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Incherchera v. Sumitomo

Sumitomo Shoji America, Inc. v. Avagliano, 457 US 176 - Supreme Court 1982

9-24-1982

Plaintiff's Notice of Motion for Determination of Class Action (with Exhibits)

Lewis M. Steel '63

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NOTICE OF ENTRY

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.,
STEEL & BELLMAN, P.C.
Attorney for
Office and Post Office Address
351 Broadway
NEW YORK, N. Y. 10003

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 19
at M.
Dated,

Yours, etc.,
STEEL & BELLMAN, P.C.
Attorney for
Office and Post Office Address
351 Broadway
NEW YORK, N. Y. 10003

To

Attorney(s) for

Civ.
Index No. 82-4930 (RWS) Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-against-

SUMITOMO CORP. OF AMERICA,

Defendant.

MOTION TO CERTIFY CLASS, SUPPORTING AFFIDAVITS & EXHIBITS

STEEL & BELLMAN, P.C.
Attorney for Plaintiff
Office and Post Office Address, Telephone
351 Broadway
NEW YORK, N. Y. 10003
(212) 925-7400

To

Attorney(s) for

Service of a copy of the within
is hereby admitted.
Dated,

.....

Attorney(s) for

© 1500—EXCELSIOR-LEGAL STATIONERY CO., INC. 62 WHITE ST., N. Y.

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STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF New York ss.: Patricia M. Cooper

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 351 Broadway, New York, N.Y.

Check Applicable Box

☒ Affidavit of Service By Mail — On September 24, 19 82 deponent served the within Motion to Certify, Supporting Affidavits & Exhibits upon Wender Murase & White attorney(s) for defendant in this action, at 400 Park Ave., New York, N.Y. 10022 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in ~~an post~~ office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on September 24, 19 82

LEWIS M. STEEL
Notary Public, State of New York
No. 31-9161625900
Qualified in New York County
Commission Expires March 30, 1984

.....
The name signed must be printed beneath

Patricia M. Cooper

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PALMA INCHERCHERA, on behalf of herself and all others similarly situated,	Civ. No. 82-4930 (RWS)
Plaintiff,	NOTICE OF MOTION FOR DETERMINATION OF CLASS ACTION
-against-	
SUMITOMO CORP. OF AMERICA,	
Defendant.	

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavits of Palma Incherchera and Lewis M. Steel, the undersigned will move this Court, at the United States Courthouse, Foley Square, New York, New York on the 5th day of October, 1982, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 23(a) and (b)(2), Federal Rules of Civil Procedure, and Local Rule 4(c):

1. Certifying that this action is maintainable as a class action pursuant to Rule 23(b)(2), and

2. Determining that the class of plaintiffs be defined as all women who have been employed by the defendant, are employed by the defendant, or have applied for employment with the defendant, and

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PALMA INCHERCHERA, on behalf of herself and all others similarly situated, Plaintiff, -against- SUMITOMO CORP. OF AMERICA, Defendant.	Civ. No. 82-4930 (RWS) AFFIDAVIT IN SUPPORT OF MOTION TO CERTIFY THE CLASS

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

PALMA INCHERCHERA, being duly sworn, deposes and says:

1. I am the named plaintiff in this action and file this affidavit in support of the motion to certify the class.

2. I have been employed by the defendant and by its predecessor corporation, Sumitomo Shoji America, Inc., since October 1972. During this entire period of time, despite my being qualified for higher level work and despite my requests, I have not been upgraded out of the clerical ranks. The treatment I have received is consistent with the way the defendant and its predecessor corporation, Sumitomo Shoji America, Inc., have treated virtually all other women employees. I believe that women employed by Sumitomo have not been upgraded above the clerical ranks or hired for higher positions due to a policy and practice of the de-

fendant to employ women in jobs of little responsibility only.

3. The best information I have with regard to the number of women presently employed by Sumitomo at its 345 Park Avenue office and their employment status is as follows: I estimate that there are approximately 85 women employed in this office. Since the filing of the Avigliano v. Sumitomo Shoji America case in 1977, I believe the defendant has given a few women titles, such as "assistant manager." To the best of my knowledge, however, none of the women who have such titles perform other than office or clerical work, nor are they given any meaningful responsibility or supervisory authority. In summary, the employment opportunities of women at Sumitomo have undergone no meaningful change since the time that the Avigliano suit was commenced.

4. During the period of my employment, virtually all of the supervisory, managerial, executive and sales jobs at Sumitomo have been held by male Japanese nationals. Some American males have held some of these positions at the lower levels, but women have been virtually excluded from jobs above the clerical level.

5. I have filed this action, not only to seek to upgrade myself, but in order to challenge Sumitomo's discriminatory employment policies and practices which adversely affect women.

Palma Incherchera

PALMA INCHERCHERA

Sworn to before me this 23rd day of September, 1982.

LEWIS M. STEEL
Notary Public, State of New York
No. 31-916162590
Qualified in New York County
Commission Expires March 30, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PALMA INCHERCHERA, on behalf of herself and all others similarly situated,	Civ. No. 82-4930 (RWS)
Plaintiff,	AFFIDAVIT IN SUPPORT OF MOTION TO CERTIFY CLASS
-against-	
SUMITOMO CORP. OF AMERICA,	
Defendant.	

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

LEWIS M. STEEL, being duly sworn, deposes and says:

1. I am a member of the firm of Steel & Bellman, P.C., attorneys for plaintiff. I submit this affidavit in support of the motion to certify the class.

2. The verified complaint in this action was filed on or about July 28, 1982. The complaint alleges, sex, national origin and race discrimination in employment. The defendant has filed an answer to the complaint in which it has admitted that it is a corporate entity, which is incorporated in New York, does business in New York and maintains its principal office in New York. Defendant has also admitted that plaintiff is a female employee in its New York office and that when she was originally employed, the corporation's name was Sumitomo Shoji America, Inc.

3. The verified complaint is filed as a class action and

the class action allegations are contained in paragraphs 5 and 6. A copy of the complaint is attached hereto as Exhibit A. Plaintiff seeks to represent a class which is defined as follows:

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

4. This affidavit is filed in order to set forth facts which establish that plaintiff satisfies Rule 23(a)(1)-(4) criteria for maintenance of this action as a class action. Many of the facts which establish that these criteria are met appear in defendant's answers to interrogatories which were filed in Avigliano, et al. v. Sumitomo Shoji America, Inc., 473 F.Supp. 506 (S.D.N.Y.), aff'd on other grounds, 638 F.2d 552 (2d Cir. 1981), vacated and remanded, ___ U.S. ___, 102 S.Ct. 2374 (decided June 15, 1982).*/ These answers are attached hereto as Exhibit B.

5. Plaintiff in this case is a female clerical employee who claims that she, as well as the class members whom she seeks to represent, have been discriminated against on the basis of their sex, as well their national origin and race in that she and women as a class have been restricted to clerical jobs and that the defendant has refused to train or promote her and women as a

*/ When this case was filed, counsel indicated on the cover sheet that it was related to the Avigliano matter. In accordance with the Rules of this Court, this case was sent to the chambers of the Judge in that case, the Hon. Charles H. Tenney. He did not, however, accept it.

class to executive, managerial and/or sales positions.

6. Plaintiff seeks to represent members of this class throughout the United States. According to interrogatory answer 12 (Exhibit B), Sumitomo maintains offices in New York City and nine other American cities. As of the time of the answer, Sumitomo stated that it had 80 female employees at its 345 Park Avenue office, 16 female employees at another New York address (350 Fifth Avenue) and additionally employed 103 women in the other nine offices. Because of Sumitomo's policies and practices with regard to employment of personnel which will be discussed below, counsel assumes that virtually all of these women are clerical employees. 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.

7. With regard to Sumitomo's New York City operations, Exhibit B contains two reporting forms (referred to as "EEO-1's") which Sumitomo filed with the Equal Employment Opportunity Commission in 1975 and 1976.*/ (Exhibit 2 attached to Exhibit B). According to the 1976 form, Sumitomo at that time employed 89 women at its 345 Park Avenue office. Eighty seven of these women were employed under the job category "office and clerical." None of the

*/ This is the latest date for which EEO-1 forms were provided in the Avigliano case, as discovery ceased when Sumitomo filed a motion to dismiss on May 18, 1978.

women were employed as sales workers while 43 males were so employed; none were employed as professionals while 35 males were so employed; and none were employed as officials and managers while 31 males were so employed. According to information presently available to counsel, the numbers of employees at the 345 Park Avenue office have not decreased since 1976, and the gender composition of the work force has remained relatively constant. See affidavit of plaintiff Incherchera, submitted herewith. As of the date the interrogatories were answered (February 3, 1978), defendant also employed 16 women at another office in New York City, at 350 Fifth Avenue (See Exhibit B, interrogatory answer 12).

8. According to interrogatory answer 4(c), the clerical employees at the 350 Fifth Avenue office are under the general supervisory authority of the personnel manager who works out of the 345 Park Avenue office. Even without the addition of these employees from the 350 Fifth Avenue office, however, counsel believes that plaintiff meets the numerosity requirement of Rule 23(a). Thus, if the class were limited only to employees working in New York at the defendant's principal office, the numerosity requirement would be satisfied.

9. Rule 23(a)(2) and (3) require, respectively, that there exist common questions of fact or law and that the named plaintiff's claims be typical of those of class members. On these issues, which are closely related, plaintiff relies heavily on statements which appear in Sumitomo Shoji America, Inc.'s brief and reply

brief filed in the United States Supreme Court. Relevant pages of these documents are attached hereto, as Exhibits C and D, respectively. These briefs, filed in the Spring of 1982, make clear that the defendant has a policy and practice of giving an employment preference to Japanese nationals for jobs above the clerical level (see Exhibit C at 17 and Exhibit D at 9-12 and 18-20). For example, on page 17 of the main brief (Exhibit C), Sumitomo states:

> As a factual matter, the basis of the employment preference under attack in this case is Japanese nationality, not place of birth or ancestry. It prefers Japanese nationals, as opposed to nationals, citizens and subjects of all other countries. . . . The preference for Japanese nationals in managerial positions is not a practice directed against any particular nationality and it has nothing to do with anyone's national origin. The group not preferred consists of persons of every other nationality, U.S. or otherwise. . . .

The reply brief states:

> There should be no uncertainty about the scope of Sumitomo's claims. . . . Sumitomo takes the position that it is entitled to everything the Treaty gives it -- the right "to engage . . . accountants and other technical experts, executive personnel, attorneys, agents and other specialists of [its] choice" -- without limitation by Title VII. . . . (Exhibit D at 12).
>
> * * *
>
> . . . respondents' effort to remedy their employment grievances by invoking that statute [Title VII] stretches it far beyond what it can bear. The class of persons allegedly discriminated against -- persons residing in the United States

> who are not Japanese treaty traders -- if, by any measure, overly broad. . . .
>
> Respondents seek to construct claims of discrimination not only on grounds of "nationality" but also on grounds of "sex" and "national origin." . . . Respondents' lack of Japanese nationality (the essential criterion for treaty trader status) sufficiently explains their exclusion from the hiring preference; it is, hence, irrelevant that they may also be female or Christian or Mexican-American or fair skinned or tall. (Exhibit D at 19-20).

As the brief for Avigliano, et al. in the United States Supreme Court showed, and as plaintiff reiterates here, the ability of women in Japan to advance into the managerial ranks is severely limited by that country's societal attitudes. For example, in a report issued by the United States Department of Labor, U.S. Employment Standards Administration, U.S. Womans' Bureau and the Japanese Ministry of Labor, Japanese Womens' and Minors' Bureau, entitled The Role and Status of Women Workers in the United States and Japan, at p. 41 (1976) it is stated:

> Women workers [in Japan] are treated only as a temporary and complementary work force and have very limited opportunities for capacity development or for promotion and upgrading.

Thus, the admitted "practice" of Sumitomo to prefer Japanese nationals for managerial and other forms of employment operates to discriminate against women as a class. In the United States Supreme Court, Sumitomo claimed it was free to discriminate in this manner. The Supreme Court summarized Sumitomo's position

as follows:

> Sumitomo contends that it is a company of Japan and that Article VIII(1) of the Treaty grants it very broad discretion to fill its executive managerial and sales positions exclusively with male Japanese citizens. ___ U.S. ___, 102 S.Ct. at 2378.

