8-17-1983

Defendant's Response to Plaintiff's Second Set of Interrogatories and Request for Documents

Lewis M. Steel '63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LISA M. AVAGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

----------x

PALMA INCHERCHERA,

Plaintiff,

-against-

SUMITOMO CORP. OF AMERICA,

Defendant.

----------x

77 Civ. 5641 (CHT)
82 Civ. 4930 (CHT)

DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Defendant responds by averring that Plaintiffs' Second Set Of Interrogatories and Request For Production of Documents was served prematurely and in violation of the Order of Magistrate Raby closing discovery pending the Court's decision on the class certification motion. (See Exhibit A).

Defendant reserves all objections until discovery is re-opened.

Dated: New York, New York
August 17, 1983

WENDER MURASE & WHITE
Attorneys for Defendant
400 Park Avenue
New York, New York 10022
(212) 832-3333

By _____
A Member of the Firm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE, NEW YORK
NEW YORK 10007

CHAMBERS OF
HAROLD J. RABY
UNITED STATES MAGISTRATE

(212) 791-0155

August 2, 1983

STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
Att: Lewis M. Steel, Esq.

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022
Att: Lance Gotthoffer, Esq.

Re: AVAGLIANO v. SUMITOMO SHOJI AMERICA, INC., 77 Civ. 5641 (CHT);
INCHERCHERA v. SUMITOMO CORP. OF AMERICA, 82 Civ. 4930 (CHT).

Gentlemen:

This letter will serve to acknowledge receipt of a letter from counsel for the plaintiffs in the above-referenced actions, under date of July 29, 1983, relating to certain difficulties which have apparently arisen in the course of pretrial discovery.

In short, counsel for the plaintiffs, Lewis M. Steel, Esq., has requested that Magistrate Raby direct the parties to commence discovery on the merits of the cases, notwithstanding the fact that Judge Tenney has not yet rendered his decision on the class action motion presently before the Court.

Please be advised that, in any event, Magistrate Raby is currently on his holiday and will not, therefore, be able to consider the aforementioned request at this moment in time. Of course, upon the Magistrate's return from vacation, at the end of August, the interested parties will be contacted in order to ascertain the existence of any outstanding discovery problems and, if necessary, to promptly schedule a pretrial conference. Until such time, opposing counsel are urged to negotiate between themselves in the hope of arriving at a mutually agreeable accord.

Respectfully,

Ira Cohen

Ira Cohen
Law Clerk to Magistrate Raby

cc: THE HON. CHARLES H. TENNEY
United States District Judge, S.D.N.Y.
United States Court House
Foley Square
New York, New York 10007

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.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

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

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVAGLIANO, et al.,
Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,
Defendant.

PALMA INCHERCHERA,
Plaintiff,

-against-

SUMITOMO CORP. OF AMERICA,
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

WENDER, MURASE & WHITE

Attorneys for Defendant

Office and Post Office Address, Telephone

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

(212) 832-3333

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE, NEW YORK
NEW YORK 10007

CHAMBERS OF
HAROLD J. RABY
UNITED STATES MAGISTRATE

(212) 791-0155

August 2, 1983

STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
Att: Lewis M. Steel, Esq.

WENDER MURASE & WHITE
400 Park Avenue
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Re: AVAGLIANO v. SUMITOMO SHOJI AMERICA, INC., 77 Civ. 5641 (CHT);
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Respectfully,

Ira Cohen

Ira Cohen
Law Clerk to Magistrate Raby

cc: THE HON. CHARLES H. TENNEY
United States District Judge, S.D.N.Y.
United States Court House
Foley Square
New York, New York 10007

STEEL & BELLMAN, P.C.

Attorneys at Law

351 Broadway, New York, New York 10013

(212) 925-7400

Richard F. Bellman
Lewis M. Steel
Gina Novendstern

July 29, 1983

Hon. Harold J. Raby
United STates Magistrate
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Avagliano v. Sumitomo Shoji America, Inc.
Incherchera v. Sumitomo Corp. of America

Dear Magistrate Raby:

I write this letter in response to Mr. Gotthoffer's letter dated July 28, 1983 and to bring to Your Honor's attention an additional issue which has arisen between the parties, relating to merits discovery.

