

## Trial decision

Revocation No. 2015-300011

Tokyo, Japan

Demandant

TERADA, Momoe

Tokyo, Japan

Demandee

NIPPON PAPER CRECIA CO., LTD

Tokyo, Japan

Patent Attorney

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A trial decision for revocation of the trademark with Registration No. 5435411 shall be made as follows.

### Conclusion

The trial of the case was groundless.

The costs in connection with the trial shall be borne by the demandant.

### Reason

#### No. 1 The trademark

The trademark with Trademark Registration No. 5435411 (hereinafter referred to as the "Trademark") is configured as indicated in Attachment 1, the application for its registration was filed on April 6, 2011, and the Trademark was registered on September 2, 2011 by setting Class No. 5 "Incontinence liners; incontinence pads; incontinence diapers." as the designated goods.

The demand for the trial of the case was submitted on January 21, 2015.

#### No. 2 Argument of demandant

The demandant requested a trial decision to the effect that the registration of the Trademark shall be canceled and that the costs in connection with the trial shall be borne by the demandee, and summarized and mentioned reasons for request and rebuttal against a reply as follows, and submitted Evidence A No. 1 and A No. 2 as means of evidence.

## 1. Reasons for demand

There is no evidence that either the holder of trademark right of the Trademark, its exclusive licensee or non-exclusive licensee has ever used the Trademark for its designated goods for 3 consecutive years or more in Japan, and thus the registration should be canceled under the provisions of Article 50(1) of the Trademark Act.

## 2. Rebuttal against reply

The trademark the use of which is indicated in the evidence filed by the demandee is not a trademark deemed identical with the Trademark from generally accepted perspective. Hereinafter, a detailed argument is given to show that there is no similarity between the Trademark and the trademark in use.

### (1) Regarding configurations of the Trademark and the trademark in use

As indicated in Attachment 1, the Trademark is constituted by: an elliptical design arranged in the upper-right of the Trademark and having an elliptical figure in which the characters of "肌ケア" are arranged and the periphery of which is encircled by two thin circle lines crossing each other; and a ring-shaped flower pattern arranged in such a manner as to form a space located left below the elliptical design.

On the other hand, although the trademark the use of which is indicated in the Evidence B No. 1 to B No. 4 is, as indicated in Attachment 2, based on the configuration substantially identical to the Trademark, it additionally has the characters of "ポイズ" arranged in a very large format in the space formed in the ring-shaped flower pattern and has many star designs distributed around the "肌ケア" characters and on the ring-shaped flower pattern (hereinafter referred to as "Used Trademark").

### (2) Regarding non-similarity between the Trademark and the Used Trademark

#### A. Appearance

As indicated in (1) above, although the Used Trademark is based on a configuration substantially identical to the Trademark, in the first place, the Used Trademark and the Trademark have a definite difference in that the Used Trademark has the "ポイズ" characters arranged in a very large format in the space formed in the ring-shaped flower pattern. The characters of "ポイズ" are arranged in the space formed in the ring-shaped flower pattern, i.e. in a central portion of the Trademark, and are represented in a very large size, which is about 1.5 to 2 times the size of the characters of "肌ケア", and thus have overwhelming presence so that the "ポイズ" characters can be said to be the core of the Used Trademark's configuration. The "ポイズ" characters are, like the ellipse shape and the flower pattern surrounding the characters, in a pink color, which provides color consistency over the whole of the Used Trademark. Thus, it is very unnatural to recognize the "ポイズ" characters

independently from their surrounding figures, and it is highly unlikely that consumers coming into contact with the "ポイズ" characters ignore these characters and recognize the surrounding figures only.

In this regard, the demandee asserts lack of oneness between the figures related to the Trademark and the "ポイズ" characters. However, as described above, taking into consideration the position, size, and color of the "ポイズ" characters, the "ポイズ" characters can be rather said to be a core constituent component in the whole of the Used Trademark having color consistency across the figures or the like. Thus, the demandee's assertion that they lack oneness is unreasonable.

The demandee alleges that lack of oneness between the figures related to the Trademark and the "ポイズ" characters is supported by the fact that the "ポイズ" trademark is widely known to consumers as representing goods of "incontinence liners" and "incontinence pads". That allegation is, however, absolutely irrational.

