12-13-1985

Defendant's Memo of Law Objecting to Plaintiff's Request for Private and Emergency Phone Numbers

Lewis M. Steel '63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12/16/85

LISA M. AVAGLIANO, et al., Plaintiffs, -against- SUMITOMO SHOJI AMERICA, INC., Defendant.	77 Civ. 5641 (CHT)
PALMA INCHERCHERA, Plaintiff, -against- SUMITOMO CORP. OF AMERICA, Defendant.	82 Civ. 4930 (CHT)

DEFENDANT'S MEMORANDUM OF LAW

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DEFENDANT'S MEMORANDUM OF LAW

Preliminary Statement

Defendant Sumitomo Corporation of America ("SCOA") submits this memorandum of law in support of its objection to the request by counsel for the plaintiff classes that SCOA provide forthwith, without obtaining the authorizations of its employees, private telephone numbers and information regarding emergency notification that those employees have provided in confidence to SCOA. Turning over the phone numbers, an undeter-

mined number of which may be unlisted, without notification to or permission of the employees, will, in SCOA's view constitute an unwarranted invasion of the privacy of the employees. Similarly, the release of emergency notification information, i.e., names and phone numbers of friends or relatives of employees who are to be contacted in the event of an emergency will invade not only the privacy of employees but also of individuals who have no interest whatever in the litigation. Plaintiffs' counsel has made no showing of any immediate need for this information that would justify not asking the employees themselves whether they wish to have the information provided to counsel.

The information sought is itself, of course, not relevant to any issue in the litigation. Unlike the employment data which plaintiffs' counsel is now in the process of discovering through inspection of personnel files, such as salary, job duties, qualifications and the like, the home telephone numbers and emergency contact data of employees do not relate to any matter in dispute. The sole reason advanced by plaintiffs' counsel for its request, at the conference before Magistrate Dolinger held on December 9, 1985, is that such data will be of use in locating members of the absent class and thus possibly lead to relevant information of an as yet unspecified kind.

This is not, however, a situation in which plaintiffs' counsel needs the information sought in order to contact the class members. Class counsel has had in his possession for

a number of weeks, the names and addresses of over 400 class members to whom individual notice of these actions is to be sent, pursuant to the Court's Order. Similar data for the remaining known members of the classes will soon be available. Class counsel has failed to show any reason why a mailing of his own to class members would not be adequate.[1]

Although we do not purport to advise plaintiffs' counsel as to how best to develop his case, it is relevant to the present motion that using telephone numbers to contact class members is likely to be a more expensive and less complete procedure than using the mails for an initial contact. Phone numbers often change more frequently than addresses, and while it is common knowledge that a long term mail forwarding system is employed by the Postal Service, no such long term system is provided by the phone company. Balancing the employees' privacy interests against class counsel's need for the home telephone numbers and emergency authorization data clearly requires that SCOA should at the least be permitted, if not required, to seek authorization from its employees before disclosing the information.

FACTS

On October 23, 1985, the parties signed, and on October 24, Magistrate Dolinger approved, a Stipulation and Order

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[1] Indeed, had class counel undertaken a mailing when he received the addresses, many responses from class members might already have been obtained.

governing the production of numerous documents. Under Paragraphs 5(11) and 5(7) of that Order, plaintiffs' counsel, Lewis M. Steel, deferred any litigation over his request for, and SCOA preserved its right to object to, the production of the telephone numbers and emergency notification data of SCOA's non-rotating staff employees, both past and present, contained in the Company's personnel files. In reliance on counsel's deferral of this request, defendant redacted and produced over 400 files. On November 22, 1985 plaintiffs' counsel received copies of the personnel documents listed in paragraph 4 of the Order for former non-rotating staff employees of SCOA. The personnel files produced contained the names and addresses of all such employees.

In a letter dated November 27, 1985 and received on December 3, 1985, Steel stated that he wished to have the telephone numbers and emergency authorization data for all employees notwithstanding his earlier agreement to defer the parties' dispute over this issue. In response, counsel for defendant orally informed Steel on December 5, 1985 that the request implicated the privacy interests of SCOA's employees. SCOA offered (i) to ask its employees and former employees if they would authorize the turning over of such personnel information -- in the same mailing, if Steel wished, in which the employees would be informed of the pendency of these actions by a notice approved by this Court -- and (ii) to comply with each

employee's directions, whatever they might be. SCOA offered to put its position in writing. Steel immediately rejected SCOA's proposal and said that rather than await the delivery of a written response he would seek at once to arrange a conference with Magistrate Dolinger. SCOA's counsel offered to appear before the Magistrate on this matter at any mutually convenient time.

