

Copyright	Date	December 23, 2020	Court	Intellectual Property High Court, Fourth Division
	Case number	2020 (Gyo-Ke) 10050		
<p>- A case in which, concerning the use by Defendant, who has the trademark right for a trademark consisting of the characters, "農口", written in standard characters, of the trademarks consisting of the characters, "農口", written vertically in cursive style or in block style, for the designated goods of "Japanese sake [Nihonshu]", the court held that since the above use cannot be considered misleading as to the quality of the goods or causing confusion with the goods pertaining to the business of Plaintiff, it cannot be acknowledged that the above use falls under Article 51, paragraph (1) of the Trademark Act.</p>				

Case type: Rescission of Trial Decision to Maintain (Trademark)

Result: Dismissed

References: Article 51, paragraph (1) of the Trademark Act

Related rights, etc.: Trademark Registration No. 5707382

Decision of JPO: Rescission Trial No. 2018-300815

Summary of the Judgment

1. Defendant, who is the holder of trademark right for Trademark Registration No. 5707382 (designated goods of "Japanese sake [Nihonshu]; Western liquors in general; Alcoholic fruit beverages; Japanese Shochu-based beverages [Chuhai]; Chinese liquors; Flavored liquors" in Class 33), which consists of the characters, "農口", written in standard characters, uses the trademarks consisting of the characters, "農口", written vertically in cursive style or in block style (hereinafter the one written in cursive style shall be referred to as "Used Trademark 1", and the one written in block style shall be referred to as "Used Trademark 2") for the designated goods of "Japanese sake [Nihonshu]". Regarding such use, Plaintiff asserted that the use is misleading as to the quality of the goods or that the use caused confusion with the goods pertaining to the business of Plaintiff, and requested for a trial for cancellation of trademark registration pursuant to Article 51, paragraph (1) of the Trademark Act. However, the JPO rendered a decision to the effect that the request for a trial is dismissed. The present case is a lawsuit seeking rescission of the JPO decision.
2. In the judgment of the present case, the court held that Cited Trademark, which consists of the characters, "農口尚彦研究所", written vertically in block style, is affixed to the nihonshu sold by Noguchi Naohiko Sake Institute Inc.

where Plaintiff serves as toji [chief sake brewer], and held as follows, namely; [i] that there is no sufficient evidence to acknowledge the sales records for the nihonshu with affixed Cited Trademark, [ii] that "農口尚彦研究所" is introduced in magazines, newspapers, and websites and the like as the sake brewery where Plaintiff serves as toji, and there are no indications, except for one case, that clearly indicate that the name, "農口尚彦研究所", is used as a brand name for nihonshu, and [iii] that while it can be said that Plaintiff's name, "X", had strong name recognition among nihonshu enthusiasts who are highly interested in brand names and the like of nihonshu, it cannot be acknowledged that the name was widely known among general customers. As such, the court denied the argument that Cited Trademark was well known at the time of the JPO decision as an indicator for the goods of "Japanese sake [Nihonshu]" pertaining to the business of Plaintiff. Furthermore, in the judgment of the present case, the court held that, given the situation of the above [iii], it cannot be said that the Used Trademarks 1 and 2 generate the concept of "Toji and master in the art, X", and that it also cannot be acknowledged that the principal part of the Cited Trademark is "農口" or "農口尚彦". Accordingly, the court held that it cannot be acknowledged that Used Trademarks 1 and 2 are similar to Cited Trademark, and also held that it cannot be acknowledged that Defendant's use caused confusion with the goods pertaining to the business of Plaintiff.

Next, in the judgment of the present case, the court held that since Used Trademarks 1 and 2 do not generate any specific concept or the concept about Plaintiff, it cannot be acknowledged that Defendant's use is misleading as to suggest that the nihonshu with affixed Used Trademarks 1 and 2 are nihonshu produced by Plaintiff as toji.

3. Based on the above, in the judgment of the present case, the court held that it cannot be acknowledged that Defendant's use of Used Trademarks 1 and 2 falls under Article 51, paragraph (1) of the Trademark Act, and the court dismissed Plaintiff's claim.

Judgment rendered on December 23, 2020

2020 (Gyo-Ke) 10050 A case of seeking rescission of the JPO decision

Date of conclusion of oral argument: October 14, 2020

Judgment

Plaintiff: X

Defendant: Noguchi Shuzo Co., Ltd.

Main text

1. Plaintiff's claim shall be dismissed.
2. Plaintiff shall bear the court costs.

Facts and reasons

No. 1 Claim

The decision made by JPO on March 27, 2020 for Rescission Trial No. 2018-300815 shall be rescinded.

No. 2 Outline of the case

1. Histories, etc. of procedures at the JPO

- (1) Defendant is the trademark right holder for the following trademark (Trademark Registration No. 5707382; hereinafter referred to as "Trademark") (Exhibits Ko 99, Ko 100).

Trademark: 農口 (standard characters)

Filing date of the trademark application: May 23, 2014

Date of decision for registration: September 5, 2014

Date of registration: October 3, 2014

Designated goods: "Japanese sake [Nihonshu]; Western liquors in general; Alcoholic fruit beverages; Japanese Shochu-based beverages [Chuhai]; Chinese liquors; Flavored liquors" in Class 33

- (2) On October 26, 2018, Plaintiff requested for a trial for cancellation of

trademark registration for Trademark pursuant to Article 51, paragraph (1) of the Trademark Act.

