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Avagliano v. Sumitomo: On Remand to the  
District Court

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

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12-23-1985

## **Magistrate Dolinger's Order to Defendant's Request for Documents of November 5, 1985**

Michael H. Dolinger

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

12/23/85

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LISA M. AVAGLIANO, et al., :

Plaintiffs, :

ORDER

-against- :

77 Civ. 5641 (CHT)

SUMITOMO SHOJI AMERICA, INC., :

Defendant. :

-----X

PALMA INCHERCHERA, :

Plaintiff, :

-against- :

82 Civ. 4930 (CHT)

SUMITOMO CORP. OF AMERICA, :

Defendant. :

-----X

MICHAEL H. DOLINGER  
UNITED STATES MAGISTRATE:

In view of the documented need by plaintiffs' counsel for efficient means of contacting class members (see Affidavit of Lewis M. Steel, Esq., sworn to December 19, 1985, at ¶ 4), I find that defendant has failed to offer a sufficient justification for denying plaintiffs' counsel such information as defendant presently retains -- including telephone numbers -- that would reasonably assist in communicating with the class. Accordingly,


It is hereby

ORDERED that defendant shall produce to plaintiffs' counsel, within two weeks from the date of this Order, the home addresses and home telephone numbers of all members of the class; and it is further

ORDERED that if, after reasonable effort, plaintiffs' counsel is unable to contact any class members, counsel may notify defendants' attorneys in writing of the names of those class members, and defendants shall provide to plaintiffs' counsel, within three (3) days thereafter, any emergency telephone numbers or addresses provided to defendants, by that class member.

DATED: New York, New York  
December 23, 1985

SO ORDERED.

  
MICHAEL H. DOLINGER  
UNITED STATES MAGISTRATE

Copies mailed this date to:

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

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Epstein, Becker, Borsody &  
Green, P.C.  
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New York, New York 10022

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

12/19/85

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LISA M. AVAGLIANO, et al.,

Plaintiffs,

-against-

77 Civ. 5641 (CHT)

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

-----X  
PALMA INCHERCHERA,

Plaintiff,

82 Civ. 4930 (CHT)

-against-

AFFIDAVIT IN OPPOSITION TO  
DEFENDANT'S MOTION FOR A  
PROTECTIVE ORDER

SUMITOMO CORP. OF AMERICA,

Defendant.

-----X  
STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK)

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

1. I am a member of the firm of Steel & Bellman, P.C., attorneys for plaintiffs in the above captioned cases. I submit this affidavit in response to the affidavits and memorandum of law submitted by counsel for defendant on December 16, 1985, in support of the motion of defendant for a protective order which would authorize it to delete names and addresses of class members as well as names and telephone numbers of the class members' emergency contact persons from files turned over during discovery.

2. This affidavit supplements the arguments of counsel which were made before the Hon. Michael H. Dolinger, United States Magistrate, on December 10, 1985.



3. Counsel for defendant refers to the stipulation and order entered into on October 24, 1985 with regard to discovery proceedings in this case. That order was entered into by the parties without prejudice to any positions which either party would thereafter take and without shifting the burdens of persuasion which would normally exist in discovery proceedings. In that October 24, 1985 stipulation and order, both sides agreed to defer resolution of the issue as to whether defendant would be required to provide plaintiffs' counsel with the information which is being resisted in this motion.

4. Thereafter, plaintiffs' counsel, in analyzing how best to move this case forward, determined that it would be helpful to their case to begin contacting class members immediately in order to obtain more detailed information about particular job functions and other issues related to these lawsuits. After receiving personnel files of former SCOA non-rotating New York City employees, and finding some addresses on these forms, plaintiffs' counsel began contacting selected former employees. Their efforts in this regard were often frustrated by the existence of old addresses, no telephone numbers on the personnel forms, and the blanking out of references to persons to be reached in emergency situations. Thus, plaintiffs' counsel was unable to contact many of the people whom they sought. Where contact was made, however, plaintiffs' counsel found that all class members were willing to provide class counsel with information which was extremely helpful to further develop plaintiffs' case. In no instance did any class member express any feelings to any of the attorneys who engaged in these telephone conversations that their privacy was being invaded or that they were otherwise offended at

being called. To the contrary, those contacted were more than willing to be of help.

5. Thereafter, I informed counsel for SCOA that I wished to obtain a modification of the discovery stipulation and order and was hopeful that I could obtain such a modification before the staff of SCOA or their attorneys redacted the information sought from any additional files. At the time the request was made, I would estimate that plaintiffs' counsel had received no more than one-third to one-fourth of all of the files to which we were entitled under the order. Counsel for SCOA resisted this request, and this motion ensued.

6. From the very outset of the discussions among counsel leading to the October 24, 1985 stipulation and order, counsel made clear that plaintiffs might find it necessary to seek modification of the order, especially with respect to material placed in the deferred categories. The purpose of the stipulation was to avoid litigation at the outset of discovery, with the hope that the parties could thereafter voluntarily agree to modifications.

7. Under traditional rules of discovery, plaintiffs are entitled to the information they now seek. As has been stated, the information is being sought so that plaintiffs can prepare their case. Oral communications with the class members at this time are one of the more important ways in which this preparation can proceed. As pointed out at the hearing on December 10, 1985, class counsel's right to make such contacts can only be denied based upon a clear record which sets forth the factual context for the denial. Gulf Oil v. Bernard, 452 U.S. 89 (1981). Counsel for plaintiffs are aware of no Title VII authority holding that class counsel, after class



certification, should not be allowed to contact class members, either orally or in writing, in order to develop the merits of the case. Both Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984) and Vivone v. Acme Markets, Inc., 105 FRD 65 (E.D. Pa. 1985), support plaintiffs' position on this matter.

8. The cases cited by SCOA are so off point as to not require detailed discussion. For example, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 4477 (1978) involved an attorney soliciting accident victims for the purpose of representing them on a contingent fee basis. Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985) involved the imposition of sanctions against defense counsel who secretly sought to obtain exclusion requests from potential class members, in violation of court orders.


9. In this case, SCOA appears to be asserting the privacy rights of its employees to protect itself rather than those workers. Both SCOA's former and present employees, as class members, have an interest in seeing to it that class counsel obtain a full and accurate factual picture as to how SCOA functions. Thus, barriers imposed limiting plaintiffs' contact with class members operate in a manner contrary to the interests of the class.

10. Accordingly, the request for a protective order should be denied, the stipulation and order of October 14, 1985 should be modified consistent with this ruling, and the Court should grant such

other and further relief as is just and equitable under the circumstances.

  
LEWIS M. STEEL

Sworn to before me this 19<sup>th</sup>  
day of December, 1985.

  
NOTARY PUBLIC

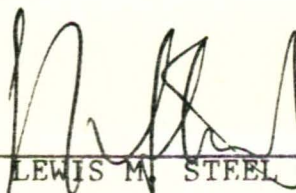
PATRICIA M. COOPER  
Notary Public, State of New York  
No. 31-4628957  
Qualified in New York County  
Commission Expires March 30, 1986



CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Affidavit in Opposition to Defendant's Motion for a Protective Order was served this 19th day of December, 1985, via first class mail, postage prepaid, upon counsel for defendant, as follows:

Epstein Becker Borsody & Green, P.C.  
250 Park Avenue  
New York, New York 10177

  
LEWIS M. STEEL