

Judgment rendered on June 8, 2018; the original was delivered on the same day; court clerk

2014 (Wa) 27733 Case of Demand for Injunction against Infringement of Breeder's Right

Date of conclusion of oral argument: March 30, 2018

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| | Judgment |
| Plaintiff: | Mori & Company |
| Defendant: | Kawatsuru Co., Ltd. (hereinafter referred to as "Defendant Kawatsuru") |
| | Successor in title for Kabushiki Kaisha Nagano Kanzai (former name: Kabushiki Kaisha AGLINK Nagano) |
| | Bankruptcy trustee for Kabushiki Kaisha Nagano Kanzai |
| Defendant: | X (hereinafter referred to as "Defendant's bankruptcy trustee") |

Main text

1. Defendant Kawatsuru shall not import the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials.
2. Defendant Kawatsuru shall not engage in the production, offering for transfer, transferring, offering for lease, leasing, or stocking for the purpose of any of these acts, of the harvested materials obtained through the use of propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials.
3. Defendant Kawatsuru shall destroy the harvested materials and the processed products pertaining to the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials.
4. Defendant Kawatsuru shall pay to the plaintiff money in the amount of 66,785,832 yen as well as money accruing therefrom at an annual interest rate of 5% for the period starting from November 26, 2014 up to a date when the payment will be completed.
5. It is confirmed that the plaintiff's bankruptcy claim against the bankrupt entity, Kabushiki Kaisha Nagano Kanzai (Osaka District Court 2016 (Fu) 5253), is zero (0) yen.
6. Other claims made by the plaintiff against Defendant Kawatsuru shall be

dismissed.

7. The court costs between the plaintiff and Defendant Kawatsuru shall be split into three equal sums, two-thirds of which being borne by the plaintiff and the remaining one-third being borne by Defendant Kawatsuru. The court costs between the plaintiff and the Defendant's bankruptcy trustee shall be borne by the plaintiff.
8. Only the preceding paragraphs 1, 2, 4 can be provisionally executed in the present judgment.

Facts and reasons

No. 1 Claims

1. Gist of the demand

- (1) Defendant Kawatsuru shall not engage in the production, conditioning, offering for transfer, transferring, exporting, importing, or stocking for the purpose of any of these acts, in regards to the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials.
- (2) Defendant Kawatsuru shall not engage in the production, offering for transfer, transferring, offering for lease, leasing, exporting, importing, or stocking for the purpose of any of these acts, in regards to the harvested materials obtained through the use of propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials.
- (3) Defendant Kawatsuru shall destroy the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials, as well as the harvested materials and the processed products.
- (4) Defendant Kawatsuru shall publish an article in each of The Japan Agricultural News (whole nation edition) and Zenkoku Kinoko Shimbun (National Newspaper on Mushroom), as per the attached Apology Ad, in the size of two vertical columns (at least 67 mm from top to bottom) with the horizontal length being at least one-half (at least 192 mm from left to right) of the vertical length of the page, in a font that is at least 10-point for the subtitle and at least 8-point for the main text.
- (5) Defendant Kawatsuru shall pay to the plaintiff money in the amount of 250,636,734 yen as well as money accruing therefrom at an annual interest rate of 5% for the period starting from November 26, 2014 up to a date when the payment will be completed.
- (6) It is confirmed that, between the plaintiff and Defendant's bankruptcy

trustee, the plaintiff has a bankruptcy claim against the bankrupt entity, Kabushiki Kaisha Nagano Kanzai, pursuant to the case of Osaka District Court 2016 (Fu) 5253, in the amount of 250,636,734 yen, which is the principal of the damages, as well as a delinquency charge accruing therefrom in the amount of 26,196,688 yen.

(7) Defendants shall bear the court costs.

(8) Declaration of provisional execution

2. Reply to the gist of the demand

(1) Defendant Kawatsuru

A The plaintiff's claims shall be dismissed entirely.

B The plaintiff shall bear the court costs.

(2) Defendant's bankruptcy trustee

A The same as paragraph 5 of the main text.

B The plaintiff shall bear the court costs.

No. 2 Outline of the case

1. In the present case, the plaintiff, who holds the breeder's right for shiitake mushrooms, which is registered under the Plant Variety Protection and Seed Act (hereinafter sometimes abbreviated as "Act"), claimed that Defendant Kawatsuru, a non-party called Kabushiki Kaisha Noken Kanzai (former trade name: Kabushiki Kaisha Kawatsuru Noken; hereinafter referred to as "Kawatsuru Noken" whether before or after the trade name change), and the bankrupt Kabushiki Kaisha Nagano Kanzai (former trade name being Kabushiki Kaisha AGLINK Nagano; hereinafter referred to as "AGLINK Nagano" whether before or after the trade name change), who have been engaged in production, transfer, and the like of propagating materials of shiitake mushrooms as well as the harvested materials thereof since around August 2011, are in infringement of the plaintiff's breeder's right because of these acts, thereby demanding the following against Defendant Kawatsuru; namely, [1] injunction of production, transfer, and the like of the aforementioned propagating materials and the harvested materials thereof pursuant to Article 33, paragraphs (1) and (2) of the Act, [2] destruction of the aforementioned propagating materials and the like pursuant to Article 33, paragraph (2) of the Act, [3] publication of an apology ad on newspaper pursuant to Article 44 of the Act, and [4] payment of a sum of 250,636,734 yen in damage for a joint act of tort as well as a delinquency charge accruing therefrom at an annual interest rate of 5%, as prescribed by the Civil Code, for the period starting from November 26, 2014, which is the day following the act of tort (day following the date of service of this

complaint) up to a date when the payment will be completed, in addition to demanding against the Defendant's bankruptcy trustee for the confirmation that the plaintiff has a bankruptcy claim against AGLINK Nagano in the amount of 250,636,734 yen, which is the principal of the damages, as well as the delinquency charge accruing therefrom in the amount of 26,196,688 yen.

2. Findings (facts on which the parties agree, or facts which can be recognized from evidence that is indicated in the text or from the entire import of the oral argument)
 - (1) Parties, etc.

A The plaintiff is a corporation that is engaged in the manufacturing and selling of mushroom spawns, mushroom beds, and processed food and drink of mushrooms, as well as in the designing and constructing of mushroom cultivation facilities and selling of equipment for such facilities, among other businesses.

B Defendant Kawatsuru is a corporation that is engaged in the manufacturing, planning, and selling of Japanese pickles, among other businesses.

Kawatsuru Noken is an affiliated company of Defendant Kawatsuru and is engaged in the cultivating and selling of mushrooms, among other businesses. On December 26, 2016, at 3 o'clock p.m., an order for commencement of bankruptcy proceedings was made against Kawatsuru Noken, and on April 13, 2017, an order for discontinuance of bankruptcy proceedings was made against Kawatsuru Noken.

C AGLINK Nagano is an affiliated company of Defendant Kawatsuru, whose purpose is to produce, process, and sell agricultural and livestock products, among other purposes. On December 26, 2016, at 3 o'clock p.m., an order for commencement of bankruptcy proceedings was made against AGLINK Nagano, followed by the appointment of a bankruptcy trustee (the Defendant's bankruptcy trustee in the present case), and on January 25, 2018, an order for discontinuance of bankruptcy proceedings was made against AGLINK Nagano. (Exhibit Ko 54; except as specifically indicated, branch numbers are included hereinafter where applicable.)

