7-1983

Correspondence: July 1983

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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.

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*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

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Richard F. Bellman
Lewis M. Steel
Gina Novendstern

July 26, 1983

William Lai
Equal Employment Opportunity Commission
90 Church Street
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Re: Palma Incherchera v. Sumitomo Corp. of America
Charge No. 021-83-1382
Rosemary Bellini v. Sumitomo Shoji America, Inc.
Charge No. 021-83-1381

Dear Mr. Lai:

This is to follow up on our meeting of yesterday.

At our meeting, I referred to a decision of Magistrate Raby regarding discovery in the above matter. I enclose a copy of the Magistrate's memorandum and order dated June 13, 1983. The memorandum is instructive because it indicates the heavyhanded manner in which Sumitomo is litigating these cases.

During the course of our discussion, both Ms. Novendstern and I emphasized that the actions of Sumitomo officials, in talking to our clients on the job about their cases, are part of the overall defense strategy, rather than casual conversations, as Sumitomo appears to claim. The Magistrate's decision substantiates our assertions in this regard.

On page 31, the Magistrate discussed defense counsel's attempt to question Ms. Incherchera concerning her financial ability to act as a class representative and her fee arrangement with counsel. The Magistrate ruled at page 32 that if discovery is warranted on this issue, it should not be done by the defendant, but rather by in camera submission to the Court. The Magistrate's ruling followed my refusal to allow Ms. Incherchera to be questioned regarding our fee agreement.

It should be noted that the attempt to question Ms. Incherchera in this regard took place at her deposition on November 9 and 10, 1982. This is significant because, according to Rosemary Bellini, Mr. Watanabe called Ms. Bellini into his office on December 29, 1982 and, among other things, sought information as to how the plaintiffs were paying their attorneys (see February 11, 1983 Bellini affidavit to the EEOC, ¶5, p. 2). In short, six weeks after counsel for plain-

tiffs objected to this line of questioning at Ms. Incherchera's deposition, Ms. Bellini's supervisor asked for the same information in an on the job conversation. I suggest that this simply could not have been coincidental. Sumitomo's claim that the December 29 meeting between Mr. Watanabe and Ms. Bellini was casual, strains belief in light of the above sequence of events and the fact that Ms. Bellini is the sole remaining Avagliano plaintiff at Sumitomo.

Additionally, I note that the conversation with Ms. Bellini took place after Ms. Incherchera had been pressured by Sumitomo officials to drop the suit and her attorney, and after I had written to counsel for Sumitomo asking him to insure that such activity cease. The Watanabe-Bellilni conversation should be viewed as deliberate conduct by Sumitomo, calculated to interfere with Ms. Bellini's attorney-client relationship, pressure her to settle prior to class certification, and warn her that her continued participation as a Title VII plaintiff would adversely affect her chances of being "promoted" -- from one clerical grade to another. The question with regard to Ms. Bellini's charge, therefore, is not whether the Watanabe-Bellini conversation prevented her from being promoted in January 1983, but instead whether this on the job discussion between a supervisor and a charging party was designed to harass and intimidate Ms. Bellini in order to interfere with her right purusue a Title VII charge on her own behalf and as a class representative.

At our meeting, we also discussed the fear of other Sumitomo employees that management might retaliate against them if they cooperate in this lawsuit. At the Incherchera deposition, Sumitomo's counsel tried to find out which of its present employees had complained to Ms. Incherchera about discrimination. Ms. Incherchera refused to divulge those names as those persons spoke to her in strict confidence. I instructed Ms. Incherchera not to respond to such questioning. Subsequently, the Magistrate ruled that Ms. Incherchera was not required to divulge these names at this time (see page 31 of the decision). I am enclosing Ms. Incherchera's testimony with regard to this subject, and refer your attention to pages 60-74.