JPO tried the case as Rescission Trial No. 2018-300815, and on March 27, 2020, rendered a decision to the effect that the "request for the trial of the present case is dismissed" (hereinafter referred to as "JPO Decision"), and a certified copy of the decision was delivered to Plaintiff on April 4 of the same year.

- (3) On April 22, 2020, Plaintiff filed the lawsuit of the present case seeking rescission of the JPO Decision.

2. Summary of the reasons for JPO Decision

The reasons for the JPO Decision are as described in the attached Decision by JPO (copy).

In sum, [i] Trademark consists of the characters, "農口", written in standard characters, and it is acknowledged that the Trademark is similar in appearance to the trademarks which are used by Defendant and which consist of the characters, "農口", written vertically in cursive style or in block style as shown in Attachment 1 as Example of Use 1 and Example of Use 2 (Exhibits Ko 5 to Ko 7; hereinafter, from among these examples, the one written in cursive style as shown in Example of Use 1 may be referred to as "Used Trademark 1" and the one written in block style as shown in Example of Use 2 may be referred to as "Used Trademark 2"), and the Trademark and Defendant's trademarks also have the same pronunciation of "nouguchi" or "noguchi", so that it is acknowledged that these trademarks are similar trademarks although it may not be possible to compare them in terms of concept, and [ii] Cited Trademark (Exhibits Ko 8, Ko 9) consists of the characters, "農口尚彦研究所", written vertically in block style, and there is no likelihood that Trademark would be mistaken for Cited Trademark in terms of appearance or pronunciation and, so that the two trademarks are not similar trademarks, and it cannot be said that the level of similarity is high, and furthermore, Plaintiff (Appellant) asserts that Cited Trademark is famous based only on the premise that Plaintiff himself is a famous toji [chief sake brewer], and it cannot be acknowledged, based on the assertion made by Plaintiff and the evidence submitted by Plaintiff, that Cited Trademark has become well known as an indicator of source of the goods pertaining to the business of Plaintiff, so that even if Defendant used Used Trademarks 1 and 2 for the designated goods of the Trademark, there is no risk of customers being misled into believing that such goods pertain to the business of Plaintiff, and it cannot be said that confusion

would be caused with the goods pertaining to the business of Plaintiff, and [iii] Used Trademarks 1 and 2 are not similar to Cited Trademark, and there is no likelihood that Used Trademarks 1 and 2 would be mistaken for Cited Trademark, and since it cannot be said that Defendant's use of Used Trademarks 1 and 2 evokes Cited Trademark, it cannot be said that Defendant's use of Used Trademarks 1 and 2 is misleading as to the quality, and [iv] since the use of Used Trademarks 1 and 2 for their designated goods has no risk of causing confusion with the goods pertaining to the business of Plaintiff, and there are no circumstances based on which it can be said that Defendant was aware that confusion would be caused with the goods pertaining to the business of Plaintiff, it cannot be acknowledged that Defendant's use of Used Trademarks 1 and 2 was based on intent as stipulated in Article 51, paragraph (1) of the Trademark Act, so that [v] since it cannot be said that Defendant intentionally used Used Trademarks 1 and 2, which are similar to Trademark, for the designated goods so as to mislead others as to the quality of the goods, or to cause confusion with the goods pertaining to the business of Plaintiff, the registration of the Trademark cannot be rescinded pursuant to the provisions of the same paragraph.

3. Reason for rescission

Incorrect determination on the applicability of Article 51, paragraph (1) of the Trademark Act

(omitted)

No. 4 Judgment of this court

1. Incorrect determination on confusion of source

(1) Whether or not Cited Trademark is well known

Plaintiff asserts that the nihonshu produced personally by Plaintiff under the name, "農口尚彦研究所", and the name of "農口尚彦研究所" as the seller of such nihonshu is widely recognized among customers, and that Cited Trademark was well known or famous as an indicator of the goods, "Japanese sake [Nihonshu]", pertaining to the business of Plaintiff at the time of the JPO Decision, so that the JPO Decision which found otherwise by denying the name recognition is incorrect. Regarding this point, the court finds as indicated below.

A. Findings

By comprehensively considering the facts and evidence described

above in No. 2-1 (Exhibits Ko 2, Ko 4 to Ko 24, Ko 31, Ko 33, Ko 34, Ko 38 to Ko 45, Ko 47, Ko 84, Ko 88 to Ko 94, Ko 107 to Ko 109, Ko 112 to Ko 123, Ko 129 (where applicable, includes branch numbers)) as well as the entire import of the oral argument, the following facts are found.

(A) On December 24, 1932, Plaintiff was born as the third-generation head of a toji family in Noto-cho, Ishikawa Prefecture. After working as a sake brewer and the like in sake breweries in Shizuoka Prefecture and Mie Prefecture, he gained employment with Kikuhime Co., Ltd. in Ishikawa Prefecture as toji in 1961 and retired from the company in 1997 at the mandatory retirement age (Exhibits Ko 11, Ko 12). In the meantime, Plaintiff received the top award from the National Sake Appraising and Deliberating Fair for 12 years in a row, and received the top award for a total of 24 times during his career (Exhibit Ko 12).

Later, from 1998 until 2012, Plaintiff worked at sake breweries in Ishikawa Prefecture as toji (Exhibits Ko 38, Ko 84, Ko 117).

(B) Defendant is a corporation whose purposes include production and sale of refined sake. On October 31, 2013, Defendant changed its trade name from "Yamamoto Shuzo Honten Kabushiki Kaisha" to "Noguchi Shuzo Co., Ltd." (Exhibit Ko 4).