D In 2014, representative directors of Defendant Kawatsuru were Director A and Director B. In addition to their positions as representative directors of Defendant Kawatsuru, Director A was also a director of Kawatsuru Noken as well as a representative director of AGLINK Nagano, and Director B was also a director of Kawatsuru Noken. Director C, who was a representative director

of Kawatsuru Noken, was also a director of AGLINK Nagano. Furthermore, Director D, who was a director of Defendant Kawatsuru (manager of Agricultural Division), was also a director of AGLINK Nagano. (Exhibits Ko 51 to 54)

(2) Cultivation methods for shiitake mushrooms

Cultivation methods for shiitake mushrooms include "log cultivation" and "mushroom bed cultivation." Of these two, the "log cultivation method" refers to the cultivation method in which spawns are embedded into logs of trees such as kunugi (*Quercus acutissima*) and konara (*Quercus serrata*), and the "mushroom bed cultivation method" refers to the cultivation method of embedding spawns into a culture medium which is solidified into shapes such as a block or cylinder by mixing sawdust with wheat-bran, rice-bran, water, and the like (Table 3 of Food Labeling Standards (Cabinet Office Ordinance No. 10 of 2015)). (the entire import of the oral argument)

(3) Plaintiff's breeder's right

A Meiji Seika Kaisha, Limited (hereinafter referred to as "Meiji Seika") held the breeder's right for the following variety (hereinafter referred to "Variety"). (Exhibit Ko 22).

Variety registration number: No. 7219

Application date: September 28, 1995

Registration date: April 15, 1999

Genus or species of the agricultural, forestry and aquatic plant: Shiitake mushroom

Name of the registered variety: "JMS 5K-16"

B On September 12, 2002, the breeder's right for the Variety was transferred to the plaintiff from Meiji Seika, and on February 28, 2003, the transfer was registered. (Exhibit Ko 1)

C Only a characteristics list that is based on the log cultivation method is attached to the original of the Register of Plant Varieties for the Plant (Exhibit Ko 22), and there is no attachment of a characteristics list that is based on the mushroom bed cultivation method. The application form (Exhibit Ko 45) for the filing of the application for the Variety indicates "shiitake mushroom spawns for mushroom bed cultivation method and log cultivation method" in the column for "Main Use of the Applied Variety," and has the attachment of test results from not only the log cultivation method but also the mushroom bed cultivation method. For reasons of operation of the variety registration

pursuant to the Plant Variety Protection and Seed Act, in the cases of shiitake mushrooms, only the expression of the characteristics of the variety that is based on the log cultivation method (Article 18, paragraph (2), item (iv) of the Act) is to be indicated on the Register of Plant Varieties for the Plant even when the use of the applied variety includes the mushroom bed cultivation as well.

(4) Wholesale, etc. of shiitake mushrooms by Defendant Kawatsuru

In February 2012, Kawatsuru Noken was selling shiitake mushrooms to Defendant Kawatsuru via [1] the route of purchasing mushroom beds from mushroom bed producers in the People's Republic of China (hereinafter referred to as "China") through Kabushiki Kaisha S.S. IT (hereinafter referred to as "SSIT"), which is a trading company in Japan, or via [2] the route of obtaining shiitake mushrooms, which are harvested material, from commercial grower(s) of shiitake mushrooms in Japan. In the case of the mushroom beds of the above [1], shiitake mushrooms were cultivated at facilities in Mie Prefecture and Nagano Prefecture and then sold to Defendant Kawatsuru, who then sold the shiitake mushrooms, which were purchased from Kawatsuru Noken, to retailers by packaging them into smaller portions without making any distinction between those obtained by way of above [1] and those obtained by way of above [2]. (Exhibits Otsu 7 to 12, 15, 16, 32 to 35, 38, 39, 41 to 48, 60, 61).

On February 3, 2012, at a retail store (Store A) of YorkMart. Co., Ltd., "Fresh Shiitake Mushrooms' produced in Nagano Prefecture" (hereinafter referred to as "Defendant's Shiitake 1") and "Meaty, Fresh Shiitake Mushrooms' produced in Nagano Prefecture" (hereinafter referred to as "Defendant's Shiitake 2") were sold, and at a retail store (Store B) of Ozeki Co., Ltd., "Fresh Shiitake Mushrooms' produced in Nagano Prefecture" (hereinafter referred to as "Defendant's Shiitake 3"; Defendant's Shiitake 1, 2, and 3 are hereinafter collectively referred to as "Defendant's Shiitake Mushrooms") were sold. Defendant's Shiitake Mushrooms were all distributed by Defendant Kawatsuru to the retail stores above.

(5) Characteristics of Defendant's Mushrooms

According to the variety examination by The Mushroom Research Institute of Japan, Defendant's Shiitake 1, 2, and 3 respectively have the characteristics, as per the column of "Characteristic Value of Applied Variety (Comparison with Standard Variety)" and the column of "Remarks (Measured Value, etc.)"

of the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials (Exhibits Ko 2, 4 to 6, 24, 27).

Kawatsuru Noken was given the explanation that while most of the mushroom beds purchased from SSIT are of the variety called "L-808" (Exhibits Otsu 1, 2), which is the name under which the variety is registered in China, some, although not in a large number, are of the variety called "Koko SD-1". However, as a result of DNA analysis using SSR Marker, it became clear that Defendant's Mushrooms and "L-808" are not of the same variety. (Exhibit Ko 29; the mushroom beds having been purchased based on the explanation by SSIT that they are "L-808" although in fact, they are not of the same variety as "L-808," are hereinafter sometimes referred to as simply "L-808").

- (6) The plaintiff sent a notice to Defendant Kawatsuru, in a content-certified mail dated May 14, 2012 (Exhibit Ko 25; hereinafter referred to as "Notice"), stating that the result of dual-culture experiments on Defendant's Mushrooms showed that the Defendant's Mushrooms are highly likely to be in infringement of the plaintiff's breeder's right. The Notice reached Defendant Kawatsuru on the 16th of the same month (the entire import of the oral argument).

In response, Defendant Kawatsuru sent a written answer (hereinafter referred to as "Written Answer") to the plaintiff, who received the document on June 4, 2012, informing the plaintiff of the name and address of the mushroom bed producer and the place(s) of purchase of spawns, and stating that, concerning said spawns, Defendant Kawatsuru had received the explanation that they are "L-808" and "Koko SD-1."

- (7) Filing of bankruptcy claim

In the bankruptcy proceedings for AGLINK Nagano, the plaintiff filed a bankruptcy claim of damages in the amount of 250,636,734 yen as well as the delinquency charge accruing therefrom in the amount of 26,196,688 yen, as the right to seek compensation for damage based on an act of tort by infringement of the breeder's right.