A conference was held with the Hon. Michael H. Dolinger, the United States Magistrate in these cases, on Tuesday, December 10, 1985 at 2:00 P.M. At the conference, Magistrate Dolinger heard oral statements of position from both parties and deferred decision until defendant had an opportunity to submit papers and plaintiff had an opportunity to respond.

POINT I

DISCLOSING EMPLOYEE TELEPHONE NUMBERS AND EMERGENCY NOTIFICATION DATA WITHOUT CONSENT OF THE EMPLOYEES WOULD INVADE THEIR PRIVACY

Plaintiffs' counsel's request for the telephone numbers and emergency notification data for all non-rotating staff personnel seeks information the confidentiality of which some class members specifically asked SCOA to protect and which large numbers of employees undoubtedly believed would be protected without their specific request. Affidavit of Allan Roberts, sworn to December 13, 1985 ("Roberts Affidavit"), ¶ 7; Affidavit of Yoshiyuki Kamajima ("Kamijima Affidavit"), ¶ 7. Clearly, the employees in question did not foresee that third parties would have access to such information absent their approval. Some employees have gone to the trouble and expense of obtaining an unlisted number so as to prevent uninvited calls from known or unknown persons.

Plaintiffs' counsel's request for emergency notification data is even more invasive of privacy interests than is his request for employee phone numbers. Here counsel is seeking information about individuals who are themselves not parties, even by way of an absent class. Plaintiffs' counsel has not stated a legitimate need for this information that would outweigh the substantial invasion of privacy that is threatened. Although the information sought could lead to discoverable

evidence, the addresses made available to counsel also have that potential, if properly used, and are at least as reliable.

Courts have long recognized the distinctions between in-person or telephone solicitation and those done by mail. These include not only the direct invasion of privacy present in the former, but not the latter instance, but other opportunities which in-person or telephone approaches present for prejudice to related interests. In Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), the Supreme Court noted that:

> [i]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education.

See also Kleiner v. First National Bank of Atlanta, 751 F.2d 1193, 1206 (11th Cir. 1985) ("unsupervised oral solicitations [by attorneys], by their very nature, are wont to produce distorted statements on the one hand and the coercion of susceptible individuals on the other..."). [4] See also Matter of Koffler, 51 N.Y.2d 140, 432 N.Y.S.2d 872 (1980), reversing 70

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[4] At the conference, plaintiffs' counsel relied upon Vivone v. Acme Markets, Inc., 105 F.R.D. 65 (E.D. Pa. 1985), to support his position that the telephone numbers and emergency data should be disclosed. Vivone, however, involved a request for information such as the employee's name, job title, home address, date of birth, date of hire, date of entry into current position and rating, id. at 68, all of which are being disclosed in the present case. There was no request for telephone numbers.

A.D.2d 201, 420 N.Y.S.2d 560 (1979), cert. denied, 450 U.S. 1026 (1981).[5]

The data sought by plaintiffs' counsel has been specifically recognized as sensitive by the Federal government. In 1977, the final Report of the Federal Privacy Protection Study Commission[6] ("Report") concluded that employees in the private sector must be forewarned of any disclosures from their personnel files. The Commission stated:

> Although employees, as a rule, recognize that employment information will be used within the employing organization for a variety of purposes, and that they cannot be

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[5]The intermediate appellate court in Koffler held that an attorney's mailing of letters to individuals identified as prospective clients and to real estate brokers for the purpose of obtaining law business exceeded the bounds of permissible commercial speech. The court noted that a holding permitting such soliciting could open the door for telephone solicitations by attorneys. The court stated that: "Even were we, in an appropriate case, to hold that telephone solicitation is essentially in person solicitation (while mail solicitation is proper) we would still be legalizing a blatant invasion of privacy of persons who should be given the decent respect of being left alone." 420 N.Y.S.2d at 574 n.4.

