SPC Guiding Case No. 30: Lan Jianjun and Hangzhou Xiaomuzhi Automobile Maintenance Technology Co., Ltd. v. Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. et al. (Trademark Infringement and Unfair Competition Dispute)

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil / trademark infringement / unfair competition / competitive relationship

Holding

1. Whether an operator has acts that exceed its statutory business scope and violate administrative licensing laws and regulations does not affect its exercise, in accordance with law, of the civil rights to stop trademark infringement and unfair competition.

2. The Anti-Unfair Competition Law does not restrict operators from having to have a direct competitive relationship, nor does it require them to engage in the same industry. Where operators have an indirect competitive relationship, and the actor violates the provisions of the Anti-Unfair Competition Law and harms the lawful rights and interests of other operators, this should also be determined as unfair competition.

Basic Facts

The plaintiffs, Lan Jianjun and Hangzhou Xiaomuzhi Automobile Maintenance Technology Co., Ltd. (hereinafter "Hangzhou Xiaomuzhi Company"), alleged that: they lawfully held the exclusive right to use the registered trademark "Xiaomuzhi," while Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. (hereinafter "Tianjin Xiaomuzhi Company") and Tianjin Huashang Automobile Import Parts Company (hereinafter "Tianjin Huashang Company"), in the course of engaging in automobile maintenance and recruiting franchisees through their websites, used the "Xiaomuzhi" mark in multiple places, and there were circumstances of using "Xiaomuzhi" alone or prominently, infringing their exclusive right to use the registered trademark; at the same time, Tianjin Xiaomuzhi Company's unauthorized use of Hangzhou Xiaomuzhi Company's prior enterprise name constituted unfair competition against Hangzhou Xiaomuzhi Company. They therefore requested the court to order Tianjin Xiaomuzhi Company to immediately cease using the trade name "Xiaomuzhi" for business operations, Tianjin Xiaomuzhi Company and Tianjin Huashang Company to cease the trademark infringement and unfair competition acts, to publicly apologize, to jointly and severally compensate economic losses of RMB 630,000 and reasonable expenses of RMB 24,379.4, and to bear the litigation costs of the case.

The defendants, Tianjin Xiaomuzhi Company and Tianjin Huashang Company, argued that: 1. Hangzhou Xiaomuzhi Company's business scope did not include licensed business items and automobile maintenance categories, nor had it obtained a license for motor vehicle maintenance, nor did it meet the "two stores and one year" franchise conditions, so it was illegal business operation beyond its business scope, and its rights should not be protected. 2. Tianjin Xiaomuzhi Company and Tianjin Huashang Company's use of the "Xiaomuzhi" mark had a lawful source and did not constitute trademark infringement. 3. Hangzhou Xiaomuzhi Company did not engage in the automobile maintenance industry, the two parties did not constitute a commercial competitive relationship, and it could not prove that it was a well-known enterprise, so its claim of enterprise name rights lacked legal basis, and Tianjin Xiaomuzhi Company and Tianjin Huashang Company did not constitute unfair competition; they therefore requested the court to dismiss the

plaintiffs' claims.

Upon trial, the court found that: Hangzhou Xiaomuzhi Company was established on October 22, 2004, with legal representative Lan Jianjun. Its business scope was: "licensed business items: none; general business items: services; technological development of automobile glass repair, technological development of rapid repair of automobile paint; wholesale and retail; automobile parts; including the business scope of its subordinate branches; all other lawful items not requiring approval (the above business scope does not include items prohibited, restricted, or requiring a license by state laws and regulations). All items involving the license system shall be operated with licenses." Its subordinate branch was the Xiaoshan Branch of Hangzhou Xiaomuzhi Company, established on November 5, 2008, with business scope: "automobile painting, glass installation." The Road Transport Operation License obtained by that branch on August 1, 2008, stated its business scope as: "maintenance (Class II motor vehicle maintenance: small vehicle maintenance)."

On January 14, 2011, Hangzhou Xiaomuzhi Company obtained the registered trademark "Xiaomuzhi" in characters, No. 6573882, with approved service items (Class 35): operation management of chain stores (business administration assistance); commercial management of franchising; commercial management consulting; advertising. The trademark is now within its validity period. On April 14, 2011, Lan Jianjun licensed his registered trademark "Xiaomuzhi" in characters, No. 6573881, to Hangzhou Xiaomuzhi Company for use by way of exclusive license.