Thus, Sumitomo's statements contained in its United States Supreme Court briefs, as well as the statistics contained in its EEO-1 report, establish that there are common questions of fact and law which affect women employees at Sumitomo and that the claim of plaintiff is typical of those class members. The fact that Sumitomo seeks to interpose defenses based upon "business necessity" or "bona fide occupational qualifications" (fourth affirmative defense) also points toward the class nature of this litigation.

10. With regard to Rule 23(a)(4)'s requirement that representative parties will fairly and adequately protect the interests of the class, counsel sets forth the following facts:

Plaintiff in this case is being represented by the firm of Steel & Bellman, P.C. Both Richard F. Bellman and I are actively involved in this matter, and both of us have extensive experience in the field of civil rights law.

Since 1964, when I became assistant counsel to the National Association for the Advancement of Colored People, my major legal specialty has been civil rights law. While at the NAACP, I was responsible for trials and appeals of major civil rights cases

in the fields of school segregation, employment discrimination, housing discrimination and First Amendment rights. After leaving the NAACP in 1968, I actively practiced law in New York with the firms of DiSuvero, Myers, Oberman & Steel, Eisner, Levy, Steel & Bellman, P.C., and presently with the firm of Steel & Bellman, P.C. For more than 11 years, I have occupied offices at 351 Broadway. During my years of practice, I have become a member of the United States District Courts for the Southern and Eastern Districts of New York, and have argued civil rights cases in many of the United States Courts of Appeals, and in the United States Supreme Court. As a partner in both the firms of Eisner, Levy, Steel & Bellman, P.C., and Steel & Bellman, P.C., I have been primarily responsible for the representation of the plaintiffs in Avigliano v. Sumitomo Shoji America, Inc., and argued that case in the United States Supreme Court. With other counsel, I tried Grant v. Bethlehem Steel & Local 40 [against the union] and argued the successful appeal in the United States Court of Appeals. See 622 F.2d 43 (2d Cir. 1980). I also participated as co-trial counsel in the trial of Grant v. Bethlehem Steel Corp. [against the company], 635 F.2d 1007 (2d Cir. 1980). Other employment discrimination cases include Gillen v. Federal Paperboard Co., Inc., 479 F.2d 97 (2d Cir. 1973) and Rodriguez v. Board of Education of Eastchester Union Free School District, 620 F.2d 362 (2d Cir. 1980). After the remand in the Rodriguez case, I handled the trial preparation and trial in the

district court which led to a verdict for plaintiff and her reinstatement as a junior high school teacher. I have also handled other employment discrimination cases in this District, some of which have led to settlements.

Mr. Bellman's involvement in civil rights law dates back to 1964 when he became a staff attorney with the United States Commission on Civil Rights. Thereafter, Mr. Bellman served as an assistant counsel at the National Association for the Advancement of Colored People. He then became General Counsel for the National Committee Against Discrimination in Housing and thereafter for Metropolitan Action Institute (formerly Suburban Action Institute). In 1974, Mr. Bellman entered private practice and shortly afterward began practicing with the firms of Eisner, Levy, Steel & Bellman, P.C. and Steel & Bellman, P.C. Mr. Bellman has tried civil rights cases in many United States District Courts and has argued civil rights appeals in many United States Courts of Appeals. Some of the major cases he has handled include: Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979); City of Hartford v. Glastonbury, 561 F.2d 1048 (2d Cir. 1977) (en banc), cert. den. 434 U.S. 1034 (1978); Brookhaven Housing Coalition v. Solomon, 583 F.2d 584 (2d Cir. 1978); Evans v. Lynn, 537 F.2d 589 (2d Cir. 1976) (en banc), cert. den. 429 U.S. 1066 (1976); Citizens Committee for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), cert. den. 421 U.S. 948 (1975); United Farmworkers of Florida

Housing Project, Inc. v. City of Delray Beach, Florida, 493 F.2d 799 (5th Cir. 1974); Dailey v. City of Lawton, Oklahoma, 425 F.2d 1037 (10th Cir. 1970); Southern Alameda Spanish Speaking Organization v. City of Union City, California, 420 F.2d 291 (9th Cir. 1970); and Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 447 F.Supp. 838 (E.D.N.Y. 1978). While the above citations are in the housing discrimination field, Mr. Bellman has also handled Title VII cases and represented the City of Hartford in Local Union No. 35, IBEW v. Hartford, 625 F.2d 416 (2d Cir. 1980), cert. den. 101 S.Ct. 3148 (1980).

11. For all of the above reasons, it is respectfully submitted that the motion to certify should be granted.

LEWIS M. STEEL

Sworn to before me this
24th day of September, 1982.

PATRICIA M. COOPER
Notary Public, State of New York
No. 31-4528957
Qualified in New York County
Commission Expires March 30, 1983

Exhibit A

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PALMA INCHERCHERA, on behalf of herself and all others similarly situated,	Civ. No.
Plaintiff,	VERIFIED COMPLAINT
-against-	CLASS ACTION
SUMITOMO CORP. OF AMERICA,	
Defendant.	

JURISDICTION

1. This case involves sex, national origin and race discrimination in employment. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1343. This case arises under the Equal Employment Opportunity Act of 1964, 42 U.S.C. §2000e, et seq., and under 42 U.S.C. §1981.

THE PARTIES

2. Plaintiff Palma Incherchera is a female citizen of the United States. She resides in the State of New York.

3. Defendant Sumitomo Corp. of America is a corporate entity doing business in the State of New York, and upon information and belief, is incorporated under the laws of the State of New York. The defendant maintains a principal office at 345 Park Avenue, New York, New York 10022.

4. Plaintiff Incherchera is presently employed by the de-

fendant at its New York office. When plaintiff was originally hired by defendant, that corporation's name was Sumitomo Shoji America, Inc. During the period that plaintiff has been employed by the defendant, the defendant has changed its corporate name from Sumitomo Shoji America, Inc. to Sumitomo Corp. of America.

CLASS ACTION ALLEGATIONS

5. Plaintiff brings this as a class action pursuant to 23 (a) and (b)(2) of the Federal Rules of Civil Procedure, on her own behalf and on behalf of 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 members of this class, or classes, are discriminated against in ways which deprive them, or have deprived them, of equal employment opportunities by reason of their sex and/or nationality, and/or race.

6. As to the class or classes described in paragraph 5 of the Complaint:

(1) The number of members in said class or classes is in the thousands and is, therefore, so numerous that joinder of all members is impracticable;

(2) There are questions of law and fact common to the class or classes, said common questions being whether the customs, practices and policies of defendant violate their federal civil rights;

(3) The claims of the plaintiff are typical of the class or classes;

(4) The plaintiff will fairly and adequately protect the interest of the class or classes as she is a woman and a citizen of the United States desirous of obtaining equality for women and equality for persons who are not of Japanese national origin or Japanese racial background;

(5) The defendant has acted or failed to act on grounds applicable generally to the class or classes, thus making final relief appropriate with respect to the class or classes as a whole.

JURISDICTIONAL PREREQUISITES

7. Plaintiff Incherchera has filed a timely and proper complaint with the Equal Employment Opportunity Commission, alleging denial by defendant of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.

8. On or about June 7, 1982, plaintiff was advised that she was entitled to institute a civil action in the appropriate United States District Court within 90 days of receipt of her notice of right to sue.

FIRST CAUSE OF ACTION

9. Defendant has engaged in unlawful employment discrimination practices against plaintiff and the class and/or classes she represents by:

(a) Discriminating against her and against women as a class by restricting them to clerical jobs;

(b) Discriminating against her and against women as a class by refusing to train her and women or promote them to executive, managerial and/or sales positions.

SECOND CAUSE OF ACTION

10. Defendant has engaged in unlawful employment discrimination practices against plaintiff and the class or classes she represents by:

(a) Discriminating against her and against the class or classes she represents on the basis of her national origin and race by restricting her and the class or classes she represents to clerical jobs;

(b) Discriminating against plaintiff on the basis of her national origin and race by refusing to train her and the members of the class or classes she represents or promote them to executive, managerial and/or sales positions.

EQUITY

11. The plaintiff and those she represents have no adequate or complete remedy at law to redress the wrongs alleged, and this suit for a permanent injunction is the only means of securing adequate relief. Plaintiff and those she represents are now suffering and will continue to suffer irreparable injury from defendant's policies, practices and customs of discrimination in its employment practices unless this Court enjoins such policies, practices and customs.

WHEREFORE, plaintiff respectfully requests this Court:

(a) To assign this case for a hearing at the earliest possible date and cause the case to be expedited in every possible way;

(b) Issue a permanent injunction:

(1) Enjoining defendant from engaging in the aforesaid unlawful employment practices;

(2) Directing defendant to promote plaintiff and the class or classes she represents to executive, managerial and/or sales positions;

(3) Directing defendant to institute a training program to upgrade plaintiff and the class or classes she represents and to take such affirmative steps as may be necessary to remedy the effects of defendant's discriminatory practices;

(4) Enjoining defendant from discriminating on the basis of sex, nationality and race in hiring, promoting, training and upgrading employees.

(c) Award plaintiff and her class or classes:

(1) Compensatory and punitive damages for injuries suffered by plaintiff and the class or classes she represents by reason of defendant's unlawful employment practices;

(2) The costs of this action, together with reasonable attorneys' fees.

(d) Grant plaintiff and the class or classes she represents

such other and further relief as may be necessary and proper.

Dated: New York, New York
July 1982

STEEL & BELLMAN, P.C.
Attorneys for Plaintiff
351 Broadway
New York, New York 10013
(212) 925-7400

by _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PALMA INCHERCHERA, on behalf of herself and all others similarly situated,	Civ. No.
Plaintiff,	VERIFICATION
-against-	
SUMITOMO CORP. OF AMERICA,	
Defendant.	

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

PALMA INCHERCHERA, being duly sworn, deposes and says: deponent is the plaintiff in the within action; deponent has read the foregoing complaint and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Palma Incherchera
PALMA INCHERCHERA

Sworn to before me this 27th day of July, 1982.

NOTARY PUBLIC

LEWIS M. STEIN
Notary Public, State of New York
No. 31-9161625900
Qualified in New York County
Commission Expires March 30, 1983

Exhibit B

Exhibit B

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES SWORN TO FEBRUARY 3, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RECEIVED FEB 3 1978

LISA M. AVIGLIANO, et al., Plaintiffs, -against- SUMITOMO SHOJI AMERICA, INC., Defendant.	76 Civ. 5641 (CHT) DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

Defendant Sumitomo Shoji America, Inc. (hereinafter "Sumitomo") hereby answers "Plaintiffs' First Interrogatories and Request for Production of Documents" as follows:

INTERROGATORY

1. In what state of the United States is the Corporation incorporated?

ANSWER

1. New York.

INTERROGATORY

2. State whether the Corporation is a subsidiary of any other corporation. If so, state the name of the parent and state the location of the parent's principal offices.

ANSWER

2. Sumitomo is a wholly-owned subsidiary of Sumitomo Shoji Kaisha, Ltd., a Japanese corporation which maintains its principal place of business at 15, Kitahama 5-Chome, Higashi-Ku, Osaka, Japan, and 2-2 Hitosubashi 1-Chome, Chiyoda Ku, Tokyo, Japan.

INTERROGATORY

3. State where the Corporation maintains its principal office, giving the full address.

ANSWER

3. 345 Park Avenue, New York, New York 10022.

INTERROGATORY

4. (As amended by December 29, 1977 letter of counsel for plaintiffs to counsel for defendant): State where the corporation maintains other offices, listing the full address of each office.

(a) As to each office, state whether the personnel practices in effect are substantially the same as the personnel practices in effect in the Corporation's principal office.

(b) As to each office where the personnel policies are not substantially the same as the policies in effect at the principal office, please state in detail how the policies differ from the principal office in respect to methods of hiring, promotion, testing, transfer, requirements for any job title, or other distinctions relating to the question of qualifications to fill similar job titles or perform similar work as may exist at the principal offices.

(c) State whether any employee of the Corporation has general authority over personnel practices in all of the offices of the Corporation. If the answer to the question is in the affirmative, please state the name, title, and address of said employee, and set forth the scope of his authority over the personnel practices in all offices. If the answer is in the negative, state who has the general supervisory authority over the personnel offices in each of the Corporation's offices, and state whether said employee or employees report to anyone at the principal office, or any other office and, if so, to whom, listing addresses for all employees and titles mentioned in this answer.