Since Ms. Incherchera's deposition, Ellen Dowling and Robin Dooley, have provided affidavits in which both indicate that their personal contacts with Ms. Incherchera met with managerial disapproval. The time sequence described by their affidavits raises an inference that the employees' fears of harassment and intimidation if they become involved in the litigation are not unfounded. In November 1982, Ms. Incherchera testified that certain employees had complained to her about discrimination. In early 1983, Ms. Dowling stated that her conversations with Ms. Incherchera led to hostile stares from managerial personnel and the "silent treatment." In Ms. Dooley's case, the intimidation was more direct; she was warned by her manager to stay away from Ms. Incherchera and not get into trouble. Even if some employees at Sumitomo have had superficial conversations with Ms. Incherchera without feeling pressured, that in no way undercuts the significance of Ms. Dowling's and Ms. Dooley's affidavits.

We also discussed the fact that Ms. Incherchera's evaluations fell precipitously from 88 and 92 in 1980 and 1981, respectively, to 78 in 1982. You told us that Sumitomo justified this in part by the fact that Ms. Incherchera had a new supervisor in 1982, Keiji Takashima. Again, the timing of this decline in her evaluation is significant as it occurred after Ms. Incherchera filed her charge and lawsuit, and resisted Sumitomo's attempts to settle the case out of the presence of her attorney. It is important to note that Mr. Takashima was brought to the offices of Sumitomo's counsel to attend several of Ms. Incherchera's depositions. There was little or no reason to have Mr. Takashima in attendance, as this deposition related to the issue of class action certification, not the merits of the action. He merely watched Ms. Incherchera testify. Even assuming management had not directed Mr. Takashima to negatively evaluate Ms. Incherchera for 1982, the very fact that he was brought into the deposition clearly must have indicated to him that Ms. Incherchera was not a person in great favor with the corporation. Certainly, the Commission should infer that the rating Ms. Incherchera received in 1982 did not reflect the quality of her work, but instead reflected the negative attitude Sumitomo had toward her for filing Title VII charges. The 78 points she received was the lowest possible rating that Sumitomo could give her without it appearing totally ludicrous in light of her earlier excellent ratings.

Moreover, Sumitomo's attempt to justify Ms. Incherchera's 1982 evaluation on the fact that Karen Markowitz was hired is frivolous as the difficulty of Ms. Incherchera's job is clearly set forth in the 1981 evaluation. Indeed, Ms. Markowitz's presence made it even more appropriate to promote Ms. Incherchera as she would be functioning as a lead person.

It is important to note that if Ms. Incherchera had received a rating anywhere near her prior ratings, Sumitomo would have had no excuse for not promoting her, given the fact that the two people who were promoted in her category had ratings of 82 and 92. Moreover, like these two people, Ms. Incherchera had two years in her grade, and therefore under Sumitomo's newly proclaimed rules, was eligible for promotion. Moreover, the difficulty of her job is clearly set forth in the 1981 evaluation.

Certainly, plaintiffs have presented an abundance of evidence to support their contentions of probable cause.

Respectfully submitted,

Lewis M. Steel

LMS:PC
Enclosures

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Richard F. Bellman
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July 20, 1983

Lance Gotthoffer
Wender Murase & White
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Re: Sumitomo

Dear Lance:

Plaintiffs' Second Set of Interrogatories which are enclosed relate to the merits. The set is intended to supplement the first set, which to date has only been partially answered. I have tried to avoid repetitiveness, but do wish to insure that the appropriate facts and documents are provided.

With regard to the first set of documents which you have turned over to me, I note that you have in answer to Avagliano question number 19 and Incherchera question number 23 provided me with materials from January 1975 to November 1977 and from August 1979 and July 1982. Given the Magistrate's request for information in his report of June 13, I request that you provide us with documents for the same time frame utilized in responding to the Magistrate. I make this request without waiving my claim of seeking documents back to 1969.

I also point out that with regard to the documents we received in answer to A20 and I24, regarding changes in personnel and promotion, no information was provided for the period from January 1978 and to August 1979. I would like to know whether this was merely an oversight, or whether there is some reason why these documents were not provided.

Please let me know what your position is with regard to the above items.

