Patent Right	Date	August 30, 2021	Court	Intellectual Property High Court, First Division
	Case number	2020 (Gyo-Ke) 10044		
- A case in which with regard to a patent application related to an invention titled "Lipid-containing composition and use method," the court rescinded the JPO Decision by finding that it contains errors in the determination concerning the difference from the cited invention and in the determination as to whether the difference could have been easily conceived of by a person skilled in the art.				

Case type: Rescission of Appeal Decision of Refusal
Result: Granted
References: Article 29, paragraph (1), item (iii) and paragraph (2) of the Patent Act
Related rights, etc.: Patent Application No. 2014-99072
Decision of the JPO: Appeal against Examiner's Decision of Refusal No. 2016-5871

Summary of the Judgment

1. This case is a lawsuit seeking rescission of a decision made by the Japan Patent Office (the "JPO Decision") regarding a patent application related to an invention titled "Lipid-containing composition and use method," that the claim for an appeal against the examiner's decision of refusal was found to be groundless.

As the grounds for rescission, the Plaintiff alleged errors in the determination on novelty and inventive steps in the invention for which Publication 5 is used as the principal cited document.

2. The court determined as outlined below and rescinded the JPO Decision by finding that it contains errors in the determination concerning Difference 2 between the Invention in the Application and the Cited Invention (Publication 5 Invention) and in the determination as to whether Difference 2 could have been easily conceived of by a person skilled in the art.

(1) Error in the determination that Difference 2 is not a substantial difference

A. In light of the fact that the statement in Publication 5 "The recent dietary habits of the Japanese are more westernized. …The fat intake has increased to 40g per day. In conjunction with these changes, the types of diseases have also changed ... increased and ... became a major social issue" is followed by the statement "However, as the study progressed, the cause was found to be an imbalance in the intake of types of unsaturated fatty acids that consist of fats" etc., it can be understood that Publication 5 does not state that the fact that the fat intake increased to 40g per day is a problem nor does it

suggest the necessity to correct such situation.

In addition, looking at the statements in Publication 5 as a whole, there is no statement or suggestion to the effect that withholding the fat intake up to 40g per day is recommendable or that the "dose of omega-6 fatty acids" should be 40g per day or per intake.

B. Even if it can be said that it is common general technical knowledge on health that "withholding the intake of a large amount of lipids" is recommendable, as stated in the JPO Decision, the appropriate intake of lipids is considered to be changeable depending on age, sex, energy intake, and other elements. Therefore, it is impossible to conclude immediately from that fact that determining the "fat intake" to be no more than 40g per day is common general technical knowledge, and it cannot also be said, on the premise that this fact is common general technical knowledge, that determining the "dose of omega-6 fatty acids" to be "no more than 40g" per day or per intake is common general technical knowledge.

C. It cannot be found that Publication 5 has a substantial disclosure that the "dose of omega-6 fatty acids" contained in Publication 5 Invention is to be no more than 40g (structure of the Invention in the Application related to Difference 2) even based on common general technical knowledge as stated in the JPO Decision, and it is found that Difference 2 is a substantial difference.

(2) Error in the determination as to whether Difference 2 could have been easily conceived of by a person skilled in the art

As stated above, Publication 5 has no statement or suggestion to the effect that withholding the fat intake up to 40g per day is recommendable and that the "dose of omega-6 fatty acids" should be "no more than 40g" per day or per intake, and there is no evidence to find that determining the "dose of omega-6 fatty acids to be no more than 40g" is common general technical knowledge. In light of the above, it cannot be found that a person skilled in the art who came across Publication 5 would have the motivation to adopt the structure of the Invention in the Application related to Difference 2 in Publication 5 Invention. Therefore, it cannot be found that adopting the aforementioned structure could have been easily conceived of by a person skilled in the art.

Judgment rendered on August 30, 2021
2020 (Gyo-Ke) 10044, Case of seeking rescission of the JPO decision
Date of conclusion of oral argument: July 20, 2021

Judgment

Plaintiff: Asha Nutrition Sciences, Inc.

Defendant: Commissioner of the Japan Patent Office

Main text

1. The decision made by the Japan Patent Office (JPO) on December 2, 2019, concerning the case of appeal against Examiner's Decision of Refusal No. 2016-5871 shall be rescinded.

2. The Defendant shall bear the court costs.

Facts and reasons

No. 1 Claim

Same as paragraph 1 of the main text.

No. 2 Outline of the case

1. Outline of procedures at the JPO

(1) A. The Plaintiff filed a new application for a patent (Patent Application No. 2014-99072; hereinafter referred to as the "Application") for an invention titled "Lipid-containing composition and use method" on May 12, 2014 by dividing part of the patent application (Patent Application No. 2011-506377) for which the international application date was April 20, 2009 (priority dates: April 21, 2008, June 25, 2008, November 5, 2008, and April 17, 2009 (hereinafter collectively referred to as the "Priority Date"); priority country: United States) (Exhibit Ko 1).

Since the Application was refused as of December 17, 2015 (Exhibit Ko 5), the Plaintiff filed an appeal against the examiner's decision of refusal (Appeal against Examiner's Decision of Refusal No. 2016-5871; Exhibit Ko 6) and made an amendment of the claims (Exhibit Ko 7) on April 20, 2016.

The Plaintiff received a notice of grounds for refusal dated April 17, 2017 (Exhibit Ko 12) and then made an amendment of the claims (Exhibit Ko 13) dated November 9, 2017.

B. Subsequently, the JPO made the decision that "the request for trial is groundless" (hereinafter referred to as the "Primary JPO Decision"; Exhibit Ko 15) on April 3, 2018.

On August 15, 2018, the Plaintiff filed a lawsuit seeking rescission of the Primary JPO Decision (Intellectual Property High Court, 2018 (Gyo-Ke) 10117).

On April 12, 2019, the Intellectual Property High Court ruled that errors related to the determination on the clarity requirements and support requirements, out of the grounds for the rescission alleged by the Plaintiff, were reasonable, and rendered a judgment to rescind the Primary JPO Decision (hereinafter referred to as the "Judgment in the Previous Lawsuit"; Exhibit Ko 16). The Judgment in the Previous Lawsuit later became final and binding.

(2) Since the Judgment in the Previous Lawsuit became final and binding, the Plaintiff received a notice of grounds for refusal dated May 28, 2019 (hereinafter referred to as the "Notice of Grounds for Refusal"; Exhibit Ko 17) in the resumed Appeal against the Examiner's Decision of Refusal No. 2016-5871 and made an amendment of the claims (hereinafter referred to as the "Amendment"; Exhibit Ko 18) dated September 4, 2019.

Subsequently, the JPO made the decision that "the request for the Appeal is groundless" (hereinafter referred to as the "JPO Decision") on December 2, 2019, and delivered a certified copy thereof to the Plaintiff on December 18, 2019.

(3) The Plaintiff filed this lawsuit to seek rescission of the JPO Decision on April 15, 2020.

