10-13-1982

Letter in Response to Plaintiff's Motion for Determination of Class Action

Lewis M. Steel '63

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 4930 Year 19 82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PALMA INCHERCHERA, on behalf of herself and all others similarly situated,

Plaintiff,

v.

SUMITOMO CORP. OF AMERICA,

Defendant

RECEIVED OCT 13 1982

LETTER IN RESPONSE TO MOTION FOR DETERMINATION OF CLASS ACTION

WENDER, MURASE & WHITE

Attorneys for Defendant

Office and Post Office Address, Telephone

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

(212) 832-3333

To STEEL & BELLMAN, P.C.

Attorney(s) for Plaintiff

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

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GREYSON BRYAN
DON T. CARMODY
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October 13, 1982

Honorable Robert W. Sweet,
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

BY HAND

RE: Incherchera v. Sumitomo
Corporation of America
Civil No. 82-4930 (RWS)

Dear Judge Sweet:

In furtherance of my telephone conversations with your law clerk, Mr. Bork, of Wednesday, October 6 and Friday, October 8, 1982, this is to set forth the position of the Defendant, Sumitomo Corporation of America, concerning the Motion for Determination of Class Action (the "Motion") filed by the Plaintiff in the above-captioned matter on September 24, 1982, and to apprise you of certain important discussions between Lewis M. Steel, Esq., Plaintiff's counsel, and the undersigned, regarding the Hearing on the Motion which was originally scheduled for Friday, October 8, 1982, and which has been rescheduled to Friday, October 15, 1982, at 12:00 noon.

Firstly, the Defendant opposes the Plaintiff's Motion, and submits that this action cannot properly be maintained under Fed. R. Civ. P. 23.

Secondly, as a result of several discussions between Plaintiff's counsel and the undersigned, which are summarized below, the question with which the Court shall be confronted most immediately at the Hearing this coming Friday is whether the Defendant is entitled to discovery from the Plaintiff on the issue of this litigation's maintainability as a class action.

In this connection, on Monday, October 4, promptly after initially reviewing the Plaintiff's Motion, I spoke with Mr. Steel by telephone, and requested that he agree to postpone the Hearing on the Motion for a period of about sixty days, to Friday, December 3, 1982.

I explained to Mr. Steel the postponement was being sought because the Defendant needs to engage in discovery concerning his Motion, and advised Mr. Steel, in particular, that we intended to serve a Notice of Deposition upon Palma Incherchera, the Plaintiff, with a return date of either October 14 or 19, depending upon his availability.

Mr. Steel quickly took the position that he would not agree to a deposition of the Plaintiff prior to class certification without a Court order.

I further asked Mr. Steel for an extension of time within which to file a response to the Motion, in that the Defendant would be unable to file an adequate response to his Motion without discovery, since the Motion is ambiguous in many critical respects.

Mr. Steel then suggested that we appear before your Honor that coming Friday, October 8, as scheduled, at which time he would oppose any attempt to depose the Plaintiff, and request the Court to establish the "ground rules" and set a "time-table" concerning the Motion.

Mr. Steel responded to my request for an extension of time within which to file a response to the Motion by assuring me that he would not claim the Defendant was in default for not filing a responsive pleading prior to the Hearing.

We concluded our telephone conversation with my statement that I would review his suggestion with the Defendant and speak with him again.

Thereafter, and before I spoke with Mr. Steel again, Mr. Bork telephoned me on Wednesday afternoon, October 6, to determine whether the Defendant intended to reply to the Plaintiff's Motion.

When I explained to Mr. Bork the substance of my telephone conversation with Mr. Steel described above, Mr. Bork advised me that the Defendant should communicate

in writing with your Honor despite Mr. Steel's position on a responsive pleading, to advise the Court that the Defendant shall contest the Motion, and to notify your Honor of the dispute between the Parties regarding the Defendant's right to engage in discovery concerning the Motion, prior to a determination on class certification.