That is, even if there is situation in which the "ポイズ" trademark is widely known to consumers, precisely for this reason, when the "ポイズ" trademark is arranged in the central portion in a very large format it is so much more unlikely that the consumers ignore the "ポイズ" trademark and recognize only the figures surrounding the "ポイズ" trademark. That situation can be a ground for proving that the demandee is using the "ポイズ" trademark. It, however, cannot be a ground for proving that the demandee is using the Trademark, and, it rather can be the strongest ground for proving that the Used Trademark, in which the "ポイズ" characters not present in the Trademark are arranged, does not have similarity with the Trademark.

Referring to the aspects of the Used Trademark (Evidence B Nos. 1, 2, and 4), in each of them the Used Trademark is accompanied with the characters of "肌ケアのポイズ" which are drawn in a large format and adjacent to or just below the Used Trademark. So it can be said that it is obvious that consumers recognize the "ポイズ" characters and the "肌ケア" characters as having oneness. Such a fact is indicated by the demandee oneself who is using the trademark in such manner.

In connection with the aspect that the small star designs not present in the Trademark are distributed in the Used Trademark, the demandee states that "a few stars are distributed". However, counting all the star designs around the "肌ケア" characters and on the ring-shaped flower pattern, there are nine star designs in total distributed over the whole of the Used Trademark, and thus "a few" is an inaccurate statement. Although each of the star designs may not be so large, a total of nine star designs are distributed over the whole of the Used Trademark, causing brilliant impression in the appearance of the Used trademark.

Therefore, the Trademark, which does not have such star designs and does not cause such brilliant impression, and the Used Trademark have totally different appearances, and thus the assertion of the demandee asserting that they have "slight difference" is not reasonable.

As described above, the Trademark and the Used Trademark are totally different from each other in terms of appearance.

#### B. Pronunciation

The Trademark gives rise to the pronunciation of "Hadakea" according to the characters of "肌ケア" in the configuration of the Trademark.

In contrast, the Used Trademark gives rise to the pronunciation of "Poizu" according to the "ポイズ" characters represented in a very large format in the middle of the Used Trademark. In addition, since the "肌ケア" characters are presented in a slightly small format on the upper right of the "ポイズ" characters, the Used Trademark may give rise to the pronunciation of "Hadakeapoizu" or "Poizuhadakea", if a pronunciation other than the above "Poizu" pronunciation could be given.

Comparing the pronunciation of "Hadakea" given from the Trademark with the pronunciations of "Poizu", "Hadakeapoizu", and "Poizuhadakea", which may be given from the Used Trademark, it is obvious that their pronunciations are different.

The demandee asserts that there is no oneness between the figure related to the Trademark and the "ポイズ" characters and asserts as if the Used Trademark could not give rise to the pronunciation of "Poizu". As described above, however, the characters of "ポイズ" have overwhelming presence so that the characters can be said to be the core of the Used Trademark's configuration. In addition, if, as the demandee asserts, the "ポイズ" trademark is widely known to the consumers, it is highly unlikely that consumers coming into contact with the "ポイズ" characters ignore these characters and recognize the surrounding figures only, and thus it is natural to consider that the Used trademark gives rise to the pronunciation of "Poizu".

Taking into consideration the presence of the "肌ケア" characters in the configuration of the Used Trademark and the actual state in the use of the Used Trademark that the "肌ケアのポイズ" characters are presented in a large format and adjacent to or just below the Used Trademark, the pronunciation that could be given from the Used Trademark is "Hadakeapoizu" or "Poizuhadakea". That is, it is very unlikely that the Used Trademark only give rise to the pronunciation of "Hadakea", which is the same as that of the Trademark.

As described above, the Trademark and the Used Trademark are totally different from each other in terms of pronunciation

### C. Meaning

The Trademark and the Used Trademark are configured as indicated in (1) above. Since the character parts of "肌ケア" and "ポイズ" are each a coined word that does not cause specific meaning in connection with the quality or the like of specific goods, the trademarks, which are each a combination of such a coined word and a figure element, do not cause specific meaning even from the whole aspect thereof. Thus, they cannot be compared in terms of meaning.