In reversing the Appellate Division, the New York Court of Appeals held that the direct mail solicitation of potential clients is constitutionally protected commercial speech and that the "[i]nvasion of privacy and the possibility of persuasion . . . which could conceivably be present in telephone solicitation as the Appellate Division suggests (citations omitted) are not sufficiently possible in mail solicitation . . . " 432 N.Y.S.2d at 877.

[6]The Privacy Act of 1974, 5 U.S.C. § 552a created the Privacy Protection Study Commission, whose purpose was to examine individual privacy rights and record-keeping practices in both the private and public sectors. The Commission's full report is entitled Personal Privacy in an Informational Society.

> notified of and asked to approve each use, they should be able to assume that this rather free flow will be contained within the boundaries of the employing organization. The expectation that the confidentiality of information about them will be respected as to outside requestors depends on certain assurances on the part of employers.
>
> The Commission believes that an employer has an obligation to inform its employees as specifically as possible of the kinds of information about them that may be disclosed both during and after the employment relationship. This means that at the beginning of the relationship, the employer should tell the applicant or employee what information about him may be disclosed. This communication is essential to protect the individual's right to determine what information he will divulge in case disclosure in some particular quarter could embarrass or otherwise harm him.

Report at 269 (emphasis added).

The Report went on to state what procedures should be used with regard to any such disclosures:

> An employer should notify each applicant and employee of its policies regarding the disclosure of directory information, that is, basic factual information freely given to all third parties. The applicant or employee should also be informed of disclosures that may be made pursuant to statute or collective-bargaining agreements, and of the procedures by which he will be notified of or asked to authorize any other disclosures. Because information may have to be released under subpoena or other legal process, employees should be assured prior notice of subpoenas where possible in sufficient time to challenge their scope and legitimacy. . .

Report at 269-70 (emphasis added).

Thus, as a matter of federal policy, the Commission stressed that in any type of unapproved third party disclosure, even in connection with subpoenas, notice be given to any employee whenever information about him is to be disclosed.

The Privacy Commission's study is consistent with SCOA's present policy regarding the disclosure of employee telephone numbers and emergency notification data. The affidavits of Allan Roberts and Yoshiyuki Kamijima, sworn to December 13, 1985, and submitted herewith, state that "[t]he policy of SCOA regarding home telephone numbers and emergency contact data is that such materials are confidential. Accordingly, SCOA does not and would not release such information to third parties without the consent of the employees concerned." Roberts Affidavit, ¶ 3; Kamijima Affidavit, ¶ 3. SOCA's policy reflects the legitimate privacy rights and expectations expressed by numerous SCOA employees, Roberts Affidavit, ¶ 4; Kamijima Affidavit ¶ 4. It is thus consistent with federally enunciated national policy. We respectfully submit that before the Court orders the disclosure of sensitive data to counsel during discovery, it should engage in a proper balancing of counsel's interests in disclosure as against the recognized expectation of the employees that their privacy would be maintained.

This kind of balancing approach, wherein the individual's right to privacy is balanced against the interest in disclosure, has been long recognized by the Courts. See Barry

v. City of New York, 712 F.2d 1554 (2d Cir. 1983), cert. denied, 464 U.S. 1048 (1983); Slevin v. City of New York, 551 F. Supp. 917 (S.D.N.Y. 1982) cert. denied, 464 U.S. 1017 (1983); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 434 U.S. 1129 (1979).[7] In the case at bar, plaintiffs' counsel's asserted need for disclosure is clearly outweighed, on the present record, by the employees' privacy interests.[8]

At the very least, plaintiffs should be forewarned that their numbers and emergency notification data are being

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[7]See also the Freedom of Information Act, 5 U.S.C. § 552, which grants the public direct access to many kinds of government documents, but specifically exempts from its coverage "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. §552(b)(6). In construing the Act, the federal courts have recognized the legitimate interests employees have in maintaining their privacy. See American Federation of Government Employees v. United States Dep't of Health, 712 F.2d 931 (4th Cir. 1983) cert. denied, 105 S.Ct. 2112 (1985) (court refused to disclose names and addresses of employees of Social Security Administration when employees had strong privacy interest, disclosure could subject employees to a barrage of mailings and personal solicitations, and union seeking information had alternative means of communication); Minnis v. U.S. Dep't of Agriculture, 737 F.2d 784 (9th Cir. 1984) cert. denied, 105 S. Ct. 2112 (1985) (government refused to disclose names and addresses of individuals who applied for park permits, since they could later be subject to solicitations; individuals privacy interests outweighed disclosure).