ANSWER

4. 350 Fifth Avenue, Room 7100
New York, New York 10001

John Hancock Center, Suite 3818
875 North Michigan Avenue
Chicago, Illinois 60611

26500 Northwestern Highway
Suite 406
Southfield, Michigan 48076

1100 Milam Building, Suite 3434
Houston, Texas 77022

Room 315, Cotton Exchange
Building
Dallas, Texas 75201

One California St. Suite 630
San Francisco, California 94111

900 Fourth Ave., Suite 3101
Seattle, Washington 98164

3108 First National Bank Tower
1300 S.W. Fifth Avenue
Portland, Oregon 97201

1014 City National Bank Bldg.
606 South Olive Street
Los Angeles, Calif. 90014

Room 3929, United States
Steel Building
600 Grant Street
Pittsburgh, Pennsylvania 15219

(a) No.

(b) Each branch office, except the office at 350 Fifth Avenue, New York, New York has autonomous control over salary, hiring, promotion, testing, transfer and requirements for job titles of certain employees including secretaries, clerks, office business machine operators, maintenance personnel, guards, chauffers, messengers, receptionists, telex machine operators, etc. Such policies differ according to standards set by the branches, labor conditions and standards in the areas where the branches are located, customs and policies in the areas where the branches are located, and the requirements of each of the branches.

(c) No. Insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of the branches, except the office at 350 Fifth Avenue, New York, New York, are under general supervisory authority of the general managers of each such branch, who do not report on such matters except on an informational basis to Sumitomo's principal office

(addresses for each of such general managers are furnished above). In New York, insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of both the offices at 345 Park Avenue and at 350 Fifth Avenue are under the general supervisory authority of Mr. H. Tsuwano, Personnel Manager, 345 Park Avenue, New York, New York 10022.

INTERROGATORY

5. State the total number of employees employed by the Corporation.

ANSWER

5. 464 (approximately, as at December 1, 1977).

INTERROGATORY

6. State the total number of employees employed by the Corporation at each of its offices.

ANSWER

6.

New York, New York (345 Park Avenue)	209
New York, New York (350 Fifth Avenue)	21
Pittsburgh, Pennsylvania	2
Chicago, Illinois	73
Detroit, Michigan	2
Houston, Texas	36
Dallas, Texas	6
San Francisco, California	44
Seattle, Washington	11
Portland, Oregon	12
Los Angeles, California	48
	464

INTERROGATORY

7. Does the Corporation use job titles? If the answer is yes, list all job titles which have been utilized by

the Corporation since April 1, 1969, and state as to each job title when it came into being, and until what date the job title was utilized.

ANSWER

Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does not object to answering this Interrogatory for the period December 1, 1974 through December 1, 1977 but objects to furnishing information for any period prior thereto (see Sumitomo's Objections to Plaintiffs' Interrogatories, hereinafter "Sumitomo's Objections", served and filed herewith). With respect to the period December 1, 1974 through December 1, 1977, Sumitomo's answer is as follows:

7. Yes. General Manager, assistant general manager, department manager, sub-branch manager, manager, assistant manager, assistant to general manager, administrator, supervisor, senior clerk, senior secretary, clerk, secretary, business machine operator, maintenance, salesperson, guard, chauffer, messenger, receptionist, telex machine operator. Not all such titles are formally assigned and other designations may be used from time to time. All such titles were used prior to December 1, 1974 and all are still utilized except supervisor, use of which was discontinued September 1, 1977.

INTEPROGATORY

8. Does the Corporation use job descriptions? If the answer is yes, identify all job descriptions which have been

in use since April 1, 1969, and annex copies of all documents containing job descriptions which have been utilized at any time by the Corporation since April 1, 1969 to date, specifying the periods when said descriptions have been utilized.

ANSWER

8. No.

INTERROGATORY

9. If the Corporation has utilized job descriptions which have not been reduced to writing, please list each job by title, stating next to each job what the description of the job is, and state when the Corporation has employed persons to fill such job from April 1, 1969 until the present.

ANSWER

9. Not applicable.

INTERROGATORY

10. Does the Corporation classify employees into categories such as executive, managerial, professional, technical, clerical, etc.? If the answer is in the affirmative, identify all documents which describe how the classification is accomplished, and attach copies to these answers. Also list all job titles which fall within each category.

ANSWER

10. Yes. Sumitomo maintains no documents which describe how such classification is accomplished. Job titles are not formally tied to employee classification nor do job

titles in all cases fall exclusively within one employee classification. The following list relates job titles, informal or otherwise, to employee classification only to the extent that such job titles usually do fall within employee classification:

Employee Classification	Job Title Usually Within Classification
Executive	General Manager, Assistant General Manager and Department Manager (if made executives)
Managerial and Supervisory	General Manager, Assistant General Manager, Department Manager, Sub-branch Manager, Manager, Assistant Manager, Assistant to General Manager, Administrator, Senior Clerk, Senior Secretary
Others	Clerk, Secretary, Business Machine Operator, Maintenance, Salesperson, Guard, Chauffer, Messenger, Receptionist, Telex Machine Operator.

INTERROGATORY

11. If the Corporation orally classifies employees, and/or refers to employees as executive, managerial, professional, technical, clerical, etc., please list all such categories utilized and list all job titles which fall within each category.

ANSWER

11. See answer to Interrogatory 10, above.

INTERROGATORY

12. As of the last day of the pay period closest to December 1, 1977, give:

(a) the number of female employees at each of the Corporation's offices, further broken down to give:

1. the number of female employees at each office by category, such as executive, managerial, professional, clerical, etc.;
2. the number of female employees at each office, by job title.

(b) the number of employees whose country of national origin is not Japan at each of the Corporation's offices, further broken down to give:

1. the number of employees whose country of national origin is not Japan at each office by category, such as executive, managerial, professional, clerical, etc.;
2. the number of employees whose country of national origin is not Japan at each office by job title.

ANSWER

12.

(a) Sumitomo has no objection to furnishing plaintiffs with the number of female employees at each of Sumitomo's offices. As to the balance of the information requested by Interrogatory 12(a), see Sumitomo's Objections served and filed herewith.

Office	Number of Female Employees at Office
New York (345 Park Avenue)	80
New York (350 Fifth Avenue)	16
Pittsburgh	1
Chicago	28
Detroit	1
Houston	14
Dallas	2
San Francisco	23
Seattle	4
Portland	6
Los Angeles	24

12. (b) Sumitomo does not maintain information as to "national origin" of its employees.

INTERROGATORY

13. Does the Corporation utilize any selection criteria by which it determines, or which aids in the determination of whom it will hire for jobs, or promote? If the answer to this question is in the affirmative, please answer the following additional questions.

(a) Has the criteria which is or has been utilized in writing? If so, identify all documents containing such criteria from April 1, 1969 to date, and attach copies of all such documents to the responses to these interrogatories.

(b) If the criteria utilized has not been reduced to writing, list what the criteria is for each job title and/or classification utilized by the Corporation since April 1, 1969 to date in descending order of importance, specifying for what period the criteria has been in effect and state whether the criteria has changed from time to time, and, if so, list the appropriate changes for the relevant time periods.

ANSWER

13. 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.

INTERROGATORY

14. Does the Corporation utilize career paths and/or progression ladders as methods of determining eligibility for promotion? If the answer to this interrogatory is yes, please answer the following questions:

(a) Does the Corporation have any documents which identify career paths or progression ladders? If so, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

(b) If the Corporation utilizes career paths and/or progression ladders which are oral, please set forth any such career path or progression ladders which have been utilized from April 1, 1969 to date, specifying the period in which each career path and/or progression ladder was utilized.

ANSWER

14. 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.

INTERROGATORY

15. Does the Corporation have a table of organization, or other chart or document(s) which sets forth the Corporation's supervisory chain of command? If such a document or documents exist, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories. If a table of organization exists which has not been reduced to writing, please set it forth in this answer.

ANSWER

15. Yes. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does not object to answering this Interrogatory for the period

December 1, 1974 through December 1, 1977 but objects to furnishing such information for any period prior thereto (see Sumitomo's Objections served and filed herewith). With respect to Sumitomo's documents reflecting its supervisory chain of command as of December 1, 1977, see Exhibit "1" hereto.*

INTERROGATORY

16. Has the Corporation since April 1, 1969 to date, utilized an employee's country of national origin, for example, Japanese citizenship, as a criterion for eligibility to hold certain jobs with the Corporation? If the answer to this interrogatory is yes, please answer the following questions:

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

16. No.

INTERROGATORY

17. Has the Corporation utilized sex as a criterion for eligibility for any job with the Corporation from April 1, 1969 to date? If the answer to this question is yes, please answer the following questions:

*Information for the period commencing December 1, 1974 will be furnished at a later date to be mutually agreed upon by counsel.

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

17. No.

INTERROGATORY

18. Has the Corporation filed with the Equal Employment Opportunity Commission Standard Form 100, known as the Employer Information Report EEO-1? If the answer is yes, please state for what years since 1969 this form has been filed, and attach a copy of the form filed for each year through the present year.

ANSWER

18. Yes. Sumitomo does not object to furnishing the information requested by this Interrogatory for its New York City offices for the years 1975, 1976 (and 1977 when available) but objects to furnishing such information for any period prior thereto, and for any of its offices other than New York (see Sumitomo's Objections served and filed herewith). For Employer Information Report EEO-1 for Sumitomo's New York City offices for the years 1975 and 1976, see Exhibit "2" hereto.

INTERROGATORY

19. Does the Corporation maintain any documents reflecting the composition of its employees, containing break

downs of number of employees by sex, race, and/or country of national origin? If the answer to this question is yes, specify for what years since April 1, 1969 such documents have been kept, identify each document, and annex a copy of each document to the answers to these interrogatories.

ANSWER

19. No.

INTERROGATORY

20. List the name, age, address, sex, country of national origin, and school years completed by each employee who is presently employed by the Corporation, and with respect to each such employee state:

(a) the office in which each employee is employed;

(b) all job titles held since date of initial employment, including present job title;

(c) the date of each job title change;

(d) salary received during the 12 month period from December 1, 1976 through November 30, 1977;

(e) the date of initial employment.

ANSWER

20. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

21. List the name, age, address, school years completed of each woman hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

21. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

22. List the name, ages, address, school years completed of each person whose country of national origin is not Japan hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee, state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

22. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

23. State whether the Corporation has maintained a personnel manual or any document containing personnel policies since April 1, 1969 to date. If the answer is yes, identify the manual or manuals, and/or documents stating dates in which each has been in use by the Corporation and attach copies to the answers to these interrogatories.

ANSWER

23. 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.

INTERROGATORY

24. State whether the Corporation has any documents setting forth employee pay rates and/or benefits, or which set forth opportunities for employee advancement, or materials which in any way explain career opportunities with the Corporation. If the answer is yes, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

ANSWER

24. 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.

INTERROGATORY

25. List the name, address, sex, country of national origin, title, and office where employed of all employees from April 1, 1969 to date who have held, or continue to hold, supervisory positions. With respect to each such employee, state:

(a) Date of initial employment;

(b) All job titles held since date of initial employment, including present job title.

(c) If not presently employed by the Corporation, the date the employee left the Corporation.

(d) Date of each hob title changed.

(e) Describe the unit, department, section, or other component of the Corporation which the employee supervises, or supervised prior to leaving the Corporation.

(f) The number of employees under the supervision of the supervisor at present, or when the supervisor left the employment of the Corporation.

ANSWER

25. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

26. List the name, age, address, sex, country of national origin, and school years completed by each present employee of the Corporation, or former employee of the Corporation who worked with the Corporation during the period April 1, 1969 to date, who functions or functioned in a sales or selling capacity. With respect to each such employee, state:

(a) date of initial employment;

(b) all job titles held since date of initial employment, including present job title;

(c) date of each job title change;

(d) salary, including all commission payments, etc.

ANSWER

26. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

27. Does the Corporation have any written criteria it utilizes to determine eligibility for hire, transfer or promotion to sales or selling jobs? If the answer is yes, identify each document which contains such criteria and attach copies to the answers to these interrogatories.

ANSWER

27. 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.

INTERROGATORY

28. If the Corporation does not have written criteria with regard to eligibility for sales or selling jobs, does the Corporation have oral criteria? If the answer is yes, list all criteria utilized in order of importance, stating which, if any, of the criteria utilized are mandatory.