As described above, there is no similarity between the Trademark and the Used Trademark even in terms of meaning.

### D. General Judgment

As described above, it is obvious that the Trademark and the Used Trademark are definitely different in terms of any of appearance, pronunciation, and meaning, and that they are not trademarks deemed identical from generally accepted perspective.

The space formed in the ring-shaped flower pattern in the configuration of the Trademark is an empty space in which an element like a character or a figure is not present. It cannot be said that a trademark is said to have similarity with the Trademark if the trademark has common constituent elements as the Trademark except a character element or a figure element arranged in the space. The application and examination for trademark registration was predicated on the premise that nothing existed in the empty space, and as a result registration was allowed. Therefore, it is considered that the holder of trademark right (demandee) is obliged to use the registered trademark with the space being empty.

Assume that, in such a situation, a trademark having in that empty space "ポイズ" characters, which are totally not present in the Trademark, is used, and if the use of that trademark is considered as use of a trademark deemed identical with the Trademark in generally accepted perspective, the use obligation of the holder of trademark right of the Trademark is uselessly discharged or lightens with no reasoning. This is definitely contrary to the objectives of the system for the trial for rescission of registered trademark not in use stipulated in Article 50 of the Trademark Act, which attempts to individually exclude not-in-use trademarks which improperly eliminate choices of third parties in selecting trademarks.

If characters having no (or weak) identification strength are presented in the space in a very small format and thus unobtrusive from the perspective of the whole configuration, there may be a room for discussing whether the Used Trademark is deemed identical with the Trademark from generally accepted perspective. It is, however, obvious that the Used Trademark indicated by the demandee has no similarity

with the Trademark.

### 3. Conclusion

As described above, the evidence submitted by the demandee fails to prove that any of the holder of trademark right, exclusive right to use or non-exclusive right to use has used the Trademark in Japan in connection with any of the designated goods pertaining to the demand for the trial within three years prior to the registration of the demand, and thus the rescission of the registration of the Trademark for the reason of no-use thereof cannot be prevented.

### No. 3 Reply of demandee

The demandee replied requesting a trial decision whose content is the same as the conclusion, summarized and mentioned reasons for request as follows, and submitted Evidence B No. 1 to B No. 7.

#### 1. Reason of reply

The Trademark has been used by the holder of trademark right (demandee) in Japan in connection with "incontinence liners" and "incontinence pads" (hereinafter referred to as the "Goods") of the designated goods pertaining to the demand for the trial within three years prior to the registration of the demand for the trial (Evidence B No. 1 to B No. 5).

(1) The holder of trademark right presented the Used Trademark as indicated in Attachment 2 with the Goods on page 25 of a goods inventory of the holder's company "2012 AUTUMN ALL PRODUCTS GUIDE 全商品カタログ(All Products catalog)" (Evidence B No. 1; hereinafter referred to as "Inventory 2012") and on page 25 of a goods inventory of the holder's company "2013 SPRING ALL PRODUCTS GUIDE 全商品カタログ(All Products catalog)" (Evidence B No. 2; hereinafter referred to as "Inventory 2013"). The holder of trademark right distributed those inventories to traders.

Those goods inventories (Evidence B No. 1 and B No. 2) were printed and bound by GAC CO, Ltd. A 30,000 copies of Inventory 2012 were delivered from GAC CO, Ltd. to the holder of trademark right on July 9, 2012; and a 25,000 copies of Inventory 2013, on January 15, 2013 (Evidence B No. 3).

Inventory 2012 has a back cover on the lower right of which an issue record "Issued July 2012" is printed, and the Inventory 2013 has a back cover on the lower right of which an issue record "Issued January 2013" is printed. Those identify the issue dates of the inventories.

In addition, the holder of trademark right has used the Used Trademark in an

advertisement in connection with the Goods in a quarterly information magazine "くまにち ゆとれあ(KUMANICHI YUTOREA)" (Evidence B No. 4) issued on December 13, 2014 (Evidence B No. 4 and B No. 5).