The Confidentiality Order Issue

In summary, Mr. Gotthoffer raises the specter of discovery involving material which he classifies as "proprietary." He also accuses me of being inflexible, while claiming flexibility for his client. Neither assertion fits the facts of this case.

At the outset, I agreed to the entry of a confidentiality order without litigating the necessity of such an order. Many Title VII cases are, of course, litigated without the entry of such orders, and information such as plaintiffs seek here is made available without any limitation on its availability to the public. I agreed to a confidentiality order primarily because discovery could conceivably touch on the privacy interests of other Sumitomo employees, and in order to reduce litigation. However, Sumitomo has taken my willingness to be cooperative as an invitation to invent additional issues to dispute.

Mr. Gotthoffer originally provided me with a confidentiality order which he conceded was patterned on an anti-trust case. After providing me with this order, Mr. Gotthoffer agreed that its provisions were onerous and much more restrictive than necessary. To get the matter resolved, I agreed to provide Mr. Gotthoffer with a confidentiality order modeled on one which was used in one of my discrimination cases. The order I utilized was patterned on the order in Ayres v. Federated Department Stores, Inc., an age discrimination case. It was prepared by the firm of Proskauer Rose Goetz & Mendel-

sohn. The plaintiff in that case was a high level executive. In this case, of course, the plaintiffs are clericals. As one would assume the sensitivity of material would increase as the rank of employees increased, the need for confidentiality on the part of the plaintiff was at least as important in Ayres as in this case. The guts of the Ayres order is paragraphs 3 and 4. The same provisions appear in paragraphs 3 and 4 of plaintiffs' proposed order in this case. Paragraph 5 of the Ayres order states that each qualified person, by signing his or her name to the copy of the order, agrees to be bound by its terms and submits to the jurisdiction of the United States District Court. This provision appears in paragraph 6 of our draft order. In Ayres, there was no separate order a person had to sign before seeing material labeled "confidential," nor were threats of contempt made, etc. I propose the same procedure here.

In order to appear cooperative, what Sumitomo's counsel has done in this matter is to assert that it is agreeing to our order, but only wishes to make certain changes. But these changes come right out of the anti-trust form order which counsel admitted was onerous in the first place. In other words, Sumitomo has hardly negotiated at all. It has merely stated that it would accept plaintiffs' form of an order, as long as it contained the substance of the onerous anti-trust order.

In any event, I indicated to Mr. Gotthoffer that I was perfectly willing to modify the form of order I submitted. For example, I stated that I understood that Sumitomo might have an objection to my employing as experts persons who work for or were associated with Sumitomo's competitors. I told Mr. Gotthoffer that I could hardly imagine doing this and would certainly agree to an appropriate modification of the order on this issue if we could obtain basic agreement concerning how the order would work. Mr. Gotthoffer was uninterested in this approach and in fact suggested that I bring this matter to Your Honor's attention. Having done this, he now accuses me of being inflexible.

Mr. Gotthoffer states that my concern about my ability to be able to speak to persons and display documents to them without his knowledge is unfounded. He points out that Sumitomo is entitled to know the names of plaintiffs' witnesses. Sumitomo, however, is not entitled to the names of every person I happen to interview and may wish to show a document that Sumitomo claims is confidential. Under plaintiffs' approach, I could not show such a person such materials unless he or she signed the confidentiality order. Under the defendant's approach, Sumitomo would be informed in advance of each and every such person I wished to interview.

Mr. Gotthoffer states on page 2 of his letter that Sumitomo's:

> sources of supply, market conditions, studies respecting competitive conditions, prospective customers and ongoing contracts are all highly sensitive, and it is information, together with strictly personal information

such as salary, internal review and the like that will be subject to plaintiffs' discovery requests.