Hangzhou Xiaomuzhi Company was awarded the certificate of the China Chain Store Top 120 by the China Chain Store and Franchise Association multiple times, and in 2009, Hangzhou Xiaomuzhi Company's "Xiaomuzhi Automobile Maintenance Service" was recognized by the Zhejiang Provincial Bureau of Quality and Technical Supervision as a Zhejiang service brand.

Tianjin Xiaomuzhi Company was established on October 16, 2008, with legal representative Tian Junshan. Its business scope was: "complete vehicle repair, assembly repair, complete vehicle maintenance, minor repair, maintenance rescue, and special repair of small passenger vehicles. (The operation period of licensed business items shall be subject to the license.)" The Tianjin Motor Vehicle Maintenance Operation License obtained by the company on July 28, 2010, stated the category as "Class II (automobile maintenance)" and the business items as "complete vehicle repair, assembly repair, complete vehicle maintenance, minor repair, maintenance rescue, and special maintenance of small passenger vehicles," valid from July 28, 2010, to July 27, 2012.

Tianjin Huashang Company was established on November 23, 1992, and its legal representative was the same person as that of Tianjin Xiaomuzhi Company, namely Tian Junshan. Its business scope was: "automobile parts, glass, lubricating grease, tires, automobile fittings; vehicle body cleaning and maintenance, electrical system maintenance, painting; handling of express delivery, consignment, and information consulting; ordinary goods (for the above business scope involving industry licenses, operate within the validity period with licenses; where the state has special franchise provisions, handle in accordance with the provisions)." The Tianjin Motor Vehicle Maintenance Operation License obtained by Tianjin Huashang Company had the business items: "complete vehicle repair, assembly repair, complete vehicle maintenance, minor repair, maintenance rescue, and special repair of small passenger vehicles," with category "Class II (automobile maintenance)," now within its validity period.

Tianjin Xiaomuzhi Company and Tianjin Huashang Company, in the course of engaging in automobile maintenance and recruiting franchisees through their websites, used the "Xiaomuzhi" mark in multiple places, and there were circumstances of using "Xiaomuzhi" alone or prominently.

On June 30, 2008, Tianjin Huashang Company and Hangzhou Xiaomuzhi Company signed a Franchise Chain Operation Contract, licensing Tianjin Huashang Company to operate a "Xiaomuzhi" brand automobile maintenance chain center in Tianjin, with a contract term from June 30, 2008, to June 29, 2011. Item (4) of

Article 3 of that contract provided: "Party B (Tianjin Huashang Company), in establishing a franchise store, shall conduct business activities under the name approved in writing by Party A (Hangzhou Xiaomuzhi Company). Restriction on the use of the trade name (select as follows): without the written consent of Party A, Party B shall not use or register as an enterprise name the 'Xiaomuzhi' or 'Xiaomuzhi micro-repair' and other related marks in any place, at any time, or in any form; without the written consent of Party A, Party B shall not add any prefix or suffix to modify or supplement the name 'Xiaomuzhi' or 'Xiaomuzhi micro-repair'; Party B shall not register domain names containing 'Xiaomuzhi' or 'Xiaomuzhi micro-repair' or characters related to or similar to them, and this restriction includes restrictions on Party B's branches." On December 16, 2010, a dispute arose between Tianjin Huashang Company and Hangzhou Xiaomuzhi Company over the performance of the Franchise Chain Operation Contract, and the contract was terminated by arbitration award of the Hangzhou Arbitration Commission.

