of Appellee's Experiment 4 lacks reasonableness, and it is not found that Appellee's Indications 4 and 5 constitute misleading indications as to quality.

b. In Verification Experiment 4 upon Filing the Appeal, the Appellee's Product of which the ion outlet was blocked with a masking tape was used as a non-ionic dryer, but as it can be said that a state where nanoe MOISTURE+ are not emitted was not being created by this method, Verification Experiment 4 upon Filing the Appeal is not eligible as a verification experiment for Appellee's Indication 4, and it cannot be found that Appellee's Indication 4 constitutes a misleading indication as to quality based on the results of Verification Experiment 4 upon Filing the Appeal, in the same manner as in the determination on Verification Experiment 3 upon Filing the Appeal ((3) C. (B) b. above). In addition, Verification Experiment 4 upon Filing the Appeal was conducted under different conditions from Appellee's Experiment 4, such as in terms of the number of times the washing and drying was conducted and whether or not bleach processing was conducted; also, each bunch of hair used in Verification Experiment 4 upon Filing the Appeal consisted of approximately 2,000 strands of hair, and the damage given to the hair by the drying with a dryer and the friction from combing is considered to be smaller compared to the damage given to hair in Appellee's Experiment 4 where each bunch of hair consisted of fewer strands of hair. Furthermore, for inspecting whether split ends have occurred, 50 strands of hair were selected from each bunch of hair, which is a smaller number of strands than in Appellee's Experiment 4.

According to the abovementioned circumstances, even if the results obtained in Verification Experiment 4 upon Filing the Appeal differ from the results of Appellee's Experiment 4 and the contents of Appellee's Indications 4 and 5, it is not found that the experiment of Appellee's Experiment 4 lacks reasonableness, and it is not found that Appellee's Indications 4 and 5 constitute misleading indications as to quality.

c. According to a. and b. above, it cannot be said that Verification Experiments 4 and 5 upon Filing the Action and Verification Experiment 4 upon Filing the Appeal are

sufficient for showing that Appellee's Experiment 4 does not support Appellee's Indications 4 and 5, and it also cannot be construed that they are sufficient for finding that Appellee's Indications 4 and 5 constitute misleading indications as to quality.

D. Determination on the Appellant's arguments

(A) As mentioned in No 2, 4. [The Appellant's arguments] (1) E. (B) above, the Appellant argues that it is unclear what kind of scientific error actually occurs as a result of using bleach processed hair, and rather, even though the probability of occurrence of split ends is higher for bleach processed hair, the numerical value in the case of processing the hair with a non-ionic dryer was only 2%, and did not reach the significant numerical value of 30.7% shown in Appellee's Indication 4. The Appellant therefore asserts that there is no problem in the Appellant having used bleach processed hair in Verification Experiment 4 upon Filing the Action and Verification Experiment 4 upon Filing the Appeal, and that Appellee's Indication 4 constitutes a misleading indication as to quality.

However, as mentioned in C. (B) a. and b. above, Verification Experiment 4 upon Filing the Action and Verification Experiment 4 upon Filing the Appeal were conducted under different conditions from Appellee's Experiment 4, not only in terms of whether bleach processing was conducted, but in multiple respects. In addition, while the purpose that the Appellant itself adopted a method of conducting the washing and drying 180 times and conducting the bleach processing three times in total was to damage the hair to be used in the verification experiment, if combing such damaged hair 1,000 times resulted in a substantially smaller number of split ends compared to that in Appellee's Experiment 4, which did not adopt the abovementioned method, it can also be considered that the damage given to the hair by combing was smaller compared to that in Appellee's Experiment 4 due to reasons such as the smaller extent of friction caused to the hair by combing because the number of hair strands in each bunch of hair used in Verification Experiment 4 upon Filing the Action and Verification Experiment 4 upon Filing the Appeal was ●●●●●, which is far larger than ●●●● strands of hair in each bunch of hair used in Appellee's Experiment 4. Therefore, even by considering the contents argued by the Appellant, the determination mentioned in C. (B) c. above is not affected.

(B) With regard to whether Appellee's Indications 4 and 5 constitute misleading indications as to quality as a result of using advertising indications for the previous model, as mentioned in No. 2, 4. [The Appellant's arguments] (2) B. (D) above, the Appellant argues that because photographs taken in an experiment using EH-NA9A are used in Appellee's Indication 4, Exhibits Otsu 53 and 56 cannot serve as backups for

Appellee's Indication 4, and therefore Appellee's Indication 4 constitutes a misleading indication as to quality. However, it is not regarded that Appellee's Indication 4 constitutes a misleading indication as to quality on the basis that photographs taken in an experiment using EH-NA9A are used in Appellee's Indication 4, as mentioned in C. (A) b. above.

In addition, as mentioned in No. 2, 4. [The Appellant's arguments] (2) B. (E) above, the Appellant argues that, while Appellee's Indication 5 is an indication showing that the "ratios of split ends" are "30.7%" and "3.0%," the results of Appellee's Experiment 4 stated in Exhibit Otsu 57 differ from the abovementioned percentages, so Appellee's Indication 5 lacks a backup and constitutes a misleading indication as to quality.

However, although the bar graph comprised in Appellee's Indication 5 differs from the results of Appellee's Experiment 4, it is construed not to constitute a misleading indication as to quality, as mentioned in C. (A) c. above.

Accordingly, the Appellant's abovementioned arguments cannot be accepted.

E. Summary

According to the above, Appellee's Indications 4 and 5 are not found to constitute misleading indications as to quality under Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act.

5. Even if other contents argued by the Appellant are examined, the abovementioned findings and determinations in the present instance are not affected.

No. 4 Conclusion

According to the above, all of the Appellant's claims are groundless and should be dismissed, and the judgment in prior instance that has ruled to the same effect is reasonable in its conclusion, so the present appeal is groundless.

Thus, the judgment is rendered as indicated in the main text.

Intellectual Property High Court, Third Division
Presiding judge: NAKADAIRA Ken
Judge: IMAI Hiroaki
Judge: MIZUNO Masanori