I hardly believe that this case will turn upon Sumitomo's sources of supply, market conditions, studies concerning competitive conditions, etc. I believe that these are bogus issues which Sumitomo is attempting to introduce at this time to complicate resolution of this matter. Basically, plaintiffs are seeking information from Sumitomo concerning the background and experience of its employees, and what their jobs entail and what they are paid. Certainly, as of this point in the case, we see no necessity to ascertain Sumitomo's sources of supply, market conditions, prospective customers or information concerning ongoing contracts. Plaintiffs do not see the relevance of these matters to a Title VII case which involves freezing female employees into clerical positions. If, at some point in the future, it appears that such matters are conceivably relevant to this case and plaintiffs need discovery on such issues, then perhaps the Court might consider a more restrictive confidentiality order as to these areas. Parenthetically, I note that Mr. Gotthoffer has not expressed concern to me about discovery in these areas. Instead, as I pointed out in my July 19 letter, he did express concern about the confidentiality of information regarding salary. Obviously, the order I propose gives ample protection on this issue. Even if salary scales did become public -- and courts do discuss salaries openly in their Title VII opinions -- the impact on Sumitomo's business would be minimal, and hardly comparable to the disclosure of, for example, Sumitomo's prospective customers.

Frankly, I am concerned that Sumitomo wishes to drag out the resolution of a confidentiality order for as long as possible, as it has dragged out and complicated other issues in this case. Mr. Gotthoffer would have me attempt to negotiate with him modification after modification of an order which should be straightforward and simple. I suggest that the order I have proposed is fully satisfactory. I, therefore, ask Your Honor to approve it, so that we can take another small step forward toward engaging in full merits discovery.

The Merits Discovery Issue

Now that class action discovery is completed, I have indicated my wish to Mr. Gotthoffer that we begin merits discovery, rather than awaiting the class action decision. Due to the length of time Sumitomo requested to file its opposition papers, that motion will not even be submitted to the Court until mid-September. In the interim, Sumitomo could well start making data and documents available with regard to its New York office, consistent with plaintiffs' discovery requests, which would be relevant even if a class is not certified, either nationally or locally.

In making this request, I have pointed out to counsel that broad discovery is allowed in individual Title VII cases as well as class cases. See, e.g., Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1100 (2d Cir. 1974). As pointed out in Schlei & Grossman, Employment

Discrimination Law, 2d Ed., 1274, "much of the data which would be relevant in a class action is of course relevant to the individual disparate treatment cases." See, also, Agid, Fair Employment Litigation, 2d Ed, 336-7. Mr. Gotthoffer, however, refuses to consider this approach, and refuses to make further discovery until the class action issue is decided unless Sumitomo is ordered to do so. I would, therefore, respectfully ask Your Honor to direct that merits discovery commence at this time.

Respectfully submitted,

Lewis M. Steel

LMS:PC
cc: Lance Gotthoffer
Enclosure

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PETER A. DANKIN
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PARIS
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STOCKHOLM
TOKYO
TORONTO

July 28, 1983

Honorable Harold J. Raby
United States Magistrate
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Avagliano v. Sumitomo Shoji America, Inc.
Incherchera v. Sumitomo Corporation of America

Dear Magistrate Raby:

We represent defendant in the above-referenced matters, and write in response to Mr. Steel's letter of July 19, 1983 concerning a proposed confidentiality order for use in these actions.

Plaintiffs' application to the Court was made only after a lengthy negotiating process during which Sumitomo agreed to withdraw its own form of order, to use instead the form proposed by plaintiffs, and to drop its request for the inclusion of several provisions in plaintiffs' form of order. Conversely, during this entire time Mr. Steel refused to compromise on so much as a single point and continues to insist that his form of order be used without modification.

However, there are a number of provisions which we believe must be included to protect Sumitomo's legitimate interests and in respect of which we feel unable to compromise any further.