The court further found that: Hangzhou Xiaomuzhi Company obtained commercial franchise filing with the Ministry of Commerce on April 8, 2008. Tianjin Huashang Company had reported to the administrative department of the Ministry of Commerce that Hangzhou Xiaomuzhi Company's conduct of engaging in franchise activities in violation of regulations should have its filing revoked. In this regard, the Letter of the Zhejiang Provincial Department of Commerce on Reporting the Relevant Circumstances of the Franchise Operation of Hangzhou Xiaomuzhi Automobile Maintenance Technology Co., Ltd. recorded: 1. Hangzhou Xiaomuzhi Company already met the "two stores and one year" conditions when filing for franchise operation, conforming to Article 7 of the Regulations on the Administration of Commercial Franchises, and could be filed; 2. Hangzhou Xiaomuzhi Company was mainly responsible for the management of the "Xiaomuzhi" brand, did not directly engage in motor vehicle maintenance business, and owned its own trademarks, patents, business models, and other business resources, and could carry out franchise business; 3. According to the relevant responsible persons of the Zhejiang Provincial Road Transport Administration Bureau, the directly-operated stores under Hangzhou Xiaomuzhi Company held Road Transport Operation Licenses with business scope including "Class III motor vehicle maintenance" or "Class II motor vehicle maintenance," and had the qualification to engage in motor vehicle maintenance; 4. Hangzhou Xiaomuzhi Company's authorized licensing, and motor vehicle maintenance operation, were not within the scope of franchise licensing.

Judgment

On September 17, 2012, the Tianjin No. 2 Intermediate People's Court rendered civil judgment (2012) Er Zhong Min San Zhi Chu Zi No. 47: (1) from the effective date of the judgment, Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. shall immediately cease the acts infringing the registered trademarks "Xiaomuzhi" in characters No. 6573881 and No. 6573882, that is, Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. shall immediately cease using the "Xiaomuzhi" mark on its website, promotional materials, discount experience coupons, and business premises (including branches), and cease using the characters "Xiaomuzhi" alone; (2) from the effective date of the judgment, Tianjin Huashang Automobile Import Parts Company shall immediately cease the acts infringing the registered trademarks "Xiaomuzhi" in characters No. 6573881 and No. 6573882, that is, Tianjin Huashang Automobile Import Parts Company shall immediately cease using the mark on its website; (3) within ten days from the effective date of the judgment, Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. and Tianjin Huashang Automobile Import Parts Company shall jointly and severally compensate Lan Jianjun and Hangzhou Xiaomuzhi Automobile Maintenance Technology Co., Ltd. for economic losses and rights-protection expenses of RMB 50,000; (4) the other litigation requests of Lan Jianjun and Hangzhou Xiaomuzhi Automobile Maintenance Technology Co., Ltd. were dismissed. After the judgment was pronounced, Lan Jianjun, Hangzhou Xiaomuzhi Company, Tianjin Xiaomuzhi Company, and Tianjin Huashang Company all appealed. On February 19, 2013, the Tianjin Higher People's Court rendered civil judgment (2012) Jin Gao Min San Zhong Zi No. 0046: (1) upholding Items 1, 2, and 3 of civil judgment (2012) Er Zhong Min San Zhi Chu Zi No. 47 of the Tianjin No. 2 Intermediate People's Court and the part on overdue performance liability;

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(2) revoking Item 4 of that judgment; (3) from the effective date of this judgment, Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. shall immediately cease using the trade name "Xiaomuzhi" in its enterprise name; (4) within ten days from the effective date of this judgment, Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. shall compensate Hangzhou Xiaomuzhi Automobile Maintenance Technology Co., Ltd. for economic losses of RMB 30,000; (5) the other appeal requests of Lan Jianjun and Hangzhou Xiaomuzhi Automobile Maintenance Technology Co., Ltd. were dismissed; (6) the appeal requests of Tianjin Xiaomuzhi Automobile Maintenance Service Co., Ltd. and Tianjin Huashang Automobile Import Parts Company were dismissed.

Reasoning

The court's effective judgment held that: the main issues in dispute in this case were whether the sued infringement acts of the defendants, Tianjin Xiaomuzhi Company and Tianjin Huashang Company, infringed the exclusive right of the plaintiffs, Lan Jianjun and Hangzhou Xiaomuzhi Company, to use the registered trademark, and whether they constituted unfair competition against Hangzhou Xiaomuzhi Company.

