3-7-1983

Plaintiff Reply Memo in Support of Motion to Consolidate

Lewis M. Steel '63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM IN

SUPPORT OF MOTION TO CONSOLIDATE

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ARGUMENT

Sumitomo complains in its memorandum in opposition that plaintiffs seek consolidation of the above actions "in their entirety." The defendant would have this Court consolidate these actions only for the limited purposes of discovery. It suggests that a further motion for consolidation could be made at a later point in time after discovery is completed.

Sumitomo points out that case law does not support total consolidation which would merge these actions, in a manner which would cause them to lose their separate identity. Ironically, the passage in Wright & Miller, ¶2382, in which consolidation in its entirety is discussed, is linked to a footnote (number 10, at 254) which points out that such consolidation is in a defendant's interest, in that this procedure would avoid a defendant being harassed with several suits "where one would answer all the purposes of justice."

Given the nature of these cases, the Court should grant consolidation to the greatest extent possible consistent with case law. The facts as cited in the Steel affidavit in support of the motion to consolidate plainly reveal that Incherchera has worked for Sumitomo in the same office in a clerical capacity as the twelve Avagliano plaintiffs. Clearly, Incherchera is a member of the Avagliano class, and would have sought to intervene in the Avagliano action, rather than move to consolidate, but for the fact that the Avagliano case was not pending in the district court at the time she

filed suit, before her 90 day period of time had expired.*/

Incherchera, like the Avagliano plaintiffs, has an individual claim as well as a class claim. Thus, even in the Avagliano case, the Court may have to make individual determinations as well as a determination as to whether the class has been discriminated against. Given that Sumitomo has admitted in the United States Supreme Court that it prefers Japanese males and given the clear impact of this policy on females (Sumitomo's 1975 and 1976 reports to the Equal Employment Opportunity Commission show no females in the managerial, sales or executive ranks, see Exhibit 2 attached to Sumitomo's answer number 18 to plaintiffs' interrogatories) plaintiffs in both cases will not have to prove that they are the most qualified individuals for a particular job.**/ Instead, Sumitomo will be required to demonstrate either that no disparity exists between opportunities for men and women or that its practices are permissible because of business necessity. See Wang v. Hoffman, ___ F.2d ___, 30 FEP Cases 703 (decided Dec. 3, 1982); Connecticut v. Teal, ___ U.S. ___, 102 S.Ct. 2525 (1982). As the court stated in Wang, plaintiff cannot be required to prove she is qualified for promotion "unless the legitimacy of that system is first established." 30 FEP Cases at 705.

*/ Incherchera received her right to sue letter in June 1982. The Avagliano case was not remanded to the district court until November.

**/ Incherchera has testified in a deposition that since the Avagliano action, some women have been given titles. She emphasized, however, that these titles were meaningless and that women were still reduced to doing clerical work only. (Incherchera deposition at p. 34, line 14, p. 46, lines 8-10).

Given that the legitimacy of the system will be the central focus of both actions, there is simply no reason to delay ordering consolidation at this time. Such a delay would only cause duplication of motion practice and the expenditure of time and loss of judicial efficiency.

Sumitomo states in a footnote on page 5 of its memorandum that there are counterclaims in the Avagliano case which do not appear in the Incherchera matter. While that is true, the Incherchera answer raises virtually the same issues as the counterclaims by way of the eighth affirmative defense. In essence, the plaintiffs in both cases are accused of bad faith for commencing their actions. Sumitomo also asserts that the two actions can be distinguished because the Incherchera case alleges a violation of 42 U.S.C. §1981 as well as Title VII. The basis for this additional claim is explained in paragraph 10 of the Steel affidavit in support of the motion and in the supporting memorandum. Sumitomo also claims that there may be a difference between the two actions due to the fact that one was commenced later than the other. Given the fact that Incherchera, in all probability, will be considered a member of the Avagliano class, however, it is hard to see how this distinction has any relevance to this motion.

Sumitomo also claims on page 5 of its memorandum that it has been unable to "ascertain the nature of plaintiffs' claims through discovery." This assertion is simply untrue. Plaintiffs in both cases have made clear that their complaints are based upon the preference which Sumitomo gives to Japanese males as well as the exclusion of women from those executive, managerial and sales jobs which are

not held by Japanese males. For the convenience of the Court, plaintiffs are making available their memorandum in opposition to Sumitomo's motion to compel. This memorandum analyzes the record to date and establishes that plaintiffs have been very direct in asserting the nature of their claims.