3. Issues

- (1) Acts by Defendant Kawatsuru, Kawatsuru Noken, and AGLINK Nagano
- (2) Comparison between the Variety and the Defendant's Mushrooms
- (3) Scope of the breeder's right
- (4) Whether or not there is abuse of right due to lack of quality stability
- (5) Whether or not there is negligence

- (6) Whether or not a joint act of tort by AGLINK Nagano can be established
- (7) Whether or not damage occurred, and the amount of damages
- (8) Necessity of injunction and destruction
- (9) Necessity of an apology ad

(omitted)

No. 4 Judgment of this court

1. Issue (1) On [Acts by Defendant Kawatsuru, Kawatsuru Noken, and AGLINK Nagano]

- (1) Defendants are aware that Kawatsuru Noken imported shiitake mushroom beds, began mushroom bed cultivation from around August 2011, that the cultivation was well under way by January 2012 or so, that Kawatsuru Noken was selling shiitake mushrooms, which are harvested material, to Defendant Kawatsuru, and that Defendant Kawatsuru was reselling these shiitake mushrooms to supermarkets and other retailers.
- (2) On the other hand, although the plaintiff claims that there were following acts; namely, [1] production, conditioning, transfer, import, and export of propagating materials of shiitake mushrooms by Defendant Kawatsuru, as well as production, lease, import, and export of the harvested materials thereof by Defendant Kawatsuru, and [2] production, conditioning, transfer, import, and export by Kawatsuru Noken of propagating materials of shiitake mushrooms, as well as lease, import, and export of the harvested materials thereof, there is not enough evidence to support that Defendant Kawatsuru and Kawatsuru Noken were engaged in these acts beyond the scope of which the defendants have admitted to being aware, as per the above (1).
- (3) Furthermore, while the plaintiff claims that AGLINK Nagano was also involved in the production and selling of shiitake mushrooms, and that therefore AGLINK Nagano was engaged in the production, conditioning, transfer, import, and export of propagating materials of shiitake mushrooms as well as in the production, transfer, lease, import, and export of the harvested materials thereof, there is not enough evidence to support this claim, either.

In other words, while the plaintiff points out that the column for objectives in the commercial registry of AGLINK Nagano indicates "business of production, processing, and selling of mushrooms" (Exhibit Ko 50), that the billboards of shiitake mushroom cultivation facilities of Kawatsuru Noken

indicate "Kabushiki Kaisha AGLINK Nagano" alongside the indication of Defendant Kawatsuru and Kawatsuru Noken (Exhibits Ko 13, 48), neither point made by the plaintiff is something that can directly support the claim that AGLINK Nagano was actually engaged in the production and transfer, and the like of the propagating materials of shiitake mushrooms or the harvested materials thereof.

Rather, the job listing of AGLINK Nagano (Exhibits Hei 1, 2) indicates that "job description" of a worker is to be engaged in the "production of highland vegetables (lettuce, broccoli, napa cabbage) in fields and vinyl greenhouses," and a magazine submitted by the plaintiff (Exhibit Ko 3) also indicates the following words from Director A, who is a representative of AGLINK Nagano: "We have established AGLINK Nagano ... if, during the winter time, it becomes difficult for AGLINK Nagano to produce crops due to snow, AGLINK partners in areas such as Kagoshima and Wakayama Prefectures will take on the production as a kind of relay production, so that fresh vegetables can be produced incessantly"; "We are actively engaged in not only the production of fresh vegetables but also in the development of seeds and other activities" (both from page 26). In light of the foregoing, AGLINK Nagano was in the business of production of lettuce and other leaf vegetables, as claimed by defendants, and it cannot be acknowledged that AGLINK Nagano was producing shiitake mushrooms.

- (4) From what is described above, of the acts claimed by the plaintiff, the following facts can be acknowledged; namely, that [1] Kawatsuru Noken imported shiitake mushroom beds and began shiitake mushroom bed cultivation from around August of 2011, thereby producing the harvested materials (shiitake mushrooms) which are obtained through the use of the propagating materials, and furthermore, transferring the harvested materials to Defendant Kawatsuru (Article 2, paragraph (5), item (ii) of the Act), and that [2] Defendant Kawatsuru was indeed transferring the harvested materials (shiitake mushrooms) of the above [1] to supermarkets and other retailers. However, other facts (including the production, selling, and the like of shiitake mushrooms by AGLINK Nagano) cannot be acknowledged (whether or not AGLINK Nagano's involvement in a joint act of tort can be established shall be considered below in 6).

2. Issue (2) On [Comparison between the Variety and the Defendant's Mushrooms]

According to evidence (Exhibits Ko 2, 23), it is acknowledged that Defendant's

Mushrooms were taken by the Center for Seeds and Seedlings (hereinafter referred to as "Center") as deposited goods. Then, when the strains of the Defendant's Mushrooms, which are deposited at the Center, and the strains of the Variety, which are likewise deposited in the same Center, were appraised during the present examination, the following results were obtained; namely, that [1] according to the comparison of the actual shiitake mushrooms which generated from strains through mushroom bed cultivation (Culture period: from October 2016 to March 2017, Development period: from March 2017 to July 2017), the Defendant's Mushrooms and the Variety showed similar values in all of the items of morphological characteristics (pileus, hymenophore, stipe, etc.) and cultural characteristics (fruiting body development, culture medium adaptability, dry matter percentage, yield performance, etc.), that [2] as a result of dual culture, no zone line could be observed, and thus the mushrooms are considered to be of the same strain, and that [3] as a result of development experiment, the mushrooms showed similar development characteristics in terms of strain, and thus they are considered to be of the same strain.

From the above, it should be said that the Defendant's Mushrooms are not of the types that are clearly distinguishable from the Variety in terms of characteristics.

3. Issue (3) On [Scope of the breeder's right]

(1) As determined in the above 2, Defendant's Mushrooms are of a variety which cannot be clearly distinguished from the Variety in terms of characteristics; thus it should be said that Defendant's Mushrooms belong to the scope of the breeder's right of the Variety (operative provisions of Article 20, paragraph (1) of the Act).

(2) Regarding this point, Defendant Kawatsuru claims that, while shiitake mushrooms would be greatly different in terms of characteristics depending on whether they were grown by log cultivation or mushroom bed cultivation, the Register of Plant Varieties for the Variety has only the characteristics list that is based on the mushroom bed cultivation attached thereto, and there is no attachment of the characteristics list that is based on mushroom bed cultivation, and thus the breeder's right for the Variety does not extend to the Defendant's Mushrooms which were grown by mushroom bed cultivation.

However, the variety registration system under the Plant Variety Protection and Seed Act protects "varieties" instead of "cultivation methods." The term, "variety" means a plant grouping which can be distinguished from any other

plant grouping by all or part of its characteristics and which can be propagated while retaining all its characteristics (Article 2, paragraph (2) of the Act), and the subject of protection under the Plant Variety Protection and Seed Act is the grouping, itself, of actually existing plants. Accordingly, it is interpreted that the expression of the characteristics of the variety as indicated on the Register of Plant Varieties upon variety registration (Article 18, paragraph (2), item (iv) of the Act) are presented for the purpose of identifying a registered variety based on the Register of Plant Varieties, and not for the purpose of determining the scope of right by the indication of characteristics as above (refer to Intellectual Property High Court Judgment dated December 25, 2006; Hanji No. 1993, page 117).

Therefore, although only the characteristics list of a single method (log cultivation) from among a plurality of cultivation methods is attached to the Register of Plant Varieties for the Variety, as long as it is acknowledged that the Defendant's Mushrooms are of a variety which cannot be clearly distinguished from the Variety in terms of characteristics, it should be said that the breeder's right for the Variety extends to the Defendant's Mushrooms, irrespective of the cultivation method, and thus the above claims by Defendant Kawatsuru cannot be accepted.

4. Issue (4) On [Whether or not there is abuse of right due to lack of quality stability]

Defendant Kawatsuru claims that, among other things, the plaintiff's exercise of breeder's right falls under abuse of right, because the plaintiff's claim constitutes the acknowledgement that the Variety lacks a requirement for variety registration (quality stability) as stipulated in Article 3, paragraph (1), item (iii) of the Act, which in turn means that there is a subsequently occurring cause for cancellation for the Variety, as stipulated in Article 49, paragraph (1), item (ii) of the Act.