ANSWER

28. 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.

INTERROGATORY

29. State whether the Corporation has any standard procedure by which an employee may seek a promotion, or by which the Corporation grants promotions on its own initiative. If the answer to this interrogatory is in the affirmative, please answer the following questions:

(a) Is the procedure in writing? If the answer to this question is in the affirmative, please answer the following:

(i) identify the document or documents and attach copies to the answers to these interrogatories;

(ii) by whom were the procedures promulgated?

(iii) how were they communicated to the employees?

(iv) to employees in which job titles were the procedures communicated, and when were they communicated?

ANSWER

29. 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.

INTERROGATORY

30. Does the Corporation have oral, rather than written standard procedures for promotion? If the answer is yes, answer the following additional questions:

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) To which employees, and when?

(d) State in detail what the procedures are.

ANSWER

30. 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.

INTERROGATORY

31 Does the Corporation have oral, rather than written procedures by which employees may become salespersons? If the answer is yes, answer the following questions?

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) to what employees and when?

(d) State in detail what the procedures are.

ANSWER

31. 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.

INTERROGATORY

32. Has the Corporation utilized any tests from April 1, 1969 to date for the purpose of selecting applicants for employment in, or promotion or transfer to, any job. If the answer to this question is yes, answer the following questions.

(a) Identify all such tests and attach copies to the answers to these interrogatories, and state when each test was used.

(b) As to each test, unless the test is attached to the answers, describe in detail the nature of the test and the questions asked.

(c) As to each test, describe the criteria which the Corporation applied, including the passing grade, etc.

(d) As to each test, state who judged or judges the test results, and/or made or makes determinations as a result thereof.

ANSWER

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

INTERROGATORY

33. State whether the Corporation has had, or presently has a training or education program which employees may utilize to seek promotions or transfers. If so, describe

in detail, including the dates of initiation and termination; what employees are eligible for inclusion; how the existence of the program was communicated to employees; and, the numbers of employees who enrolled, year by year, from April 1, 1969 to date, indicating sex and country of national origin during each program. Also state as to each such program whether the Corporation actually ran the program, and if not, who did. Also list the address where each program was conducted.

ANSWER

33. 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.

INTERROGATORY

34. State whether the Corporation utilizes any system of written evaluations or efficiency reports regarding the quality and quantity of work performed by employees. If so, answer the following:

(a) Identify all such documents, stating during what period of time from April 1, 1969 to date each report was utilized, and attach blank copies of each form utilized.

(b) For each evaluation utilized, state which categories of employees by job title were, or are, evaluated.

(c) For each category of employee by job title evaluated, state how often they are evaluated, listing the date of the last evaluation.

ANSWER

34. 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.

INTERROGATORY

35. Does the Corporation maintain personnel files for individual employees? If the answer is in the affirmative, answer the following:

(a) Are the files maintained on all employees. If not, list the job titles for which such files are maintained.

(b) Identify all standard documents contained in such employee personnel file, stating during what period of time from April 1, 1969 to date, each document was utilized, and attach blank copies of each form utilized. If different types of files are maintained for different categories of employees, or for employees with different job titles, answer this question category by category, and/or job title by job title.

ANSWER

35. Yes.

(a) Yes.

(b) See Sumitomo's Objections served and filed herewith.

INTERROGATORY

36. Has the Corporation ever been charged with discrimination on the basis of sex and/or national origin in any other court, or before any public agency, federal, state or local, in any jurisdiction of the United States? If the answer is in the affirmative, list each case name individually, setting forth the forum, the case identification number, and the status of each case.

ANSWER

36. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

37. With regard to each question above which requires the Corporation to set forth information which is not based on documents, please given the source of information, stating the name and address of the informant(s).

ANSWER

37. Mr. M. Tsuge, Manager
Bunker Section
Petroleum Products Department
Sumitomo Shoji Kaisha, Ltd.
24-1, Kandanishikicho
3-chome, Chiyoda-ku
Tokyo, Japan

Mr. H. Nakagawa, Manager, Legal Department
Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

INTERROGATORY

38. Identify separately and with particularity sufficient for use as a description in a subpoena each document (not already identified in the answers to the foregoing interrogatories or produced in response to the requests contained herein) which contains any of the information given in answer to each of the foregoing interrogatories.

ANSWER

38. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

39. State whether the Corporation asserts that either sex and/or country of national origin is a bona fide occupational qualification (hereinafter "b.f.o.q.") for holding of any job with the Corporation. If the answer is in the affirmative, list all job titles and/or categories in which the Corporation asserts a b.f.o.q. defense; listing for each job title or job category what defense is asserted, and stating in detail the basis for the assertion of the defense.

ANSWER

39. No.

Dated: New York, New York
February 3, 1978

H. Nakagawa
H. NAKAGAWA

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

H. Nakagawa, being duly sworn, deposes and says that deponent is Manager, Legal Department of Sumitomo Shoji America, Inc., defendant in the within action, that he has read the foregoing answers to plaintiffs' first interrogatories and request for production of documents and knows the contents thereof, and that the same is true to deponent's own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

H. NAKAGAWA

Sworn to before me this
3rd day of February, 1978

Notary Public

PAMELA ROTH
Notary Public, State of New York
No. 41-4622400
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1979

Approved (OMB-124-R0182)

EQUAL EMPLOYMENT OPPORTUNITY
EMPLOYER INFORMATION REPORT EEO-1

- Joint Reporting Committee
- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

J 6102315 CO 6102315 S 3 SIC 5099
51302700 51302600 E.I. 135612163

SUMITOMO SHOJI AMERICA INC P 9-0024400 MC 07471P
345 PARK AVE
NEW YORK NY 10022 2 OF 5 COMPANY UNITS

PLEASE USE THIS FORM FOR HEADQUARTERS REPORT.

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☑ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (If same as label, skip to item 2, this section) a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No. | | | | | | | | | |

2. Establishment for which this report is filed.

a. Name of establishment SUMITOMO SHOJI AMERICA, INC. c.

Address (Number and street)	City or town	County	State	ZIP Code	d.
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. | | | | | | | | | | (If same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☒ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☒ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

NOTE: If the answer is NO to BOTH questions, skip to Section G; otherwise complete ENTIRE form.

☐ Yes ☒ No 3. Does the company or any of its establishments (a) have a prime contract with any agency of the Federal Government, a Federally-assisted construction contract, or a subcontract at any tier under any prime Government contract, amounting to more than $10,000; or (b) serve as a depository of Federal Government funds; or (c) serve as an issuing and paying agent of U.S. Savings Bonds and Notes; or (d) hold a Federal Government bill of lading in any amount?

In columns 1, 2, and 3, include all employees in the establishment including those in minority groups.

Job Categories (See Appendix (4) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT: Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	MINORITY GROUP EMPLOYEES (See Appendix (5) for definitions): MALE Negro (4)	MALE Oriental (5)	MALE American Indian * (6)	MALE Spanish Surnamed American (7)	FEMALE Negro (8)	FEMALE Oriental (9)	FEMALE American Indian * (10)	FEMALE Spanish Surname America (11)
Officials and managers	30	30			27						
Professionals	29	29			24						
Technicians	1	1			1						
Sales workers	44	44			40						
Office and clerical	100	25	75		5			2	11		8
Craftsmen (Skilled)											
Operatives (Semi-skilled)	1	1									
Laborers (Unskilled)											
Service workers											
TOTAL →	205	130	75		97			2	11		8
Total employment reported in previous EEO-1 report	173	104	69		79			1	10		7

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-job trainees	White collar											
	Production											

*In Alaska include Eskimos and Aleuts with American Indians

1. NOTE: On consolidated report, skip questions 2-5 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 ☒ Visual Survey
   2 ☒ Employment Record
   3 ☐ Other—Specify.....
3. Dates of payroll period used—
   4/1 - 4/30/75
4. Pay period of last report submitted for this establishment
   3/1 - 3/31/74
5. Does this establishment employ apprentices?
   This year? 1 ☐ Yes 2 ☒ No
   Last year? 1 ☐ Yes 2 ☒ No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 ☒ Yes 2 ☐ No 3 ☐ Did not report last year 4 ☐ Reported on combined basis

2. Is the major business activity at this establishment the same as that reported last year?
   1 ☒ Yes 2 ☐ No 3 ☐ No report last year 4 ☐ Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manfacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

   Import & Export

e.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See instructions G)

Check one
1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Name of Authorized Official	Title	Signature	Date
Shigehiro Kumamoto	Exective Vice President		5/29/75

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts					
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Mgr-Personnel	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII

WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW. U.S. CODE, TITLE 18, SECTION 1001

E. PLOYER INFORMATION REPOR EO-1

- Equal Employ Opportunity Com sion
- Office of Fe Contract Compl

1976, USE THIS FORM FOR YOUR HEADQUARTERS REPORT

S1302700 3 S=3 SIC=509

CU=6102315 U=6102315 EI=135612163 6

SUMITOMO SHOJI AMERICA INC
345 PARK AVE
NEW YORK NY 10022 1 91236440

Section A — TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☒ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B — COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (If same as label, skip to item 2, this section) — a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed.

a. Name of establishment: Sumitomo Shoji America, Inc. — c.

Address (Number and street)	City or town	County	State	ZIP code	d
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. (If same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company — b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

Section C — EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☒ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☒ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

☐ Yes ☒ No 3. Does the company or any of its establishments (a) have 50 or more employees AND (b) is not exempt as provided by 41 CFR 60-1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

NOTE: If the answer is yes to ANY of these questions, complete the entire form; otherwise skip to Section G.

Columns 1, 2, and 3 include ALL employees in the establishment including those in minority groups.

Job Categories (See Appendix (5) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix (4) for definitions)							
				MALE				FEMALE			
	Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	Negro (4)	Oriental (5)	American Indian * (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian * (10)	Spanish Surnamed American (11)
Officials and managers	31	31			28						
Professionals	35	35			25						
Technicians	5	3	2								1
Sales workers	43	43			37						
Office and clerical	103	16	87		4		1	2	12		9
Craftsmen (Skilled)											
Operatives (Semi-skilled)	2	2									
Laborers (Unskilled)											
Service workers											
TOTAL →	219	130	89		94		1	2	12		10
Total employment reported in previous EEO-1 report	205	130	75		97			2	11		8

(The trainees below should also be included in the figures for the appropriate occupational categories above)

Formal On-the-job trainees		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
	White collar											
	Production											

* In Alaska include Eskimos and Aleuts with American Indians

NOTE: On consolidated report, skip questions 2-5 and Section E.

How was information as to race or ethnic group in Section D obtained?

1 [X] Visual Survey
2 [X] Employment Record
3 [ ] Other — Specify .....

Dates of payroll period used — 3/1 – 31/76

4. Pay period of last report submitted for this establishment: 4/1 – 30/75

5. Does this establishment employ apprentices?
This year? 1 [ ] Yes 2 [X] No
Last year? 1 [ ] Yes 2 [X] No

Section E — ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
1 [X] Yes 2 [ ] No 3 [ ] Did not report last year 4 [ ] Reported on combined basis

2. Is the major business activity at this establishment the same as that reported last year?
1 [X] Yes 2 [ ] No 3 [ ] No report last year 4 [ ] Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

Import and Export

Section F — REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G — CERTIFICATION (See instructions G)

Check one
1. [ ] All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)
2. [X] This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date
S. Kumamoto	Executive Vice-President		6/30/76

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts	345 Park Avenue				
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Personnel Mgr.	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII

Exhibit C

Exhibit C

No. 80-2070
No. 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER AND CROSS-RESPONDENT

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January 18, 1982

SUMMARY OF ARGUMENT

Sumitomo's practice of preferring Japanese nationals for managerial positions, the practice attacked by the complaint, is not prohibited by Title VII. In *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), this Court held that hiring on the basis of nationality or citizenship is not unlawful under Title VII. *Accord, Morton v. Mancari*, 417 U.S. 535 (1974). These holdings should dispose of this case. The Second Circuit, however, did not apply them. Instead, it assimilated Sumitomo's *nationality*-based employment preference to discrimination on the basis of *national origin,* a characterization which is both factually incorrect and legally at odds with the cited rulings of this Court.

