2-4-1985

Defendant's Memo on Statutes of Limitations re: Notice of Class Action

Sumitomo Shoji America, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANT'S MEMORANDUM OF LAW ON THE APPROPRIATE STATUTES OF LIMITATION FOR THE AVAGLIANO TITLE VII CLASS, THE INCHERCHERA TITLE VII AND SECTION 1981 CLASSES, AND ON WHETHER NOTICE SHOULD BE SENT TO ABSENT CLASS MEMBERS

EPSTEIN BECKER BORSODY & GREEN, P.C.
250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077
(212) 370-9800

Attorneys for Defendant

TABLE OF CONTENTS

Exhibit A | Exhibit B | Exhibit C | Exhibit D | Exhibit E

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In this Court's November 7, 1984 Memorandum opinion and order granting plaintiffs' motions for class certification in the above-referenced matters, the Court provisionally certified three distinct classes of females under Fed. R. Civ. P. 23(b)(2). Each class is extremely broad and nationwide in reach. In Avagliano v. Sumitomo Shoji America, Inc., 77 Civ.

5641 (CHT) ("Avagliano") the Court certified a class of female present and past employees of defendant alleging employment discrimination on the basis of sex and possibly national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") ("Class I"). In Incherchera v. Sumitomo Corporation of America, 82 Civ. 4930 (CHT) ("Incherchera"), the Court certified two classes of female present and past employees of defendant; one alleging discrimination on the bases of sex and national origin under Title VII ("Class II") and the other alleging discrimination on the bases of sex, national origin and "race," under the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("section 1981") ("Class III" or the "section 1981 class"). As the Court's opinion concluded:

> In both of the actions before the Court, a Title VII class is hereby certified. In Incherchera, a § 1981 class is also certified. Each of the classes will be nationwide in scope and will consist of all past and present female employees of Sumitomo, except as limited by the applicable statutes of limitations.

Avagliano v. Sumitomo Shoji America, Inc., No. 77 Civ. 5641 (CHT) slip op. at 48 (S.D.N.Y. Nov. 7, 1984) ("Avagliano II").

In its November 7 opinion, the Court posed three questions for briefing by the parties. First, the Court asked that the parties provide it with factual information sufficient to determine the appropriate statutes of limitation for the two Title VII classes it had certified, to aid it in ascertaining those who are members of the class. Second, to the same end,

it asked that the parties brief the question of what statute of limitations would be applicable to the section 1981 class (Class III) certified in Incherchera. The third issue posed was whether notice to all absent class members should now be sent.

As discussed more fully herein, the answer to the first question i.e., the statutes of limitations applicable to the Title VII claims at issue, is reasonably straightforward. This is because Title VII itself specifically provides for the time periods within which claims must be filed thereunder. See 42 U.S.C. § 2000e-5(c) and (e).

The responses to the other two questions, concerning the statute of limitations applicable to the section 1981 claim and whether notice should be issued at this time to absent class members, are quite complex. That is to say, by certifying the Incherchera nationwide section 1981 class, comprised of all present and former female employees as requested by plaintiff, a legal anomoly has been created. As noted in more detail infra, Class III in its present configuration appears to conflict with the well-established holdings of the courts in this and other jurisdictions, that section 1981 does not bar discrimination on the basis of sex whatsoever. See Avagliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506, 513 (S.D.N.Y. 1979) ("Avagliano I"); Runyon v. McCrary, 427 U.S. 160, 167 (1976); B. Schlei & P. Grossman, Employment Discrimination Law 674 & n.23 (2d ed. 1983) (collecting cases, and noting that "[t]he point has become so

generally accepted today that courts rarely analyze the issue any longer."). As discussed more fully at Point IV, at 37-44, defendant questions whether plaintiff Incherchera has a viable claim under section 1981 at all, insofar as she claims discrimination on the bases of sex and national origin only (in fact) and purports to represent a class of females with like alleged aggrievement. This fact, together with plaintiffs' counsel's failure to articulate the precise contours of his clients' Title VII or section 1981 class claims, has resulted in substantial uncertainty concerning both the applicable statutes of limitation and the question of notice in respect of the claims asserted by the Incherchera class (Class III) under that statute.

Indeed, never once during the seven year pendency of the Avagliano matter and the two and one-half year history of Incherchera has plaintiffs' counsel articulated the precise claims he seeks to have adjudicated in these litigations. It appears that the Court will be unable to resolve the three questions it has posed unless plaintiffs are now required to articulate their claims with reasonable specificity. Thus, for example, unless the Court is advised of the precise nature of these claims and the facts plaintiffs assert in support thereof, the Court cannot properly determine the location where plaintiff Incherchera's and the Class III absent class members' causes of action under section 1981 allegedly arose, and hence, decide the appropriate section 1981 statutes of limitation

applicable to these claims. Nor can it decide the severity of the evident conflict between the claims of the various certified classes so as to determine whether it is essential that notice, etc., issue to all class members at this time.