I. On whether the defendants infringed the exclusive right of Lan Jianjun and Hangzhou Xiaomuzhi Company to use the registered trademark: Tianjin Xiaomuzhi Company and Tianjin Huashang Company, in the course of engaging in automobile maintenance and recruiting franchisees through their websites, used the "Xiaomuzhi" mark in multiple places, and there were circumstances of using "Xiaomuzhi" alone or prominently. With ordinary attention by the relevant public, this was sufficient to cause confusion about the source of the services, or misidentification that there was a specific connection between Tianjin Xiaomuzhi Company and Hangzhou Xiaomuzhi Company. The main body of the mark and the most easily identifiable part, the characters "Xiaomuzhi," were identical to the registered trademark involved in the case; at the same time, considering Tianjin Xiaomuzhi Company's trademark use of "Xiaomuzhi" in its business premises, websites, and promotional materials, it should be found that the mark and the registered trademark "Xiaomuzhi" in characters involved in the case were similar. On this basis, because Tianjin Xiaomuzhi Company and Tianjin Huashang Company, on the same service items as those approved for the registered trademark "Xiaomuzhi" in characters No. 6573881 in which Lan Jianjun and Hangzhou Xiaomuzhi Company held rights, used the "Xiaomuzhi" mark and used the characters "Xiaomuzhi" alone without permission, which was sufficient to cause confusion and misidentification by the relevant public, this belonged to the infringement acts provided in Item (1) of Article 52 of the Trademark Law of the People's Republic of China (hereinafter the "Trademark Law"). Tianjin Xiaomuzhi Company and Tianjin Huashang Company's commercial acts of recruiting franchisees through their websites, in accordance with Article 12 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Trademark Civil Dispute Cases, could be found to have used similar trademarks in services similar to the approved service items of the registered trademark "Xiaomuzhi" in characters No. 6573882 in which Lan Jianjun and Hangzhou Xiaomuzhi Company held rights, without the permission of the right holder, which also constituted the infringement acts provided in Item (1) of Article 52 of the Trademark Law.

II. On whether the defendants constituted unfair competition against Hangzhou Xiaomuzhi Company: this issue in dispute involved two key questions: first, whether the operator had acts of exceeding the statutory business scope and violating administrative licensing laws and regulations, and whether its civil rights and interests could be protected by law; second, how to determine the competitive relationship regulated by the Anti-Unfair Competition Law.

(1) On whether the operator had acts of exceeding the statutory business scope and whether its civil rights and interests could be protected by law: one of the main reasons Tianjin Xiaomuzhi Company and Tianjin Huashang Company believed that their acts did not constitute unfair competition was that Hangzhou Xiaomuzhi Company had not lawfully obtained the relevant licenses for motor vehicle maintenance, had exceeded the statutory business scope in engaging in franchise operations, and did not meet the statutory conditions, constituting illegal business operation, and the civil rights and interests claimed by Hangzhou

Xiaomuzhi Company should not be protected by law. Therefore, in this case, it was necessary to clarify whether the acts referred to by Tianjin Xiaomuzhi Company and Tianjin Huashang Company of Hangzhou Xiaomuzhi Company exceeding the statutory business scope and violating administrative licensing laws and regulations were established, and whether the corresponding civil rights and interests could be protected by law.

First, with respect to acts of exceeding the statutory business scope and violating relevant administrative licensing laws and regulations, they should be determined by the corresponding administrative department in accordance with law, and the party asserting that the other party had illegal business operation acts should bear the corresponding burden of proof. In this case, with respect to whether Hangzhou Xiaomuzhi Company had acts of illegally engaging in motor vehicle maintenance and franchise business, it was difficult to draw an affirmative conclusion from the existing evidence and facts. Engaging in automobile maintenance is a business item subject to licensing in accordance with law, but Hangzhou Xiaomuzhi Company did not engage in automobile maintenance business; what it actually engaged in was authorizing others to use its trademark in services such as vehicle cleaning, maintenance, and repair, or licensing its directly-operated stores and franchisees to use its "Xiaomuzhi" brand, patented technology, etc. in business activities by way of commercial franchising, which was not premised on its own acquisition of the administrative license to operate the motor vehicle maintenance business. In addition, Hangzhou Xiaomuzhi Company had already obtained commercial franchise filing with the Ministry of Commerce, and had met the "two stores and one year" conditions when filing for franchise operation; it was mainly responsible for the management of the "Xiaomuzhi" brand, did not directly engage in motor vehicle maintenance business, and owned its own trademarks, patents, business models, and other business resources, and could carry out franchise business. Therefore, based on the existing evidence in this case, it could not be found that Hangzhou Xiaomuzhi Company had acts of violating administrative licensing laws and regulations in engaging in motor vehicle maintenance or franchise business.