The decision of the Second Circuit should be reversed for other reasons. The express language of the Treaty, reinforced by its legislative and negotiating history, clearly grants the employment right claimed by Sumitomo. An explicit objective of the U.S. negotiators of this and at least a dozen other postwar FCN treaties was to secure for U.S. investors abroad the right to employ U.S. citizens in managerial positions. Since the structure of the treaty is reciprocal, it follows that a parallel right is granted to Japanese investors in the United States. Well-established rules of statutory construction prescribe that an Act of Congress not be construed to abrogate or modify solemn treaty obligations in the absence of an express indication of Congressional intent to do so. *E.g., Cook v. United States,* 288 U.S. 102 (1933); *Murray v. The Charming Betsy,* 6 U.S. (2 Cranch) 64 (1804). There is neither statutory language nor legislative history to support a construction of Title VII restrictive of the Treaty rights invoked by Sumitomo. Moreover, such a construction would create duplication, confusion and conflict between the administration of Title VII by the EEOC, on the one hand, and administration of the INA by the State Department and the Immigration and Naturalization Service (INS), on the other. All these considerations were disregarded by the Court below.

Cross-petitioners argue that because Sumitomo is a U.S. subsidiary of a Japanese corporation, it cannot invoke the Article VIII(1) employment provision. This argument is belied by the language of the Treaty and by its negotiating and legislative history, which demonstrate a purpose to promote and protect U.S.-Japanese private direct investments and specifically to assure to foreign investors the right to manage and control their investments whatever the legal form. Recognizing this purpose, both the Court below and the United States Court of Appeals for the Fifth Circuit in *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, (5th Cir. 1981), Pet. App. 63a, *rehearing en banc granted,* 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated,* No. 79-2382 (Dec. 9, 1981), held that the Treaty's employment right may be invoked by a U.S. subsidiary of a Japanese investor.

The Second Circuit's instruction as to the liberal BFOQ exception to be applied on remand was necessarily entailed by its holding that Title VII is applicable to employment practices authorized by the Treaty—if any significance is to be accorded the Treaty right. But this consequence is an independent ground for refusing to apply Title VII here.

For the above reasons, the complaint in this case should be dismissed for failure to state a claim upon which relief may be granted.

ARGUMENT

I.

SUMITOMO'S PREFERENTIAL EMPLOYMENT OF JAPANESE NATIONALS IN EXECUTIVE, SUPERVISORY AND SPECIALIST POSITIONS IS NOT AN UNLAWFUL EMPLOYMENT PRACTICE UNDER TITLE VII.

The Treaty expressly provides that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party. . . executive personnel . . . and other specialists of their choice." Treaty, Article VIII(1). Sumitomo has availed itself of this right and employed in executive, supervisory and specialist positions nonimmigrant Japanese nationals assigned to it by its parent company in Japan. It is this employment practice that plaintiffs attack. Thus, the central question presented by Sumitomo's motion to dismiss is whether a practice of preferring Japanese nationals for these key positions constitutes an "unlawful employment practice" for purposes of Title VII. Sumitomo contends that it does not because Title VII does not interdict employment practices based on nationality.

Sumitomo makes no claim that it is "exempt" from Title VII or that it is not an employer within the meaning of the Act. It concedes, for example, that it could not hire male U.S. citizens to the exclusion of female U.S. citizens. Similarly, it could not discriminate on the basis of national origin. See discussion at pp. 16-17, *infra*. The issue therefore is not whether Title VII "applies" to Sumitomo, or to Japanese companies in general, but whether the employment practice under attack violates Title VII.

Title VII is not a general equal protection in employment statute. *See Elrod v. Burns,* 427 U.S. 347 (1976); *Branti v. Finkel,* 445 U.S. 507 (1980). To state a Title VII claim, plaintiff must allege an employment practice "based on a discriminatory criterion illegal under the Act." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 575 (1978); *see also, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253-54 (1981). As this Court said in *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86, 95 (1973), the initial inquiry in a Title VII suit is "what kinds of discrimination the Act makes illegal." Sections 703 and 704 of Title VII, 42 U.S.C. §§ 2000e-2 & 2000e-3, define an "unlawful employment practice" as one that discriminates on the basis of "race, color, religion, sex, or national origin." It is only when an employer treats some people less favorably than others because of one of these five criteria that Title VII is violated. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977); *accord, Furnco Construction Corp. v. Waters, supra,* 438 U.S. at 577.

In this case, the challenged criterion is Japanese nationality. But in *Espinoza, supra,* this Court squarely held that

> nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.

414 U.S. at 95. The logic underlying the Court's holding is equally applicable whether the alleged discrimination favors United States citizens, as in *Espinoza,* or favors individuals having other nationalities. *See Dowling v. United States,* 476 F. Supp. 1018, 1022 (D. Mass 1979) (complaint by U.S. citizen that the National Hockey League and the World Hockey Association discriminated against him on the basis of his U.S. citizenship by hiring only Canadian referees failed to state a claim under Title VII); *Novak v. World Bank,* 20 Empl. Prac. Dec. (CCH) ¶ 30,021 (D.D.C 1979) (complaint by a U.S. citizen alleging that the hiring practices of the World Bank discriminated against him on the basis of his U.S. citizenship failed to state a claim under Title VII); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan. L. Rev. 947, 958 (1979).

The principle of *Espinoza* was applied again in *Morton v. Mancari*, 417 U.S. 535 (1974), where the Court held that a preferential employment practice favoring members of federally recognized Indian tribes did not violate Title VII. The preference for Indians was "political rather than racial in nature." 417 U.S. at 553 n. 24. It was available for Indians not because of their racial or ethnic heritage, and not because of their identification with a racial or ethnic group, but rather because they were members of certain sovereign political bodies.

The Second Circuit treated the employment practices here in issue as "national origin" discrimination. *See* 638 F.2d at 559, Pet. App. at 14a (quoting only national origin language of statutory BFOQ exception). But such a characterization is both legally and factually incorrect.

As a legal matter, the statutory phrase "national origin" does not embrace citizenship. After reviewing Title VII's legislative history, this Court decided in *Espinoza* that the phrase "national origin" refers to "the country where a person was born, or, more broadly, the country from which his or her ancestors came," in contrast to the country of which he or she is a citizen or national. 414 U.S. at 88.

The distinction between nationality and national origin has consistently been recognized by the federal government. Indeed, as this Court said in *Espinoza*, to hold that national origin embraces citizenship or alienage would require the Court to conclude that "Congress itself has repeatedly flouted its own declaration of policy." 414 U.S. at 90. This is because Congress itself has passed laws discriminating against aliens, *see, e.g.*, 31 U.S.C. § 699b. Although in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Court struck down practices of various government agencies barring aliens from government employment, it recognized that such practices could be mandated by express congressional or presidential action. Thereafter the President did prohibit employment of aliens in federal government positions. Exec. Order No. 11,935, 41 Fed. Reg. 37,301

(1976), codified at 5 C.F.R. § 7.4. In contrast, other Executive Orders prohibit national origin discrimination in federal government employment. *See* Exec. Order No. 11,478 (1969), 3 C.F.R. 803 (1966-1970 Compilation), as amended by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978). Similarly, an Act of Congress extended Title VII to apply to government employment. Act of March 24, 1972, Pub. L. 92-261, § 11, 86 Stat. 103. The EEOC has also recognized that discrimination on the basis of citizenship, without more, is not national origin discrimination under Title VII. *See, e.g.*, EEOC Dec. No. 76-141, Empl. Prac. Guide (CCH) ¶ 6703 (1976); EEOC Dec. No. 76-133, Empl. Prac. Guide (CCH) ¶ 6695 (1976); EEOC Dec. No. 76-111, Empl. Prac. Guide (CCH) ¶ 6677 (1976); *see also* Guidelines on Discrimination because of National Origin, 29 C.F.R. §§ 1606.1, 1606.5 (1981).

As a factual matter, the basis of the employment preference under attack in this case is Japanese nationality, not place of birth or ancestry. It prefers Japanese nationals, as opposed to the nationals, citizens and subjects of all other countries. This result occurs by operation of law, since only Japanese nationals can acquire treaty trader visa status for employment in Japanese owned firms. INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E); 22 C.F.R. § 41.40(a); 9 Foreign Affairs Manual, Part II, § 41.40 Note 16. The preference for Japanese nationals in managerial positions is not a practice directed against any particular nationality, and it has nothing to do with anyone's national origin. The group not preferred consists of persons of every other nationality, U.S. or otherwise, and persons of every conceivable national origin, including those who by birth or ancestral background might be regarded by some, or consider themselves "Japanese," but who are not Japanese nationals.

Nor does the complaint state a claim of employment discrimination on the basis of sex. Sumitomo's criterion of preference—derived directly from its treaty rights as imple-

mented by the INA—is Japanese nationality, not sex.[6] Moreover, plaintiffs cannot, on the facts alleged, construct a so-called "sex-plus" claim. Such claims have been recognized only where there was an inherent linkage between the criterion used by the employer—*e.g.*, pregnancy—and gender. *E.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971). In those cases the facially neutral criterion served as a surrogate for gender. In contrast, courts have rejected "sex plus" claims when the employer's classification is based on citizenship because there is no correlation between nationality and gender. *Spirides v. Reinhardt*, 22 Empl. Prac. Dec. (CCH) ¶ 30,740 (D.D.C. 1980), *aff'd w/o opinion*, 656 F.2d 900 (D.C. Cir. 1981); *Michalas v. Reinhardt*, No. 78-0920, slip op. at 4 (D.D.C. May 29, 1979), *aff'd w/o opinion*, No. 79-2007 (D.C. Cir. June 21, 1980).

The decisions of this Court in *Espinoza* and *Morton, supra*, are dispositive of this case, in which the plaintiffs attack an employment preference based on nationality, not "race, color, religion, sex or national origin." In accordance with those decisions, the complaint herein should be dismissed for failure to state a claim upon which relief may be granted.

---

6 Sumitomo acknowledges that the sex discrimination claim of Reiko Turner, a Japanese national, is not inextricably linked to the claim of hiring practices based on nationality. Accordingly, in the proceedings below, Sumitomo conceded that her individual sex discrimination claim survives the motion to dismiss insofar as Turner alleges that Sumitomo has discriminated against her as a woman in its selection of Japanese nationals for managerial positions.

II.

THE TREATY ESTABLISHES A RIGHT TO CONTROL AND MANAGE ENTERPRISES IN THE HOST COUNTRY BY EMPLOYMENT OF HOME COUNTRY NATIONALS IN MANAGERIAL POSITIONS.

A. The Right to Employ Home Country Personnel of Choice to Control and Manage Enterprises in the Host Country Is Manifest on the Face of the Treaty, from its Background and Negotiating History and from its Legislative and Administrative Implementation.

Treaties of establishment, of which the FCN treaties are the most recent form, have been a central feature of U.S international economic policy from the beginnings of the Republic. The first establishment treaty was signed with France in 1778, eleven years before adoption of the Constitution, and was the first treaty of any kind concluded by the United States. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805 (1958) (cited hereafter as Walker, *FCN Treaties*); S. Metzger, *Commercial Treaties of the United States and Private Foreign Investment*, in International Law, Trade and Finance: Reality and Prospects 147-48 (1963). Such treaties are designed to lay the basis for fruitful, stable and effective commercial relations between the parties and to advance American economic foreign policy objectives. Walker, *FCN Treaties supra*, at 809. *See also* Message of President to United States Senate Transmitting Treaty, Senate Exec. O, 83d Cong. 1st Sess. 2 (1953) (transmitting a Report of the Secretary of State to the President describing the Japanese treaty).

Viewed in the light of this purpose, the experience under the Japanese Treaty has been spectacularly successful. In 1953, when the Treaty was signed, trade and investment between the two countries were almost dormant. By 1980, U.S. trade with Japan amounted to over $50 billion. The Japan-United States Economic Relations Group, Supplemental Report Prepared for the President of the United States and the Prime Minister

Exhibit D

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2070
No. 81-24

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT

I. SUMITOMO, AS A WHOLLY-OWNED SUBSIDIARY OF ITS JAPANESE PARENT, IS ENTITLED TO INVOKE THE EMPLOYMENT RIGHT GRANTED IN ARTICLE VIII(1) OF THE TREATY.