In this memorandum, defendant Sumitomo Corp. of America ("Sumitomo/America") will address the vacuum caused by plaintiffs' imprecision of dialectic.

SUMMARY OF ARGUMENT

The Title VII Claims (Class I and Class II)

Under Title VII, and in a deferral state such as New York wherein these proceedings have commenced, a charge of employment discrimination must be filed with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the allegedly unlawful act. The United States Supreme Court has determined that in such a deferral state the filing with the EEOC may not generally occur until a party has submitted such claim to the deferral agency for its exclusive inquiry for a period of sixty days. Mohasco Corp. v. Silver, 447 U.S. 807 (1980); 42 U.S.C. § 2000e-5(c) and (e).

The named plaintiff (Joanne Schneider) who first filed a charge in Class I submitted a charge of sex discrimination to the EEOC for deferral to the New York State deferral agency (New York State Division of Human Rights) on October 12, 1976. This charge was returned by the deferral agency to the EEOC as of October 19, 1976. (See Exhibit A.) If plaintiffs are also asserting national origin discrimination claims on behalf of the women in Class I, the named plaintiff (Janice Silberstein) who first submitted such a charge to the EEOC for deferral did so on February 28, 1977. The deferral agency returned the charge to the EEOC on March 17, 1977. Likewise, in Class II, Incherchera submitted her charge alleging only sex and national origin discrimination to the EEOC for deferral to the New York State

Division of Human Rights on or about January 5, 1982. It became a perfected EEOC filing on March 6, 1982 (60 days afterwards) and therefore was "filed" with the EEOC on that date. (See Exhibit B.) Accordingly, only those women employed with Sumitomo within 300 days prior to the first filing of sex and national origin charges by a named plaintiff in Class I and within 300 days of Ms. Incherchera's filing in Class II may be included in these classes. The respective class participation dates are December 24, 1975 for Class I (sex discrimination claims) and May 21, 1976 (national origin discrimination claims) and May 10, 1981 for Class II (sex and national origin discrimination claims).[1]

The 1981 Claims (Class III)

The second question, regarding the applicable statute of limitations for Class III (the section 1981 class) is made complex by the Court's certification of this class, which apparently embraces a virtually limitless number of claims, on a nation-wide (multi-state) basis. As previously noted, defendant questions whether plaintiffs may maintain a section 1981 claim in these premises since, under the law of the case, they have no cause of action.

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[1]Related to this and as discussed infra in the text, no race discrimination charge was ever filed by Ms. Incherchera. (See Exhibit B.) Thus, plaintiff Incherchera and the class she represents (Class II) may only allege discrimination on the basis of sex and national origin. Plaintiff Incherchera's race allegation in her judicial complaint cannot nunc pro tunc be made a part of her Title VII charge and neither she nor any other Class I or Class II members may bring Title VII race discrimination claims.

Notice to Class

Whether notice should be given to the classes and the form of such notice involve matters generally reserved to a trial court's discretion. The Court should, however, consider a number of factors that depend on the as yet to be determined precise configuration of the three classes certified in this action. For example, when, as in this case, there are many potential class members who are unaware of these suits, who do not know their class representatives or their class counsel whose actions could prejudice their rights, and are unaware of their rights and obligations in this case, notice and the opportunity to opt out would appear essential.

This is particularly critical with respect to Class III in which the Court has certified a nationwide section 1981 class of all present and past female employees purporting to assert any type of promotion or training claim under section 1981; a class whose claims and interests appear to conflict with those of either Class I or Class II or both as more fully discussed at Point V.B, at 49-56. The existence of this conflict has been heightened by the failure of plaintiffs' counsel to clearly articulate the basis of these claims.

Defendant believes that the gravaman of the claims of all three classes appear to derive from the common complaint of the named plaintiffs -- that Sumitomo/America allegedly prefers

for certain exempt level positions in the United States persons who are assigned as rotating staff by its parent Sumitomo Corporation ("Sumitomo/Japan"). All such rotating staff persons assigned to United States employment opportunities are employees of Sumitomo/Japan, who, as demonstrated by their visa status, and due to United States immigration controls and requirements but not any policy fairly attributable to defendant or Sumitomo/Japan, are citizens of Japan.[3] In attempting to incorporate this complaint into a viable action against Sumitomo/America, however, the plaintiffs have employed a shotgun approach, which has resulted in broader nationwide class claims and more expansive classes than would be appropriate herein. The current conflict among the very different and extremely broad classes plaintiff Incherchera seeks to represent (Class II and Class III) as more fully discussed herein at Point V.B, at 49-56, may be traced directly to her articulation of facially incompatible claims. Under these circumstances, therefore, notice to absent class members, informing them of