These verify the fact that the holder of trademark right has presented on an inventory of the Goods and on an advertisement of the Goods a trademark deemed identical with the Trademark in generally accepted perspective, and that operation of the holder of trademark right corresponds to "distribution of advertisement materials, price lists or transaction documents relating to goods to which a mark is affixed" stipulated in Article 2(3)(viii) of the Trademark Act.

(2) Regarding the similarity between the Trademark and the Used Trademark

The Trademark is constituted by: an elliptical design arranged in the upper-right of the Trademark and having an elliptical figure in which the characters of "肌ケア" are arranged and the periphery of which is encircled by two thin circle lines crossing each other; and a ring-shaped flower pattern arranged in such a manner as to form a space located left below the elliptical design.

The Used trademark is constituted by: a graphic having the "肌ケア" characters and the ring-shaped flower pattern of the Trademark and having small star designs distributed around the "肌ケア" characters and on the ring-shaped flower pattern; and the characters of "ポイズ" arranged in the space formed in the ring-shaped flower pattern.

The Trademark and the Used Trademark thus configured have similarity for the reasons described below, and thus use of the Used Trademark means use of the Trademark.

A. In the use of a trademark in general commercial transactions, if the registered trademark is a figure, it is widely practiced to use the registered trademark of that figure with characters, or if the registered trademark is characters, it is widely practiced to use the registered trademark of those characters with a figure.

In those cases, if consumers are able to recognize the figure and characters separately, that is, for example, when a registered trademark is a figure and if consumers are able to separate a figure and characters from an in-use trademark constituted by the figure and the characters and readily recognize that figure as the figure of the registered trademark, it is said that the figure registered as the trademark and the characters have no oneness and if the registered trademark and the figure of the in-use trademark have similarity, the use of the in-use trademark is recognized as the use of the registered trademark.

Taking into consideration the Used Trademark, the "ポイズ" characters

arranged in the space formed in the ring-shaped flower pattern slightly engage with the elliptical design having the "肌ケア" characters in the elliptical figure and two thin circle lines crossing each other encircling the periphery of the elliptical figure, but do not change the configuration of the Trademark, and consumers readily recognize from the Used Trademark a figure which is the Trademark. That is, in the Used Trademark, the figure which is the Trademark and the accompanying characters of "ポイズ" have no oneness.

B. An additional remark is that the "ポイズ", which is accompanied with the figure of the Trademark in the Used Trademark, is a third party's registered trademark (Registered Trademark No. 4824968) whose holder of trademark right is "Kimberly-Clark Worldwide Incorporated". The holder of trademark right is licensed from the holder of the "ポイズ" trademark the right to use the trademark, and uses the "ポイズ" trademark on the Goods.

The goods on which the "ポイズ" trademark is attached have won acceptance mainly from female consumers as incontinence goods with high absorbability and gentle quality for skins, since "ポイズパッド", a napkin type product specialized for urine care, was sold first in our country in 1994. Those goods are sold in drug-stores, supermarkets, convenience stores, and home centers, and their market share in light incontinence goods from 2009 to 2013 was a very high percentage, 15 percent in average.

As described above, the "ポイズ" trademark is widely recognized among the traders and consumers as representing the Goods sold by the holder of trademark right.

As a result, consumers seeing the Used Trademark readily recognize the "ポイズ" trademark separate from the figure, which means they recognize the figure of the Trademark.

C. As described above, in the Used Trademark, the figure of the Trademark and the "ポイズ" characters accompanied therewith have no oneness and there is no specific reason to always identify the figure of the Trademark and the "ポイズ" characters accompanied therewith as one entity.

In the light of precedent trials, for a used trademark constituted by a figure and characters, when there is no specific reason to always recognize the figure and the characters as one entity and when the figure and the characters of the trademark can be clearly recognized as separated, independent marks, it has been admitted to separate the characters part and figure part from the used trademark to identify the similarity between the used trademark and a registered trademark (Evidence B No. 6 and B No. 7)

Also in the light of such precedent trials, the Trademark and the Used



Trademark are recognized to have similarity.