However, the plaintiff's claim cited by Defendant Kawatsuru (in page 5 and thereafter of the plaintiff's Brief (3) dated September 30, 2015) is the part of the plaintiff's opinions made in response to the defendants' request for appraisal, merely describing that, in summary, the strains stored at the Center continue to be active, expanding through cell division, and that they are highly likely to have characteristics that are, due to DNA mutation, different from the strains of the Variety which were deposited at the time of the filing of the application for variety registration. In other words, the plaintiff's above claim merely points out the possibility of unavoidable DNA mutation, which is seen in plants in general, and we cannot go so far as to say that the plaintiff acknowledged that the Variety lacks

the stability prescribed in Article 3, paragraph (1), item (iii) of the Act.

Defendant Kawatsuru claims that a report on the shape anomaly of the Variety can also be found in a blog of a shiitake mushroom grower (Exhibit Otsu 25). However, the circumstances such as the cultivation environment are unclear, and it cannot be said that the existence of the above blog directly means that the Variety lacks the stability prescribed in Article 3, paragraph (1), item (iii) of the Act.

Furthermore, since there is no other evidence to support that the Variety lacks the above stability, the above claims made by Defendant Kawatsuru are groundless.

5. Issue (5) On [Whether or not there is negligence]

(1) Whether or not Article 35 of the Act (presumption of negligence) is applicable

Concerning the applicability of Article 35 of the Act (presumption of negligence) to Defendant Kawatsuru's acts in the present case, Defendant Kawatsuru claims that negligence cannot be presumed because, [1] in the current system of variety registration, characteristics of shiitake mushrooms which are grown by mushroom bed cultivation are not made public, and [2] it is extremely difficult to investigate/confirm the differences in the types of shiitake mushrooms, among other reasons.

However, Article 35 of the Act merely provides that "a person who has infringed a breeder's right or an exclusive exploitation right of another person shall be presumed to have been negligent in the commission of said act of infringement," and there are no special exemptions providing for restriction or limitation to the scope of application according to the extent to which the characteristics are made public and how difficult it is to investigate into and confirm cases of infringement.

Defendant Kawatsuru also claims that, if compensation for damage were to be allowed against Defendant Kawatsuru, who was engaged in the selling of harvested materials, as a case of exception based on the cascade principle, the provisions concerning presumption of negligence should not be applicable, or should be allowed in a repressive manner. However, this claim, too, lacks basis according to the letter of the law, and thus this claim cannot be accepted.

Accordingly, the above claim that Article 35, in itself, of the Act is not applicable to the present case cannot be accepted, and the circumstances claimed by Defendant Kawatsuru should be considered as circumstances that annihilate negligence.

(2) Whether or not there is any reason for annihilating presumption of negligence

Defendant Kawatsuru claims that in the present case, there are

circumstances which annihilate the presumption of negligence because, among other reasons, [1] the Register of Plant Varieties for the Variety has only the characteristics list of mushroom bed cultivation attached thereto, and since the characteristics of shiitake mushrooms differ greatly depending on mushroom bed cultivation and log cultivation, the identity of a shiitake mushroom with the Variety cannot be confirmed from the characteristics of log cultivation having been made public, [2] institutions where comparative culture experiments by mushroom bed cultivation of shiitake mushrooms can be implemented are extremely limited, and it was very difficult to investigate/confirm the differences of varieties, [3] Kawatsuru Noken was given the explanation from SSIT that said mushroom bed is "L-808" and the like., and the variety name could not be known from the indication on the invoice and the like, and [4] every possible means of investigation/confirmation was carried out after the Notice, including DNA analysis.

In view of the above, whether or not there is any reason for annihilating negligence shall be considered by dividing the present case into phases of before the Notice and after the Notice.

A Phase prior to the Notice

(A) The plaintiff claims that, even during the phase prior to the Notice, Defendant Kawatsuru or Kawatsuru Noken was sufficiently able to investigate/confirm the differences between the Variety and the Defendant's Mushrooms, and that such investigation/confirmation should have been implemented.

Regarding this point, Kawatsuru Noken was certainly engaged in the production and selling of shiitake mushrooms, and Defendant Kawatsuru, too, was engaged in the selling of these mushrooms; thus it must be said that they were under a duty of care to carefully investigate/confirm whether or not the spawns and the like of the purchased shiitake mushrooms were of a variety which were, by their characteristics, not clearly distinguishable from the variety for which variety registration had been granted.

On the other hand, as pointed out by defendants, the following facts are acknowledged; namely, that, for reasons of operation of the variety registration system pursuant to the Plant Variety Protection and Seed Act, in the cases of shiitake mushrooms, only the expression of the characteristics of the variety pertaining to log cultivation are to be indicated on the original of the Register of Plant Varieties, even when use of the

applied variety includes mushroom bed cultivation (aforementioned No. 2, 2(3)C), and that the characteristics of shiitake mushrooms are greatly different between those grown by log cultivation and those grown by mushroom bed cultivation.

In that case, in order for Defendant Kawatsuru, et al. to investigate/confirm as to the infringement of the breeder's right in the present case, given the circumstances in which Defendant Kawatsuru and Kawatsuru Noken cannot acknowledge, from factors such as explanations provided by business partners and the indication and the like on invoices, that the mushroom beds pertain to the Variety, and in which the differences between the Defendant's Mushrooms (mushroom bed cultivation) and the Variety cannot be determined, from the way in which shiitake mushrooms are handled in the variety registration system, even based on the comparison of the characteristics list (log cultivation only) which is made public for the Variety, the following steps must be taken. First, the shiitake mushrooms to be handled are grown by log cultivation. Next, comparison is made with the lists for the expression of the characteristics of all varieties that are registered. Finally, investigation/confirmation is carried out, as needed, by DNA analysis and the like, for the varieties which have a risk of infringing the breeder's right. However, it should be said that it is not reasonable to impose this level of duty of care on ordinary business partners such as Defendant Kawatsuru, et al.

- (B) In response to the above, the plaintiff claims that it is possible to determine the similarities between the Defendant's Mushrooms and the Variety from the appearance of Defendant's Mushrooms, and that in fact, the plaintiff was able to recognize the likelihood of infringement of the breeder's right for the Variety by looking at the Defendant's Mushrooms that were sold in stores.

However, given that the characteristics of shiitake mushrooms pertaining to mushroom bed cultivation are not made public, it should be said that it was difficult for an ordinary business partner to determine the differences between the shiitake mushrooms, which pertain to mushroom bed cultivation and which are handled by the business partner, and the Variety from their appearances, unlike the plaintiff, who, as the holder of the breeder's right, understands the expression of characteristics of the Variety in the case of mushroom bed cultivation.

In addition, the plaintiff claims that, according to what the defendants claim, a person who infringes another person's breeder's right by way of mushroom bed cultivation of shiitake mushrooms would not be presumed to be negligent, at all times, but that such interpretation cannot be accepted.

However, whether or not there is any reason for annihilating presumption of negligence should be determined comprehensively by taking into consideration the facts involved in each case, including details of the explanation provided by dealers of mushroom beds, the reasonableness of the explanation, indication on invoice and the like, and whether or not any points are made by the holder of the breeder's right, and the determination as to there being no negligence, at all times, is not made based on the manner in which shiitake mushroom varieties are made public.

Accordingly, the plaintiff's above claims are groundless.

