6-14-1979

Defendant's Memo of Law in Support of Motion to Amend Order

Sumitomo Shoji America, Inc.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG, On Behalf of Themselves And All Others Similarly Situated,	:	77 Civ. 5641(CHT)
Plaintiffs,	:	
-against-	:	
SUMITOMO SHOJI AMERICA, INC.,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO AMEND ORDER

INTRODUCTION

Defendant, Sumitomo Shoji America, Inc. ("Sumitomo"), submits this memorandum of law in support of its motion made pursuant to 28 U.S.C. § 1292(b) for an order amending this Court's opinion and order dated June 5, 1979 (hereinafter the "Order"), so as to include a finding that:

1. Insofar as this Court refused to dismiss plaintiffs' claims made pursuant to Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000(e), et seq.), the Order

involves controlling questions of law as to which there is substantial ground for difference of opinion; and

2. An immediate appeal from the Order may materially advance the ultimate determination of this litigation.

STATEMENT

On June 5, 1979, following several rounds of briefing by the parties as contemplated by the Court, including amicus curiae briefs filed by the United States Equal Employment Opportunity Commission, as well as numerous post-briefing submissions, this Court issued its Order which, among other things, denied so much of a motion made by Sumitomo, pursuant to R.12(b)(6) of the Federal Rules of Civil Procedure, as requested dismissal of plaintiffs' Title VII claim herein. The part of Sumitomo's motion which was denied was made on the ground that plaintiffs' Title VII claim, insofar as it challenges Sumitomo's hiring of certain nonimmigrant Japanese nationals for managerial and executive positions, fails to state a claim because such hiring practices are authorized by, and privileged pursuant to, the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (1953) (the "Treaty"), and the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq., and therefore are not proscribed by or otherwise violative of Title VII.

In its June 5 Order, this Court held, in substance, that:

a. Sumitomo, which is a wholly owned subsidiary of a Japanese corporation, is by definition of law including the

Treaty a citizen of New York, the place of its incorporation, and is therefore not a national of Japan for the purposes of the Treaty;

b. Although a branch of a Japanese corporation doing business in New York has standing to assert the freedom of choice hiring rights granted by the Treaty, a United States subsidiary of a Japanese corporation does not have standing to do so;

c. The Treaty provides to a United States subsidiary of a Japanese corporation only national treatment and the right not to be discriminated against in favor of domestic corporations, and thus a New York subsidiary of a Japanese corporation has no rights in respect of hiring executive and managerial personnel beyond those of any other New York corporation; and

d. Since the Treaty accords no rights to a United States subsidiary of a Japanese corporation with respect to freedom of choice in hiring nonimmigrant treaty trader Japanese nationals for executive and managerial positions, such hiring practice is subject to scrutiny under Title VII.

Sumitomo submits that each of these questions is a controlling question of law as to which there is substantial ground for difference of opinion, and that immediate appellate resolution of such questions will materially advance the ultimate determination of this litigation. Accordingly, it is appropriate to certify such questions for immediate appeal to the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1292(b).

ARGUMENT

POINT 1

THIS COURT'S ORDER SHOULD BE AMENDED TO PROVIDE A CERTIFICATION FOR APPEAL

The general preference in our Federal Court system for final, rather than interlocutory, appeals is subject to the specific, well-recognized exception that in certain instances interlocutory appeals serve a valuable and salutary purpose. Under appropriate circumstances, appeal from an interlocutory order may avoid unnecessary trials and expedite the just and economic resolution of litigation. See, e.g., 7B Moore's Federal Practice, §1292, JC430, et seq. Thus, in an appropriate case, appeal from an interlocutory order is not merely permitted -- it is favored. See, e.g., Ackerly v. Red Line Systems Inc., 551 F.2d 539 (3d Cir. 1977); United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959); E.F. Hutton & Company v. Brown, 305 F.Supp. 371 (S.D. Texas 1969).

28 U.S.C. § 1292(b) expressly provides for appeal of an interlocutory order:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order...."

Thus, for certification to be appropriate, three elements must be present:

a. A controlling question of law;

b. A substantial basis for a difference of opinion on such question; and

c. That an immediate appeal may materially advance the ultimate determination of the litigation.

Each such criterion is satisfied here, and this Court's June 5, 1979 Order should be amended to provide for an immediate appeal.