Meanwhile, Plaintiff gained employment with Defendant, and from November 2013 until April 2015, Plaintiff engaged in the production of sake as toji during two seasons (Exhibit Ko 31), and retired from Defendant in the same month.

Since 2014, Defendant began selling nihonshu under the brand name of "農口" by placing the labels, which are shown in Example of Use 1 or Example of Use 2 on Attachment 1, on the bottles.

In addition, on May 23 of the same year, Defendant filed an application for registration of the Trademark, which consists of the characters, "農口", written in standard characters. Then on October 3 of the same year, registration was established for Trademark Right.

(C) After retiring from Defendant, Plaintiff gained employment with Noguchi Naohiko Sake Institute Inc. in 2017, and began to produce sake as toji. On April 23 of the same year, Noguchi Naohiko Sake Institute Inc. changed its trade name from "Misago Shuzo Kabushiki Kaisha" to "Kabushiki Kaisha Noguchi Toji Kenkyusho", and then on June 7 of the same year, changed the trade name again to the current

trade name (Exhibit Ko 108).

Since around December of the same year, Noguchi Naohiko Sake Institute Inc. began selling nihonshu, which was produced with Plaintiff as toji, under the brand name of "農口尚彦研究所" [which is the company name, "Noguchi Naohiko Sake Institute Inc.", written using kanji characters] (hereinafter referred to as "Nihonshu of NNSII").

On the bottles of Nihonshu of NNSII (Exhibits Ko 8, Ko 9), there is a label placed at the center of the body part of each bottle, indicating a figure of a motif of a hiragana character, "の", and indicating, on the left side of the figure, the characters, "杜氏 X" ["Toji X" written using kanji characters], written vertically in a small size, and a seal of the artist, and there is also a label shaped like a strip and placed at the neck part of each bottle, indicating the above figure, and indicating, underneath the figure, the characters, "農口尚彦研究所", written vertically in block style (Exhibits Ko 8, Ko 9; the label shown in the photograph in Exhibit 2 is one of such examples).

In addition, on March 27 of the same year, Plaintiff filed an application for registration of a trademark consisting of the characters, "農口尚彦", written in standard characters, with the designated goods of "Sake" in Class 33, and on September 8 of the same year, Plaintiff was granted the trademark registration (Exhibit Ko 10).

(D) From October 2017 until April 2020 (the time of JPO Decision), Plaintiff and "農口尚彦研究所" were introduced in magazines, newspapers, and websites (Exhibits Ko 11, Ko 13 to Ko 24, Ko 88 to Ko 94, Ko 112 to Ko 117, Ko 119, Ko 121, Ko 122). Examples are as shown below.

a. In an article titled "Project" (Exhibit Ko 121) dated October 13, 2017 in SAKETIMES, a website specializing in nihonshu, under the heading, "Comeback of X Toji, the god of sake brewing! Now at his ideal sake brewery, passing down his technique, spirit, and way of life to the next generation", along with a photograph showing Plaintiff and the sake brewery under construction, there are words such as the following, "Upon building the new sake brewery, emphasis was placed on putting X Toji's 'technique, spirit, way of life' into even the details. The name, '農口尚彦研究所', was given because this is not only the place where X Toji will start his search

for fine sake once again, but is also the place where the very person of 'X' will be succeeded." On the other hand, the above article does not indicate anything to the effect of using "農口尚彦研究所" as a brand name for the nihonshu which will be produced in the sake brewery.

- b. In a column titled "Release information" (Exhibit Ko 122) dated November 17, 2017 on SAKETIMES, a website specializing in nihonshu, under the scare-heading, "X, the god of sake brewing, comes back", and the heading, "農口尚彦研究所 launches a project in the crowdfunding service, 'Makuake'! Your return gift will be the very first sake to be brewed in the new facilities", along with a photograph of Plaintiff, there are words such as the following, "To those of you who support us through Makuake, we will return you a gift of the very first sake to be brewed in the newly built sake brewery" in sizes and types of "Honjozoshu 720 ml", "Yamahai Junmaishu 720 ml", and "Yamahai Ginjoshu". On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu.
- c. In a corner titled "Living amidst traditional industries!" (Exhibit Ko 16) in the homepage for a TV program titled "Sunday Theater 'Rikuo'", which was broadcasted by TBS around November 2017, under the heading, "File 8 '農口尚彦研究所'", there are words such as the following, "Mr. X (age 84), who is called the 'god of sake brewing' and is one of the most famous toji, is a key player who made the foundation for the nihonshu boom in recent years by popularizing 'Ginjoshu' in the market of nihonshu, which had remained stagnant since the 1970s", and "In November of this year, the sake brewery by the name of '農口尚彦研究所', which is full of Mr. X's visions, will be completed in Kanagaso-machi, Komatsu-shi, Ishikawa Prefecture. A new nihonshu will be produced fresh from the brewery in December 2017". The above homepage indicates the explanation, "At the end of 2017, Mr. X's new challenge will be realized into a product and delivered fresh from the brewery. Anyone who takes pride in being a drinker would wish to try a taste of nihonshu produced by the 'god of sake brewing'", along with a photograph of "nihonshu". On the other hand, there are no

indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".