Second, even if the relevant acts exceeded the statutory business scope and violated administrative licensing laws and regulations, they should be investigated and dealt with by the administrative department in accordance with law, and this did not necessarily affect the qualification of the subject whose civil rights and interests were infringed to bring a civil lawsuit, nor could it serve as a defense for the sued infringer that its acts did not constitute infringement. In this case, even if Hangzhou Xiaomuzhi Company exceeded the statutory business scope and violated administrative licensing laws and regulations, this belonged to the category of administrative liability, and the act did not affect its exercise, in accordance with law, of the civil rights to stop trademark infringement and unfair competition, nor did it affect the people's court's protection of its civil rights and interests in accordance with law. Where a sued infringer asserts that its acts do not constitute infringement on the ground that the operator exceeded the statutory business scope and violated administrative licensing laws and regulations, the people's court shall not support it.

(2) On how to determine the competitive relationship regulated by the Anti-Unfair Competition Law: whether there is a competitive relationship between operators is the key to determining whether unfair competition is constituted. Article 2 of the Anti-Unfair Competition Law of the People's Republic of China (hereinafter the "Anti-Unfair Competition Law") provides: "Operators shall, in market transactions, follow the principles of voluntariness, equality, fairness, honesty, and credibility, and observe recognized business ethics. The 'unfair competition' as used in this Law refers to acts of operators that violate the provisions of this Law, harm the lawful rights and interests of other operators, and disrupt the social economic order. The 'operators' as used in this Law refer to legal persons, other economic organizations, and individuals engaged in commodity trading or profit-making services (commodities hereinafter include services)." It can be seen that the Anti-Unfair Competition Law does not restrict operators from having to have a direct or specific competitive relationship, nor does it require operators to engage in the same industry. The unfair competition acts regulated by the Anti-Unfair Competition Law refer to acts that harm the lawful rights and interests of other operators and disrupt economic order; from the perspective of the direct object of harm, what is harmed is

the market interests of other operators. Therefore, where operators have an indirect competitive relationship, and the actor violates the provisions of the Anti-Unfair Competition Law and harms the lawful rights and interests of other operators, this should also be determined as unfair competition.

In this case, both Tianjin Xiaomuzhi Company and Tianjin Huashang Company, which were sued for unfair competition, engaged in the automobile maintenance industry. According to the facts found, Hangzhou Xiaomuzhi Company itself did not have the qualification to engage in motor vehicle maintenance, and did not actually engage in automobile maintenance business; however, from its technological development activities such as automobile glass repair and rapid repair of automobile paint, and from the vehicle maintenance and repair included in the approved service items of the registered trademarks it was licensed to use, it could be found that Hangzhou Xiaomuzhi Company licensed its enterprise marks, registered trademarks, patents, proprietary technology, and other business resources to its directly-operated stores or franchisees for use, making it the operator of the "Xiaomuzhi" brand, and engaged in business activities related to automobile maintenance by way of commercial franchising. Therefore, Hangzhou Xiaomuzhi Company was a relevant operator in the automobile maintenance market, and it had an indirect competitive relationship with Tianjin Xiaomuzhi Company and Tianjin Huashang Company.