(3) Regarding the similarity between the figures of the Trademark and the Used Trademark

It is admitted that the figures of the Trademark and the Used Trademark differ in that the latter has a figure in which a few small star designs are distributed around the "肌ケア" characters and on the ring-shaped flower pattern.

This difference is, however, a minor one. The figure in the Used trademark and the Trademark are substantially identical and the Trademark and the Used Trademark are deemed identical from generally accepted perspective.

Even in the light of the court decision of the case of suit against trial decision (1990 (Gyo-Ke) 48 by Tokyo Supreme Court) in connection of a trial for rescission of trademark registration under the provisions of the Article 50(1) of the Trademark Act, it can be said that the figure which is resulted by removing characters from the configuration of the Used Trademark is substantially the same as the Trademark, and that the Used Trademark clearly maintains the identity of the Trademark.

Therefore the Trademark and the Used Trademark are deemed identical from generally accepted perspective.

(4) Summary

As described above, the holder of trademark right (demandee) has used in Japan a trademark deemed identical with the Trademark from generally accepted perspective in connection with the goods of "incontinence liners" or "incontinence pads" of the designated goods pertaining to the demand for the trial within three years prior to the registration of the demand.

Therefore, the demand for the trial of the case is groundless.

#### No. 4 Judgement by the Body

1. The following facts have been acknowledged based on the items of Evidence B submitted by the demandee and the assertions made by the demandee.

(1) Evidence B No. 1 is a goods inventory titled "2012 AUTUMN ALL PRODUCTS GUIDE 全商品カタログ(All Products catalog)" (Inventory 2012). The inventory has a page 25 on the left uppermost portion of which a recitation of "Healthcare (light incontinence)" is given, on the left upper portion of which a trademark as indicated in Attachment 2 (Used Trademark) is presented, and in the lower half of which photographs of the goods are presented with the characters of "尿ケアライナータイプ" (urine care liner type) and "尿ケア専用ナプキンタイプ" (napkin type specialized for urine care) and the like. In addition, on the back cover of the inventory, recitations

of "Nippon Paper Crecia Co., Ltd." and "Issued July 2012" are given.

(2) Evidence B No. 2 is a goods inventory titled "2103 SPRING ALL PRODUCTS GUIDE 全商品カタログ(All Products catalog)" (Inventory 2013). The inventory has a page 25 on the left uppermost portion of which a recitation of "Healthcare (light incontinence)" is given, on the left upper portion of which the Used Trademark is presented, and in the lower half of the page of which photographs of the goods are presented with the characters of "尿ケアライナータイプ" (urine care liner type) and "尿ケア専用ナプキンタイプ" (napkin type specialized for urine care) and the like. In addition, on the back cover of the inventory, recitations of "Nippon Paper Crecia Co., Ltd." and "Issued January 2013" are given.

(3) Evidence B No 3 is a "certificate" dated March 2, 2015 signed by a sales director of GAC CO, Ltd. (hereinafter referred to as "GAC"). The certificate states that GAC printed and bound the inventories, and delivered them to Nippon Paper Crecia Co., Ltd. The certificate includes recitations of "1. 2012 AUTUMN ALL PRODUCTS GUIDE 全商品カタログ(All Products catalog)/Issue in July 2012/Number of published copies: 30,000/Date of deliver: July 9, 2012" and "2. 2013 SPRING ALL PRODUCTS GUIDE 全商品カタログ(All Products catalog)/Issue in January 2013/Number of published copies: 25,000/Date of deliver: January 15, 2013".

The certificate includes: as annex 1, the cover, page 25, and back cover of Inventory 2012; and as annex 2, the cover, page 25, and back cover of Inventory 2013.

(4) Evidence B No 4 is an informational magazine titled "くまにち ゆとれあ (KUMANICHI YUTOREA)" issued on December 13, 2014. The Evidence has a recitation of "Nippon Paper Crecia Co., Ltd" in a right lower portion, the Used Trademark presented in a middle upper portion, and photographs of urine care napkin type goods accompanied with the characters of "多い時も安心用" (for ease even at a large amount) and "長時間・夜も安心用" (for ease for long period and night) under the caption of "選ぶなら、肌ケアのポイズ。" (choose skin-care Poizu) in a lower portion.