Sincerely,

Lewis M. Steel

LMS:NM
Enclosures

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Richard F. Bellman
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Gina Novendstern

July 19, 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, Inc.
77 Civ. 5641
Incherchera v. Sumitomo Corp. of America
82 Civ. 4930

Dear Magistrate Raby:

This letter is written with the knowledge and consent of counsel for Sumitomo. Both sides to the above dispute respectfully request that Your Honor resolve the remaining issues between the parties concerning what provisions are appropriate for inclusion in a confidentiality order, which defendant seeks before making certain documents available to plaintiffs' counsel, pursuant to discovery requests.

Both sides to date have exchanged draft confidentiality orders, which would govern the terms and conditions of Sumitomo complying with plaintiffs' discovery requests. Sumitomo contends it needs certain protection in this regard, and this firm as counsel for plaintiffs has attempted to meet defendants' concerns. I enclose a copy of our draft order which was submitted to Sumitomo's counsel in late May.

Mr. Gotthoffer informs me that our draft is unacceptable, unless we agree to the additional provisions which are set forth in his letter to me dated July 1, 1983, a copy of which is enclosed.

Under paragraph (a) of the July 1 letter, counsel for Sumitomo would add a confidential-restricted category in addition to the confidential category which is in the draft. Under the confidential-restricted category, counsel for plaintiffs could not disclose certain materials to his own clients without going through the extremely cumbersome procedure established in paragraph (b), which, if agreement is not reached, includes having to apply to the Court for an order permitting disclosure.

Despite many phone conversations with Mr. Gotthoffer, I have no idea what material which he contemplates I would be seeking which would

need such protection. When I questioned Mr. Gotthoffer about this, he could give me no examples, other than salaries of other Sumitomo employees, about which he said the following in a June 21, 1983 letter to me:

> Certain information -- such as the salary of other Sumitomo employees -- even if necessary for you to frame your case, in our view is not appropriate material for disclosure to your clients . . .

But, of course, it would be appropriate for plaintiffs to know the salaries of other employees, so that they could give counsel whatever knowledge they had as to how salaries compared to the type of work performed, etc.

Paragraph (b) of the proposed Sumitomo modification of the defendant's confidentiality order is equally burdensome with regard to showing anyone other than "qualified persons," confidential as well as confidential-restricted material. Under the terms of this paragraph, plaintiffs' counsel would first have to give defendant's counsel 15 days written notice as to what it wished to show such additional persons. Thereafter, defense counsel would have ten days to advise plaintiffs' counsel whether or not the defendant objected to such disclosure. Following this, additional time would be required for "a good faith effort" to resolve differences. If differences could not be resolved, then an application to the Court would once again be required. Obviously, this procedure could delay resolution of this action for years, and involve the Magistrate and possibly the Court in endless wrangles.

In paragraph 3 of their proposed order, plaintiffs clearly agree that "confidential data shall be made available only to qualified persons," as such persons are defined in paragraph 2. The only exception to this is contained in paragraph 4.

Under paragraph 4, plaintiffs can show material to people who are not qualified if this would be necessary in order to prepare the case, and if the person agrees to abide by the confidentiality order, and signifies his or her agreement by appropriately executing said order. The reason for this exception is obvious. Sumitomo may well turn over documents which will require counsel for plaintiffs to speak to non-qualified people in order to check out their accuracy. Under the formulation proposed by plaintiffs, counsel would have to obtain this person's agreement to treat the material confidentially before displaying it. If the person refused, then counsel for plaintiffs would either be precluded from disclosing the material or would be required to seek a Court order.

Significantly, under the formulation of plaintiffs' counsel, if a person agreed to abide by the confidentiality provisions by executing an appropriate document, counsel for plaintiffs would not have to

reveal the name of that person to counsel for defendant.[1] Again, the reason for this is obvious. Plaintiffs' counsel believe they are entitled to prepare their case without having defense counsel aware of their every step and everyone they interview.

By contrast, paragraphs (b) and (c) in Mr. Gotthoffer's proposal would require that defense counsel be notified in advance of every such interview where confidential material was involved. Paragraph (c) of the Gotthoffer letter would not only require that all persons designated as confidential sign an appropriate undertaking, but that this be turned over to defendant before confidential material is made available. Thus, the defense could attempt to speak to the prospective witness first or in some other manner attempt to neutralize them. Even if the defendant made no such attempt, however, the process itself could intimidate prospective witnesses and could lead to time delays which could be detrimental to the plaintiffs. Moreover, plaintiffs would not have equal access to the names of the people counsel for Sumitomo is conferring with.