Mr. Bork suggested that I apprise Mr. Steel of our telephone conversation, and determine whether Mr. Steel would agree to an adjournment of the Hearing then scheduled for only two days later.

Accordingly, I spoke with Mr. Steel by telephone on Thursday, October 7, and the result of our conversation was an agreement that the Hearing be rescheduled to Friday, October 15.

Thereafter, Mr. Steel agreed, and I advised Mr. Bork, that the Defendant would file a statement of position concerning the Motion on this date, rather than by yesterday, as contemplated by Local Rule 3(c).

As stated above, the Defendant strongly contests the Plaintiff's Motion.

Furthermore, the Defendant seeks discovery from the Plaintiff concerning the Motion, and argues that discovery should be had, as expeditiously as is feasible, prior to a determination by the Court concerning the Plaintiff's Motion.

The appropriateness of discovery on the issue of maintenance of an employment discrimination action under

Fed. R. Civ. P. 23 is readily understandable in light of the Supreme Court's recent Opinion in General Telephone Co. v. Falcon, 50 U.S.L.W. 4638, 28 FEP Cases 1745 (June 14, 1982), and is clearly apparent from the reaction of the various United States District Courts to the Falcon decision.

In Falcon, the Supreme Court carefully articulated the standards by which a District Court should be guided in reaching a determination as to whether an employment discrimination action may be maintained as a "class action" under Fed. R. Civ. P. 23.

In Falcon, the Plaintiff, a Mexican-American, initiated a class action under Title VII in the United States District Court for the Northern District of Texas, complaining both of General Telephone Company's failure to promote him because of his national origin, and of its general employment policies subjecting Mexican-Americans to continuous employment discrimination.

The Complaint contained some factual allegations concerning the failure to promote, but set forth no factual allegations concerning the Defendant's hiring practices.

The District Court, without conducting an evidentiary Hearing, certified a class including Mexican-American employees and Mexican-American applicants for employment who had not been hired, following the "across the board" rule of the Fifth Circuit which is that any victim of racial discri-

mination in employment may maintain a broad attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of employment discrimination.

Following a judgment in favor of the Plaintiff in the District Court, the Court of Appeals for the Fifth Circuit, in pertinent part, sustained the District Court's certification of the action as a class action on behalf of both employees who were denied promotion and applicants who were denied employment.

The Supreme Court initially vacated the Judgment of the Court of Appeals and directed further consideration in light of the Court's recent Opinion in Texas Department of Community Affairs v. Burdine, 415 U.S. 248, 25 FEP Cases 113. After the Fifth Circuit vacated the portion of its Opinion addressing the Plaintiff's promotion claim, but reinstated the portions of its Opinion approving the District Court's class certification, the Supreme Court granted certiorari to decide whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment.

The Supreme Court, reversing the Fifth Circuit's affirmance of the certification order of the District Court, cited its earlier opinion in East Texas Motor Freight System Inc. v. Rodriguez, 431 U.S. 395, 14 FEP Cases 1505, stating:

We have repeatedly held that 'a class representative must be part of the class' and 'possess the same interest and suffer the same injury' as the class member. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 14 FEP Cases 1505, 1508 (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216). In East Texas Motor Freight, a Title VII action brought by three Mexican-American city drivers, the Fifth Circuit certified a class consisting of the trucking company's black and Mexican-American city drivers allegedly denied on racial or ethnic grounds transfers to more desirable line-driver jobs. We held that the Court of Appeals had 'plainly erred in declaring a class action.' 431 U.S., at 403, 14 FEP Cases, at 1508. Because at the time the class was certified it was clear that the named plaintiffs were not qualified for line-driver positions, 'they could have suffered no injury as a result of the allegedly discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury.' Id. at 403-404, 14 FEP Cases at 1508.