Dated: New York, New York
March 7, 1983

Respectfully submitted,

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Richard F. Bellman
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BY HAND

March 8, 1983

Hon. Harold J. Raby
United States Magistrate
United States Courthouse
Foley Square
New York, New York

Re: Avagliano, et al. v. Sumitomo Shoji America, Inc.
77 Civ. 5641 (CHT)
Incherchera v. Sumitomo Corp. of America, Inc.
82 Civ. 4930 (CHT)

Dear Magistrate Raby:

At the hearing before Your Honor concerning Sumitomo's motion to compel further answers, Mr. Gotthoffer pressed the defendant's attempt to seek further financial information from plaintiff Incherchera. He cited as authority Rode v. Emery Air Freight Corp., 76 FRD 229 (W.D. Pa. 1977) and a decision in the same case reported at 80 FRD 314. Your Honor indicated that I could respond to the citation of this case by letter.

In Rode, the district court judge was concerned that frivolous class action suits could be filed by indigent nominal plaintiffs without fear of reprisal in the hope of "blackmailing" the defendant into a settlement. The court was concerned that such indigent plaintiffs might not be subject to penalty pursuant to §706 (k) of Title VII, which allows for the imposition of attorneys' fees against plaintiffs who have filed frivolous suits. See 76 FRD at 231-2. The court was concerned because the class action sought to be certified included 2,600 employees who were located in 80 offices in 38 states. The size of the class played a large role in the court's ruling with regard to the financial ability of plaintiffs to move forward with the litigation and to stand ready to make appropriate payment if a court were to later find that the suit was frivolous.

In this case, of course, the class sought to be represented is nowhere near as large as that contemplated in Rode. According to

Sumitomo's answer to interrogatory number 12, the corporation has approximately 200 female employees nationwide. Ninety six of these were located in New York City at the time of Sumitomo's answer, 28 were in Chicago, 23 in San Francisco and 24 in Los Angeles. Moreover, it is clear that the Rode case would involve a much more detailed study of individuals than will be necessary in this case. Here, of course, the analysis of the evidence will start from Sumitomo's concession that it gives a preference to male Japanese who enter the country as treaty traders. Moreover, Sumitomo has admitted in supplementary answer to interrogatory number 13, quoted in its entirety in plaintiffs' main brief at pp. 5 and 6, that it has no objective criteria for whom it promotes. Under these circumstances, plaintiffs will merely have the burden of proving that these practices of Sumitomo result in a significantly discriminatory pattern of promotion. See Wang v. Hoffman, ___ F.2d ___, 30 FEP Cases 703 (9th Cir., 12/3/82), citing Connecticut v. Teal, ___ U.S. ___, 73 L.Ed2d. 130 (1982).

Equally significant, the rationale of Rode has been specifically rejected in this district. See Kamens v. Horizon Corp., 81 FRD 444, 447 (S.D.N.Y. 1979). The district court in Bartelson v. Dean Witter & Co., 86 FRD 657, 675 (E.D. Pa. 1980) also specifically rejected Rode. In Bartelson, as here, a nationwide class was being sought.

Rode and Kamens are underpinned by Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), cert. den. sub. nom. Nissan Motor Corp. v. Sanderson, 421 U.S. 914 (1975). Sanderson makes clear that the courts "generally eschew the question whether litigants are rich or poor," and do not get involved with fee arrangements between lawyers and clients. 507 F.2d at 479.

Judge Haight in Greene v. Emerson, Ltd., 86 FRD 47, 62 (S.D.N.Y. 1980) pointed out that he was not overly concerned with fee arrangement details. Referring to the Sanderson case on this issue, Judge Haight pointed out that "the Tenth Circuit said [the fee arrangement] was none of the class action defendants' business." In Greene, the court also pointed out that the few cases where judges have allowed discovery with regard to financial ability and fee arrangements had occurred in cases involving huge classes where the cost of notice could exceed the named plaintiff's capacity to pay. Obviously, the problem of having to mail out expensive notices does not exist in this case.

The Sanderson court and other courts have been satisfied by a statement from plaintiff's counsel that they are advancing costs

in the case. This firm so states at this time.

