Judgment rendered on June 28, 2018; Original received on the same date by Court Clerk
2015(Wa)4292 Case of Demand for Injunction against Infringement of Patent Right
Date of conclusion of oral argument: March 27, 2018

Judgment

Plaintiff Medion Research Laboratories Inc.

Plaintiff's representative Attorney at Law	Iichiro YAMADA
Plaintiff's representative Attorney at Law	Kyoko MATSUMOTO
Plaintiff's sub-agent Attorney at Law	Kazuhiko SHIBATA
Plaintiff's representative patent attorney	Keiya MIZUTANI
Assistant in court, patent attorney	Junya TANAKA
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Defendant: NeoChemir inc.
(Hereinafter referred to as "Defendant NeoChemir".)
Defendant's representative Attorney at Law Jun TAKAHASHI

Defendant: COSMEPRO CO., LTD.
(Hereinafter referred to as "Defendant Cosmepro".)

Defendant: Airica
(Hereinafter referred to as "Defendant Airica".)

Defendant Chiara Macchiato
(Hereinafter also referred to as "Defendant Chiara Macchiato".)

Defendant: Rhythm Co., Ltd.
(Hereinafter referred to as "Defendant Rhythm".)

Defendant: AMPLY CO., LTD.
(Hereinafter referred to as "Defendant AMPLY".)

Defendant: Limited Liability Company SHIN
(Hereinafter referred to as "Defendant SHIN".)

Defendant: Japan Cosme
(Hereinafter referred to as "Defendant Japan Cosme".)

Defendant: Wingsense Co., Ltd.
(Hereinafter referred to as "Defendant Wingsense".)

Defendant: Cosme Bose
(Hereinafter referred to as "Defendant Cosme Bose".)

Defendant: Clear noir
(hereinafter referred to as "Defendant Clear noir",

Hereinafter the above 10 parties are referred to as "Defendants Cosmepro et al.".)
A litigation representative of the above 10 parties, Attorney at Law Norio MATSUMOTO

Main text

As per attachment, "List of Main text"

Facts and Reasons

No. 1 Claims

As per attachment, "List of claims"

No. 2 Outline of the case, etc.

1 Outline of the case

The case is a case in which Plaintiff having each of the below-mentioned patent rights sought an injunction of the production and sales of the Defendant's products 1, 3 to 5, 8, 9, 11, 13 to 15, 17 and 18 under the provision of Article 100, paragraph (1) of the Patent Act against Defendants, and demanded the disposal of the Defendant's products under the provision of Article 100, paragraph (2) of the Patent Act, and claimed compensation for damage on the grounds of tortious acts of patent rights infringement primarily under Article 102, paragraph (2) of the Patent Act and secondarily under paragraph (3) of the Patent Act, and claimed for the payment of any default charges in a proportion of 5 percent per year prescribed in Civil Code from the last date or later date of tortious acts to the date of the completion of payment, alleging that: [i] carbonate packs described in the attachment "List of Defendants' products"

(hereinafter referred to as "each of Defendant's products"), which are produced and sold by the Defendants or third parties, fall within a technical scope of the invention, and the acts of production and sales of the carbonate packs correspond to a direct infringing act according to a part of claims of the respective patent rights; [ii] the acts of production and sales of each of Defendant's products correspond to an indirect infringing act according to a part of claims of the respective patent rights (Article 101, items (i) or (ii), and (iv) or (v) of the Patent Act); and [iii] the acts of the Defendant NeoChemir's producing and selling granules used for a part of products correspond to an indirect infringing act of a part of claims of the respective patent rights (item (i) or (ii) of the same article). Further, Plaintiff distinguishes a primary claim and a secondary claim with respect to a claim for compensation for damage; however, both claims have a subject-matter of a claim for compensation for damage caused by a tortious act of patent right infringement. Therefore, it can only be seen that Plaintiff prioritizes an amount of damage and a ground of a computation of damages within the same subject matter.

2 Basic facts (Facts without dispute between parties, or facts that can be easily recognized from the evidence listed below or the overall gist of oral proceedings. Note that the identification of documentary evidence in the decision omits a branch number if it includes all the branch numbers).

(1) Party concerned

A Plaintiff is a corporation that engages in research, development, production, and sales of pharmaceutical products and cosmetics.

B Defendant NeoChemir is a corporation that engages in the development and production, etc. of cosmetic products and quasi-pharmaceutical products, etc., and develops by itself, produces, and sells a two pack-mixing type carbon dioxide-containing gel production kit, and produces and sells granules to be used for each of the respective Defendants' products to the other Defendant et al. or third parties.

C Defendant Cosmepro is a corporation that engages in production, production and sales, and sales of cosmetic products and quasi-pharmaceutical products.

D Defendant Airica is a corporation that engages in production and sales of cosmetic products and quasi-pharmaceutical products for cosmetics.

E Defendant Chiara Macchiato is a corporation that engages in production, sales, import and export of cosmetic products.

F Defendant Rhythm is a corporation that engages in sales, mail-order business, and import and export of cosmetic products and health foods.

G Defendant AMPLY is a corporation that engages in production, sales, import and export, and research and development of cosmetic products, and production and sales of pharmaceutical products and quasi-pharmaceutical products.

H Defendant SHIN is a corporation that engages in planning, production, wholesaling, retailing, mail-order utilizing internet, and import and export of cosmetic products and quasi-pharmaceutical products.

I Defendant Japan Cosme is a corporation that engages in production, sales, and import and export of cosmetic products, and sales and import and export of quasi-pharmaceutical products.

J Defendant Wingsense is a corporation that engages in research and development, production, wholesaling, sales, and import and export of cosmetic products.

K Defendant Cosme Bose is a corporation that engages in production, import and export, and sales etc. of cosmetic products.

L Defendant Clear noir is a corporation that engages in production, sales, and import and export of cosmetic products.

(2) Patent rights owned by Plaintiff

A Patent right 1

Plaintiff has the patent rights (hereinafter referred to as "patent right 1"; the invention according to Patent 1 is referred to as "the Invention 1", and the description attached to the application of Patent 1 is referred to "description 1".) according to the following patent (hereinafter referred to as "the Patent 1"). Description 1 (as far as page 2, line 39 to page 11, line 30) is as per the patent publication of Patent 1 attached to the decision (Exhibits Ko 1, 2).

Patent number: No. 4659980

Title of invention: Carbon dioxide-containing viscous composition

Registered Date: January 7, 2011

Japanese Patent Application No. 2000-520135

International Application Date: October 5, 1998

Priority claim No.: Japanese Patent Application No. 1997-305151

Priority date: November 7, 1997

The scope of claims: As per patent publication of Patent 1 attached to the decision

B Patent right 2

Plaintiff has the patent rights (hereinafter referred to as "patent right 2", and

together with the patent right 1, referred to as "the respective patent rights", and the invention according to Patent 2 is referred to as "Invention 2", and together with Invention 1, is referred to as "the respective invention", and the description attached to the application of Patent 2 is referred to as "description 2", and together with description 1, referred to as "the respective descriptions") according to the following patent (hereinafter referred to as "Patent 2", and together with Patent 1, referred to as "the respective patents"). Description 2 (as far as [0001] to [0062]) is as per the patent publication of Patent 2 attached to the decision (Exhibits Ko 3, 4).

Patent number: No. 4912492

Title of invention: Carbon dioxide-containing viscous composition

Registered Date: January 27, 2012

Japanese Patent Application No. 2010-199412

Application Date: September 6, 2010

Indication of Divisional Application: Divisional of Japanese Patent Application No. 2000-520135

Original filing date: October 5, 1998

Priority claim No.: Japanese Patent Application No. 1997-305151

Priority date: November 7, 1997

The scope of claims: As per patent publication of Patent 2 attached to the decision

(3) Separate description of the constituent features according to Patent 1

A The constituent features of the Invention according to Claim 1 of Patent 1 (hereinafter referred to as "Invention 1-1") are separately described as follows (hereinafter referred to as "constituent features 1-1A", etc., and the constituent features of the respective inventions are collectively referred to as "constituent feature 1-1" in some cases. The same shall apply hereinafter.).

1-1A A kit for obtaining a carbon dioxide-containing viscous composition to be used for cosmetics for the improvement of partial adiposeness or pharmaceutical compositions for the treatment of athlete's foot, atopic dermatitis, or bedsore, consisting of:

1-1B 1) a combination of an aqueous viscous composition comprising carbonate and sodium alginate with granules including an acid (subtle granules, powders); or

2) a combination of composite granules (subtle granules, powders) comprising a carbonate and an acid with an aqueous viscous composition comprising sodium alginate,

1-1C an aqueous viscous composition is characterized in that it can retain carbon dioxide in the form of bubbles,

1-1D A kit capable of obtaining said carbon dioxide-containing viscous composition comprising the carbon dioxide in the form of bubbles by reacting carbonate and acid in an aqueous viscous composition,

B The constituent features of the invention according to Claim 4 of Patent 1 (hereinafter referred to as "Invention 1-4")
are separately described as follows:

1-4A wherein the aqueous viscous composition comprises 2 % by weight or more of sodium alginate.

1-4B The kit of any one of Claims 1 to 3,

C The constituent features of the invention according to Claim 5 of Patent 1 (hereinafter referred to as "Invention 1-5")
are separately described as follows:

1-5A wherein the aqueous viscous composition comprises 87 % by weight or more of water.

1-5B The kit of any one of Claims 1 to 4,

D The constituent features of the invention according to Claim 7 of Patent 1 (hereinafter referred to as "Invention 1-7")
are separately described as follows:

1-7A comprising a carbon dioxide-containing viscous composition capable of obtaining the kit of any one of Claims 1 to 5.

1-7B Cosmetics for the improvement of partial adiposeness.

E The constituent features of the invention according to Claim 8 of Patent 1 (hereinafter referred to as "Invention 1-8")
are separately described as follows:

1-8A used for the improvement of partial adiposeness of the face, leg, arm, abdomen, flank, back, neck, or jaw.

1-8B Cosmetics of Claim 7,

F The constituent features of the invention according to Claim 9 of Patent 1 (hereinafter referred to as "Invention 1-9")
are separately described as follows:

1-9A A method for preparing a carbon dioxide-containing viscous composition to be used for cosmetics for the improvement of partial adiposeness or pharmaceutical compositions for the treatment of athlete's foot, atopic dermatitis, or bedsore, by use of

1-9B 1) an aqueous viscous composition comprising carbonate and sodium alginate, and granules including an acid (subtle granules, powders); or
2) composite granules (subtle granules, powders) comprising a carbonate and an acid, and an aqueous viscous composition comprising sodium alginate;
Comprising the step of preparing a carbon dioxide-containing aqueous viscous composition comprising the carbon dioxide in the form of bubbles by reacting carbonate and acid in an aqueous viscous composition,

1-9C wherein the aqueous viscous composition can retain the carbon dioxide in the form of bubbles.

1-9D A method of preparing a carbon dioxide-containing viscous composition,

G The constituent features of the invention according to Claim 12 of Patent 1 (hereinafter referred to as "Invention 1-12") are separately described as follows:

1-12A wherein the aqueous viscous composition comprises 2 % by weight or more of sodium alginate.

1-12B The method for preparation according to any one of Claims 9 to 11,

H The constituent features of the Invention according to Claim 13 of Patent 1 (hereinafter referred to as "Invention 1-13") are separately described as follows:

1-13A wherein the aqueous viscous composition comprises 87 % by weight or more of water.

1-13B The method for preparation according to any one of Claims 9 to 12,

(4) Separate description of the constituent features according to Patent 2

A The constituent features of the Invention according to Claim 1 of Patent 2 (hereinafter referred to as "Invention 2-1") are separately described as follows (hereinafter referred to as "constituent features 2-1A" etc.):

2-1A A kit for obtaining a carbon dioxide-containing viscous composition to be used for pharmaceutical compositions or cosmetics, consisting of:

2-1B 1) a combination of an aqueous viscous composition comprising carbonate and sodium alginate with granules, subtle granules, or powders comprising an acid;
2) a combination of an aqueous viscous composition comprising an acid and sodium alginate with granules, subtle granules, or powders comprising a carbonate; or
3) a combination of composite granules, subtle granules, or powders comprising a carbonate and an acid with an aqueous viscous composition comprising sodium alginate;

2-1C characterized in that the aqueous viscous composition is capable of

retaining carbon dioxide in the form of bubbles,

2-1D A kit capable of obtaining said carbon dioxide-containing viscous composition comprising the carbon dioxide in the form of bubbles by reacting carbonate and acid in an aqueous viscous composition,

B The constituent features of the invention according to Claim 4 of Patent 2 (hereinafter referred to as "Invention 2-4") are separately described as follows:

2-4A wherein the aqueous viscous composition comprises 2 % by weight or more of sodium alginate.

2-4B The kit of any one of Claims 1 to 3,

C The constituent features of the invention according to Claim 5 of Patent 2 (hereinafter referred to as "Invention 2-5")
are separately described as follows:

2-5A wherein the aqueous viscous composition comprises 87 % by weight or more of water.

2-5B The kit of any one of Claims 1 to 4,

D The constituent features of the invention according to Claim 7 of Patent 2 (hereinafter referred to as "Invention 2-7")
are separately described as follows:

2-7A comprising a carbon dioxide-containing viscous composition capable of obtaining the kit of any one of Claims 1 to 5.

2-7B Cosmetics

(5) Defendants' acts and the respective Defendants' products

A Defendants (excluding Defendant NeoChemir) NATURELAB. CO., LTD. (hereinafter referred to as "NatureLab"), LEVANTE Co., Ltd. (hereinafter referred to as "LEVANTE"), ESCO (hereinafter referred to as "ESCO"), Acnes Labo Inc. (hereinafter referred to as "Acnes Labo"), CEFINE (hereinafter referred to as "CEFINE"), Wamu Corporation (hereinafter referred to as "Wamu"), SUHADA COSMETICS CO., LTD. (Hereinafter referred to as "SUHADA COSMETICS"), and AVON PRODUCTS CO., LTD (hereinafter referred to as "AVON PRODUCTS") have produced and sold Defendants' products 1 to 9 and 11 to 18 as described in the column of "manufacturer and distributor, etc., " of "List of Defendants' products" of the attachment after the registered date of Patent 1 of January 7, 2011 as manufacturer and distributor, general sales agent, or seller.

Further, TRUST WINGS Co., Ltd. (Hereinafter referred to as "TRUST WINGS") has sold Defendant's products 3 and 4 immediately after the same date.

B Defendant NeoChemir has produced and sold Defendant's products 1, 3, 4, 8, and 15, and produced the granules to be used for Defendant's products 2, 5, 6, 7, 9, 11 to 14, and 16 to 18, and these were sold to Manufacturer and distributor of the respective products of Defendant et al. or third parties.

C All the respective Defendants' products have been sold with a set of two-pack of a gel and a granule, and the mixed component is as per the description of the columns "gels" and "granules" of the attachment "List of Defendants' products". All the respective Defendants' products are cosmetic kits for pack to be used by mixing gels comprising sodium hydrogen carbonate, sodium alginate, and water with granules comprising malic acid (Exhibits Ko 7, 8, 22, 26, 41).

D A gel of the respective Defendant's products are an aqueous viscous composition, sodium hydrogen carbonate is a carbonate, and malic acid is an acid. Therefore, the Defendant's products satisfy the constituent features 1-1B and 2-1B of Invention 1.

3 Issues

(1) Whether the respective Defendants' products fall within a technical scope of the respective inventions (the sufficiency of constituent features 1-1C and 2-1C) (Issue 1-1)

(2) Whether the respective Defendants' products fall within a technical scope of the respective inventions, and indirect infringement (the sufficiency of constituent features 1-1A, etc.) (Issue 1-2)

(3) Whether the respective Defendants' products cause the functions and effects of the respective inventions (Issue 2)

(4) Whether the respective patents should be invalidated as a result of a trial for patent invalidation (Issue 3)

A Incompletion of the respective inventions (Issue 3-1)

B Nonconformance to support requirement (Issue 3-2)

C Nonconformance to enablement requirement (Issue 3-3)

D Lack of Inventive Step over a main cited reference of Example 9 of Kanebo publication (Kanebo Example Invention) (Issue 3-4)

E Lack of Inventive Step over a main cited reference of Comparative Example 2 of Kanebo publication (Kanebo Comparative Example Invention) (Issue 3-5)

(5) Presence or absence of negligence of Defendants Cosmepro et al. (Issue 4)

(6) Establishment of joint tort (Issue 5)

(7) Amount of loss to Plaintiff (Issue 6)

A Article 102, paragraph (2) of the Patent Act (Issue 6-1)

B Article 102, paragraph (3) of the Patent Act (Issue 6-2)

No. 3 Allegation of issues by the parties

1 Issue 1-1 (the respective Defendants' products fall within a technical scope of the respective inventions (the sufficiency of constituent features 1-1C and 2-1C))

(Plaintiff's allegation)

(1) The respective inventions are the inventions of a kit consisting of a combination of an aqueous viscous composition (gel) comprising carbonate and sodium alginate with granules comprising an acid. The inventions are characterized in that an "aqueous viscous composition comprising sodium alginate" can generate carbon dioxide therein, and suppresses the diffusion of generated carbon dioxide into the air, which allows for the sealing of carbon dioxide in the form of bubbles.

Specifically, the technical meaning of the constituent elements of "retain carbon dioxide in the form of bubbles" in constituent features 1-1C and 2-1C lies in suppressing the diffusion of generated carbon dioxide into the air to retain carbon dioxide in the form of bubbles in an aqueous viscous composition. It is reasonable to construe that the constituent features are satisfied should an aqueous viscous composition have a viscosity to the extent that can retain carbon dioxide in the form of bubbles for a certain time when a user is scheduled to use products.

(2) All the respective Defendants' products contain a certain amount of sodium alginate in an aqueous viscous composition, so as to cause viscosity suitable for retaining carbon dioxide in the form of bubbles, and are designed to retain the generated carbon dioxide in the form of bubbles in the aqueous viscous composition. Further, mixing gels and granules of the respective Defendants' products may result in the generation of carbon dioxide in the form of bubbles in a gel, so that a generated carbon dioxide in the form of bubbles may be retained in the form of bubbles in a gel after mixing for about 30 minutes.

Therefore, the respective Defendant's products are obviously ones "capable of retaining a carbon dioxide in the form of bubbles", and the respective Defendant's products satisfy constituent features 1-1C and 2-1C.

(3) Defendants' allegation set forth below

A The respective inventions are inventions that aim to retain dissolved carbon dioxide in an aqueous viscous composition in a high concentration by suppressing the diffusion into the air of carbon dioxide generated in an aqueous viscous composition. The inventions premise that not all generated carbon dioxide is present in the form of bubbles, but a certain amount of carbon dioxide is dissolved in a gel. Further, the

above constituent features only specify that carbon dioxide can be retained in the form of bubbles in an aqueous viscous composition, but it is only a discussion without relation to the above constituent features as to in what manner carbon dioxide is absorbed transdermally.

Further, gel agents in the respective Defendants' products have a viscosity capable of retaining carbon dioxide in the form of bubbles by comprising a viscous agent such as sodium alginate together with water. The gel corresponds to an aqueous viscous composition "capable of retaining carbon dioxide in the form of bubbles" as recited in Inventions 1-1C and 2-1C. Defendants' allegation opposed to the aforementioned allegation is negated and refuted.

B Note that one with an increase rate in volume of 30% or less is described as "0" in the assessment of bubbling property in the examples of the description, but this is only a relative barometer for the comparison of bubbling properties of the plurality of examples. It cannot be said that one with an assessment of "0" does not cause the effects of the respective inventions. If a preparation should be conducted so that the extent of bubbling properties (an increased rate in volume) is to decrease the increase rate in volume to 30% or less, it does not mean that the function and effect of the respective inventions are not caused, but a negative assessment is made in the respective descriptions with regard to ones with an increase rate of volume of 30% or less.

(4) As aforementioned, the respective Defendants' products satisfy constituent features 1-1C and 2-1C.

(Defendants' allegation)

(1) Background, Disclosure of the Invention, and best mode for Carrying Out the Invention of [Detailed Description of the Invention] of description 1 (hereinafter these descriptions of description 1 are simply described as "Background art" etc.) and paragraphs [0004] to [0006], [0017], [0032], and [0066] of description 2 (hereinafter a paragraph number of description 2 may be simply described with parentheses in some cases) state that a pack utilizing carbonate gas or a foaming effect of carbonate gas generating substance is well-known in cosmetics for facial beauty treatment (This is evident from many prior art documents (See Exhibit Otsu E all 3 to 5)). According to Plaintiff's allegation in the prosecution history of the respective Patents, the respective inventions are characterized in the foaming and sustained bubbles of the respective descriptions, so that a sufficient amount of carbon dioxide in the form of bubbles can be absorbed transdermally in a sustained manner, and as a result of carbon dioxide in the form of bubbles effectively acting on an applied site, blood circulation etc. are promoted to cause an epoch-making therapeutic effect that has never seen before.

Further, the respective inventions are characterized in that sodium alginate is added in advance to an aqueous solution to form a gel for the purpose of "retaining" carbon dioxide in the form of bubbles.

Further, a characteristic point different from prior art of the respective inventions lies in that the respective inventions cause the effects of the respective descriptions by forming a viscous composition by "preliminarily" mixing sodium alginate with an aqueous composition including carbonate before the generation of carbon dioxide to retain bubbles of generated carbon dioxide without breaking bubbles, and effectively retaining carbon dioxide in the form of bubbles as compared to a carbon dioxide composition without mixing sodium alginate, to supply a sufficient amount of bubbling carbon dioxide to a subcutaneous tissue.

In view of the above, "capable of retaining carbon dioxide in the form of bubbles" means "retaining carbon dioxide in the form of bubbles so that a sufficient amount of bubbling carbon dioxide may be supplied to a subcutaneous tissue in which bubbling is observed sustainably and sufficiently to the extent that may cause the effects of the respective descriptions such as skin improving action and partial adiposeness improving effects". The term "sustainably and sufficiently" used herein means "to the extent that may cause the effects of the respective descriptions such as skin improving action and partial adiposeness improving effects". For this goal, at least "sufficient and sustained bubbling" of the respective description should be recognized.

(2) In the respective inventions, "aqueous viscous composition is characterized in that it may retain carbon dioxide in the form of bubbles" definitely described in the scope of claims does not simply mean any form of bubbles is present in a gel. Specifically, regarding the respective inventions, carbon dioxide retained in the form of bubbles and a viscous composition including the same are described in the description as satisfying two barometers of bubbling and sustainability. On the contrary, a composition not satisfying these barometers is not described as causing the function and effect of the respective inventions even if carbon dioxide bubbles should be present.

Further, some sort of quantification should be naturally required in the construction of constituent features 1-1C and 2-1C due to the necessity of distinction from prior art. Further, it is only a test example in the respective descriptions that supports such a "quantification". Further, it is extremely natural to think that the one with evaluation criterion 1 in the test example of an increase rate of 30% or less; i.e., one with an evaluation of bubbling "0", includes prior art that may not achieve the effect of the respective inventions due to an insufficient retained amount of carbon dioxide,

which does not fall within a technical scope of the respective inventions (excluded from the scope of the respective inventions, and thus an enforcement is not permitted).

(3) When it comes to bubbling of the respective Defendants' products, the volume increase rate of many of them is only 10% or so. It remains 27% at the most. Both are ranked as "0" of the above evaluation criterion 1. Therefore, the respective Defendants' products neither achieve massaging effect (blood circulation promotion) due to carbon dioxide in the form of bubbles nor cause the effects described in the respective descriptions.

(4) Therefore, the respective Defendant's products are not ones "capable of retaining carbon dioxide in the form of bubbles", nor do the respective Defendant's products satisfy the constituent features 1-1C and 2-1C.

2 Issue 1-2 (Whether the respective Defendants' products fall within a technical scope of the respective inventions, and indirect infringement (the sufficiency of constituent feature 1-1A, etc.))

(Plaintiff's allegation)

(1) The sufficiency of constituent feature 1-1A

The respective Defendants' products are products that have an activation of fat metabolism and a partial slimming effect such as facial slimming, facial lifting up, and slimmed face contour Commercial advertisements have been created for these products in product brochures and on the internet to emphasize a partial slimming effect. Further, it was widely-known to consumers that a carbonate pack (carbonate gas pack) had a partial slimming effect and a facial contour slimming effect. On a website of Defendant NeoChemir, who is a developer of the respective Defendants' products, it is heavily promoted that a general carbonate gas pack has a facial contour slimming effect and a partial slimming effect. Therefore, the respective Defendants' products are kits for providing a gel containing carbon dioxide to be used as a gel cosmetic having a partial slimming effect such as activation of fat metabolism, improvement, lift up, and smaller face. These kits correspond to "partial adiposeness improvement" of constituent feature 1-1A, and gel cosmetics prepared from the respective Defendants' products obviously correspond to "cosmetics for improvement of partial adiposeness".

In addition to the above, in view of the aforesaid allegation, the respective Defendants' products satisfy constituent feature 1-1A.

(2) The sufficiency of constituent feature 1-1D

In view of the aforesaid allegation, the respective Defendants' products satisfy constituent feature 1-1D. Therefore, the respective Defendants' products satisfy constituent feature 1-1, and fall within a technical scope of Invention 1-1.

(3) The sufficiency of constituent features 1-4 and 1-5

In view of the components and structures of the respective Defendants' products, a gel comprises 2 % by weight or more of sodium alginate and 87 % by weight or more of water. Therefore, the respective Defendants' products satisfy constituent features 1-4 and 1-5, and fall within a technical scope of Inventions 1-4 and 1-5.

(4) Indirect infringement of Invention 1-7

The respective Defendants' products have been sold as a kit of a gel and a granule. These products are intended to mix two packs by the consumer himself/herself who has purchased the products to produce a gel cosmetics for use. In the respective Defendants' products, there is no use other than the production of cosmetics by mixing two packs. Further, it is obvious that two-pack kit is essential for the solution of problems to be solved by Invention 1-7.

Further, Defendants are selling products, while positively advertising that the respective Defendants' products have a partial slimming effect. It is naturally recognized that the respective Defendants' products are to be used for the production of "cosmetics for the improvement of partial adiposeness".

Therefore, the act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Invention 1-7 (Article 101, item (i) or (ii) of the Patent Act).

(5) Indirect infringement of Invention 1-8

The respective Defendants' products have been sold as a kit of a gel and a granule. Cosmetics produced by mixing both agents are mainly used for the improvement of partial adiposeness of the face. Therefore, the act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Invention 1-8 (Article 101, item (i) or (ii) of the Patent Act).

(6) Indirect infringement of Invention 1-9

The respective Defendants' products have been sold as a kit of a gel and a granule. These products are intended to mix two packs by the consumer himself/herself who has purchased the products to prepare a gel cosmetics including carbon dioxide for use. In the respective Defendants' products, there is no use other than the preparation of gel cosmetics including carbon dioxide by mixing two packs. Further, it is obvious that two-pack kit is essential for the solution of problems to be solved by Invention 1-9.

Further, Defendants are selling products, while positively advertising that the respective Defendants' products have a partial slimming effect. It is naturally recognized that the respective Defendants' products are to be used for the preparation of "cosmetics for the improvement on partial adiposeness".

Therefore, the act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Invention 1-9 (Article 101, item (iv) or (v) of the Patent Act).

(7) Indirect infringement of Invention 1-12

The respective Defendants' products contain 2 % by weight or more of sodium alginate in a gel. Therefore, the act of producing and selling the respective Defendants' products also corresponds to an act of indirect infringement of Invention 1-12 (Article 101, item (iv) or (v) of the Patent Act).

(8) Indirect infringement of Invention 1-13

The respective Defendants' products contain 87 % by weight or more of water in a gel. Therefore, the act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Invention 1-13 (Article 101, item (iv) or (v) of the Patent Act).

(9) The sufficiency of constituent feature 2-1A

In view of the aforesaid allegation 1, the respective Defendants' products satisfy constituent feature 2-1A.

(10) The sufficiency of constituent feature 2-1D.

In view of the aforesaid allegation 1, the respective Defendants' products satisfy constituent feature 2-1D. Therefore, the respective Defendants' products satisfy constituent feature 2-1, and fall within a technical scope of Invention 2-1.

(11) The sufficiency of constituent features 2-4 and 2-5

The respective Defendants' products comprise a gel comprising 2 % by weight or more of sodium alginate and 87 % by weight or more of water. Therefore, the respective Defendants' products satisfy constituent features 2-4 and 2-5, and fall within a technical scope of Inventions 2-4 and 2-5.

(12) Indirect infringement of Invention 2-7

The respective Defendants' products are sold as a kit of a gel and a granule, and are intended to mix two packs by the consumer himself/herself who has purchased the products to produce a gel cosmetics for use. In the respective Defendants' products, there is no use other than the production of cosmetics by mixing two packs. Further, it is obvious that two-pack kit is essential for the solution of problems to be solved by Invention 2-7.

Further, Defendants recognize that the respective Defendants' products are used for the production of "cosmetics".

Therefore, the act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Invention 2-7 (Article 101, item (i) or

(ii) of the Patent Act).

(13) Regarding the act of production and sales of granules by Defendant NeoChemir Defendant NeoChemir is producing and selling granules of Defendant's products 2, 5, 6, 7, 9, 11 to 14, and 16 to 18. The granules are products intended for selling in combination with a gel. The above Defendant's products consisting of granules and gels do fall within a technical scope of Inventions 1-1, 1-4, and 1-5 and Inventions 2-1, 2-4, and 2-5. Further, the granules are not intended for any use other than the use in combination with a gel, but only correspond to use in the production of the above Defendant's product. Therefore, the act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of the respective inventions (Article 101, item (i)) of the Patent Act.

Further, Inventions 1-1, 1-4, and 1-5 and Invention 2-1, 2-4, and 2-5 are inventions of kit in combination with an aqueous viscous composition and a granule. Therefore, granules produced by Defendant NeoChemir correspond to ones essential for the solution to the problem to be solved by these inventions. Further, Defendant NeoChemir is in a position of technically collaborating with the other Defendants and conducting the development of carbonate gel pack. Thus, Defendant NeoChemir naturally recognizes that granules provided by itself are utilized for the above Defendants' products. Therefore, the act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of the respective inventions (Article 101, item (ii) of the Patent Act).

(Defendants' allegation)

Defendant NeoChemir recognizes that the granules of the products alleged by Plaintiff are produced and sold, and the remaining allegation by Plaintiff is negated and refuted.

At least in recent times, in a similar manner to carbonate spring, it is supposed that carbonate gas "pack" with carbonate gas concentration of not more than 0.2% does not have a partial slimming effect, but only have a swelling removing effect. Further, the respective Defendants' products are cosmetics that have effects as per described in the advertisement. Not all the cosmetics are cosmetics for the improvement of partial adiposeness.

3 Issue 2 (Whether the respective Defendants' products cause the functions and effects of the respective inventions)

(Defendants' allegation)

The respective Defendants' products have been developed with a concept of "retaining carbon dioxide in the form of bubbles may become a barrier for transdermal

absorption of carbon dioxide". The respective Defendants' products try to dissolve generated carbon dioxide into a gel, not in the form of bubbles. Thus the technical idea is fundamentally different from that of the respective inventions.

Further, granules of the respective Defendants' products contain lactose. This has an effect of slowly releasing an acid into an aqueous viscous composition, and suppresses the generation of carbon dioxide in the form of bubbles, thereby inhibiting the effect of the respective inventions.

As aforementioned, bubbling of the respective Defendants' products is ranked as "0" in evaluation criterion 1 of the test example, which should be evaluated as not causing the function and effect of the respective inventions. It can never be said that one not causing the function and effect should fall within a technical scope of the respective inventions.

(Plaintiff's allegation)

Defendants' allegation is negated and refuted. In view of the aforesaid item 1 (Plaintiff's allegation), the respective Defendants' products cause the function and effect of the respective inventions.

4 Issue 3-1 (Incompletion of the respective inventions)

(Defendants' allegation)

(1) The respective descriptions describe a test example together with examples. The respective test examples demonstrate that the respective inventions cause a desired technical effect. It is indefinite as to what kind of test result serves as a basis. The test examples do not have a comparative test, nor do they have a description of evaluation method, prosecution observation, etc. and significantly lack specificity. Therefore, the above test examples have no credibility as a whole. It is indefinite as to whether or not the respective test examples were actually implemented.

Further, even if an experimentation or a test should be conducted, it is indefinite as to whether compositions used in the respective test examples were really the respective compositions described in the examples.

Furthermore, in a case where an experiment or a test was conducted, there is no submission of original data of the respective test examples normally present, or documentation, etc. of subject information. In view of the aforesaid fact, it cannot be believed that the results of the respective test examples are accurately described in the respective descriptions.