Given the minimal possibility that anything turned over by defendant to plaintiffs' counsel could adversely affect defendant, even if disclosed, there is simply no justification for the onerous procedure which Sumitomo suggests. The order proposed by plaintiffs fully protects Sumitomo. Even without such an order, there is no reason why anyone would have any use for the material which will be turned over by Sumitomo in the course of this litigation for any other purpose than the preparation of this case.

The confidentiality Agreement and Affidavit, a copy of which is also enclosed, which Sumitomo would have confidential witnesses sign only compounds this problem.[2] Paragraph after paragraph is written in the most threatening language.

For example, the last clause of paragraph 2 speaks to holding persons "personally responsible." Paragraph 5 warns of the the "sanction of contempt of court," and requires each individual to submit to the personal jurisdiction of the Court and to waive all objections or defenses to jurisdiction. Paragraph 6 speaks to serving these individuals with papers and pleadings, and requires them to designate an address where they can be served.

Persons who aid or speak with plaintiffs' counsel, either as employees of this firm, experts, translators, or possible witnesses should not be treated like prospective law violators. The affidavit requested by Sumitomo simply does not fit the circumstances of this case.

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[1] Of course, if Sumitomo had evidence that the order had been violated, counsel understands Sumitomo would be entitled to know who had seen the confidential material in question.

[2] Counsel for Sumitomo has agreed to certain cosmetic changes to the draft affidavit, but these do not resolve any of the material issues raised in this letter.

Not only does the Agreement and Affidavit threaten witnesses with court proceedings, it contains the following prohibition:

> 4. I hereby agree not to accept employment or to be retained or engaged by or on behalf of any person engaged in the actual or potential competition with defendant for a period of one (1) year after final disposition of these actions.

Such a provision is bound to discourage prospective witnesses, as it closes persons out of many employment opportunities for an unspecified number of years. By the very nature of its business, Sumitomo competes with untold numbers of businesses, buying and selling thousands of products. Under this provision, a translator employed to translate one document labeled confidential could be barred from working for hundreds of firms in the future. So, too, experts would have to think twice before working with such materials. Other witnesses also would be hesitant to sign such a document.

Plaintiffs suggest that the simplest way to insure that persons have knowledge of the order and abide by it is to have them sign a statement, attached to the order itself, which reads:

> I have read the attached Confidentiality Order, and fully understand it, and agree not to disclose any confidential material, except to qualified persons.

Plaintiffs' counsel would then keep these signed statements in his possession unless Sumitomo came forward with evidence of a violation.

Counsel for Sumitomo asks that you give them appropriate time to respond to this letter. After reading Sumitom's response, I may wish to submit a brief reply. Both sides agree oral argument on this issue is not necessary.

Respectfully yours,

Lewis M. Steel

LMS:PC
Enclosures
cc: Lance Gotthoffer, Esq.

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July 14, 1983

Lewis M. Steel, Esq.
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351 Broadway
New York, New York 10013

Re: Avagliano, et al. v. Sumitomo Shoji America, Inc., 77 Civ. 5641; Incherchera v. Sumitomo Corporation of America, 82 Civ. 4930

Dear Mr. Steel:

By letter dated July 5, 1983, we advised you that during the period from December 1, 1974, through December 31, 1982, defendant employed 354 females in its New York office. This will confirm the advice I gave you during our telephone conversation this morning that during the same time period, defendant employed approximately 530 additional females in its other offices in the United States. As I explained to you during our telephone conversation, this latter number was arrived at on the basis of our client's best estimate that a reasonable approximation of the number of female employees in offices other than the New York office during the specified time period would amount to 150 percent of the number of females employed in the New York office.