Respondents contend that, because Sumitomo is organized under the laws of New York, it is not a company of Japan and thus is not covered by Article VIII(1) of the Treaty, even though it is a wholly-owned subsidiary of a Japanese company. A complete answer to this contention is given in an August, 1979 telegram from the Department of State to the American Embassy in Tokyo:

> DEPARTMENT REITERATED . . . VIEW SET FORTH IN MARKS LETTER THAT FCN COVERS INVESTMENT THROUGH HOST COUNTRY-INCORPORATED SUBSIDIARIES AS WELL AS OTHER FORMS. . . . EXCLUSION OF INVESTMENT THROUGH LOCALLY-INCORPORATED SUBSIDIARIES [from Article VIII(1) coverage] WOULD GUT JAPANESE FCN OF MOST OF ITS VALUE IN INVESTMENT AREA, WITH ADVERSE IMPLICATIONS FOR ALL OUR OTHER FCN'S WHICH EMPLOY SIMILAR STRUCTURE AND TERMINOLOGY.

Dep't of State Telegram No. 227464 to U.S. Embassy, Tokyo, ¶ 2, Aug. 29, 1979.[1] This document, unusually direct and unequivocal for diplomatic correspondence, accurately states Sumitomo's position. It was not previously cited to this Court because it was not released by the Department until March 11, 1982, after all the principal briefs in this case had been filed, the last of the official documents to be dribbled out by the Department over the long course of this litigation.[2]

On this issue, the great bulk of both respondents' and the government's briefs is devoted to the proposition that Sumitomo is not a company of Japan as defined in the Treaty. The argument consists chiefly of minute textual exegesis of State Department telegrams and instructions, shards of testimony before congressional committees, and comments of Herman Walker, the moving spirit of the FCN treaty program. As our principal brief shows, the same texts can be adduced, and more persuasively we submit, to support Sumitomo's position. Pet.

1 The telegram and the covering letter of the Department of State releasing it are reproduced and reprinted in full in Appendix A, *infra*, at p. 1a.

2 Appendix B, *infra*, at p. 9a, contains a chronology of the State Department's selective release from its archives of documents relating to the negotiating history of the Treaty. Interestingly, the message from Tokyo to which the above-quoted telegram from the Department responds and another answering message from Tokyo were released by the Department on November 30, 1981, and are relied on by the respondents in their brief in this case. Res. Br. at 15.

Br. at 35-41.[3] In truth, however, although this material throws light on the context and general orientation of the FCN treaty program, none of the negotiating documentation is addressed to the precise question before the Court: may a domestic subsidiary of a foreign investor invoke Article VIII(1) rights?

On that question, the whole elaborate textual analysis in the respondents' and government's briefs is simply beside the point. It is beside the point because Sumitomo is entitled to the benefit of Article VIII(1) *whether or not it is a company of Japan*. *See* Pet. Br. at 40-41.

1. If Sumitomo is regarded as a company of Japan within the meaning of Article VIII(1), then, as all agree, it is the right-holder by direct operation of the language of the Article.[4]

2. But even if Sumitomo is not so regarded, its parent, Sumitomo Shoji Kabushiki Kaisha, is undeniably a company of Japan. As such it is entitled under the Treaty to engage executive and specialist personnel of its choice to manage and control its investment. To make the parent's right effective, Sumitomo, the subsidiary, must be permitted to invoke it defensively in cases like the present, charging that an employment practice insulated by the Treaty is in violation of domestic laws. The principle that a party with standing may assert the rights of a third party where that is essential to make those rights effective is a familiar one. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). It has been recognized even in the sensitive field of constitutional adjudication. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976); *see* Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

Careful analysis of the opinion below reveals that it relies on both of the above theories as alternative bases of decision.

3 Briefs and Appendices filed in this Court are referred to as follows:

Brief for Petitioner and Cross-Respondent	Pet. Br.
Brief for Respondents and Cross-Petitioners	Res. Br.
Brief for the United States as *Amicus Curiae*	U.S. Br.
Appendices to the Petition for a Writ of Certiorari	Pet. App. __a.
Joint Appendix	App. __a.

4 That a subsidiary is a company of Japan for purposes of Article VIII(1) does not necessarily imply that it will be so regarded with respect to all other treaty provisions.

Adopting the first rationale above (the piercing-the-veil approach), it says:

> Since Sumitomo is a wholly-owned subsidiary of a Japanese corporation, it is properly classified as a Japanese company for the purpose of invoking . . . Article VIII.

638 F.2d at 557-58, Pet. App. at 11a-12a. Earlier in the opinion, speaking to the second rationale above (the parent's-right approach), the court said:

> [T]he Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States. To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form . . . .

Id. at 555-56, Pet. App. at 7a-8a. *See also Bulova Watch Co. v. K. Hattori & Co.,* 508 F. Supp. 1322, 1335 (E.D.N.Y. 1981) (Weinstein, C.J.: "A New York subsidiary of a Japanese parent could . . . invoke whatever rights its parent had under applicable Japanese-American treaties . . . ," citing the opinion below).

Indeed, from the government's brief in this Court it appears that the United States itself is by no means prepared to reject the parent's-right rationale. It acknowledges that,

> as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above, even if the Court concludes that Sumitomo is not a company of Japan that may invoke the special employment privilege in Article VIII(1) of the Treaty.

U.S. Br. at 6. And again:

> [B]ecause Sumitomo's parent corporation apparently is a company of Japan, the parent might well have discretion protected by the Treaty to select Japanese nationals for certain top-level managerial positions in Sumitomo through the exercise of the parent's right under Article VIII(1) to engage "executive personnel" of its choice in the United States to the extent necessary to effectuate its right under Article VII(1) to "control and manage" Sumitomo.

Id. at 21-22; *see also id.* at 22 n.12.

The convergence of the two rationales and the Second Circuit's indifference as between them stem from an explicit recognition that the overriding purpose of the Treaty is to protect and promote foreign investment. Thus, the court concluded that respondents' reading "would overlook the purpose of the Treaty, which was not to protect foreign investments through branches, but rather to protect foreign investments generally." 638 F.2d at 556, Pet. App. at 8a. For the Fifth Circuit, also, respondents' interpretation "would create an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other." *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, 358 (5th Cir. 1981), Pet. App. at 71a.

What is entirely missing from respondents' lengthy textual analysis is the suggestion of any plausible reason why U.S. negotiators would have sought to distinguish between employment rights with respect to U.S. branch operations abroad and U.S. foreign investment carried out through locally incorporated subsidiaries. Respondents assert that "the terms were carefully chosen to give specific and distinct rights as between companies of each party and their subsidiaries operating in a host country." Res. Br. at 8.[5] The government says that "to the

5 The suggestion that the Treaty employs a carefully worked out dichotomy between companies of a Party and subsidiaries is unwarranted. In fact, the Treaty never uses the word "subsidiaries." In addition to "companies of a party," the Treaty uses a wide variety of terms to refer to the entities it covers: "an enterprise in which [nationals of a Party] have invested . . . a substantial amount of capital," Art. I(1); "enterprises which [nationals and companies of the other Party] have established," Art. V(1); "enterprises in which nationals and companies of [the other] Party have a substantial interest," Art. VI(4); "enterprises which [nationals and companies] control," Art. VII(1); "enterprises . . . which are owned or controlled by nationals

extent that there are differences in treatment depending on the place of incorporation, *there is every reason to believe* that the Parties intended precisely that result." U.S. Br. at 15 (emphasis added). And Judge Reavley's dissent finds it "*very reasonable* that the two nations would reserve the most extraordinary degree of Treaty protection only for business enterprises created under their own laws . . . ." *Spiess v. C. Itoh, supra*, 643 F.2d at 369, Pet. App. at 92a (emphasis added). But the reasons supporting these "reasonable" beliefs are never identified.

This failure to offer a concrete reason in support of a distinction in the employment right as between branches and subsidiaries is easily explained. There is no such reason. On the contrary, all the policy considerations that animated the American negotiators argue for rights of control and management that are equal as between branches and subsidiaries. At least since World War II, American direct investment abroad has overwhelmingly taken the form of locally incorporated subsidiaries. It was to accommodate this preference that Herman Walker and his colleagues in the State Department designed the new post-war version of the FCN Treaty.

> [I]nvestors choose to operate abroad not only through branches of corporations of their own country, but also very frequently through subsidiaries chartered under the laws of the foreign country where operations are conducted. Systematic treatment, therefore, required the introduction of provisions to cover this situation, a step representing something of a departure from traditional treaty concepts. Normally and classically, a country extends diplomatic protection abroad for objects which are, and because they are, juridically identified with it—e.g., for individuals who are its nationals, for entities which owe their existence to its laws, for ships which fly its flag. Here however, treaty protection is gained for entities not so identified; the "corporate veil is pierced" for the purpose of making economic interest, rather than legal relationship, the justification and the basis for protection.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 233 (1956); *see also Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 82d Cong., 2d Sess. 4-5 (1952) (statement of Harold F. Linder, Dep. Ass't Sec'y of State for Econ. Affairs). One of the main objectives of the Treaty, as revealed by Article VII and implemented in Article VIII(1), was to permit American investors abroad to choose the form of organization of their investments without sacrificing their rights of control because of irrelevant technical and formal distinctions. *See Walker, supra*, 5 Am. J. Comp. L. at 236 (treaty text designed, *inter alia*, "to emphasize the owners' prerogatives of control and management").[6]

As of year-end 1980, $180 billion out of $213.5 billion, or 84% of U.S. direct investment abroad, was in incorporated affiliates. Whichard, *U.S. Direct Investment Abroad in 1980*, U.S. Dep't of Commerce, Survey of Current Business 20, 22, Table 3 (Aug. 1981). No wonder the State Department said that respondents' interpretation excluding subsidiaries from the coverage of Article VIII(1) "would gut Japanese FCN Treaty of most of its value . . . ." Appendix A, *infra*, at 3a. The "reasonable" beliefs and suppositions indulged by respondents, the government and Judge Reavley would expose the overwhelming bulk of U.S. foreign investment in Japan (and of Japanese foreign investment in the United States) to the type of domestic legislation restricting employment of

and companies," Art. VII(2); "alien-controlled enterprises," Art. VII(3); "enterprises controlled by such nationals and companies," Art. VII(4); "companies of [one] Party controlled by [the other's] nationals and companies," Art. XVI(2).

6 The argument that the investor, having chosen the corporate form, must accept the burdens along with the benefits, though superficially attractive, is question-begging. The very purpose of the FCN treaties was to change the normal incidence of burdens and benefits as between forms of business enterprise to accommodate the preference for the corporate form. To say what package of burdens the foreign investor "must accept" when it chooses the corporate form, one must first look to the substantive provisions of the Treaty. That is, we must first decide whether Article VIII(1) extends to subsidiaries before we can know the effect on the employment right of choosing the corporate form for the investment.

executives and specialists against which Article VIII(1) was designed to protect the foreign investor.

Once this central point is grasped, as both the Courts of Appeals grasped it, it is a matter of indifference, or at best aesthetic preference, whether the protection of the Treaty is extended to these subsidiaries by piercing the corporate veil or by recognition of the parent's right.

It remains only to address the various governmental positions put before the Court. The government proffers in support of respondents' position a communication from the Japanese Ministry of Foreign Affairs rejecting the piercing-the-veil approach. Statement of the Japanese Ministry of Foreign Affairs delivered to U.S. Embassy, Tokyo, on February 26, 1982, *reprinted in* Dep't of State Telegram No. 03300 from U.S. Embassy, Tokyo, to the Dep't of State, Feb. 26, 1982, U.S. Br., App. B at 14a-15a; *but see* Brief herein for the Ministry of International Trade and Industry of the Government of Japan as *Amicus Curiae*. The foreign treaty partner's construction, however, is not decisive on the question of the scope of treaty obligations. *Factor v. Laubenheimer*, 290 U.S. 276, 298 (1933). The considerations adduced in that case are especially weighty here, where numerous treaties "which employ similar structure and terminology" will be affected by the Court's decision. Dep't of State Telegram No. 227464 to U.S. Embassy, Tokyo, Aug. 29, 1979, Appendix A, *infra*, at 3a. Indeed, the Danish government, a party to one of these treaties, has officially aligned itself in this Court in support of Sumitomo's position. *See* Statement of the Danish Government Concerning the Interpretation of the Treaty of Friendship, Commerce and Navigation between the Kingdom of Denmark and the United States of America, signed on 1 October 1951 (Dec. 23, 1981), *reprinted in* Brief *Amicus Curiae* for the East Asiatic Co., Ltd. *et al.* in Support of Petitioner Sumitomo Shoji America, Inc., App. B at 31a.