Further, it cannot be seen from the descriptions other than the respective test examples in the respective descriptions that a technical effect expected from the respective inventions was actually confirmed for a composition, and even at the present

time, there is no fact that a therapy utilizing the efficacy of carbon dioxide is widely practiced for various skin diseases, nor that such therapeutic agent is widely used.

(2) Therefore, Plaintiff fails to establish as a Patentee that the respective inventions can cause a desired technical effect, and thus the inventions are incomplete as inventions, and thus the inventions do not correspond to the "invention" as specified in Article 29, paragraph (1) of the Patent Act. Therefore, the respective inventions have reasons for invalidation of incomplete invention.

(Plaintiff's allegation)

The respective descriptions have 33 test examples. All of these test examples accurately describe the results of the tests that the inventors appropriately conducted by utilizing compositions of the examples of the description. Further, original data with respect to the test in the description is a common descriptive method.

Therefore, the respective inventions are completed.

Note that Defendant et al. alleges the incompletion of the respective inventions as a defense under Article 104-3, paragraph (1) of the Patent Act. Therefore, a burden of proof is obviously on Defendant with regard to the existence or non-existence of such reasons for invalidation.

5 Issues 3-2 (Support requirement)

(Defendants' allegation)

(1) The respective descriptions have 299 examples. There is only an experimental result of bubbling and sustainability. It is indefinite as to whether or not the problem of the respective inventions to remedy a number of diseases, etc. in the respective descriptions may be solved.

In this regard, the respective descriptions have 33 test examples. Among them, there is some description that a therapeutic effect was confirmed for a specific symptom (only one). There is no test example showing that all the problems to be solved by the respective inventions have been solved. Further, the examples used in the test example are only 1, 8, 18, 20, 31, 135, 170, 296, 297, and 298. It is indefinite as to whether or not there is a remedial effect on a specific symptom in the other examples. If the respective inventions are completed on the basis of medical findings, satisfying the support requirement require description to the extent of describing a result according to a pharmacological test. The respective descriptions are totally silent about that.

Furthermore, the respective descriptions are silent about action mechanism (mechanism) of carbon dioxide in the form of bubbles healing the above diseases. It is possible that any factor other than transdermal absorption of carbon dioxide in the

form of bubbles acts on healing of the above diseases.

In addition to the above, in view of the description of the aforesaid item 4 (Defendants' allegation), it can never be said that a person skilled in the art could recognize that all the examples could solve many problems listed in the respective inventions even if a target for consideration should be limited to the examples. Needless to say, it cannot be said that a person skilled in the art could recognize from the statement of the detailed explanation of the invention and common general knowledge that the respective inventions, without limitation to the compositions of carbonate and acid, could solve the problem.

Even if a person skilled in the art could recognize that many problems to be solved by the respective inventions might be solved, it holds true for only the invention disclosed as a specific example. Therefore, a conclusion that the support requirement is not satisfied does not change.

(2) In addition to the respective descriptions, a reference is made to the statement in prosecution histories of the respective Patents of Plaintiff, even if the test examples of the respective descriptions were true, the significant function and effect of the respective inventions demonstrated by the test example cannot be logically explained from a simple blood circulation promoting effect. Another extra factor might be functioning. Consequently, this "extra factor" or specific constituent elements causing the same should be recited in the scope of claims as matters specifying the invention, whereas not only the scope of the claims but also the respective descriptions fail to describe such constituent elements with respect to the respective Patents.

Therefore, even if a description of test example were true, the recitation of the scope of claims of the respective patents has a broader scope as compared to the invention described in the respective descriptions. Thus a person skilled in the art could not recognize that a problem might be solved.

(3) As seen above, the respective inventions have a reason for invalidation of nonconformance to the support requirement.

(Plaintiff's allegation)

(1) The description 1 discloses a result of 33 test examples which demonstrate efficacy on diseases recited in the scope of claims. Thus Invention 1 obviously satisfies the support requirement.

Further, regarding the above argument by Defendants, in order that a person skilled in the art could recognize that a problem to be solved by the invention may be solved, it is unnecessary to know an action mechanism (mechanism) for healing the diseases, etc. The description of the action mechanism cannot be a condition for

satisfying the support requirement. Further, the detailed description of the invention of Patent 1 discloses an example in which sodium hydrogen carbonate and sodium carbonate are used. When another carbonate is used, similarly to sodium hydrogen carbonate and sodium carbonate, a person skilled in the art could have easily recognized in view of the common general knowledge at that time that the mixture with an acid results in the generation of carbon dioxide.

(2) The detailed description of the invention of description 2 describes a problem to be solved by the invention ([0004], [0005]). An efficacy and effect of carbon dioxide-containing viscous composition is shown as a means for solving the problem ([0006]). A test result is disclosed as a test example for representative diseases, etc. While a test result is not described for all diseases, it can be said that the diseases are obviously healed or alleviated by "a suppressing action on itching for which an antihistamic agent and antiallergic agent, non-steroidal antiinflammatory agent and steroidal agent for external use are ineffective, anti-inflammatory action, wound healing promoting action, skin improving effect, partial adiposeness dissolving action, and transdermal absorption promoting effect". Therefore, the efficacy and effect of carbon dioxide-containing viscous composition are described in description 2. In view of the common general knowledge as of the filing, a person skilled in the art could easily recognize that a healing effect is caused for the other diseases for which a test result is not described, similar to the diseases for which a test result is described.

(3) In addition to the above, according to the description of the aforesaid item 4 (Plaintiff's allegation), it is obvious that the respective patents satisfy the support requirement.

6 Issues 3-3 (Violation of Enablement Requirement)

(Defendants' allegation)

(1) The respective inventions list healing, etc. of many diseases as a use, whereas it should be construed that the Detailed Description of the Invention provides description of inventions for defining a use over such a wide range to the extent that supports the fact that a desired function and effect of the invention is caused for general use.

(2) According to the disclosure of the invention of description 1 and Best Mode for Carrying Out the Invention and the descriptions of [0006], [0017], and [0066], desired function and effect of the respective inventions are to heal the above diseases, etc. by sustainably retaining a large amount of carbon dioxide in the form of bubbles in a carbon dioxide-containing viscous composition.

But the respective descriptions only describe the names of substances

constituting the composition of the respective inventions and their compositions, or the method for the use of the substances. They are silent about the mechanism of the above function and effect. Further, even if the above diseases were healed, it might possibly be attributed to any factor other than transdermal absorption of carbon dioxide in the form of bubbles.

(3) In addition to the above, in view of the description of the aforesaid items 4 and 5 (Defendants' allegation), it cannot be said that the respective description describes to the extent that supports the fact that the above function and effect are caused for many general diseases listed in the respective inventions. Thus the respective inventions have reasons for invalidation of nonconformance to the enablement requirement.

(Plaintiff's allegation)

The respective descriptions describe the object of invention (background of the description 1, [0004], [0005]), show the efficacy and effect of a carbon dioxide-containing viscous composition (the disclosure of the Invention of description 1, [0006]), disclose a test result for representative diseases, and demonstrate that there is a healing effect on the diseases (test examples 1 to 33).

The respective descriptions fail to describe a test result for all the diseases described in the description; however, they describe the efficacy and effect on a carbon dioxide-containing viscous composition. Therefore, it is easily recognizable that a healing effect is caused for the other diseases, similar to the diseases for which a test result is described.

In addition to the above, according to the description of the aforesaid items 4 and 5 (Plaintiff's allegation), it can be said that a person skilled in the art could sufficiently implement the respective inventions with the respective descriptions, and it is obvious that the respective patents satisfy the enablement requirement.

7 Issue 3-4 (lack of inventive step over a main cited reference of Kanebo's publication, Example 9 (Kanebo example invention))

(Defendants' allegation)

(1) Technical meaning of Invention 1-1

According to the result of a verification experiment (Exhibit Otsu A2), carbon dioxide bubbles do not contribute to transdermal absorption of carbon dioxide, but rather interfere with the action. Further, according to the result of the verification experiment (Exhibit Otsu A3), a transdermal absorption rate of carbon dioxide is not significantly increased, nor may carbon dioxide bubbles be significantly increased as an aqueous viscous composition in which sodium alginate is preliminarily mixed with

water.

(2) Lack of Inventive step of Invention 1-1

Given the fact of the above item (1), after consideration of well-known art described in the publicly known document, Invention 1-1 was easily conceivable as of the filing on the basis of Example 9 (hereinafter referred to as "Kanebo example invention") of the publication of Japanese Unexamined Patent Application Publication No. 1988-310807 (Exhibit Otsu A102 and Exhibit Otsu E all 6, hereinafter referred to as "Kanebo publication") with an Applicant of Kanebo, Ltd.

A Common points and different features between the constituent elements of Invention 1-1 and the Kanebo example invention are set forth as below:

(Common points)

[i] As for the constituent feature 1-1A

- A kit including the use of cosmetics for obtaining a carbon dioxide-containing viscous composition.

[ii] Constituent elements 1-1B, 1-1C and 1-1D

- A combination of a first agent of an aqueous agent and a second agent of granules (solid agent: granules, fine grains and powders).

- Either of a first agent and a second agent contains four components of (carbonate) sodium hydrogen carbonate, sodium alginate, citric acid, and water.

- A first agent contains water.

- A carbonate and an acid are separately mixed into a first agent and a second agent.

- A kit capable of obtaining a carbon dioxide-containing viscous composition comprising the carbon dioxide in the form of bubbles by mixing a first agent and a second agent to react a carbonate with an acid.

- Carbon dioxide generated upon the mixture of a first agent and a second agent can be retained in the form of bubbles in an aqueous viscous composition.

(Different features)

[i] Different feature 1: In Invention 1-1, sodium alginate is preliminarily mixed with water to form an aqueous viscous composition, whereas, in the Kanebo example invention, sodium alginate and water are divided into a first agent and a second agent, and the mixing results in the formation of an aqueous viscous composition.

[ii] Different feature 2: In Example 1 of Invention 1-1, polyethyleneglycol is not contained as a component, but polyethyleneglycol is contained in a second agent in the Kanebo example invention.

[iii] Different feature 3: In Invention 1-1, the use of kit is cosmetics for the

improvement on partial adiposeness, or a pharmaceutical composition for the treatment of athlete's foot, atopic dermatitis, or bedsore, whereas the Kanebo example invention is a bubbling cosmetic.

B Evaluation of different features

(A) As for Different feature 1

a Prior to the mixture of a first agent and a second agent, it is a matter of common technical knowledge of a person skilled in the art that water must not be mixed together with the agents, in order to prevent the reaction of a carbonate and an acid. Carbonate and acid may be filled in either a first agent or a second agent so long as they are not mixed with water. This is within the body of common technical knowledge of a person skilled in the art, and merely a selective matter or only a design matter.

Further, according to the experiment of Exhibit Otsu A3, there is no significant difference in a generated amount of bubbling of carbon dioxide between preliminary preparation and simultaneous preparation of water. Furthermore, in terms of transdermal absorption amount, it can be said Invention 1-1 is inferior, not superior. Therefore, it is technically insignificant that Invention 1-1 preliminary prepares an aqueous viscous composition. Therefore, preparing in advance is only a selective matter for design.

Further, first of all, it is obvious that carbon dioxide bubbles do not contribute to transdermal absorption. Therefore, the constituent features of carbon dioxide bubbles as specified in the constituent features 1-1C and 1-1D are insignificant technical limitations. In the presence of water of aqueous viscous composition, carbon dioxide is generated. Therefore, bubbles are generated only as a useless product, due to the viscosity of a viscous composition. Therefore, it is merely a selective matter for design to form carbon dioxide bubbles.

In summary, in Invention 1-1, there is no technical significance to retain carbon dioxide bubbles, nor there is technical significance to prepare an aqueous composition in advance. It is a well-known matter of art to make one agent an aqueous viscous composition. Therefore, in Invention 1-1, it can be said that the constitution of retaining carbon dioxide and the constitution of preparing in advance an aqueous composition are merely design matters for a person skilled in the art to select as necessary. Regarding Different feature 1, it can be said that a person skilled in the art would easily conceive of it on the basis of the Kanebo example invention.

Further, constituent feature 1-1B specifies two combinations. These are the same in that carbon dioxide is generated in a liquid agent by a reaction of carbonate and

acid during mixing. Thus the selection is merely a design matter for a person skilled in the art.

b Even if the difference is recognized as alleged by Plaintiff, it remains a design matter to overcome the difference, because it is merely a selection of combination of agent types as to whether carbonate and sodium alginate are formed into a gel or otherwise a solid; a person skilled in the art who aims a technical variation would try a combination of various agent types (only four combinations that premise two-pack type in which carbonate and acid are separated from each other) without particularly considering a relationship between problems or a difference in function and effect.

Further, even if it cannot be said that it is a design matter to overcome the different features, it is a commonly used art to preliminarily dissolve a thickener such as sodium alginate into water. Therefore, it is easy to overcome Different feature 1 by applying this. By definition, commonly used art is a technique used daily. Therefore, as long as there is no technical barrier in its application, a person skilled in the art would try without any particular motivation.

The Kanebo example invention ensures stability of bubbles by the viscosity of a thickener to improve the ability to store carbonate gas. There is no technical barrier to apply the above commonly used art to the Kanebo example invention, and it can be said that there is a motivation. Further, there is no disincentive.

(B) As for Different feature 2

First of all, the respective description shows a case of including polyethyleneglycol as a matrix (see the production methods of Examples 109 to 144), and further Invention 1-1 does not exclude the possibility of including polyethyleneglycol shown in the examples. Therefore, components included in either a first agent or a second agent can be seen as substantially identical to each other.

Therefore, Different feature 2 is not a substantial difference.

(C) As for Different feature 3

It is recited in the scope of claims of Exhibit Otsu A5 that carbon dioxide solution having a blood circulation promoting effect obtained by a composition generating bubbles of carbon dioxide through a reaction of a carbonate and an acid in water can be used as a therapeutic agent for bedsore. Further, it is also described in Exhibit Otsu A6, page 849, Tables 10 to 12, respectively, that the use of an artificial carbonate gas bathing agent that generates bubbles of carbon dioxide by a reaction of a carbonate and an acid in water improves a symptom of atopic dermatitis without the use of oil moisturizer. Thus a person skilled in the art who read the description of these publicly

known documents could have easily conceived of using a carbon dioxide-containing viscous composition obtained by a kit of the Kanebo example invention as a pharmaceutical composition for the treatment of atopic dermatitis or bedsore.

Further, carbon dioxide has a blood circulation promoting effect, as described in Exhibit Otsu E all 3, Exhibit Otsu A5, and Exhibit Otsu A6. Further, it is widely known to a person skilled in the art that the promotion of blood circulation may promote metabolism, and as a result of decreasing subcutaneous adipose, beauty slimming is caused. Therefore, a person skilled in the art could have easily conceived of using a carbon dioxide-containing composition having a function of improving blood circulation of skin obtained by a kit of the Kanebo example invention as a cosmetic for the improvement of partial adiposeness.

(3) Lack of Inventive step of Invention 1-4

Invention 1-4 is "The kit of any of Claims 1 to 3, wherein the aqueous viscous composition comprises 2 % by weight or more of sodium alginate." Such technical limitation is publicly known and a well-known fact. Further, when it comes to weight percent ratios of water, sodium hydrogen carbonate, and sodium alginate in an aqueous viscous composition produced in the Kanebo example invention, sodium alginate is calculated as 4.8 % by weight.

Therefore, the technical limitations of Invention 1-4 have no technical meaning or are disclosed in Kanebo's examples invention.

(4) Lack of Inventive step of Invention 1-5

Similar to the above item (3), when it comes to a weight percent ratio in an aqueous viscous composition produced in the Kanebo example invention, water is calculated as 91.3 % by weight. Therefore, the technical limitations of Invention 1-5 are disclosed in Kanebo's examples invention.

(5) Lack of Inventive step of Invention 1-7

As discussed in the above (2)B(C), a person skilled in the art could have easily conceived of using a carbon dioxide-containing composition having a function of improving blood circulation of skin obtained by a kit of the Kanebo example invention as a cosmetic for the improvement of partial adiposeness. Invention 1-7 only specifies a kit as a cosmetic for the improvement of partial adiposeness. Thus obviously it does not involve an inventive step.

(6) Lack of Inventive step of Invention 1-8

The Invention limits a part for the improvement of adiposeness of Invention 1-7 lacking inventive step to only the "face, leg, arm, abdomen, flank, back, neck, or jaw", which is obvious. Thus obviously the Invention does not involve an inventive step.

(7) Lack of Inventive step of Invention 1-9

Invention 1-9 is considered to be the same invention from a viewpoint of "a method invention" instead of a "product invention". Therefore, for a similar reason to Invention 1-1, it does not involve an inventive step.

(8) Lack of Inventive step of Invention 1-12

Invention 1-12 merely replaces Invention 1-4 with a method invention. They are substantially the same. Therefore, for a similar reason to that for Invention 1-4, it does not involve an inventive step. Further, Invention 1-12 encompasses Inventions 1-10 and 1-11. They only replace Invention 1-2 or 1-3 with a method invention instead of a product invention. They are substantially the same.

(9) Lack of Inventive step of Invention 1-13

Invention 1-13 merely replaces Invention 1-5 with a method invention. They are substantially the same. Therefore, for a similar reason to that for Invention 1-5, it does not involve an inventive step.

(10) Lack of Inventive step of Invention 2-1

There is no particular different feature between Invention 2-1 and Invention 1-1. Therefore, the discussion about Invention 1-1 applies here as well.

(11) Lack of Inventive step of Inventions 2-4 and 2-5

Inventions 2-4 and 2-5 have completely the same technical limitations as Inventions 1-4 and 1-5. Therefore, the discussion about Inventions 1-4 and 1-5 applies here as well.

(12) Lack of Inventive step of Invention 2-7

Invention 2-7 is a use invention that limits the use of carbon dioxide-containing viscous compositions of Inventions 2-1 to 2-5 to cosmetics and lacks an inventive step. It is substantially the same as a kit of Invention 2-1 being "a kit for obtaining carbon dioxide-containing viscous compositions to be used as a cosmetic".

As already discussed in the allegation of lack of inventive step of Invention 1-1, a person skilled in the art could have easily conceived of using a carbon dioxide-containing composition having a function of improving blood circulation of skin obtained by a kit of the Kanebo example invention as a cosmetic for the improvement on a partial adiposeness. Invention 2-7 only specifies a kit as a cosmetic. Thus obviously it does not involve an inventive step.

(13) For the above reason, the above respective inventions were easily conceivable by applying well-known art to the Kanebo example invention. Thus it has reasons for invalidation due to lack of inventive step.

(Plaintiff's allegation)

(1) Defendants' allegation is negated and refuted.

(2) Inventive step of Invention 1-1

A It is an essential requirement in the Kanebo example invention to cover sodium hydrogen carbonate and sodium alginate with a solid polyethyleneglycol at room temperature. In a case of simply mixing sodium hydrogen carbonate, sodium alginate, and a solid polyethyleneglycol at room temperature, it has significantly poor gas retainability and results in poor storage stability (Kanebo publication, Comparative Example 1). Therefore, integrating Different features 1 and 2 as Defendant alleges, it is more appropriate to find the following different features:

Different feature 1' "Carbon dioxide-containing viscous composition" according to Invention 1-1 consists of a combination of an aqueous viscous composition comprising carbonate, sodium alginate, and granules (fine grains, powders) comprising an acid, whereas "an on-demand mixing-type bubbling cosmetic" according to the Kanebo example invention comprises an aqueous solution obtained by dissolving an acidic substance into water as a first agent and a solid covered with a solid polyethyleneglycol at room temperature comprising sodium alginate and carbonate as a second agent to be mixed and produced in use.

B Different feature 1 or Different feature 1'

Defendants allege that the difference of Different feature 1 is merely a design matter; however, the difference in constituent features according to Different feature 1 or Different feature 1' cannot be said as a matter to be considered naturally in specifically applying a technique, but features of an important technical significance. Thus these features are not just design matters.

Specifically, the Kanebo example invention is an invention with a liquid first agent and a solid second agent being a technical requirement. On the basis of such presumption, a technical device is made to cover a carbonate and a water-soluble polymer with a solid polyethyleneglycol at room temperature in order to improve gas storage ability as much as possible. In view of the technical significance of such Kanebo example invention, in the Kanebo example invention consisting of a liquid first agent and a solid second agent covered with a solid polyethyleneglycol at room temperature, it is a change that loses a technical significance of the Kanebo example invention to preliminarily mix a thickener included in the second agent with the first agent to make the first agent of an aqueous viscous composition (a gel).

Further, if a design modification is made as Defendants allege, the agent types of a first agent and a second agent are changed. In addition to a method for use and a method for storage, in terms of function and effect, it becomes a completely different

cosmetic. As of the priority date of Patent 1 of November 7, 1997, it could not be said that an on-demand mixing-type bubbling cosmetics consisting of a combination of gels and granules were well-known. Therefore, it can never be believed that a person skilled in the art who knew of the Kanebo example invention could have easily conceived of changing a first agent of the invention with a preliminarily prepared gel comprising sodium alginate. Defendants allege that it was easily conceivable by the application of a commonly used art. In view of the aforementioned, there is no motivation to apply a commonly used art. On the contrary, such application has a disincentive.

Furthermore, in a bubbling cosmetic of the Kanebo example invention, a carbonate and an acid react, and the resultant carbon dioxide diffuses into air to be lost while a thickener contacts water. As a result, carbon dioxide in the form of bubbles cannot be retained sufficiently. When a formulating technique described in the Kanebo publication is fully used, it is difficult to effectively seal and retain carbon dioxide in the form of bubbles in an aqueous viscous composition comparable to the respective inventions. As aforementioned, the constitution of Different feature 1 is a constitution of technical significance that carbon dioxide is effectively sealed in an aqueous viscous composition.

C Regarding Different feature 3

The description of the Kanebo publication fails to suggest the use of Different feature 3. It cannot be said that the other publicly-known document as Defendant points out has a sufficient suggestion of the use of Different feature 3.

Therefore, the use of Invention 1-1 for the use in "a cosmetic for the improvement of partial adiposeness or a pharmaceutical composition for the treatment of athlete's foot, atopic dermatitis, or bedsore" was not easily conceivable by a person skilled in the art.

D After the application of Patent 1, when Plaintiff started sales of the products utilizing Invention 1, and the number of sales of products is growing with a focus on its efficacy to achieve a commercial success. Considering such commercial factors, Invention 1-1 can solve a technical problem that has not been overcome ever before, and obviously involves an inventive step.

(3) The inventive step of Inventions 1-4, 1-5, 1-7 to 1-9, 1-12, and 1-13

These inventions are inventions depending from Invention 1-1, and thus were obviously not easily conceivable on the basis of the Kanebo example invention.

(4) Inventive step of Invention 2-1

Comparing with the Kanebo example invention, a difference between Inventions

1-1 and 2-1 that may affect the determination of inventive step lies in whether or not a limitation is made of the use of "carbon dioxide-containing viscous composition to be used for cosmetics for the improvement of partial adiposeness or pharmaceutical compositions for the treatment of athlete's foot, atopic dermatitis or bedsore".

Further, as discussed in the above item (2), regarding the point that it cannot be said that Different feature 1 or Different feature 1' are design matters, and regarding the point of commercial success, the same holds true for Invention 2-1. Therefore, Invention 2-1 was also an invention that was not easily conceivable by a person skilled in the art on the basis of the Kanebo example invention, similar to Invention 1-1.

(5) Inventive step of Inventions 2-4, 2-5, and 2-7

These inventions are inventions depending from Invention 2-1, and thus were obviously not easily conceivable by a person skilled in the art on the basis of the Kanebo example invention.

(6) For the above reason, the above respective inventions involve inventive step.

8 Issue 3-5 (lack of inventive step over a main cited reference of Kanebo's publication, Comparative Example 2 (Kanebo comparative example invention))

(Defendants' allegation)

(1) Lack of Inventive step of Invention 1-1

A Comparative Example 2 of Kanebo publication discloses an invention constituting the following respective constituent features (hereinafter referred to as "Kanebo comparative example invention").

(A) A two-pack bubbling cosmetics for activating the skin through a blood circulation promoting effect of carbonate gas,

(B) consisting of: a combination of a solid comprising a carbonate and a water-soluble polymer of sodium alginate; and an aqueous solution comprising an acid,

(C) characterized in that a viscous composition produced by mixing a solid containing a carbonate and a water-soluble polymer of sodium alginate with an aqueous solution containing an acid may retain carbonate gas,

(D) a two-pack bubbling cosmetic capable of obtaining the above carbonate gas-containing viscous composition comprising carbonate gas by reacting a carbonate and an acid in the above viscous composition.

B The constituent features of the Kanebo comparative example invention (A) and (D) correspond to constituent features 1-1A and 1-1D, respectively.

On the other hand, comparing the constituent feature 1-1B with the constituent feature (B) of the Kanebo comparative example invention, an agent type of a composition is a solid containing a carbonate and sodium alginate in the Kanebo

comparative example invention, whereas an agent type of the composition is an aqueous viscous composition in Invention 1-1. Further, an acid-containing agent is an aqueous solution in the Kanebo comparative example invention, whereas an agent type of an acid-containing agent is granules (fine grains, powders) in Invention 1-1 (this difference is hereinafter referred to as "Different feature 1").

Further, comparing constituent feature 1-1C with constituent feature (C) of the Kanebo comparative example invention, constituent feature (C) of the Kanebo comparative example invention of "a viscous composition produced by mixing a solid containing a carbonate and a water-soluble polymer of sodium alginate with an aqueous solution containing an acid may retain carbonate gas" corresponds to constituent feature 1-1C of "an aqueous viscous composition is characterized in that it can retain carbon dioxide in the form of bubbles". First of all, the Kanebo comparative example invention produces a viscous composition by mixing a solid containing a carbonate and a water-soluble polymer of sodium alginate, and an aqueous solution containing an acid, whereas in Invention 1-1, a composition comprising sodium alginate is preliminarily in a state of aqueous viscous composition before mixing (hereinafter this difference is referred to as "Different feature 2").

C As aforementioned, the Kanebo comparative example invention and Invention 1-1 are different from each other in terms of the difference in agent types of the agents constituting a two-pack bubbling cosmetic (or a kit) (Different feature 1) and as to which of a solid and an aqueous viscous composition a composition comprising sodium alginate is (Different feature 2), however, both of these different features may be overcome as set forth below. Therefore, Invention 1-1 is easily conceived from the Kanebo comparative example invention as a main cited reference, and Invention 1-1 does not have an excellent effect compared to the Kanebo comparative example invention.

(A) As for Different feature 1

Regarding the form (agent type) of cosmetics (or pharmaceutical composition), it was a conventional technique as of the filing of the respective patents to select as necessary an agent type such as powder, liquid, or viscous composition (gel) (see e.g. A publication of Japanese Unexamined Patent Application Publication No. 1995-76512 (Exhibit Otsu E all 7), International Publication No. WO1995-19160 (Exhibit Otsu E all 8)).

Regarding the respective agents in a cosmetic kit obtained by mixing two packs for on-demand use, it was a conventional technique to select as necessary an agent type such as powder, liquid, or viscous composition (gel) (see e.g. A Kanebo publication

(Exhibit Otsu A102, Exhibit Otsu E all 6), Japanese Unexamined Patent Application Publication No. 1985-215606 (Exhibit Otsu E all 3)).

Further, the Kanebo comparative example invention and the respective inventions have in common the problem of improving the ability to retain carbonate gas. The selection of agent type in the respective inventions does not cause a particular difference in function and effect, and thus is feasible by a person skilled in the art without any particular creativity. It is merely a design modification or a design matter to change agent types of the first agent and the second agent as necessary in the Kanebo comparative example invention.

(B) As for Different feature 2

It was well-known as of the filing of the respective patents that sodium alginate has a property of being hard to be dispersed and swelled in water, and takes time to be dissolved into water. Further, as aforementioned, a thickener including sodium alginate takes time for thickening. Thus it is merely a means commonly used as necessary by a person skilled in the art to dissolve sodium alginate into water in advance and use it to exhibit sufficient viscosity (see e.g. Japanese Unexamined Patent Application Publication No. 1994-179614 (Exhibit Otsu E all 9)).

Therefore, in the Kanebo comparative example invention with a problem of an improvement on the ability to retain carbonate gas, it is merely a design modification or a design matter to make a composition comprising sodium alginate as a viscous composition.

(2) Lack of Inventive step of Invention 1-4

The Kanebo comparative example invention is a bubbling cosmetic in which 20 weight % of a second agent is sodium alginate, and the first agent and the second agent are mixed in a proportion of 10:1 (Table 2 of Kanebo publication). Specifically, sodium alginate comprises about 1.8% sodium alginate in a bubbling cosmetic. This does not satisfy constituent feature 1-4. Therefore, there is a difference between Invention 1-4 and the Kanebo comparative example invention.

However, the difference is merely a design matter that a person skilled in the art would carry out.

(3) Lack of Inventive step of Invention 1-5

The Kanebo comparative example invention is a bubbling cosmetic in which 95 weight % of a first agent is water, and the first agent and the second agent are mixed in a proportion of 10:1 (Table 2 of Kanebo publication). Specifically, sodium alginate comprises about 86% water in a bubbling cosmetic. This does not satisfy constituent feature 1-5. Therefore, there is a difference between Invention 1-5 and the Kanebo

comparative example invention.

However, the difference is merely a design matter that a person skilled in the art would carry out.

(4) Lack of Inventive step of Invention 1-7

Invention 1-7 merely limits the use of a cosmetic for the improvement of partial adiposeness and a pharmaceutical composition for the treatment of athlete's foot, atopic dermatitis, or bedsore to a use for improvement of partial adiposeness, and merely changes a category of an invention into a cosmetic obtained by a kit according to any one of Claims 1 to 5. In addition, the category change from "a kit" to "a cosmetic obtained by a kit" does not cause any technical significance that supports the inventive step.

(5) Lack of Inventive step of Invention 1-8

The Kanebo comparative example invention is a cosmetic applying to a skin and does not particularly specify an application site. On the other hand, Invention 1-8 limits an application site to "for the improvement of partial adiposeness of the face, leg, arm, abdomen, flank, back, neck or jaw". This is a difference.

The constituent features of "for the improvement of partial adiposeness of the face, leg, arm, abdomen, flank, back, neck, or jaw" do not find any technical significance that supports the inventive step.

(6) Lack of Inventive step of Invention 1-9

Invention 1-9 merely changes a category of an invention relating to "a kit for obtaining a carbon dioxide-containing viscous composition" of Invention 1-1 with "a method for preparing a carbon dioxide-containing viscous composition". Further, the category change itself does not cause any technical significance that supports the inventive step.

(7) Lack of Inventive step of Invention 1-12

As discussed in the above item (2), the Kanebo comparative example invention comprises about 1.8% sodium alginate in a bubbling cosmetic. This does not satisfy constituent feature 1-12. Therefore, there is a difference between Invention 1-12 and the Kanebo comparative example invention.

However, the difference is merely a design matter (selection of numerical value) that a person skilled in the art would carry out.

(8) Lack of Inventive step of Invention 1-13

As discussed in the above item (3), the Kanebo comparative example invention comprises about 86% water in a bubbling cosmetic. This does not satisfy constituent feature 1-13. Therefore, there is a difference between Invention 1-13 and the Kanebo

comparative example invention.

However, the difference is only a design matter that a person skilled in the art would carry out.

(9) Lack of Inventive step of Invention 2-1

Invention 2-1 is different from Invention 1-1 in that a use of pharmaceutical composition or cosmetics is not limited, and it comprises a combination form of an aqueous viscous composition comprising an acid and sodium alginate with granules, fine grains, or powders comprising a carbonate.

These points are not differences from the Kanebo comparative example invention. Thus the difference between Invention 2-1 and the Kanebo comparative example invention are the same as the difference between Invention 1-1 and the Kanebo comparative example invention. Further, as aforementioned, these different features are merely design variations or the adoption of design matters.

(10) Lack of Inventive step of Invention 2-4

As discussed in the above item (2), the Kanebo comparative example invention comprises about 1.8% sodium alginate in a foaming cosmetic. This does not satisfy constituent feature 2-4. Therefore, there is a difference between Invention 2-4 and the Kanebo comparative example invention.

However, the difference is merely a design matter that a person skilled in the art would carry out.

(11) Lack of Inventive step of Invention 2-5

As discussed in the above item (3), the Kanebo comparative example invention comprises about 86% water in a bubbling cosmetic. This does not satisfy constituent feature 2-5. Therefore, there is a difference between Invention 2-5 and the Kanebo comparative example invention.

However, the difference is merely a design matter (selection of numerical value) that a person skilled in the art would carry out.

