
On Remand to the District Court

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

8-11-1982

Affidavit of Lance Gotthoffer

Lance Gotthoffer

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address
400 PARK AVENUE
BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: - Please take notice that an order

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

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.,
WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address
400 PARK AVENUE
BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 77 Civ. 5641
82 Civ. 4930 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVAGLIANO, et al.,
Plaintiffs,

-against-
SUMITOMO SHOJI AMERICA, INC.,
Defendant.

PALMA INCHERCHERA, on behalf
of herself and all others
similarly situated,
Plaintiff,

-against-
SUMITOMO CORP. OF AMERICA,
Defendant.

Affidavit of LANCE GOTHOPFER

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address, Telephone
400 PARK AVENUE
BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022
(212) 832-3333

To

Attorney(s) for DEFENDANT

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

WENDER, MURASE & WHITE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

LISA M. AVAGLIANO, et al., :
Plaintiffs, : 77 Civ. 5641 (CHT)
- against - :

SUMITOMO SHOJI AMERICA, INC., :
Defendant. :

----- x

PALMA INCHERCHERA, on behalf :
of herself and all others :
similarly situated, : 82 Civ. 4930 (CHT)
Plaintiff, :

- against - :
SUMITOMO CORP. OF AMERICA, :
Defendant. :
: AFFIDAVIT OF LANCE GOTTHOFFER
: :
: :

----- x

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

LANCE GOTTHOFFER, being duly sworn, deposes and says:

1. I am a member of the firm of Wender Murase & White, attorneys for the defendant ("Sumitomo"). I have personal knowledge of the facts set forth below, and make this affidavit to summarize the prior proceedings herein relevant to the Court's consideration of plaintiffs' motions for certification of these actions as class actions.

2. The starting point is this Court's reference of both captioned matters to Magistrate Raby for purposes of supervising discovery and other matters preliminary to class certification. In the course of class discovery, Sumitomo propounded interrogatories to each of the named plaintiffs in the Avagliano action, and took the deposition of Palma Incherchera, the sole plaintiff in the Incherchera action. Sumitomo asked, inter alia, that plaintiffs provide information regarding the specific positions at Sumitomo from which they claim to have been excluded, and the specific qualifications which they claim to have for those positions. Sumitomo also asked plaintiffs to identify with specificity the members of the class they purport to represent and to provide information regarding positions and qualification in respect of such alleged class members.

3. Plaintiffs' responses were consistent; if unenlightening. In every instance plaintiffs merely stated that they represented all female employees of Sumitomo, past, present or future, and that all such women had been excluded from all positions above the clerical and secretarial levels at Sumitomo. Plaintiffs refused to provide any information in respect of specific positions or the qualifications they claimed were required for such positions.

4. After efforts failed to secure more meaningful answers through plaintiffs' counsel on a voluntary basis, Sumitomo applied for an Order pursuant to Rule 37 of the Federal Rules of Civil Procedure to compel plaintiffs to

articulate more clearly the factual basis for their class claims. In papers submitted to Magistrate Raby, and in oral argument, Sumitomo pointed out that the information it sought would be necessary to a determination of the class certification motions. In Sumitomo's submission, it was inconceivable that plaintiffs would really ask this Court to certify a class of all female employees on the ground that they were excluded from all managerial level positions without establishing their qualifications for such positions. Since significant issues on the certification motions would include whether there were a sufficient number of women qualified for advancement to management positions to constitute a class, and, if so, whether the named plaintiffs were a part of that class, further discovery seemed necessary on the qualification issue.

5. Amazingly, however, plaintiffs took the position before Magistrate Raby that the only class they would seek to certify was a class of all female employees at Sumitomo, past present and future, without regard to their qualifications. Plaintiffs argued that the existing record was sufficient, and that no further discovery was needed by any party in order for this Court to rule upon plaintiffs motions to certify such a class. Plaintiffs thus urged Magistrate Raby to deny further discovery and to order the class certification motions on for a hearing.

6. On behalf of Sumitomo, I conceded that, if plaintiffs were truly willing to stand or fall on their class defini-

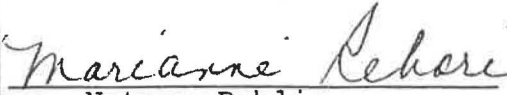
tion, no further discovery was necessary and by letter dated March 8, 1983 I so advised Magistrate Raby. See Exhibit 1 hereto. Sumitomo's only concern was that plaintiffs would seek to redefine their class definition when the certification motions came on before this Court, and, at that time, would try to assert that a more limited class, such as a class of qualified female employees of Sumitomo, in fact existed. In such an instance, the absence of additional discovery would indeed work to Sumitomo's prejudice.

7. Therefore, Sumitomo advised Magistrate Raby that it would be satisfied if he either ordered further responses from plaintiffs, or denied further discovery on the ground that plaintiffs were to be held to their definition of a single class of all female employees of Sumitomo, and that if such definition was improper as a matter of law, plaintiffs would not be free to change their theory in mid-stream.

8. On June 13, 1983, Magistrate Raby rendered his decision on Sumitomo's motion to compel, holding that no further discovery on the referenced issues was necessary because "[P]laintiffs have . . . declared that they are seeking certification of a single class, consisting of all female employees of defendant Sumitomo past, present and future." (at p. 17).


LANCE GOTTHOFFER

Sworn to before me this
19th day of August, 1982.


Marianne Rebori
Notary Public

MARIANNE REBORI
NOTARY PUBLIC, State of New York
No. 4699667
Qualified in Nassau County
Commission Expires March 30, 1985

Exhibit 1

HURTON Z. ALTER
GREYSON BRYAN
JONATHAN H. CHURCHILL
PETER A. DANKIN
DOUGLAS J. DANZIG
SAMUEL M. FEDER*
PETER FIGDOR
ARTHUR J. GAJARSA*
PETER J. GARTLAND
LANCE GOTTHOFFER
CARL J. GREEN
RICHARD LINN*
MATTHEW J. MARKS
EDWARD H. MARTIN
GENE Y. MATSUO
FUMIAKI MIZUKI
JIRO MURASE
ALDEN MYERS
PETER J. NORTON
MICHAEL E. PARRY
WAYNE E. PARTRIDGE
ROBERT D. PILIERO
JOHN C. ROSENGREN
ROGER L. SELFE
JOHN B. WADE III
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JOHN TOWER WHITE

IRA T. WENDER
COUNSEL
*(NOT ADMITTED IN NEW YORK)

WENDER MURASE & WHITE

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PARTNERS RESIDENT IN
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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

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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.

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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