As to the stance of the U.S. Government, its present assertion that domestic subsidiaries are excluded from Article VIII(1) coverage is certainly not the kind of consistent, long-standing administrative interpretation that is entitled to significant weight in the courts. *See Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Only two weeks

before issuing the Atwood letter on September 11, 1979 (App. 307a), the State Department was saying that the position in that letter would "gut" the Treaty. *See* Dep't of State Telegram No. 227464. Appendix A, *infra,* at 3a.[7] The Fifth Circuit rightly dismissed the Atwood letter "as an aberration in State Department policy." *Speiss v. C. Itoh, supra*, 643 F.2d at 358 n.3, Pet. App. 70a n.3. The teaching of *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956), is applicable here: "Against . . . prior longstanding and consistent administrative interpretation . . . [a] more recent *ad hoc* contention as to how the statute should be construed cannot stand."

The government disparages the earlier Marks letter (App. 94a) which supported Sumitomo's position, with the comment that it "set forth no legal analysis of the question." U.S. Br. at 19. But as the Second Circuit remarked,

> both [the Marks and Atwood] letters were conclusory in tone, providing little guidance as to how the authors reached the position adopted. Finally, neither of the letters referred to any documentary evidence supporting its position, nor did the 1979 [Atwood] letter explain how the 1978 letter writer [Marks] had fallen into error.

638 F.2d at 558 n.5, Pet. App. at 12a n.5.

In this Court the government comes down on the Atwood side of the Atwood-Marks argument, thus rejecting the piercing-the-veil rationale discussed above. In doing so, however, it has some difficulty dealing with the regulations promulgated under the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq*. (the "INA"), authorizing treaty trader visas for persons employed by U.S. companies controlled by foreign nationals. 22 C.F.R. § 41.40 (1981). The regulations speak of such companies as "having the nationality of the treaty country." The government parries with the assertion that the INA has been administratively broadened in this respect. U.S. Br. at 6. But the INA requires that for a treaty trader visa to issue, the alien must be "*entitled* to enter the United States under and in pursuance of the provisions of a treaty of commerce and

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7 Nowhere in its brief does the United States attempt to deal with this telegram.

navigation . . . ." INA § 101(a)(15)(E)(emphasis added). The government's brief does not explain how administrative fiat can expand the entitlement under the Treaty. Thus, despite what the government may say here, the regulations it enforces expressly adopt the piercing-the-veil approach to Article VIII(1) rights.

As to the parent's-right approach, the government's brief is much more hospitable—one might almost say inviting—as demonstrated above. *See* pp. 4-5, *supra*. Perhaps the figures cited above on the proportion of U.S. investment abroad that is conducted through incorporated affiliates may account for this Janus-like attitude in the government's brief. Whatever the reason, at bottom, the position of the government and that of Sumitomo are not as irreconcilable as may at first appear.

In any case, the usual strictures about the weight to be given to official interpretation of treaties are inapposite here. The varying governmental positions presented to this Court are neither uniform nor consistent enough to control the interpretation of Article VIII(1). They certainly should not operate to frustrate the manifest objective of the Article to permit U.S. (and so, reciprocally, Japanese) investors to employ their fellow-citizens in executive and specialist positions in their enterprises abroad, no matter what the form of business organization in which these enterprises are cast.

II. THE TREATY PRECLUDES A TITLE VII ATTACK ON SUMITOMO'S EMPLOYMENT OF JAPANESE TREATY TRADERS IN EXECUTIVE AND SPECIALIST POSITIONS.

Sumitomo's position is that the Treaty affords a Japanese investor the right to manage and control its investment by engaging Japanese nationals of its choice in executive and other specialist positions. The scope of this right is spelled out in the treaty trader provisions of the INA and the regulations thereunder.

The basic source of the employment right is Article VIII(1) of the Treaty, although, as pointed out in our brief at pages 20-22, that Article must be read together with Article VII (establishing the right of Japanese investors to "manage and control" their enterprises in the United States) and Article I (providing for entry of Japanese nationals for purposes of carrying out U.S. Japanese trade and related commercial activities). INA § 101(a)(15)(E) is also directly relevant in the construction of the treaty right. It was enacted during the period when the post-World War II FCN treaties were being negotiated and was designed to carry out their entry and employment provisions.[8] Together with its implementing regulations, it reflects the contemporaneous understanding of Congress as to the scope of the rights granted.[9]

8 Congress first recognized the alien trading provisions of FCN treaties by creating a new category of non-immigrant aliens "entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present, existing treaty of commerce and navigation" in the Immigration Act of 1924, ch. 190, § 3(6), 43 Stat. 153, 155. The treaties then in force gave blanket rights "to carry on trade, wholesale and retail," *e.g.*, Treaty of Commerce and Navigation between the United States of America and Japan, Feb. 21, 1911, Art. I, 37 Stat. 1504, or "to engage in . . . commercial work of every kind . . . ." Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, Dec. 8, 1923, Art. I, 44 Stat. 2132, 2133. Under these provisions aliens gained entry for the purpose of carrying on purely local trade or business. In the belief that this went beyond the intention of the treaties, Congress, in 1932, amended the Act to authorize treaty trader visas for entry "solely to carry on trade between the United States and the foreign state of which [the alien] is a national . . . ." Act of July 6, 1932, ch. 434, 47 Stat. 607-08. The post-World War II FCN draft picked up this limitation, *see, e.g.*, United States-Japan Treaty, Art. I(1)(a), and added a further category of entries "for the purpose of developing and directing the operations of an enterprise in which [the alien has] invested . . . a substantial amount of capital . . . ." *Id.* Art. I(1)(b). This new category was promptly reflected in the "treaty investor" provisions of the 1952 Act. INA § 101(a)(15)(E)(ii). Thus, it is apparent that, from the beginning, the treaty trader provisions of the immigration laws were designed to carry out U.S. obligations under the FCN treaties, and the post-World War II modernization of both the INA and the treaties reflects a single, coherent legislative intention.

9 The present regulations do not differ materially from those first adopted to implement INA § 101(a)(15)(E)(i). *Compare* 22 C.F.R. § 41.40 (1981) *with* 17 Fed. Reg. 11577 (1952) (predecessor regulation). A technical change occurred in 1959 when the words "under and in pursuance of the provisions of a treaty of commerce and navigation" were replaced by language spelling out the meaning of that requirement: "[that the alien] will be engaged in duties of a supervisory or executive character, or . . . has special qualifications that will make his services essential to the . . .

There should be no uncertainty about the scope of Sumitomo's claim. *Cf.* U.S. Br. at 22 n.13. Sumitomo takes the position that it is entitled to everything the Treaty gives it—the right "to engage . . . accountants and other technical experts, executive personnel, attorneys, agents and other specialists of [its] choice"—without limitation by Title VII. The content of these categories is spelled out in the INA and its implementing regulations governing the issuance of E-1 or treaty trader visas. Thus, the question whether a particular Sumitomo employee falls within the protection of Article VIII(1), and therefore outside the scope of Title VII, depends on whether that employee has been able to demonstrate to the State Department and the Immigration and Naturalization Service that he is entitled to hold an E-1 visa.[10]

The statutory and regulatory scheme is summarized at pages 3-6 of the government's brief. For a treaty trader visa to issue, the applicant must be "engaged in duties of a supervisory or executive character," in accordance with rigorously and narrowly defined criteria. U.S. Br. at 4, *citing* 22 C.F.R. § 41.40(a)(2); 9 Foreign Affairs Manual, Part II, § 41.40 Notes 10 and 13, *id.* § 41.41 Note 4. More particularly, in accordance with recent instructions issued by the State Department, "a position will be regarded as 'executive' or 'supervisory' for treaty trader purposes only if it is a top-level management

employer's enterprise . . . ." 24 Fed. Reg. 6683 (1959). In 1974 a similar clarification made it explicit that "[t]he employment [of the applicant] must be by an individual employer having the nationality of the treaty country . . . or by an organization which is principally owned by . . . persons having the nationality of the treaty country . . . ." 39 Fed. Reg. 26153-54 (1974). The regulations thus reflect clearly all three of the Treaty Articles referred to in the text, at pages 10-11, *supra*. The original version looked most directly to the entry provisions of Article I. The 1959 elaboration specifically limiting entry to executive and specialized personnel draws from Article VIII(1). The 1974 revision, focusing on the identity of the treaty trader's employer, evokes the control and management conception of Article VII(1).

10 During Fiscal Year 1980 the Department of State issued 27,301 treaty trader and treaty investor visas for all countries. U.S. Dep't of State, Bureau of Consular Affairs, Immigrant Visa Control & Reporting Division, *Statistics on Nonimmigrant Visa Issuances During Fiscal Year 1980*. The group protected by FCN treaties thus represents an infinitesimal fraction of the U.S. job market.

position." The visa cannot issue unless "the position the alien would occupy 'principally requires management skills, or entails supervision over and key responsibility for a large portion of a firm's operation . . . .' " As to other specialized personnel, the government's account shows that they must be "truly essential to the firm's operations in the U.S." in the sense that they perform functions "that an American worker cannot do or cannot be trained to do . . . ." U.S. Br. at 5, *citing* Dep't of State Telegram No. 089624 to Japanese Posts, ¶¶ 2-10, sent to all Diplomatic and Consular Posts on July 10, 1981, *reprinted in* U.S. Br. App. A. (instruction regarding the assessment of an "executive/supervisory position" and "essential skills"). In short, E-1 visas may be issued only to members of a core group of key executives and specialists necessary for the investor to control its U.S. enterprise.

The government accepts that "as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above . . . ." U.S. Br. at 6. That is exactly the position Sumitomo takes in this case, adding only that the scope of the categories "executive personnel" and "other specialists" is defined by INA § 101(a)(15)(E) and its regulations, specifying the requirements for treaty trader visas.[11]

The right as thus defined is unqualified in the sense that it is not contingent on the treatment of domestic enterprises (national treatment) or on the treatment of enterprises of third countries (most-favored-nation treatment). In particular, it is non-contingent in that it is designed to override restrictions in the law of the host country upon the employment of home country nationals in the covered positions.

11 At one point, the government raises the possibility of a distinction between "executive personnel" and the other Article VIII(1) categories. It suggests that the latter may not fall within the investor's right to "control and manage" its subsidiary granted in Article VII. U.S. Br. at 22 n.12. But when we recall that for an E-1 visa to issue to someone other than an executive or supervisory employee, he must be "truly essential to the firm's operations in the U.S." and without a U.S. counterpart, *id.* at 5, it hardly seems possible that an investor could control and manage the enterprise unless it could engage such home country nationals.

Title VII, if applied to "executive personnel" and "other specialists" necessary to manage and control the investment, would be the very kind of local legislation against which the Treaty sought to protect the foreign investor. There is no doubt that if respondents had their way, Title VII would restrict the right of Sumitomo to employ Japanese nationals in these executive and specialist positions. Indeed, that is the very object of plaintiffs' lawsuit: the complaint asks for an injunction "[d]irecting defendant to promote plaintiffs . . . to executive, managerial, and/or sales positions . . . ." App. 10a. Respondents have not produced a scrap of evidence, either in the language of Title VII or in its legislative history, to suggest that Congress intended, or was even aware of the possibility of such a drastic abridgement of treaty rights. In the absence of such an expression, the unquestioned doctrine is that the Court will not so construe the statute. *Cook v. United States*, 288 U.S. 102, 119-20 (1933); *see Weinberger v. Rossi*, No. 80-1924, ____ U.S ____, 50 U.S.L.W. 4354, 4355-56 (Mar. 31, 1982).

In order to avoid the force of the injunction against implied abridgement of treaty rights, respondents seek to construe away any such encroachment by an impermissibly restrictive interpretation of the object of Article VIII(1). They contend that the Article was designed only to override "bad" restrictions on investor choice of personnel—so-called "percentile limitations"—not "good" restrictions, like anti-discrimination laws. But this proposition (which incidentally *concedes* that the Article VIII(1) right is non-contingent) cannot stand.