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[3]In prior memoranda, defendants have used the terms "nationals" when referring to citizens of Japan. This, however, has led to much confusion as to the persons being described. For the sake of simplicity, defendant will employ the term "citizen" when referring to persons who are nationals of Japan. A national of Japan is the literal translation of the Japanese concept that in English is identified as citizenship. Like citizens of other countries, nationals of Japan travel with passports issued by Japan, are vested with other rights and privileges that are associated with citizenship, and while in the United States are limited by United States immigration laws and by the practical difficulties of living and working in what is to them a foreign country.

their right to opt out, would appear to be required at this time.

A careful review of the uncontroverted facts indicates that these conflicts may be minimized or resolved, and the otherwise pressing need for notice reduced, albeit not entirely obviated, if the claims of the plaintiffs were more properly focused. The allegation of Class I, concerning sex discrimination (and perhaps national origin discrimination) but embracing all females, including some who are of Japanese national origin, challenges defendant's assignments of personnel to exempt level positions. Inasmuch as the exempt level local staff contains a number of women who appear to be a part of this class, their precise claim must principally focus on assignments given to the rotating staff.[4] Class II alleges an identical sex discrimination claim which must be further focused in the same manner and an explicit national origin claim which must be interpreted so as to resolve the admitted conflict between female class members whose national origins may and indeed do differ. It appears that plaintiffs allege there is a systematic illegal "preference" for persons of Japanese national origin,

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[4]Defendant assumes that plaintiffs' are seeking the United States work assignments which rotating staff personnel receive at Sumitomo/America and not positions on the worldwide rotating staff per se. For, as discussed infra, individuals comprising the rotating staff are all employed by Sumitomo/Japan, which is not a party to this action and as to which the Treaty of Friendship, Commerce and Navigation would undeniably apply.

although both Class I and Class II certainly are defined to include females of Japanese national origin. Finally, Class III, which alleges discrimination against women on account of sex, national origin and "race" under section 1981, if legally viable and not barred by law of the case, must be limited to an allegation that defendant has engaged in some form of intentional race discrimination by virtue of its decision to accept persons employed by the parent corporation who are assigned to it (who, by virtue of the E-1 visa requirement of the United States Government, are all citizens of Japan) for assignment to the positions performed by the rotating staff in the United States.

FACTS

The basic facts involved in these actions are well-known to the Court. Nevertheless, a brief review of the most salient among them is an essential predicate for the legal analysis of the questions treated herein.

The general outline concerning the nature and structure of Sumitomo/America and its relation to its parent corporation, Sumitomo/Japan has been previously and extensively briefed to the Court. See Defendant's Memorandum of Law in Support of Motion to Dismiss at 4-9, filed in Avagliano I in May 1978. It is undisputed that Sumitomo/America is part of an international network wholly owned by Sumitomo/Japan, which is a multinational but "integrated" trading company. Overall corporate management of the international enterprise is maintained exclusively by Sumitomo/Japan.

The world-wide network of wholly-owned subsidiaries and branch offices, of which Sumitomo/America is but one, assists the entire enterprise in completing trading transactions in the world market. A single and discrete transaction may involve various subsidiaries of Sumitomo/Japan in several different countries. For this reason and to maintain management of its subsidiaries' operations, Sumitomo/Japan routinely assigns many of its employees to its world-wide "rotating" staff consistent with applicable business requirements, staffing

availability and immigration restrictions in the host countries. Sumitomo/Japan employees are assigned to subsidiaries and branches all over the world.

As with any other company operating under the strictures of United States labor and employment laws, persons employed by Sumitomo/America can be said to fall into two distinct categories. In the first category are "nonexempt" employees as defined under the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA") -- secretaries, clerical employees, and other support-level staff. All plaintiffs and those whose claims they assert fall within this category.[5] The second category consists of locally-hired FLSA exempt employees who occupy mid-level supervisory, sales and management positions within Sumitomo/America. Many class members too fall within this cate-