Very truly yours,

Robert D. Piliero

RDP:lb

cc: Hon. Charles H. Tenney
Hon. Harold J. Raby

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July 11, 1983

Hon. Charles H. Tenney
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Avagliano, et al. v. Sumitomo Shoji America, Inc., 77 Civ. 5641; Incherchera v. Sumitomo Corporation of America, 82 Civ. 4930

Dear Judge Tenney:

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

Pursuant to the request of Mr. Smith, enclosed herewith is a copy of a letter which we sent to plaintiffs' counsel providing information responsive to the directive of Magistrate Raby in his June 13, 1983, Memorandum and Order.

Very truly yours,

Robert D. Piliero

RDP:lb
Enclosure

cc: Lewis M. Steel, Esq.

BURTON Z. ALTER
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July 5, 1983

Lewis M. Steel, Esq.
Steel & Bellman
351 Broadway
New York, New York 10013

Re: Avagliano v. Sumitomo Shoji America, Inc., 77 Civ. 5641; Incherchera v. Sumitomo Corporation of America, 82 Civ. 4930

Dear Mr. Steel:

During the period from December 1, 1974, through December 31, 1982, defendant employed 354 females in its New York office.

Very truly yours,

Robert D. Piliero

RDP:lb

cc: Honorable Harold J. Raby

BURTON Z. ALTER
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PETER A. DANKIN
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July 1, 1983

Lewis M. Steel, Esq.
Steel & Bellman
351 Broadway
New York, New York 10013

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

Dear Lew:

Further to our conversation in respect of your draft confidentiality agreement in the above-referenced matters, herewith are proposed new provisions respecting materials to be reviewed only by counsel, and the notice to be given us prior to your disclosing confidential materials to third parties:

a) Confidential data which is further designated as "Confidential-Restricted" may be examined only by the members, associates, legal assistants and other peronnel employed by Steel & Bellman, P.C. who are engaged in the preparation of this action for trial, and may not be examined by plaintiffs or any other persons except as may be permitted in accordance with paragraph "b" of this Order. It is anticipated that the designation "Confidential-Restricted" will be used in relatively limited circumstances.

b) Confidential or Confidential-Restricted data may be disclosed to individuals other than those specified in paragraphs respectively only upon 15 days prior written notice from Steel & Bellman to defendant's counsel, providing the identity, function, title, profession or other capacity of the individual so designated, together with a statement as to whether Confidential data, Confidential-Restricted data, or both will be disclosed. Defendant's counsel may

refuse to consent to such disclosure by advising plaintiffs' attorneys within ten days of receipt of such notice. Counsel shall then confer in a good faith effort to resolve any differences and in the absence of such resolution plaintiffs' counsel may seek an order of the court permitting such disclosure, which shall be granted only upon the showing that good cause therefor exists. No disclosure will be made absent such an order.

c) Each individual whom plaintiff seeks to designate as a qualified person to examine Confidential or Confidential-Restricted data shall execute a sworn undertaking in a form reasonably acceptable to defendant's counsel agreeing to abide by the terms of this Order. Such undertaking shall be furnished to defendant's counsel together with the notice provided for by paragraph "b" hereof.

Assuming that we agree on the phraseology, we can then decide where these provisions should go into the draft, although at first glance I would suggest they should generally replace your paragraph 4.

With respect to the form of undertaking, when we sent you our original proposed draft order we appended thereto an affidavit that qualified witnesses could sign. If you have no problem with that format I would suggest we use it, but if there is something there that strikes you as problematic let me know, and we can redraft appropriately. The same, of course, is true for the paragraphs proposed above.

Best regards.

Sincerely,

Lance

Lance Gotthoffer

LG/mr

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DON T. CARMODY
JONATHAN H. CHURCHILL
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July 1, 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:

We represent defendant Sumitomo Corporation of America ("SCOA") in the above-captioned cases.

We refer to your Memorandum and Order dated June 13, 1983, and wish to bring to the attention of the Court two matters we believe warrant clarification at this juncture.

First, we refer to the second footnote on the first page of said Memorandum and Order. We wish to confirm that SCOA's corporate name was changed from Sumitomo Shoji America, Inc., to Sumitomo Corporation of America effective June 1, 1978.

Second, we refer to page 20 of the same Memorandum and Order wherein it is stated that before the United States Supreme Court:

> "defendant contended it had broad discretion to fill its higher echelon positions exclusively with males of Japanese ancestry."