- (C) From what is described above, during the phase prior to the Notice, the following circumstances can be acknowledged; namely, [1] Kawatsuru Noken was given the explanation that the mushroom beds purchased from SSIT are "L-808," and there are no circumstances due to which said explanation should be considered doubtful, [2] there was no indication of variety on the invoices issued by SSIT, et al., and [3] for reasons of the variety registration system, Defendant Kawatsuru and Kawatsuru Noken could not determine the differences of varieties based on the characteristics list attached to the Register of Plant Varieties. Given these circumstances, it should be said that they constitute reasons for annihilating negligence.

B After the Notice

As described above (No. 2, 2(6)), the Notice indicates that the Defendant's Mushrooms are highly likely to be infringing the breeder's right for the Variety, even clearly indicating the product labels of the Variety and of the Defendant's Mushrooms as well as the method of a test implemented concerning the differences of varieties. As such, it should be said that after the Notice, Defendant Kawatsuru should be liable for carrying out appropriate investigation/confirmation, including DNA analysis, on whether or not the Defendant's Mushrooms are infringing the breeder's right for the Variety.

In this regard, Defendant Kawatsuru claims that it voluntarily performed DNA analysis. However, it must be said that the DNA analysis which is said to have been carried out by Defendant Kawatsuru was insufficient as a means of investigation/confirmation, not only because it is questionable whether the

materials used in the analysis concerned the Variety, but also because the analysis examined the DNA base sequence of ITS1, which is in the gene region of the ribosomal RNA sequence, and can only analyze as far as the level of identifying which seeds will grow into shiitake mushrooms (Exhibit Ko 26).

Also, while Defendant Kawatsuru claims that it was very difficult to implement investigation/confirmation of the differences of varieties due to the extremely limited number of institutions which can carry out comparative cultivation tests based on mushroom bed cultivation of shiitake mushrooms, not only is the DNA sequence for the Variety made public at the National Institute of Genetics (Exhibit Ko 10), but also there are a plurality of methods for investigation/confirmation of the differences of varieties, including dual-culture experiments and DNA analysis, and thus it was sufficiently possible for Defendant Kawatsuru or Kawatsuru Noken to investigate/confirm the differences between the Defendant's Mushrooms and the Variety.

Accordingly, concerning the acts by Defendant Kawatsuru after the Notice, it is reasonable to acknowledge that there is no reason for annihilating the presumption of negligence, and that there is negligence on the part of Defendant Kawatsuru.

C From what is described above, it can be acknowledged that there is negligence on the part of Defendant Kawatsuru only for the acts committed by Defendant Kawatsuru after May 2012, which is when the Notice was given.

6. Issue (6) On [Whether or not a joint act of tort by AGLINK Nagano can be established]

Concerning the act of selling Defendant's Mushrooms, the plaintiff claims that AGLINK Nagano's involvement in a joint act of tort, along with Defendant Kawatsuru and Kawatsuru Noken, can be established on the grounds of circumstances such as that [1] AGLINK Nagano is one of the subsidiaries having been established as part of the Agricultural Division of Defendant Kawatsuru, which purchased the agricultural crops which were cultivated and produced by the subsidiaries, that [2] as is clear from the "Objectives" column on the commercial registry as well as from the billboards of shiitake mushroom cultivation facilities of Defendant Kawatsuru, AGLINK Nagano was in fact cultivating shiitake mushrooms, that [3] senior officials of AGLINK Nagano overlap with those of Defendant Kawatsuru and Kawatsuru Noken, and in particular, AGLINK Nagano and Defendant Kawatsuru shared the same representative director, and that [4] in the present case, even before the present suit was filed, the same lawyer acting on

behalf of Defendant Kawatsuru was acting on behalf of AGLINK Nagano.

The facts of the above [3] can be acknowledged. However, in regards to the above [1] and [2], AGLINK Nagano was engaged in the production of lettuce and other leaf vegetables as described in above 1, and it cannot be acknowledged that AGLINK Nagano was engaged in the production of shiitake mushrooms. In regards to the above [4], the negotiating partner of the plaintiff prior to the filing of the present suit was Defendant Kawatsuru alone (Exhibits Ko 25, 26), and AGLINK Nagano was not considered a negotiating partner. As such, there is no evidence that suggests that the same lawyer acting on behalf of Defendant Kawatsuru was also acting on behalf of AGLINK Nagano.

In that case, it must be said that, concerning the selling of Defendant's Mushrooms, it cannot be said only from the circumstances of the above [3] that a joint act of tort can be established between AGLINK Nagano, and Defendant Kawatsuru and Kawatsuru Noken. Furthermore, there seems to be no other circumstance to support the establishment of a joint act of tort, and thus the plaintiff's above claims are groundless.

7. Issue (7) On [Whether or not damages occurred, and the amount of damages]
 - (1) Whether or not it is possible to exercise the right for harvested material pursuant to Article 2, paragraph (5), item (ii) of the Act

A The Plant Variety Protection and Seed Act stipulates that "the holder of a breeder's right shall have an exclusive right to exploit, in the course of business, the variety which is registered (hereinafter referred to as 'registered variety') and varieties which, by the expressions of the characteristics, are not clearly distinguishable from the registered variety" (Article 20, paragraph (1) of the Act). The Act further stipulates that, in regards to the "harvested materials obtained through the use of the propagating materials" (Article 2, paragraph (5), item (ii) of the Act) and the "processed products of the variety" (Article 2, paragraph (5), item (iii) of the Act), the breeder's right can extend to only the cases "where the holder of the breeder's right ... has not had reasonable opportunity to exercise his/her right" against the acts performed by producers and the like of the propagating materials.

The cases "where the holder of the breeder's right ... has not had reasonable opportunity to exercise his/her right," as used in the above items, should be interpreted as including the cases such as [1] the cases in which the breeder, without knowing about unauthorized propagation or selling of propagating materials by a third party, becomes aware for the first time, during the phase of

distribution of harvested material, of the unauthorized propagation of said propagating materials and of the selling of the harvested materials thereof, and [2] the cases in which the breeder becomes aware that unauthorized propagation of the propagating materials of a registered variety was being carried out overseas, and in which it is legally or virtually difficult to exercise the breeder's right.

When the above is considered in the present case, the shiitake mushrooms for the Variety were imported to Japan after having been propagated overseas, without authorization, and the plaintiff discovered the unauthorized selling of the Defendant's Mushrooms during the phase of the harvested materials being distributed, without the knowledge of the unauthorized propagation and selling of propagating materials by Defendant Kawatsuru, et al. As such, the present case falls under a case "where the holder of the breeder's right ... has not had reasonable opportunity to exercise his/her right."

B In response, defendants claim that their response to the plaintiff by indicating the company name and address of the distributor and the like who are suspected of infringing the breeder's right constitutes the arrival of a "reasonable opportunity to exercise [the plaintiff's] right" on July 31, 2012, if not earlier.

However, the Written Answer (Exhibit Otsu 62-1) merely indicates the name and address of the mushroom bed producer and of the place(s) of purchase of spawns in China, and there are no objective materials or explanation that supports an act of infringement by said producer of mushroom beds. Rather, SSIT has never acknowledged that the mushroom beds sold to Kawatsuru Noken were those of the Variety, and has explained that the said mushroom beds were "L-808," and thus it can only be said that it was difficult for the plaintiff, even after receiving the above response, to recognize the infringer based on objective materials.

In addition, while China was at the time a member of the "International Convention for the Protection of New Varieties of Plants" (UPOV Treaty), shiitake mushrooms were not among the subject of protection until May 15, 2016, and thus the plaintiff could not claim his breeder's right for the Variety in China at the time of the period for infringement of the present case (all parties agree on this point).