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[5]The complaints in both Avagliano and Incherchera alleged discrimination against women in restricting them to "clerical" (i.e., non-exempt) positions. The classes certified by the Court, consistent with plaintiffs' request, include all females. It is not disputed, however, that females are employed in non-clerical positions, although plaintiffs do appear to challenge whether some of these positions are truly exempt. Accordingly, plaintiffs' classes are overbroad to the extent they include women not claiming injury in respect of defendant's alleged employment policies and practices. The Incherchera complaint also alleges discrimination on the basis of national origin, and notes further that plaintiff seeks to represent a class of persons seeking "equality for women and equality for persons who are not of Japanese national origin or Japanese racial background." Incherchera Complaint ¶ 6(4). This allegation likely is the heart of her complaint -- that she and other female Sumitomo/America employees are unable to obtain the positions to which rotating staff are assigned in the United States. In Avagliano, plaintiffs assert a claim on behalf of women based upon "nationality." While it remains unclear, it appears that plaintiffs regard this term as asserting some form of "national origin" discrimination under Title VII.

gory. A third category also exists: those who work at Sumitomo/America's facilities but are hired in Japan and assigned to the rotating staff of Sumitomo/Japan by whom they are employed.[6] Only to the extent that this latter group are considered employees of Sumitomo/America under Title VII and subject to the FLSA, would they too be exempt under that latter statute.

The composition of each category also differs. The nonexempt, clerical category employs many, though certainly not exclusively, female employees. It is indisputable that each race, however, -- white, black, and Oriental -- is to be generously found within this category, as are persons whose national origin is Japanese. Also indisputable is that the composition of the second category of Sumitomo employees, to wit locally-hired exempt personnel, consists of both Caucasian and Oriental employees, many of whom, though certainly not all, are male. The third category, the rotating staff, have been assigned to Sumitomo/America by their employer Sumitomo/Japan in Japan. To date all such persons so assigned to defendant have also been Japanese citizens.[7] Thus, it is clear that the true focus

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[6] In fact, the rotating staff appear not to be employees of Sumitomo/ America, but of the parent corporation. See Shiseido Cosmetics (America), Ltd. v. State Hum. Rts. App. Bd., 72 A.D. 2d 711, 421 N.Y.S.2d 589 (1st Dep't 1979), aff'd, 52 N.Y.2d 916, 419 N.E.2d 346, 437 N.Y.S.2d 668 (1981).

[7] All persons who are part of the rotating staff of Sumitomo/America originally worked in Japan for Sumitomo/Japan. Thus, Sumitomo/America does not require rotating staff personnel

(footnote continued)

of all of plaintiffs' allegations of discrimination with regard to positions held by the rotating staff, although couched in terms of discrimination on the basis of sex, national origin or race, principally concern the fact that women of diverse races, including Orientals, and national origins, including Japanese, have not received assignments given to rotating staff members in the United States, who, to date, have all been of Japanese nationality, i.e., citizenship.

(footnote continued)

to be Japanese citizens. Rather only those who worked for Sumitomo/Japan may be on the rotating staff. Since the parent company is located in Japan, it is not surprising that many of the people who work on its rotating staff assignments are Japanese citizens. In fact, for Sumitomo/Japan personnel to receive entry to the United States on an E-1 Visa from the United States government, each must generally be a citizen of Japan. Only when put in this context can the statements in defendant's brief before the United States Supreme Court that Sumitomo/America "prefers Japanese nationals" be fully understood. It is a matter of United States Immigration Law, over which neither Sumitomo/America nor its parent has any control, that "treaty traders" must be citizens of Japan. See 22 C.F.R. §§ 41.12 and 41.40. Indeed, in Defendant's Answers To Plaintiffs' Interrogatories Sumitomo/America states without contradiction that it does not use Japanese citizenship or any other citizenship as a criterion for eligiblity for any of its jobs (See Exhibit C, Defendant's Answers to Plaintiffs Interrogatories, (dated February 3, 1983), question 16 at 11.)

ARGUMENT

POINT I

PLAINTIFFS' FILING DATES UNDER TITLE VII FOR THE AVAGLIANO CLASS (CLASS I)

The first named plaintiff to file a charge in the Avagliano Title VII class (Class I) was Joanne Schneider (EEOC Charge #021-77-0049) (See Exhibit A). Ms. Schneider's charge alleged sex discrimination only. This claim was received and deferred by the EEOC to the New York State Division of Human Rights on October 19, 1976.

The Supreme Court has held that the term "filed" must be given a technical meaning when interpreting the filing requirements of subsections (c) and (e) of section 706 of Title VII.[8] See Mohasco Corp. v. Silver, 447 U.S. 807 (1980). Under

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[8]Section 706(c) of Title VII provides in pertinent part as follows:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . no charge may be filed . . . [with the the EEOC] before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . .

(footnote continued)

Mohasco, a charge is deemed "filed" with the EEOC only after the sixty-day mandatory state deferral requirement has been satisfied. In states like New York, where work-sharing agreements exist between the EEOC and state deferral agencies, the act of delivering a charge to the EEOC automatically commences the deferral process, unless the individual has previously made such a filing on his or her own. The Schneider charge was, however, referred back to the EEOC on October 19, 1976, on which date it was "filed" with the EEOC. Accordingly, former Sumitomo/America employees who left the company prior to December 24, 1975, 300 days prior to the EEOC filing, clearly are excluded from Class I. No one claiming sex discrimination last occurring prior to 300 days of that filing may be a member of Class I nor may anyone arguably in that class seek relief for any conduct attributed to the defendant in this proceeding which occurred prior to that date.[9]

(footnote continued)

42 U.S.C. § 2000e-5(c) (emphasis added). Section 706(e) requires that when "the person aggrieved has initially instituted proceedings with a State of local agency . . . to . . . seek relief . . . such charge [to the EEOC] shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred. . . ." Id. § 2000e-5(e).

[9]Defendant notes that the Court has discussed the possibility of applying the continuing violation theory to the matter at hand (Avagliano II, slip op. at 30-31). Although defendant objects to the use of this theory here, it will reserve discussion of this issue pending further development of the factual record.

Additionally, plaintiffs' complaint in Avagliano vaguely suggests a claim of discrimination based on "nationality." Assuming this is a claim of national origin discrimination actionable under Title VII, the first named plaintiff to file a charge with the EEOC alleging national origin discrimination was Janice Silberstein who submitted a charge to the EEOC on February 28, 1977. The charge was deferred to the state agency and later returned to or "filed" with the EEOC on March 17, 1977. Thus, persons alleging national origin discrimination before May 21, 1976 -- 300 days prior to the March 17, 1977 filing of the first national origin charge -- are excluded from the class for purposes of any colorable national origin Title VII claim on behalf of Class I members.

POINT II

PLAINTIFFS' FILING DATES UNDER TITLE VII FOR THE INCHERCHERA CLASS (CLASS II)

Palma Incherchera presented her charge of sex and national origin discrimination to the EEOC on January 5, 1982. (See Exhibit B.) As discussed before, under Mohasco, the charge would not be considered filed until March 6, 1982. Thus, only those females employed from May 10, 1981, 300 days prior to the EEOC filing, may be members of Class II. Such women, to the extent they raise sex discrimination claims, also belong to Class I. The same is not true with respect to Incherchera's national origin claim unless the plaintiffs in Avagliano are construed to be asserting a claim by Class I females of national origin discrimination under Title VII. In any event, no female claiming national origin discrimination occurring before May 10, 1981 may be a member of Class II.

The Title VII class that Incherchera may represent is further limited by the charge she filed with the EEOC. Although she has filed a complaint in this Court alleging sex, national origin, and "race" discrimination, her charge to the EEOC alleged discrimination only on the bases of sex and national origin. Thus, she may only represent members of the

class defined above (Class II) with respect to claims of national origin and sex discrimination under Title VII.[10]

It is well established in this Circuit that a court may not exercise subject matter jurisdiction over Title VII allegations not raised in the charge filed with the EEOC unless the court determines that the investigation of the charge conducted by the EEOC reasonably would have included the omitted allegation. See, e.g., Silver v. Mohasco Corp., 602 F.2d 1083, 1087 (2d Cir. 1979), rev'd on other grounds, 447 U.S. 807 (1980) (a charge constitutes the condition precedent to a suit under Title VII); see also Almendral v. New York Office of Mental Health, 568 F. Supp. 571, 575 (S.D.N.Y. 1983), rev'd on other grounds, 743 F.2d 963 (2d Cir. 1984) (brown-skinned female of Filipino origin who alleged national origin discrimination in her EEOC charge not permitted to go forward claiming race in her federal litigation).

Incherchera's EEOC charge allegations, which includes sex and national origin only, are not related in any fashion to her belated assertion of race discrimination before this Court. As to her charge to the EEOC of sex discrimination, Incherchera asserts that this claim exists because "all, or virtually all of

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[10]Any other assertion simply would be wholly inconsistent with the constant position of plaintiff, that she and her class have been injured because they are either not Japanese citizens or of Japanese national origin. See discussion infra at 37-44, that such discrimination is not race based.

charge to the EEOC is equally clear, alleging discrimination "against persons whose country of national origin is other than Japan." It can in no way follow from this deductively-established allegation of national origin discrimination that race discrimination was alleged to the EEOC. See Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462 (5th Cir. 1970) ("the crucial element of a charge of discrimination is the factual statement contained therein."). Plaintiff simply did not allege that race-based animus was involved - i.e., that Orientals are treated preferentially to Caucasians or blacks. On the contrary, plaintiff alleged that the discrimination was against all persons of whatever race whose country of national origin was not Japan. According to plaintiff's allegations, blacks, whites, and various Orientals (including Japanese Americans) were all allegedly disfavored by defendant's alleged practice unless their country of citizenship is no other than Japan.[11]