Our holding in East Texas Motor Freight was limited; we noted that "a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate, class representatives.' Id. at 406, n.12, 14 FEP Cases at 1509. We also recognized the theory behind the Fifth Circuit's across-the-board rule, noting our awareness 'that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class-wide wrongs,' and that '[c]ommon questions of law or fact are typically present.' Id. at 405, 14 FEP Cases at 1509. In the same breath, however, we reiterated that 'careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable' and that the 'mere fact that a

> complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.' Id. at 405-406, 14 FEP Cases at 1509. 28 FEP Cases at 1749-1750

The Court, expressing its view of the "across-the-board" theory of employment discrimination claims, continued:

> We cannot disagree with the proposition underlying the across-the-board rule -- that racial discrimination is by definition class discrimination. (Footnote omitted) But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified. Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. (Footnote omitted) For respondent to bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's Irving division, or (3) that this policy of ethnic

> discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices. These additional inferences demonstrate the tenuous character of any presumption that the class claims are 'fairly encompassed' within respondent's claim.
>
> Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent (Footnote omitted), it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants. If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation. 28 FEP Cases at 1750 (Footnote omitted)

Finally, drawing attention to a concurring opinion of a member of the Fifth Circuit panel that had originally announced the "across-the-board" rule, the Supreme Court endorsed the need for "concise pleadings" and "reasonable specificity" in order for a District Court to determine whether an employment discrimination action should be maintained under Fed. R. Civ. P. 23, with the following observation:

> The need to carefully apply the requirements of Rule 23(a) to Title VII class actions was noticed by a member of the Fifth Circuit panel that announced the across-the-board rule. In a specially concurring opinion in Johnson v. Georgia Highway Express, Inc., supra, at 1125-1127, 2 FEP Cases at 233-235. Judge Godbold emphasized the need for 'more precise pleadings,' id. at 1125, 2 FEP Cases at 233, for 'without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend,' id. at 1126, 2 FEP Cases at 234. He termed as 'most significant' the potential unfairness to the class members bound by the judgment if the framing of the class is overbroad. Ibid. And he pointed out the error of the 'tacit assumption' underlying the across-the-board rule that 'all will be well for surely the plaintiff will win and manna will fall on all members of the class.' Id. at 1127, 2 FEP Cases at 235. With the same concerns in mind, we reiterate today that a Title VII action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. 28 FEP Cases at 1751

The Plaintiff's Motion merely makes the general allegations of discrimination frowned upon by the Court in Falcon, and, in particular, fails to set forth a specific presentation of a sufficient basis for concluding that the adjudication of the Plaintiff's "claim of discrimination and promotion would require the decision of any common question concerning the failure of (the Defendant) to hire (putative class members)".

The decisions which have been issued by United States District Courts, concerning class certification in employment discrimination cases, since the Supreme Court decision in Falcon, supra, demonstrate the extent to which a court might properly go in heeding the lesson of Falcon, by carefully scrutinizing whether the plaintiff's claims are typical of the claims of the putative class, and whether there are questions of law or fact common to the class.

Thus, for example, in Hawkins v. Fulton County, 29 FEP Cases 762 (N.D. Ga. 1982), the Court denied certification of a class of "all past, present and future female and black applicants and employees and all those blacks and females who at any time during the applicable statute of limitations have applied to work, have worked, or will work in the future for the Fulton County Police Department in any capacity." 29 FEP Cases at 765.

Finding that the claims of the plaintiffs were unquestionably "disparate treatment" claims, the Court, specifically relying upon the "rather stringent guidelines for allowing Rule 23 class action certification in Title VII cases...based on disparate treatment theories," enunciated in Falcon, supra, concluded that the plaintiffs had "simply failed to meet the requisite specific showing Falcon requires." 29 FEP Cases at 765-766. (emphasis in original)

Accordingly, the Court described in detail the type of information lacking in the plaintiffs' motion for class certification as follows:

> Plaintiffs' motion lacks the type of detailed information concerning Defendants' alleged discriminatory policies to pass muster--e.g., names of others who feel they should have been hired or promoted but who were not; names of those who were hired or promoted with lesser qualifications than those who were not hired; specific showings of the qualifications of those who were and were not hired or promoted; specific details -- i.e., time, place and persons present -- of incidents in which racial slurs or epithets were directed against Plaintiffs or putative class members; names of others who feel they were constructively discharged; and more detailed statistical information on the work force and hiring practices than has already been provided. The number of instances of any of these occurrences must bear some relationship to the number of persons hired or promoted in some period of time which is relevant. In other words, any such occurrences must be statistically significant in light of the overall work force.
> 29 FEP Cases at 766.