In that case, given that the plaintiff cannot recognize the infringer even after receiving the above response, it cannot be said that the plaintiff was able to

have a reasonable opportunity to exercise his right by way of conclusion of a licensing agreement with said infringer, or by filing to the Japan Customs a request for injunction of import of the goods suspected of infringement, among other measures.

Accordingly, the plaintiff may exercise his breeder's right for the harvested materials of the Variety.

C Defendant Kawatsuru claims that, in light of the circumstances described above, it may be possible to acknowledge comparative negligence with respect to the extended damage on and after June 4, 2012 (while the plaintiff claims that said claim by Defendant Kawatsuru falls under a case of allegations or evidence that a party has advanced outside the appropriate time, we cannot go so far as to say, in light of the content and the status of progress of the present suit, that the timing is outside the appropriate time). However, in light of the explanations given above, the claim about comparative negligence cannot be accepted.

(2) Lost profits (Article 34, paragraph (1) of the Act)

A Calculation method of lost profits

(A) Calculation Methods 1 and 2

The plaintiff calculates the amount of lost profits, as prescribed in Article 34, paragraph (1) of the Act, by determining the number of "mushroom beds" transferred by Defendant Kawatsuru, Kawatsuru Noken, and AGLINK Nagano as 4,909,409 (Calculation Method 1), or the number of "mushroom beds" transferred by Kawatsuru Noken (as converted into mushroom beds of the plaintiff) as 6,168,461 (Calculation Method 2), and multiplying these numbers by the gain of 46 yen which the plaintiff obtains from the transfer for each "mushroom bed."

However, as recognized in the above 1, [1] Kawatsuru Noken merely imported shiitake mushroom beds, began mushroom bed cultivation of shiitake mushrooms using these shiitake mushroom beds, and sold the harvested material, or shiitake mushrooms, to Defendant Kawatsuru, [2] Defendant Kawatsuru was merely reselling the harvested materials, or shiitake mushrooms, of the above [1], to retailers, and [3] as for AGLINK Nagano, it cannot even be sufficiently acknowledged that AGLINK Nagano was engaged in the production, transfer, and the like of shiitake mushrooms.

In that case, since it cannot be acknowledged that Defendant Kawatsuru, Kawatsuru Noken, and AGLINK Nagano were involved in the transfer of

"mushroom beds" for shiitake mushrooms, the plaintiff's Calculation Methods 1 and 2 cannot be accepted, because they lack the premises.

(B) Calculation Method 3

The plaintiff calculates the amount of lost profits prescribed in Article 34, paragraph (1) of the Act by multiplying 1,265,216,042 yen, which is the total delivery volume of Defendant Kawatsuru's shiitake mushrooms (harvested material) between 2012 and 2014, by 18.8%, which is the plaintiff's "gross margin rate" (Calculation Method 3).

However, according to Article 34, paragraph (1) of the Act, the "amount of damages" is determined by multiplying the quantity of the propagating materials, the harvested materials, or the processed products, which were transferred by the infringer, by the "profit per unit" of the propagating materials, the harvested materials, or the processed products which would have been sold if there had been no such an act of infringement, instead of the "gross margin rate" of the holder of the breeder's right or other such person, and thus the plaintiff's above calculation method is not in line with the tenor of Article 34, paragraph (1) of the Act.

Accordingly, there is no need to determine other claims made by the plaintiff, and thus the plaintiff's Calculation Method 3 cannot be accepted.

(C) Calculation Method 4

The plaintiff calculates the amount of lost profits prescribed in Article 34, paragraph (1) of the Act by multiplying the sales volume of Defendant Kawatsuru's shiitake mushrooms (harvested material) by the amount of profit per unit (1 kg) in the case of the plaintiff selling shiitake mushrooms (harvested materials) (Calculation Method 4). Calculation Method 4, in itself, is in line with the tenor of the same paragraph, and in the present case, the amount of lost profits shall be considered pursuant to Calculation Method 4.

In summary, Defendant Kawatsuru makes claims as follows; namely, that [1] applicability of Article 34, paragraph (1) of the Act is limited to the cases in which there is a competitive relationship between the usage by the holder of the breeder's right and the usage by the infringer. For example, a holder of the breeder's right whose usage involves only the propagating materials cannot demand compensation based on the same paragraph from an infringer whose usage involves the harvested materials, and that [2] in the present case, the plaintiff, who is the holder of the breeder's right, is

engaged only in the manufacturing and selling of mushroom beds (propagating materials) for shiitake mushrooms, and is therefore not in a competitive relationship with Defendant Kawatsuru and Kawatsuru Noken, whose business involves cultivation of shiitake mushrooms and selling of the harvested materials thereof.

However, according to evidence (Exhibits Ko 57 to 59), it is acknowledged that the plaintiff was engaged in not only the manufacturing and selling of mushroom beds (propagating materials) but also in the selling of shiitake mushrooms as harvested materials, and thus the above claim made by Defendant Kawatsuru lacks the premise and cannot be accepted.

B Quantity of shiitake mushrooms transferred by Defendant Kawatsuru

(A) The quantity of shiitake mushrooms (harvested material) sold by Defendant Kawatsuru during the three years from 2012 until 2014 is 1,822,805.7 kg (all parties agree on this point).

However, like Defendant's Mushrooms, the entire sales volume above is of the variety which cannot be clearly distinguished from the Variety in terms of characteristics, and thus it cannot be said that this volume is the quantity of shiitake mushrooms to which the plaintiff's breeder's right extends (hereinafter simply referred to as "Infringed Goods"). In other words, while Defendant Kawatsuru claims that the shiitake mushrooms, which are Infringed Goods, were harvested from the mushroom beds which were imported by Kawatsuru Noken under the name of "L-808," and that Kawatsuru Noken also harvested other shiitake mushrooms from mushroom beds which were imported under names such as "Koko SD-1 (Nanakawaichigo)," it can indeed be acknowledged, from various documents of transaction (Exhibits Otsu 42 to 47, 50), that Kawatsuru Noken was importing multiple types of mushroom beds in addition to "L-808."

Then, when we look at the part of the above transferred quantity which is made up of Infringed Goods, it is acknowledged that, according to the Notice of Permission for Import (Exhibit Otsu 56) and Invoice (Exhibit Otsu 57), the number of the mushroom beds which were imported by Kawatsuru Noken and which have the name of "L-808" is 2,955,000 out of the total import volume of 3,600,000, accounting for the proportion of approximately 82% (refer to Exhibits Otsu 58, 59).

Accordingly, it is reasonable to calculate that, of the shiitake mushrooms (harvested materials) which were sold during the three years from 2012 until 2014, the quantity of Infringed Goods is 1,494,700.674 kg.

(Calculation formula)

$$1,822,805.7 \text{ kg} \times 82\% = 1,494,700.674 \text{ kg}$$

- (B) In regard to this point, Defendant Kawatsuru makes claims as follows; namely, that [1] the shiitake mushrooms sold by Defendant Kawatsuru included shiitake mushrooms which were purchased as harvested materials from traders other than Kawatsuru Noken, and that [2] many of the "L-808" shiitake mushrooms, which are Infringed Goods, were dead or had grown poorly, and thus, of the total sales volume of shiitake mushrooms, the proportion of "L-808" is even less than 82% and remains at around 60%.

However, there are no objective materials to support the above claims of [1] and [2]. As such, it is difficult to recognize the facts involved, let alone the quantity to be deducted, and thus these claims cannot be accepted.