(12) Lack of Inventive step of Invention 2-7

"The cosmetic comprising a carbon dioxide-containing viscous composition capable of obtaining by the kit of any one of Claims 1 to 5" of Invention 2-7 only changes a category of the invention into a cosmetics obtained by a kit according to any one of Claims 1 to 5. The category change from "a kit" to "a cosmetics obtained by a kit" does not cause any technical significance in favor of the inventive step.

(13) For the above reason, the above respective inventions have reasons for invalidation of lack of inventive step over the cited invention of the Kanebo comparative example invention.

(Plaintiff's allegation)

(1) In the Kanebo publication, in a case where a surface of a solid of a second agent is covered with polyethyleneglycol in a combination of a liquid first agent including an acid and a second agent comprising a carbonate and a water-soluble polymer (thickener) (Examples 1 to 11), it causes the excellent ability to retain gas, but in a case where a surface of a solid of a second agent is not covered with polyethyleneglycol (Comparative Examples 1 and 2), it causes an insufficient ability to retain gas. Carbonate gas gradually generates with a second agent being a solid covered with a solid polyethyleneglycol at room temperature, so that carbonate gas is not fully discharged until a liquid first agent exhibits viscosity. Such effect is highlighted.

Specifically, to achieve excellent ability to retain gas in the Kanebo comparative example invention where water and a thickener are mixed on demand, it is essential to cover a carbonate and a water-soluble polymer with a polyethyleneglycol in a solid form at room temperature. Thus it can be naturally said that Comparative Example 2 lacking polyethyleneglycol cannot be a ground for negating the inventive step of the respective inventions.

(2) "Carbon dioxide-containing viscous composition" according to the respective inventions consists of a combination of an aqueous viscous composition comprising a carbonate and sodium alginate with granules comprising an acid. It is an invention of "preliminarily prepared-type carbon dioxide generating pack" that generates carbon dioxide in a viscous composition prepared in advance (gel). On the other hand, the Kanebo comparative example invention is a combination of an aqueous solution comprising an acid (first agent) and a solid comprising a carbonate and sodium alginate (second agent), and an invention of "on-demand preparation-type carbon dioxide generating pack" that imparts viscosity to an aqueous solution by mixing these agents together in use.

It could never be believed that a person skilled in the art could have easily conceived of as of the priority date of the Patent of November 7, 1997 that the Kanebo comparative example invention of "on-demand preparation-type carbon dioxide generation pack" in which an aqueous solution and a solid are combined is changed into a combination of granules including an acid and a viscous composition prepared in advance with a carbonate and sodium alginate added thereto. Such design modification might change the agent types of a first agent and a second agent and results in a totally different cosmetic in terms of function and effect as well as use method and storage method. It could not be said as of the above priority date that the on-demand

mixing cosmetics consisting of a combination of a viscous composition (gel) and granules was well-known. Thus it could never be thought that a person skilled in the art who knew the Kanebo comparative example invention could have easily conceived of completely changing into a totally different constitution; i.e., changing an aqueous solution containing an acid in the invention (first agent) into granules containing an acid, and further changing a solid containing a carbonate and sodium alginate (second agent) into an aqueous viscous composition containing a carbonate and sodium alginate.

Further, in the Kanebo comparative example invention, what is disclosed is merely a constitution in which the ability to retain gas is not sufficiently ensured. The respective inventions have a greatly different technical significance from the respective inventions where generated carbon dioxide is sealed in a viscous composition by adopting a constitution consisting of a combination of an aqueous viscous composition containing a carbonate and sodium alginate with granules containing an acid. From such a viewpoint, it is obvious that the respective inventions are not easily conceivable on the basis of the Kanebo comparative example invention.

(3) Therefore, the above respective inventions involve inventive step.

9 Issue 4 (presence or absence of negligence of Defendants Cosmepro et al.)

(Defendants Cosmepro et al.)

Defendants Cosmepro et al. did not at all originally have an intention to infringe the respective patents. At that time, they had an intention to purchase and sell the products covered by the patent right owned by Defendant Neochemir, who had a sole patent right in Japan with respect to carbonate gas pack. As seen above, Defendants Cosmepro et al. only have a recognition of purchasing and selling legitimate products. Thus they have no negligence at all.

(Plaintiff's allegation)

Defendants Cosmepro et al.'s allegation is negated and refuted.

10 Issue 5 (Establishment of joint tort)

(Plaintiff's allegation)

In regard to the construction of the paragraph of Civil Code, Article 719, paragraph (1), it is a court precedent and a reigning theory that mutual communication between tort-feasors is not always necessary, but the presence of objectively closely-associated cooperativity is sufficient. In a case of patent right infringement as in this case, it is reasonable to find the establishment of joint tort even in a position of general agency where all amounts of infringing products produced by a manufacturer are sold by a specific seller as well as in a case where a manufacturer and a seller of infringing products produces and sells infringing products with communication.

In this regard, regarding the productions and sales of the Defendant's products 1 to 9, 11, and 13 to 18, it is found that Defendant NeoChemir and the other defendants are involved with a commercial distribution like a form described in the attachment of "commercial distribution of the respective Defendant's products", and persons who are involved with dealing of the respective products are respectively involved with the sales of the whole amount of the respective products.

Therefore, the patent infringing acts of Defendant NeoChemir and the other Defendants for the respective products, Esco for the Defendant's products 2 and 16, TRUST WINGS for the Defendant's product 3, CEFINE for the Defendant's product 6, Wamu and SUHADA Cosmetics for the Defendant's product 7 (the above respective companies are referred to as "Defendants") correspond to joint tort as specified in Article 719, paragraph (1) of the Civil Code, and thus the respective Defendants have an obligation to jointly compensate a total amount of profit obtained by Defendants who are involved with dealing of the respective products.

(Defendants' allegation)

Plaintiff's allegation is negated and refuted. There is no relationship between Defendants that corresponds to the completion requirement of joint tort.

(Defendants Cosmepro et al.'s Allegation)

Defendants Cosmepro et al. directly or indirectly began to deal with Defendant NeoChemir who was a sole patentee with regard to carbonate gas pack, and have paid money including a patent royalty. They are only in a business connection with Defendant NeoChemir via products. Further, Defendants Cosmepro et al. and Defendant NeoChemir have no common executive officer, no capital relation, let alone are they in a general agency position.

Therefore, Defendants Cosmepro et al. does not have joint tort liability together with Defendant NeoChemir.

11 Issue 6-1 (Plaintiff's amount of damage - Article 102, paragraph (2) of the Patent Act)

(Plaintiff's allegation)

(1) Defendants' sales figures and profit according to the respective Defendants' products

A General discussion

Defendants' sales figures for the respective Defendant's products and an amount of expenses to be deducted from the sales figure in calculating an "amount of profit" in Article 102, paragraph (2) of the Patent Act after the registration of Patent 1 are respectively as per described in the columns of "sales figure" and "expenses" of the

attachment "List of claimed amount (Plaintiff's allegation)" (Plaintiff accepts an amount of a part not highlighted in yellow in the sales figure of the column "sales figure" of the attachment "List of sales figure and expenses (Defendants' Allegation)", and further Plaintiff also accepts the deduction of an amount of a part not highlighted in yellow in an amount (total amount) of the column of the attachment "Purchases, raw material costs, shipping costs etc." in calculating "an amount of profit").

Note that the amounts in the column of sales figure of the columns of "Defendant AMPLY" for Defendant's product 8 and "Defendant Wingsense" for the Defendant's product 13 of the attachment "List of claimed amount (Plaintiff's allegation)" include consumption tax.

Defendants raise expenses of the column "the other expenses (Defendants' allegation)" of the attachment "List of sales and expenses (Defendants' allegation)" as an expense to be deducted from sales figure. "An amount of profit" in Article 102, paragraph (2) of the Patent Act should be construed as meaning so-called "marginal profit" in which only an additional cost necessary for production and sales of infringing products is deducted from sales figures of the infringing products. The expenses to be deducted from the sales figure are limited to variable expense directly required. It cannot be said that the above expenses as Defendants allege was a variable expense additionally required for the production and sales of the infringing products, nor is it definite as to whether or not it is an expense necessary for the production and sales of the respective Defendant's products. Thus it should not be deducted from the sales figure.

B Sales figure and expenses of TRUST WINGS (in relation to Defendant's products 3 and 4)

Plaintiff claims a compensation for damage after January 7, 2011 on which Patent 1 was registered. The sales figure of TRUST WINGS after that date is as per described in the column of "sales figure" of the column "TRUST WINGS" of the respective products of the attachment "List of claimed amount (Plaintiff's allegation)" (The number of sales is 15,120 units for Defendant's product 3, and 7,000 units for Defendant's product 4).

Further, the expenses amount to 9,616,320 yen (purchases 9,450,000 yen, material cost 166,320 yen) in total for Defendant's product 3, and 6,600,500 yen in total for Defendant's product 4. The latter is set forth as below:

(A) Defendant's product 4-1 (2,000 unit) Total 1,862,000 yen

Purchases 1,840,000 yen (unit price 920 yen)

Spatula 22,000 yen (unit price 11 yen)

(B) Defendant's product 4-2 (5,000 unit) Total 4,738,500 yen

Purchases 4,400,000 yen (unit price 880 yen)

Spatula 55,000 yen (unit price 11 yen)

Granules sealing 6,500 yen (unit price 1.3 yen)

Granules sealing mold 8,000 yen

Face sheet 217,500 yen (unit price 43.5 yen)

B agent bag 51,500 yen (unit price 10.3 yen)

C Allegation of stock articles (in relation to Defendant's products 6, 8, 9, and 15)

(A) CEFINE's expenses for the Defendant's product 6

An amount of expenses for the purchases in the column of "CEFINE" of the Defendant's product 6 of the attachment "List of sales and expenses (Defendants' allegation)" (an amount excluding packaging costs, warehouse expense, and shipping costs) includes a part of stock articles that were not actually sold. The expenses for the purchases of the stock articles that were not sold are not deductible.

In this regard, the number of purchases of the Defendant's product 6 by Defendant CEFINE is described as 3,506 boxes, of which 450 boxes remain as stock articles. Thus the products that were actually sold amount to 3,056 boxes, and expenses for the purchases thereof amount to 4,020,506 yen (4,612,530 yen * 3,056 units /3,506 units).

Therefore, the expenses deducted from the sales figure amount to 6,240,118 yen in total, including the above amounts, packaging costs, warehouse expense, and shipping costs.

(B) Defendant Rhythm's expenses for the Defendant's product 8

Purchases in the column of "Defendant Rhythm" of the Defendant's product 8 of the attachment "List of sales and expenses (Defendants' allegation)" include a part of stock articles that were not actually sold. The purchases of the stock articles that were not sold are not deductible.

In this regard, the number of purchases of the Defendant's product 8 by Defendant Rhythm is described as 31,446 boxes, of which 695 boxes remain as stock articles. Thus the products that were actually sold amount to 30,751 boxes, and the purchases thereof amount to 124,750,992 yen (127,570,476 yen * 30,751 units /31,446 units).

Therefore, the expenses deducted from the sales figure amount to 135,184,458 yen in total of the above purchases and shipping costs.

(C) Defendant SHIN's expenses for the Defendant's product 9

Purchases in the column of "Defendant SHIN" of the Defendant's product 9 of the attachment "List of sales and expenses (Defendants' allegation)" include a part of products that were not actually sold. The purchases of products that were not sold are not deductible.

In this regard, the number of purchases of the Defendant's product 9 by Defendant SHIN is described as 7,550 units, whereas the number of sales is described as 7,450 units (packs). Thus the purchases of the products that were actually sold amounts to 5,393,800 yen (5,466,200 yen * 7,450 units (packs) /7,550 units), which should be deducted from the sales figure.

(D) Defendant Clear noir's expenses for the Defendant's product 15

An amount of expenses for the purchases in the column of "Defendant Clear noir" of the Defendant's product 15 of the attachment "List of sales and expenses (Defendants' allegation)" (an amount for granules) include a part of products that were not actually sold. The expenses for the purchases of products that were not sold are not deductible.

In this regard, the number of sales from Defendant NeoChemir to Defendant Clear noir is ●(omitted)● units, the number of sales by Defendant Clear noir is ●(omitted)● units. Therefore, an amount of expenses regarding the purchases of products that have actually sold amounts to ●(omitted)● yen.

Therefore, the expenses deducted from the sales figure amount to ●(omitted)● yen in total, including the above amounts and shipping costs.

D Sales figure and profit for granules that Defendant NeoChemir has produced and sold (in relation to Defendant's products 9, 11, 12, 14, 17, and 18)

(A) Defendant NeoChemir produced and sold granules of Defendant's products 9, 11, 12, and 17, which were identical to each other. The sales figure and profit were calculated collectively. Thus accurate sales figure and profit for the respective products are indefinite. Therefore, the sales figure and profit of granules according to the respective products should be calculated pro rata in accordance with the proportions of the respective sales figures of Defendant SHIN (Defendant's product 9), Defendant Japan Cosme (Defendant's products 11 and 17) and AVON PRODUCTS (Defendant's product 12) who produced and sold the respective products (Note that the sales figure of AVON PRODUCTS is ●(omitted)● yen.).

Specifically, in a sales figure (●(omitted)● yen in total) and a profit (●(omitted)● yen in total) deducting purchases (●(omitted)● yen) from the sales figure for the above respective products, ●(omitted)●% should be attributed to Defendant's product 9, ●(omitted)●% should be attributed to Defendant's product 11,

●(omitted)●% should be attributed to Defendant's product 12, and ●(omitted)●% should be attributed to Defendant's product 17.

(B) Defendant NeoChemir produced and sold granules of Defendant's products 14 and 18, which were identical to each other. The sales figure and profit were calculated collectively. Thus accurate sales figure and profit for the respective products are indefinite. Therefore, the sales figure and profit of granules according to the respective products should be calculated pro rata in accordance with the proportions of the respective sales figures of Defendant Cosmepro, who produced and sold the respective products.

Specifically, of a sales figure (●(omitted)● yen in total) and a profit (●(omitted)● yen in total) deducting purchases (●(omitted)● yen) from the sales figure for the above respective products, ●(omitted)●% should be attributed to Defendant's product 14 and ●(omitted)●% should be attributed to Defendant's product 18.

(2) As seen above, the profit obtained by Defendants is as per described in the column of "profit" of the column of the respective Defendant of the attachment "List of claimed amount (Plaintiff's allegation)". In a case of joint tort being established, Plaintiff can claim a compensation for damage in an amount of the column "total" of the respective products against Defendants who are involved with production and sales of Defendant's products 1 to 9, 11, and 13 to 18.

Further, Plaintiff is forced to bear attorney costs. The attorney cost in association with the tortious act of Defendants does not fall below an amount of 10% of the above amount.

(3) Defendants' allegation of a ground for rebuttal to presumption

A Defendants allege that the respective Defendant's products have a significantly excellent effect. The requirements of the below-mentioned items [i] and [ii] as Defendants allege merely rephrase foaming or sustained bubbles. Therefore, the examples of the respective inventions (Plaintiff's products) may exhibit a sufficient Bohr effect. Therefore, there was obviously a causal relationship that, if there were no sales of the respective Defendant's products, the sales of the Plaintiff's products would be possible.

B Defendants had promoted and advertised the respective Defendants' products with an emphasis on a partial adiposeness improving effect. The facial contour slimming effect as Defendants allege is included in a partial adiposeness improving effect. Thus the respective Defendants' products have a partial adiposeness improving effect. Further, the effects become a differentiating factor from the other company's

products.

C Defendants allege that the respective Defendant's products fall within a technical scope of the patented invention of the below-mentioned Defendant NeoChemir. The patent according to the invention has first of all a narrow scope of right. Further, even if one should adopt the constitution of the invention, no significant effect is observed leading to the increase of sales. There was obviously a causal relationship that, if there were no sales of the respective Defendant's products, the Plaintiff's products would be sold.

D Defendants allege that the effects of the respective inventions are only incidental effects; however, "to retain carbon dioxide and allow users to enjoy the transdermal efficacy caused by carbon dioxide" in the field of carbonate gel packs is an effect that premises the effective performance of beauty effects including partial adiposeness improving effect and other effects. It is not an incidental effect. This is a key factor that affects the most of consumers' motivation for purchases. Further, it is difficult to produce a carbonate pack that avoids a patent according to a patent right owned by Plaintiff including the respective patent rights. Thus the value of the patent is extremely high.

E Defendants allege that there are competing products; however, the products pointed out by Defendants include ones with a constitution different from the respective Defendant's products; i.e. not a two-pack type carbonate gel pack of gel and granules. These competing products cannot absorb a sufficient amount of carbon dioxide transdermally, nor do they become competitive with the respective Defendant's products. Further, Plaintiff seeks an injunction of production and sales against a company which sell a two-pack type product of a gel and a powder (Attachment "List of carbonate-related cosmetics", items 6, 9). The sales of the company seem to be small. Thus Plaintiff is not getting around to file a suit against the company.

F As per the below-mentioned Defendants' allegation, Defendants allege that the technical value of the respective inventions is extremely low by pointing out Shiseido 614, Nisshin 324, and Ishigaki inventions 1 and 2; however, the technical value of the respective inventions is sufficiently high.

(A) Defendants allege that the combination of gel and powder falls within matters of common general knowledge; however, Shiseido 614 and Nisshin 324 as pointed by Defendants fail to disclose or suggest cosmetics generating carbon dioxide, and lack motivation to combine the other well-known art or common general knowledge as Defendants allege.

(B) Defendants allege that a skeleton moiety of the respective inventions is a

matter of well-known art; however, Ishigaki inventions 1 and 2 have an objective for massaging skin and hair by breaking bubbles of carbonate gas generated by mixing a first agent and a second agent in water. Therefore, it is unnecessary to retain carbon dioxide in the form of bubbles in a bubbling cosmetic. Further, carbonate gas in this invention only massages the skin. It is not absorbed into the skin dermally and transmucosally.

Therefore, the respective inventions and Ishigaki inventions 1 and 2 are totally different from each other in an action mechanism of carbon dioxide on the skin, method for use, and effects and efficacy. There is no motivation to combine the other well-known art or common general knowledge as Defendants allege.

(C) Defendants allege that the preliminary preparation is essential. Even if the technical matters of Shiseido 614 should be combined with Ishigaki inventions 1 and 2, the result would not reach the respective inventions. First of all, the technical matters of Shiseido 614 and Ishigaki inventions 1 and 2 have nothing in common with respect to the problem and function and effect. There is no motivation to combine them.

Further, even if the technical matters of Shiseido 614 should be applied to Ishigaki inventions 1 and 2, in a case where these inventions should be subjected to a design modification to the same configuration as the respective inventions, the massaging effect of Ishigaki inventions 1 and 2 would be lost, and the essence of the invention would be destroyed.

Therefore, there is obviously a disincentive to modify Ishigaki inventions 1 and 2 with a kit including a "viscous composition" and "granules including a carbonate and an acid". The allegation that sodium alginate should be dissolved in water in advance is not reasonable.

(D) As seen above, the aforementioned common general knowledge and well-known art as Defendants allege cannot be a ground for undermining the technical value of the respective inventions, nor is there a motivation to combine them. Therefore, the technical value of the respective inventions is sufficiently high.

G Defendant's remaining allegation is negated and refuted. The reason as Defendants allege cannot be circumstances of the rebuttal to presumption.

(Defendants' allegation)

(1) Defendants' sales figure and profit according to the respective Defendants' products

A General discussion

The Defendants' sales figures, expenses, and profit for the respective Defendants' products are respectively set forth as below. In an amount of the columns of "sales

figure", "expenses", and "profit" of the attachment "List of claimed amount (Plaintiff's allegation)", an amount highlighted in yellow is negated and refuted. Note that the amounts of sales figure of Defendant AMPLY for Defendant's product 8 and Defendant Wingsense for Defendant's product 13 including consumption tax are as per the amounts alleged by Plaintiff. Plaintiff's remaining allegation is negated and refuted.

(A) Sales figures Amount in the column of "sales figure" of the attachment "List of sales and expenses (Defendants' allegation)"

(B) Expenses Total amount in the columns of "Purchase, raw material costs, shipping cost etc." and "other expenses" of the attachment

(C) Profit Amount in the column "profit" of the attachment

B Sales figure of TRUST WINGS (in relation to Defendant's products 3 and 4)
An amount in the column "sales figure" of the column "TRUST WINGS" of Defendant's products 3 and 4 of the attachment "List of sales and expenses (Defendants' allegation)" is an amount deducting the one ordered on January 2012 for Defendant's product 3, and an amount deducting the one ordered on May 11, 2011 for Defendant's product 4.

C Regarding the cost to be deducted from sales figure, there is no legal ground to limit to marginal expense. It should be disciplined by the presence or absence of causal relationship (Article 416 of the Civil Code). Regarding the expenses other than marginal expense, it allows the company to survive and allows factories to operate. Thus it should be construed that an amount proportional to sales figure should be included in expenses to be deducted.

D Defendant NeoChemir's allegation (in relation to Defendant's products 1 to 9 and 11 to 18)

Defendant NeoChemir does not leave production processes of procurement of raw materials, preparation of factory order, the adjustment of production process, bulk check of factory product, acceptance validation, and storage test to factory's discretion for the quality control of products as well as ensuring the credibility of consumers and distributors, but leaves it to NeoChemir's employees among NeoChemir R&D researchers. In accounting, the production costs by researchers are allocated as an employment cost. They engage in production. Thus it can be said that an employment cost per one researcher is a cost for the production of the products. This should be allocated as a marginal expense of products. However, a researcher in charge of production engages in a production process of products other than the respective Defendants' products. Thus only a proportion of sales figure of the respective Defendants' products on a whole sales basis should be allocated as a marginal expense for the respective Defendants' products (an amount in the column "the other

expenses" of the column "Defendant NeoChemir" of the attachment "List of sales and expenses (Defendants' allegation)" is an amount calculated by the ratio.).

E Defendants Cosmepro et al.'s Allegation

(A) Stock articles (in relation to Defendant's products 6, 8, 9, and 15)

Plaintiff alleges that purchases of stock articles should not be deducted as expenses; however, the product source is Defendant NeoChemir. The amount of purchase paid by the respective Defendants who purchased the products should be allocated as a sales figure of Defendant NeoChemir, and a profit should be calculated therefrom. Ultimately it should be reflected on the calculation of loss of damage of Plaintiff. Therefore, if a profit should be calculated as Plaintiff alleges, a purchase of stock articles should be deducted from the sales figure and profit of Defendant NeoChemir and the amount of damage of Plaintiff.

Further, the stock articles include products that Defendant refrained from selling as a result of a cautionary notice from Plaintiff or the settlement of the provisional injunction case. Thus it is unreasonable unless the deduction of the amount of purchases is accepted. Furthermore, regarding products used as samples, products could be sold by their use. Therefore, these expenses should be deducted as expenses.

(B) Other expenses (in relation to Defendant's products 1, 5, 6, 7, 8, 13 to 15, and 18)

Expenses in the column "other expenses" of the attachment "List of sales and expenses (Defendants' allegation)" for Defendants Cosmepro et al. are additionally required expenses for the production and sales of the respective Defendants' products. It corresponds to a variable expense as Plaintiff alleges.

The respective Defendants' products are cosmetics to be used by women for the face. Defendants are not the companies known to the whole of the country. Thus the Defendants' sales are attributed to promotion and advertisement and steady business activities. It is natural to deduct expenses such as promotion and advertisement costs and traveling expenses that produce the sales.

Extraordinarily large sales figure of Defendant Rhythm is due to a business type and sales type different from the other companies. Defendant Rhythm has paid a sales commission and sales promotion cost as a margin to people who make an effort to sell the products, and has focused on promotion and advertisement through exhibitions and training sessions. To hold an exhibition and a session, many employees and staff members should go there, which results in a large amount of traveling costs. Further, Defendant AMPLY believed that the sales increase of Defendant Rhythm would lead to the profit increase of its own, and has been making an effort to sell the Defendant's

product 8 in cooperation with Defendant Rhythm, and has been paying great expense such as promotion and advertising costs. Therefore, these expenses should be deducted.

It should also be noted that Defendant Cosmepro has paid expenses such as fuel and light expenses and employment expense in addition to the above expense. Given this, a profit is further decreased.

(2) Ground for rebuttal to presumption

The following facts should be considered for the rebuttal to presumption. It should be construed that the presumption is to be rebutted by 99%. Further, Plaintiff alleges that it is difficult to produce carbonate packs that avoid the patents according to the patent rights owned by Plaintiff other than the respective patent rights. This allegation is substantially an allegation of infringement discussion about the patent rights other than the respective patent rights, and thus should be dismissed as a method of allegation or evidence presented after the time for doing so.

A Plaintiff's products have poorer performance compared to the respective Defendants' products

(A) The technical features of the respective Defendants' products are to satisfy the requirements of [i] a technique to keep generated carbonate gas (to make a highly viscous gel), [ii] a technique to sustain a time for transdermal absorption of carbonate gas for a long period (to make slowly releasing granules), and [iii] a technique to cause carbonate gas to be absorbed more effectively from the skin (to adjust a pH to 4 to 5.7) in order to provide much oxygen to skin cells using Bohr effect as well as to enhance Bohr effect.

Defendants utilized know-how obtained through their own technical development to develop the respective Defendants' products that satisfy the above requirements. By coating such respective Defendants' products on the skin, oxygen can get across the skin as an act of Bohr effect to cause great beauty effects. Furthermore, the respective Defendants' products have earned a reputation in the market for their high moisturizing effect and convenience. As seen above, it can be said that the respective Defendants' products have a significantly excellent efficacy as compared to the implemented products (Plaintiff's products) of the respective patents. In an imaginary world where the production and sales of the respective Defendants' products are disregarded, it can never be said that the implemented products of the respective patents could be sold comparable to the respective Defendants' products.

(B) Further, the respective Defendants' products have no partial adiposeness improving effect that Invention 1 causes.

Partial adiposeness improving effect means the decrease of fat at a part of the body. This effect is caused by a medical device or a pharmaceutical product. Indeed, it is true that the respective Defendants' products even have an effect of early recovery of muscle fatigue and a muscle promoting effect due to the discharge of oxygen in transdermal absorption of carbonate gas. This effect causes a facial contour slimming effect. However, the facial contour slimming effect does not physically reduce a size of the face by decreasing fat of the face. It is different from a solution to partial adiposeness. Further, consumers would not purchase carbonate gas packs for the purpose of solving adiposeness. Defendants do not promote partial adiposeness improving effects through transdermal absorption of carbon dioxide in the form of bubbles, nor do they make it as a differentiating factor.

Further, the sales of carbonate gas packs for the dissolution of partial adiposeness violate the law and regulations such as the Pharmaceutical Affairs Law. Thus it is hardly believed that cosmetics manufacturers daringly produce and sell such products violating laws.

For the above reason, the function and effect of the respective inventions of partial adiposeness improving effects do not at all contribute to the sales of the respective Defendants' products.

B Plaintiff's products are less convenient

Carbonate gel pack is a two-pack type product. Gel and granules are mixed in use, and scheduled to be coated on the skin. Thus a reduction of a time necessary for one-time use becomes a problem. Further, Defendant's products 1, 8, and 15 use a gelator (gel hardening agent) to overcome any disadvantage associated with the removal of pack and subsequent face wash, and have no need to rub the skin with a spatula etc., and have a convenience to prevent scratching of the skin. Further, Defendant's products 1, 2, 3, 4, 15, and 16 use a stand pouch container as a gel container to overcome a disadvantage involved with washing gel off in a stirring container. Further, since granules are contained at the bottom of the stand pouch, it is convenient to easily carry.

C The respective Defendants' products do not claim an efficacy for the improvement of partial adiposeness. The partial adiposeness improving effect does not become a differentiating factor from the other companies' products

D The sales of the respective Defendants' products are accomplished by planning ability and marketing efforts of Defendants and their business contacts

A carbonate gel pack is a cosmetic, and corresponds to a shopping goods for which a professionally trained salesperson can give a helping hand to customers in the store; i.e., face-to-face sales are effective. It is necessary to provide a salesperson with

training and construct a distribution system so as to meet the needs of each customer.

Many consumers buy the respective Defendants' products because Defendants produced products with excellent efficacy on the basis of the below-mentioned Defendant NeoChemir's patented invention, and further presented product promotions with a full consciousness on the AISAS principle, not because the respective Defendants' products were implemented products of the respective inventions. Consumers selected the respective Defendants' products from an enormous amount of competing products because Defendants provided business contacts with sufficient information and training. In particular, implemented products of the respective inventions with poor performance compared to the respective Defendants' products could not have been sold in the same amount as the respective Defendants' products.

E The respective Defendants' products fall within a technical scope of the below-mentioned Defendant NeoChemir's patented invention

Defendant NeoChemir has three patent rights related to carbonate gel packs titled "Composition for the preparation of carbon dioxide topical products" (patents according to the below-mentioned Defendant NeoChemir's patented inventions). The respective Defendants' products fall within a technical scope of the invention according to Claim 1, and have the same function and effect. In an imaginary world where the production and sales of the respective Defendants' products are disregarded, it can never be said that the implemented products of the respective inventions could be sold comparably to the respective Defendants' products.

F Essential feature of the respective inventions and the existence of competing products

(A) An essential feature of the respective inventions lies in the selection of a gel of "an aqueous viscous composition (aqueous gel) preliminarily containing sodium alginate in a sticky state" as a first agent. Further, its direct effect lies in that "to effectively retain carbon dioxide and allow users to effectively enjoy a transdermal efficacy of carbon dioxide", whereas a fundamental function of a common carbonate gel pack lies in "to retain carbon dioxide and allow users to effectively enjoy a transdermal efficacy of carbon dioxide". Thus this effect is only incidental.

Further, the function and effect of the respective inventions is healing etc. of various diseases. The effect caused by the respective Defendants' products is an improvement on a common beauty problem such as skin fitness and prevention of skin trouble. This is only a part of the function and effect of the respective inventions. Further, Invention 1 is an invention in which the use is limited to a partial adiposeness improving effect. The respective Defendants' products are not utilized for the use, nor

are such effect caused first of all. The function and effect of Invention 2 is a problem that should be solved by general skincare cosmetics. It can never be said to be a significant effect, nor to totally affect a buying motive of the respective Defendants' products. Further, in the advertisement of the respective Defendants' products, it is emphasized that Bohr effect allows oxygen to get across skin cells and this is "good for the skin" (recover a beauty skin function of original skin). This point has nothing to do with the function and effect of the respective inventions.

(B) In the carbonate gel pack market, as per described in the attachment "List of carbonate-related cosmetics", there are many competing products for the respective Defendants' products. In an imaginary world where the sales of the respective Defendants' products are disregarded, competing products would have absorbed most of the demand for the respective Defendants' products.

G Low technical value of the respective inventions

First, a combination of gel and powder is within common general knowledge (see Japanese Unexamined Patent Application Publication No. 1994-179614 (Exhibit Otsu A103, Exhibits Otsu E all 9, 35. Hereinafter referred to as "Shiseido 614"), Exhibit Otsu E all 41, Japanese Unexamined Patent Application Publication No. 1995-53324 (Exhibit Otsu E all 36. Hereinafter referred to as "Nisshin 324")).

Further, the core of the respective inventions is to mix a first agent and a second agent when in use to cause generation of carbon dioxide in the form of bubbles. This is a matter of well-known art described in a plurality of documents such as Japanese Unexamined Patent Application Publication No. 1993-229933 (Exhibits Otsu E all 4, 37. Hereinafter referred to as "Ishigaki invention 1") and Japanese Patent Publication No. 1995-39333 (Exhibits Otsu E all 5, 38. Hereinafter referred to as "Ishigaki invention 2").

Further, sodium alginate has been utilized as a thickener useful in a wide variety of industrial fields including cosmetics and foods. It was a matter of common general knowledge that had been known since early times that sodium alginate could be dissolved in water, but took time to be dissolved, and thus it was desirable to dissolve it in water in advance (Exhibit Otsu E all 40). Further, it was also a matter of common general knowledge that sodium alginate precipitates in acid as alginic acid, or is not soluble (Exhibits Otsu E all 39, 40). Therefore, in a case where sodium alginate is added to an aqueous solution as a thickener, it is a matter of common general knowledge that not an acidic aqueous solution but a basic aqueous solution is selected.

Furthermore, water-soluble salt of alginate tends to clump due to its poor solubility in water. Thus it was well-known to be hard to form a uniform film in

applying onto the face (Exhibit Otsu E all 35). Thus it was a matter of common general knowledge for a person skilled in the art that there was a problem of "hard to form a uniform film" in a case of utilizing sodium alginate as a thickener.

Therefore, starting from Ishigaki Invention 1 or 2, according to common general knowledge, in a case of on-demand mixture of a first agent of an aqueous composition and a second agent of granules, a person skilled in the art who faced a problem of the formation of clumping would have dissolved sodium alginate in water in advance to solve the problem on the basis of the common general knowledge.