Similarly, in Nation v. Winn-Dixie Stores, 29 FEP Cases 756 (N.D. Ga. 1982), the Court, in reliance upon Falcon, supra, held that claims presented by individuals who collectively were complaining of a promotional track between full-time clerk positions and departmental manager positions in individual stores had not been shown to be typical of those that might be made by part-time clerks, cashiers, bookkeepers, or persons holding a position of assistant store manager or a higher position. The Court

stated that, "In order to determine whether plaintiffs' claims are typical of the claims of the class, and whether there are questions of law or fact common to the class, the Court must under the dictates of Falcon look first to see exactly what the named plaintiffs' individual claims are." 29 FEP Cases at 760.

The Complaint in Winn-Dixie alleged that the defendant company preferred and chose white employees over qualified black employees from those employees eligible for promotion. The Court, holding that "the only possibility" of class certification was for plaintiffs to show, as suggested in Falcon, "significant proof" that the defendants operated under a general policy of discrimination, stated:

> In a promotions case such as this one, significant proof of a general policy of discrimination should include proof of a number of instances in which the better qualified black employee was passed over for promotion by a less qualified white employee. The particular number of instances which would need to be shown, should, in the Court's opinion, bear some significant relationship to the number of promotions granted by the employer in the time frame selected for class definitional purposes. Additionally, it would seem that statistical evidence could be quite relevant. 29 FEP Cases at 762

Another case which is instructive regarding the application of Falcon to class certification is Ladele v. Consolidated Rail Corporation, No. 80-2464, (E.D. Pa. Sept. 3, 1982) (available Oct. 11, 1982, on LEXIS, Genfed Library, Newer file). In

Ladele, the Court, following a lengthy analysis of Falcon, denied certification of a putative class which would have included individuals who had not been promoted and rejected applicants. The Court stated:

> Plaintiff's individual claims, especially his claim that he was not promoted and was differently compensated due to race, are likely to involve a comparative analysis of plaintiff's qualifications in relation to those of other employees, as well as an evaluation of the reasons advanced for the allegedly differential treatment of plaintiff. On the other hand, a claim on behalf of unsuccessful applicants for employment is likely to involve statistical analysis of defendant's hiring practices.... Plaintiff's complaint does not allege any basis whatsoever for concluding that adjudication of his individual claim will share common questions of law or fact with a portion of the proposed class consisting of rejected applicants or that his claim will be typical of that portion of the class. Id.

Moreover, the Court stated:

> Absent evidence that qualified blacks, other than plaintiff, applied for and were denied promotion or that qualified blacks were not selected for the managerial job categories in question, plaintiff cannot assert that the small number of promotions or the absence of blacks in certain job categories, of itself, constitutes evidence of discrimination based on race.... Id.

Finally, it should be noted that on October 4, 1982, the United States Supreme Court vacated and remanded to the Fifth Circuit and to the Ninth Circuit respectively

two employment discrimination class actions for reconsideration in light of Falcon: University of Houston v. Wilkins, 51 U.S.L.W. 3222 (Oct. 4, 1982) vacating and remanding 662 F.2d 1156, 27 FEP Cases 1199 (5th Cir. 1981), and Los Angeles v. Jordan, 51 U.S.L.W. 3221 (Oct. 4, 1982) vacating and remanding 668 F.2d 1311, 28 FEP Cases 518 (9th Cir. 1982).

The post-Falcon decisions summarized above are compatible with the Second Circuit's adherence to the general principle, also followed by other circuits, that trial courts should defer a decision on certification of class actions pursuant to Fed. R. Civ. P. 23(b)(2) pending discovery. Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962 (2d Cir. 1978).