- d. On the website of "Fujingaho February Issue" (Exhibit Ko 19) as of January 19, 2018 (date of update), under the heading, "Sake of X, the god of sake brewing, makes a comeback!", an article introducing Plaintiff's return as toji at a sake brewery called "農口尚彦研究所" is posted. The website shows a photograph of Plaintiff sitting alongside "nihonshu". On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".
- e. In a column titled "New Nihonshu Travel" in Shukan Diamond which was issued on February 10, 2018 (Exhibit Ko 18), under headings such as "New challenge by 85-year-old toji! Passing down the community and traditional technique to the next generation through sake brewing" and "農口尚彦研究所", along with a photograph of "農口尚彦研究所 Junmaishu Gohyakumangoku produced in Komatsu-shi", an article introducing Plaintiff was posted. However, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".
- f. In a column titled "This month's another cup" in "MONO Magazine" which was issued on February 10, 2018 (Exhibit Ko 20), under the heading, "God of Nihonshu, once again in action!", along with a photograph of "nihonshu", there are words such as the following, "As for the new product, Honjozoshu was released on December 26, which is two days after the 85th birthday of Mr. X, followed by 'Junmaishu' ... 'Yamahai Ginjoshu' to be released in mid-January of this year, and 'Junmaishu Daiginjoshu' to be released by mid-March of this year." Under the photograph of "nihonshu" which is posted, there are the words, "From left, '農口尚彦研究所 Honjozoshu' Using Gohyakumangoku, priced at 3,240 yen (1,800

ml), '農口尚彦研究所 Junmaishu' Using Gohyakumangoku, priced at 3,240 yen (1,800 ml), '農口尚彦研究所 Yamahai Junmaishu' Using Gohyakumangoku, priced at 2,160 yen (720 ml) ... '農口尚彦研究所 Junmai Daiginjoshu' Using Yamadanishiki, priced at 4,320 yen (720 ml), 8,640 yen (1,800 ml)". On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".

- g. In the evening edition of The Nihon Keizai Shimbun dated April 13, 2018 (Exhibit Ko 17), under the scare-heading, "Sake breweries of 'The four famous sake brewers of Noto'", and the headings, "農口尚彦研究所 in Ishikawa" and "Passing down sake brewing to younger people", an article introducing a sake brewery called "農口尚彦研究所" was posted. However, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for the nihonshu which will be produced in the sake brewery.
- h. In a column titled "These ambitious people" (Exhibit Ko 109) in a magazine titled "Hitotoki June 2018" dated May 20, 2018, under the title, "X Toji", along with photographs of Plaintiff and nihonshu, an article introducing Plaintiff was posted. Underneath the posted photograph of "nihonshu", there are the words, "Junmai Daiginjoshu. The new label is also innovative". On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".
- i. In a magazine titled "Gekkan Senmonryori" published in May 2018 (Exhibit Ko 22), under the heading, "農口尚彦研究所 is in action! Special three-way conversation among key players", along with a photograph of "nihonshu", an article showing a three-way conversation among Plaintiff, a ceramic artist who is designated a living national treasure, and an art director. Underneath the posted photograph of nihonshu, there are the words, "Here is a lineup of the memorable products which are the first to be released. From left, 'Yamahai Ginjo' (1,800 ml, 5,400 yen), 'Yamahai Junmai' (1,800 ml,

4,320 yen), 'Honjozo' (1,800 ml, 3,240 yen), 'Junmai' (1,800 ml, 3,240 yen), 'Junmai Daiginjo' (1,800 ml, 8,640 yen)". On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".

- j. In a column titled "Personnel development" in "SMBC Management" published in May 2018 (Exhibit Ko 21), under the heading, "Passionate 'desire to brew sake' and willingness to get along with others are important", an interview with Plaintiff about the establishment of Noguchi Naohiko Sake Institute Inc., a sake brewery bearing Plaintiff's name, and about the background to taking the position of toji was posted. On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu.
- k. In a blog entry dated May 8, 2018 on the website of Kyobashi Moto (Exhibit Ko 116), along with a photograph bearing the words, "農口尚彦研究所 Yamahai Junmaishu Murokanamagenshu", there are words such as the following, "In 2017, '農口尚彦研究所' was established in Komatsu-shi, Ishikawa Prefecture, and the industry of nihonshu was excited over X Toji's comeback after two years of absence". On the other hand, it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".
- l. On the website of Hokuriku Chunichi Shimbun dated August 11, 2018 (Exhibit Ko 24), under the heading, "'農口' takes off to the world Sake being offered on ANA international lines", along with a photograph of nihonshu, there are words such as the following, "Beginning this fall, the nihonshu of 農口尚彦研究所, a sake brewing company in Komatsu-shi, Ishikawa Prefecture, where Mr. X (85 years old), who is called the 'god of sake brewing', serves as toji, will start providing nihonshu of 農口尚彦研究所 in in-flight meals in the first class on ANA international lines throughout the year", and "ANA says ... there is usually a reshuffling of nihonshu from various places every three months, and the year-round use of the same nihonshu is very rare". On the other hand, it

is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".