[8]The Supreme Court has noted that there are at least two types of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 & n.24 (1977). For the reasons stated above, both types of interests are implicated in the present case. See also Nixon v. Administrator of General Services, 433 U.S. 425, 457 quoting Whalen, supra, 429 U.S. at 599 (1977) ("one element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters").

sought so that they may assert their own privacy interests if they wish to do so. Such an approach was adopted by the court in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980). There, the company objected to a request by the Occupational Safety and Health Administration ("OSHA") that it produce employee medical records. The court found that the strong public interest of a government agency in obtaining disclosure for enforcement purposes outweighed in that case the employees' privacy interest in outright denial of the records, but determined that

> the most appropriate procedure is to require [the goverment] to give prior notice to the employees whose medical records it seeks to examine and to permit the employees to raise a personal claim of privacy, if they desire. The form of notice may vary in each case but it should contain information as to the fact and purpose of the investigation and the documents [the government] seeks to examine, and should advise the employees that if they do not object in writing by a date certain, specifying the type of material they seek to protect, their consent to disclosure will be assumed.

Id. at 581. Thus, the court found it essential that all employees be advised that confidential information would be disclosed absent their objection. Most courts "agree that privacy of personal matters is a protected interest [citations omitted] and that some form of intermediate scrutiny or balancing approach is appropriate as a standard of review . . . ." Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983).

Denying the telephone numbers listed in the personnel folders to plaintiffs' counsel absent the employees' authorization will not, of course, preclude counsel from using other readily available means to contact members of the classes.[10] Mr. Steel is free to consult the telephone book or information for the area in which the individual resides in order to find the individual's telephone number if she has chosen to have it published. The existence of that opportunity is itself a factor militating against forced disclosure. See Ferguson v. Schweiker, 90 F.R.D. 624 (W.D. Pa. 1981) (government need not disclose names of all social security cases appealed and reversed since information was not relevant to subject matter and was also a matter of public record, easily accessible to plaintiff).

Certain telephone numbers, those which are unlisted, may not, of course, be available to plaintiffs' counsel, except

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[10] Mr. Steel's contention at the conference that he is entitled to speak with class members under the Supreme Court's decision in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), and the Ninth Circuit's decision is Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1985), is thus beside the point. In Gulf Oil, the court held that the district court had abused its discretion by restricting communications between counsel and potential class members absent any indication of potential abuses or threatened misconduct of a serious nature. Similarly, in Domingo the circuit court held that the trial court had erred when it denied class counsel the right to interview class members and assist them in filing back pay claims absent any specific finding of abuse. Defendant does not seek to prevent class counsel from communicating with class members. Rather, it believes that the production of personal information provided in confidence to the company would be a breach of the individual employee's privacy interests, and that it has an obligation to its employees to assert those interests here.

through disclosure of the employees' personnel records without their permission. Our society accords great weight, however, to the interest in maintaining the private nature of these unlisted numbers. The phone company is authorized not to disclose an unlisted number even in a life or death or other emergency situation. Public Service Commission Telephone Tariff No. 900, Section 9(6)(b)(1), p. 14 (1984). The practice reflects the deeply and broadly held view "that when a citizen is within the privacy of his home, the state has broad powers to safeguard his 'very basic right to be free from sights, sounds and tangible matter' he does not want." Reeves v. McConn, 631 F.2d 377, 384 (5th Cir. 1980) quoting Rowan v. United States Post Office, 397 U.S. 728, 736 (1970).

CONCLUSION

For all of the foregoing reasons, defendant requests that plaintiffs' counsel's request for the home telephone numbers and emergency authorization data be denied.