A. The Order Involves A Controlling Question of Law

Since the issues here involved -- standing, and the interaction of certain provisions of a United States treaty and related statutes -- are purely legal, as distinct from factual, there is no question but that the Order, not based on disputed fact issues, involves a question of law. Whether Sumitomo may assert the hiring rights granted by the Treaty is a "controlling" question within the meaning of 28 U.S.C. §1292(b), since as there used, the term refers simply to those questions which, if erroneously decided by the District Court, would constitute reversible error on appeal. Katz v. Carte Blanche, 496 F.2d 747 (3d Cir. cert. denied 419 U.S. 885 (1974); In re Hedendorf, 263 F.2d 887 (1st Cir. 1959). See, also, 9 Moore's Federal Practice, ¶205.5, at 1109-10 (1975). The question of law need not be dis-

positive to be controlling. It need only be a question the resolution of which may appreciably shorten the time, effort and expense exhausted between the filing of a lawsuit and its termination. E.F. Hutton v. Brown, supra, 305 F. Supp. at 403, and cases there cited; accord, 9 Moore's, supra, at 1109-1110.

Assuming, as Sumitomo asserts, that it is entitled to rely on and raise as a defense the freedom of choice hiring provisions of Article VIII of the Treaty and related provisions of the Immigration and Nationality Act, which provide the right to hire Japanese nationals for executive and managerial positions, it follows that a determination at trial by this Court of liability in respect of Sumitomo's hiring of executive and managerial personnel would have to be reversed.* Also, as appears more fully in Point "C" below, an appellate determination contrary to this Court's Order would appreciably shorten the time, effort and expense which would be otherwise incurred in this action. Thus, within the meaning of Section 1292(b), a controlling question of law is presented.

B. A Substantial Basis Exists for A Difference of Opinion on the Issues of Law Involved.

That the issue here involved--Sumitomo's standing to assert hiring rights granted by the Treaty--is a novel question,

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*Except possibly as to plaintiff Turner, who claims to be a citizen of Japan. Cf., Opinion of United States Department of State dated October 17, 1978, at para. 1.

as to which there exists substantial basis for difference of opinion, does not seem susceptible to serious doubt. Prior to the return date of Sumitomo's motion, neither plaintiffs nor defendant, nor the EEOC as amicus curiae, were able to cite a single judicial authority which addressed the issue of the right of a United States subsidiary of a Japanese corporation to assert the Treaty's hiring rights. The only judicial authority cited which purported to address the nationality of a Japanese subsidiary corporation for purposes of the Treaty, United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957), did so in a different context, i.e., application of United States antitrust laws in relation to an article of the Treaty which does not purport to grant a non-contingent self-enforcing right. Sumitomo also believes that the Oldham decision is, in pertinent part, called into question by a subsequent decision from the same Circuit, Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, (9th Cir.), cert. denied 429 U.S. 940 (1976), where the Ninth Circuit held that a U.S. subsidiary of a foreign corporation can raise substantive rights granted by a treaty.

The decision in Spiess v. C. Itoh & Co. America, Inc., ___ F. Supp. ___ (S.D. Tex. March 1, 1979), relied on by this Court in its denial of Sumitomo's motion to dismiss, was decided after submission of Sumitomo's motion. In Spiess v. C. Itoh, the Court relied heavily on the decision in Oldham, supra, and

held that a corporation owned by Japanese nationals does not have Japanese "nationality" for purposes of the Treaty. However, that Court, by Order dated April 10, 1979, did precisely what Sumitomo asks here, i.e., it amended its order denying dismissal to provide for certification of its determination, acknowledging that its decision did involve a controlling question of law as to which there is substantial ground for difference of opinion. Indeed, the mere fact that the question involved is a novel one is sufficient by itself to satisfy the standard of substantial basis for difference of opinion. See, Colon v. Tomkin Square, Inc., 294 F.Supp. 134, 139-40 (S.D.N.Y. 1968).

In addition to the authority of Spiess v. C. Itoh, supra, which admits doubt as to the standing issue, this Court may consider other authorities, not restricted to judicial holdings, which show that there is substantial ground for difference of opinion. 9 Moore's, supra, at 1110. Such other authorities exist here, e.g., the Opinion of the United States Department of State, dated October 17, 1978, which provides:

> "The phrase 'of their choice' should be interpreted to give effect to the intention that United States companies operating in Japan could hire United States personnel for critical positions and vice versa, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders...."

* * *

> "....[W]e see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form."

Reference is also made to administrative determinations that corporate nationality under the Treaty for purposes of employing one's own nationals as nonimmigrant treaty traders--the very question here presented--should be determined by the ownership of the subsidiary, and not by its place of incorporation. Matter of N.S., VII I & N Decs. 426 (March 26, 1958); Matter of Z & R, VIII I & N Decs. 482 (November 23, 1959).*

So too, in contrast to this Court's holding that the purpose of the Treaty is to assure merely that a United States subsidiary will not be discriminated against in favor of domestic corporations, noted authorities have stated that the hiring provisions of treaties such as the provisions of Article VIII(1) of the Treaty are, indeed, intended to grant greater than national treatment. Walker, "Provisions on Companies in United

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*That this Court rejected Sumitomo's reliance on the State Department Opinion, regulatory standards and other authority as unwarranted in the face of definitional provisions in Article XXII(3) of the Treaty (e.g., Order at pp.10-11), citing Spiess v. C. Itoh, supra, does not remove this issue from doubt; even the Court in the latter case has expressed its doubts about the standing issue and certified it for appeal.