2. Statement of the claims

The claims after the Amendment consist of Claims 1 through 47 and the statement of Claim 19 is written as follows (hereinafter the invention related to Claim 19 is referred to as the "Invention in the Application"; the underlined part is the part amended by the Amendment; Exhibit Ko 18).

[Claim 19]

A lipid-containing compound that contains a mixture of lipids derived from different sources, wherein the aforementioned compound contains a certain dose of omega-6 fatty acids and a dose of omega-3 fatty acids; the ratio of omega-6 and omega-3 is 4:1 or higher: and

(i) omega-3 fatty acids are 0.1 to 20wt% of the total lipids <u>in the aforementioned compound</u>;

or

(ii) a dose of omega-6 fatty acids is no more than 40g.

3. Summary of the grounds for the JPO Decision

(1) Grounds for the JPO Decision are as stated in Attachment, "Written Decision

(copy)".

The summary is as follows: the Invention in the Application is an invention stated in Unexamined Patent Application Publication No. 1991-53869, which is a publication distributed prior to the Priority Date of the Application (hereinafter referred to as "Publication 5"; Exhibit Ko 24) (hereinafter the invention is referred to as "Publication 5 Invention") or an invention that can be invented by a person skilled in the art easily based on Publication 5 Invention and common general technical knowledge at the time of the Priority Date of the Application; therefore the Invention in the Application cannot receive a patent pursuant to the provisions of Article 29, paragraph (1), item (iii) or paragraph (2) of said Article of the Patent Act; accordingly, the Application should be refused without the need to examine the remaining claims.

(2) Publication 5 Invention that was found by the JPO Decision and the common feature and differences between the Invention in the Application and Publication 5 Invention are stated below.

A. Publication 5 Invention

A health drink composition which has efficacy in the prevention and improvement of cardiovascular diseases such as heart diseases, and breast cancer, colon cancer, and other diseases through an intake of a proper balance of omega-3 and omega-6 fatty acids; wherein the ratio of omega-3 and omega-6 fatty acids in the contained lipids is 1:4; and which is created by generating a mixed oil by adding 300ppm antioxidant to 15g of oil that is obtained by concentrating omega-3 fatty acids from skipjack fish oil and also by adding 35g of evening primrose oil; stirring 100g of beta-cyclodextrin after adding 100mL of water to it, kneading it with a homogenizer after adding the mixed oil, cleaning it with ethanol, collecting precipitation, drying it under reduced pressure at room temperature, and obtaining approximately 70g of cyclodextrin powder of the mixed oil, and then adding the cyclodextrin powder to the health drink.

B. Common feature and differences between the Invention in the Application and Publication 5 Invention

(Common feature)

"A lipid-containing compound that contains a mixture of lipids derived from different sources, contains omega-6 fatty acids and omega-3 fatty acids, with a ratio of omega-6 and omega-3 of 4:1 or higher."

(Difference 1)

The Invention in the Application specifies that "the compound contains a certain dose of omega-6 fatty acids and a dose of omega-3 fatty acids; the ratio of omega-6 and omega-3 is 4:1 or higher"; however, in Publication 5 Invention, "the ratio of omega-3

and omega-6 in contained lipid is 1:4" and it does not specify the dose.

(Difference 2)

In the Invention in the Application, it is specified that "(i) omega-3 fatty acids are 0.1 to 20wt% of the total lipids in the aforementioned compound; or (ii) a dose of omega-6 fatty acids is no more than 40g."; however, in Publication 5 Invention, the ratio of omega-3 fatty acid composition in the total lipids or the dose of omega-6 fatty acids are not specified.

(omitted)

No. 4 Judgment of this court

1. Statement in the description in question

There are the following statements in the description attached to the application form of the Application (hereinafter referred to as the "Description"; Exhibit Ko 1) (for Tables 1 and 9 that are cited in the following statements, see the Attachment).

(1) [Background art]

[0002]

Fatty acids fulfill an important physiological function. Fatty acids constitute an extremely important component of the constituent units and cell membrane of phospholipids and glycolipids. Fatty acids are the best bio-fuel molecule with the ability to produce more than double per 1g of energy than carbohydrates or proteins. Fatty acids have an impact directly on the function of many proteins through covalent modification of the proteins. Fatty acids have an impact on membrane fluidity and relevant cellular processes. In addition, fatty acids are also involved in gene regulation. For example, prostaglandin, thromboxane, leukotriene, lipoxin, resolvin, and other derivatives of fatty acids are also important hormones and bio-messengers. These hormones and messengers have an impact on a broad range of physiological functions, such as angiomegaly, platelet aggregation, pain control, inflammation, and cell proliferation, etc.

[0003]

Human and animal bodies synthesize many kinds of fatty acids, which are carbon chains of various lengths with double bonds of various numbers and positions. If the double bond joins in a fatty acid chain, the fatty acids are converted into unsaturated fatty acids that fulfill a significant role in physiological function. One of the methods for tracking the position of the double bond in the unsaturated fatty acid molecule is by measuring its distance from the end carbon, which is omega-carbon. For example, oleic

acid C18 that has a double bond with the 9th carbon from the omega position is called omega-9 fatty acid. Table 1 below shows various groups of unsaturated fatty acids that are named by the position of the double bond from the omega position.

[0004]

As indicated in the table above, linoleic acid (hereinafter referred to as "LA") and alpha-linolenic acid (hereinafter referred to as "ALA") are precursors of all omega-6 fatty acids and omega-3 fatty acids. It has been fully established that LA and ALA are "essential" fatty acids. LA and ALA must be supplied by one's diet. The reason is because human beings and other mammals cannot synthesize LA and ALA from other sources. When these two essential fatty acids are lacking or in excess, many diseases may occur. It is well-known that LA and ALA share the same metabolic pathway and that if one of them is in excess, the requirement of the other increases or it may cause a lack of the other one. In the same way as LA and ALA, oleic acid and other specific fatty acids and specific saturated fatty acids are also considered to be important for human nutrition although they can be produced in the human body. The latest science shows evidence that an optimal amount of nonessential fatty acids is beneficial; however, if it is in excess, it may hinder the activity and metabolism of essential fatty acids and the amount of dietary fat may also have an impact on the metabolism of fatty acids. It is well known that the human body metabolizes ALA preferentially depending on the amount of other fatty acids in the diet.

[0005]

Based on the evidence, it shows that antioxidants, phytochemicals, microbes, vitamins, minerals, and other dietary elements (proteins, carbohydrates, etc.), as well as hormones and genes are involved in the metabolism of essential fatty acids. In addition, based on the human study, it is confirmed that there may be differences in the ability to metabolize essential fatty acids between men and women. It is suggested that a sex hormone has something to do with these differences. Polyunsaturated fatty acid molecules have a zigzag structure with a double bond. Since these molecules have flexibility and they are not tightly crowded, they remain in liquid form even at low temperatures, and therefore they gather and give flexibility to the organization. For this reason, in colder climates, the human body has more benefits in having a larger amount of polyunsaturated fatty acids. However, a greater number of double bonds in the lipid molecules may increase association with several diseases, and the possibility of generating peroxidation increases, which may accelerate aging. This is another reason for the need to take polyunsaturated fatty acids carefully.