This is not an accurate reiteration of SCOA's position. In fact, SCOA's argument was based on Japanese nationality, not on ancestry. A special effort was made to render this clear in SCOA's main brief (at page 17):

> "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. [citations omitted.] 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 some, or consider themselves 'Japanese,' but who are not Japanese nationals."

To foreclose possible continuing misperception of SCOA's contention, we enclose relevant excerpts of SCOA's main brief (pages 14-18) and reply brief (pages 19-20) before the Supreme Court.

The distinction between nationality or citizenship, on the one hand, and national origin or ancestry, on the other, is crucial for purposes of Title VII. The Supreme Court explicitly declined to reach this issue. See 102 S. Ct. 2374, 2377, n.4; 457 U.S. 176, 180 n.4. As a result, it remains central to disposition of the above-captioned cases, and SCOA therefore regards it as essential that its position be accurately reflected to the Court.

Respectfully yours,

WENDER MURASE & WHITE

By _____

cc: Hon. Charles H. Tenney, Jr.
Lewis Steel, Esq.

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 discrimina-

tory 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.

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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Attorney for Petitioner and Cross-Respondent

Of Counsel:

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ABRAM CHAYES

J. PORTIS HICKS

April 19, 1982

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Richard F. Bellman
Lewis M. Steel
Gina Novendstern

July 1, 1983

David DeRienzis
Assistant Director
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Veatch Program
Plandome Road
Plandome, New York 11030

Dear David:

This letter follows up on our conversation concerning my firm's involvement in litigation against an American subsidiary of a Japanese corporation for class based sex and national origin employment discrimination. As I explained to you, this litigation, against Sumitomo Shoji America, Inc., involves the critical question of whether American subsidiaries of foreign corporations which operate in the United States must obey this country's employment discrimination laws. The outcome of this case will affect the hiring and promotion practices of hundreds, if not thousands, of such American corporations, whose foreign parent corporations are headquartered in countries where many different forms of discrimination are openly embraced. Assuming the Sumitomo litigation is successfully concluded, many thousands of jobs will be opened up in this country to Americans of all races and national origins, as well as to women.

This case also involves classic problems faced by private attorneys engaged in employment discrimination litigation against a corporation with unlimited resources and the willingness to utilize these resources to resist compliance with civil rights laws.

This law firm represents the Sumitomo plaintiffs. In their behalf, we seek support from the Veatch Program for this nationally significant case, which we have already been litigating for more than five years, and which has already led to a major United States Supreme Court decision.

The Sumitomo plaintiffs are a group of women who are past and present employees of an American subsidiary of a Japanese trading corporation.[1] The complaint alleges both sex and national origin discrimination. Shortly after the complaint was filed, Sumitomo sought to dismiss the action on the ground that a Treaty of Friendship, Commerce and Navigation between the United States and Japan exempted the company from American civil rights laws and allowed it to hire managerial and executive employees of its own choice. Sumitomo's contention was rejected by the United States Supreme Court in June 1982. A copy of the decision is enclosed.

---

[1]The case was originally filed on behalf of 12 women in 1977. In 1982, this firm filed a similar action on behalf of another Sumitomo employee. The two actions are both pending before Judge Tenney in the United States District Court for the Southern District of New York. They have been consolidated for discovery purposes, and may be consolidated for trial. The financial support we seek would be utilized for the preparation of both cases.

In the Supreme Court, our position was supported by amicus briefs filed by the NAACP, NOW Legal Defense Fund, Puerto Rican Legal Defense Fund and the American Civil Liberties Union. Also, the Department of Justice filed a brief and argued in support of our legal theory.

The Supreme Court decision, while extremely helpful on a basic legal issue, does not deal with the merits of our claim of discrimination. Moreover, Sumitomo can still defend its policies by asserting the doctrine of "business necessity" and by claiming that there is a bona fide occupational qualification with respect to the jobs it reserves for Japanese men. The case has been returned by the Supreme Court to the district court to resolve these issues.