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[11] As discussed infra at 37-44, national origin and race are not synonymous. The EEOC itself recognizes only three races and two other ethnic groups for employer record-keeping and reporting purposes. On the annual employer information report (EEO-1), five racial/ethnic groups are listed: White, Black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan. Of the five groups, only white, black and Asian/Pacific are considered racial groups; Hispanic and American Indian or Alaskan are described in ethnic and cultural terms. People of Japanese origin are not considered to be a separate race but are considered to be Asians. In the instant memorandum, defendant employs the term "Oriental" to refer to persons who would fall within the EEO-1 form's Asian/Pacific racial category. The

(footnote continued)

Moreover, the Incherchera Title VII charge was filed during the pendency of the long on-going Avagliano Title VII action, in which race was not at issue, and Ms. Incherchera was and is represented by the same experienced counsel then representing the plaintiffs in Avagliano. Had plaintiff Incherchera sought to include an allegation of race-based discrimination along with her claim of national origin discrimination which she did include in her charge, she surely could and would have done so. This belated effort to bootstrap onto the instant litigation an improperly added afterthought claim must fail.

(footnote continued)

EEO-1 form and its instructions are reprinted at 8 Fair Empl. Prac. Man. (BNA) 441.275-441.282. See also 1980 Census of Population, U.S. Department of Commerce, B-2, "Asian and 'Pacific Islander' includes persons who indicated their race as Japanese, etc."

POINT III

NEW YORK'S THREE YEAR STATUTE OF LIMITATIONS AND ITS BORROWING STATUTE SHOULD APPLY TO THE SECTION 1981 CLASS ACTION

Notwithstanding defendant's position that plaintiff has failed to state a claim under section 1981, defendant will, as requested by the Court, brief the issue of the proper statute of limitations to be applied to the section 1981 class.

Section 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. § 1981.

Section 1981 does not provide any specific limitation period. Courts therefore have held that in section 1981 actions "the controlling period would ordinarily be the most appropriate one provided by state law." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975). See also Meyer v. Frank, 550 F.2d 726, 728 (2d Cir.), cert. denied, 434 U.S. 830 (1977) (actions under federal Civil Rights Acts are subject to statute of limitation state courts would apply in analogous state action); Staples v. Avis Rent-A-Car System, Inc., 537 F.

Supp. 1215, 1218 (W.D.N.Y. 1982) (look to analogous state statute for determining section 1981 statute of limitations).

The question of the statute or statutes of limitation applicable to the Class III claim does not permit of a simple or hasty response. The decided cases offer little guidance; they suggest only that a court should employ the state statute of limitation most "appropriate." Which state's statute is most appropriate to a nationwide section 1981 action has not previously been answered, albeit hardly an unsurprising fact given the paucity of precedent in support of a nationwide section 1981 class action generally.[12] Thus, the Court is faced with the task of determining whether to apply the New York statute of limitations (and its borrowing statute) because New York is the situs of the action, or whether to apply the statute of the potential class member's residence or employment.[13] In

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[12]Although complaints alleging section 1981 class actions are not unique, the nationwide class certified here appears to be. Indeed, only one other certified section 1981 nationwide class action, in an unreported decision, has been identified by defendant's research. See Speiss v. C. Itoh & Co., Civ. No. 75-H-267 (S.D. Tex. Sept. 2, 1977). Given the complexity of the issue concerning the applicable statute of limitations to a multi-state section 1981 class action, the virtual absence of precedent for such an action is troubling and may raise a question regarding the appropriateness of the nationwide Class III certification. To the extent Speiss is at all instructive in this regard, the Court applied the law of the forum (Texas) in discerning the applicable statute of limitations.

[13]Sumitomo/America operates facilities in eleven different jurisdictions throughout the United States: New York, Illinois,

(footnote continued)

any case, some Class III members will be injured while others will be windfall beneficiaries due to the nationwide class certification. (See infra note 21.)