Dated: December 16, 1985

Respectfully Submitted,

EPSTEIN BECKER BORSODY & GREEN, P.C.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVAGLIANO, et al.,	:	
Plaintiffs,	:	
-against-	:	77 Civ. 5641 (CHT)
SUMITOMO SHOJI AMERICA, INC.,	:	
Defendant.	:	
PALMA INCHERCHERA,	:	
Plaintiffs,	:	
-against-	:	82 Civ. 4930 (CHT)
SUMITOMO CORP. OF AMERICA,	:	
Defendant.	:	

Yoshiyuki Kamijima, being duly sworn, deposes and says:

1. I am the Manager-Personnel and General Affairs Department, Sumitomo Corporation of America ("SCOA"). I have overall responsibility for supervising the maintenance of personnel related data for SCOA's rotating staff and upper level non-rotating staff.

2. I have been advised by counsel for SCOA that plaintiffs in the above-referenced matters seek access to the home telephone numbers and the emergency contact data of SCOA's employees and former employees who are within the class definitions certified in the above-referenced matters.

3. The policy of SCOA regarding home telephone numbers and emergency contact data is that such information is confidential. Accordingly, SCOA does not, and would not, voluntarily release such information to third parties without the prior consent of the employees concerned. To my knowledge, no employee of SCOA has provided such consent.

4. On a few occasions, individual employees (the names of whom I do not now recall) have expressed concern to SCOA management about the confidentiality of their home telephone numbers and similar data. On these occasions, the employees in question have been assured that such data is confidential and for company use only, and would not be disclosed by SCOA to third parties without their consent.

5. SCOA's records do not distinguish between listed and unlisted home telephone numbers, and accordingly, SCOA can not identify which numbers are unlisted, although I believe that some of these telephone numbers are unlisted.

6. Even where SCOA has learned that employee home telephone numbers are unlisted, SCOA has not always made special notations to the effect that home telephone numbers were unlisted, but nevertheless has required employees to provide the numbers to SCOA.

7. As a result of the general knowledge of employees concerning SCOA's policy as described above, I believe that many of SCOA's employees regard their home telephone numbers and similar sensitive data in the possession of SCOA as confidential.

Y. Kamijima

Yoshiyuki Kamijima

Sworn to before me this
13rd day of December 1985

Lori Joy Hoff

LORI JOY HOFF
Notary Public, State of New York
No. 43-4824558
Qualified In Richmond County
Commission Expires March 30, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Allan Roberts, being duly sworn, deposes and says:

1. I am the Manager-Personnel and Office Administration, Sumitomo Corporation of America ("SCOA"). I have overall responsibility for supervising the maintenance of personnel related data for SCOA's lower-level non-rotating staff in the New York Office.

2. I have been advised by counsel for SCOA that plaintiffs in the above-referenced matters seek access to the home telephone numbers and the emergency contact data of SCOA's employees and former employees who are within the class definitions certified in the above-referenced matters.

3. The policy of SCOA regarding home telephone numbers and emergency contact data is that such information is confidential. Accordingly, SCOA does not, and would not, voluntarily release such information to third parties without the prior consent of the employees concerned. To my knowledge, no employee of SCOA has provided such consent.

4. On a few occasions, individual employees (the names of whom I do not now recall) have expressed to me their personal concern about the confidentiality of their home telephone numbers and similar data. On these occasions, the employees in question asked me whether such data was confidential. I assured them that such data is confidential and would not be disclosed by SCOA to third parties without their consent.

5. On those occasions, the employees have also advised me that, because they have received harassing, threatening or other unauthorized telephone calls, they have made their telephone numbers unlisted. Because of the special concern raised by these individuals, I recall having made special notations on their individual files to the effect that their home telephone numbers were unlisted.

6. SCOA's records do not otherwise distinguish between listed and unlisted home telephone numbers. I have learned on various occasions, however, that some employees, unknown to SCOA, have unlisted numbers. For example, SCOA learned that several employees had made their telephone numbers unlisted when SCOA attempted to contact them.

7. As a result of the general knowledge of employees concerning SCOA's policy as described above, I believe that many of SCOA's employees regard their home telephone numbers and similar sensitive data in the possession of SCOA as confidential.

Allan Roberts

Sworn to before me this
13th day of December 1985

LORI JOY HOFF
Notary Public, State of New York
No. 43-4824558
Qualified in Richmond County
Commission Expires March 30, 1986