As described above, the respective inventions was easily conceivable by fully utilizing common general knowledge, starting from well-known art. Thus the technical value of these inventions is extremely low.

(Defendants Cosmepro et al.'s Allegation)

In view of the history of the respective inventions having been made and the history of Defendants Cosmepro et al. having produced and sold the respective Defendants' products, Defendants Cosmepro et al. neither had intention nor serious fault. Thus a consideration should be given to this fact in finding an amount of compensation for damage (Article 102, paragraph (4) of the Patent Act).

12 Issue 6-2 (Plaintiff's amount of damage - Article 102, paragraph (3) of the Patent Act)

(Plaintiff's allegation)

(1) The Defendant's sales figure for the respective Defendant's products are as per described in the aforesaid item 11 (Plaintiff's allegation). In view of the following circumstances, royalty rate of the respective patents should be 10% of the sales figure of the respective Defendant's products.

A Rate by industry and value of the respective patents

According to "Research and study reports on how to utilize patents, etc. in view of value assessment of intellectual property" (Exhibit Ko 48), an average of royalty rate for patents in the field of chemistry (questionnaire result) is about 5.3%, and an average of royalty rate determined by court is described as 6.1% (20% at the maximum). In view of the technical value of the respective patents and the relationship between Plaintiff and Defendant, it is natural that the royalty rate of the respective patents exceeds this.

The respective Defendants' products are such products with high margins that generate profits 10 times or more of production cost. Such profit is attributed to attractive nature and originality of the product of carbonate gel pack. In the background, the value of the respective patents makes a great contribution. Therefore,

in the determination of royalty rate, such value of the invention should be considerably considered. It is natural to set a royalty rate higher than the above-mentioned industry-standard rate.

B Court decision of the other case

In a lawsuit between Plaintiff and a company other than Defendants (Hereinafter referred to as "lawsuit of the other case"), the technical value of the Patent 1 is highly evaluated, and a court decision rendered to the effect that a compensation in which a sales figure of products in issue was multiplied by a royalty rate of 10% should be paid (Exhibits Ko 29, 30). In the lawsuit of the case, similar patents cause problems. Given this, it is reasonable to find a royalty rate similarly.

C Record of settlement with the other infringer

Plaintiff enforced a right on the grounds of the respective patent rights and the other patent rights owned by Plaintiff against a plurality of companies who sold similar products of carbonate gel packs, and entered into a settlement agreement subject to the suspension of sales of the products and the payment of a certain amount of settlement money. The amount of settlement money then was set to 10% or more of the sales figure in principle. In a settlement where it is taken into consideration that the other party voluntarily suspends the sales of the infringing products, 10% or more of the sales figure was paid. In view of this, it is unusual that a royalty rate in calculating an amount of compensation for damage against Defendants falls below 10%.

(2) In view of the sales figure of the respective Defendants' products, an amount of loss under Article 102, paragraph (3) of the Patent Act is as per described in the column "an amount of 10% royalty" of the column of the respective Defendants of the attachment "List of claimed amount (Plaintiff's allegation)" (In a case of joint tort being established, as long as a plurality of Defendants are involved with the production and sales of products, the Defendants have an obligation to jointly pay a compensation for damage to the extent that overlaps.). Further, Plaintiff is forced to bear attorney costs. The attorney cost in association with the tortious act of Defendants does not fall below an amount of 10% of the above amount.

(3) Defendants' allegation set forth below

The following allegation from Defendants is negated and refuted. A counterargument against Defendants' allegation is as discussed above. The matters as Defendants' allege are not factors that reduce license fee.

(Defendants' allegation)

(1) In Plaintiff's allegation, the fact that a payment of compensation with a royalty rate of 10% was affirmed in a court decision of the other case is admitted, and

the remaining is negated and refuted.

(2) A consideration should be given to the description of the item (2) of the aforesaid item 11 (Defendants' allegation) as a reason for reducing a license fee. A reasonable license fee does not exceed 1% of a standard amount. Further, in calculating a reasonable license fee, a consideration is given to: a fact that an agreement of Defendant NeoChemir is necessary for the sales of the respective Defendants' products, a fact that the respective inventions did not conduct a test, a fact that Exhibit Ko 48 cited by Plaintiff is based on a questionnaire survey, which must be said to have a low reliability, and a fact that Plaintiff is not at all involved with an act of an invention of the respective patent rights.

No. 4 Judgment by the Court

1 Issue 1-1 (whether the respective Defendants' products fall within a technical scope of the respective inventions (the sufficiency of the constituent features 1-1C and 2-1C))

(1) Plaintiff alleges that a language of "capable of retaining carbon dioxide in the form of bubbles" of the constituent features 1-1C and 2-1C is merely a requirement that only matters in terms of whether or not to contain carbon dioxide in the form of bubbles in the literature, whereas Defendants see this in a limited interpretation and allege that the language means "to retain carbon dioxide in the form of bubbles, so that a sufficient amount of carbon dioxide in the form of bubbles may supplied to subcutaneous tissues in a manner that sustained bubbles are observed to the extent that causes effects of the respective descriptions such as skin improving effect and partial adiposeness dissolving action".

A Accordingly, first taking a look at the description of the scope of the claims of the respective descriptions, as Plaintiff points out, Claim 1 only recites "carbon dioxide can be retained in the form of bubbles" (constituent features 1-1C, 2-1C). Literally, there is no description that limits the extent of carbon dioxide in the form of bubbles that should be contained by a carbon dioxide-containing viscous composition (hereinafter referred to as "a composition of the respective inventions", and in some cases referred to as "a composition of Invention 1" in relation to the respective inventions).

Further, the respective descriptions do disclose that: [i] the disclosure of description 1 and [0061] disclose that a composition of the respective inventions comprises 1 to 99 volume %, preferably 5 to 90 volume %, more preferably 10 to 80 volume % of carbon dioxide in the form of bubbles when in use; and [ii] the disclosure of the invention of description 1 and [0017] disclose that an aqueous viscous

composition allows "carbon dioxide to retain in the form of bubbles, and in a case of applying on a skin mucosa or a damaged dermal tissue etc., carbon dioxide bubbles can be retained to the extent that can supply a sufficient amount of carbon dioxide to hypodermal tissue etc." However, the above description [i] is only a part that describes a preferable means for solving problem. As is described as "to the extent", a definite numerical limitation has not been made, nor does item 1 of [0007] mention about the content of carbon dioxide in the form of bubbles in a carbon dioxide-containing viscous composition, since it discloses that Invention 2 relates to "carbon dioxide-containing viscous composition comprising carbon dioxide in the form of bubbles in an aqueous viscous composition comprising one or more kinds of thickeners, wherein the thickener is ..." (the disclosure of the invention of the description 1 also has a similar description). Further, the above description [ii] ([0017], etc.) definitely discloses that an aqueous viscous composition is not "particularly limited to the one for retaining carbon dioxide in the form of bubbles". Thus it cannot be seen that the above description directly underlies the Defendants' allegation.

In this regard, Defendants put forth the descriptions of [0004] to [0006], [0032], [0066], etc. of description 2 as a basis of their allegation. These descriptions only disclose an efficacy and function of a carbon dioxide-containing viscous composition and a method for obtaining this, as well as an evaluation method and criteria of bubbling. It cannot be recognized that it is a description that addresses the content of carbon dioxide in the form of bubbles in the composition.

B Accordingly, a consideration is given to the technical significance of the respective inventions in view of the respective descriptions and the prosecution histories of the respective patents.

(A) Summary of the respective descriptions

The respective inventions are "kits for obtaining a carbon dioxide-containing viscous composition to be used for cosmetics for the improvement of partial adiposeness or pharmaceutical compositions for the treatment of athlete's foot, atopic dermatitis, or bedsore" (constituent feature 1-1A) or a method for preparing the same composition, or "kits for obtaining a carbon dioxide-containing viscous composition to be used for pharmaceutical compositions or cosmetics" (constituent feature 2-1A). The summary of the respective descriptions of such inventions is set forth as below.

a Conventional technique

For the treatment of itching, topical antihistamics and anti-allergic agents are commonly used as a topical therapy. These are used when itching occurs, to temporarily suppress itching to some extent. For itching associated with eczema,

topical non-steroidal anti-inflammatory agent and steroidal agent are commonly used. These are used to prevent the occurrence of itching by suppressing inflammation ([0002]).

However, topical antihistamic agent and anti-allergic agent have almost no effect on itching caused by atopic dermatitis, athlete's foot, and insect bites. Topical non-steroidal anti-inflammatory agent and steroidal agent have a weak effect on itching and have no immediate effect. Further, due to strong side effect of steroid, the use is not easy ([0003]. The above paragraphs are described in background art of description 1).

b Problem to be solved by the invention

The object of the respective inventions is to provide a formulation effective for itching associated with mucocutaneous disease or mucocutaneous disorder and a method for the treatment and prevention using the same ([0004]).

Further, the object of the respective inventions is to provide a formulation effective for skin mucosal damage; graft failure; dental problem; cutaneous ulcer, cold sense and feeling of numbness associated with peripheral circulatory disturbance; musculoskeletal complaint; nervous system disease; dyskeratosis; suppurative skin disease; constipation associated with weakness or loss of defecation reflex; hair regrowth suppression after removal of hair (removal of excess hair); beauty problems of skin and hair; and partial adiposeness, and a method for the prevention and treatment using the same formulation ([0005]. The above paragraphs are described in background art of description 1).

c Effect of the Invention

As a result of intensive study, the inventors of the respective inventions have found that a carbon dioxide-containing viscous composition is effective for itching in which topical antihistamic agent, anti-allergic agent, non-steroidal anti-inflammatory agent, and steroidal agent are ineffective, and have further found that the composition has anti-inflammatory effect, wound healing promoting effect, beauty skin effect, partial adiposeness improving effect, and transdermal absorption effect to complete the respective inventions ([0006]).

The composition of the respective inventions can treat, prevent, or improve with almost no side effects problems such as itching associated with mucocutaneous disease or mucocutaneous disorder; skin mucosal damage; graft failure; dental problem; cutaneous ulcer, cold sense and feeling of numbness associated with peripheral circulatory disturbance; musculoskeletal complaint; nervous system disease; dyskeratosis; suppurative skin disease; constipation associated with weakness or loss of defecation reflex; hair regrowth suppression after removal of hair (removal of excess

hair); beauty problems of skin and hair; and if it is used for a desired part, the part can be slimmed ([0062]. The above paragraphs are described in the disclosure of the Invention of description 1).

d Best Mode for Implementing the Invention

The "aqueous viscous composition" used in the respective inventions is a composition comprising one or two or more kinds of thickeners dissolved into or swelled by water. The composition is not particularly limited as long as it can retain carbon dioxide in the form of bubbles. Thickeners used for common pharmaceutical products, cosmetics and foods may be used without limitation. Agent types may include the ones commonly applied to skin mucosa, damaged tissue and hair, including gel, cream, paste, and mousse ([0017]).

A substance generating carbon dioxide by a reaction is reacted in an aqueous viscous composition to generate carbon dioxide and obtain a carbon dioxide-containing viscous composition. A substance generating carbon dioxide may include, for example, a combination of a carbonate and an acid, specifically a combination of a carbonate-containing viscous composition and granules of acid (fine grains or powders), may result in a carbon dioxide-containing viscous composition ([0032]).

A composition of the respective inventions including carbon dioxide in the form of bubbles may be produced by mixing the respective components of a kit including a carbonate-containing aqueous viscous composition and granules of acid (fine grains, powders) when in use ([0018], [0019]).

A carbon dioxide-containing viscous composition of the respective inventions is effective for the treatment or prevention of itching, various mucocutaneous diseases, or mucocutaneous disorders, or beauty even when applied to the skin or the mucosa for a few minutes and wiped immediately; however, it is usually applied to the skin mucosa or damaged skin tissue, etc. for 5 minutes or more. Particularly in a treatment of bedsores, it can be continuously applied for 24 hours or more, and is also very effective for work saving such as nursing. In a case where it is used for the purpose of beauty such as improvement of skin type, one-time use brings about an immediate response. Upon the increase of hours of use, times of use, and use period, beauty effects are further improved. For the use in partial slimming, a sufficient effect is achieved if once-daily use is continued for one month or more. Upon the increase of hours of use, times of use, and use period, the effect is further improved ([0055]).

Compositions of the respective inventions usually have a volume of 30 or more after two hours, preferably 50 or more, more preferably 70 or more, given that a volume when put into a measuring cylinder immediately after preparation is 100 ([0060]).

Carbon dioxide-containing viscous compositions of the respective inventions comprise 1 to 99 volume %, preferably 5 to 90 volume %, more preferably 10 to 80 volume % of carbon dioxide in the form of bubbles when in use ([0061]. The above paragraphs are described in the disclosure of the Invention of description 1).

e Example

(a) Invention 1

What is disclosed in description 1 as examples is ones in which a carbonate, an acid, water, and a thickener are mixed together. Among them, the examples of Invention 1 are Examples 109 to 144, Examples 227 to 249, and the below-mentioned Examples 296 and 298.

In the former two examples, an assessment of bubbling ability and sustainability of bubbling was made for the produced compositions. Particularly regarding the bubbling ability, an increase rate of volume one-minute after stirring and mixing 20 times in 10 seconds was calculated from an initial volume of an aqueous viscous composition and granules, and an increase rate of 70% or more was evaluated as +++, 50% to 70% was evaluated as ++, 30% to 50% was evaluated as +, and 30% or less was evaluated as 0 (evaluation criterion 1). Particularly regarding the sustainability of bubbles, from a volume one-minute after stirring and mixing an aqueous viscous composition and granules 20 times for 10 seconds there was calculated a decrease rate of the volume when two hours passed from then, and a decrease rate of 20% or less was evaluated as +++, 20% to 40% was evaluated as ++, 40% to 60% was evaluated as +, and 60% or more was evaluated as 0 (evaluation criterion 2). Further, in the above-mentioned examples, the bubbling ability was + for one case, and ++ or +++ for the other cases, and the sustainability of bubbles was ++ or +++ (Tables 10 to 12, 20, 21).

Description 1 describes a result of a test in which compositions of a part of the examples were applied for a subject's skin. Treatment tests were conducted in the test examples 19 and 20 for a composition of Example 296, which was a composition of Invention 1, in the test example 26 for a composition of Example 298, and in the test example 33 for a composition of Example 135. Itching immediately disappeared by the attachment for 30 minutes, and cornification and drying of epidermis of the affected part were significantly improved (test example 19), and the attachment by daily exchange resulted in epithelialization without forming crusta on Day 2, and healing without scarring on Day 5 (test example 20) (Best Mode for Carrying Out the Invention of description 1).

(b) Invention 2

Description 2 describes the same examples as description 1. Particularly, what

corresponds to the examples of Invention 2 is Examples 109 to 144, Examples 145 to 179, Examples 227 to 249, and Examples 296 and 298.

The description of the examples other than Examples 145 to 179 is the same as that for Invention 1 ([0075] to [0079], [0089] to [0093], [0100], [0101], [0103]). The remaining Examples 145 to 179 also made an assessment of bubbling ability and sustainability of bubbling for produced compositions. The bubbling ability was + for one case and ++ or +++ for the other cases, whereas the bubbling sustainability was ++ or +++ (Tables 13 to 15).

Description 2 also describes a result of a test in which compositions of a part of examples were applied to patients' skin, and the content is the same as description 1 ([0123], [0124], [0130], [0137]). Further, test example 27 conducted a treatment test of canker sore for a composition of Example 170, which was a composition of Invention 2, and discloses that coating for 20 minutes immediately diminished pain ([0131]).

(B) The prosecution history of the respective patents

a Invention 1

(a) For the patent application according to Invention 1, a reason for refusal was given on March 3, 2006, and the summary of the reason is that on the basis of the cited documents such as the publication of Ishigaki invention 1 (Exhibits Otsu E all 4, 37. Hereinafter referred to as "Publication A2" in some cases in this item), a claimed invention before the below-mentioned amendment cannot be granted a patent under the provision of Article 29, paragraph (2) of the Patent Act.

In contrast, Plaintiff submitted a written amendment on May 12, 2006 and made an amendment to limit the use of the carbon dioxide-containing viscous composition of Claim 1 to cosmetics or pharmaceutical compositions. Further, Plaintiff submitted a written opinion on the same date and set forth as below. First, regarding the feature of Invention 1, [i] conventional cosmetics and pharmaceutical compositions are capable of generating carbon dioxide, but unable to retain carbon dioxide in the form of bubbles. Thus it was difficult to effectively develop an action of carbon dioxide in the form of bubbles. On the other hand, all the combinations in a kit of Claim 1 (Note: includes a combination of Claim 1 of the respective inventions) comprise in advance an aqueous viscous composition that can retain carbon dioxide in the form of bubbles by comprising one kind or two kinds or more thickeners, and are designed to cause a carbonate and an acid to react with each other in the aqueous viscous composition. Therefore, a kit of Invention 1 allows us to obtain a carbon dioxide-containing viscous composition comprising carbon dioxide in the form of bubbles. [ii] As seen above, a carbon dioxide-containing viscous composition prepared by a kit of Invention 1 retains carbon dioxide

in the form of bubbles, and thus the use of this as a cosmetic or pharmaceutical composition allows sufficient supply of carbon dioxide in the form of bubbles to a subcutaneous tissue, and at an applied site, carbon dioxide in the form of bubbles may effectively function. For the above reason, a carbon dioxide-containing viscous composition prepared by a kit of Invention 1 causes various significantly excellent useful effects.

Further, [iii] cited documents fail to teach or suggest the constitution of Invention 1. Further, even a person skilled in the art could not easily conceive of a special constitution of Invention 1 and a significant effect caused by such constitution on the basis of the documents, [iv] regarding a publication of Ishigaki invention 1, "It simply describes a bubbling powder cosmetics for the purpose of massaging effect caused by a bubbling function, and does not disclose an aqueous viscous composition capable of retaining carbon dioxide in the form of bubbles." "Furthermore, Publication A2 only describes a bubbling powder cosmetic as being used by mixing a first agent comprising sodium hydrogen carbonate with a second agent comprising an acid, and it fails to specifically describe the preliminary preparation of aqueous viscous composition and the reaction of sodium hydrogen carbonate with an acid in the aqueous viscous composition." "In usual cases, a thickener does not perform thickening function instantly upon contact with water, but exhibits viscosity by dispersing or swelling into water. Therefore, a simple simultaneous mixture of a thickener, a carbonate, an acid, and water without the preliminary preparation of an aqueous viscous composition would cause carbon dioxide generated by the reaction of a carbonate and an acid to be diffused into the air and lost while a thickener contacts with water to cause stickiness. Taking this into account, like a bubbling powder cosmetics of Publication A2, a simple mixture of a thickener, a carbonate, an acid, and water does not result in an aqueous viscous composition that retains carbon dioxide in the form of bubbles without preliminarily preparing an aqueous viscous composition, or otherwise fails to retain a small amount of carbon dioxide in the form of bubbles. It only results in an aqueous viscous composition that could not cause a significant effect of the Invention." (Hereinabove Exhibit Otsu E all 1-1).

(b) Thereafter, Plaintiff submitted a written amendment on February 6, 2007, but a decision of rejection was issued. Plaintiff filed a notice of appeal (Exhibit Ko 27), and further made an amendment, but a reason for refusal was issued on June 30, 2010 for a claimed invention after the amendment, and a summary of the reason is that Invention 1 does not involve an inventive step according to cited documents such as Japanese Unexamined Patent Application Publication No. 1985-215606 (Exhibit Otsu

E all 3; hereinafter referred to as "document 1" in the item).

In contrast, Plaintiff submitted a written amendment on September 6, in the same year to specify combinations of Claim 1 and specify that an aqueous viscous composition comprises sodium alginate as a gelling agent. Further, Plaintiff submitted a written opinion on the same date and set forth as below. First, regarding a feature of Invention 1, [i] all the combinations in a kit of Claim 1 comprise an aqueous viscous composition comprising sodium alginate in advance, and on the basis of the constitution, it is designed to react a carbonate with an acid in the aqueous viscous composition and retain generated carbon dioxide. Therefore, a kit of Invention 1 allows us to obtain a carbon dioxide-containing viscous composition comprising carbon dioxide in the form of bubbles. Further, an aqueous viscous composition comprising sodium alginate can maintain viscosity in a sustained manner without forming a film on a skin when coated on the skin, and thus a carbon dioxide-containing viscous composition obtained by a kit of Invention 1 is capable of effectively maintaining generated carbon dioxide and extremely increasing a penetrating amount of carbon dioxide into the skin. Furthermore, a carbon dioxide-containing viscous composition obtained by a kit of Invention 1 has a particularly significant effect for the treatment of athlete's foot, atopic dermatitis, or bedsore and the improvement of partial adiposeness due to its extremely high penetrating effect of carbon dioxide into the skin.

Further, [ii] "As document 1 discloses, in a case of mixing an acid-containing viscous composition and a carbonate-containing viscous composition when in use, viscous fluids are hard to mix. Thus it is difficult to mix them easily and uniformly. As a result, this causes an insufficient and inhomogeneous generation of carbon dioxide. In contrast, the present invention is designed to mix an aqueous viscous composition with granules, and the uniform mixture of a viscous fluid and a solid can be easily implemented. Thus a uniform mixture of them when in use is easy, and carbon dioxide can be sufficiently and uniformly generated." "Furthermore, as disclosed in document 1, an acid-containing viscous composition and a carbonate-containing viscous composition are present in a state in which an acid and a carbonate have been already dissolved into a viscous composition. Thus mixing them results in instant generation of a large amount of carbon dioxide bubbles that exceeds an ability of an aqueous viscous composition to retain carbon dioxide. As a result, carbon dioxide diffuses into the air, thereby failing to penetrate a sufficient amount of carbon dioxide into the skin. In contrast, like the present invention, when granules comprising an acid or granules comprising an acid and a carbonate are mixed in an aqueous viscous composition, granules comprising an acid or granules comprising an acid and a carbonate are

gradually released in the aqueous viscous composition, thereby generating carbon dioxide in a sustained manner. The present invention is designed to generate carbon dioxide in such a sustained manner, and is capable of continuously penetrating a large amount of carbon dioxide into the skin in a sustained manner from the aqueous viscous composition." Cited documents including document 1 do not disclose the constitution of Claim 1 after the Amendment. A viscous composition capable of penetrating a large amount of carbon dioxide into the skin in a sustained manner without forming a film on the skin is not easily conceivable. [iv] Plaintiff further mentions that "the present invention generates carbon dioxide in an aqueous viscous composition in a sustained manner, and further seals this in the aqueous viscous composition, thereby increasing a pressure of carbon dioxide in the form of bubbles, and the pressure promotes the penetration of carbon dioxide into the skin, and further allows an unimaginable amount of carbon dioxide to penetrate into the skin and significantly causes the treatment effect of athlete's foot, atopic dermatitis, or bedsore as well as the improvement effect of partial adiposeness." "Conventionally, it is publicly known that carbon dioxide has a blood circulation promoting effect. However, even if one could expect that blood circulation temporarily provides a benefit to the skin, there is no way athlete's foot, atopic dermatitis, bedsore, or partial adiposeness may be drastically treated or improved. The inventor (Doctor Masato HIOKI), who is a medical practitioner, assumes that a particularly significant effect of the present invention is associated with an extra function such as neoangiogenesis in addition to a blood circulation prominent effect by penetrating a large amount of carbon dioxide into the skin in a sustained manner. Rather, unless it is supposed that an unknown, extra function in addition to a blood circulation promoting effect is involved, it is difficult to logically explain such a particularly significant effect by only a blood circulation prominent effect." Such particularly significant effect "could not be expected at all" from cited documents. (Hereinafter Exhibit Otsu E all 1-2).

(c) Thereafter, a decision to grant a patent was made for Invention 1.

b Invention 2

(a) For the patent application according to Invention 2, a reason for refusal was issued on March 4, 2011, and the summary of the reason is that on the basis of the cited documents such as the publication of Ishigaki invention 1 and Japanese Unexamined Patent Application Publication No. 1996-268828 (hereinafter referred to as "Cited document A6" or "A6"), Invention 2 does not involve an inventive step (Exhibit Ko 28).

In response, Plaintiff submitted a written amendment on May 6, 2011 and made an amendment to limit "a kit for obtaining a carbon dioxide-containing viscous

composition" of Claim 1 to "a kit for obtaining a carbon dioxide-containing viscous composition to be used for pharmaceutical composition or cosmetics". Further, Plaintiff submitted a written opinion on the same date, and mentioned the same thing as that presented in the respective written opinions of the above item a with regard to the feature and the inventive step of Invention 2. Further, Plaintiff discussed Cited document A6 as in the following: "It discloses a pack cosmetic characterized in comprising 5 to 60 % by weight of a carbonate, 5 to 60 % by weight of an organic acid, a heat generating substance, and a foam stabilizer (see Claim 1). However, the pack cosmetics of A6 does not comprise "an aqueous viscous composition comprising sodium alginate" that has been prepared in advance, but is designed to mix a non-aqueous composition comprising a carbonate, an organic acid, a heat generating substance, and a foam stabilizer with water when in use. Specifically, in a pack cosmetics of A6, a carbonate and an acid react to cause the resultant carbon dioxide to be diffused into the air and lost while a thickener contacts with water to cause stickiness. As a result, carbon dioxide in the form of bubbles cannot be retained sufficiently." This is "supported by a result of "comparative examples in which one agent consists only of water."

Further, in the above written opinion, in a case of preliminarily preparing an aqueous viscous composition and mixing a carbonate and an acid in the aqueous viscous composition, and in a case of mixing a thickener, a carbonate, an acid, and water in the other embodiments, for the purpose of assessing an amount of retained carbon dioxide in the obtained respective compositions, the following experiments were implemented: [i] experimental examples where an aqueous viscous composition with a first agent of granules comprising an acid and a second agent comprising a carbonate and sodium alginate were mixed; and [ii] four comparative experimental examples with a first agent of only water or water and citric acid and a second agent of sodium hydrogen carbonate free of water (see Exhibit Otsu A117-2). Further, in the above written opinion, as an experimental result, the experimental example sufficiently retains carbon dioxide in the form of bubbles even 10 minutes after mixing and stirring, whereas in an experimental example with a first agent of water only, the comparative experimental example fails to retain carbon dioxide in the form of bubbles due to the diffusion of carbon dioxide into the air, or fails to retain carbon dioxide in the form of bubbles one to two minutes after mixing and stirring, and in an experimental example with a first agent of water and citric acid, carbon dioxide in the form of bubbles could not be retained (Hereinbefore Exhibit Otsu E all 2).

(b) Thereafter, a decision to grant a patent was made for Invention 2.

(C) Publicly known art of the effects of carbon dioxide

a Exhibit Otsu A111 (Japanese Unexamined Patent Application Publication No. 1984-141512)

This document describes an invention of cosmetics, and discloses that "It is known that carbonate gas has a blood vessel expansion effect, and has a clinical use such as carbonate gas bath for rehabilitation." (Page 1, left column, line 14 to right column, line 2) (Exhibit Otsu A115 also has a similar description of medicated cosmetics or cosmetics).

b Exhibit Otsu A105, 114, Exhibit Otsu E all 3 (Japanese Unexamined Patent Application Publication No. 1985-215606)

This document describes an invention of "a pack characterized in comprising carbonate gas or a carbonate gas generating substance" (Claim 1), and that "the inventors have ... intensively investigated in an attempt to provide a pack that promotes blood circulation, and finally found that a direct action of carbonate gas on the skin improves blood circulation of the skin and provides skin with moist feeling, to thereby complete the Invention" (page 2, left upper column, lines 1 to 6).

c Kanebo's publication (Exhibit Otsu A102, Exhibit Otsu E all 6)

This document is a publication of unexamined patent application according to the Kanebo example invention and Kanebo comparative example invention of the case, and it discloses that "Conventionally cosmetics mixed with carbonate gas for the purpose of blood circulation promotion are proposed." (page 1, left column, lines 17 to 18).

(D) In view of the foregoing, a consideration is given to a technical significance of the respective inventions.

a In view of the description of Background Art of the respective descriptions, there was a problem that topical antihistamic agent and anti-allergic agent had almost no effect on itching caused by atopic dermatitis, athlete's foot, and insect bites, and topical non-steroidal anti-inflammatory agent and steroidal agent had a weak effect on itching and had no immediate effect. It is thus recognized that the respective inventions have a goal for discovering a treatment method effective for them.

Further, it can be seen from the scope of the claims and the description of the respective descriptions that the respective inventions reacts a carbonate and an acid in an aqueous viscous composition that can retain carbon dioxide in the form of bubbles to contain bubbling carbon dioxide in a composition to obtain a carbon dioxide-containing viscous composition, which is used for a pharmaceutical composition or cosmetics.

First of all, in view of the aforesaid publicly known techniques, carbon dioxide is known to have a function of blood circulation promotion. Pack and cosmetics are invented to cause carbon dioxide to act on the skin. These products supply carbon dioxide included in a pack, etc. to a subcutaneous tissue to exhibit blood circulation promoting effect.

Consequently, it is reasonable to find that the technical significance of the respective inventions does not simply utilize carbon dioxide, but prepares an aqueous viscous composition in advance (the disclosure of the invention and the best mode for carrying out the invention of the description 1, [0032], [0075], [0079], [0089]), and causes carbon dioxide in the form of bubbles to be retained in the composition and applied to a skin mucosa or damaged skin tissue, etc. to cause carbon dioxide to be supplied to a subcutaneous tissue (the disclosure of the invention of description 1, [0017]).

Further, in view of the prosecution history of the respective patents of the aforesaid findings, similarly to the respective inventions, a pack cosmetic in which carbon dioxide generated by the reaction of a carbonate and an acid is retained in a viscous composition as bubbles has been already disclosed in cited document A6, which is a cited document of the notice of reasons for refusal for Invention 2. In Cited document A6, a thickener is contained in a composite powder of a carbonate and an acid, and the thickener is mixed with water when in use (on-demand preparation). Thus it takes time for a thickener to be dissolved into water and exhibit viscosity. In the meantime, carbon dioxide generated by the reaction of a carbonate and an acid is diffused into the air, whereas in the respective inventions, a thickener is dissolved into water in advance (preliminary preparation, constituent features 1-1B, 2-1B). Carbon dioxide generates by the reaction of a carbonate and an acid in a viscous composition. Therefore, generated carbon dioxide does not diffuse into the air, which causes more carbon dioxide to be retained in the composition and supplied to a subcutaneous tissue in a sustained manner (This is not recognized as easily conceivable on the basis of a publicly known technique, as per the determination of the below-mentioned issues 3-4 and 3-5.).

b Further, the effects of preliminary preparation can be observed by the comparison between "the sustainability of bubbles" of the examples of the respective descriptions and an experimental result of the comparative examples of the written opinion against a notice of reasons for refusal for Invention 2.

Further, according to Exhibit Ko 32, carbon dioxide-generating packs of on-demand preparation-type and preliminary preparation-type are respectively coated on

the skin. The preliminary preparation-type maintained a volume about two times an initial volume even after two hours from the completion of stirring operation and the skin exhibited quite red color, whereas an on-demand preparation-type decreased to almost the same volume as an initial volume 30 minutes after the completion of stirring operation, so that a difference in color between a coated part and a non-coated part is not recognized. It can be seen that a preliminary preparation-type is superior in sustainability and transdermal absorption of carbon dioxide.

Furthermore, Defendant NeoChemir implements an experiment similar to the above experiment made by Plaintiff. The result was submitted as Exhibit Otsu A3. Exhibit Otsu A3 corresponds to Exhibit Ko 32. A composition mixed and stirred for 10 seconds had an increased volume after two hours compared to a volume after one minute in a preliminary preparation type, whereas it showed a 30% decrease from a volume after one minute in an on-demand preparation type (a time for stirring is 10 seconds, similarly to the preliminary preparation type). It showed poor sustainability of bubbles.

First of all, Exhibit Otsu A3 conducted transdermal absorption simulation experiments, in which there was no significant difference between them in total permeable amount of carbon dioxide in gas permeable films when 30 minutes passed after the completion of stirring operation. Further, regarding an experimental result of Exhibit Otsu A3, an amount of transdermal absorption of carbon dioxide is simulated by use of gas permeable films. According to Exhibit Otsu A11, the amount of transdermal absorption is associated with a degree of reddening of a skin in this experimentation. Thus it has reasonable reliability as a measurement of an amount of transdermal absorption of carbon dioxide. Further, in an experiment of Exhibit Otsu A3, 5% butyleneglycol is added. This is described as components that can be mixed as a moisturizer in the respective descriptions (Disclosure of the Invention of the description 1, [0046]). Thus it is believed that there is no particular problem to add this for a comparative experimentation. Consequently, an experimental result of Exhibit Otsu A3 has considerable reliability as a comparative result where 5% butyleneglycol was added. What was measured therein is an amount of transdermal absorption of carbon dioxide when 30 minutes passed after the completion of stirring. Thus it does not show that there is no significant difference between an on-demand preparation-type and a preliminary preparation-type in transdermal absorption 2 hours after stirring and mixing as like evaluation criterion 2 of the examples of the respective descriptions.

