

Patent	Date	August 22, 2018	Court	Intellectual Property High Court, Second Division
Right	Case number	2017 (Gyo-Ke)10216		
- A case in which, with regard to an invention titled "HAIR DYE, it was determined that METHOD FOR USING SAME, AND HAIR DYE ARTICLE," the amendment added to claims for dimensions of a stirring blade, which is an accessory of an emulsification tester originally disclosed in the description , does not correspond to the addition of new matter.				

Case type: Rescission of Appeal Decision of Refusal

Result: Granted

References: Article 17-2, paragraph (3) of the Patent Act

Number of related rights, etc.: Patent Application No. 2011-42737, Appeal against Examiner's Decision of Refusal No. 2016-7849

#### Summary of the Judgment

1. The case is a lawsuit for revocation against the decision on appeal not to complete the request for a trial against an examiner's decision of refusal for the Invention titled "HAIR DYE, METHOD FOR USING SAME, AND HAIR DYE ARTICLE." The JPO dismisses the amendments made by the plaintiff, for the following reasons: Among the amendments made by the plaintiff with a request for an appeal against the examiner's decision of refusal, with regard to the stirring blade stated in claim 1, specifying the dimensions of the stirring blade to "a width in the left-right direction is 58 mm in full width, the diameter of spindle is 6 mm, the spacing (clearance) between a spindle and a wing is 16 mm, and the width of the wing is 10 mm" introduces new technical matters and violates the provisions of Article 17-2, paragraph (3) of the Patent Act. In addition, the JPO made the decision on appeal not to complete the demand, because the present invention is unclear due to unknown size, shape, and stirring conditions of the stirring blade and could not be practiced by a person skilled in the art. Plaintiff asserted the erroneous judgment of addition of new matter, etc. as the grounds for rescission of the JPO decision.

2. The judgment rescinded the decision by the JPO as stated below.

"In the originally attached description and so on, it is not explicitly stated to use a stirring blade, which is an accessory of a commercial ET-3A type emulsification tester. However, paragraph [0012] of the originally attached description states that (i) the above emulsification tester is used for stirring; (ii) a stirring blade is one that extends the pair of feathers in configuration that forms the Kanji character of "YAMA

(mountain)" from the lower end of the spindle provided as the center of rotation; and (iii) the rotating radius of the stirring blade is slightly smaller than the radius (about 3 cm) of a cylindrical container such as a beaker having an internal diameter of about 6 cm and an internal volume of 200 ml. The shape and dimensions of the stirring blade stated in the originally attached description are consistent with those of the stirring blade for a 200-ml beaker, which is an accessory of the above emulsification tester. Also, according to the above finding matters, the above emulsification tester has been on sale for many years since around 1985. It is a laboratory machine that seems to have been used by many persons skilled in the art. Since sales began, there has never been a change in the shape and dimensions of the stirring blade of the accessory. Moreover, at the latest, around July 2005, the stirring blade of the accessory was listed in the catalog of Nikko Chemicals together with the above emulsification tester. In addition, it is not evidently recognized that a stirring blade for the above emulsification tester having a shape and dimensions conforming to the statement of the originally attached description had been commercially available separately from the main body of the emulsification tester.

Considering the above facts, when a person skilled in the art touched the originally attached description and so on, it is recognized that the stirring blade described therein could be understood to be a stirring blade for a 200-ml beaker attached as an accessory to the emulsification tester. Thus, stating the actual size of the stirring blade for the 200-ml beaker of the accessory in addition to claim 1 of the present application cannot be said to be an amendment that introduces new technical matters that cannot otherwise be introduced by taking together all the statements of the description or drawings. Therefore, there are reasons for the plaintiff's allegation to allege an error in adding new matters."