C Amount of profit per unit for the plaintiff

- (A) According to evidence (Exhibits Ko 57 to 59, 61 to 63), the plaintiff's sales volume of shiitake mushrooms for the period of one year from October 2013 until September 2014 is 81,979.64 kg, and the amount of profit for the same period is 12,508,596 yen. As such, the amount of profit per kilogram of shiitake mushrooms is 152 yen.

(Calculation formula)

$$12,508,596 \text{ yen} / 81,979.64 \text{ kg} \approx 152 \text{ yen (round down to the nearest decimal)}$$

- (B) Regarding this point, Defendant Kawatsuru claims that the calculation of the above amount of profit is inappropriate because the sales volume of shiitake mushrooms according to the above (A) contains many varieties other than the Variety.

However, Article 34, paragraph (1) of the Act provides for a calculation method for the amount of damages upon demanding damage compensation for the lost profits due to decrease in the sales volume pursuant to Article 709 of the Civil Code, and the provision is aimed at more flexibly identifying the decreased sales volume by shifting the

burden of proof concerning the decreased sales volume that has legally sufficient cause with respect to the act of infringement. As such, in light of the tenor and objective of the provision, it should be interpreted that what sufficiently constitutes "the propagating materials, the harvested materials, or the processed products which would have been sold [by the holder of the breeder's right or other such person] if there had been no such an act of infringement" are the propagating materials, the harvested materials, or the processed products of the holder of the breeder's right or other such person, who is influenced by the sales volume as a result of the act of infringement, or in other words, the propagating materials, the harvested materials, or the processed products of the holder of the breeder's right, which are in a competitive relationship with the Infringed Goods in the market.

If the present case is considered in light of the above, the harvested materials of shiitake mushrooms are generally not sold with the registered variety name, for example "JMS 5K-16," being clearly indicated in a large size. Instead, the indication is such that only "fresh shiitake mushrooms" and the like would be written (refer to Exhibit Ko 2). Given the above, as long as the harvested material of shiitake mushrooms sold by the plaintiff are shiitake mushrooms, it should be said that these mushrooms are in a competitive relationship in the market with the harvested material of shiitake mushrooms which are Infringed Goods of Defendant Kawatsuru.

Accordingly, the above claim by Defendant Kawatsuru cannot be accepted without the need to determine whether or not the sales volume of shiitake mushrooms in above (A) includes varieties other than the Variety.

(C) Defendant Kawatsuru also claims that the plaintiff was selling shiitake mushrooms without individually packaging them, whereas Defendant Kawatsuru was selling shiitake mushrooms by individually packaging them, and that further deduction of the facility cost and the labor cost, which were involved in the individual packaging, from the amount of profit of 152 yen per kilogram is necessary.

However, Article 34, paragraph (1) of the Act stipulates that the amount of damages is presumed by multiplying the transferred quantity by the profit per unit of the propagating materials, the harvested

materials, or the processed products of the "holder of the breeder's right or other such person," instead of stipulating that the amount of damages is presumed by multiplying the transferred quantity by the profit per unit of the "infringer." The above claim by Defendant Kawatsuru is not in line with the provisions of Article 34, paragraph (1) of the Act, and thus cannot be accepted.

D Capacity of exploitation by holder of the breeder's right or other such person

(A) According to Article 34, paragraph (1) of the Act, the amount of damages is presumed by multiplying the transferred quantity by the profit per unit of the propagating materials, the harvested materials, or the processed products of the holder of the breeder's right or other such person, within the limits of the capacity of exploitation of the holder of the breeder's right or other such person. As such, it should be interpreted that what sufficiently constitutes the "capacity of exploitation" of the holder of the breeder's right or other such person, as stipulated in the same paragraph, is the acknowledgement of the potential capacity to handle, and supply for, the additional demand for the propagating materials, the harvested materials, or the processed products which would have arisen if there had been no such an act of infringement, during the period of the act of infringement or around the same period, even if said demand had not actually existed during the period of the act of infringement.

If the present case is considered in light of the above, the plaintiff is a company which produces and sells shiitake mushrooms as harvested materials, in addition to manufacturing and selling the spawns and mushroom beds thereof (refer to the above No. 2, 2(1)A). Furthermore, the Infringed Goods in the present case are, in the first place, merely shiitake mushrooms (harvested materials), and it is sufficiently possible to supply these mushrooms by way of subcontracting to other companies or outsourcing or the like instead of the plaintiff personally producing these mushrooms. In fact, given that the plaintiff purchased shiitake mushrooms, which are harvested materials, from other shiitake mushroom producers (such as "Yugen Kaisha Faure Shiraoi" as indicated on page 12 of Exhibit Ko 64, among others), it is acknowledged that, concerning the transferred quantity that was

identified in the above B(A), the plaintiff had the potential capacity, at the time of the act of infringement of the present case, to supply for the additional demand for the harvested material which would have arisen if there had been no such an act of infringement.

- (B) In this regard, Defendant Kawatsuru claims that the plaintiff's sales figure of shiitake mushrooms for the period of one year (from October 2013 to September 2014) is slightly more than 66,360,000 yen, which is one-fifth or less of the sales figure of Defendant Kawatsuru for 2013 (352,237,680 yen), and thus the transferred quantity of the harvested materials, as per the calculation of Article 34, paragraph (1) of the Act, should be no more than one-fifth of the transferred quantity of Defendant Kawatsuru.

However, as explained in above (A), it should be interpreted that what sufficiently constitutes the capacity of exploitation of the holder of the breeder's right or other such person is the acknowledgement of the potential capacity to handle, and supply for, the additional demand even if such demand did not actually exist during the period in which the act of infringement took place. As such, the above claims by Defendant Kawatsuru cannot be accepted.

- E Whether or not there is "any circumstance under which the holder ... may not be able to sell" (proviso of Article 34, paragraph (1) of the Act)

- (A) In regards to the "circumstances under which the [holder of the breeder's right or other such person] ... may not be able to sell" the quantity which corresponds to "the transferred quantity in whole or in part" as stipulated in the proviso of Article 34, paragraph (1) of the Act, the infringer is responsible for proving said circumstance, and once such circumstance is proven to exist, the infringer deducts the amount appropriate for the quantity which corresponds to said circumstance. It should be said that a "circumstance under which the holder ... may not be able to sell" means a circumstance which interferes with the legally sufficient cause between the act of infringement and the decreased sale of the propagating materials, the harvested materials, or the processed products of the holder of the breeder's right or other such person. Examples of such circumstance are the presence of a competitive product in the market, sales efforts by the infringer, quality of the Infringed Goods, and non-identity of the market.

(B) Defendant Kawatsuru claims the following as the circumstances which annihilate the presumption of Article 34, paragraph (1) of the Act; namely, that [1] while almost all of shiitake mushrooms which are sold by the plaintiff are for the use of professionals, the shiitake mushrooms sold by Defendant Kawatsuru target general consumers, and thus the shiitake mushrooms of the plaintiff and those of Defendant Kawatsuru are completely different in terms of quality, sales destination, usage, and price, thereby not placing the plaintiff and Defendant Kawatsuru in a competitive relationship in the market, that [2] the plaintiff's sale of shiitake mushrooms accounts for only 0.1% of the market share nationwide, and thus the demand for the plaintiff's shiitake mushrooms which would have arisen had there not been any sale of shiitake mushrooms by Defendant Kawatsuru should account for only 0.1% of the sales volume of Defendant Kawatsuru, and that [3] while the plaintiff is at the top in the industry for spawn, the plaintiff claims that it does not have sales capabilities or marketing capabilities towards retailers.