Additionally, Defendant NeoChemir submitted Exhibit Otsu A 108 to 116 for the

purpose of establishing the fact that the sustainability of bubbles does not change by either of on-demand preparation or preliminary preparation. Exhibit Otsu A108 controlled a reaction of generating carbon dioxide by a polyethyleneglycol membrane similar to the Kanebo example invention, and thus it is inappropriate for the comparison between on-demand preparation and preliminary preparation. Exhibit Otsu A116 does not have such a membrane, a trend of the sustainability of bubbles after two hours does not coincide with the above Exhibit Otsu A3, and thus it cannot be adopted.

In view of the foregoing, there is no significant difference between preliminary preparation-type and on-demand preparation-type until 30 minutes have passed after the completion of stirring in a case of adding 5% butyleneglycol. Fundamentally, it is reasonable to find that the preliminary preparation-type retains more carbon dioxide and has an effect of supplying it to subcutaneous tissues, etc. in a sustained manner.

c Further, the respective inventions retain more carbon dioxide in a carbon dioxide-containing viscous composition and supply it to subcutaneous tissues, etc. in a sustained manner. In view of this, it is reasonably understood from these matters on common general knowledge that an effect and efficacy on the skin due to blood circulation promoting effect of carbon dioxide known in publicly known art would be caused. Taking this into consideration, the respective descriptions refer to an object to provide a formulation effective for itching associated with mucocutaneous disease or mucocutaneous disorder as well as a treatment and prevention method using the same (Background Art of the description 1, [0004], [0005]) because it has an objective to achieve an effect of supplying carbon dioxide to subcutaneous tissues in a sustained manner. Further, it is reasonable to understand that the respective inventions call for the effects of treating, preventing, or improving with almost no side effects such as itching associated with mucocutaneous disease or mucocutaneous disorder; skin mucosal damage; graft failure; dental problem; cutaneous ulcer, cold sense and feeling of numbness associated with peripheral circulatory disturbance; musculoskeletal complaint; nervous system disease; dyskeratosis; suppurative skin disease; constipation associated with weakness or loss of defecation reflex; hair regrowth suppression after removal of hair (removal of excess hair); beauty problems of skin and hair; and if it is used for a desired part, the part can be slimmed (Disclosure of the Invention of description 1, [0062]) because sustained supply of carbon dioxide to subcutaneous tissues etc. is achieved. It is reasonable to understand that the respective inventions do not call for particularly significant effects that go beyond the effects of retaining more carbon dioxide in a composition, and supplying to subcutaneous tissues, etc. in a sustained manner by a preliminary preparation.

(E) As seen above, the respective inventions are characterized by the preliminary preparation allowing more carbon dioxide to be retained in a composition and supplied to subcutaneous tissues in a sustained manner. No matter how much carbon dioxide is generated by a carbonate and an acid, such effect is caused. Thus, although it is necessary to contain carbon dioxide in the form of bubbles in a composition, and the amount is preferably large (Disclosure of the Invention of the description 1, [0061]), it cannot be recognized that an amount of carbon dioxide in the form of bubbles in a composition should be more than a certain amount. In addition, the examples of the respective descriptions evaluated bubbling ability as well as sustainability of bubbling. In view of the Plaintiff's allegation of the content of the conventional technique and the prosecution history of the respective patents, it cannot be seen from the description of the examples that the respective inventions made a limitation to the bubbling ability.

C Defendants' allegation

(A) First, Defendants allege that the respective inventions are characterized in the occurrence of an epoch-making therapeutic effect that has never seen before.

Indeed, the respective descriptions describe a result of conducting a treatment test for multiple kinds of carbon dioxide-containing viscous compositions with a similar composition to the respective inventions. These descriptions describe that excellent results including healing of diseases were obtained. However, as aforementioned, the respective inventions are characterized in that they allow more carbon oxide to be retained in a composition by a preliminary preparation, and supplied to subcutaneous tissues in a sustained manner. As per the determination about the below-mentioned issues 3-4 and 3-5, it cannot be recognized that the constitution of adopting the preliminary preparation was easily conceivable on the basis of publicly known techniques. In view of this, the inventive step of the respective inventions is not first established by achieving an excellent result like a test example of the respective descriptions. Consequently, these test examples only have a meaning showing that a carbon dioxide-containing viscous composition with a composition similar to the respective inventions may bring about an excellent result in a specific mixing amount or for specific subjects in some cases. It is not reasonable to understand that the respective inventions may always bring about such a result. In other words, it is not reasonable to understand that the essential effects of the respective inventions are like the effects observed in the test examples. Therefore, the above Defendants' allegation is not acceptable.

(B) Further, Defendants rely on the Plaintiff's allegation in the prosecution history of the application of the respective patents (Exhibit Otsu E all 1, 2) as a ground

for their own allegation.

However, the description of Exhibits Otsu E all 1 and 2 as Defendants point out explains a function and effect caused by retaining carbon dioxide in the form of bubbles in a composition of the respective inventions and releasing it in a sustained manner. It cannot be recognized that its amount matters.

Indeed, Plaintiff highlighted in the written opinion according to the respective inventions that the effects demonstrated by the test result of the respective descriptions are particularly significant effects based on a function of permeating carbon dioxide into a skin, and the effects cannot be expected from a simple blood circulation promoting effect of carbon dioxide. However, Plaintiff had insisted in the above written opinion that the constitution of the respective inventions was first of all not easily conceivable on the basis of the cited documents of the notice of reasons for refusal before alleging that the respective inventions cause a particularly significant effect. Consequently, as mentioned below, supposing that it cannot be recognized that the constitution of the respective inventions was easily conceivable on the basis of publicly known technique, the inventive step is not supported by the above explanation of particularly significant effect by Plaintiff. Therefore, it is not reasonable to construe the respective inventions in a limited sense by the above Plaintiff's explanation. The above finding is not affected by the Plaintiff's allegation in the prosecution history of the respective patents.

(C) Furthermore, Defendants allege that a pack utilizing carbonate gas or the bubbling effect of carbonate gas-generating substance was well-known in a cosmetic for facial treatment. The respective inventions are inventions with a purpose of retaining carbon dioxide in the form of bubbles in a composition and releasing it in a sustained manner to supply carbon dioxide to subcutaneous tissues. It does not simply provide a pack utilizing carbonate gas or the bubbling function of carbonate gas-generating substance. Therefore, it cannot be said that the above Defendants' allegation affects the above finding.

(2) Taking the above into account, it is reasonable to understand that the language of "capable of retaining carbon dioxide in the form of bubbles" of constituent features 1-1C and 2-1C literally means that a composition of the respective inventions can retain carbon dioxide in the form of bubbles. It cannot be construed that a limitation should be made as Defendants allege.

(3) Accordingly, a consideration is given as to whether the respective Defendants' products have such configuration. Defendants only address an amount of carbon dioxide in the form of bubbles for a composition obtained from the respective

Defendants' products, and do not refute the fact itself that the composition contains and retains carbon dioxide in the form of bubbles.

Further, according to Exhibits Ko 25, 26, and 42, it is recognized that Defendant's products 1 to 8 and 11 to 18 contain and retain carbon dioxide in the form of bubbles in a gel for 20 minutes or more after mixing the gel and granules. Further, although there is no experimental result for Defendant's product 9, it has same compositions as a gel and granules of Defendant's product 12. Thus, it is assumed that the sustainability of bubbling of Defendant's product 9 was at a similar level to Defendant's product 12. In addition, it can be seen from Exhibits Otsu A1 and 8 that an increase rate of volume of a composition one minute after mixing and stirring 25 g of carbonate-containing aqueous viscous composition and 1.2 g of an acid of the Defendant's product 1 to 17 20 times for 10 seconds was 27% for a higher product (Defendant's product 17) and 12% for a lower product (Defendant's product 3). It can be recognized from these documents that compositions obtained from the respective Defendants' products retain carbon dioxide in the form of bubbles and release it in a sustained manner.

In this regard, Defendants point out that an increase rate of the above volume one minute after stirring corresponds to the lowest rank ("0") of the evaluation criterion 1 for the bubbling ability of the respective descriptions. The respective descriptions cannot be construed as specifying bubbling ability, as aforementioned. Therefore, it cannot be recognized that "0" of the evaluation criterion 1 for the bubbling ability is used as not causing a function and effect of the respective inventions. Further, Exhibit Otsu E all 10 does not negate the fact that Defendant's product 2 retains carbon dioxide in the form of bubbles. Thus this does not affect the above findings.

(4) Based on the above, a composition obtained by the respective Defendant's products are one capable of retaining carbon dioxide in the form of bubbles, and the respective Defendant's products satisfy constituent features 1-1C and 2-1C.

2 Issue 1-2 (Whether the respective Defendants' products fall within a technical scope of the respective inventions, and indirect infringement (the sufficiency of constituent feature 1-1A, etc.))

(1) The sufficiency of constituent feature 1-1A

The respective Defendants' products are cosmetic kits for pack. According to the finding of the aforesaid item 1, they are kits for obtaining a carbon dioxide-containing viscous composition. Further, it is known that carbon dioxide has a partial slimming and slimming effect (Exhibits Ko 11, 12, 17, 19, and 21), and a viscous composition obtained from the respective Defendants' products is described as being

used for coating on the whole face (Exhibits Ko 7, 8, 10, 17, 20, 24, the overall gist of oral proceedings), the face is a part for the improvement of partial adiposeness (Exhibits Ko 10, 17, 24, the overall gist of oral proceedings).

In fact, the respective Defendants' products included ones that called for a partial slimming or slimming effect as an expected effect in the advertisements (Exhibits Ko 17, 19. Defendants allege that these are exaggerations, but what was promoted and advertised is clear and definite, and thus the Defendants' allegation is not acceptable); a similar description can be found in the promotion and advertisement by the sellers of the respective Defendants' products (Exhibits Ko 10, 13, 15, 18, 24). It is hard to believe that the Defendants who were manufacturers and distributors of the respective Defendants' products were not involved with the content of the advertisement. It is assumed that the Defendant's recognition was reflected on the promotion and advertisement. Further, Defendant NeoChemir and its representative refer to a partial slimming effect caused by carbonate gas on a website and in articles (Exhibits Ko 11, 12; defendants allege that Exhibit Ko 12 is a description of a technique in which carbon dioxide is dissolved into water, but as per the aforesaid ruling, it is indefinite as to whether or not the respective inventions might transdermally absorb carbon dioxide in the form of bubbles in a composition as they are. The above finding is not affected by the Defendants' allegation.).

In addition, Defendants allege that not all the respective Defendants' products are cosmetics for the improvement of partial adiposeness. The respective Defendants' products have almost the same composition and have a common point in that they are cosmetics for pack for obtaining a carbon dioxide-containing viscous composition. In view of the above findings, the above Defendants' allegation is not acceptable. Further, Defendants allege that "carbonate gas" pack only has a swelling removal effect, and a facial contour slimming effect is an effect different from partial adiposeness improvement in relation to Issue 6. It cannot be seen that Examples 8, 9, and 13 of the respective descriptions distinguish these effects. Exhibit Ko 54 discloses that "the adiposeness is classified into a type of simply deposition of fat and a type of swelling". In view of these facts, the Defendants' allegation is not acceptable. Furthermore, Defendants point out that some of promotion and advertisement do not refer to a partial adiposeness improving effect (Exhibits Otsu A36 to 45). It cannot be recognized that they excluded the use for partial adiposeness improvement.

As aforementioned, it can be recognized that the respective Defendants' products have their use in obtaining a carbon dioxide-containing viscous composition to be used as a cosmetic for the improvement of partial adiposeness, and kits for obtaining a carbon

dioxide-containing viscous composition to be used as a cosmetic for the improvement on partial adiposeness. Therefore, the products satisfy the constituent features 1-1A and 2-1A.

(2) The sufficiency of constituent feature 1-1D

Besides the constitution of the respective Defendant's products and a method for use thereof (Aforesaid No. 2, 2(5)C), according to the aforesaid finding 1, the respective Defendant's products satisfy constituent feature 1-1D, and constituent feature 1-1.

(3) The sufficiency of constituent features 1-4 and 1-5

The ingredients labels of the gels of the respective Defendants' products are as per described in the column of "gel" of the attachment "List of Defendants' products". Water is listed at the top, and the order of the list of sodium alginate is as per described in the same column. Further, it can be seen from Exhibits Ko 25, 26, 42, Exhibits Otsu A1, 8 that an aqueous viscous composition obtained from the respective Defendants' products have a certain level of viscosity. In view of the fact that Defendants do not positively provide counter evidence, it is recognized from the overall gist of oral proceedings that an aqueous viscous composition obtained from the respective Defendants' products comprise 2 % by weight or more of sodium alginate and 87 % by weight or more of water.

Therefore, the respective Defendants' products satisfy constituent features 1-4 and 1-5.

(4) Whether or not indirect infringement of Inventions 1-7 and 1-8 is established

According to the above findings including the aforesaid item (1), purchasers of the respective Defendants' products can obtain a carbon dioxide-containing viscous composition by the kit, and a viscous composition obtained from the respective Defendants' products is used by coating on the whole face. Therefore, it cannot be recognized that there is a use other than a use for cosmetics for the improvement of partial adiposeness in the respective Defendants' products.

Therefore, the Defendants' act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Inventions 1-7 and 1-8 (Article 101, item (i) of the Patent Act).

(5) Whether or not an indirect infringement of Inventions 1-9, 1-12, and 1-13 is established

The respective Defendants' products are sold as a kit including two agents of a gel and granules. The outer case describes a method for use that these two agents are mixed and coated on the whole face (Exhibits Ko 7, 8, 17, 20, the overall gist of oral proceedings). This suggests that a person who purchases the respective Defendants'

products prepares a pack cosmetics including carbon dioxide by mixing two agents by herself.

Further, it cannot be recognized from the finding and ruling of the aforementioned item (4) that there is any use other than cosmetics for the improvement of partial adiposeness in the respective Defendants' products.

Therefore, the Defendants' act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Inventions 1-9, 1-12, and 1-13 (Article 101, item (iv) of the Patent Act).

(6) The sufficiency of constituent features 2-1, 2-4, and 2-5

In view of the above findings, the respective Defendants' products are kits for obtaining a carbon dioxide-containing viscous composition to be used as a cosmetic (constituent feature 2-1A), and the sufficiency of the other constituent features is recognized.

(7) Whether or not an indirect infringement of the constituent feature 2-7 is established

It is recognized that a purchaser of the respective Defendants' products can obtain a carbon dioxide-containing viscous composition by a kit of the respective Defendants' products and use it as cosmetics. Further, it cannot be recognized from the aforementioned facts that there is any use other than cosmetics in the respective Defendants' products.

Therefore, the Defendants' act of producing and selling the respective Defendants' products corresponds to an act of indirect infringement of Invention 2-7 (Article 101, item (i) of the Patent Act).

(8) Regarding the acts of production and sales of granules by Defendant NeoChemir

As per the above findings, Defendant NeoChemir produces and sells granules of the Defendant's products 2, 5, 6, 7, 9, 11 to 14, and 16 to 18. The above Defendant's products consisting of a gel produced and sold by Defendants and the granules fall within a technical scope of Inventions 1-1, 1-4, 1-5 and Inventions 2-1, 2-4, and 2-5. Further, as per the aforesaid findings, the granules include lactose. It is recognized that this delays the reaction of malic acid included in granules and sodium hydrogen carbonate included in a gel to make a sustained-release composition (Exhibits Otsu A18 to 20). Consequently, granules sold to Defendants by Defendant NeoChemir were produced and sold as the one to be sold with a gel produced and sold by Defendants. Therefore, it cannot be seen that there is any other economical, commercial, or practical use.

Therefore, the Defendant NeoChemir's act of producing and selling granules corresponds to an act of indirect infringement of the respective inventions (Article 101, item (i) of the Patent Act).

3 Issue 2 (Whether the respective Defendants' products cause the functions and effects of the respective inventions)

(1) As per the finding of the aforesaid item 1, the function and effect of the respective inventions is to cause carbon dioxide to be contained in a composition as bubbles, retain the carbon dioxide in the form of bubbles, and release it in a sustained manner so as to supply carbon dioxide to a subcutaneous tissue in a sustained manner.

Furthermore, as per the findings of the aforesaid item 1(3), it is recognized that a composition obtained by the respective Defendants' products can retain carbon dioxide in the form of bubbles and release it in a sustained manner.

(2) Note that Defendants allege that the technical idea of the respective Defendants' products is fundamentally different from that of the respective inventions. It is indefinite, however, as to whether or not the respective inventions might transdermally absorb carbon dioxide in the form of bubbles in a composition as they are, and the function and effect of the respective inventions are as per the above findings. A viscous composition falls within a technical scope of the inventions as long as it retains and continuously releases carbon dioxide in the form of bubbles. Furthermore, as in the above findings, a composition obtained by the respective Defendants' products can retain carbon dioxide in the form of bubbles and release it in a sustained manner.

Further, Defendants point out that granules of the respective Defendants' products contain lactose. Even if lactose should have an effect of suppressing the generation of carbon dioxide in the form of bubbles, a composition obtained from the respective Defendants' products would retain carbon dioxide in the form of bubbles, as per the aforesaid findings. Thus the above findings are not affected by the above Defendants' allegation.

(3) For the above reason, it is recognized that the respective Defendants' products cause the above function and effect of the respective inventions. Therefore, it is not negated that the respective Defendants' products fall within the technical scope of the Inventions 1-1, 1-4, and 1-5 and the Inventions 2-1, 2-4, and 2-5, and an indirect infringement is established.

4 Issue 3-1 (Incompletion of the respective inventions)

(1) Production method of compositions of the respective inventions

First, a consideration is given to a specific method of producing a composition of the respective inventions, the respective inventions are inventions regarding a

method for preparing a kit for obtaining a carbon dioxide-containing viscous composition to be used as a cosmetic and a pharmaceutical composition and a method for preparing the viscous composition. Further, the composition is obtained by mixing an aqueous viscous composition (including a carbonate or an acid) with (composite) granules, fine grains, or powders including a carbonate or an acid.

Further, the respective descriptions (Disclosure of the Invention of description 1, [0020] to [0030] and [0034] to [0037], [0058], [0059]) describe specific matters (compositions and contents, etc.) of water, a thickener, a carbonate, and an acid used in the respective inventions. Further, a method of producing granules including a carbonate and an acid, and a method of producing an aqueous viscous composition are described in the examples. Further, it is seen as a design matter to make (composite) granules (composite) fine grains or powders.

Furthermore, the disclosure of the invention and the best mode for carrying out the invention of description 1 and [0032], [0033], [0100], [0101] and [0103] describe a method for producing a carbon dioxide-containing viscous composition consisting of a combination of Claim 1 of the respective inventions.

It is recognized from the above description that a composition of the respective inventions may be produced.

(2) Use of composition produced by the method of the above item (1)

The disclosure of the invention and the best mode for carrying out the invention of description 1 and [0049] to [0056] describe the use of the compositions of the respective inventions. Further, a test example cited in the below-mentioned (3) also describes cosmetics including a cosmetic for the improvement of partial adiposeness and a method for the use of a composition as a pharmaceutical composition (for treatment)

It is recognized from the above description that a composition of the respective inventions may be used for cosmetics including a cosmetic for the improvement of partial adiposeness and a pharmaceutical composition (for treatment). Therefore, it is recognized from the above description that a kit for obtaining a composition of the respective inventions may also be produced and used.

(3) Function and effect of composition produced by the method of the above item (1)

A The respective descriptions disclose that a reaction of a carbonate and an acid results in generation of carbon dioxide, and when they are reacted in a composition including water and sodium alginate, carbon dioxide is contained and retained in the composition (Disclosure of the Invention of description 1, [0032]).

Further, as per the aforesaid findings, the respective descriptions describe an evaluation result of bubbling ability and the sustainability of bubbling of a composition produced by the above method (1). This evaluation result describes that regarding bubbling ability one case had an increase rate of a volume of a composition of 30 to 50% (two cases for Invention 2) and the other cases had 50% to 70% or 70% or more, and regarding the sustainability of bubbling, a decrease rate was 20% or less or 20% to 40%.

In view of the aforementioned description, a composition of the respective inventions produced by the above method (1) has a bubbling ability and a considerable level of sustainability of bubbling. Further, [0017] discloses that compositions of the respective inventions are applied to a targeted site to supply carbon dioxide in the form of bubbles in a composition to subcutaneous tissues in a sustained manner. Further, as per the aforesaid item 1(1)B(D)c, it is reasonably understood from these matters of common general knowledge that an effect and efficacy on a skin due to a blood circulation promoting effect of carbon dioxide known in publicly known art would be caused. Test examples specifically confirmed the effect. In addition, test examples include ones in which the examples of the respective inventions were not used. This holds true for the test examples 8, 9, and 13 with regard to partial slimming test and face slimming test. Also in these test examples, an aqueous viscous composition is preliminarily prepared, and a carbonate and an acid are reacted therein to generate carbon dioxide. The mixed components and the content are the same as those of a composition of the respective inventions. Therefore, these test examples are also construed as being permitted to be referred as one confirming a function and effect of the respective inventions.

In view of the foregoing, it is recognized that the respective inventions have been completed.

B Defendants' allegation

(A) Defendants allege that the test examples of the respective descriptions are unreliable, or it is not believed that their results are correctly described in the respective descriptions.

As aforementioned, however, it is not recognized that excellent results as described in the test examples are essential for the effect of the respective inventions. Further, even if setting this point aside, the Defendants' allegation of the test examples is abstract in many cases. For a composition used in the test examples of the respective descriptions, the examples describe specific mixed components and contents as well as their production method. Further, the bubbling ability and sustainability of

bubbling are evaluated by objective numerical values.

Further, test examples also describe specific numerical values, and thus it cannot be recognized that the test examples include definitely unreasonable contents.

Furthermore, Defendants allege that the test examples containing lactic acid and the test examples in which an aqueous viscous composition is acidic may not produce a desired carbonate gel pack, and thus these test examples are faked; however, there is no evidence to find its specific evidence. Thus the above determination is not affected by the Defendants' allegation.

Therefore, the above Defendants' allegation is not acceptable.

(B) Defendants allege that the original data of the test examples are not submitted. In view of the technical significance of the respective inventions, it is reasonably understood that there is a case of obtaining a result as described in the test examples. In view of the general method of description, it cannot be said that the description of the test examples has no credibility. Further, the respective descriptions describe a number of examples and test examples, whose content is consistent. The description of the examples and test examples of the respective descriptions are consistent with experimental results (Exhibits Ko 25, 26, 42, Exhibits Otsu A1, 8) for the respective Defendants' products that fall within a technical scope of the respective inventions as is found in the aforesaid item 1(3).

Therefore, in this case, the respective test examples have credibility without submitting original data.

(C) Furthermore, Defendants allege that a treatment method utilizing the efficacy of carbon dioxide on various skin diseases has not yet been widely practiced even now. It cannot be said that such an extent of supportive evidence is required for the test examples, nor can it be said that the above allegation instantly undermines the credibility of the test examples.

In addition, Defendants submitted a report of an experimental result of Exhibit Otsu E all 21 and submitted a written opinion of Exhibit Otsu A48 by a holder of a doctorate, alleging that an additional test of the test example 13 (partial slimming test of arm) of the respective descriptions was conducted by use of Plaintiff's products.

Indeed, an effect of partial slimming of arms cannot be observed in Exhibit Otsu E all 21, but it is unavoidable to cause an individual difference to some extent in view of the function and effect of the respective inventions of cosmetics for improvement of partial adiposeness. Therefore, it cannot be deduced from this fact that the test examples of the respective descriptions have no credibility, nor can it be recognized that excellent results as described in the test examples are essential for the effect of the

respective inventions. Thus it cannot be inferred from the result of Exhibit Otsu E all 21 that the respective inventions are incomplete. Further, the written opinion of Exhibit Otsu A48 discloses that the respective inventions significantly lack a scientific ground for the effectiveness and safety in applying the substance to human for all the diseases and symptoms of the respective descriptions, and it cannot be totally recognized that a problem is solved. However, the respective inventions may retain more carbon dioxide in a composition and supply it to subcutaneous tissue, etc. in a sustained manner by preliminary preparation. In view of this, it is reasonably understood from these matters of common general knowledge that an effect and efficacy on the skin due to a blood circulation promoting effect of carbon dioxide known in publicly known art would be promoted. Therefore, even if there is no ground at a strong evidence level such as systematic review and one or more randomized comparative tests of Exhibit Otsu A48 as like a case of a novel compound in which an effect is unpredictable, it cannot be said that the invention is incomplete. This also holds true for Exhibit Otsu A47.

Further, according to an experimental result of Exhibit Otsu E all 10, there are several examples in which the skin is colored reddish in a case of using "one with a low viscosity". However, a method for producing "one with a low viscosity" is indefinite from documentary evidence. Even if setting this aside, one with a low viscosity can be seen as having a certain degree of viscosity. In view of this, it cannot be supported by the experimental result of Exhibit Otsu E all 10 that the respective inventions are incomplete.

Furthermore, Defendants submit Exhibit Otsu A2, and allege that a carbonate gas pack (sample A) generating a large amount of carbon dioxide bubbles during the mixture have a lower transdermal permeation of carbon dioxide as compared to a carbonate gas pack (sample B) slowly releasing less bubbles. What matters in relation to the effect of the respective inventions is the presence or absence of a difference between the case of on-demand preparation and preliminary preparation in a carbonate gas pack with a same ability to release carbon dioxide. This is confirmed by Exhibit Ko 32, and thus Exhibit Otsu A2 does not negate the function and effect of the respective inventions.

(4) In view of the foregoing, it is recognized that the respective inventions have been completed.

5 Issues 3-2 (nonconformance to support requirement) and Issue 3-3 (nonconformance to enablement requirement)

(1) According to the finding and ruling of the aforesaid item 4, the respective

descriptions specifically describe the mixed components and contents of a composition of the respective inventions. The descriptions also discloses a specific method for producing an aqueous viscous composition (including a carbonate or an acid), (composite) granules, fine grains, or powders including a carbonate or an acid and mixing them to produce a composition of the respective inventions as well as its function and effect. Thus the descriptions satisfy the support requirement and enablement requirement.

(2) Defendants' allegation

A Defendants allege that there is no test example showing that all the problems of the respective inventions have been solved.

However, the problem as Defendants allege is a problem described in background art and [0004] and [0005] of description 1. As in the aforesaid item 1(1)B(D)c, these descriptions of the respective inventions solve a problem to achieve the effects of retaining more carbon dioxide in a carbon dioxide-containing viscous composition and supplying it to subcutaneous tissues in a sustained manner. Further, the respective inventions may retain more carbon dioxide in a composition and supply it to subcutaneous tissue, etc. in a sustained manner by preliminary preparation. In view of this, it is reasonably understood from these matters of common general knowledge that an effect and efficacy on a skin due to a blood circulation promoting effect of carbon dioxide known in publicly known art would be promoted. Therefore, it is recognized that a person skilled in the art could recognize that the respective inventions might solve a problem and the respective inventions were feasible without test examples for all the efficacy described in the respective descriptions.

Further, it can be said as a matter of common general knowledge that the reaction of a carbonate and an acid results in the generation of carbon dioxide (Disclosure of the Invention of the description 1, [0032], Kanebo publication, etc.). Thus it is permitted to confirm a function and effect of the respective inventions in reference to the test examples in which a composition comparable to or inferior to a composition of the respective inventions in bubbling ability and sustainability of bubbles is used, as per rules in the aforesaid item 4(3)A. Consequently, it cannot be recognized as not conforming the support requirement.

B Subsequently, Defendants allege that it is necessary to describe to the extent of the description of a result according to a pharmacological test to satisfy the support requirement.

Indeed, the respective inventions are inventions directed to a kit for obtaining a carbon dioxide-containing viscous composition to be used as a pharmaceutical

composition (for the treatment). As per the aforesaid item 1(1)B(D)c, however, the respective inventions may retain more carbon dioxide in a composition and supply it to subcutaneous tissue, etc. in a sustained manner by preliminary preparation. In view of this, it is reasonably understood from these matters of common general knowledge that an effect and efficacy on a skin due to a blood circulation promoting effect of carbon dioxide known in publicly known art would be promoted. Therefore, it cannot be said that the effects of the respective inventions are hard to be expected or unpredictable like a novel compound (as in the aforesaid item 1(1)B(D)c, it is not recognized that excellent results as described in the test examples are essential for the effect of the respective inventions).

Therefore, the above Defendants' allegation is not acceptable.

C Defendants allege that the respective descriptions are silent about action mechanism, and there is a possibility that any factor other than transdermal absorption of carbon dioxide in the form of bubbles might function.

However, Defendants' allegation only points out the possibility. Besides, the respective inventions may retain more carbon dioxide in a composition and supply it to subcutaneous tissue, etc. in a sustained manner by preliminary preparation. In view of this, it is reasonably understood from these matters of common general knowledge that an effect and efficacy on a skin due to a blood circulation promoting effect of carbon dioxide known in publicly known art would be promoted. Further, Defendants cite the Plaintiff's allegation in the prosecution history of the respective patents and allege that an extra function other than a blood circulation promoting effect is involved. The Plaintiff's allegation discusses excellent results of the test examples of the respective descriptions, and does not hold true for all the respective inventions. Further, as in the above findings, the respective descriptions describe a specific method for producing and using compositions of the respective inventions, as well as a function and effect caused by use of the compositions. It can be seen from this description that a person skilled in the art could solve a problem to be solved by the respective inventions, and the respective inventions were feasible.

D Furthermore, Defendants allege that since there is no limitation to the compositions of a carbonate and an acid, it cannot be said that a person skilled in the art could recognize that the respective inventions could solve the problem.

However, the respective inventions cause carbon dioxide generated by the reaction of a carbonate and an acid to be retained in the form of bubbles in a composition. As in the above findings, it is a matter of common general knowledge that carbon dioxide generates by the reaction of a carbonate and an acid. Thus it is a design matter

that a person skilled in the art should select as to what kinds of carbonate and acid are to be selected. Further, the respective descriptions also describe the test examples in which a composition comparable to or inferior to a composition of the respective inventions in bubbling ability and sustainability of bubbles is used in addition to the examples of the respective inventions. As in the above findings, in view of the fact that it was a matter of common general knowledge that carbonate gas improves blood circulation, it is recognized that a person skilled in the art could recognize from the description of the respective descriptions that the respective inventions might solve a problem.

(3) For the above reason, the recitation of the scope of the claims according to the respective inventions conforms to the support requirement (Article 36, paragraph (6), item (i) of the Patent Act), and the description of the Detailed Description of the Invention of the respective description conforms to the enablement requirement (Article 36, paragraph (4), item (i) of the Patent Act).

6 Issue 3-4 (lack of inventive step over a main cited reference of Kanebo's publication, Example 9 (Kanebo example invention))

(1) Kanebo example invention

A According to Kanebo publication (Exhibit Otsu A102, Exhibit Otsu E all 6), the scope of claims and the summary of the invention described in Example 9 are set forth as below.

(A) The invention described in the scope of the claims of Kanebo publication is a bubbling cosmetic with excellent gas retaining ability activating skin by a blood circulation promoting effect of carbonate gas, storage stability, feeling, and skin safety (Kanebo publication, (technical field)).

What is proposed before is a cosmetic in which carbonate gas is mixed for the purpose of blood circulation promotion, e.g. a cosmetics in which carbonate gas is mixed with an aqueous cosmetics and sealed in a pressurized container. These cosmetics have a defect of high cost due to pressure-tightness of a container (Kanebo publication (Conventional technique)).

Accordingly, a two-pack type was first made to improve storage stability.

Further, supposing that a water solution obtained by dissolving an acidic substance into water is a first agent, and a solid in which a water soluble polymer and/or clay mineral and a carbonate are covered with a solid polyethyleneglycol at room temperature is a second agent, carbonate gas bubbles gradually generate in an on-demand mixture and stable bubbles generate by a viscosity of a water-soluble polymer and/or clay minerals to improve the retaining ability of carbonate gas (gas retaining

ability) (Scope of the claims, (Disclosure of the Invention) and (Object of invention) of Kanebo publication).

Furthermore, the above constitution provides excellent feeling (Kanebo publication (The object of invention)).