Item (3) of Article 5 of the Anti-Unfair Competition Law provides that operators are prohibited from using another person's enterprise name without authorization, causing people to misidentify it as another person's goods, so as to harm competitors. On the basis of finding that the plaintiffs and defendants had an indirect competitive relationship, to determine whether Tianjin Xiaomuzhi Company's registration of the trade name "Xiaomuzhi" constituted the unfair competition act of using another person's enterprise name without authorization, the following factors should be comprehensively considered: 1. whether the enterprise trade name of Hangzhou Xiaomuzhi Company had a certain market popularity — according to the existing evidence in this case, Hangzhou Xiaomuzhi Company had used "Xiaomuzhi" in its enterprise name as its trade name since its establishment in October 2004, engaged in the automobile maintenance industry by way of commercial franchising, and specifically targeted the micro-trauma repair of small scratches and collisions of automobiles, establishing the "Xiaomuzhi" automobile micro-repair system; as of 2011, Hangzhou Xiaomuzhi Company had more than 400 franchise stores nationwide. Although "Xiaomuzhi" itself was an existing word, through the continuous use and publicity by its directly-operated stores and franchise stores in the automobile maintenance field, "Xiaomuzhi" automobile maintenance had played a role in the relevant market of identifying the business subject and distinguishing it from other services. When Tianjin Xiaomuzhi Company was established in October 2008, the trade name "Xiaomuzhi" of Hangzhou Xiaomuzhi Company and its related services already had a certain market popularity among the relevant public. 2. Whether Tianjin Xiaomuzhi Company had subjective malice in registering and using the trade name "Xiaomuzhi" — operators in market competition should follow the principle of honesty and credibility, observe recognized business ethics, respect the market labor achievements of others, and, when registering an enterprise name, should bear the obligation to avoid the prior trade name in the same industry. In this case, Tianjin Huashang Company, as a franchisee, had signed a Franchise Chain Operation Contract with Hangzhou Xiaomuzhi Company, the franchisor of the "Xiaomuzhi" brand, on June 30, 2008, and its legal representative Tian Junshan signed the contract on behalf of the company and knew the relevant content of the contract. Although Tianjin Xiaomuzhi Company claimed that it had no connection with Tianjin Huashang Company and that they were two independent legal persons, the legal representatives of the two companies were both Tian Junshan, and the promotional information and related contact information displayed on the website of Tianjin Huashang Company directly pointed to Tianjin Xiaomuzhi Company, and Tianjin Huashang Company used its registered business location as the business location of the Tianjin head store of Tianjin Xiaomuzhi Company. Therefore, it should be found that, as an operator in the market related to automobile maintenance, Tianjin Xiaomuzhi Company, at its establishment, should have known of Hangzhou Xiaomuzhi Company, its business resources, and development trends, but still used "Xiaomuzhi" as the enterprise trade name, the core mark identifying different market subjects in its enterprise name, and could

not provide a reasonable basis for using "Xiaomuzhi" as the trade name, and its subjective intention of "free-riding" and attaching itself to another's goodwill was obvious. 3. Whether Tianjin Xiaomuzhi Company's use of the trade name "Xiaomuzhi" was sufficient to cause market confusion — according to the facts found, Tianjin Xiaomuzhi Company, on its website and other promotional materials, prominently noted in special fonts the phrases "What to do about small scratches and collisions on automobiles? Find Tianjin Xiaomuzhi" and "Tianjin Xiaomuzhi professional expertise," and its "discount experience coupons" also stated "For small scratches and marks on automobiles, find Tianjin Xiaomuzhi," and its service targets overlapped to a large extent with the consumer group of the "Xiaomuzhi" automobile micro-repair system operated by Hangzhou Xiaomuzhi Company. Moreover, since 2010, the franchise stores of Hangzhou Xiaomuzhi Company in the Tianjin area had also been established successively, and the service areas of the two parties had also overlapped. Therefore, Tianjin Xiaomuzhi Company's registration and use of "Xiaomuzhi" as its trade name would inevitably cause the relevant public to misidentify that there was some origin or connection between the two, and, together with Tianjin Xiaomuzhi Company's acts of using "Xiaomuzhi automobile maintenance," "Tianjin Xiaomuzhi," and other phrases alone or prominently for publicity, this was sufficient to cause confusion and misidentification by the relevant public about the market subject and source of services, easily causing chaos in the competition order.

In summary of the above analysis, Tianjin Xiaomuzhi Company's registration and use of the enterprise name itself violated the principle of honesty and credibility and was improper; regardless of whether it was used prominently, it was difficult to avoid causing market confusion, and it had constituted unfair competition, so it should bear the civil liability of ceasing the use of the trade name "Xiaomuzhi" and compensating the corresponding economic losses.

Relevant Legal Provisions

Article 2 of the Anti-Unfair Competition Law of the People's Republic of China.

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