Finally, the concern in Rode that the cause of action may be frivolous simply is not a possibility here. The Supreme Court has already ruled that Sumitomo's practice of giving a preference to Japanese males is not insulated from attack by the Treaty of Friendship, Commerce and Navigation between Japan and the United States. Wang v. Hoffman, supra, establishes that in such circumstances a plaintiff will not have to prove she was the most qualified individual for a job nor prove discriminatory intent in order to prevail. The law is also clear that in a Title VII case which is certified as a class action it is possible for the court to find class discrimination and thereby grant relief, even when the same court finds that a particular individual plaintiff's claim is not meritorious. Given all of the above, it is virtually inconceivable that a court will find this case to be baseless so that Sumitomo would have a claim for attorneys' fees under §706.

It is respectfully submitted that the defendant now has in its possession as much information as it is entitled to have prior to the district court deciding the pending class certification motions.

Respectfully submitted,

Lewis M. Steel

LMS:PC
cc: Lance Gotthoffer, Esq.

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Richard F. Bellman
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BY HAND

March 8, 1983

Hon. Harold J. Raby
United States Magistrate
United States Courthouse
Foley Square
New York, New York 10007

Re: Avagliano, et al. v. Sumitomo Shoji America, Inc.
77 Civ. 5641 (CHT)
Incherchera v. Sumitomo Corp. of America, Inc.
82 Civ. 4930 (CHT)

Dear Magistrate Raby:

I am in receipt of a copy of a letter to you from Lance Gotthoffer, Esq., dated March 8, 1983.

This letter follows on the heels of the argument held before you on March 7, in which Mr. Gotthoffer attempted to justify compelling further answers to interrogatories which were clearly irrelevant to a class action determination motion, if not irrelevant to a determination on the merits. Mr. Gotthoffer also argued that certain answers, in his opinion, were incomplete, despite my assurances that the interrogatories in question had been answered as fully as possible. When it started to become apparent at this hearing that Sumitomo was entitled to no further discovery on the class action motions, counsel for Sumitomo put forth the suggestion which is now embodied in Mr. Gotthoffer's March 8 letter. I responded then in the same way that I respond now.

The plaintiffs have defined the class in a manner which they believe to be appropriate. The district court, however, has the responsibility to determine what class or classes are appropriate. At times, a court may ask the plaintiff to redefine the class or subclasses. Moreover, even if after a class is certified, courts at times redefine classes. In light of this process, Sumitomo's proposed order simply does not make sense.

Sumitomo has had more than adequate discovery on the class certification issue. It has sought to delay resolution of the class certification motions by pursuing a motion to compel which has no merit.

Now it seeks further delay by attempting to shift the focus away from its own motion.

For all of the reasons set forth in plaintiffs' Memorandum in Opposition to the Motion to Compel, at oral argument and in my letter dated March 8, 1983, the motion to compel should be denied.

Respectfully submitted,

Lewis M. Steel

LMS:PC
cc: Lance Gotthoffer, Esq.

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March 8, 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:

This firm represents the defendant in the above-referenced actions.

At the pretrial conference held before this Court yesterday, we requested that this Court issue an Order pursuant to Rule 37, Fed. R. Civ. P., compelling plaintiffs to supplement many of their answers to defendant's interrogatories. As Your Honor may recall, plaintiffs' counsel resisted our attempt to secure such further discovery on the ground that plaintiffs had already provided answers to all interrogatories that are reasonably relevant to a determination of the class certification issue with respect to the sole class as to which plaintiffs seek class certification, viz., a class composed of "all past, present and future female employees of defendant."

Your Honor may also recall that we expressed our agreement with your observation that if plaintiffs' counsel does, in fact, intend to seek certification of only that class, most of defendant's unanswered interrogatories need not be answered prior to a determination of the class action issue. We did, however, express our strong reservations that if plaintiffs actually seek certification of some other class, plaintiffs' failure to provide discovery of the information

defendant has requested would effectively make it impossible for defendant to challenge, or for the Court to determine, whether such alternative formulation of the class satisfies the requirements of Rule 23, Fed. R. Civ. P.