(5) Evidence B No 5 is a web site titled "熊本県高齢者介護施設・住宅ガイドブログ: くまにち ゆとれあ (KUMANICHI YUTOREA)" (Guide blog for Kumamoto prefecture nursing home and house for aged people: Kuremachi Yutorea). The web site recites that, under the caption of "くまにちゆとれあ(KUMANICHI YUTOREA)", "We, an NPO corporation workshop 'いふ(IFU)', participate in the corporation and supervision on the reporting conducted for 'くまにちゆとれあ (KUMANICHI YUTOREA)' issued by Kumamoto Nichi Nichi Shimbun Koukokukyoku. 'ゆとれあ (YUTOREA)' is a quarterly information magazine for considering "a way of life in an individual personality".

2. The facts identified in the above result in the following recognition.

(1) The holder of trademark right has created goods inventories which present on a page of "Healthcare (light incontinence)" the trademark as indicated in Attachment 2 (Used Trademark) as well as photographs of the goods which are recognized as "incontinence liners" and "incontinence pads" with the characters of "尿ケアライナータイプ" (urine care liner type) and "尿ケア専用ナプキンタイプ" (napkin type specialized for urine care) and the like. Inventory 2012, a goods inventory issued in July 2012, was created in an amount of 30,000 copies. Inventory 2013, a goods inventory issued in January 2013, was created in an amount of 25,000 copies.

In the light of the above-described issue status of the goods inventories, it is reasonable to presume that the copies of Inventory 2012 were at least distributed to traders in the period from July 9, 2012, on which date the copies of Inventory 2012 were delivered, to January 15, 2013, on which date the copies of Inventory 2013 were delivered (the above facts (1) to (3)).

The duration from the delivery day of Inventory 2012 to the delivery day of Inventory 2013 is within the three years prior to the registration of the demand for the trial (hereinafter referred to as "period required to prove trademark use").

(2) The holder of trademark right presented an advertisement of the goods "尿ケア専用ナプキンタイプ" (napkin type specialized for urine care), which is recognized as an "incontinence pad", with the Used Trademark on the information magazine "くまにちゆとれあ(KUMANICHI YUTOREA)" issued on December 13, 2014.

The information magazine is presumed to be distributed at least and mainly in the Kumamoto prefecture immediately after the issue date, taking into consideration the format of the magazine and the fact that Kumamoto Nichi Nichi Shimbun Koukokukyoku is the issuer (the above facts (4) and (5)).

Note that the issue date is within the period required to prove trademark use.

Note that the demandant is not taking issue with those facts.

(3) As described in (1) and (2) above, it is recognized that the holder of trademark right distributed transaction documents (goods inventory) or advertisement materials of "incontinence liners" or "incontinence pads" of the designated goods pertaining to the demand for the trial with the Used Trademark within the period required to prove trademark use in Japan.

3. Regarding the similarity between the Trademark and the Used Trademark

The demandant is taking issue with the similarity between the Trademark and the Used Trademark. Examination on this issue is as follows.

(1) Regarding the Trademark

The Trademark is, as indicated in Attachment 1, constituted by: an elliptical design arranged in the upper-right of the Trademark and having an elliptical figure in which the characters of "肌ケア" are arranged and the periphery of which is encircled by two thin circle lines crossing each other; and a ring-shaped flower pattern arranged in such a manner as to form a space located left below the elliptical design.

(2) Regarding the Used Trademark

A. The Used trademark is, as indicated in Attachment 2, constituted by a mark which is based on a configuration substantially identical to the Trademark, the "ポイズ" characters arranged in the ring-shaped flower pattern, and nine star designs distributed around the characters of "肌ケア" and on the ring-shaped flower pattern.

The "ポイズ" characters in the configuration of the Used Trademark are alone colored in deep pink and thus distinguished from other parts whose base color is a light pink, and therefore it is natural to see that the Used Trademark is understood and recognized as consisting of those characters and the outline figures surrounding the characters (hereinafter the outline figures in the configuration of the Used Trademark, including the "肌ケア" characters but except the "ポイズ" characters, is referred to as "Figure Part").