The within actions involve allegations by plaintiffs that they have been denied advancement to management and other high level positions at Sumitomo despite their qualifications for these positions. Discovery has involved, and will necessarily continue to involve, inquiries as

to the actual work being performed by the individuals who presently hold the positions plaintiffs are seeking.

Defendant is engaged in the buying and selling of a great many products. Its business is a highly competitive one. Sources of supply, market conditions, studies respecting competitive conditions, prospective customers and on-going contracts are all highly sensitive, and it is this information, together with strictly personal information such as salary, internal review and the like, that will be subject to plaintiffs' discovery requests. Sumitomo seeks to protect this information since, if it reached the hands of customers, competitors, suppliers or others, it could readily be used to Sumitomo's disadvantage.

With this in mind, Sumitomo finally agreed to request only two addenda to plaintiffs' proposed confidentiality order. One is a provision whereby Sumitomo could restrict disclosure of the most sensitive information in the first instance to plaintiffs' counsel and persons acting under their instruction such as paralegals and support staff. The second proposal would prohibit plaintiffs' counsel from disclosing confidential materials to persons other than plaintiffs without first giving Sumitomo notice and a chance to object to the disclosure. If no objection was made, disclosure would be permitted if the individual in question signed a prescribed affidavit of confidentiality. Plaintiffs object to both proposals.

Mr. Steel objects to the first proposal -- the provision that would initially limit certain information to counsel's use -- because it would deny him the ability to make disclosure of that information to his clients. However, as I have repeatedly told Mr. Steel, it is anticipated we would invoke this restriction only in limited circumstances, and if he felt that he could not make proper use of certain information without disclosing it to one of the plaintiffs, we would consent to such disclosure. There would, of course, be recourse to the Court by plaintiffs if they felt Sumitomo acted unreasonably in withholding its consent.

Apparently because of his own unwillingness to compromise or negotiate in good faith, Mr. Steel assumes that others will act the same way, and therefore maintains that such a procedure places an unreasonable restraint upon him and will necessitate frequent Court applications. To the contrary, it would be the height of folly on Sumitomo's part to overuse this designation, because I doubt very sincerely this Court would

have much patience with Sumitomo if we required plaintiffs to make such an application without a very good reason.

In fact, Sumitomo's proposal is designed to limit the need for Court involvement. Information that may be properly classified as proprietary is often argued as being completely immune from discovery, or at least subject to in camera inspection before being turned over to the opposing party. Moreover, information such as salary data is often granted protection in the Title VII case. "The privacy of the individuals whose salaries are revealed during discovery may be protected by 'sanitizing' the statistics through deletion of names and use of some other means of identifying the employees." Agid, Fair Employment Litigation at 345-46 (1978). The restriction Sumitomo proposes may obviate the need for Sumitomo to make repeated applications to the Court for relief of this kind.

Although plaintiffs' discovery requests will necessarily call for the production of much information sensitive from Sumitomo's standpoint, that information will frequently be of no use or interest to plaintiffs. I somehow doubt, for example, that Mr. Steel will really need to disclose the salary of the President of Sumitomo to his clients, or that information as to the prevailing source of supply of non-ferrous metals must be shown to someone whose employment with Sumitomo was in a different area and in any event terminated five years ago.

Thus, once plaintiffs' counsel reviews such materials, in the great majority of cases he will neither need nor want to disclose it to his clients, and there will be no need for any further action by parties or the Court. For that reason, restricting certain limited information to plaintiffs' counsel, subject to further disclosure to plaintiffs either upon consent or order of the Court, makes sense, causes no prejudice and will materially expedite progress of this litigation.