We pointed out, for example, that certain interrogatories asked plaintiffs to identify the particular positions for which they believe they were qualified by reason of their education or work experience. Plaintiffs objected to these interrogatories on the ground set forth above, i.e., that the information requested is not relevant to a determination of the class as plaintiffs seek to define it. The scenario we fear is that if plaintiffs are unsuccessful in their effort to have such a class certified, they may then attempt to have certified a class composed of all qualified past, present and future employees of defendant. If defendant is foreclosed from discovery of "qualifications" and other facts relevant to the certification of a class comprised of something other than all women, and if plaintiffs do seek certification of a class of "qualified" women or such other class as plaintiffs choose to redefine, the prejudice to defendant is obvious.

We understand that Judge Tenney and this Court are anxious that these two actions move forward expeditiously. To this end, we would like to offer to the Court a suggested solution. We believe this suggestion would expedite these actions and protect the rights of all the parties by simplifying the issues to be proven at the class certification hearings, something contemplated by ¶2 of Judge Tenney's Order of January 11, 1983, referring these actions to this Court. Our suggestion is embodied in the enclosed draft of a proposed Order that this Court may wish to consider.

If the approach embodied in the proposed Order is adopted, plaintiffs will be afforded the option to avoid further discovery at this time by confirming that they really intend to seek certification solely with respect to the class signified to this Court by plaintiffs' counsel. Conversely, if plaintiffs do intend to seek certification of a different class, we respectfully submit that this Court and defendant have a right to know that fact at this time so that the scope of relevant class certification discovery may be properly defined.

In the hope of expediting matters further, if this approach is adopted Sumitomo would be willing to withdraw its motion to compel answers to those interrogatories not referenced in the Order, and would agree to seek no other discovery prior to a hearing on the class action issue except discovery relating to the financial ability of the plaintiffs to act as class representatives. In such circumstance, defendant could submit its papers in opposition to class certification in both the Avagliano and Incherchera actions within 60 days after the cut-off of class action discovery as provided in the Order.

A copy of this letter and enclosure is being delivered by messenger this day to plaintiffs' counsel.

Respectfully submitted,

Lance Gotthoffer

LG/mr
enclosure

PROPOSED ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,	:	
Plaintiffs,	:	77 Civ. 5641 (CHT)
-against-	:	
SUMITOMO SHOJI AMERICA, INC.,	:	
Defendant.	:	

PALMA INCHERCHERA, on behalf of herself and all others similarly situated,	:	
Plaintiff,	:	82 Civ. 4930 (CHT)
-against-	:	
SUMITOMO CORP. OF AMERICA,	:	
Defendant.	:	

Defendant having filed a Motion pursuant to Rule 37, Fed. R. Civ. P., seeking an Order compelling plaintiffs to respond to interrogatories 17-18; 36-37; 38(b)-39(b); 42; 50-51; 60-89; 98-99 (the "Interrogatories") heretofore served by defendant relevant to plaintiffs' class action claims; and plaintiffs having resisted such Motion by asserting that they have already provided answers to all interrogatories that are relevant to a determination of the class as plaintiffs seek to define it; and plaintiffs' counsel having advised this Court

at a pretrial conference held on March 7, 1983, that the only class plaintiffs seek to certify is one composed of "all past, present and future female employees of defendant"; it is hereby

ORDERED, pursuant to Rule 37(b)(2)(B), Fed. R. Civ. P., that plaintiffs shall be precluded from asserting or seeking certification of the existence of any class other than a class of all past, present and future female employees of defendant, and shall be precluded from offering any evidence in support of the existence or composition of any other class unless plaintiffs elect to supplement their answers to the Interrogatories as hereinafter provided; and it is

FURTHER ORDERED, that within five (5) days from the date of this Order, plaintiffs' counsel shall notify this Court in writing whether plaintiffs elect to supplement their answers to the Interrogatories referred to above; and it is

FURTHER ORDERED, that in the event plaintiffs elect to supplement such answers, plaintiffs' supplemental answers must be served and filed within 30 days from the date of this Order; and it is

FURTHER ORDERED, that in the event that plaintiffs elect not to supplement such answers, no further discovery shall be permitted by or required of any party until after a determination of the pending Motions seeking class certification, except that defendant shall have the right to take limited discovery relating

solely to the issue of plaintiffs' financial ability to act as class representatives.

Dated: New York, New York
March , 1983

HAROLD J. RABY
UNITED STATES MAGISTRATE