- m. On the website of The Chunichi Shimbun as of September 8, 2018 (Exhibit Ko 15), under the heading, "Mr. X talks about his passion towards sake brewing Appearance tomorrow on the '27-Hour TV Ishikawa TV'", there are words such as the following, "Mr. X, (85 years old) who serves as toji at 農口尚彦研究所, a sake brewing company in Kanagaso-machi, Komatsu-shi, will appear on the 9th ... on the '27-Hour TV' produced by Fuji TV as one of the masters of food". On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for the nihonshu which will be produced in the sake brewery.
- n. In a magazine titled "Tokyo Calendar" published on December 21, 2018 (Exhibit Ko 113), in an article titled "A grown-up's first date", there are words such as the following about a female "exclaiming, 'Here is one from "農口尚彦研究所"!'", suggesting that she really likes nihonshu".
- o. In a magazine titled "Chichi February Issue" and published on January 1, 2019 (Exhibit Ko 112), under the scare-heading, "Continuous search for the best taste", and the heading, "God of sake and his tireless challenge", an article featuring an interview was posted, containing words such as the following, "Mr. X, who is called the 'god of sake brewing' and 'legendary toji', is 86 years old. He began studying sake brewing at the age of 16, and he has dedicated his life to this craftsmanship for 70 years and has become a modern-day master. He has won the top award from the National Sake Appraising and Deliberating Fair for 12 years in a row, receiving the top award for a total of 27 times during his career, and there is no end to the fans seeking the taste of his sake", and "After a blank of two years, he made a new start at this sake brewery called '農口尚彦研究所' which was completed in November 2017." (page 48). On the other hand, it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".
- p. On the website of Hoshino Resort as of July 23, 2019 (date of update) (Exhibit Ko 115), under the heading, "Being drunk with the

sake brewing by 'X Toji', the god of Nihonshu", along with a photograph of Plaintiff and "nihonshu", there are words such as the following, "The sake brewed by 'Noto toji', X, who has pursued nihonshu. It is a well-known brand sake of Ishikawa Prefecture, popular not only at established expensive restaurants but also among fans overseas in recent years", and "Here are the allure of thick sake and the world view of new nihonshu, disseminated from '農口尚彦研究所', a logical and pioneering sake brewery which was completed in Komatsu-shi, Ishikawa Prefecture in 2017". Underneath the posted photograph of "nihonshu" are the words, "From left, 'Daiginjo' 8,640 yen, Yamahai series 'Gohyakumangoku' 5,400 yen, Yamahai series 'Aiyama' 5,400 yen, Yamahai series 'Miyamanishiki' 5,400 yen, all 720 ml". On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".

- q. In a magazine titled "Good Aging Book 2019" (Exhibit Ko 91) and published on September 12, 2019 (Exhibit Ko 91), under the headings, "Noguchi Naohiko Sake Institute Inc. Toji X" and "The life as toji who made a comeback at 農口尚彦研究所, as reflected in the brewing of nihonshu which brings joy", an article introducing Plaintiff who was awarded "The 17th Good Ager Award" was posted. On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu.
- r. In a column titled "Landscape with fine sake" in "Forbes 2019 November Issue" published on September 25, 2019 (Exhibit Ko 114), under the heading, "農口尚彦研究所 Noguchi Naohiko Sake Institute YAMAHAI AIYAMA, a challenging work of sake produced by the legendary toji, X, to be enjoyed during a meal", along with a photograph of "nihonshu", an article introducing Plaintiff and "農口尚彦研究所 Yamahai Aiyama" was posted. On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and although the photo of the above nihonshu shows the attachment of a label indicating a figure of a motif of a hiragana character, "の", and the

like, there is no attachment of a label shaped like a strip and indicating the characters, "農口尚彦研究所", written vertically in block style.

- s. In the Hokuriku Chunichi Shimbun dated January 29, 2020 (Exhibit Ko 93), under the headings, "Enjoying creative cuisine that goes well with sake" and "Event at Noguchi Institute in Komatsu", an article about an event for enjoying creative cuisine that goes well with nihonshu being held at a sake brewery called "農口尚彦研究所" was posted. On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu.
- t. On the website of ANA as of February 10, 2020 (Exhibit Ko 89), on a page titled "ANA News", under the heading, "Decision over the new brand name for 'ANA Nihonshu Selections'", there are words such as the following, "ANA has decided on a new brand name for 'ANA Nihonshu Selections' to be offered during flight and in lounges beginning in March 2020. The new nihonshu ... was selected from among 46 brand names from 25 prefectures (*1) ... in addition to the beloved '農口尚彦研究所', we have highly rare brand names which have been cherished by many people over the years, such as 'Jikon' and 'Kamoshibito Kuheiji'".
- u. In the Hokuriku Chunichi Shimbun dated February 29, 2020 (Exhibit Ko 94), along with a photograph of the company president of a bakery specializing in loaf bread, holding a loaf of bread and nihonshu in his hand, an article was posted to describe the sale of the loaf bread, which is created through collaboration between Shinde Seipansho, a bakery specializing in loaf bread, and 農口尚彦研究所, a sake brewery in Komatsu-shi, and which is made by adding sakekasu [sake lees] into the dough. On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".
- v. On the website of Sumitomo Mitsui Trust Bank, Limited as of April 16, 2020, on a page titled "Sumitomo Mitsui Trust Special Interview Series" (Exhibit Ko 90), along with a photograph of

Plaintiff and the actor, A, an article about an interview between A and Plaintiff was posted. A photograph posted there shows bottles of "nihonshu" in the background of the persons having the interview. On the other hand, there are no indications to suggest that "農口尚彦研究所" is used as a brand name for nihonshu, and it is difficult to decipher from the posted photograph of "nihonshu" that the label on the bottle of nihonshu indicates "農口尚彦研究所".

