10-14-1982

Plaintiff's Reply Memo in Support of Motion to Certify Class Action

Lewis M. Steel '63

Office Copy served by hand 10/14/82

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)

PLAINTIFF'S REPLY MEMORANDUM

IN SUPPORT OF MOTION TO CERTIFY CLASS ACTION

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This memorandum is submitted in response to defendant's letter of October 13, 1982, which asks this Court to defer a determination on plaintiff's motion, pending completion of discovery.

Plaintiff agrees with defendant that discovery prior to class certification and/or an evidentiary hearing are appropriate if the Court does not have sufficient factual information before it to make the necessary Rule 23 findings. In this case, defendant argues that the complaint does not contain sufficient factual information to support conclusions of numerosity, commonality or typicality. In so arguing, the defendant completely overlooks the moving affidavits and exhibits, which include admissions made by Sumitomo in the United States Supreme Court that it gives a preference to Japanese nationals and Sumitomo's own EEO-1 reports which demonstrate that this preference limits non-Japanese nationals and particularly women to clerical and office positions.

Sumitomo now complains to this Court that the information contained in these EEO-1's is stale. Despite the fact that plaintiff Incherchera has filed an affidavit indicating that the present work force is constituted in a manner consistent with the EEO-1's today, Sumitomo has seen fit to withhold from the Court up to date EEO-1's, either for its New York principal office or for its other offices. This failure on the part of Sumitomo should be viewed as an admission.

Moreover, Sumitomo, despite having sought an adjournment

to prepare for this hearing, has made no attempt to submit any affidavits relative to the "preference" it gives to Japanese nationals. A review of the EEO-1's attached to the moving papers, reveals that approximately 40% of the work force in the principal office are Japanese nationals and all of these persons clearly occupy positions above the clerical level. As a result, this Court certainly should conclude that members of the class plaintiff seeks to represent are severely limited in their job opportunities as a result of Sumitomo's admitted policy and practice. Thus, the commonality and typicality requirements are satisfied.

In reality, defendant would have this Court delay certification so that it can conduct discovery into the merits of plaintiff's individual case. Yet plaintiff need not establish a meritorious claim in order to represent a class. Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982), citing with approval Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir. 1973) (en banc). See also Eisen v. Carlisle & Jacquilen, 417 U.S. 156 (1974).

Defendant also cites some post-General Telephone Co. v. Falcon cases for the proposition that this Court should allow pre-certification discovery into the question of plaintiff's comparative qualifications to employees who have received higher level jobs. In none of the cases cited by defendant is there an admitted preference such as the one which exists in this case. Moreover, in Nation v. Winn-Dixie Stores, 29 FEP Cases 756 (N.D.

Ga. 1982), a case cited by defendant, the court states, at 761:

> The Falcon decision is interpreted by this Court to have little, if any, effect on the certification of so-called disparate impact cases in which the named plaintiff is seeking to enjoin defendant's utilization of an employment practice, procedure or policy which adversely limits employment of members of a protected class in a disproportionate fashion. . . . He is only seeking to prove that the complained of practice has a disproportionate adverse impact on the group he seeks to represent. It then becomes the employer's burden to prove the legitimacy of the challenged practice or policy.

Additionally, in Hawkins v. Fulton County, 29 FEP Cases 762 (N.D. Ga. 1982), cited by defendant and decided by the same district court judge who ruled in Nation, the court pointed out that the plaintiffs had a series of different claims.

Significantly, in providing this Court with a series of post-Falcon district court decisions, Sumitomo has neglected to cite the Eighth Circuit's decision in Paxton v. Union National Bank, ___ F.2d ____, 29 FEP Cases 1233 (decided 9/10/82). That Court, which explicitly made clear its awareness of the Falcon decision, stated:

> Rule 23(a)(2) requires that there be common questions of law or fact among members of a class. The Rule does not require that every question of law or fact be common to every member of the class, [citations omitted] and may be satisfied, for example, where the questions of law linking the class members is substantially related to the reso-

> lution of the litigation, even though the individuals are not identically situated. 29 FEP Cases at 1241.

The Court of Appeals pointed out that the district court had improperly denied class relief because it felt that the facts with regard to the individual claims did not support their right to be class representatives. The Circuit stated, at 1241:

> Again, Judge Woods applied an incorrect legal standard that was improperly influenced by his view of the merits of the claims. The commonality requirement was satisfied because the following issue pervades all the class members' claims -- has Union National Bank discriminated by denying them promotions and giving them lesser promotions than those given whites similarly situated. . . . Obviously, the Bank's discriminatory promotion procedures will affect individual employees in different ways because of their diverse qualifications and ambitions. These factual variations are not sufficient to deny class treatment to the claims that have a common thread of discrimination. . . .

The Court further stated, at 1242:

> Typicality is not defeated because of the varied promotional opportunities or the differing qualifications of the plaintiffs and class members.

Given Sumitomo's clear policy and practice in this case, there is simply no need for the defendant to engage in individual discovery of the plaintiff prior to class certification. At best, Sumitomo could attempt to develop facts from which it could argue that perhaps the individual plaintiff was not qualified for a promotion. That argument, however, would not be relevant to the class

certification issue. */ If Sumitomo has any evidence in its own possession which would support an argument against class certification, it should be required to submit that evidence immediately. Any other procedure at this time would merely delay resolution of this case.

Dated: New York, New York
October 14, 1982

Respectfully submitted,

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*/ Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962 (2d Cir. 1978), cited by defendant, holds that a court should allow pre-certification discovery where the record is inadequate, not in every case. Chateau de Ville involved complicated anti-trust issues, and it was far from clear that the four individual plaintiffs, who owned large live entertainment theaters in the metropolitan area, had the same or conflicting interests with smaller theater owners who operated far away from the industry's Broadway center. Even if this Court were to find that the record here is inadequate, pre-certification discovery should be limited. National Organization for Women v. Sperry Rand, 88 F.R.D. 272, 277 (D. Conn. 1980).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Plaintiff's Reply Memorandum in Support of Motion to Certify Class Action has been served this 14th day of October, 1982, via first class mail, postage prepaid, upon counsel for defendants, as follows:

Wender Murase & White
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LEWIS M. STEEL