[0006]

Many studies presented evidence for prevention and treatment of medical conditions using a supply of omega-3 fatty acids and recommended a decreased intake of omega-6 fatty acids. Relevant medical conditions are menopausal disorder, cardiovascular disease, mental disability, neuropathy, musculoskeletal disorder, endocrine disorder, cancer, digestive system disorder, geriatric condition, viral infection, bacterial infection, obesity, overweight, renal disease, lung disorder, ophthalmopathy, skin disorder, sleep disorder, dental disease, and immune system disease such as autoimmunity, etc. For example, Patent Document 1 demonstrated lipid compounds for patients with ulcerative colitis that contain omega-3 fatty acids, omega-6 fatty acids, and omega-9 fatty acids. The omega-3 fatty acid content in these lipid compounds was significantly high. In the same way, Patent Document 2, which was recently published, disclosed lipid compositions which are used for patients with diabetes and contain omega-3 fatty acids, omega-6 fatty acids, and omega-9 fatty acids, with specific ratios of omega-6 and omega-3 between 0.25:1 to 3:1.

(2) [Problem to be solved by the invention]

[0008]

It has been traditionally emphasized that we should increase the intake of omega-3 fatty acids while decreasing the intake of omega-6 fatty acids, but this cannot be a sufficient relief in many cases. This is because of the uncertainty that is caused by dietary and demographic elements. Therefore, improved methods and treatment for medical conditions and prevention using improved lipid compositions are considered to be still needed. In fact, on January 26, 2009, the American Heart Association issued a recommendation for the first time to correct the recognition that omega-6 fatty acid is not good for health (http://mericanheart.mediaroom.com/index.php?s=43&item=650). Since the current methodology confuses people who take these fatty acids, it may cause overdoses or inadequate intake of definitely important nutrients, which may lead to major health results.

(3) [Means of solving the problem]

[0009]

The disclosure in question (hereinafter referred to as the "Disclosure") is related to a composition and method for prevention and/or treatment of medical conditions related to imbalances of one or multiple lipids that are related to other elements. For more details, the Disclosure is related to the composition using more advantageous sources of omega-6 fatty acids in the presence of nutritionally appropriate omega-3 fatty acids and related to the use of methods. Furthermore, the Disclosure is also related to the method and composition of delivering everyday omega-6 and omega-3 for prevention

and/or treatment of medical conditions related to imbalance of one or more lipids as well as to deliver omega-6 fatty acids and omega-3 fatty acids along with other nutrients that optimize bioavailability. The Disclosure is also related to the method of stably delivering bioactive substances whose broad and sudden variations are considered to be harmful, for one day, one week, one month, or for a longer period. In addition, the Disclosure is related to the method of delivering everyday essential fatty acids within the optimal range concerning the recommendation.

[0010]

An overall and general embodiment in the Disclosure is a lipid-containing composition for mammals containing an optimal amount of fatty acids, antioxidants, minerals, and phytochemicals and it is a composition based on one or more elements that are selected from a group including the age, sex, diet, bodyweight, physical activity, medical conditions, and climate of the living environment of the subjects. The composition is administered to the subjects through a stable delivery process as explained later, according to one embodiment in the Disclosure. According to another embodiment in the Disclosure, fatty acids, antioxidants, minerals, and phytochemicals that are contained in the lipid of the composition can at least be partially achieved by using one or more of the following high concentration lipid sources: oil, butter, nuts, and seeds.

(4) [0022]

Lipid compound

According to one embodiment, the Disclosure incorporates a rather high ratio of omega-6 fatty acids into omega-3 fatty acids, while maintaining an optimal delivery amount per day of both omega-6 fatty acids and omega-3 fatty acids. One of the reasons for maintaining a high ratio is because the content of antioxidants, minerals, and phytochemicals is high as essential components of the compound and nuts, seeds, and nut oil with other characteristics that are considered to eliminate the use of excess omega-3 fatty acids are incorporated. In some cases, excess omega-3 fatty acids (that have three to six double bonds) cause peroxidative stress. A specific embodiment of the Disclosure is considered to facilitate in-vivo formation of linoleic acid metabolites, gamma-linolenic acid (three double bonds) and dihomo-gamma-linolenic acid (three double bonds), which are considered to have dose-dependent anti-inflammatory characteristics and other health benefits. Nuts and seeds have a limited therapeutic range and may have undesirable interactions and other characteristics requiring careful use. Therefore, the compound is delivered with a measured and optimized amount of nuts and seeds along with oils.

[0037]

Administration

In some embodiments, a composition containing a lipid compound that is disclosed in the Description can be administered to individuals in an arbitrary form that can be taken orally. This lipid compound can be packed in one, two, three, four, or more pieces that are a mutually complementary amount per day. In some embodiments, the lipid compound may be contained in one or more of the following items in some cases, but is not limited to these: capsule, soft gel capsule, hard capsule, tablet, powder, lozenge, or pill for single doses or for sustained release and controlled release that are prepared with starch, sugar, diluent, granulating agent, lubricant, bonding agent, disintegrating agent, and other carriers; powder or granule; nutritious supplement bar; bread, dessert, pastry, truffle, pudding or cake and other bakery products; sealed single dose sachet or resealable package where liquid, oil-blend, gel, sauce, dressing, spread, butter, drop, and semisolid materials are contained; liquid, etc.; or frying oil, cooking oil for skillets, release oil, and other cooking oils. In some embodiments, the lipid compound may be consumed orally by unsealing the package or it may be added as part of cooking ingredients to pre-cooked or non-cooked prepared food (fats do not have to be added). For example, the lipid compound may be used as a special cooking oil, butter, or dressing or may be added to foods while such foods are prepared. In a specific embodiment, some or all of the ingredients of the composition may be processed by peeling and/or not peeling off the skin, by soaking and/or not soaking in advance, by sprouting and/or not sprouting, by cutting and/or not cutting, by dicing, chopping, pureeing, smashing, blending, grilling, baking, roasting, sautéing, and/or cooking or not cooking, not processing, and/or in another arbitrary method. Ingredients of the composition may be delivered in part or multiple parts of the various component of a diet or in order to supplement a diet, for example. In some embodiments, the lipid-containing composition may be delivered using gelatinous cases, vials, pouches, or foils in order to contain the composition. In some embodiments, the lipid-containing composition may be part of enteral or parenteral compounds or combinations thereof. In some embodiments, a diet plan may be considered for one day, one week, two weeks, every two weeks, every two months, or one month, which includes various lipid compounds stated in the Description by changing the compound to be administered every day.