- w. In a review site for nihonshu as of April 17, 2020 (date of update) called "SAKETIME" (Exhibit Ko 88), in a column for "Nihonshu Ranking 2020 in Ishikawa", in regards to "No. 1 農口尚彦研究所", the following review was posted, "'農口尚彦研究所' is a sake brewery that was newly established in 2017 with the purpose of passing down X Toji's sake brewing technique and spirit to the next generation. X Toji has the nickname of the 'god of sake brewing', and is one of the top sake brewers in Japan by being counted as one of 'The four famous sake brewers of Noto'".

B. Consideration

Plaintiff asserts as follows. Given that the Nihonshu of NNSII was ranked first in the Nihonshu Ranking 2020 for Ishikawa Prefecture in "SAKETIME", which is a website for ranking nihonshu, and that, on the international lines of ANA, Nihonshu of NNSII has been continuously offered in the first class since 2018, and that, even in various famous magazines and in TV programs that are broadcasted nationwide, not only Plaintiff but also "農口尚彦研究所" is introduced as a leading sake brewery in Hokuriku, it can be said that not only the name of Plaintiff himself but also the Nihonshu of NNSII produced by Plaintiff as well as the name of "農口尚彦研究所" which sells the nihonshu are widely recognized among customers, and that, at the time of the JPO Decision, Cited Trademark was well known or famous as an indicator for the goods, "Japanese sake [Nihonshu]", pertaining to the business of Plaintiff. As such, the JPO Decision which found otherwise by denying the name recognition is incorrect. This assertion by Plaintiff is considered below.

- (A) As shown in Attachment 2, Cited Trademark consists of the characters, "農口尚彦研究所", written vertically in block style.

The goods, "Japanese sake [Nihonshu]", are luxury goods, and customers for these goods are general consumers, so that in order to

consider that Cited Trademark is well known, it is necessary for Cited Trademark to be widely recognized among general consumers, who are the customers, as an indicator of "Japanese sake [Nihonshu]" pertaining to the business of Plaintiff.

(B) When the above is considered, the following is true. According to the findings described above in A, Noguchi Naohiko Sake Institute Inc., where Plaintiff serves as toji, has continuously sold nihonshu with affixed Cited Trademark (Nihonshu of NNSII) since around December 2017, and by the time of JPO Decision (date of judgment on March 27, 2020), the sale had continued for approximately one year and five months. On the other hand, no assertions are made in terms of sales volume, sales amount, and market share and the like concerning the nihonshu with affixed Cited Trademark, and there is no sufficient evidence to find the sales records for the nihonshu with affixed Cited Trademark.

(C) Next, in magazines, newspapers, and websites and the like described above in A (D), it is found that Plaintiff is described by words such as "Comeback of X Toji, the god of sake brewing!", "Sake of X, the god of sake brewing, makes a comeback!", "God of nihonshu, once again in action!", and "Mr. X, also called the 'god of sake brewing' and 'legendary toji'", and that Plaintiff is introduced as restarting sake brewing as toji at a sake brewery called "農口尚彦研究所" since 2017, and that the nihonshu with affixed Cited Trademark has been selected as one of the "Nihonshu Selections" being offered during flight on the international lines of ANA in first class since 2018, and also that the same nihonshu is introduced on the website of ANA as a popular brand name in 2020.

However, in the above magazines, newspapers, and websites and the like, "農口尚彦研究所" is introduced as a sake brewery where Plaintiff serves as toji, and there is no clear indication, except for the aforementioned website of ANA, suggesting that "農口尚彦研究所" is used as a brand name for nihonshu, and even with regard to the photograph showing nihonshu, it is difficult to decipher from the posted photograph that the label on the bottle of nihonshu indicates "農口尚彦研究所".

In addition, according to the articles and the like introducing

Plaintiff in magazines, newspapers, and websites and the like as described above in A (D), it can be said that Plaintiff's name, "X", had strong name recognition among nihonshu enthusiasts who are highly interested in brand names and the like of nihonshu, but it cannot be acknowledged that the name of "X" was widely known among general consumers, whose tastes and degrees of pickiness are varied.

Based on the above, it can be acknowledged from the conditions of posts in magazines, newspapers, and websites and the like as described above in A (D) that, at the time of the JPO Decision, the sake brewery called "農口尚彦研究所" and Nihonshu of NNSII were recognized, to a considerable degree, among nihonshu enthusiasts who are highly interested in brand names and the like of nihonshu, but it cannot be acknowledged that these names were widely recognized among general consumers, and even more, that Cited Trademark was widely recognized as an indicator for the goods, "Japanese sake [Nihonshu]", pertaining to the business of Plaintiff. There is no other evidence to sufficiently acknowledge as such.

(D) Based on the above, it cannot be acknowledged that Cited Trademark was, at the time of the JPO Decision, widely recognized among customers as an indicator for the goods, "Japanese sake [Nihonshu]", pertaining to the business of Plaintiff, so that the above assertion by Plaintiff cannot be accepted.

(2) Similarities between Used Trademarks 1 and 2, and Cited Trademark

A. Used Trademarks 1 and 2

(A)a. As described above in (1) A (B), since 2014, Defendant began selling the nihonshu that bears the brand name of "農口" placed on the bottle, to which a label of Example of Use 1 or Example of Use 2, as shown in Attachment 1, is attached.

The labels of Example of Use 1 indicate the characters, "農口", written vertically in cursive style (Used Trademark 1), and the label of Example of Use 2 indicates the characters, "農口", written in block style (Used Trademark 2), respectively, in a large size, and on the left side of the characters, "農口", there are the characters, "杜氏 X", and the seal of the artist, "X".