The language of the Article, which is unmistakably affirmative, provides no basis for such constricted reading. So respondents are compelled to seek support in scraps of negotiating history and general commentary on the Treaty. For example, they cite Herman Walker's proposition that the objective of the Treaty "is to secure non-discrimination, or equality of treatment: a sort of 'equal protection of the laws' objective." Res. Br. at 27, *quoting* Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 810-11 (1958). That remark, however, occurs in a passage discussing "the extensive use of so-called contingent standards as the cornerstone of rule-making." *Id.* at 810. As has been pointed out, Article VIII(1) is one of the few provisions of the

Treaty that is explicitly *non*-contingent. Walker himself identified it as such. *Id.* at 811, 813. And in commenting specifically on the question of employment rights, he said that the Article was directed against "percentile restrictions *and the like* . . . ." Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 234 (1956) (emphasis added). Thus, he expressly recognizes that it is not confined to percentile restrictions *simpliciter. See also* Brown, *Treaty, Guaranty, and Tax Inducements for Foreign Investments*, 40 Am. Econ. Review, Papers & Proceedings 486, 487 (1950).

The negotiating documents relied on by respondents are equally insubstantial. The Foreign Service Despatch on the German treaty quoted at page 22 of respondents' brief says only that the "major special purpose" of the Article—not the exclusive purpose—"is to preclude the imposition of 'percentile legislation.' " Indeed, read as a whole, the document supports Sumitomo's position:

> The first sentence [of Article VIII(1)] is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel.

Foreign Service Despatch No. 2529 from HICOG, Bonn, to the Dep't of State, March 18, 1954, App. 181a, 182a.

Similarly, the Japanese documents do not support respondents' limited construction of Article VIII(1). The 1951 despatch quoted by respondents does show, of course, that the Japanese inquired whether there were some professions in the U.S. to which entry was barred by reason of alienage. Res. Br. at 21, *quoting* Foreign Service Despatch No. 915 from USPOLAD, Tokyo, to the Dep't of State, Dec. 17, 1951, App. 120a, 123a. The Department replied in the affirmative and pointed out that paragraph (2) of Article VIII, as opposed to paragraph (1), was addressed to this problem. *See* Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. /, 1952, App. 130a, 134a. Indeed, it was *only* as to such professions and licensed occupations that legislation excluding aliens was in effect in the 1950s. *See, e.g., Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392

(1927) (upholding state statute requiring owners of licensed pool halls to be citizens). There were no percentile limitations on the employment of "executive personnel" at that time, because such legislation as applied to general employment has been unconstitutional at least since this Court's decision in *Truax v. Raich*, 239 U.S. 33 (1915). Nor was there percentile legislation in Japan in 1952. *See* Alexander, *Foreign Investment Laws and Regulations of the Countries of Asia and the Far East*, 1 Int'l & Comp. L. Q. 29, 37 (1952).

In any case, it is artificial to construe Article VIII(1), as respondents would have it, by an imputation of what "the Japanese negotiators were seeking . . . ." Res. Br. at 21. As has repeatedly been shown, the FCN treaties in general and the employment provisions in particular were put forward by the United States. *See* Pet. Br. at 23-25. Respondents themselves concede that U.S. opposition to foreign requirements for local hiring was an important motivating factor underlying Article VIII(1). Res. Br. at 22 n.25. And the government's brief acknowledges that

> [t]he purpose of Article VIII(1) was to override these percentile restrictions *so that American businesses operating abroad would be able to select U.S. nationals for essential positions.*

U.S. Br. at 24-25 n.14 (emphasis added).

Today, thirty years later, Sumitomo seeks only that same right.

Of course, Title VII does not by its terms prefer U.S. citizens over aliens. But its practical consequences for the foreign investor, should respondents prevail, do not look so very different from the "percentile legislation" concededly overridden by the Treaty. Defendants who are found to have violated Title VII in class actions such as this one are frequently faced with decrees requiring percentage hiring quotas or goals proportionate to the share of the plaintiffs in the relevant employment pool. *E.g.*, *Association against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981) (city must offer 41% of firefighter positions to minority group applicants during relevant period); *Phillips v. Joint*

Legislative Committee, 637 F.2d 1014 (5th Cir. 1981) (state agencies required to set goals of approximately 20% for black employees and to hire one black for every two whites until goal is achieved); *United States v. Elevator Constructors Local No. 5*, 538 F.2d 1012 (3d Cir. 1976) (union ordered to establish a goal for black membership of 23% and a black referral quota of 33%); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (employer ordered to promote one black foreman for every white until there are 15 black foremen in plant). Similarly, employers seeking to protect themselves against Title VII actions may be well advised to hire on a quota basis to avoid the statistically "disparate impact" that makes out a *prima facie* case under Title VII. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 956-57, 1026 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (proof of disparate impact of employment practices makes out *prima facie* case of Title VII violation). In other words, the application of Title VII that the respondents propose here could well give rise to a restrictive quota on hiring of Japanese nationals, not so different in effect, even if worlds apart in motivation, from the "percentile limitations" admitted to have been the principal target of Article VIII(1).

Here again, the government seems, in effect, to agree with Sumitomo's position. It suggests that Article VIII(1) may "itself constitute[] a legislative-type validation (as a 'business necessity') of a citizenship preference (at least for the top-level 'executive' positions mentioned in that Article) that excuses a company of Japan from showing the job relatedness of a citizenship preference on a case-by-case basis." U.S. Br. at 26. This is an unnecessarily involuted way of reaching the result. There is no need to read Article VIII(1) as a "legislative-type" business necessity exception to Title VII, which was, in any event, enacted after the adoption of the Treaty and so could not have been amended by it. It is much more straightforward to say that Article VIII(1) establishes a non-contingent right to employ Japanese nationals in executive and specialist positions and that Title VII is therefore inapplicable to those employees. That is exactly what the government suggests in the footnote to the sentence quoted above:

> Article VII(1) of the Treaty gives nationals and companies of Japan the right to "control and manage" their enterprises in the United States, and it could be argued that the discretion to select top-level "executive personnel" in whom the nationals and companies have confidence is a necessary component of that right.

Id. at 26 n.16. It not only "could be argued," but that is exactly what Sumitomo *does* argue. We add only that the necessity implicit in Article VII(1) is made explicit in Article VIII(1). And the scope of the terms "executive personnel" and "other specialists" is defined by the contemporaneous enactment of INA § 101(a)(15)(E) and its implementing regulations.

These questions of treaty and statutory interpretation are fully ripe for adjudication on the record as it stands, contrary to the contention of the government. U.S. Br. at 23-30. Sumitomo's motion to dismiss presents a pure question of law and needs no further factual amplification. The legal issue tendered here is whether Sumitomo is entitled to employ Japanese nationals qualifying for treaty trader visas in executive and other specialist positions in accordance with Article VIII(1) of the Treaty, INA § 101(a)(15)(E)(1) and the regulations thereunder, without limitations flowing from the provisions of Title VII.

The case was heard and disposed of below on the footing that the positions in controversy are occupied by Japanese nationals carrying E-1 treaty trader visas. Plaintiffs' allegations of discrimination "on the basis of nationality," Complaint ¶ 13, App. 9a, are addressed to "Sumitomo's practice of employing almost exclusively Japanese men" for these positions, as appears from their brief. Res. Br. at 5. In this Court, respondents further acknowledge that "many, if not all, of the persons who are classified as 'Oriental' [in Sumitomo's EEO-1 report], entered the United States as treaty traders." Res. Br. at 30. And the government appears to agree that they are probably all "executive personnel" within the meaning of the Treaty. U.S. Br. at 26 n.16; *see id.* at 29 n.18. Even if a remand were appropriate for formal proof of which particular employees have E-1 visa status, the proof would be mechanical and

ministerial. It would not alter or illuminate the legal issue presented.

That issue should be resolved on the record before this Court. Far from remanding without reaching the question, the Court should decide it now as a matter of sound judicial administration. Only by doing so can it provide authoritative guidance for any further proceedings that may be necessary, thus preventing needless proliferation of issues for trial and possibly another appeal to this Court.

III. SUMITOMO'S CITIZENSHIP PREFERENCE DOES NOT VIOLATE TITLE VII IN ANY EVENT.

As this Court held in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), nationality is not a prohibited criterion of employment under Title VII. Respondents' effort to remedy their employment grievances by invoking that statute stretches it far beyond what it can bear. The class of persons allegedly discriminated against—persons residing in the United States who are not Japanese treaty traders—is, by any measure, overly broad. It is surely not the kind of historically disadvantaged class of persons that Title VII was designed to protect. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (purpose of Congress was "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"); *United Steelworkers of America v. Weber*, 443 U.S. 193, 203 (1979) ("[I]t was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."). No stigma attaches in American society to the condition of not being Japanese.

Respondents seek to construct claims of discrimination not only on grounds of "nationality" but also on grounds of "sex" and "national origin." The government's brief suggests the addition of the category "race." U.S. Br. at 7 n.4. One is left to speculate why they have omitted "color," since few Japanese

are black, white or brown, and "religion," in view of the well-known paucity of Hindus, Moslems, Christians and Jews in Japan. But respondents' subsidiary claims are all disposed of by the principle of Occam's razor: "What can be done with fewer [assumptions] is done in vain with more." The New Columbia Encyclopedia 2981 (4th ed. 1975). Respondents' lack of Japanese nationality (the essential criterion for treaty trader status) sufficiently explains their exclusion from the hiring preference; it is, hence, irrelevant that they may also be female or Christian or Mexican-American or fair-skinned or tall.

In the last analysis, respondents are attempting to use Title VII for a purpose Congress never intended. Protection of job opportunities for Americans as against nonimmigrant foreign nationals is a function not of Title VII, but of the Immigration and Nationality Act. Plaintiffs' complaint confuses these disparate statutory schemes.

Conclusion

For the reasons developed in this and the principal Brief for Petitioner and Cross-Respondent, the decision of the United States Court of Appeals for the Second Circuit should be reversed and the case remanded with directions to dismiss.

Respectfully submitted,

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APPENDICES

Local Rules

Effective January 1, 19[illegible], only size 8½ x 11 inch papers will be acceptable for filing in all federal courts.

Raymond F. Burghardt,
Clerk

Motions, Applications, Orders

1. All papers, motions, applications, and orders presented for consideration or filing must bear the docket number of the matter followed by the initials of the Judge assigned thereto.

2. Applications for orders to show cause, provisional remedies, emergency relief or to proceed in forma pauperis, and orders and notice of settlement of judgments, shall be presented to the Orders and Appeals Clerk (Room 14A). Judgments shall be presented to the Judgment Clerk (Room 16). These documents will be examined as to form and thereafter transmitted to the assigned Judge.

3. Motions and responses thereto, with proof of service thereof, should be submitted to the Clerk (Room 10) for docketing.

(a) Any party wishing to make a motion should arrange for a pre-motion conference prior to preparation and submission of any papers in cases assigned to Judges Conner, Griesa, Knight, Leval, Pollack, Sprizzo and Werker (all motions), Judge Knapp (as to summary judgment only), and Judge Stewart (as to discovery only).

(b) The following Judges require that copies of all motion papers be delivered to their chambers on the same date as delivered to the Clerk: Judges Broderick, Conner, Cooper, Edelstein, Griesa, Knight, Knapp, Lasker, Leval, Lowe, Motley, Sand, Sofaer, Sprizzo, Stewart, Sweet, Tenney and Weinfeld.

4. All motions, except those of an emergency nature or requiring provisional relief, may be made returnable for docketing purposes on any business day at 9:30 A.M. and the motion papers, responsive and reply papers shall be lodged not less than two business days before the return day with the Clerk (Room 10) for docketing and transmittal to the assigned Judge. The notice and responses to be given shall conform to the times specified in Civil Rule 3 of this court.

(a) Oral argument is required on all motions in cases assigned to Judges Bonsal, Brieant, Goettel, Knight, Knapp, Owen, Pollack, Sand, Sweet and Weinfeld. At the time of filing of papers, the Clerk will apprise Counsel of any STANDING instructions as to time and place for oral argument. The Clerk will have the information and will furnish the day of the week and time that the Judge will hear motions to be argued and counsel should appear at the time and place so specified and not on the return date.

(b) As to the other Judges, Counsel will be notified by telephone of the time and place for oral argument, if desired by the Court. In the absence of such notification Counsel should not appear on the return date.

5. In cases assigned to Judges Cooper, Griesa, Knight, Lasker, Motley, Sweet and Werker, communication with Chambers on requests and inquiries shall be made by letter other than on urgent matters requiring the Court's immediate attention. Their telephone numbers are given below and may be used at the times indicated for any urgency. In cases assigned to the other Judges, those not named above in this paragraph, letters are not required and phone calls will be received during business hours.

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