(B) Kanebo publication describes Examples 1 to 11. A method for preparing a first agent is to add citric acid to water and stir and uniformly mix them. Example 9 was conducted with 5.0 % by weight of citric acid and 95.0 % by weight of water. Further, a preparation method of a second agent is to dissolve polyethyleneglycol (molecular weight: 4000) at about 80°C, and add sodium hydrogen carbonate and sodium alginate during heating, and uniformly mix them and cool down to room temperature to make a powder covered with polyethyleneglycol. In Example 9, polyethyleneglycol, sodium hydrogen carbonate, and sodium alginate were set to 10.0 % by weight, 40.0 % by weight, and 50.0 % by weight, respectively. Further, a weight ratio of a first agent and a second agent was set to 10:1. Further, citric acid used in this example is an acid, sodium hydrogen carbonate is a carbonate, and sodium alginate is a water-soluble polymer (Exhibit Ko 2, Exhibit Otsu A102, Exhibit Otsu E all 6).

According to test results of the respective examples, bubbling ability, gas retaining ability, and storage stability were excellent or good for all, whereas they were good, good, and excellent respectively for Example 9.

(C) Taking the above matters into account, it can be recognized that Example 9 of the Kanebo publication describes the following invention (Kanebo example invention):

a A two-pack bubbling cosmetic for activating the skin through a blood circulation promoting effect of carbonate gas,

b consisting of a combination of an aqueous solution containing an acid with a solid in which a carbonate and a water-soluble polymer of sodium alginate are covered with a solid polyethyleneglycol at room temperature,

c wherein a composition is obtained by mixing an aqueous solution containing an acid with a solid in which a carbonate and a water-soluble polymer of sodium alginate are covered with a solid polyethyleneglycol at room temperature.

d A two-pack bubbling cosmetic.

B Comparison between Invention 1-1 and the Kanebo example invention

In view of the above findings, "carbonate gas" of the Kanebo example invention corresponds to "carbon dioxide" of Invention 1-1. Further, comparing Invention 1-1 and the Kanebo example invention, it is recognized that there are at least the following

differences.

[i] Different feature 1: Invention 1-1 consists of a combination of an aqueous viscous composition comprising a carbonate and sodium alginate with granules (fine grains, powders) comprising an acid, and a combination of composite granules (fine grains, powders) comprising a carbonate and an acid with an aqueous viscous composition comprising sodium alginate (constituent feature 1-1B), both of which are mixed to obtain a composition, whereas the Kanebo example invention consists of a combination of an aqueous solution containing an acid with a solid in which a carbonate and a water-soluble polymer of sodium alginate are covered with a solid polyethyleneglycol at a room temperature, both of which are mixed to obtain a composition.

[ii] Different feature 2: In Invention 1-1, the use is a cosmetic for the improvement of partial adiposeness, or a pharmaceutical composition for the treatment of athlete's foot, atopic dermatitis, or bedsore, whereas the Kanebo example invention is a bubbling cosmetic.

(2) Whether a person skilled in the art could have been easily conceived of different feature 1

As in the above findings, Invention 1-1 and the Kanebo example invention are directed to a two-pack type that obtains a composition by mixing a carbonate, an acid, sodium alginate, and water. There are different combinations of these components. Accordingly, there is a difference as to whether to obtain an aqueous viscous composition by a preliminary preparation or on-demand preparation. A consideration is given as to whether such difference is easily conceivable.

A First, Defendants allege that the constitution of holding carbon dioxide is merely a design modification.

Indeed, it is recognized that the Kanebo example invention is a two pack-type on-demand mixture-type cosmetic and tries to solve a problem common to Invention 1-1 to improve gas retaining ability of a composition (sustainability of bubbling). This problem is solved by covering a component of a second agent with a solid polyethyleneglycol at room temperature. A means for solving the problem is different from Invention 1-1. Therefore, this modification cannot be a design matter.

B Defendants also allege that since it is a commonly used art to preliminarily dissolve a thickener such as sodium alginate into water, it is easy to overcome the different feature by applying this.

As in the above findings, while a two-pack cosmetic consisting of a combination of an aqueous solution containing an acid (a first agent) with a solid comprising

carbonate and water-soluble polymer of sodium alginate (a second agent) (Comparative Example 2, Kanebo comparative example invention) has a problem of significantly poor gas retaining ability, the Kanebo example invention is an invention that is characterized in covering each component of a second agent with polyethyleneglycol to gradually generate carbonate gas bubbles in an on-demand mixture and forming stable bubbles due to the viscosity of a water-soluble polymer to improve gas retaining ability (Kanebo publication, page 1, right column, lines 5 to 13). Therefore, it cannot be said that there is a motivation to change a solid of a water-soluble polymer of sodium alginate covered with a polyethyleneglycol into an aqueous viscous composition by taking off a cover of polyethyleneglycol for the purpose of solving such a problem.

Therefore, it cannot be recognized that different feature 1 was easily conceivable by the application of a commonly used art as Defendants allege.

C Based on the above, without the determination of different feature 2, it cannot be said that Invention 1-1 was easily conceivable on the basis of the Kanebo example invention. Thus, in addition to Inventions 1-4, 1-5, 1-7 to 1-9, 1-12, and 1-13 that further technically specify Invention 1-1 or change the category of Invention 1-1 into a method invention, the inventive step is not negated.

Further, Invention 2-1 adds one combination to the other combination recited in Claim 1 of Invention 1-1. A difference from the Kanebo example invention is substantially not different from a difference between Invention 1-1 and the Kanebo example invention. Therefore, the above finding and ruling for Invention 1-1 holds true for Invention 2-1. Thus the inventive step of Invention 2-1 is not negated. Further, Inventions 2-4, 2-5, and 2-7 merely technically specify Invention 2-1, and thus similarly the inventive step is not negated.

(3) Therefore, the allegation of lack of inventive step over a main cited reference of the Kanebo example invention is groundless.

7 Issue 3-5 (lack of inventive step over a main cited reference of Kanebo's publication, Comparative Example 2 (Kanebo comparative example invention))

(1) Kanebo comparative example invention

A According to the Kanebo publication, the Kanebo comparative example invention is set forth as below.

(A) The Kanebo publication describes Comparative Example 2 (Kanebo comparative example invention) in which a second agent is a solid comprising a carbonate and a water-soluble polymer and/or clay minerals, and the solid is not covered with polyethyleneglycol, nor mixed with polyethyleneglycol, as a comparative example for the invention recited in the scope of claims (Aforesaid item 6(1)A(A)).

But it is described as a comparative example without the use of polyethyleneglycol, and thus the bubbling ability is fair, gas retaining ability is poor, storage stability is fair; and thus gas retaining ability is significantly poor and storage stability is poor. Further, a skin stimulation is considerably caused (Table 2 of Kanebo publication). Thus it has poor feeling.

(B) Besides the above, this comparative example is described in the Kanebo publication as a comparative example for the invention recited in the scope of claims of the Kanebo publication. In view of this, it is recognized that comparative example 2 describes the following invention (Kanebo comparative example invention).

a A two-pack bubbling cosmetic for activating the skin through a blood circulation promoting effect of carbonate gas,

b consisting of a combination of an aqueous solution containing an acid with a solid comprising carbonate and water-soluble polymer of sodium alginate,

c wherein a composition is obtained by mixing an aqueous solution comprising an acid with a solid comprising a carbonate and a water-soluble polymer of sodium alginate.

d A two-pack bubbling cosmetic.

B Comparison between Invention 1-1 and the Kanebo comparative example invention

Comparing Invention 1-1 and the Kanebo comparative example invention, it is recognized that there are at least the following differences.

[i] Different feature 1: Invention 1-1 consists of a combination of an aqueous viscous composition comprising a carbonate and sodium alginate with granules (fine grains, powders) comprising an acid, and a combination of composite granules (fine grains, powders) comprising a carbonate and an acid with an aqueous viscous composition comprising sodium alginate (constituent feature 1-1B), both of which are mixed to obtain a composition, whereas the Kanebo comparative example invention consists of a combination of an aqueous solution containing an acid with a solid comprising carbonate and water-soluble polymer of sodium alginate, both of which are mixed to obtain a composition.

[ii] Different feature 2: In Invention 1-1, the use is a cosmetic for the improvement of partial adiposeness, or a pharmaceutical composition for the treatment of athlete's foot, atopic dermatitis, or bedsore, whereas the Kanebo comparative example invention is a bubbling cosmetic.

(2) Whether a person skilled in the art could have been easily conceived of

different feature 1

Invention 1-1 and the Kanebo comparative example invention are directed to a two-pack type that obtains a composition by mixing a carbonate, an acid, sodium alginate, and water. There are different combinations of these components. Accordingly, there is a difference as to whether to obtain an aqueous viscous composition by a preliminary preparation or on-demand preparation. In view of this, a consideration is given to the
Defendants' allegation.

A Application of commonly used art

(A) Defendants allege that it was commonly used art as of the filing date of the respective patents to use a viscous composition for an agent type of cosmetics (or pharmaceutical composition).

However, Exhibits Otsu E all 7, 8 on which Defendants rely as a ground for commonly used art are firstly not directed to a two pack-type cosmetic according to the description, but only list a gel, a jelly, a powder, a granule, and a liquid as examples of agent types of the cosmetic itself. It cannot be recognized as commonly used art that makes one agent type of the two pack-type cosmetics an aqueous viscous composition.

(B) Subsequently, Defendants list Exhibit Otsu E all 3 as commonly used art to make one agent type of two-pack type cosmetics a viscous composition. Further, Exhibit Otsu E all 3 provides a pack comprising carbonate gas or a carbonate gas generating substance (page 2, left upper column, lines 7 to 9). In the embodiment, a carbonate and an acid are respectively supported by two carriers different from each other. These carriers may retain moisture and cause carbonate gas to be generated by attaching to a part to be subjected to pack when in use (left bottom column, lines 1 to 8). This pack may compound various substances (including a gelling agent and a thickener.) to be used for a common pack as necessary (page 3, left bottom column, lines 5 to 11). Production example 4 describes an example in which the agent A of a water-soluble polymer, sodium hydrogen carbonate, and water and the agent B of a water-soluble polymer, tartaric acid, and water are mixed together when in use (page 4, right upper column, line 12 to left bottom column, line 14).

However, as aforementioned, the Kanebo comparative example invention is a comparative example of an invention recited in the scope of claims of the Kanebo publication. The comparative example is described as having a problem of significantly poor gas retaining ability in the Kanebo publication with a purpose of improving gas retaining ability. Consequently, in the Kanebo comparative example invention, it can be said that there is a motivation to improve gas retaining ability.

Regardless of the fact that there is no suggestion to improve gas retaining ability by gelling a solid of a water-soluble polymer of sodium alginate in advance, it cannot be said that there is a motivation to change into gelling in advance only for a reason that it is used for a common pack.

Further, Exhibit Otsu E all 3 only disclose a constitution of supporting a carbonate and an acid on two carriers different from each other, and a constitution of making two agents viscous compositions. Therefore, it cannot be recognized as a ground for commonly used art to make one agent type of a two pack-type on-demand mixture-type an aqueous viscous composition (Exhibit Ko 30).

Therefore, it cannot be recognized that different feature 1 was easily conceivable by the application of a commonly used art as Defendants allege.

B Design modification or design matter

Defendants allege that the selection of agent type in the respective inventions does not cause a particular difference in function and effect, and it is merely a design modification or a design matter to change agent types of the first agent and the second agent as necessary in the Kanebo comparative example invention.

However, the Kanebo comparative example invention has a problem of significantly poor gas retaining ability, whereas the respective inventions preliminarily prepare an aqueous viscous composition for one agent type, and cause carbon dioxide to be generated in the aqueous viscous composition to improve the sustainability of carbon dioxide bubbles. Thus it cannot be said that this modification is a design matter.

C Based on the above, without the determination of different feature 2, it cannot be said that the Invention 1-1 was easily conceivable on the basis of the Kanebo comparative example invention. Thus in addition to Inventions 1-4, 1-5, 1-7 to 1-9, 1-12, and 1-13 that further technically specify Invention 1-1 or change the category of Invention 1-1 into a method invention, the inventive step is not negated.

Further, Invention 2-1 adds one combination to the other combination recited in Claim 1 of Invention 1-1. A difference from the Kanebo comparative example invention is substantially not different from a difference between Invention 1-1 and the Kanebo comparative example invention. Therefore, the above finding and ruling for Invention 1-1 holds true for Invention 2-1. Thus the inventive step of Invention 2-1 is not negated. Further, Inventions 2-4, 2-5, and 2-7 only technically specify Invention 2-1, and thus similarly the inventive step is not negated.

(3) Therefore, the allegation of lack of inventive step over a main cited reference of the Kanebo comparative example invention is also groundless. It cannot be said that the respective patents should be invalidated by a patent invalidation trial.

8 Issue 4 (presence or absence of negligence of Defendants Cosmepro et al.)

Defendants Cosmepro et al. allege that they had a recognition of purchasing and selling the products covered by the patent right owned by Defendant Neochemir, and thus they have no negligence.

The patent rights owned by Defendant NeoChemir are the patent rights directed to a composition for the preparation of carbon dioxide topical products (Exhibits Otsu A18 to 20), and have a technical field in common with the respective patents; however, they are patent rights different from each other in their constituent features. Thus it cannot be said that only the existence of circumstances alleged by Defendants Cosmepro et al. negates the presence of negligence. Further, it cannot be recognized that there are any other circumstances in which the negligence of Defendants Cosmepro et al. should be negated.

Therefore, the fact that Defendants Cosmepro et al. had implemented with negligence is not negated. Thus the Defendants have liability for damages against Plaintiff.

9 Issue 5 (Establishment of joint tort)

To establish a joint tort, it should be required that there is a specific cooperativity that allows each infringer to compensate damage caused by an act of another infringer, e.g. in a case of the presence of a subjective associated cooperativity such as collusive ties in each infringer, or in a case of the presence of objectively closely-associated cooperativity. Further, for example, a transaction form of a manufacturer selling a product to a retail seller and the retail seller selling to consumers is extremely common. Even if a manufacturer and a retail seller both should recognize and permit such transaction form, this fact is not sufficient to find sufficient associated cooperativity to establish a joint tort responsibility.

Hereinafter, from such viewpoint, a consideration is given as to whether to find a joint tort for each of the respective Defendants' products.

(1) Defendant's product 1

According to Plaintiff's allegation, Defendant NeoChemir is involved with commercial distribution. As in the aforesaid findings, the company was a developer of Defendant's product 1 (Exhibit Ko 7), and had produced and sold by itself similar kinds of products (Defendant's products 3, 4, and 8) that fall within a technical scope of the respective inventions. On the other hand, Defendant Cosmepro had also sold similar kinds of products (Defendant's products 14, 15, and 18) that fall within a technical scope of the respective inventions, purchased granules from Defendant NeoChemir for Defendant's product 14 and 18, and had sold each of the above products

to a person other than Defendant NeoChemir. In view of such circumstances, it cannot be said that Defendant NeoChemir was in a position like a general agency as Plaintiff allege, nor can it be said that the Defendants' acts had objectively closely-associated cooperativity.

Therefore, it cannot be said that a joint tort is established between Defendants with regard to Defendant's product 1.

(2) Defendant's products 2, 13, and 16

Defendant NeoChemir had been selling granules to Esco and Defendant Cosme Bose; however, as in the aforesaid findings, Defendant NeoChemir had been selling granules to a person other than Esco or Defendant Cosme Bose. In view of such circumstances, it cannot be said that Esco et al. were in a position like a general agency as Plaintiff allege, nor can it be said that the Defendants' acts had objectively closely-associated cooperativity.

Further, it matters as to whether a joint tort may be established between Defendant Cosme Bose and Defendant Wingsense with regard to Defendant's product 13. Defendant Cosme Bose is an OEM manufacturer (the overall gist of oral proceedings). It cannot be said that Defendant Wingsense was in a position like a general agency, nor can it be said that the Defendants' acts have objectively closely-associated cooperativity.

Therefore, it cannot be said that a joint tort is established between the above infringers with regard to the above respective products.

(3) Defendant's products 3 and 4

According to Plaintiff's allegation, Defendant NeoChemir had sold the Defendant's product 3 to TRUST WINGS. Defendant NeoChemir had also sold similar kinds of products (Defendant's products 1, 8, and 15) that fall within a technical scope of the respective inventions to the other Defendants. On the other hand, TRUST WINGS had produced and sold a carbonate gas pack by itself in OEM in addition to the purchase and sales of the final products (Exhibit Ko 21). TRUST WINGS was also involved with the sales of a carbonate gas pack of "INSQUARE mixing pack" as "a seller". The "manufacturer and distributor" was described as Esco (Exhibit Ko 26). For the Defendant's product 3, a manufacturer and distributor were described as Acnes Labo, and the general sales agent was described as NatureLab (Exhibit Ko 7). In view of such circumstances, it cannot be said that TRUST WINGS was in a position like a general agency as Plaintiff alleges, nor can it be said that the Defendants' acts had objectively closely-associated cooperativity.

A commercial distribution of Defendant's product 4 of the attachment

"Commercial distribution of the respective Defendants' products" is silent about TRUST WINGS; however, even if it is in a commercial distribution similar to Defendant's product 3, the above ruling may apply similarly.

Therefore, it cannot be said that a joint tort is established between the above infringers with regard to the above respective products.

(4) Defendant's products 5, 6, 7, 9, 11, and 17

According to the Plaintiff's allegation, a commercial distribution as Plaintiff alleges includes "Company not a party to the case (Company name unknown)" for each of these products. Further, a company not a party to the case with an unknown company name intervenes between Defendant NeoChemir and Defendants, CEFINE or SUHADA Cosmetics. Consequently, even in view of the Plaintiff's allegation, there is an indefinite point in a commercial distribution of the respective products. The relationship between the above infringers is also indefinite. Thus it cannot be said that the acts of Defendant NeoChemir and the infringers had an objectively closely-associated cooperativity.

Further, it matters as to whether a joint tort may be established between Defendant Chiara Macchiato and Defendant Airica with regard to Defendant's product 5. Defendant Chiara Macchiato promoted its own products (below-mentioned 10(3)B(B)). In view of the sales figure and profit, there is no difference from the above mentioned common transaction form. It cannot be said that Defendant Airica was in a position like a general agency for Defendant Chiara Macchiato, nor can it be said that these Defendants' acts had objectively closely-associated cooperativity.

Therefore, it cannot be said that a joint tort is established between the above infringers with regard to the above respective products.

(5) Defendant's product 8

Defendant AMPLY purchased Defendant's product 8 from Defendant NeoChemir, and sold this to Defendant Rhythm. Defendant Rhythm had consulted Defendant AMPLY about the products to be sold from the establishment of the company. In the process, Defendant Rhythm has ended up purchasing Defendant's product 8. Thus Defendant Rhythm had recognized Defendant AMPLY as a special business connection (Exhibit Otsu B12-1). In contrast, Defendant AMPLY was an OEM manufacturer, and decided to support the start of business of Defendant Rhythm and started a transaction with Defendant Rhythm with the intention of bringing up Defendant Rhythm as a sales channel. Defendant AMPLY had allegedly positioned Defendant Rhythm as a first business for "sales channel bringing up program" and launched a carbonate gas pack in cooperation with Defendant Rhythm (Exhibit Otsu

B13-1, the overall gist of oral proceedings). Further, in this lawsuit, Defendant AMPLY alleges that it had exchanged information on customers and the orders from the customers with Defendant Rhythm. Accordingly, it is recognized that there was such a relationship between Defendant AMPLY and Defendant Rhythm (For the above fact, see the overall gist of oral proceedings). Further, the sales figure of Defendant Rhythm goes beyond three hundred-million yen. The sales figure of Defendant AMPLY itself also goes beyond one hundred-million yen. In comparison to the sales figures of the other products of the other Defendants, the sales figures are extremely high. It is assumed that such sales figure was achieved because there was a relationship between Defendant AMPLY and Defendant Rhythm. It can be said that the two companies had utilized and complemented each other to produce and sell Defendant's product 8. Therefore, the acts of both companies had an objectively closely-associated cooperativity. Thus a joint tort should be established.

In contrast, when it comes to the relationship between Defendant AMPLY and Defendant Rhythm, while Defendant AMPLY was a business connection of Defendant NeoChemir, Defendant NeoChemir had also sold similar kinds of products (Defendant's products 1, 3, 4, and 15) that fall within a technical scope of the respective inventions, and had sold each of the above products to a person other than Defendant AMPLY. In view of such circumstances, it cannot be said that Defendant AMPLY was in a position like a general agency for Defendant NeoChemir, nor can it be said that the Defendants' acts had objectively closely-associated cooperativity.

As aforementioned, a joint tort is established only between Defendant AMPLY and Defendant Rhythm with regard to Defendant's product 8.

(6) Defendant's products 14 and 18

Defendant NeoChemir had been selling granules to Defendant Cosmepro; however, as in the aforesaid findings, Defendant NeoChemir had been selling granules to a person other than Defendant Cosmepro. Further, Defendant Cosmepro had allegedly produced and sold similar kinds of products (Defendant's products 1 and 15) that fall within a technical scope of the respective inventions, and had sold the products to Defendant NeoChemir. In view of such circumstances, it cannot be said that Defendant Cosmepro was in a position like a general agency as Plaintiff alleges, nor can it be said that the Defendants' acts had objectively closely-associated cooperativity.

Therefore, it cannot be said that a joint tort is established between Defendants with regard to the above respective products.

(7) Defendant's product 15

According to Plaintiff's allegation, Defendant Clear noir was a seller, and

Defendant NeoChemir had intervened between a manufacturer and distributor of Defendant Cosmepro and Defendant Clear noir. Defendant NeoChemir had sold a similar kind of products (Defendant's products 1, 3, 4, and 8) that fall within a technical scope of the respective inventions, and had sold each of the above products to a person other than Defendant Clear noir. Further, Defendant Cosmepro had allegedly purchased granules from Defendant NeoChemir for Defendant's products 14 and 18. In view of such circumstances, it cannot be said that Defendant NeoChemir et al. were in a position like a general agency as Plaintiff allege, nor can it be said that the Defendants' acts had objectively closely-associated cooperativity.

Therefore, it cannot be said that a joint tort is established between Defendants with regard to Defendant's product 15.

(8) As aforementioned, a joint tort is established only between Defendant AMPLY and Defendant Rhythm with regard to Defendant's product 8.

10 Issue 6-1 (Plaintiff's amount of damage - Article 102, paragraph (2) of the Patent Act)

(1) Defendants' sales figure according to the respective Defendants' products

A In Defendants' sales figure for the respective Defendants' products (hereinafter including granules in relation to Defendant NeoChemir.), there is no dispute between parties with respect to an amount not highlighted in yellow in the column "sales figure" of the attachment "List of claimed amount (Plaintiff's allegation)" and the column "sales figure" of the attachment "List of sales and expenses (Defendants' allegation)".

Further, as in the finding and ruling of the aforesaid item 9, it cannot be said that a joint tort is established between Defendants and TRUST WINGS. Thus it is unnecessary to consider the sales figure.

B Further, while there is a dispute in the sales figure of Defendant AMPLY according to the Defendant's product 8 and the sales figure of Defendant Wingsense according to the Defendant's product 13, the only issue lies in whether the sales figure might include an amount of consumption tax. In view of the fact that Plaintiff itself does not refute the Defendant sales figure according to the other products if Defendant alleges a sales figure on the basis of an amount excluding tax (see Attachment "List of sales and expenses (Defendants' allegation)"), it is reasonable to find a sales figure on the basis of an amount excluding tax for the above two products.

C Furthermore, regarding Defendant's products 9, 11, 12, 14, 17, and 18, a calculation method of sales figure for granules produced and sold by Defendant NeoChemir becomes a matter in issue. In view of the fact that granules produced and

sold by Defendant NeoChemir were used as granules of the respective products, it can be said that a method as Plaintiff alleges; i.e., a method of calculating pro rata in accordance with the proportions of the sales figures of a person who had produced and sold the respective products, is reasonable. Thus a calculation should be made by the method.

Specifically, the sales figures of Defendant's product 9, 11, and 17 for manufacturers and sellers are as per described in the column "sales figure" of the respective products of the attachment "List of claimed amount (Plaintiff's allegation)". Further, the sales figure of Defendant's product 12 for manufacturers and sellers (AVON PRODUCTS) is ●(omitted)● yen (the overall gist of oral proceedings). Therefore, in the sales figure of these products as Defendant NeoChemir alleges (● (omitted) ● yen in total), ●(omitted)●% is allocated to Defendant's product 9, ●(omitted)●% is allocated to Defendant's product 11, ●(omitted)●% is allocated to Defendant's product 12, and ●(omitted)●% is allocated to Defendant's product 17. The calculation result is as per described in the column "sales figure" of the column "Defendant NeoChemir" of each product of the attachment.

Further, the sales figures of Defendant's products 14 and 18 for manufacturers and sellers (Defendant Cosmepro) are as per described in the column "sales figure" of the respective products of the attachment "List of claimed amount (Plaintiff's allegation)". Therefore, in the sales figures of these products as Defendant NeoChemir alleges (● (omitted) ● yen in total), ●(omitted)●% is allocated to Defendant's product 14, and ●(omitted)●% is allocated to Defendant's product 18. The calculation result is as per described in the column "sales figure" of the column "Defendant NeoChemir" of each product of the attachment.

D In conclusion, the sales figure of the respective Defendants' products is as per described in the column "sales figure" of the attachment "List of amount as the court finds" (a part changed from the attachment "List of claimed amount (Plaintiff's allegation)" is highlighted in blue.).

(2) Defendants' purchases, raw material costs and shipping cost

A In Defendants' purchases, raw material costs, and shipping cost for the respective Defendants' products, there is no dispute between parties with respect to an amount not highlighted in yellow in the column "expenses" of the attachment "List of claimed amount (Plaintiff's allegation)" and the column "purchases, raw material costs, and shipping cost" of the attachment "List of sales and expenses (Defendants' allegation)". Further, as in the finding and ruling of the aforesaid item 9, it cannot be said that a joint tort is established between Defendants and TRUST WINGS or CEFINE.

Thus it is unnecessary to consider the purchases, raw material costs and shipping costs for them.

B Purchases for stock articles (in relation to Defendant's products 8, 9, and 15)

(A) Defendants allege that purchases for stock articles should be deducted from sales figure as expenses.

However, it is reasonable to understand that the "profit" of Article 102, paragraph (2) of the Patent Act means an amount from which an additionally required expense in direct relation to the production and sales of infringing products is deducted from a total sales amount of products infringing the patent right.

Further, stock articles are products that have not been sold in the end. Thus the sales thereof are not allocated to a sales amount. It is obvious that a purchase of the stock articles cannot be said as an expense that was additionally required in direct relation to the production and sales of infringing products. This fact remains unchanged by a reason for producing stock articles as to whether Defendants refrained from selling by the settlement of provisional disposition case.

Further, Defendants allege that there were products used as a sample for free. In this case, the samples are not allocated to a sales amount. It is obvious that a purchase for the samples cannot be said to be an expense additionally required in direct relation to the production and sales of infringing products, like the above stock articles.

Further, Defendants allege that given a profit be calculated as Plaintiff alleges, a purchase of stock articles should be deducted from the sales figure of Defendant NeoChemir. However, Defendant NeoChemir had sold out without stock articles. Thus it must be said that there is no reason to make such a calculation.

(B) On the basis of the above findings, a purchase of a part in dispute is set forth as below.

a Defendant Rhythm's purchases of Defendant's product 8

A purchase volume of Defendant's product 8 by Defendant Rhythm is recognized as 31,446 units, a sales volume is recognized as at least 30751 units (the overall gist of oral proceedings). Therefore, a purchase of Defendant's product 8 to be deducted from the sales figure amounts to 124,750,992 yen (127,570,476 yen * 30,751 units / 31,446 units). Therefore, an amount of expenses including shipping cost amounts to 135,184,458 yen.

b Defendant SHIN's purchase of Defendant's product 9

A purchase volume of Defendant's product 9 by Defendant SHIN is 7550 units, a sales volume is 7450 units (packs). Therefore, a purchase of the Defendant's product 9 to be deducted from the sales figure amounts to 5,393,800 yen (5,466,200 yen * 7,450

units (packs) / 7,550 units).

c Defendant Clear noir's purchase of Defendant's product 15

A purchase volume of the Defendant's product 15 by Defendant Clear noir is 5,016 units, a sales volume is 4,515 units. Therefore, a purchase of the Defendant's product 9 to be deducted from the sales figure amounts to 12,584,701 yen (13,981,143 yen * 4,515 units / 5,016 units). Therefore, an amount of expenses including shipping cost amounts to 13,072,526 yen.

C Expenses for granules that Defendant NeoChemir has produced and sold (in relation to Defendant's products 9, 11, 12, 14, 17, and 18)

In view of the ruling on the sales figure of the aforesaid (1)C, it is reasonable to calculate expenses in a similar method. The calculation result is as per described in the column "expenses" of the column "Defendant NeoChemir" of each product of the attachment "List of claimed amount (Plaintiff's allegation)".

(3) Defendants' other expenses (the column "Other expenses" of the attachment "List of sales and expenses (Defendants' allegation)")

A Defendant NeoChemir's expenses (in relation to Defendant's products 1 to 9 and 11 to 18)

Regarding Defendant NeoChemir, an employment cost for researchers of R&D center is allegedly an expense to be deducted from the sales figure.

Indeed, an employment cost should be deducted in a case that constant expenses such as an employment cost of employees of its own company are particularly increased for the production and sales of the above respective products, but there is no evidence sufficient to find details of a production step of the above respective products by Defendant NeoChemir or specific circumstances of the engagement of R&D center employees. Consequently, it cannot be recognized as a case to be deducted. Therefore, it is not deductible.

B Defendant Cosmepro et al.'s Expenses

(A) Defendant Cosmepro et al.'s Expenses (in relation to Defendant's products 1, 14, 15, and 18)

a Employment cost for part-time employees

It should be deducted in a case that an expense as Defendants allege is particularly increased for the production and sales of the above respective products. A specific content of all works in which a part-time worker as Defendants allege was involved and specific circumstances of engagement of part-time workers in the production and sales of the above respective products cannot be found in Exhibit Otsu B2-7. Consequently, it cannot be recognized as a case to be deducted.

b Outsourced experiment and research expenses

It cannot clearly be seen from Exhibit Otsu B2-9[i] as to what kind of products Defendant Cosmepro provided. Therefore, this does not show that the expenses should be deducted. In contrast, Exhibit Otsu B2-9[ii] and [iii] may be presumed to be antiseptic and antifungal tests of Defendant's product 18 in view of the time of drafting. The cost for this test (38,880 yen in total) was incurred as a cost necessary for the production thereof. Therefore, this cost would be not incurred unless Defendant's product 18 is produced and sold, and was thus increased particularly for the production and sales thereof.

c Promotion costs

In the respective documentary evidence of Exhibit Otsu B2-11 (1) to (3), one-half or one-third of an amount is allocated as an "expense for carbonate gas pack". Therefore, it can be seen that not only the above respective products were exhibited in Cosmetics development exhibition. Further, it cannot be seen from documentary evidence as to what kind of products were exhibited in Kansai beauty industry fair 2015 (Exhibit Otsu B2-11 (4)). Further, the object of the aforementioned exhibition is to introduce products produced and sold by Defendant Cosmepro. Given such a purpose, it cannot be instantly inferred that the production and sales of the above respective products resulted in the increase in expenses for the exhibition. Further, Exhibit Otsu B2-11 includes an expense for product leaflet (Exhibit Otsu B2-11(4)); however, its specific content is indefinite. Thus it cannot be recognized as corresponding to a case to be deducted.

d Cost for free distribution of sample and cost for distribution in exhibition

Defendant Cosmepro distributed purchased products as free samples. This means that products that should be originally allocated to the sales were distributed for free. Further, in this case, only the sales of the products actually sold is allocated to a sales figure (it cannot be said that what is allocated is a sales figure that would be obtained in a case that a free distributed sample should be actually sold). It is not reasonable to see a purchase of samples distributed for free as an expense for the sales thereof.

e In conclusion, a deduction is affirmed to the extent of a latter part of the above b (38,880 yen in total) for Defendant's product 18. The remaining expenses are not to be deducted. Therefore, an amount of expenses for Defendant's product 18 amounts to 376,156 yen, including raw material cost and shipping cost in addition to the above amount.

(B) Promotion and advertising cost for Defendant Airica and Defendant Chiara

Macchiato (in relation to Defendant's product 5)

First, a promotion and advertising cost for Defendant Airica should be deducted in a case that the cost is particularly increased for the production and sales of Defendant's product 5. It cannot be recognized from Exhibit Otsu B8-8 that this cost was directed to Defendant's product 5, nor are the details of advertisement definite. Therefore, it cannot be recognized that the cost was increased particularly for the production and sales of the Defendant's product 5. Therefore, these promotion and advertising costs are not deductible.

In contrast, Defendant Chiara Macchiato bears a promotion and advertising cost of 1,089,837 yen for Defendant's product 5 (Exhibit Otsu B8-4). This cost would be not incurred unless Defendant's product 5 is produced and sold, and was thus increased particularly for the production and sales thereof. Therefore, this cost should be deducted. An amount of expenses including this cost and purchases amounts to 6,277,437 yen.