However, the characters, "農口", of Used Trademarks 1 and 2 can be observed by clearly separating the characters from other character

parts and the like, so that these characters can be recognized as constituting an independent indicator of source for the goods.

b. Used Trademarks 1 and 2 produce the pronunciation of "noguchi" or "nouguchi", respectively, according to the characters of constitution.

In addition, since it is interpreted that the word, "農口", is recognized as a coined word that has no specific meaning, Used Trademarks 1 and 2 do not generate any specific concept.

(B) Regarding this point, Plaintiff argues that, in the world of nihonshu, Plaintiff's name is well known or famous, and that the fact that "農口" represents "X", who is famous toji, is common knowledge among retailers and fans of nihonshu, so that if Used Trademarks 1 and 2 are affixed to the "Japanese sake [Nihonshu]" from among the designated goods for Trademark, Used Trademarks 1 and 2 will generate the concept of X, who is a famous toji.

However, as per the findings of the above (1) B (C), while it can be said that Plaintiff's name, "X", had strong name recognition among nihonshu enthusiasts who are highly interested in brand names and the like of nihonshu, it cannot be acknowledged that the name of "X" was widely known among general consumers, whose tastes and degrees of pickiness are varied.

Also, in the articles and the like described above in (1) A (D), which introduce Plaintiff and the sake brewery called "農口尚彦研究所", it is often the case that Plaintiff is introduced by the full name of "X", and Plaintiff is introduced by the name of "農口" only in the following two cases; namely, "'農口' takes off to the world Sake being offered on ANA international lines", and "Mr. X talks about his passion towards sake brewing" ((1) A (D) l, m). Given these circumstances, it cannot be acknowledged, even in the demographic of customers who are considerably knowledgeable about nihonshu brand names, that the mere indication of "農口" generates the concept of "X", who is a famous toji.

Accordingly, the above argument by Plaintiff cannot be accepted.

B. Cited Trademark

(A) Cited Trademark consists of the characters, "農口尚彦研究所", written vertically in block style.

Cited Trademark is shown by the characters being written vertically in the same font and size, with equal-sized spaces in between, and is

recognized in the entirety as a unified single mark, so that the trademark, in its entirety, produces the pronunciation of "noguchinaohikokenkyujo" or "nouguchinaohikokenkyujo" as a set without any pause in between the characters.

As for Cited Trademark, it generates the concept of "X's institution" or "an institution for studying X".

- (B) Regarding this point, Plaintiff argues that Cited Trademark, "農口尚彦研究所", consists only of Plaintiff's name to which a generic term, "研究所" [meaning "institution" in English], is affixed, so that from among the constitution of Cited Trademark, the part of "農口" or "農口尚彦" constitutes the principal part, and if Cited Trademark is affixed to nihonshu, Cited Trademark generates the concept of X, who is a famous toji.

However, as per the findings of the above (1) B (C), while it can be said that Plaintiff's name, "X", has strong name recognition among nihonshu enthusiasts who are highly interested in brand names and the like of nihonshu, considering that it cannot be acknowledged that the name of "X" was widely known among general consumers, whose tastes and degrees of pickiness are varied, it cannot be acknowledged that if Cited Trademark is used for nihonshu, the character part of "農口尚彦" from among the constitution of Cited Trademark would give a strong and governing impression to traders and customers as an indicator of source for the goods. Also, while the word, "研究所", is a generic name referring to a place where study is conducted, it cannot be said that the word is commonplace in the field of nihonshu, and it also cannot be said that the character part, "研究所", from among the constitution of Cited Trademark, does not produce a pronunciation or concept as an indicator of source.

Accordingly, the character part, "農口尚彦", cannot be extracted from Cited Trademark as the principal part, so that the above assertion by Plaintiff is groundless in regards to its premise.

C. Similarities

When Used Trademarks 1 and 2 are compared with Cited Trademark, both of Used Trademarks 1 and 2 consist of the two kanji characters, "農口", respectively, whereas Cited Trademark consists of the seven kanji characters, "農口尚彦研究所", so that Used Trademarks 1 and 2 are

different in appearance from Cited Trademark.

Next, while Used Trademarks 1 and 2 produce the pronunciation of "noguchi" and "nouguchi", respectively, Cited Trademark produces the pronunciation of "noguchinaohikokenkyujo" or "nouguchinaohikokenkyujo", so that Used Trademarks 1 and 2 are different in pronunciation from Cited Trademark.

While Used Trademarks 1 and 2 do not generate any specific concept, Cited Trademark generates the concept of "X's institution" or "an institution for studying X", so that Used Trademarks 1 and 2 are different from Cited Trademark in concept as well.

In that case, Used Trademarks 1 and 2 are different from Cited Trademark in appearance and pronunciation, and even in concept, so that if Used Trademarks 1 and 2, and Cited Trademark are used for "Japanese sake [Nihonshu]" from among the designated goods of Trademark, it cannot be acknowledged that there is a risk of being misleading and causing confusion as to the source, so that it cannot be acknowledged that Used Trademarks 1 and 2 are similar to Cited Trademark.