(footnote continued)

Pennsylvania, Texas, California, Oregon, Colorado, Washington, Massachusetts, District of Columbia, and Michigan. The statutes of limitation for these states vary as follows:

New York: 3 years -- Keyse v. Cal. Tex. Oil Corp., 590 F.2d 45 (2d Cir. 1978); Ghosh v. New York Univ. Med. Ctr., 576 F. Supp. 86 (S.D.N.Y. 1983);

Illinois: 5 years -- Waters v. Wis. Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970); Killingham v. Board of Governors, 549 F. Supp. 225 (N.D. Ill. 1982);

Pennsylvania: 6 years -- Liotta v. Nat'l Forge Co., 629 F.2d 903 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981);

Texas: 2 years -- Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980);

California: 3 years -- Chung v. Pomona Valley Comm. Hosp., 667 F.2d 788 (9th Cir. 1982);

Oregon: 6 years -- Wrighten v. Metropolitan Hosp., Inc., 726 F.2d 1346 (9th Cir. 1984);

Washington, D.C.: 3 years -- Covert v. Washington Hilton Hotel, 33 Fair Empl. Prac. Cas. (BNA) 660 (D.D.C. 1983);

Michigan: 3 years -- Chai v. Michigan Tech. Univ., 493 F. Supp. 1137 (W.D. Mich. 1980);

Massachusetts: 6 months -- Carter v. Supermarkets General Corp., 684 F.2d 187 (1st Cir. 1982) (Defendant notes that in Burnett v. Grattan, 104 S. Ct. 2924, 2928 n.9 (1984), the Court noted its disapproval of, inter alia, the six month statute of limitations made applicable to section 1981 claims by Carter. The Court did not suggest an alternative period and in the most recent Massachusetts District Court section 1981 ruling issued five months after Burnett, the six month period again was

(footnote continued)

Under the general rule, and in the absence of controlling federal law, the federal courts apply the statute of limitation of the state "in which the suit is filed." McGhee v. Ogburn, 707 F.2d 1312, 1313 (11th Cir. 1983) (emphasis added). Accord Polite v. Diehl, 507 F.2d 119, 122 (3d Cir. 1974) ("the limitation to be applied is that which would be applicable in the courts of the state in which the federal court is sitting had an action seeking similar relief been brought under state law."). See also Fitzgerald v. Larson, 741 F.2d 32 (3d Cir. 1984). This Circuit also has held, consistent with the general rule, that "[a]n action brought under the federal Civil Rights Act is subject to the statute of limitations the state courts would apply in an analogous state action." Meyer v. Frank, 550 F.2d 726, 728 (2d Cir.), cert. denied, 434 U.S. 830 (1977). And in Swan v. Board of Higher Education, 319 F.2d 56, 59 (2d Cir. 1963), the court stated that "the applicable period of limitation is that which New York would enforce had an action seeking similar relief been brought in a court of that state."

(footnote continued)

employed. See Townsend v. Grey Line Bus Co., 36 Fair Empl. Prac. Cas. (BNA) 577, 580 (D. Mass. 1984));

Colorado: 3 years -- McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984) (section 1983 action, court applies 3 year period); EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984) (Okla. law applied; court opinion suggests 3 year period will be applied to section 1981 action in Colorado);

Washington State: 3 years -- Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981) (3 year statute applicable to section 1983 actions; no reported decisions regarding section 1981).

Although these holdings suggest that a federal court look to the law of the state in which it sits to determine the applicable statute of limitations, these decisions do not resolve this question because the causes of action in those cases arose in the states where they were filed. In the action at bar the locus of the accrual of all of the causes of action embraced within the broad section 1981 class that has been certified is not in only one state -- New York, but likely in no fewer than eleven jurisdictions.

Moreover, precisely where the claims in the instant matter arose is not simply ascertained; such a determination clearly depends on the nature of each class member's claims. If they are claiming discrimination in confinement to clerical positions on the various local staffs and the denial of promotion to the local exempt staffs, then their actions would appear to have arisen in all of the eleven different jurisdictions, given Sumitomo/America's decentralized employment practices vis-a-vis the local exempt and non-exempt positions. If, as is more likely, they are challenging Sumitomo/Japan's alleged preference for the employment of citizens of Japan in connection with the rotating staff positions at its United States subsidiary Sumitomo/America, the cause of action may be limited to either Japan or New York, arguably where the policy at issue regarding rotating staff appointments was made by Sumitomo/

Japan[14] or implemented by Sumitomo/America,

where the alleged discrimination had its consequences felt.[16]

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[14]Plaintiffs' claim, although vague does suggest that Sumitomo/Japan's alleged policy of employing persons who are Japanese citizens for rotating staff positions is violative of Title VII. However, such a claim can be addressed only to Sumitomo/America's parent company, Sumitomo/Japan, since it is the entity which decides the rotating staff policy. Sumitomo/Japan itself, however, is not a party to the action and would clearly be covered by the Treaty of Friendship, Commerce and Navigation, and the defenses previously held unavailable to Sumitomo/America thereunder. See generally Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982).

[15]As discussed supra, n.7 Sumitomo/America has no preference for citizens of Japan but merely employs in its rotating staff individuals assigned to it who work for Sumitomo/Japan.