At present, Sumitomo continues to impose the Japanese practice of limiting women to clerical work. Most of the executive, managerial and sales jobs are filled by male Japanese nationals who enter this country under special visa regulations, although some American men have lower level managerial and sales positions.

Sumitomo's defense of its practices is being presented in a manner which inevitably will make this litigation costly. For example, when we have sought through interrogatories to obtain information concerning job descriptions and qualifications for positions above the clerical level, Sumitomo has maintained that there are no written descriptions, and that each job has to be viewed separately as the functions are constantly in a state of flux. While we believe this defense to be disingenuous, we will have to employ experts to evaluate the company's operations and employee practices. Our experts estimate that we should be prepared to spend $20,000, and

perhaps more, in order to analyze Sumitomo's practices and perform appropriate statistical studies. Not only will our experts have to analyze documents, we plan to seek direct access to the company's offices so that we can actually verify job functions.

The experts working with us, Professors Michael Yuseem and Paul Osterman of Boston University, are both experienced in employment discrimination litigation and are well regarded by other civil rights attorneys. Their rates are modest by standards in the industry and their estimate is at the low end of the range of expected costs for the type of work which will be required. Additional heavy expenses will result from our need to take depositions, and translate certain documents from Japanese into English. The saving grace with regard to costs, however, is the relatively small size of Sumitomo. The company employs approximately 500 persons nationwide, of which approximately one half work in New York. In our view, therefore, the case is manageable.

This firm, of course, is prepared to spend additional thousands of hours of time in order to pursue this case. This means that all of us working here will be devoting a substantial amount of time prosecuting this case. Such an effort affects our cash flow as our staff must be paid while we carry the burden of this litigation. As our clients cannot afford to pay for complex litigation, we represent them without fee.

To help us continue our work on this case, I am asking the Veatch Program to consider a grant in the amount of $50,000. I have attached a grant budget proposal which breaks down how we would utilize these funds. In summary, $20,000 would be allocated for

payments to experts; $7,500 is allocated for deposition expenses and translating documents from Japanese into English and other miscellaneous expenses; $2,500 is allocated for travel. We believe this sum to be necessary as we are seeking to represent a national class and therefore anticipate the probability of having to visit Sumitomo offices outside of New York City. Additionally, our experts are located in Boston, thus necessitating some travel to work with them. Finally, we seek an allocation of $20,000 for payment to attorneys working on the case.

Both my partner and I, as well as our associate, Gina Novendstern, are spending substantial amounts of time litigating this case. We propose drawing off this $20,000 sum at the rate of $100 per hour for time spent on the Sumitomo case. This rate is substantially below our normal rate for litigation. The receipt of such remuneration for our work would immeasurably lighten the burden that this case has placed on our firm. We do, of course, anticipate that we will be required to expend far greater than 200 additional hours on this case to resolve it. Therefore, we would hope that if our grant money is exhausted, the Veatch Program would consider additional aid for this litigation. If, however, this firm does not receive additional monies from the Veatch Program in the future, we will continue our representation of the plaintiffs and the class they represent.

Given what we know about Sumitomo's practices and the United States Supreme Court decision in this case, we do expect to prevail. We believe that success in this case will go far toward convincing other American subsidiaries of foreign corporations that they should

comply with American civil rights law, rather than reserve large numbers of jobs for foreign nationals, and to continue, in certain cases, discriminating against women and minorities.

In terms of impact, I believe that this case represents a very sound use of Veatch funds. Additionally, if we prevail, we will seek from the court reimbursement of all expenses as well as an appropriate attorneys' fees award. In that event, we would reimburse the Veatch Program for its outlay to us.

I would be most appreciative if the Program would consider this request at its earliest convenience. My clients and this firm would be extremely grateful for any help which we receive.

Very truly yours,

Richard F. Bellman

RFB:PC

GRANT REQUEST SUBMITTED BY
STEEL & BELLMAN, P.C. TO
SUPPORT THE SUMITOMO LITIGATION

1.	Expert Witness Costs	$20,000.00
2.	Attorneys' Fees to Counsel	20,000.00
3.	Depositions & Translation Costs	7,500.00
4.	Travel Expenses	2,500.00
	TOTAL REQUESTED	$50,000.00