D. Plaintiff's assertion

Plaintiff makes the following assertions: namely, [i] that the actual conditions surrounding nihonshu are that even in the case where nihonshu products bear the same brand name, a large number of products of different brewing methods, grades, and raw materials and the like are distributed, in different price ranges, and it can be said that, in addition to the product name (brand name) itself, various information which can be obtained by reading a label also has the power to attract customers, so that it is reasonable to consider that a trademark that is used for nihonshu is the entire design of the label placed on a product, and that [ii] while the labels of Used Trademarks 1 and 2, as shown in Attachment 1, have different colors and backgrounds, they have the characters, "農口", shown at the center and generating the concept of "X" or "杜氏 X" [meaning "Toji X" in English], and on the left side are the characters of "杜氏 X" and a seal of the artist, "X", and in the labels of Used Trademarks 1 and 2, the principal part consists of the characters, "農口", which, together with the indication of the characters, "杜氏 X", leaves a strong impression of the name of "杜氏 X", and that [iii] accordingly, when the entirety of a label placed on a product bearing Cited Trademark is compared with the entirety of a label of

Used Trademarks 1 and 2, the trademarks fall under similar trademarks.

However, considering that the characters, "農口", of Used Trademarks 1 and 2 are, as per Example of Use 1 and Example of Use 2 in Attachment 1, indicated at the center of a label in a large size, and can be observed as being clearly separate from other characters parts and the like so as to be recognized as constituting an independent indicator of source for the goods (as described above in A (A) a), there is no reason to compare the entirety of the label, which is placed on a product with affixed Cited Trademark, with the entirety of a label of Used Trademarks 1 and 2 in order to determine the similarities between Used Trademarks 1 and 2, and Cited Trademark.

Accordingly, the above assertion by Plaintiff cannot be accepted.

(3) Confusion as to the source

Plaintiff asserts that Cited Trademark is well known or famous and that Used Trademarks 1 and 2 are similar to Cited Trademark, so that if Defendant uses Used Trademarks 1 and 2 for "Japanese sake [Nihonshu]", which are designated goods for Trademark, not only is there a risk of causing confusion that the goods pertain to the business of a person having an organizational or economical relationship with Plaintiff and "農口尚彦研究所", but also confusion is actually caused with the goods pertaining to the business of Plaintiff and "農口尚彦研究所", so that Defendant's use of Used Trademarks 1 and 2 fall under Article 51, paragraph (1) of the Trademark Act, and that the JPO Decision, which found otherwise, is incorrect.

However, as described above in (1) and (2), it cannot be acknowledged that, at the time of the JPO Decision, the Cited Trademark was widely recognized among customers as an indicator for the goods, "Japanese sake [Nihonshu]", pertaining to the business of Plaintiff, and it cannot be acknowledged that Used Trademarks 1 and 2 are similar to Cited Trademark, so that the above assertion by Plaintiff cannot be accepted in regards to its premise.

2. Incorrect determination on being misleading as to quality

Plaintiff asserts that customers have purchased Defendant's nihonshu, which use Used Trademarks 1 and 2, based on the misunderstanding that such nihonshu were produced by Plaintiff, and thus the fact that the customers were misled as to the quality of the goods means that Defendant's use of Used Trademarks 1 and 2 is misleading as to quality, so that the JPO Decision which found otherwise by denying this assertion is incorrect.

Upon considering the above, it is interpreted that the "quality of the goods", as stipulated in Article 51, paragraph (1) of the Trademark Act, includes, if the goods are nihonshu (refined sake), the cases where the goods are "tokutei meishoshu" [sake with a specific class name], which is classified according to the differences in raw materials and production methods, as well as the cases where specific toji is involved in the production of the goods.

However, as described above in 1 (2) A (A) b, Used Trademarks 1 and 2 do not generate any specific concept, and do not generate the concept of Plaintiff, so that it cannot be acknowledged that the nihonshu with affixed Used Trademarks 1 and 2 are misleading by causing others to believe that the nihonshu with affixed Used Trademarks 1 and 2 were produced with Plaintiff as toji.

Given that the labels placed on the bottles of Defendant's nihonshu indicate, as per Example of Use 1 and Example of Use 2 on Attachment 1, "杜氏 X" on the left side of Used Trademark 1 or 2 (as described above in 1 (2) A (A) a), it is acknowledged that customers coming in contact with the above labels would recognize, from the indication of "杜氏 X", that the nihonshu was brewed with Plaintiff as toji. However, this recognition is generated from the indication of "杜氏 X", and it cannot be acknowledged that the recognition resulted from Used Trademarks 1 and 2 per se, or that Used Trademarks 1 and 2 per se misled customers into believing as such.

Accordingly, the above assertion by Plaintiff cannot be accepted.

3. Summary

Based on the above, it cannot be said that Defendant used Used Trademarks 1 and 2, which are similar to Trademark, for their designated goods in order to be misleading as to quality of the goods or to cause confusion with the goods pertaining to the business of Plaintiff. Accordingly, it cannot be acknowledged that Defendant's use of Used Trademarks 1 and 2 falls under Article 51, paragraph (1) of the Trademark Act without having to determine whether or not there was intent on the part of Defendant.

Therefore, the decision rendered by the JPO to the same effect is correct, and thus the reason for rescission as asserted by Plaintiff is groundless.

No. 5 Conclusion

As described above, the reason for rescission as asserted by Plaintiff is groundless, and the JPO Decision has no illegality due to which it should be rescinded.

Therefore, Plaintiff's claim shall be dismissed.

Intellectual Property High Court, Fourth Division

Presiding judge: OTAKA Ichiro

Judge: MOTOYOSHI Hiroyuki

Judge: OKAYAMA Tadahiro

(Attachment 1) Used Trademarks 1 and 2

[Example of Use 1]





[Example of Use 2]



(Attachment 2) Example of Cited Trademark (page 3 of Exhibit Ko 9)