(C) Promotion and advertising costs of Defendant Rhythm (in relation to Defendant's product 8)

a Promotion and advertising cost

It should be deducted in a case that an expense as Defendants allege is particularly increased for the production and sales of Defendant's product 8. Exhibit Otsu B12-3 includes various costs such as leaflet printing cost, a cost to run an advertisement, and an exhibition cost, and most of the details thereof are indefinite, including whether these costs are directed to Defendant's product 8 (Rather including expenses obviously having nothing to do with Defendant's product 8, including DM for the invitation to New Products Presentation Party held on April 2016 (Exhibit Otsu B12-3[iv]) or Balance R water (Exhibit Otsu B12-3[v]).) Therefore, it cannot be recognized that this cost was increased particularly for the production and sales of Defendant's product 8.

First of all, according to the following documentary evidence, the following expenses (1,748,029 yen) are directed to Defendant's product 8. This cost would be not incurred unless Defendant's product 8 is produced and sold, and was thus increased particularly for the production and sales thereof.

- Exhibit Otsu B12-3, [ii]

2,000 leaflets according to the invoice on March 10, 2014 18,690 yen

- Exhibit Otsu B12-3, [iii]

3,000 leaflets according to the order on March 30, 2015 25,466 yen

5,000 A4-size leaflets according to the order on January 14, 2015 34,668 yen

5,000 A4-size leaflets according to the order on October 7, 2014 34,668 yen
5,000 A4-size leaflets according to the order on July 22, 2014 34,668 yen
2,000 A4-size leaflets according to the order on June 9, 2014 19,224 yen
2,000 A4-size leaflets according to the order on April 8, 2014 19,224 yen
2,000 A4-size leaflets according to the order on April 14, 2014 19,224 yen
2,000 A4-size leaflets according to the order on May 1, 2014 19,224 yen
- Exhibit Otsu B12-3, [iv]

Production and printing costs for an A1-size poster according to the invoice on January 31, 2016 486,000 yen

2000 A4-size leaflets (blue) according to the order on September 11, 2015 19,224 yen

Product photo & retouching and resize, and magazine advertising resizing according to the invoice on October 31, 2015 97,200 yen

TOP banner, Esgra leaflet 2P resize, pamphlet according to the invoice on September 30, 2015 369,360 yen

Resize 200*150 mm according to the invoice on the same date (half the billing amount in view of the inclusion of cream) 12,500 yen

5,000 A4-size leaflets according to the order on July 21, 2015 34,668 yen
5,000 A4-size leaflets (blue) according to the order on May 18, 2015 34,668 yen
- Exhibit Otsu B12-3, [v]

600 copies of additional printing of poster according to the invoice on October 31, 2016 (half the billing amount in view of the inclusion of "Bodio", taking 100,000 yen discount into consideration) 70,833 yen

500 documents for training on cosmetics according to the order on October 4, 2016 93,960 yen

An increased volume of 10,000 leaflets according to the order on November 30, 2016 304,560 yen

b Sales fee

Sales fee is paid by Defendant Rhythm as a fee to a person who contributed to the sales when Defendant's product 8 is produced and sold (Exhibit Otsu B12-4[i] to [iv], the overall gist of oral proceeding). Therefore, this cost would be not incurred unless Defendant's product 8 is produced and sold, and was thus increased particularly for the production and sales thereof. Further, according to the above documentary evidence, the amount is recognized as 5,733,084 yen in total as below:

Fiscal 2013 10,920 yen

Fiscal 2014 1,937,844 yen (a total amount of those allocated to the columns

"sales fee" or "remuneration" of each payment details)

Fiscal 2015 3,628,800 yen (same as above)

Fiscal 2016 155,520 yen

c Expenses for sales promotion

The details are indefinite from Exhibit Otsu B12-5. It cannot be recognized that this expense was increased particularly for the production and sales of Defendant's product 8.

d Traveling expenses

A breakdown of traveling expense is unclear from Exhibit Otsu B12-6. It cannot be recognized that this expense was increased particularly for the production and sales of Defendant's product 8.

e In conclusion, a deduction is affirmed to the extent of the above items a and b (7,481,113 yen). The remaining expenses are not to be deducted. Therefore, an amount of expenses including expenses (135,184,458 yen) found in the aforesaid (2)A(B)b amounts to 142,665,571 yen.

(D) Exhibition cost, etc. of Defendant AMPLY (in relation to Defendant's product 8)

a Exhibition cost

It should be deducted in a case that an expense as Defendants allege is particularly increased for the production and sales of Defendant's product 8. According to the explanation by Defendant AMPLY, not only Defendant's product 8 was exhibited in an exhibition (see Exhibit Otsu B13-5, [i] to [iv]). An expense for Defendant's product 8 was calculated as 20% of the whole expense. Further, the object of the aforementioned exhibition is to introduce products produced and sold by Defendant AMPLY. Given such a purpose, it cannot be inferred that the production and sales of Defendant's product 8 resulted in the increase in expenses for the exhibition instantly.

b Promotion cost

According to Exhibit Otsu B13-5, [v] and [vi], Defendant AMPLY paid 3,240,000 yen for cost to run an advertisement of Defendant's product 8. Therefore, this cost would be not incurred unless Defendant's product 8 is produced and sold, and was thus increased particularly for the production and sales thereof.

c Traveling and accommodation expenses

A breakdown of traveling and accommodation expenses is unclear from Exhibit Otsu B13-6. It cannot be recognized that this expense was increased particularly for the production and sales of Defendant's product 8.

d In conclusion, a deduction is affirmed to the extent of the above item b (3,240,000 yen). The remaining expenses are not to be deducted. Therefore, an amount of expenses including purchases amounts to 121,450,207 yen.

(E) Employment cost of Defendant Wingsense (in relation to Defendant's product 13)

It should be deducted in a case that an expense as Defendants allege is particularly increased for the production and sales of Defendant's product 13. Specific circumstances of the engagement of part-time workers in the production and sales of Defendant's product 13 as Defendants allege cannot be found in Exhibit Otsu B18-7, [xix]. Consequently, it cannot be recognized as a case to be deducted. Therefore, it is not deductible.

(F) Promotion and advertising costs of Defendant Clear noir (in relation to Defendant's product 15)

a Promotion and advertising costs

It should be deducted in a case that an expense as Defendants allege is particularly increased for the production and sales of Defendant's product 15. Exhibit Otsu B20-3 includes various costs such as a signboard manufacturing cost, a cost to run an advertisement, and an exhibition cost. The details of the costs are indefinite, including whether these costs are directed to Defendant's product 15. It cannot be recognized that this expense was increased particularly for the production and sales of Defendant's product 15.

b Traveling expense

A breakdown of traveling expense is unclear from Exhibit Otsu B20-5. It cannot be recognized that this expense was increased particularly for the production and sales of Defendant's product 15.

c For the above reason, none of the expenses are deductible.

C For the above reason, expenses to be deducted with respect to the respective Defendants' products (including purchase, raw material cost, and shipping cost) are as per described in the column "expenses" of the attachment "List of amount as the court finds". Defendants' profit of the respective Defendants' products is as per described in the column "profit" of the attachment "List of amount as the court finds" (a part changed from the attachment "List of claimed amount (Plaintiff's allegation)" is highlighted in blue).

(4) Ground for rebuttal to presumption

A In addition to the supposed facts, according to the evidence listed below and the overall gist of oral proceedings, the following facts may be found

(A) The other patent rights owned by Plaintiff

Plaintiff has patent rights according to the following respective patents in addition to the respective patent rights.

a Patent No. 5164438 (Exhibit Ko 51-1. Hereinafter referred to as "first patent of the other case").

Filing date: June 11, 2007

Original filing date: May 6, 1999

Registered Date: December 28, 2012

Title of invention: A composition for transdermal and transmucosal absorption of carbon dioxide

b Patent No. 5993336 (Exhibit Ko 51-2. Hereinafter referred to as "second patent of the other case").

Filing date: April 26, 2013

Original filing date: May 6, 1999

Registered Date: August 26, 2016

Title of invention: A composition for transdermal and transmucosal absorption of carbon dioxide

c Patent No. 5643872 (Exhibit Ko 51-3)

Filing date: April 26, 2013

Original filing date: May 6, 1999

Registered Date: November 7, 2014

Title of invention: A composition for transdermal and transmucosal absorption of carbon dioxide

(B) Plaintiff's products

Plaintiff has been producing and selling a two pack-type carbonate pack (hereinafter referred to as "Plaintiff's products") consisting of a gel and granules with a product name of "Mediplorer" and "Spa Oxygel" since September 1999. Further, Plaintiff advertises the respective products in the manner of "Power of carbonate to moisturize skin deep inside", "bubbling carbonate gas delivers 'oxygen' necessary for metabolism of skin". The method for use of Plaintiff's products comprises the steps of putting a gel and granules into a cup, uniformly mixing with a spatula, heavily applying a resultant gel onto cleaned skin, packing steadily for about 20 minutes or 30 minutes, roughly removing gel with a spatula, and wiping off with a wet towel to clean off.

Further, Plaintiff also produces and sells a carbonate gel pack (Product name: Nano Aqua Gel Pack) sold by Favorina Co., Ltd. (Exhibits Ko 5, 6, 46, 55-2).

(C) Lawsuit filing and extra-judicial settlement by Plaintiff

a Plaintiff filed a suit with Osaka District Court for claiming the payment of compensation for damage and compensation against KBC, alleging that the company infringed patent right 1. The Court and the IP High Court both found a royalty fee as 10%, which constituted a basis for the calculation of compensation (Exhibits Ko 29, 30, 52-1).

b Plaintiff filed a suit with Osaka District Court for claiming an injunction of the production and sales of the products produced and sold by Creyente Co., Ltd. (old trade name: Gracious Co., Ltd.) and compensation for damage, alleging that Creyente Co., Ltd. infringed patent right 2. Further, Plaintiff and Defendants reached an amicable settlement on April 16, 2014 to the effect that Defendants should not produce and sell the products and Defendants should jointly pay settlement money of 2,000,000 yen (Exhibit Ko 52-2).

c Plaintiff claimed a suspension of the production and sales of the products produced and sold by H2O Co., Ltd. on the grounds of the patent right according to the first patent of the other case, and reached an extra-judicial compromise on April 30, 2013 with the company, to the effect that Plaintiff may receive the payment of settlement money of 561,219 yen corresponding to 10% of the sales figure of the products, and received a remittance of the settlement money (Exhibits Ko 49, 57-1).

d Plaintiff claimed a suspension of the sales of the products sold by RISE Co., Ltd. on the grounds of the patent right according to the first patent of the other case, and reached an extra-judicial compromise on October 1, 2013 with the company, to the effect that Plaintiff may receive the payment of a settlement money of 346,225 yen corresponding to 10% of the sales figure of the products, and received a remittance of the settlement money (Exhibits Ko 50, 57-2).

e Plaintiff sent a notice claiming the immediate suspension of the production and sales of the products described in No. 6 of the attachment "List of carbonate-related cosmetics" to Happy One Co., Ltd. which produced and sold the products of Nos. 6 and 9 of the attachment, alleging that the company infringed the patent right according to the first patent of the other case (Exhibit Ko 56).

f Plaintiff filed a suit with Osaka District Court for claiming an injunction of the production and sales of the products produced and sold by Creyente Co., Ltd. and compensation for damage, alleging that Creyente Co., Ltd. infringed a patent right according to the second patent of the other case (Exhibit Ko 52-3).

(D) Patent right owned by Defendant NeoChemir

Defendant NeoChemir has patent rights according to the following respective

patents (hereinafter the inventions according to these patent rights are referred to as "patented inventions of Defendant NeoChemir") Further, the respective Defendants' products include ones in which the existence of this patent right or the registration of the patent right was definitely described in an outer case or in a promotion and advertisement (Exhibit Ko 7, 8, 17, 20).

a Patent No. 4,130,181 (Exhibit Otsu A18)

Filing date: June 21, 2004

Original filing date: April 5, 2002

Registered date: May 30, 2008

Title of invention: Composition for the preparation of carbon dioxide topical products

Claims

[Claim 1]

A composition for the preparation of carbon dioxide topical products, comprising: a particulate, in which a thickener is mixed with a water-soluble acid and a water-soluble dispersant, the particulate having essential components of said water-soluble acid of malic acid, said thickener of one kind or two or more kinds selected from processed starch, dextrin, and potato starch, and said water-soluble dispersant of lactose different from this thickener;

and a viscous composition to be mixed with said particulate when in use, the viscous composition having essential components of a carbonate, water, and a thickener of one kind or two or more kinds selected from sodium alginate, alginate propyleneglycol ester, and sodium carboxymethylcellulose,

wherein said particulate comprises 2 to 50 % by weight of said water-soluble acid, 10 to 40 % by weight of said thickener for particulate and 30 to 85 % by weight of said water-soluble dispersant on a total weight basis of said particulate,

wherein said viscous composition comprises 0.1 to 10 % by weight of said carbonate, 70 to 97.5 % by weight of water, and 0.5 to 20 % by weight of said thickener for viscous composition on a total weight basis of said viscous composition,

wherein a weight ratio of said particulate to said viscous composition is 1:10 to 40.

b Patent No. 4,248,878 (Exhibit Otsu A19)

Filing date: April 5, 2002

Registered date: January 23, 2009

Title of invention: Composition for the preparation of carbon dioxide topical products

Claims

[Claim 1]

A composition for the preparation of carbon dioxide topical products, comprising: a particulate, in which a thickener is mixed with a water-soluble acid and a water-soluble dispersant, the particulate having essential components of said water-soluble acid, said thickener of one kind or two or more kinds selected from processed starch, dextrin, hydroxypropylcellulose, and xanthane gum and said water-soluble dispersant selected from one kind or two or more kinds of D-mannitol, lactose, and urea different from this thickener;

and a viscous composition to be mixed with said particulate when in use, the viscous composition having essential components of a carbonate, water, and a thickener of one kind or two or more kinds selected from sodium alginate, alginate propyleneglycol ester, and sodium carboxymethylcellulose,

wherein said particulate comprises 2 to 50 % by weight of said water-soluble acid, 10 to 40 % by weight of said thickener for particulate, and 30 to 85 % by weight of said water-soluble dispersant on a total weight basis of said particulate,

wherein said viscous composition comprises 0.1 to 10 % by weight of said carbonate, 70 to 97.5 % by weight of water, and 0.5 to 20 % by weight of said thickener for viscous composition on a total weight basis of said viscous composition,

wherein a weight ratio of said particulate to said viscous composition is 1:10 to 40,

and said viscous composition comprises 1 to 15 % by weight of 1,3-butyleneglycol to improve tackiness and stretching ability of carbon dioxide topical product to a skin mucosa for an improved beauty effect or medical effect.

c Patent No. 4,589,432 (Exhibit Otsu A20)

Filing date: November 21, 2008

Original filing date: April 5, 2002

Registered Date: September 17, 2010

Title of invention: Composition for the preparation of carbon dioxide topical products

Claims

[Claim 1]

A composition for the preparation of carbon dioxide topical products, comprising: a particulate, in which a thickener is mixed with a water-soluble acid and a water-soluble dispersant, the particulate having essential components of said water-soluble acid, said thickener of one kind or two or more kinds selected from a processed starch, dextrin, potato starch, corn starch, xanthane gum, and hydroxypropylcellulose

and said water-soluble dispersant of lactose, sucrose, D-mannitol, and urea different from this thickener;

and a viscous composition to be mixed with said particulate when in use, said viscous composition having essential components of a carbonate, water, and a thickener,

wherein said particulate comprises 2 to 50 % by weight of said water-soluble acid, 10 to 40 % by weight of said thickener, and 30 to 85 % by weight of said water-soluble dispersant on a total weight basis of said particulate,

wherein said viscous composition comprises 0.1 to 10 % by weight of said carbonate, 70 to 97.5 % by weight of water, and 0.5 to 20 % by weight of said thickener for viscous composition on a total weight basis of said viscous composition,

wherein a weight ratio of said particulate to said viscous composition is 1:10 to 40.

(E) The respective Defendants' products

a The outer case of the respective Defendants' products highlighted the effects of carbonate gas on the skin, advocating that "Feature: This product effectively acts on the skin (horny cell layer) with a power of carbonate gas generated by mixing granules and a gel." (Defendant's product 3), "Effectively act on a skin* with a power of carbonate gas generated by mixing granules and a gel. Support the potential power of a skin to lead to a moisturized healthy skin. *Skin: horny layer" (Defendant's product 4) and "Filled with oxygen, your skin is changed into fresh skin" (Defendant's product 6). Further, a similar description was found on the shopping website, and "Deliver carbonate gas to a skin and approach from inside by utilizing the Bohr effect." (Defendant's product 9) (Exhibits Ko 7, 8, 22, 26, and 41).

b A method for the use of the respective Defendants' products is generally instructed as below: [i] moderately mixing an agent A (granules) and an agent B (gel) and extending to the whole surface of the face slightly thicker (1 mm or so), [ii] estimated time for packing is 20 minutes to 30 minutes, [iii] After packing, a gel is removed with an included spatula, and [iv] finally washing the face lightly to clean off (Defendant's product 3), while a method for use slightly differs depending on products.

But regarding a time of [ii], one is 15 minutes or more (Defendant's product 5), one is 15 minutes to 30 minutes (or so) (Defendant's products 13, 14), and one is 15 minutes to 20 minutes (Defendant's product 9). Thus a time for using a composition obtained from the respective Defendants' products (a time for packing) is 15 minutes to 30 minutes.

Further, regarding [iii] and [iv], in Defendant's product 1, it is described that a proper amount of a mousse gelator is sampled with a spatula, and extended in a small

amount to the face so as to cover a gel coated on the face with a thin layer, after coating the gelator, the gel is peeled several times, remaining gel is wiped off, or washed off for complete removal. In Defendant's product 8, it is described that a proper amount of an included fixer (hardening agent) is scooped with a cleaned spatula, and extended first so as to cover a gel on a face, and after a surface is gradually solidified, a solid is slowly peeled off, and after peeling, the face must be washed off thoroughly. Furthermore, the use of a solidifying agent was instructed to peel a gel in Defendant's product 15 (Exhibits Ko 7, 8, 20, Exhibits Otsu A36-3, 42-4, Exhibit Otsu E all 27-3).

c A third party website describes a transdermal absorption effect of carbon dioxide with respect to the respective Defendants' products (Exhibits Otsu A36 to 45, Exhibits Otsu E all 27, 28), advocating that "carbonate gas concentration in a body is improved -> body determines that 'an activity of cell is activated' -> deliver oxygen in blood to a skin" (Defendant's product 4. Exhibit Otsu A37-2) or "carbonate gas powder is concentrated in it!, it is a pack with a new concept for aging care that activates skin itself" (Defendant's product 16. Exhibit Otsu A43-2, Exhibit Otsu E all 26-2).

d Third party's website (including sellers.) mentioned a partial adiposeness improving effect of the respective Defendants' products as in the following:

(a) Defendant's product 1 (Exhibit Ko 13)

"Partial slimming effect. At the shortest, one time packing may bring about an effect on the swelling of face and upper arm. Partial slimming effect in a fat level may bring about an effect when a packing is continued for one month."

(b) Defendant's product 2 (Exhibit Ko 14)

"Using several times, pores are closed, and the face contour becomes slimmed. Feel that a face contour is getting smaller"

(c) Defendant's product 3 (Exhibit Ko 15)

"When a carbonate pack is used, blood circulation of the skin and an activity of cells is activated. Thus remaining waste is excreted. As a result, water retention, which is a cause of swelling, is improved. Consequently, facial swelling is dissolved to improve a facial contour slimming effect. Face contour is slimmed to change into a slimmed contour. Further, the use of a carbonate pack may also result in improved metabolism. Thus a partial slimming effect is also expected."

(d) Defendant's product 4 (Exhibit Ko 16)

"Increase in oxygen amount, blood vessel expansion, excretion promotion of waste, protein synthesis activation, fat metabolism slimming" -> "Improvement of dullness, face contour slimming effect, etc."

(e) Defendant's product 6 (Exhibit Ko 18)

"It brings about effects not only on promotion of blood circulation, but also on whitening and partial slimming."

(f) Defendant's product 8 (Exhibit Otsu A38-2)

"Major effects of carbonate gas pack" "facial contour slimming effect ... blood circulation is activated and metabolism is promoted to remove swelling and cause a facial contour slimming effect"

(g) Defendant's product 9 (Exhibit Ko 8)

"Impression of a person who favors products" "I have a smaller face!"

(h) Defendant's product 11 (Exhibit Ko 10)

(Feature of products) "removing swelling and slimming facial contour" "An activation of collagen synthesis results in improved wrinkles. Fat metabolism promotion is expected to provide a facial contour slimming effect."

(Advice of use interval) "Facial slimming ... Effects in a fat level are brought by daily use for one month, thereafter continue at least two times weekly to maintain the effect."

(i) Defendant's product 13 (Exhibit Otsu A40-2)

(Effects of the use of the products) "may be expected by one-time packing for a partial face contour slimming or a person who tends to have swelling of the upper arm. The effect in fat level takes about one month. It is recommended packing at least two time weekly for maintaining the effects." etc.

(j) Defendant's product 15 (Exhibit Otsu A42-3)

"... Care for face contour slimming, anytime in your home, like a salon"

(k) Defendant's product 16 (Exhibit Ko 24, Exhibit Otsu A43-5, Exhibit Otsu E all 26-5)

"Effects of Avenus Celeb Gel Pack" "Partial slimming promoting effect - carbonate gas acts on muscle fibers, and activates fat metabolism to cause face contour slimming, swelling improvement, and face lifting effects" (Exhibit Ko 24)

"Carbonate gas effect of Avenus Celeb Gel Pack results in the impressive face contour slimming!!"

"Effects of Avenus Celeb Gel Pack - Face contour slimming ... combustion of excess fat results in a face contour slimming" (Exhibit Otsu A43-5, Exhibit Otsu E all 26-5)

(l) Defendant's product 17 (Exhibit Ko 23)

"Impression of a person who favors products" "I have a smaller face!"

e Furthermore, a third party's website describes unique features of the products (Exhibits Otsu A36 to 45, Exhibits Otsu E all 27, 28), saying that "A method for use is

just simple! ... Since a jelly serving for a solidifying agent is finally put on a pack to facilitate peeling, the gel can be easily removed, which is a feature" (Defendant's product 1. Exhibit Otsu A36-2, Exhibit Otsu E all 27-2),"a weakly acidic carbonate gas pack for all types of skin" (Defendant's product 8. Exhibit Otsu A38-2),"Carbonate power causes a focusing beauty component to be permeated into the skin!", "10 kinds of beauty components are mixed" (Defendant's product 12. Exhibit Otsu A39-2), "To effectively cause a high level carbonate gas to be permeated into a horny layer, a highly viscous gel" is used (Defendant's product 18. Exhibit Otsu A45-2).

B In the following, a consideration is given to Defendants' allegation of a ground for the rebuttal to presumption.

(A) First Defendants allege that there is a ground for rebuttal to presumption with regard to the efficacy of Plaintiff's products and the respective Defendants' products.

Further, Defendants allege that [i] a technique to prevent discharge of generated carbonate gas and [ii] a technique to sustain a time for transdermal absorption of carbonate gas are necessary for improving the Bohr effect. It is recognized that the above techniques [i] and [ii] as Defendants allege are substantially the same as the sustainability of bubbles described in the respective descriptions. There is no evidence sufficient to find that the effect and efficacy of carbon dioxide on a skin considerably differ in Plaintiff's product and the respective Defendants' products having a packing time of 15 minutes to 30 minutes.

Further, Defendant alleges that the respective Defendants' products have no partial adiposeness improving effect. However, Defendants' allegation is not consistent with the content of the promotion and advertisement by Defendants and sellers of the respective Defendants' products. As is found in the aforesaid item 2(1), carbon dioxide is known to have a partial slimming and a slimming effect. In the respective Defendants' products, a thickener is prepared in advance in the respective Defendants' products to cause unique function and effect of the respective inventions of causing more carbon dioxide to be supplied to subcutaneous tissues in a sustained manner. Therefore, it cannot be recognized as having no effect on partial adiposeness improvement.

Further, Defendants allege that a partial adiposeness improving effect does not function as a differentiating factor from the other company's products, and submit Exhibit Otsu A35 and Exhibit Otsu E all 25 as evidence. This evidence is only an item of questionnaire. Defendants' allegation is not acceptable in view of the fact that there

were a considerable number of websites in third party's websites that referred to a partial adiposeness improving effect of a face with regard to the respective Defendants' products.

In conclusion, it cannot be recognized that there is a difference sufficient to find a rebuttal to presumption with regard to the efficacy of Plaintiff's products and the respective Defendants' products.

(B) Subsequently, Defendants allege that Plaintiff's products are less convenient, or the sales of the respective Defendants' products have been accomplished by the planning ability and marketing efforts of Defendants.

Indeed, it can be seen that Defendants had improved convenience of the respective products and had made a marketing effort to increase the sales. It is undeniable that these facts considerably contribute to the sales of the respective Defendants' products. However, it is usual for business operators to make a considerable device and a marketing effort in the production and sales activity of products. It cannot be recognized that the Defendants' device or marketing effort as mentioned above is particularly significant far beyond an ordinary level. First of all, as in the aforesaid findings, in a composition obtained from the respective Defendants' products, a thickener is prepared in advance to cause unique function and effect of the respective inventions of causing more carbon dioxide to be supplied to subcutaneous tissues in a sustained manner. It is thus obvious that such function and effect is essential in a carbonate pack cosmetics. Further, as in the aforesaid findings, in the promotion and advertisement of the respective Defendants' products, it is highlighted that carbon dioxide realizes the effects of improvement on a beauty problem of a skin or partial adiposeness. Taking the description of a third party's website into consideration, it is reasonable to find that the effect of supplying carbon dioxide to subcutaneous tissues also had a considerable impact on the buying motive of consumers.

Consequently, it cannot be recognized that the Defendants' allegation corresponds to the rebuttal to presumption.

(C) Furthermore, Defendants allege that the respective Defendants' products fall within a technical scope of the Defendant NeoChemir's patented invention.

Indeed, as in the aforesaid findings, the outer case of the respective Defendants' products definitely describes the existence of a patent right according to the patented invention of Defendant NeoChemir. In selling the respective Defendants' products, it can be seen that it had been highlighted that the respective Defendants' products fell within a technical scope of the patented invention of Defendant NeoChemir.

However, Defendants fail to allege and establish the mixed components and its

proportion of the respective Defendants' products, and fail to establish the fact that the respective Defendants' products fall within the technical scope of the patented invention of Defendant NeoChemir. Even if the respective Defendants' products fall within the technical scope of the patented invention of Defendant NeoChemir as Defendants allege, Defendant NeoChemir invention is an invention "directed to a composition to be used for the preparation of a carbon dioxide topical product having beauty effect and medical effect" (Exhibits Otsu A18 to 20, [0001]). The object is "to obtain a composition for the preparation of a carbon dioxide topical product capable of preparing a carbon dioxide topical product that can achieve a stronger beauty effect and medical effect in a shorter time and being easily prepared in a short time without soiling clothes" (Exhibits Otsu A18 to 20, [0008]). It cannot be recognized that a function and effect of "capable of preparing a carbon dioxide topical product that can achieve a stronger beauty effect and medical effect in a shorter time and being easily prepared in a short time without soiling clothes" would not be achieved in the Plaintiff's products that are the implemented products of the respective inventions and have a technical field in common with the respective inventions. There is no evidence sufficient to find that there is a significant difference in the effects. Further, a unique function and effect of the respective inventions is to supply more carbon dioxide to subcutaneous tissues in a sustained manner by preparing a thickener in advance. It has a great significance that a function and effect of the respective inventions is caused in the respective Defendants' products. Further, as in the aforesaid findings, in the sales efficacy and effect are highlighted by supplying carbon dioxide to subcutaneous tissues.

Consequently, it cannot be recognized that the Defendants' allegation affects a buying motive of consumers and the presumption is rebutted.

(D) In addition, Defendants allege that the effect is only incidental in view of an essential feature of the respective inventions.

a Indeed, a pack cosmetics utilizing carbon dioxide (carbonate gas) has been sold since early times (Exhibit Ko 5, Exhibits Otsu A102, 105, 114, Exhibits Otsu E all 3, 6, etc.). Therefore, it cannot be recognized that the supply of carbon dioxide to subcutaneous tissue is buying motive of consumers. As in the findings and ruling of the aforesaid item 1, a unique function and effect of the respective inventions is to supply more carbon dioxide to subcutaneous tissues by preliminary preparation of a thickener. This function and effect can be said to be a function and effect that are associated with essential function and efficacy for Plaintiff's products and the respective Defendants' products, both of which are kits of cosmetics for carbonate pack. Thus it has a great impact on buying motive of consumers.

Further, as in the finding of the aforesaid item 1(1)B(D)b, in a case that butyleneglycol is mixed, it must be said that a contribution of implementing the respective inventions of preliminary preparation-type is limited; however, butyleneglycol is not mixed with a gel of the respective Defendants' products. Thus this point does not matter.

Further, Plaintiff points out the existence of a patent right of Plaintiff's own other than the respective patent rights. There is no evidence sufficient to find that the respective Defendants' products fall within a technical scope of the invention according to the patent right of Plaintiff's own other than the respective patent rights. Thus Plaintiff's allegation is not considered (Defendant NeoChemir filed a motion in the Defendant's Brief (13) (on December 26, 2017) and the brief (15) (on February 14, 2018) to dismiss a Plaintiff's allegation that it was difficult to produce carbonate packs that avoided the patents according to the patent rights owned by Plaintiff other than the respective patent rights for a reason of a method of allegation or evidence presented after the time for doing so. However, Plaintiff fails to establish the above its own allegation and the allegation is not acceptable. Thus it is not recognized that the above Plaintiff's allegation delays the completion of lawsuit. Therefore, the above Defendant NeoChemir's motion for dismissal should be dismissed.).

b Defendants alleges that there were competing products; however, it is reasonable to understand that the competing products are required to have a function and effect comparable to the respective patents and be competitive as a comparable alternative for consumers to find a reason for the rebuttal to presumption.

From this viewpoint, the products that Defendants allege as competing products have a definitely different constitution from the respective Defendants' products, as long as it is not two pack-type gel. Thus it cannot be said to be a competing product. Further, products are not competing products as long as they are not the preliminary preparation type even in the case of two pack-type gel in view of the technical significance of the respective inventions as in the aforesaid findings.

When a consideration is given to the attachment "List of carbonate-related cosmetics" from such a viewpoint, products of preliminary preparation-type in a two pack-type gel similarly to the respective inventions consist of: the products of Nos. 5, 6, 9 of the attachment of two pack-type of gel and powder (Exhibits Otsu A79, 80, 83, Exhibits Otsu E all 49, 50, 53. Further, the products of No. 3 dissolve powder into water, and thus have a different constitution from the respective inventions); and the products of Nos. 2, 12, 14 to 16, 26 of the attachment of two pack-type of a gel and a gel (Exhibits Otsu A76, 86, 88 to 90, 100, Exhibits Otsu E all 46, 56, 58 to 60, and 70).

However, the sales period and shares of these competing products are indefinite. Thus it cannot be recognized in such circumstances that a presumption is to be rebutted.

c For the above reason, the above Defendants' allegation is not acceptable, nor can it be said that the effect of the respective inventions is only incidental.

(E) Furthermore, Defendants allege that a combination of a gel and a powder is within common general knowledge, and thus the technical value of the respective inventions is low.

However, none of Shiseido 614, Exhibit Otsu E all 41, and Nisshin 324 as Defendants allege is the invention directed to cosmetics that generates carbon dioxide (Exhibit Otsu A103, Exhibits Otsu E all 9, 35, 36, 41). Therefore, the above Defendants' allegation is not acceptable. Further, Defendants allege that a gist of the respective inventions lies in the generation of carbon dioxide in the form of bubbles by mixing two agents when in use and this is a well-known technique; however, the feature of the respective inventions is not limited to the above, as discussed above. Furthermore, Defendants allege that the respective inventions are easily conceivable by fully utilizing common general knowledge from a starting point of Ishigaki inventions 1 and 2; however, Ishigaki inventions 1 and 2 are both inventions of bubbling cosmetics for massaging the skin by breaking bubbles of carbonate gas generated (Exhibits Otsu E all 4, 37, 38). Thus there is a disincentive to combine them with common general knowledge as Defendants allege. It cannot be recognized that it was easily conceivable.

Therefore, the above Defendants' allegation is not acceptable, nor can it be said that the technical value of the respective inventions is low.