Plaintiffs' opposition to Sumitomo's second proposal -- that it be given notice and a chance to object prior to plaintiffs' disclosing confidential material to third parties -- is completely inexplicable. Under plaintiffs' proposed order, they are free to designate any one they wish to review confidential material. It would not matter whether that individual works for Sumitomo's biggest competitor, or whether he is a prospective customer who will gain access to information as to what his competitors are doing or the

like; plaintiffs' choice would be absolute, and Sumitomo would have no bases for objecting because Sumitomo would never know to whom its confidential information was going.*

It is illustrative of the lack of merit in plaintiffs' position that their principal objection to Sumitomo's proposal is grounded on an alleged "fear" that Sumitomo will seek to coerce or otherwise improperly influence the individuals to whom plaintiffs intend to make such disclosure. Putting aside the obvious fact that it ill-behooves plaintiffs to accuse Sumitomo (or its counsel) of unethical and potentially criminal conduct without any basis, plaintiffs are not being asked to give up a right of secrecy they would have but for the confidentiality order. Under the Federal Rules of Civil Procedure, the identity of witnesses, including expert witnesses, is wholly discoverable. Sumitomo's right to protect its lists of suppliers, customers and like information outweighs plaintiffs' spurious fears and make weight allegations of potential misconduct.

The other differences between the parties center over the form of affidavit an individual must sign before he will be entitled to receive confidential information. Neither of the disputes involved should have to be resolved by the Court, but plaintiffs' intransigence made this unavoidable.

First, plaintiffs balk at the affidavit provision that makes clear the affiant understands the obligation of confidentiality is imposed by court order and that violation thereof would be treatable as a contempt. Plaintiffs do not deny that the obligation is imposed by court order or that a violation would be a contempt. Although candor and considerations of fairness to the affiant would seem to require that disclosure of these facts be made, Mr. Steel suggests that it would somehow intimidate his potential witnesses if they were advised of the nature of their act and the consequences of any misfeasance.

---

*It is no solution to say that plaintiffs' counsel will inquire as to whether the individual to whom disclosure is being made works for a competitor of Sumitomo. Equal problems may exist if disclosure of certain information is made to customers or suppliers, and in any event plaintiffs' counsel is in no position to ascertain whether there is a relationship requiring non-disclosure.

If anything, the provision at issue is a very mild one. Initially, I requested that we include a provision for liquidated damages in the event of violation. At Mr. Steel's instance I agreed to drop that request, but I do feel it is appropriate to impress upon the individuals to whom disclosure is being made that what they are signing is not merely a private contract with obligations running solely to the parties, but rather a judicial order with obligations running directly to the Court. From Sumitomo's standpoint, the disclosure of its confidential documents to any person is a serious matter, and if there is any legitimacy to the contention of Mr. Steel that by treating this matter seriously it may deter those to whom he intends to make disclosure, then the need for this provision is all the greater.

Finally, plaintiffs contend that the provision in the affidavit which would bar a person who receives information from plaintiffs from working for a competitor of Sumitomo for a period of one year after the termination of this litigation is overbroad. I agree. When Mr. Steel first raised the point, I told him the only information we were concerned about in this regard was information that might be of use, right now, to one of Sumitomo's competitors, such as bids on on-going projects or the administration of on-going contracts. I suggested we try to work out a far more narrow provision, one limited to the disclosure of such information, and which would restrain competitive employment for a reasonable period measured from the date of disclosure, together with whatever other safeguards Mr. Steel felt were necessary to assure plaintiffs adequate latitude in preparing their case.

Predictably, Mr. Steel refused to discuss this proposal and maintained that it would not be acceptable in any form. Thus, the instant application.

When I spoke with Mr. Steel, I did indicate my belief that this matter could be resolved without lengthy briefing or oral argument, simply by submitting to the Court the proposed form of confidentiality order, a statement of the matters still in dispute and a brief factual recitation as to the positions of each party. In light of the tenor of Mr. Steel's letter, and the allegations he makes, it now appears that colloquy with the Court might be helpful. Accordingly, unless the unreasonableness of plaintiffs' position is apparent to the Court on the existing record, I would respectfully request a conference on this matter at the Court's earliest convenience.

Very truly yours,

Lance Gotthoffer

LG/mr
cc: Lewis Steel, Esq.

BY HAND