[0041]

One form in the Disclosure is to deliver fatty acids in a method so that the total delivery amount per day of omega-6 and omega-3 from the lipid compound and other

diets are optimal for the recommended amount per day.

(5) [0050]

(Embodiment Example 3)

Lipid compound based on age, sex, and diet

One form in the Disclosure is to deliver a lipid compound that is prepared based on age, sex, and diet of an individual human subject. Table 9 below shows the dose range (unit: g) of total fatty acid content, the range of the ratio between monounsaturated fatty acids and polyunsaturated fatty acids and the range of the ratio between monounsaturated fatty acids and saturated fatty acids, the range of content of omega-6 fatty acids (unit: g), the range of the ratio between omega-9 fatty acids and omega-6 fatty acids; the range of content of omega-3 fatty acids (unit: g), and the range of the ratio between omega-6 fatty acids and omega-3 fatty acids, by sex and age group, for vegetarians or non-vegetarians who take a large amount of antioxidants and/or a large amount of phytochemicals, which are disclosed by the embodiments in the Disclosure.

[0061]

(Embodiment Example 6)

Compound based on medical conditions

In various embodiments, the lipid composition stated in the Description is administered to individuals for the prevention and/or treatment of diseases, disorders, or conditions. For example, the lipid compound is used to relieve the symptoms of menopause, which occurs in the process where menstruation stops. The lipid compound is used also to relieve the symptoms of endocrine disorders.

[0077]

(Embodiment Example 12)

Case study of hypercholesterolemia and cardiovascular diseases

Most of the subject hosts took low-fat vegetarian food, taking olive oil (75% of which is monounsaturated fat), 1g of fish oil dietary supplement every day, and 1g of total essential fatty acid (EFA) dietary supplement every day, and contracted hypercholesterolemia. As part of the treatment, the intake of fish oil and EFA dietary supplement was discontinued. Next, subjects were administered dietary supplements of lipid composition for daily intake that are composed mainly of a combination of vegetable oil, nuts, and seeds and contain 11g of omega-6 fatty acids and 1.2g of omega-3 fatty acids. As a result of administration of this lipid composition, LDL decreased from 160mg to 120mg. When omega-3 was increased to 1.8g, very low-level blood pressure, 90/55mmHg was observed; however, blood pressure was normalized to 105/70mmHg with 11g of omega-6 fatty acids and 1.2g of omega-3 fatty acids. When

omega-3 was decreased from 1.8g to 1.2g per day, the subject suffered arrhythmia and the arrhythmia was tranquilized in two to three weeks. However, when omega-3 was further reduced to 0.5g per day, arrhythmia continued.

[0078]

Based on this case study, it was demonstrated that when vegetable oil, nuts, and seeds in which the ratio of omega-6 fatty acids and omega-3 fatty acids is approximately 9:1 are supplied, LDL cholesterol level (dyslipidemia related to atherosclerosis) in blood is considered to significantly decrease. Based on this case study, it was also demonstrated that the lipid composition and the ratio stated in the Description is considered to be helpful in relieving high blood pressure and arrhythmia.

2. Grounds for Rescission 1 (error in the determination on novelty and inventive steps in the Invention in the Application for which Publication 5 is used as the principal cited document)

(1) Statements in Publication 5

Publication 5 (Exhibit Ko 24) has the following statements.

A. "2. Claim

Food containing highly unsaturated fatty acids for which fatty acid composition in the food in the Claim is adjusted so that the ratio of omega-3 fatty acids and omega-6 fatty acids is 1:1 to 1:5." (Column 1, line 4 through line 7)

B. "(Industrial applicability)

The Invention is related to foods containing highly unsaturated fatty acids." (Column 1, line 9 through line 11)

C. "(Prior art)

Highly unsaturated fatty acids have two representative systems: omega-3 fatty acids and omega-6 fatty acids (omega refers to the number from the end of the methyl group of fatty acids to the carbon with the first double bond).

Examples of omega-6 fatty acids are linoleic acid, gamma-linolenic acid, and arachidonic acid; and examples of omega-3 fatty acids are alpha-linolenic acid, eicosapentaenoic acid, docosahexaenoic acid, etc. Based on the analysis of the fatty acid intake by Japanese people, it is strongly biased towards omega-6. This is because omega-6 fatty acids are contained in bird and animal meats, egg products, milk products, and vegetable oil, such as corn and sunflower oils, and they are essential to Japanese meals.

Foods containing omega-3 fatty acids are soybeans and canola oil, etc. (8 to 10%), Japanese basil, perilla, flaxseed oils, etc. Omega-3 fatty acids are also contained in marine fishes, and seaweeds in large quantity. However, these foods were consumed

relatively well before but are not seen as often on our tables today.

None of these omega-3 and omega-6 fatty acids can be biosynthesized in the human body. They are not interconverted between both fatty acid systems, and the ratio of omega-3 and omega-6 in the human body demonstrates the ratio in foods." (Column 1, line 12 through column 2, line 16)

D. "The recent dietary habits of the Japanese are more westernized. The opportunities for having meals consisting mainly of meats have increased drastically. The fat intake has increased to 40g per day. In conjunction with these changes, the types of diseases have also changed. The number of cases of cardiovascular diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, etc. has increased and these aspects have also been westernized and become a major social issue. The cause of these diseases was considered to be the excessive intake of fatty acids. However, as the study progressed, the cause was found to be an imbalance in the intake of types of unsaturated fatty acids that consist of fats. This imbalance was caused by an excess in type 2 prostaglandin, leukotriene, etc. that are produced from arachidonic acids, which are omega-6 fatty acids that are contained in meats in large quantity and thereby the balance with type 3 prostaglandin and leukotriene that are produced by omega-3 fatty acids is lost.

In consideration of these dietary habits, capsuled health foods of oil in which eicosapentaenoic acid is highly concentrated, eggs in which the content of eicosapentaenoic acid and docosahexaenoic acid has been increased by feeding chickens fish oil, and other foods enriched with omega-3 fatty acids have been developed." (Column 2, line 17 through column 3, line 17)

E. "(Problem to be solved by the invention)

Overdose of omega-6 fatty acids encourages the production of type 2 prostaglandin and leukotriene, such as PGF_2-alpha, TXA_2, etc., causes platelet aggregation and vasoconstriction, and induces arteriosclerosis and thrombosis. However, on the other hand, it was reported that omega-3 fatty acids inhibit these diseases, control the carcinogenic rate of breast cancer and colon cancer (L.M. Brander & K.K. Carroll, Lipids 21, 285 (1985); R.K. Karmali et. al., J. Natl. Cancer Inst., 73, 457 (1984)), and decrease the metastatic potential of cancer cells (T. Hori et. al., Chem. Pharm. Bull., 35, 3925 (1987)).