(F) Defendants allege the other various things as a ground for rebuttal to presumption; however, the allegation is not acceptable in view of the aforesaid findings and rulings, or cannot be recognized as a ground for rebuttal to presumption.

(G) Therefore, the presumption under Article 102, paragraph (2) of the Patent Act is not rebutted in this case.

(5) Further, Defendant Cosmepro et al. allege that lack of an intention or a serious fault for the infringement of the respective patent rights should be considered in determination of an amount of compensation for damage. Even if Defendants Cosmepro et al. had neither an intention nor a serious fault, it cannot be said reasonable to consider the circumstances as Defendants Cosmepro et al. allege in the determination of an amount of compensation for damage.

(6) In conclusion, an amount of damage to be calculated under Article 102, paragraph (2) of the Patent Act is as per described in the column "profit" of the

attachment "List of amount as the court finds" (further, regarding Defendant's product 8, a joint tort is established between Defendant Rhythm and Defendant AMPLY; thus, Defendants bear a joint liability in the broad sense of the term for an amount combining both profits).

11 Issue 6-2 (Plaintiff's amount of damage - Article 102, paragraph (3) of the Patent Act)

(1) Plaintiff secondarily alleges an amount of damage calculated on the basis of Article 102, paragraph (3) of the Patent Act. Accordingly, just to be safe, a consideration is given as to whether this amount might go beyond a damage calculated by Article 102, paragraph (2).

(2) According to the evidence (Exhibit Ko 48, Exhibit Otsu A49) and the overall gist of oral proceedings, the following facts can be found.

A In Table III-10 of "Research and study reports on how to utilize patents, etc. in view of value assessment of intellectual property - Investigation of intellectual property (assets) assessment and royalty rate - (March 2010)" prepared by TEIKOKU DATABANK, LTD., (hereinafter referred to as "the report"), as a questionnaire result of royalty rate of domestic businesses, a royalty rate of patent in an industrial field of chemistry is described as 5.3%.

First of all, in Table II-3 where a result of questionnaire on 2007 for domestic businesses is described, an average of a royalty rate of patent in a technical category of chemistry is described as 4.3% (maximum value 32.5%, minimum value 0.5%) (103 cases).

B In Table III-12 of the reports, a royalty rate determined by court of patent is described as 6.1% on average (maximum value: 20%, minimum value: 0.3%) (for 5 cases) for patents in an industrial field of chemistry from 2004 to 2008.

On the other hand, in Table III-11 of the report, a royalty rate of patent determined by court is described as 3.1% on average (median 3.0%, maximum 5.0%, for 7 cases) for patents in an industrial field of chemistry from 1997 to 2008.

(3) Taking into account the above facts and the findings and ruling of the aforesaid item 10, when a consideration is given to a reasonable license fee for the sales of the respective Defendants' products, an average license fee in recent statistics of a technical field to which the respective inventions pertain is 5.3% in a result of questionnaire for domestic businesses, and 6.1% in the determination by court. Further, taking into account the fact that this case reached an infringement lawsuit, a license fee of this case would be approximately ●(omitted)●.

Therefore, an amount of damage calculated by Article 102, paragraph (3) of the

Patent Act is as per described in the column "an amount of ●(omitted)●" of the attachment "List of amount as the court finds" (a part changed from the attachment "List of claimed amount (Plaintiff's allegation)" is highlighted in blue.). Further, a license fee that could be obtained by Plaintiff in a case that the respective Defendants' products were sold from one to another is approved at the most to the extent of an amount for a person who achieved the highest sales figure in a commercial distribution. Therefore, in a case where a joint tort is not established, the respective Defendants bear a joint liability in the broad sense of the term for the respective Defendants' products with the other Defendants to the extent of a license fee borne by itself, whereas in a case that a joint tort is established, the respective Defendants bear a joint liability in the broad sense of the term with regard to a license fee for a person who achieved the highest sales figure in a commercial distribution.

Therefore, an amount of damage of Defendant Chiara Macchiato for Defendant's product 5, an amount of damage of Defendant SHIN for Defendant's product 9, and an amount of damage of Defendant Japan Cosme for Defendant's products 11 and 17 are respectively higher than the amounts of damage calculated by the same article, paragraph (2) in the findings of the aforesaid item 10. Thus for these products the amounts should be recognized as the amounts of damage of Plaintiff.

On the other hand, the amounts of damage calculated by the same article, paragraph (2) found in the aforesaid item 10 are higher than the amounts of damage of Defendants with regard to the remaining respective Defendants' products. Thus for these products the amounts of damage calculated by the same article, paragraph (2) should be recognized as the amounts of damage of Plaintiff

12 Summary

(1) A claim for compensation for damage

As ruled in the aforesaid item 11, an amount of damage calculated by Article 102, paragraph (2) or paragraph (3) of the Patent Act should be recognized as an amount of damage of Plaintiff. Further, Plaintiff entrusted a Plaintiff's procedural representative with the pursuing of the lawsuit (Facts obvious to the court). It is reasonable that an attorney cost in association with the Defendants' act is recognized as ten percent of an amount described in the column "profit" or "an amount of ●(omitted)●" of the attachment "List of amount as the court finds"(within the range Plaintiff allege). A total amount of damage of Plaintiff is as per described in the column "profit + attorney fee" or "license fee + attorney fee" of the same attachment.

Therefore, the Plaintiff's claim for compensation for damage should be accepted to the extent of an amount described in the same column of the same attachment.

(2) Day on which the computation of delinquent charge begins

In this case, Plaintiff alleges that the end of the sales period of the respective Defendants' products or a date later than the end is a day on which the computation of delinquent charge begins. First, in a case that Plaintiff alleges a date of the end of the sales as Defendants allege or a date later than the end as a day on which the computation begins, the computation of date shall begin as Plaintiff alleges. Further, otherwise, Defendant Rhythm had sold Defendant's product 8 until February 28, 2017 (Exhibit Otsu B12-2), Defendant Japan Cosme had sold Defendant's product 11 until December 3, 2015 (Exhibit Otsu B16-2[viii]), Defendant Wingsense had sold Defendant's product 13 until January 2015 (Exhibit Otsu B18-5), Defendant Clear noir had sold Defendant's product 15 until January, 2015 (Exhibit Otsu B20-1[xiv]), Defendant Japan Cosme had sold Defendant's product 17 until October 7, 2013 (Exhibit Otsu B16-4[ii]), and Defendant Cosmepro had sold Defendant's product 18 until December 26, 2014 (Exhibit Otsu B2-5[ii]). Therefore, the end of the sales (the end of month in a case where the date is indefinite on a day basis) shall be a day on which the computation of delinquent charge begins. Further, in a case that Defendants do not allege the sales period, the computation of date shall begin as Plaintiff alleges in view of the evidence (Exhibit Otsu B8-3-[vii] with respect to Defendant Chiara Macchiato for Defendant's product 5) or the overall gist of oral proceedings.

(3) A claim for injunction and a claim for disposal

Defendants had argued against the fact that the respective Defendants' products fall within a technical scope of the respective inventions, and had continued to produce and sell the products even after the filing of this lawsuit. In view of these facts, it is reasonable to find that Defendants are likely to infringe the respective patent rights even if the production and sales of some of the respective Defendants' products are suspended at present. Therefore, the Plaintiff's claim for injunction should be accepted.

Further, it is reasonable to find a claim for disposal of the respective Defendants' products and granules described in the column "granules" of the attachment "List of Defendants' products" for the prevention of infringement of the respective patent rights by Defendants.

13 Conclusion

As is discussed above, the Plaintiff's claims have a point to the extent of the above item 12, and thus should be accepted to the extent, and the remaining claims are groundless and thus shall be dismissed, and the court renders as in the main text.

Additionally, it is not reasonable to attach a declaration of provisional execution for items 1 to 26 of the main text, and thus the court decides not to attach the declaration.

The Osaka District Court, 26th Civil Division

Presiding Judge Hiroyuki TAKAMATSU
Judge Seiichi NOGAMI
Judge Koichiro DAIMON

Attachment

List of Main text

1 Defendant NeoChemir and Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 1 of the attachment "List of Defendants' products".

2 Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, the products described in item 3 of the attachment "List of Defendants' products".

3 Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, the products described in item 4 of the attachment "List of Defendants' products".

4 Defendant Airica and Defendant Chiara Macchiato should not produce, sell or export, or sell or offer the export of, the products described in item 5 of the attachment "List of Defendants' products".

5 Defendant Rhythm, Defendant AMPLY, and Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, the products described in item 8 of the attachment "List of Defendants' products".

6 Defendant SHIN should not produce, sell or export, or sell or offer the export of, the products described in item 9 of the attachment "List of Defendants' products".

7 Defendant Japan Cosme should not produce, sell or export, or sell or offer the export of, the products described in item 11 of the attachment "List of Defendants' products".

8 Defendant Wingsense and Defendant Cosme Bose should not produce, sell or export, or sell or offer the export of, the products described in item 13 of the attachment "List of Defendants' products".

9 Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 14 of the attachment "List of Defendants' products".

10 Defendant Clear noir, Defendant NeoChemir, and Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 15 of the attachment "List of Defendants' products".

11 Defendant Japan Cosme should not produce, sell or export, or sell or offer the export of, the products described in item 17 of the attachment "List of Defendants' products".

12 Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 18 of the attachment "List of Defendants' products".

13 Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, granules in the column of "granules" of the attachment "List of Defendants' products" to be used for the products described in items 2, 5, 6,7, 9, 11 to 14, and 16 to 18 of the attachment "List of Defendants' products".

14 Defendant NeoChemir and Defendant Cosmepro should dispose of the products described in item 1 of the attachment "List of Defendants' products".

15 Defendant NeoChemir should dispose of the products described in item 3 of the attachment "List of Defendants' products".

16 Defendant NeoChemir should dispose of the products described in item 4 of the attachment "List of Defendants' products".

17 Defendant Airica and Defendant Chiara Macchiato should dispose of the products described in item 5 of the attachment "List of Defendants' products".

18 Defendant Rhythm, Defendant AMPLY, and Defendant NeoChemir should dispose of the products described in item 8 of the attachment "List of Defendants' products".

19 Defendant SHIN should dispose of the products described in item 9 of the attachment "List of Defendants' products".

20 Defendant Japan Cosme should dispose of the products described in item 11 of the attachment "List of Defendants' products".

21 Defendant Wingsense and Defendant Cosme Bose should dispose of the products described in item 13 of the attachment "List of Defendants' products".

22 Defendant Cosmepro should dispose of the products described in item 14 of the attachment "List of Defendants' products".

23 Defendant Clear noir, Defendant NeoChemir, and Defendant Cosmepro should dispose of the products described in item 15 of the attachment "List of Defendants' products".

24 Defendant Japan Cosme should dispose of the products described in item 17 of the attachment "List of Defendants' products".

25 Defendant Cosmepro should dispose of the products described in item 18 of the attachment "List of Defendants' products".

26 Defendant NeoChemir should dispose of granules in the column of "granules" of the attachment "List of Defendants' products" to be used for the products described in items 2, 5, 6,7, 9, 11 to 14, and 16 to 18 of the attachment "List of Defendants' products".

27

(1) Defendant NeoChemir should pay to Plaintiff 6,659,019 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the

date paid.
(2) Defendant Cosmepro should pay to Plaintiff 705,873 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
28 Defendant NeoChemir should pay to Plaintiff 11,573,540 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2015 to the date paid.
29 Defendant NeoChemir should pay to Plaintiff 2,100,968 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2015 to the date paid.
30 Defendant NeoChemir should pay to Plaintiff 8,192,802 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 31, 2016 to the date paid.
31
(1) Defendant Airica should pay to Plaintiff 5,239,432 yen and an interest for arrears in a proportion of 5 percent on an annual basis from March 17, 2017 to the date paid.
(2) Defendant Chiara Macchiato should pay to Plaintiff 691,152 yen and an interest for arrears in a proportion of 5 percent on an annual basis from March 17, 2017 to the date paid.
(3) Defendant NeoChemir should pay to Plaintiff 1,423,288 yen and an interest for arrears in a proportion of 5 percent on an annual basis from March 17, 2017 to the date paid.
32 Defendant NeoChemir should pay to Plaintiff 2,786,410 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
33 Defendant NeoChemir should pay to Plaintiff 6,621,308 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 29, 2016 to the date paid.
34
(1) Defendant Rhythm and Defendant AMPLY should jointly pay to Plaintiff 195,127,282 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2017 to the date paid.
(2) Defendant NeoChemir should pay to Plaintiff 56,980,626 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
35
(1) Defendant SHIN should pay to Plaintiff 644,127 yen and an interest for arrears in a

proportion of 5 percent on an annual basis from September 14, 2016 to the date paid.
(2) Defendant NeoChemir should pay to Plaintiff 1,257,616 yen and an interest for arrears in a proportion of 5 percent on an annual basis from September 14, 2016 to the date paid.
36
(1) Defendant Japan Cosme should pay to Plaintiff 434,872 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 3, 2015 to the date paid.
(2) Defendant NeoChemir should pay to Plaintiff 847,960 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 3, 2015 to the date paid.
37 Defendant NeoChemir should pay to Plaintiff 521,381 yen and an interest for arrears in a proportion of 5 percent on an annual basis from May 31, 2015 to the date paid.
38
(1) Defendant Wingsense should pay to Plaintiff 8,041,199 yen and an interest for arrears in a proportion of 5 percent on an annual basis from January 31, 2017 to the date paid.
(2) Defendant Cosme Bose should pay to Plaintiff 477,540 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
(3) Defendant NeoChemir should pay to Plaintiff 2,786,410 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
39
(1) Defendant NeoChemir should pay to Plaintiff 484,985 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
(2) Defendant Cosmepro should pay to Plaintiff 312,434 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
40
(1) Defendant Clear noir should pay to Plaintiff 12,236,265 yen and an interest for arrears in a proportion of 5 percent on an annual basis from January 31, 2017 to the date paid.
(2) Defendant Cosmepro should pay to Plaintiff 2,277,668 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
(3) Defendant NeoChemir should pay to Plaintiff 6,806,545 yen and an interest for

arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.

41 Defendant NeoChemir should pay to Plaintiff 896,579 yen and an interest for arrears in a proportion of 5 percent on an annual basis from May 16, 2017 to the date paid.

42

(1) Defendant Japan Cosme should pay to Plaintiff 121,000 yen and an interest for arrears in a proportion of 5 percent on an annual basis from October 7, 2013 to the date paid.

(2) Defendant NeoChemir should pay to Plaintiff 237,772 yen and an interest for arrears in a proportion of 5 percent on an annual basis from January 31, 2011 to the date paid.

43

(1) Defendant Cosmepro should pay to Plaintiff 390,548 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 26, 2014 to the date paid.

(2) Defendant NeoChemir should pay to Plaintiff 900,686 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 25, 2014 to the date paid.

44 All the remaining claims from Plaintiff shall be dismissed.

45 Regarding the court costs, one-fourth of the cost incurred to Plaintiff, one-fourth of the cost incurred to Defendant NeoChemir, one-fourth of the cost incurred to Defendant Rhythm and Defendant AMPLY, and one-fourth of the cost incurred to the remaining Defendants shall be borne by Plaintiff. One-half the cost incurred to Plaintiff and three-fourths of the cost incurred to Defendant NeoChemir shall be borne by Defendant NeoChemir. Three-fourteenths of the cost incurred to Plaintiff and three-fourths of the cost incurred to Defendant Rhythm and Defendant AMPLY shall be jointly borne by Defendant Rhythm and Defendant AMPLY. One twenty-eighth of the cost incurred to Plaintiff and three-fourths of the cost incurred to the remaining Defendants shall be borne by the remaining Defendants.

46 This court decision may be provisionally executed as far as item 27 to item 43.

Period

Attachment

List of claims

1 Defendant NeoChemir and Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 1 of the attachment "List of Defendants' products".

2 Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, the products described in item 3 of the attachment "List of Defendants' products".

3 Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, the products described in item 4 of the attachment "List of Defendants' products".

4 Defendant Airica and Defendant Chiara Macchiato should not produce, sell or export, or sell or offer the export of, the products described in item 5 of the attachment "List of Defendants' products".

5 Defendant Rhythm, Defendant AMPLY, and Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, the products described in item 8 of the attachment "List of Defendants' products".

6 Defendant SHIN should not produce, sell or export, or sell or offer the export of, the products described in item 9 of the attachment "List of Defendants' products".

7 Defendant Japan Cosme should not produce, sell or export, or sell or offer the export of, the products described in item 11 of the attachment "List of Defendants' products".

8 Defendant Wingsense and Defendant Cosme Bose should not produce, sell or export, or sell or offer the export of, the products described in item 13 of the attachment "List of Defendants' products".

9 Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 14 of the attachment "List of Defendants' products".

10 Defendant Clear noir, Defendant NeoChemir and Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 15 of the attachment "List of Defendants' products".

11 Defendant Japan Cosme should not produce, sell or export, or sell or offer the export of, the products described in item 17 of the attachment "List of Defendants' products".

12 Defendant Cosmepro should not produce, sell or export, or sell or offer the export of, the products described in item 18 of the attachment "List of Defendants' products".

13 Defendant NeoChemir should not produce, sell or export, or sell or offer the export of, granules used for the products described in items 2, 5, 6, 7, 9, 11 to 14, and 16 to 18 of the attachment "List of Defendants' products".

14 Defendant NeoChemir and Defendant Cosmepro should dispose of the products described in item 1 of the attachment "List of Defendants' products".

15 Defendant NeoChemir should dispose of the products described in item 3 of the attachment "List of Defendants' products".

16 Defendant NeoChemir should dispose of the products described in item 4 of the attachment "List of Defendants' products".

17 Defendant Airica and Defendant Chiara Macchiato should dispose of the products described in item 5 of the attachment "List of Defendants' products".

18 Defendant Rhythm, Defendant AMPLY and Defendant NeoChemir should dispose of the products described in item 8 of the attachment "List of Defendants' products".

19 Defendant SHIN should dispose of the products described in item 9 of the attachment "List of Defendants' products".

20 Defendant Japan Cosme should dispose of the products described in item 11 of the attachment "List of Defendants' products".

21 Defendant Wingsense and Defendant Cosme Bose should dispose of the products described in item 13 of the attachment "List of Defendants' products".

22 Defendant Cosmepro should dispose of the products described in item 14 of the attachment "List of Defendants' products".

23 Defendant Clear noir, Defendant NeoChemir, and Defendant Cosmepro should dispose of the products described in item 15 of the attachment "List of Defendants' products".

24 Defendant Japan Cosme should dispose of the products described in item 17 of the attachment "List of Defendants' products".

25 Defendant Cosmepro should dispose of the products described in item 18 of the attachment "List of Defendants' products".

26 Defendant NeoChemir should dispose of the granules used for the products described in items 2, 5, 6, 7, 9, 11 to 14, and 16 to 18 of the attachment "List of Defendants' products".

27

(Primary claim)

Defendant NeoChemir and Defendant Cosmepro should jointly pay to Plaintiff 7,364,892 yen and an interest for arrears in a proportion of 5 percent on an annual basis

from December 16, 2016 to the date paid.
(Secondary claim)
(1) Defendant NeoChemir should pay to Plaintiff 969,206 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Cosmepro to the extent of 104,104 yen).
(2) Defendant Cosmepro should pay to Plaintiff 104,104 yen and an interest for arrears in a proportion of 5 percent from December 16, 2016 to the date paid (with the proviso of jointly with Defendant NeoChemir).
28
(Primary claim)
Defendant NeoChemir should pay to Plaintiff 20,853,199 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2015 to the date paid.
(Secondary claim)
Defendant NeoChemir should pay to Plaintiff 1,364,000 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2015 to the date paid.
29
(Primary claim)
Defendant NeoChemir should pay to Plaintiff 10,037,758 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2015 to the date paid.
(Secondary claim)
Defendant NeoChemir should jointly pay to Plaintiff 415,800 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2015 to the date paid.
30
(Primary claim)
Defendant NeoChemir should pay to Plaintiff 13,772,552 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 31, 2016 to the date paid.
(Secondary claim)
Defendant NeoChemir should pay to Plaintiff 1,648,266 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 31, 2016 to the date paid.
31
(Primary claim)
Defendant Airica, Defendant Chiara Macchiato, and Defendant NeoChemir should jointly pay 7,867,880 yen and an interest for arrears in a proportion of 5 percent on an annual basis from March 17, 2017 to the date paid.
(Secondary claim)

(1) Defendant Airica should pay to Plaintiff 1,215,095 yen and an interest for arrears in a proportion of 5 percent on an annual basis from March 17, 2017 to the date paid (with the proviso of jointly with Defendant Chiara Macchiato to the extent of 691,152 yen and jointly with Defendant NeoChemir to the extent of 184,140 yen).
(2) Defendant Chiara Macchiato should pay to Plaintiff 691,152 yen and an interest for arrears in a proportion of 5 percent on an annual basis from March 17, 2017 to the date paid (with the proviso of jointly with Defendant Airica, and jointly with Defendant NeoChemir to the extent of 184,140 yen).
(3) Defendant NeoChemir should pay to Plaintiff 184,140 yen and an interest for arrears in a proportion of 5 percent on an annual basis from March 17, 2017 to the date paid (with the proviso of jointly with Defendant Airica and Defendant Chiara Macchiato).
32
(Primary claim)
Defendant NeoChemir should pay to Plaintiff 6,155,646 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
(Secondary claim) Defendant NeoChemir should pay to Plaintiff 316,800 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
33
(Primary claim)
Defendant NeoChemir should pay to Plaintiff 41,949,557 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 29, 2016 to the date paid.
(Secondary claim)
Defendant NeoChemir should pay to Plaintiff 770,880 yen and an interest for arrears in a proportion of 5 percent on an annual basis from November 6, 2015 to the date paid.
34
(Primary claim)
Defendant Rhythm, Defendant AMPLY, and Defendant NeoChemir should jointly pay to Plaintiff 270,633,428 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.
(Secondary claim)
(1) Defendant Rhythm should pay to Plaintiff 35,205,941 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant AMPLY to the extent of 14,032,752 yen, and jointly with Defendant NeoChemir to the extent of 12,135,200 yen).
(2) Defendant AMPLY should pay to Plaintiff 14,032,752 yen and an interest for arrears

in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Rhythm, and jointly with Defendant NeoChemir to the extent of 12,135,200 yen).
(3) Defendant NeoChemir should pay to Plaintiff 12,135,200 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Rhythm and Defendant AMPLY).
35
(Primary claim)
Defendant SHIN and Defendant NeoChemir should jointly pay to Plaintiff 1,765,707 yen and an interest for arrears in a proportion of 5 percent on an annual basis from September 14, 2016 to the date paid.
(Secondary claim)
(1) Defendant SHIN should pay to Plaintiff 644,127 yen and an interest for arrears in a proportion of 5 percent on an annual basis from September 14, 2016 to the date paid (with the proviso of jointly with Defendant NeoChemir to the extent of 162,834 yen).
(2) Defendant NeoChemir should pay to Plaintiff 162,834 yen and an interest for arrears in a proportion of 5 percent on an annual basis from September 14, 2016 to the date paid (with the proviso that jointly with Defendant SHIN).
36
(Primary claim)
Defendant Japan Cosme and Defendant NeoChemir should jointly pay to Plaintiff 1,046,895 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 3, 2015 to the date paid.
(Secondary claim)
(1) Defendant Cosmepro should pay to Plaintiff 434,872 yen and an interest for arrears in a proportion of 5 percent from December 3, 2015 to the date paid (with the proviso of jointly with Defendant NeoChemir to the extent of 109,792 yen).
(2) Defendant NeoChemir should pay to Plaintiff 109,792 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 3, 2015 to the date paid (with the proviso of jointly with Defendant Japan Cosme).
37
(Primary claim)
Defendant NeoChemir should pay to Plaintiff 521,381 yen and an interest for arrears in a proportion of 5 percent on an annual basis from May 31, 2015 to the date paid.
(Secondary claim)
Defendant NeoChemir should pay to Plaintiff 67,507 yen and an interest for arrears in

a proportion of 5 percent on an annual basis from May 31, 2015 to the date paid.

38

(Primary claim)

Defendant Wingsense, Defendant Cosme Bose, and Defendant NeoChemir should jointly pay to Plaintiff 12,547,058 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.

(Secondary claim)

(1) Defendant Wingsense should pay to Plaintiff 1,841,222 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Cosme Bose to the extent of 204,692 yen, and jointly with Defendant NeoChemir to the extent of 316,800 yen).

(2) Defendant Cosme Bose should pay to Plaintiff 204,692 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2014 to the date paid (with the proviso of jointly with Defendant Wingsense and Defendant NeoChemir).

(3) Defendant NeoChemir should pay to Plaintiff 316,800 yen and an interest for arrears in a proportion of 5 percent on an annual basis from February 28, 2014 to the date paid (with the proviso of jointly with Defendant Wingsense, and jointly with Defendant Cosme Bose to the extent of 204,692 yen).

39

(Primary claim)

Defendant NeoChemir and Defendant Cosmepro should jointly pay to Plaintiff 797,419 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.

(Secondary claim)

(1) Defendant Cosmepro should pay to Plaintiff 43,619 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant NeoChemir).

(2) Defendant NeoChemir should pay to Plaintiff 64,911 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Cosmepro to the extent of 43,619 yen).

40

(Primary claim)

Defendant Clear noir, Defendant Japan Cosme, and Defendant NeoChemir should jointly pay to Plaintiff 21,320,478 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid.

(Secondary claim)
(1) Defendant Clear noir should pay to Plaintiff 2,661,604 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Cosmepro to the extent of 346,037 yen, and jointly with Defendant NeoChemir to the extent of 1,589,682 yen).
(2) Defendant Cosmepro should pay to Plaintiff 346,037 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Clear noir and Defendant NeoChemir).
(3) Defendant NeoChemir should pay to Plaintiff 1,589,682 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 16, 2016 to the date paid (with the proviso of jointly with Defendant Clear noir, and jointly with Defendant Cosmepro to the extent of 346,037 yen).
41
(Primary claim)
Defendant NeoChemir should pay to Plaintiff 1,598,640 yen and an interest for arrears in a proportion of 5 percent on an annual basis from May 16, 2017 to the date paid.
(Secondary claim)
Defendant NeoChemir should pay to Plaintiff 105,600 yen and an interest for arrears in a proportion of 5 percent on an annual basis from May 16, 2017 to the date paid.
42
(Primary claim)
Defendant Japan Cosme and Defendant NeoChemir should jointly pay to Plaintiff 302,672 yen and an interest for arrears in a proportion of 5 percent on an annual basis from January 31, 2011 to the date paid.
(Secondary claim)
(1) Defendant Cosmepro should pay to Plaintiff 121,000 yen and an interest for arrears in a proportion of 5 percent from January 31, 2011 to the date paid (with the proviso of jointly with Defendant NeoChemir to the extent of 30,786 yen).
(2) Defendant NeoChemir should pay to Plaintiff 30,786 yen and an interest for arrears in a proportion of 5 percent on an annual basis from January 31, 2011 to the date paid (with the proviso of jointly with Defendant Japan Cosme).
43
(Primary claim)
Defendant Cosmepro and Defendant NeoChemir should jointly pay to Plaintiff 1,334,002 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 25, 2014 to the date paid.

(Secondary claim)

(1) Defendant Cosmepro should pay to Plaintiff 80,432 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 25, 2014 to the date paid (with the proviso of jointly with Defendant NeoChemir).

(2) Defendant NeoChemir should pay to Plaintiff 120,549 yen and an interest for arrears in a proportion of 5 percent on an annual basis from December 25, 2014 to the date paid (with the proviso of jointly with Defendant Cosmepro to the extent of 80,432 yen).

Period

Attachment

List of Defendants' products

1	eCO2 GEL EX
2	LEVANTE LITS Sparkling gel pack
3	AL Gel Pack
4	HIN Acnes Labo R GEL Pack
5	Soulage 315
6	Oxygen Jacuzzi
7	Sparkle 1000 Plus
8	RougeFil Pret a Pack
9	La felice CO2 Gel Pack
10	(missing number)
11	Simon CO2 Pack
12	Premium Selection Gel Pack
13	Ever Feel Mixing Gel Pack
14	COO FORCE Gel Pack
15	DM Skin Gel Pack C
16	Avenus Celeb Gel Pack
17	Cinderella Queen Beauty CO2 Gel Pack
18	E. SA. White CO2 Gel Mask

Period

(omitted)

Appendix

Commercial distribution of each Defendant's product

1. Defendant's product 1

Defendant Cosmepro [Manufacturer and distributor]
↓(Sell final products)
Defendant NeoChemir [Seller]
↓(Sell final products)
Retail shops and General consumers

2. Defendant's product 2

Defendant NeoChemir
↓ (Sell granules)
Esco [Manufacturer and distributor]
↓(Sell final products)
LEVANTE [Seller]
↓(Sell final products)
NatureLab [General Sales Agent]
↓(Sell final products)
Retail shops and General consumers

3. Defendant's product 3

Defendant NeoChemir
↓(Sell final products)
TRUST WINGS
↓(Sell final products)
ACNES LABO [Manufacturer and distributor]
↓(Sell final products)
NatureLab [General Sales Agent]
↓(Sell final products)
Retail shops and General consumers

4. Defendant's product 4

Defendant NeoChemir

↓(Sell final products)
ACNES LABO [Manufacturer and distributor]
↓(Sell final products)
Retail shops and General consumers

5. Defendant's product 5
Defendant NeoChemir
↓ (Sell granules)
Company not a party to the case (Company name unknown)
↓(Sell final products)
Defendant Chiara Macchiato [Manufacturer and distributor]
↓(Sell final products)
Defendant Airica [Seller]
↓(Sell final products)
Retail shops and General consumers

6. Defendant's product 6
Defendant NeoChemir
↓ (Sell granules)
Company not a party to the case (Company name unknown)
↓(Sell final products)
CEFINE [Manufacturer and distributor]
↓(Sell final products)
Retail shops and General consumers

7. Defendant's product 7
Defendant NeoChemir
↓ (Sell granules)
Company not a party to the case (Company name unknown)
SUHADA Cosmetics [Manufacturer and distributor]
↓(Sell final products)
Wamu [Seller]
↓(Sell final products)
Retail shops and General consumers

8. Defendant's product 8

Defendant NeoChemir

↓(Sell final products)

Defendant AMPLY [Manufacturer and distributor]

↓(Sell final products)

Defendant Rhythm [Seller]

↓(Sell final products)

Retail shops and General consumers

9. Defendant's product 9

Defendant NeoChemir

↓ (Sell granules)

Company not a party to the case (Company name unknown)

↓(Sell final products)

Defendant SHIN [Manufacturer and distributor]

↓(Sell final products)

Retail shops and General consumers

10. Defendant's product 11

Defendant NeoChemir

↓ (Sell granules)

Company not a party to the case (Company name unknown)

↓(Sell final products)

Defendant Japan Cosme Service [Manufacturer and distributor]

↓(Sell final products)

L. E. SIMON [Seller]

↓(Sell final products)

Retail shops and General consumers

11. Defendant's product 12

Defendant NeoChemir

↓ (Sell granules)

Company not a party to the case (Company name unknown)

↓(Sell final products)

AVON PRODUCTS [Manufacturer and distributor]

↓(Sell final products)

Retail shops and General consumers

12. Defendant's product 13

Defendant NeoChemir
↓ (Sell granules)
Defendant Cosme Bose [Manufacturer and distributor]
↓(Sell final products)
Defendant Wingsense [Seller]
↓(Sell final products)
Retail shops and General consumers

13. Defendant's product 14

Defendant NeoChemir
↓ (Sell granules)
Defendant Cosmepro [Manufacturer and distributor]
↓(Sell final products)
Retail shops and General consumers

14. Defendant's product 15

Defendant Cosmepro [Manufacturer and distributor]
↓(Sell final products)
Defendant NeoChemir
↓(Sell final products)
Defendant Clear noir [Seller]
↓(Sell final products)
Retail shops and General consumers

15. Defendant's product 16

Defendant NeoChemir
↓ (Sell granules)
Esco [Manufacturer and distributor]
↓(Sell final products)
GOLD RUSH [Seller]
↓(Sell final products)
Retail shops and General consumers

16. Defendant's product 17

Defendant NeoChemir

↓ (Sell granules)

Company not a party to the case (Company name unknown)

↓(Sell final products)

Defendant Japan Cosme [Manufacturer and distributor]

↓(Sell final products)

Cinderella JAPAN [Seller]

↓(Sell final products)

Retail shops and General consumers

17. Defendant's product 18

Defendant NeoChemir

↓ (Sell granules)

Defendant Cosmepro [Manufacturer and distributor]

↓(Sell final products)

Company not a party to the case (Company name unknown)

↓(Sell final products)

E.SA. White COMPANY LIMITED [Seller]

↓(Sell final products)

Retail shops and General consumers

Period

(omitted)