States Commercial Treaties", 50 AM.J. Int'l. L. 373, 386, n.62 (1956).

Because in the instant case there is no appellate court authority in point, and the one federal case on consonant facts itself embodies a recognition that reasonable minds may differ on the question involved, certification is appropriate. Indeed, this action at its present stage falls squarely within the cautionary direction of Kelley v. Societe Anonyme Belge D'Exploitation, etc., 242 F.Supp. 129, 148 (E.D.N.Y. 1965) where the Court, in granting certification pursuant to § 1292(b) in an action involving the much construed provisions of the Warsaw Convention, stated:

> "While the Court reaches this decision with certainty it is not unmindful of the admonition of Justice Cardozo...
>
> 'no one can study the vague and wavering statements of treaties and decision in this field of international law [the application of a treaty] with any feeling of assurance at the end that he has chosen the right path. One looks in vain for a uniformity of doctrine or of scientific accuracy of exposition. There are wise cautions for the statesmen. There are few precepts for the judge.'
>
> "The Court, therefore, deems it advisable that this decision to the Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1292(b)".

Accord, Spiess v. C. Itoh & Co., supra (April 10, 1979 Order at 1-2).

C. An Immediate Appeal from the Order May Materially Advance the Termination of this Litigation.

Plaintiffs have brought this suit as a putative nation-

wide class action. It is manifest that in such an action, both pre-trial discovery and the trial on the merits will prove long, arduous and expensive to all of the parties. See, e.g., Spiess v. C. Itoh, supra. If the questions for appeal are resolved as Sumitomo believes they should be, as a practical matter this action will be vastly simplified and will proceed to trial at less expense and much more quickly than in its present form. As to the executive and managerial and other specialist positions occupied by nonimmigrant Japanese nationals, the first and second claims pleaded in the complaint herein, asserting violations of Title VII, will be dismissed as against all plaintiffs except, perhaps, plaintiff Turner who claims to be a citizen of Japan. Even if the action remained as a class action as to positions not within the ambit of the Treaty, there would no longer be at issue the question of whether the positions occupied by treaty traders are subject to attack. Thus, the instant matter would be converted into a manageable litigation which could be disposed of without the substantial time and cost problems this action presents in its present posture.

Moreover, if Sumitomo's position is sustained on appeal, it would also remove from this case the necessity of litigating a large number of issues as to which only persons who have been reassigned to Japan have knowledge (since, pursuant to law, as nonimmigrant Japanese nationals their assignment to the United States under the Immigration and Nationality Act is

limited to a few years, many of the plaintiffs' former supervisors are no longer in the United States). Thus, if Sumitomo's Treaty-based defense is sustained on appeal, the necessity for lengthy travel, potential discovery in Japan, and the concomitant cost, burden and expense to all concerned, should be obviated.

Finally, because the United States Department of State has expressed its belief that the hiring rights at issue herein extend to United States subsidiaries of Japanese companies, immediate appellate resolution of this matter can also obviate possible conflicts between this Court's interpretation of the Treaty and the interpretation given the Treaty by the executive branch.

In summary, the record demonstrates that this action involves issues which are controlling issues of law on which substantial difference of opinion exists. An appeal may materially advance the determination of this litigation. Accordingly, Sumitomo's motion for an order providing a certification for appeal should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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MEMORANDUM OF LAW IN SUPPORT
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June 14, 1979

Hon. Charles H. Tenney
United States District Court
Southern District of New York
Foley Square
New York, New York

Re: Lisa M. Avigliano, et al. v. Sumitomo Shoji America, Inc. - 77 Civ. 5641

Dear Judge Tenney:

I enclose plaintiffs' Notice of Motion for Reargument and for Dismissal of Counterclaims 2, 3 and 4 and supporting Affidavit and Memorandum. The originals of these papers have been filed with the Clerk of the Court and served upon opposing counsel.

Respectfully yours,

Lewis M. Steel

LMS/pc
Enclosures
cc: Wender, Murase & White

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June 14, 1979

Clerk
United States District Court
Southern District of New York
Foley Square
New York, New York

Re: Avigliano, et al. v. Sumitomo Shoji America, Inc.
77 Civ. 5641 (CHT)

Dear Sir or Madam:

I enclose for filing plaintiffs' Notice of Motion for Reargument and for Dismissal of Counterclaims 2, 3 and 4 and supporting Affidavit and Memorandum of Law. Certificates of Service are enclosed.

Very truly yours,

Lewis M. Steel

LMS/pc
Enclosures
cc: Wender, Murase & White