In view of the above, consideration as to the sales destination suggests that while Defendant Kawatsuru sells shiitake mushrooms mostly to retailers such as supermarkets, the plaintiff sells shiitake mushrooms mostly to professionals such as factories and wholesalers, although the plaintiff's sales destinations also include supermarkets such as "Store C of Yaoko Co., Ltd.," "Store D of SuperValue," and "Store E of SuperValue" (Exhibits Ko 57, 62).

Next, concerning the sales value, the unit price per kilogram of the plaintiff's shiitake mushrooms is higher than that of Defendant Kawatsuru's shiitake mushrooms (Exhibit Ko 58), which is higher than what is normal for shiitake mushrooms that are sold to retailers. Given the foregoing, there is not enough evidence to support that the shiitake mushrooms of the Variety were evaluated as having an especially high quality compared to the shiitake mushrooms that have other qualities, and that customers and dealers were aware of such evaluation.

Furthermore, according to the "Statistical Survey on Specified Forest Products/2012 Basic Data for Minor Forest Products" (Exhibit Otsu 95) of the Forestry Agency, it is acknowledged that the plaintiff's sales volume (approximately 82 tons; Exhibit Ko 63) is of the level that

represents only about 0.1% of the sales performance for fresh shiitake mushrooms nationwide (approximately 65,600 tons; however, this figure is for 2012).

When the above circumstances are taken into consideration, it is difficult to acknowledge that the plaintiff was able to sell all of the Infringed Goods even by taking into consideration that the plaintiff is at the top of the industry for spawns, that the plaintiff was engaged in a broad range of businesses from mushroom bed business to food business, and that, as described above, it can be acknowledged that the plaintiff had the potential capacity to handle the additional demand. In addition, when all circumstances presented in the present case are also taken into consideration, it should be said that there were circumstances under which the plaintiff could not sell the quantity which corresponds to 70% of the transferred quantity of the Infringed Goods.

F Summary

Based on the above, calculation of the amount of the plaintiff's lost profits during 2012 and 2014 results in the amount of 68,158,350 yen, as shown below, of which negligence on the part of Defendant Kawatsuru is limited to the part after May 2012 (for the 31 months from June 2012 until December 2014), which is when the Notice arrived, of the above three-year period, and thus the amount of damages for which Defendant Kawatsuru is responsible for compensation is 58,691,912 yen.

(Calculation formula)

$1,494,700.674 \text{ kg} \times 152 \text{ yen} \times (1 - 0.7) \approx 68,158,350 \text{ yen}$ (round down to the nearest decimal)

$68,158,350 \text{ yen} \times 31 \text{ months} / 36 \text{ months} \approx 58,691,912 \text{ yen}$ (round down to the nearest decimal)

(3) Cost of investigation

According to evidence (Exhibits Ko 19 to 21), it is acknowledged that the plaintiff, in order to investigate the fact of infringement of the breeder's right by Defendant Kawatsuru, spent [1] a sum of 116,260 yen as the cost for preparing records and the like of the conditions of infringement, [2] a sum of 1,439,778 yen as the cost for preparing the material for investigation of variety, and [3] a sum of 467,882 yen as the cost of DNA analysis, and thus it can be said that the total of these sums, or 2,023,920 yen, is the damage which has legally sufficient cause with respect to the act of infringement by Defendant

Kawatsuru.

(4) Attorney's fee

It is reasonable to acknowledge that the damage corresponding to the attorney's fee that has legally sufficient cause with respect to the act of infringement in the present case is 6,070,000 yen.

(5) Total amount of damages

From what is described above, the total amount of damages payable by Defendant Kawatsuru in the present suit to the plaintiff is 66,785,832 yen.

8. Issue (8) On [Necessity of injunction and destruction]

(1) Whether or not injunction is required

As recognized in the above 1, Defendant Kawatsuru had transferred to retailers and the like shiitake mushrooms (harvested materials) which were purchased from Kawatsuru Noken, and thus there is a risk that Defendant Kawatsuru may offer for transfer, transfer, offer for lease, lease, or stock for the purpose of any of these acts, the shiitake mushrooms (harvested materials) of a variety which is not clearly distinguishable from the Variety in terms of characteristics, and to which the plaintiff's breeder's right extends, or in other words, the harvested materials which are obtained through the use of the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials. As such, it is necessary to issue an injunction of these acts.

Also, as recognized in the above 1, Kawatsuru Noken imported shiitake mushroom beds, carried out mushroom bed cultivation, produced shiitake mushrooms which are the harvested materials thereof, and transferred the same to Defendant Kawatsuru. In light of the facts such as that Kawatsuru Noken is an affiliated company of Defendant Kawatsuru, and that in fact, Kawatsuru Noken was shipping out shiitake mushrooms directly to retailers and settling accounts at a later date (as explained by Defendant Kawatsuru), it must be said that there is a risk that Defendant Kawatsuru may import the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials, personally or through a third party, or that Defendant Kawatsuru may produce the harvested material which can be obtained by using said propagating materials, and thus it is necessary to issue an injunction of these acts.

On the other hand, it must be said that there is no such risk in regards to other acts ([1] production, conditioning, offer for transfer, transfer, export, and

stocking of the propagating materials, [2] import and export of the harvested materials obtained through use of propagating materials) as demanded by the plaintiff.

(2) Whether or not there is need for destruction

In light of what is explained in above (1), it should be said that an order for destruction of the harvested materials and the processed products pertaining to the propagating materials numbered 1 through 3 on the attached Defendant's List of Propagating Materials must be issued to Defendant Kawatsuru (while the plaintiff also demands that the propagating materials themselves be destroyed, there is not enough evidence to support to acknowledge that Defendant Kawatsuru has ever owned the propagating materials themselves, and thus the plaintiff's above claim lacks the premise).

9. Issue (9) On [Necessity of an apology ad]

While the plaintiff demands that an apology ad be published as a measure for restoring confidence in the present suit, such need cannot be acknowledged in light of the amount of compensation having been approved as well as of the findings described above. As such, the demand for publishing an apology ad as described above is groundless.

10. Conclusion

Accordingly, of the claims made by the plaintiff against Defendant Kawatsuru, the part of injunction demand based on Article 33, paragraphs (1) and (2) of the Act as well as the demand for destruction are rational, and should therefore be accepted. As for the demand for damage compensation based on an act of tort, the demand is reasonable within the extent of the demand for payment of 66,785,832 yen, which is the total amount of damages, as well as the delinquency charge accruing therefrom at an annual interest rate of 5%, as prescribed in the Civil Code, for the period starting from November 26, 2014, which is the day following the act of tort (day following the date of service of compliant in the present suit) up to a date when the payment will be completed. Other claims made by the plaintiff against Defendant Kawatsuru shall be dismissed because they are groundless, and as for the plaintiff's claims concerning Defendant's bankruptcy trustee, it shall be confirmed that the bankruptcy claim against the plaintiff's bankrupt entity, Kabushiki Kaisha Nagano Kanzai (Osaka District Court 2016 (Fu) 5253) is zero (0) yen, and the judgment shall be rendered as per the main text.

Presiding judge: SATO Tatsubumi

Judge HIROSE Takashi cannot place his signature or seal hereon due to transfer, and
KATSUMATA Kumiko cannot place her signature or seal hereon due to reassignment.

Presiding judge: SATO Tatsubumi