In Tams-Witmark, supra, the Court stated:

> Although the trial court must determine if an action is to be maintained as a class action '[a]s soon as practicable after the commencement' of the action, Fed. R. Civ. P. 23(c)(1), this does not mandate precipitate action. The court should defer decision on certification pending discovery if the existing record is inadequate for resolving the relevant issues. In particular, 'discovery may be necessary in order to...appraise the adequacy of representation.' Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 41 (1967). See generally Cruz v. Estelle, 497 F.2d 496, 499 (5th Cir. 1974); Huff v. N.D. Cass Company of Alabama, 485 F.2d 710, 712-13 (5th Cir. 1973) (en banc); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972). Failure to allow discovery, where there are substantial factual issues relevant to certification of the class,

> makes it impossible for the party seeking discovery to make an adequate presentation either in its memoranda of law or at the hearing on the motion if one is held." 586 F.2d at 966.

Furthermore, the United States District Court for the Southern District of New York has held consistently that class certification in the context of Title VII cases is inappropriate absent sufficient proof that the requirements of Fed. R. Civ. P. 23(b)(2) have been satisfied. Women's Group v. MacMillan Publishing Co., 18 FEP Cases 1821 (S.D.N.Y. 1978); Solin v. State University of New York, 416 F. Supp. 536, 14 FEP Cases 1274 (S.D.N.Y. 1976).

Thus, in MacMillan Publishing Co., supra, the Court held that where, as here, plaintiffs in a Title VII action sought to certify a class of females, the defendant company was entitled to discovery prior to a determination regarding class certification in order to explore such issues as whether the plaintiffs presented questions of law and fact common to the class, and whether the plaintiffs were adequate representatives of the class.

In light of the foregoing precedent, in particular the acute sensitivity on the part of District Courts since Falcon to evaluating the precise claims of plaintiffs in employment discrimination cases, and the need for a special showing of typical claims and common questions of fact and law among the claims of putative class members, it is clear that

discovery in the instant action should be a prerequisite to a determination of Plaintiff's Motion.

In the first instance, the Defendant needs to discover precisely what class the Plaintiff seeks to represent.

In this regard, the description of the putative class set forth in Paragraph 3 of Mr. Steel's Affidavit in Support of Motion to Certify Class is inconsistent with the description of the class on whose behalf the action is maintained, as set forth in Paragraph 5 of the Verified Complaint.

The Verified Complaint defines the putative class as:

> "...all women who have worked for the defendant, are working for the defendant, have left the employ of the defendant because of its discriminatory policies, or may seek employment with the defendant."

The Affidavit supporting Plaintiff's Motion defines the class as:

> "All women who have been employed by the defendant, are employed by the defendant, or have applied for employment with the defendant."

Thus, the Plaintiffs' Motion apparently attempts to remove from the class on whose behalf suit is brought all women who "have left the employ of the defendant because of its discriminatory policies" and who "may seek employment with the defendant", and purports to add a class of "all women who...have applied for employment with the defendant."

Not only must the Defendant discover which alleged injuries the Plaintiff seeks to redress among putative class members, but the Defendant also must seek by discovery to rid the Motion of ambiguity as to the geographic breadth of the putative class.

In this connection, although Mr. Steel's Affidavit in Support of Motion to Certify Class states in Paragrpah 6 that the Plaintiff seeks to represent a class "throughout the United States," this oblique reference to a nation-wide class stands conspicuously alone, in the midst of factual allegations which clearly are limited to the Defendant's New York City operations.

It can hardly be denied that, given the diverse descriptions of the purported class, much confusion exists as to precisely what class the Plaintiff seeks to represent.

Irrefutably, a fundamental prerequisite to a ruling on a motion for class certification is a clear definition of the putative class.

The Defendant also needs discovery of the Plaintiff to resolve other ambiguities of the Motion, in order to know with certainty how to defend itself with a totally responsive pleading to the Motion.