Prostaglandin, leukotriene, thromboxane, etc. that are induced from highly unsaturated fatty acids are called autacoid. They are produced in the kidney, liver, blood vessels, and other cells, and have antipyretic actions, platelet aggregation, inhibition of platelet aggregation, hypertension, drops in blood pressure, and other inconsistent

actions. They balance each other and normally maintain biogenic homeostasis. However, when the balance is lost, thrombosis, myocardial infarction, hypertension, immunologic disease (diabetes, asthma, psoriasis), allergic symptoms, etc. are manifested. Attention must be paid not to take omega-3 fatty acids alone, but to take both omega-3 and omega-6 fatty acids in a balanced manner.

However, as mentioned above, today's Japanese meals are biased towards an intake of omega-6 fatty acids.

In order to correct this situation, there are foods and nutritional supplements in which omega-3 fatty acids, etc. are highly concentrated and added. However, if these products are taken in excess, it leads adversely to an overdose of omega-3 fatty acids and it may cause a new disease. As such, omega-3 and omega-6 fatty acids must be taken in an appropriate ratio.

The Invention aims to provide foods in which the fatty acid composition of lipids is adjusted to an appropriate ratio so that omega-3 and omega-6 fatty acids can be consumed in a balanced manner and the prevention and correction of the aforementioned diseases can be expected." (Column 3, line 18 through column 5, line 15)

F. "(Means of solving the problem)

Foods in the Invention are characterized by containing highly unsaturated fatty acids for which fatty acid composition is adjusted so that the ratio of omega-3 fatty acids and omega-6 fatty acids is 1:1 to 1:5.

Omega-3 fatty acids used in the Invention are highly unsaturated fatty acids obtained from lipids derived from marine animals, such as sardine oil, skipjack oil, squid oil, cod liver oil, menhaden oil, etc. For example, docosahexaenoic acids, eicosapentaenoic acids, alpha-linolenic acids, etc. are common; however, their sources are not limited to seaweeds, microbes, animals, plants, etc. There is no problem with concentrating these oils into highly-concentrated docosahexaenoic acids and eicosapentaenoic acids by means of physical, chemical, and biochemical methods. In addition, alpha-linolenic acids, etc. are generally considered to be plant-based, but their sources may be microbes, animals, etc. or anything. On the other hand, representative examples of omega-6 fatty acids are linoleic acids, alpha-linolenic acids, and other highly unsaturated fatty acids, but their sources are not limited specifically and include microbes, plants, and animals. In addition, food forms are not limited to the embodiment examples mentioned later.

Fatty acid composition of the foods in the Invention is adjusted so that the ratio of omega-3 fatty acids and omega-6 fatty acids is 1:1 to 1:5. If the ratio is lower than this

range, this causes an excess of omega-3 fatty acids, and if the ratio is higher than this range, this causes an excess of omega-6 fatty acids. In both cases, it is not preferable due to the intake imbalance of omega-3 and omega-6 fatty acids." (Column 5, line 16 through column 7, line 5)

G. "(Effects of the Invention)

Based on the Invention, it is possible to provide foods for which the ratio of omega-3 fatty acids and omega-6 fatty acids of lipids contained therein are adjusted to maintain an appropriate ratio, 1:1 to 1:5. Therefore, omega-3 and omega-6 fatty acids can be taken in a proper balance and effects for the prevention and improvement of cardiovascular diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, and other diseases can be expected." (Column 7, line 6 through line 13)

H. "Embodiment Example 4

(Health drinks)

300ppm of mixed tocopherols was added as antioxidants to 15g of oil (IV:190.2, POV: 0.56, eicosapentaenoic acid: 6.3%, and docosahexaenoic acid: 26.9%) in which omega-3 fatty acids were concentrated by wintering skipjack oil. In addition, 35g of evening primrose oil (IV: 104, POV: 0.23, linoleic acid: 71.1%, and alpha-linolenic acid: 10.0%) was added to create the mixed oil. 100g of beta-cyclodextrin was stirred after adding 100mL of water, and then the aforementioned mixed oil was added and the beta-cyclodextrin was kneaded with a homogenizer for approximately 25 minutes. It was cleaned with ethanol twice and the precipitation was collected. The precipitation was dried under reduced-pressure at room temperature and approximately 70g of cyclodextrin powder of mixed oil was obtained. The cyclodextrin powder was added to the health drinks with the composition indicated in the following table. Dispersion of cyclodextrin powder into the health drinks was easy up to approximately 3%. In addition, the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids was approximately 1:4. The powder health drinks were stored in a refrigerator for approximately 150 days; however, there was no big change to the taste.

Table: Composition of health drinks

NaCl	0.85g/L
KCl	0.35g/L
$CaCl_2$	0.15g/L
$MgCl_2$	0.15g/L
Citric acid	1.35g/L
Citric soda	1.10g/L
L-glutamic acid soda	0.05g/L

Glucose	20g/L
Sugar	20g/L
Fruit juice	30g/L" (Column 10, line 12 through column 12, line 3)

(2) Error in the finding of the common feature and overlooking of differences

The Plaintiff alleged that Publication 5 has no disclosure on the point that the health drink in Embodiment Example 4 has a structure wherein "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids is 1:4"; the health drink stated in Publication 5 is different from the Invention in the Application on the point that it does not have the aforementioned structure; and therefore, it is an error that the JPO Decision found that the point of having the aforementioned structure is a common feature between the Invention in the Application and Publication 5 Invention and the difference was overlooked. Therefore, it is examined as follows.

A. According to the statement ((1) H. above) in Embodiment Example 4 in Publication 5, Publication 5 contains the statements that [i] antioxidants (300ppm of mixed tocopherols) were added to 15g of "oil (IV:190.2, POV: 0.56, eicosapentaenoic acid: 6.3%, and docosahexaenoic acid: 26.9%) in which omega-3 fatty acids were concentrated by wintering skipjack oil" and 35g of "evening primrose oil (IV: 104, POV: 0.23, linoleic acid: 71.1%, and alpha-linolenic acid: 10.0%)" to create the "mixed oil" and that [ii] 100g of beta-cyclodextrin was stirred after adding 100mL of water, and the aforementioned "mixed oil" was added and the beta-cyclodextrin was kneaded with a homogenizer for approximately 25 minutes; the beta-cyclodextrin was cleaned with ethanol twice and the precipitation was collected; and the precipitation was dried under reduced-pressure at room temperature and approximately 70g of cyclodextrin powder of the aforementioned "mixed oil" was obtained.