In addition, it is reasonable to consider that, based on the configuration of the Used Trademark, the Used Trademark will be of course recognized and recalled by an observer by paying attention to the "ポイズ" characters represented in a large format in the middle portion and that the Used trademark will also be generally recognized and recalled by focusing on the Figure Part.

Thus it should be said that the Figure Part of the Used Trademark may independently serve to distinguish relevant products from others.

B. The demandant asserts that the "ポイズ" characters are arranged in a very large format, colored in a pink color in the same manner as the surrounding elements, and thus providing color consistency over the whole of the Used Trademark, and that it is very unlikely that "ポイズ" characters be ignored and only the Figure Part be recognized.

However, in general there are many trademarks which have a plurality of parts that independently serve to distinguish relevant products from others. Therefore the demandant's assertion does not deny recognizing each of the "ポイズ" characters and the Figure Part of the Used Trademark as a part which independently serves to distinguish relevant products from others.

Moreover, in a trial for rescission of trademark registration under the provisions of the Article 50(1) of the Trademark Act, whether the registered trademark

(including a trademark deemed identical from generally accepted perspective) is used is examined, and the demandant states that "the Used Trademark is based on a configuration substantially identical to the Trademark".

Therefore the assertion asserted by the demandant cannot be accepted.

(3) Regarding the similarity between the Trademark and the Used Trademark

It cannot be said that the Figure Part and the "ポイズ" characters of the Used Trademark is unitary and inseparable, and, as seen in (2) A above, the Figure Part independently serves to distinguish relevant products from others. The figure part can be said to be constituted by the constituent elements of the Trademark and nine small star designs distributed thereon.

The Figure Part of the Used Trademark does not change the basis of the Trademark's configuration and can be said to stay within a range in which there is no effect on the identity of the Trademark. Therefore, the Used Trademark should be said to be a trademark that is deemed identical with the Trademark from generally accepted perspective.

Thus, it should be said that the Figure Part in the configuration of the Used Trademark may independently serve to distinguish relevant products from others and is deemed identical with the Trademark from generally accepted perspective, and thus the Used Trademark is deemed identical with the Trademark from generally accepted perspective.

The demandant asserts that the registration of the Trademark has been allowed on the premise that nothing exists in the middle empty space in its configuration and therefore it is considered that the holder of trademark right is obliged to use the registered trademark with the space being empty. The demandant further asserts that, if use of the Trademark with "ポイズ" characters arranged newly in that space is recognized as use of a trademark that is deemed identical with the Trademark from generally accepted perspective, such recognition is contrary to the objectives of the system for the trial for rescission of registered trademark not in use stipulated by Article 50 of the Trademark Act. However, the Used Trademark does not change the basis of the Trademark in such a manner as to make effect to the identity of the Trademark and is deemed identical with the registered trademark from generally accepted perspective as described above. In addition, taking into consideration the objectives of Article 5 C(2) of the Paris Convention, such assertion cannot be accepted.

4. Summary

As described above, it should be said that the holder of trademark right has distributed transaction documents and advertisements of goods of "incontinence liners"

or "incontinence pads" of the designated goods pertaining to the demand for the trial in Japan within three years prior to the registration of the demand, with a trademark deemed identical with the Trademark from generally accepted perspective (Article 2(3)(viii) of the Trademark Act).

Therefore, it should be said that the demandee (holder of trademark right) has proved that the Trademark (including a trademark deemed identical with the Trademark from generally accepted perspective) has been used in Japan by the holder of trademark right in connection with the goods that falls in the category of the designated goods pertaining to the demand for the trial within 3 years prior to the registration of the demand, and thus the registration of the Trademark shall not be cancelled with respect to the designated goods pertaining to the demand of the trial under the provisions of the Article 50 of the Trademark Act.

Therefore, the trial decision shall be made as described in the conclusion.

August 25, 2015

Chief administrative judge:	HAYASHI, Eiji
Administrative judge:	KAJIWARA, Yoshiko
Administrative judge:	NAKATSUKA, Toshie

Attachment 1 (The Trademark)  
(See original for colors)



Attachment 2 (The Used Trademark)

(See original for colors)