In this regard, the Motion is equally vague as to exactly how the Plaintiff, herself, has supposedly been the victim of employment discrimination.

Thus, the Plaintiff, in her Affidavit in Support of Motion to Certify the Class, claims in Paragraph 2 that she is qualified "for higher level work" and offers her belief that "...women employed by Sumitomo have not been upgraded above the clerical ranks or hired for higher positions," all without even the semblance of detail.

If the Courts share a uniform view on any aspect of class certification in Title VII cases since the Supreme Court Decision in Falcon, supra, it is that a vital question in considering a motion for class certification is whether the Plaintiff has asserted a claim of "disparate treatment" or "disparate impact" by the alleged employment discrimination, in order that an informed decision can be reached on the questions of "typicality", "commonality" and "adequacy of representation."

Consequently, the Defendant requires discovery to establish the precise nature of the Plaintiff's claim, in order to accurately meet the Motion.

Furthermore, the Defendant requires discovery to establish that the Plaintiff's Motion is highly speculative, in that it relies upon insufficient and outmoded factual data.

In this regard, the Defendant notes that the only specific data profferred in support of Plaintiff's Motion, apart from being sparse, is extremely stale, having been extracted from interrogatories filed in another proceeding in February of 1978.

Also, the Defendant draws the attention of your Honor to an Answer oft repeated in the Defendant's Answer to Plaintiff's Interrogatories Sworn to February 3, 1978, annexed to the Motion as "Exhibit B" and upon which the Plaintiff heavily rèlies to support the Motion, as follows:

> "Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel."

This recurring Answer serves to emphasize the fact that the Plaintiff's counsel has engaged in no discovery in this action prior to the Motion, relying instead upon uncompleted discovery in a different proceeding.

Finally, although perhaps most telling, the Plaintiff acknowledges the value of discovery on the issue of this action's maintainability as a class action under Fed. R. Civ. P. 23.

Thus, Mr. Steel's Affidavit in Support of Motion to Certify Class recognizes at Paragraph 6:

> "If, after discovery in this action, the record reveals that a national class is inappropriate for any reason, plaintiff will then seek to represent a local class relating to Sumitomo's operations in New York City". (Emphasis added).

The Defendant submits that the question of whether "a national class is inappropriate for any reason" indeed necessitates "discovery in this action", but that discovery rightfully should precede a ruling by the Court on the Plaintiff's Motion.

In summary, Plaintiff's counsel rejected the Defendant's first request for an adjournment of the Hearing on Plaintiff's Motion, and for an extension of time within which to file a response to the Motion, with the suggestion that the Parties appear before your Honor, in order that the Court might determine whether the Defendant is entitled to take the deposition of the Plaintiff in advance of a determination on the Motion, and establish a time-table for discovery and submission of a responsive pleading.

It is plain that, in light of the strictures of Falcon, discovery on the issue of maintainability as a class action under Fed. R. Civ. P. 23 of employment discrimination cases involving alleged denial of promotion, such as the Plaintiff claims here, is appropriate.

The Defendant seeks discovery from the Plaintiff on the issue of the maintainability of her claim as a class action in an expeditious manner. Had Plaintiff's counsel agreed to the first deposition date of October 14, proposed by the undersigned, the deposition would have commenced by the time the Parties appear before your Honor this coming Friday.

In closing, we wish to inform the Court that the Defendant intends to serve the Plaintiff with a Notice of Deposition, pursuant to Fed. R. Civ. P. 30, prior to the Hearing presently scheduled for this coming Friday, with a return date of Tuesday, November 9, 1982.

Therefore, for all of the reasons stated above, the Defendant respectfully requests the Court to defer a determination on the Plaintiff's Motion, pending completion of discove within a time-table deemed by the Court to be appropriate.

Respectfully,

WENDER MURASE & WHITE

By: _____
DON T. CARMODY, ESQ.

400 Park Avenue
New York, New York 10022
Tel. No.: (212) 832-3333

cc: Steel & Bellman, P.C.