Also, Publication 5 further states following the aforementioned statements, "The cyclodextrin powder was added to the health drinks with the composition indicated in the following table. Dispersion of cyclodextrin powder into the health drinks was easy up to approximately 3%. In addition, the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids was approximately 1:4." According to these statements, the part in the aforementioned statement "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids was approximately 1:4." is understood to represent that as a result of measurement of the lipid content of the "health drink" with the composition shown in the Table of Embodiment Example 4 to which cyclodextrin powder of the aforementioned "mixed oil" was added, the ratio of omega-3 fatty acids and omega-6 fatty acids was approximately 1:4. On the other hand, Publication 5 has no statement concerning the measurement method of fatty acid composition; however,

in "Reference 3.2 Fatty acid composition and quantitative method" in the "Standard Methods for the Analysis of Fats, Oils and Related Materials Established by Japan Oil Chemists' Society, 2003," issued in July 2003 (Exhibit Otsu 2), there is the following statement, "There are cases where you need to know the fatty acid composition of oil contained in the food and where you need to know the content of the specific fatty acids. In the former case, extract lipids from the food, sample a specific amount, esterify it, and measure it with gas chromatography. In the latter case, correctly sample a specific amount from the extracted lipids, correctly add internal standards to it, esterify it, and analyze it with gas chromatography. Then, calculate the fatty acid amount based on the relationship between the ratio of peak areas and the ratio of weight of internal standards and fatty acids." There are statements concerning a method of gas chromatography measurement after saponification, methyl esterification, or propyl esterification of samples and preparation of methyl ester solution or propyl ester solution respectively in the sections of "General animal and plant oils" (Reference 3.2.1), "Oils containing short-chain fatty acids" (Reference 3.2.2), "Oils containing highly unsaturated fatty acids" (Reference 3.2.3), and the "Act on Japanese Agricultural Standards" (Reference 3.2.4). Based on these statements, it is found that, at the time of Priority Date of the Application, it was common general technical knowledge that the gas chromatography measurement method existed as a standard for measurement of the fatty acid composition of lipids contained in food.

Based on the aforementioned common general technical knowledge, it can be said that a person skilled in the art who came across Publication 5 would understand that the statement in Publication 5, "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids was approximately 1:4." is the statement of the fact that, as a result of measurement of the lipid content of the "health drink" with gas chromatography, the ratio of omega-3 fatty acids and omega-6 fatty acids was approximately 1:4. Therefore, it is found that Publication 5 has a disclosure that the health drink indicated in Publication 5 has a structure wherein "the ratio of omega-3 and omega-6 fatty acids in the contained lipids is 1:4."

B. On the other hand, the Plaintiff alleged as follows: [i] When the ratio of omega-3 fatty acids and omega-6 fatty acids is obtained according to the statement in Embodiment Example 4 in Publication 5 based on the weight of fatty acids that is calculated for skipjack oil and evening primrose oil that are raw materials of the health drink in Embodiment Example 4, the rate is "1:5.7" and is not consistent with the statement in Publication 5, "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids was approximately 1:4." and therefore, Publication 5 does not

substantially disclose that the health drink in Embodiment Example 4 has the structure wherein "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids is 1:4."; and [ii] for example, there is a method of using an improvement method of BF_3·MeOH method, NaOMe method, and HCl·MeOH method for the derivatization method of fatty acids, which is a pretreatment of a measurement method using gas chromatography; measurement values of omega-3 fatty acids vary depending on the difference in the derivatization method (Exhibit Ko 36); it is obvious that this difference in measurement values has a big impact on the ratio of omega-3 fatty acids and omega-6 fatty acids; however, since Publication 5 has no statement of the fact that fatty acids were measured and the measurement conditions (the use of gas chromatography and derivatization method of samples, etc.), it cannot be said that Publication 5 substantially discloses that the health drink in Embodiment Example 4 has the structure wherein "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids is 1:4."

However, it is as stated in A. above that a person skilled in the art who came across Publication 5 would understand that the statement in Publication 5, "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids was approximately 1:4." is the statement of the fact that, as a result of measurement of the lipid content of the "health drink" with gas chromatography, the ratio of omega-3 fatty acids and omega-6 fatty acids was approximately 1:4.

In addition, the aforementioned statement in Publication 5 shows the ratio of fatty acids in the lipids contained in the "health drink" that was produced from the raw material, the mixed oil, that is stated in Embodiment Example 4 through the processes of kneading with a homogenizer, cleaning, collecting precipitation, reduced-pressure drying, etc., and it is obvious that fatty acid composition of the raw material, the mixed oil, may change during these processes. Therefore, even if the aforementioned ratio is not consistent with the ratio of omega-3 fatty acids and omega-6 fatty acids in the composition (1:5.7) that is obtained based on the weight of the fatty acids that is calculated for skipjack oil and evening primrose oil that are raw materials as alleged by the Plaintiff, the aforementioned ratio cannot be said to be unnatural.

Furthermore, for example, there is a method of using an improvement method of BF_3·MeOH method, NaOMe method, and HCl·MeOH method for the derivatization method of fatty acids, which is a pretreatment of a measurement method using gas chromatography. Even if the measurement values of omega-3 fatty acids vary depending on the difference in the derivatization method, that fact itself cannot be a basis for denying that the aforementioned statement in Publication 5 is understood to be a statement that, as a result of measurement of the lipid content of the "health drink" with

gas chromatography, the ratio of omega-3 fatty acids and omega-6 fatty acids was approximately 1:4.

Consequently, the aforementioned allegation of the Plaintiff cannot be adopted.

C. As mentioned above, since it is found that Publication 5 has a disclosure that the health drink stated in Publication 5 has the structure wherein "the ratio of omega-3 fatty acids and omega-6 fatty acids in the contained lipids is 1:4," there is no error that the JPO Decision found the point of "containing omega-6 fatty acids and omega-3 fatty acids and the ratio of omega-6 and omega-3 is 4:1 or higher" as a common feature between the Invention in the Application and Publication 5 Invention.

Consequently, the allegation of the Plaintiff indicating an error in the finding of the common feature and overlooking of differences in the JPO Decision is groundless.

(3) Error in the determination concerning Difference 2

The Plaintiff alleged concerning Difference 2 that [i] in consideration of the statement in Publication 5 and common general technical knowledge on health to the effect that withholding the intake of a large amount of lipids is recommendable, it cannot be considered to use a lipid-containing compound that contains omega-6 fatty acids exceeding 40g as one "dose" and that "the dose of omega-6 fatty acids is to be no more than 40g" (structure of the Invention in the Application related to Difference 2) is an obvious matter equivalent to be disclosed even though there is no relevant statement in Publication 5; therefore, it is an error that the JPO determined that Difference 2 is not a substantial difference or that it is a technical matter that a person skilled in the art can easily conceive of to determine the "dose of omega-6 fatty acids to be no more than 40g" in Publication 5 Invention, irrespective of whether the meaning of "dose" is the "dose" per intake or the "dose" per day. Therefore, this point is examined in the following.

A. (A) Publication 5 (Exhibit Ko 24) has the following statements: [i] As "prior art," "The recent dietary habits of the Japanese are more westernized. The opportunities for having meals consisting mainly of meats have increased drastically. The fat intake has increased to 40g per day. In conjunction with these changes, the types of diseases have also changed. The number of cases of cardiovascular diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, etc. has increased and these aspects have also been westernized and become a major social issue. The cause of these diseases was considered to be excessive intake of fatty acids. However, as the study progressed, the cause was found to be an imbalance in the intake of types of unsaturated fatty acids that consist of fats. This imbalance was caused by an excess in type 2 prostaglandin, leukotriene, etc. that are produced from arachidonic acids, which are omega-6 fatty

acids that are contained in meats in large quantity and thereby the balance with type 3 prostaglandin and leukotriene that are produced by omega-3 fatty acids is lost." ((1) D. above); [ii] As "Problem to be solved by the invention," "Overdose of omega-6 fatty acids encourages the production of type 2 prostaglandin and leukotriene, such as PGF_2-alpha, TXA_2, etc., causes platelet aggregation and vasoconstriction, and induces arteriosclerosis and thrombosis." However, on the other hand, it was reported that omega-3 fatty acids inhibit these diseases, control the carcinogenic rate of breast cancer and colon cancer (...), and decrease metastatic potential of cancer cells (...). Attention must be paid not to take omega-3 fatty acids alone, but to take both omega-3 and omega-6 fatty acids in a balanced manner. However, as mentioned above, today's Japanese meals are biased towards an intake of omega-6 fatty acids. In order to correct this situation, there are foods and nutritional supplements in which omega-3 fatty acids, etc. are highly concentrated and added. However, if these products are taken in excess, it leads adversely to an overdose of omega-3 fatty acids and it may cause a new disease. As such, omega-3 and omega-6 fatty acids must be taken in an appropriate ratio." "The Invention aims to provide foods in which the fatty acid composition of lipids is adjusted to an appropriate ratio so that omega-3 and omega-6 fatty acids can be consumed in a balanced manner and the prevention and correction of the aforementioned diseases can be expected." ((1) E. above); [iii] as the "Means of solving the problem," "Foods in the Invention are characterized by containing highly unsaturated fatty acids for which fatty acid composition is adjusted so that the ratio of omega-3 fatty acids and omega-6 fatty acids is 1:1 to 1:5." "Fatty acid composition of the foods in the Invention is adjusted so that the ratio of omega-3 fatty acids and omega-6 fatty acids is 1:1 to 1:5. If the ratio is lower than this range, this causes an excess of omega-3 fatty acids, and if the ratio is higher than this range, this causes an excess of omega-6 fatty acids. In both cases, it is not preferable due to the intake imbalance of omega-3 and omega-6 fatty acids." ((1) F. above); [iv] As "Effects of the Invention," "Based on the Invention, it is possible to provide foods for which the ratio of omega-3 fatty acids and omega-6 fatty acids of lipids contained therein are adjusted to maintain an appropriate ratio, 1:1 to 1:5. Therefore, omega-3 and omega-6 fatty acids can be taken in a proper balance and effects for the prevention and improvement of cardiovascular diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, and other diseases can be expected." ((1) G. above).

Based on these statements, it is found that Publication 5 disclosed the following points: [i] concerning the technical meaning of foods containing highly unsaturated fatty acids (the "Invention") that is stated in Publication 5, the causes of cardiovascular

diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, and other diseases had been considered to be the "excessive intake" of fatty acids before, but as the study progressed, it is found to be caused by an imbalanced intake of types of unsaturated fatty acids that consist of fats; and [ii] Japanese meals today are biased toward an intake of omega-6 fatty acids and, in order to correct this situation ("overdose" of omega-6 fatty acids), foods and nutritional supplements were developed by highly concentrating and adding omega-3 fatty acids, etc.; however, if these products are taken in excess, it results in an "overdose" of omega-3 fatty acids and may cause a new disease; therefore, it is necessary to take omega-3 and omega-6 fatty acids in an appropriate ratio; consequently, the "Invention" aims to provide foods in which the fatty acid composition of lipids is adjusted to be at an appropriate ratio so that omega-3 and omega-6 fatty acids can be taken in a proper balance and prevention and improvement of the aforementioned diseases can be expected; as the means of solving the problem, it adopted a structure containing highly unsaturated fatty acids that is adjusted so that the fatty acid composition has the ratio of omega-3 fatty acids and omega-6 fatty acids of 1:1 to 1:5 and thereby omega-3 and omega-6 fatty acids can be taken in a proper balance and the effects of prevention and improvement of cardiovascular diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, and other diseases are expected. In addition, according to the statement in Publication 5 mentioned in (1) above, in light of the fact that Publication 5 states, by setting the range of the appropriate ratio (1:1 to 1:5) of omega-3 fatty acids and omega-6 fatty acids, that "If the ratio is lower than this range, this causes an excess of omega-3 fatty acids, and if the ratio is higher than this range, this causes an excess of omega-6 fatty acids." ((1) F. above), the term "overdose" is used to express the condition where the intake balance (ratio) of omega-3 fatty acids and omega-6 fatty acids is lost. On the other hand, it is found that when expressing the condition where the "intake amount" is large, the term "excessive intake" is used and the term "overdose" is not used in relation to the "intake amount."

When examining the allegation of the Plaintiff based on the above, in light of the fact that the statement in Publication 5, "The recent dietary habits of the Japanese are more westernized. The opportunities for having meals consisting mainly of meats have increased drastically. The fat intake has increased to 40g per day. In conjunction with these changes, the types of diseases have also changed. The number of cases of cardiovascular diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, etc. has increased and these aspects have also been westernized and become a major social issue." is followed by the statement "However, as the study

progressed, the cause was found to be an imbalance in the intake of types of unsaturated fatty acids that consist of fats." etc., it is natural to understand that Publication 5 does not state that the fact that the "fat intake" increased to "40g per day" is a problem nor does it suggest the necessity to correct such situation.

In addition, looking at the statements in Publication 5 as a whole, there is no statement or suggestion to the effect that withholding the fat intake up to 40g per day is recommendable or that the "dose of omega-6 fatty acids" should be no more than 40g per day or per intake.

(B) Next, even if it can be said that it is common general technical knowledge on health that "withholding the intake of a large amount of lipids" is recommendable, as stated in the JPO Decision, the appropriate intake of lipids is considered to be changeable depending on age, sex, energy intake amount, and other elements. Therefore, it is impossible to conclude immediately from that fact that the "fat intake" should be no more than 40g per day is common general technical knowledge, and it cannot also be said, on the premise that this fact is common general technical knowledge, that determining the "dose of omega-6 fatty acids" to be "no more than 40g" per day or per intake is common general technical knowledge. In this case, there is no other evidence to find that determining the "dose of omega-6 fatty acids to be no more than 40g" is common general technical knowledge.

B. (A) Taking the findings in A. above together, it cannot be found that Publication 5 has a substantial disclosure concerning the statement that the "dose of omega-6 fatty acids is to be no more than 40g," which is contained in Publication 5 Invention, even based on common general technical knowledge as stated in the JPO Decision.

Then, it is not found that Publication 5 Invention has the structure wherein the "dose of omega-6 fatty acids is no more than 40g" (structure of the Invention in the Application related to Difference 2), and therefore, it is found that Difference 2 is a substantial difference.

The JPO Decision that is different from the above is incorrect.

(B) Next, as it is found in A. above, Publication 5 has no statement or suggestion to the effect that withholding the fat intake up to 40g per day is recommendable and that the "dose of omega-6 fatty acids" should be "no more than 40g" per day or per intake, and there is no evidence to find that determining the "dose of omega-6 fatty acids to be no more than 40g" is common general technical knowledge. In light of the above, it cannot be found that a person skilled in the art who came across Publication 5 would have the motivation to adopt the structure of the Invention in the Application related to Difference 2 in Publication 5 Invention. Therefore, it cannot be found that adopting the

aforementioned structure could have been easily conceived of by a person skilled in the art.

The JPO Decision that is different from the above is incorrect.

C. On the contrary, the Defendant alleged that [i] Publication 5 contains the statements that the intake of fat increased to 40g per day and that it is found to be a problem; since Publication 5 Invention is an invention based on restriction of the excessive intake of lipids (fat) and with the technical idea to take omega-6 and omega-3 fatty acids in a proper balance, it is natural to withhold the intake of omega-6 fatty acids that are part of unsaturated fatty acids, which are part of lipids, and a person skilled in the art has a strong motivation to specify the intake as no more than 40g, which is found to be an excessive intake of lipids as a whole; and [ii] in addition, lipid intake per day is also generated from foods other than the health drink composition of Publication 5 Invention, and therefore setting the upper limit to be no more than 40g of omega-6 fatty acids per day or per intake is a technical matter that a person skilled in the art can easily make and a person skilled in the art can easily conceive of adopting the structure of the Invention in the Application related to Difference 2 in Publication 5 Invention.

However, as explained in A. (A) above, the statement in Publication 5 "The recent dietary habits of the Japanese are more westernized. The opportunities for having meals consisting mainly of meats have increased drastically. The fat intake has increased to 40g per day. In conjunction with these changes, the types of diseases have also changed. The number of cases of cardiovascular diseases, such as hypertension and heart diseases, and breast cancer, colon cancer, etc. has increased and these aspects have also been westernized and become a major social issue." does not state that the fact that the "fat intake" increased to "40g per day" is a problem nor does it suggest the necessity to correct such situation.

In addition, looking at the statements in Publication 5 as a whole, there is no statement or suggestion to the effect that withholding the fat intake up to 40g per day is recommendable or that the "dose of omega-6 fatty acids" should be no more than 40g per day or per intake.

Furthermore, in this case, there is no other evidence to find that determining the "dose of omega-6 fatty acids to be no more than 40g" is common general technical knowledge.

Consequently, it cannot be found that a person skilled in the art who came across Publication 5 would have the motivation to adopt the structure of the Invention in the Application related to Difference 2 in Publication 5 Invention, and therefore the aforementioned allegation of the Defendant cannot be adopted.

(4) Summary

As mentioned above, the JPO Decision has an error in the determination concerning Difference 2, and therefore it cannot be found that the Invention in the Application is the same invention as Publication 5 Invention and it cannot be found that a person skilled in the art could have easily made the Invention in the Application based on Publication 5 Invention and common general technical knowledge.

Consequently, the Plaintiff's Grounds for Rescission 1 are well-grounded.

No. 5 Conclusion

As mentioned above, the Plaintiff's Grounds for Rescission 1 are well-grounded, and therefore the JPO Decision should be rescinded without the need to make determinations on the other remaining points.

Intellectual Property High Court, First Division
Presiding judge: OTAKA Ichiro
Judge: KOBAYASHI Yasuhiko
Judge: OGAWA Takatoshi

(Attachment)

[Table 1]

Table 1. Outline of several types of fatty acids

Fatty acid name	General formula	Starting molecule for biosynthesis
Omega-3	CH_3-CH_2-CH=CH-R-COOH	Alpha-linolenic acid
Omega-6	CH_3-$(CH_2)_4$-CH=CH-R-COOH	Linoleic acid
Omega-7	CH_3-$(CH_2)_5$-CH=CH-R-COOH	Palmitoleic acid
Omega-9	CH_3-$(CH_2)_7$-CH=CH-R-COOH	Oleic acid

[Table 9]

Table 9. Dose of lipids based on age and sex of vegetarians and non-vegetarians who take a large amount of antioxidants and phytochemicals

	Range of total fats (g)	Range of the ratio of monounsaturated and polyunsaturated fatty acids	Range of the ratio of monounsaturated and saturated fatty acids	Range of omega-6 (g)	Range of the ratio of omega-9 and omega-6	Range of omega-3 (g)	Range of the ratio of omega-6 and omega-3
Infants							
7 to 12 months	10-50	1:1-3:1	1:1-5:1	1-10	1:1-3:1	0.1-3	4:1-45:1
Children							
1 to 3 years old	10-60	1:1-3:1	1:1-5:1	2-15	1:1-3:1	0.1-3	4:1-45:1
Men							
4 to 8 years old	10-75	1:1-3:1	1:1-5:1	2-25	1:1-3:1	0.1-4	4:1-45:1
9 to 13 years old	15-80	1:1-3:1	1:1-5:1	2-30	1:1-3:1	0.1-4	4:1-45:1
14 to 18 years old	20-100	1:1-3:1	1:1-5:1	2-35	1:1-3:1	0.2-5	4:1-45:1
19 to 30 years old	20-100	1:1-3:1	1:1-5:1	2-40	1:1-3:1	0.2-5	4:1-45:1
31 to 50 years old	20-80	1:1-3:1	1:1-5:1	2-40	1:1-3:1	0.2-5	4:1-45:1
51 to 70 years old	15-80	1:1-3:1	1:1-5:1	2-30	1:1-3:1	0.2-5	4:1-45:1
Over 70 years old	15-80	1:1-3:1	1:1-5:1	2-30	1:1-3:1	0.2-5	4:1-45:1
Women							
4 to 8 years old	12-70	1:1-3:1	1:1-5:1	2-25	1:1-3:1	0.1-3	4:1-45:1
9 to 13 years old	15-80	1:1-3:1	1:1-5:1	2-25	1:1-3:1	0.1-3	4:1-45:1
14 to 18 years old	20-80	1:1-3:1	1:1-5:1	2-30	1:1-3:1	0.2-4	4:1-45:1
19 to 30 years old	20-80	1:1-3:1	1:1-5:1	2-30	1:1-3:1	0.2-4	4:1-45:1
31 to 50 years old	15-80	1:1-3:1	1:1-5:1	2-30	1:1-3:1	0.2-4	4:1-45:1
Pregnancy	24-100	1:1-3:1	1:1-5:1	2-35	1:1-3:1	0.2-5	4:1-45:1
Lactation period	24-100	1:1-3:1	1:1-5:1	2-35	1:1-3:1	0.2-5	4:1-45:1
Menopause	15-80	1:1-3:1	1:1-5:1	2-30	1:1-3:1	0.2-4	4:1-45:1