[16]In similar situations, some courts have determined that "the most appropriate limitation period [is that] of the state in which the cause of action arises." Jordan v. Lewis Grocer Co., 467 F. Supp. 113, 116 (N.D. Miss. 1979) (emphasis added); accord Rose v. Rinaldi, 654 F.2d 546, 547 (9th Cir. 1981) (under 42 U.S.C. § 1983: "the federal courts will apply the applicable period of limitations under state law for the jurisdiction in which the claim arose."). See also Harrison v. Wright, 457 F.2d 793 (6th Cir. 1972). The court's opinion in Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973), noted the limited value of the decided authority in this area, albeit in a case arising under 42 U.S.C. § 1983. There, the plaintiff sued in Georgia, claiming that Tennessee officials had deprived him of his constitutional rights. In deciding whether Tennessee's or Georgia's statute of limitation would apply, the court noted the significance of all previous decisions "is undermined, because in each case the state in which the federal trial court sat and the state in which the action arose were the same." Id. at 459. The court noted that applying the rule that the statute of the state where the cause of action arose ought govern would have the distinct effect of discouraging forum shopping. In this regard, the court went on to note that

> [b]ecause there seems to be no precedent in this circuit that is squarely on point, this

(footnote continued)

The principle that a court should apply the statute of limitations of the state in which it sits rather than where the cause of action arose is of course not a novel idea.[17] The

(footnote continued)

> Court is greatly tempted to hold that, where a civil rights action arose in one state but is brought in another, a federal district court should apply the staute of limitations of the state in which the action arose.

Id. at 459-60.

Nevertheless, the court decided to follow Fifth Circuit cases indicating that a court should "borrow the applicable statute of limitations from the state in which it sits." Id. at 459, quoting McGuire v. Baker, 421 F.2d 895, 898 (5th Cir. 1970) (emphasis in original).

Similarly, in Burns v. Union Pacific Railroad, 564 F.2d 20 (8th Cir. 1977), a California resident claiming an injury in Kansas, sought relief in the District Court in Missouri. Although the court stated that "[w]e need not decide this question," id. at 21, of the statute of limitation under section 1981, it noted that according to Missouri's borrowing statute, which is similar to New York's, Kansas' statute of limitations would apply. Because the complaint was untimely under both Missouri's and Kansas' statutes, it was immaterial whether the court applied the law of the state in which it sat or the law of the state in which the action arose.

[17]The Supreme Court has consistently referred to state law in civil rights class actions involving statutes of limitation. For example, in Chardon v. Soto, 103 S. Ct. 2611 (1983), the Court held that Puerto Rican law determined whether after the denial of class certification in a section 1983 action the statute of limitation begins anew or would be found to have been temporarily suspended during consideration of the class certification motion. Similarly, in Board of Regents v. Tomanio, 446 U.S. 478 (1980), the Court found that for section 1983 actions, the state law would not only govern the applicable statute of limitation but would control any tolling provisions as well. In a similar vein, the Court noted in Holmberg v. Ambrecht, 327 U.S. 392, 395 (1946), that

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courts long have held that in "procedural matters, a court will apply the law of the forum." Mahalsky v. Salem Tool Co., 461 F.2d 581, 583 (6th Cir. 1972); Barker v. Smith, 290 F. Supp. 709, 712 (S.D.N.Y. 1968). Such statutes have been deemed procedural in almost every instance. For example in Stafford v. International Harvester Co., 668 F.2d 142, 147 (2d Cir. 1981), the court noted that "the statute of limitations is considered procedural since it goes to the remedy, and New York will apply its own statute of limitations even though the injury which gave rise to the action occurs in another state." See also Association for the Preservation of Freedom of Choice v. Simon, 299 F.2d 212 (2d Cir. 1962).[18]

(footnote continued)

> [a]part from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation.

See also Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971). Finally, in Sack v. Low, 478 F.2d 360, 365 (2d Cir. 1973), the court noted that in an action under the federal securities laws, where no statute of limitation was provided, there was no "dispute that the reference to New York limitations law [was] required."

[18]Some commentators have abandoned the distinction between "procedural" and "substantive" for choice of law purposes. Restatement (Second) Conflicts of Law § 122 comment (b) (1971). The Restatement instead asks simply whether the forum's rule should be applied. Id. In any case, its position is the same as those of the courts that make the distinction since it continues to apply the statute of limitation of the forum. See id. § 142 comment (d). See also Twerski & Mayer, Toward a Pragmatic Solution of Choice of Law Problems - At the Interface of Substance and Procedure, 74 Nw. U.L. Rev. 781 (1979).

Assuming New York's statute of limitation is applicable, plaintiff's cause of action may not be asserted on behalf of class members claiming injury in New York more than three years prior to the filing of the lawsuit. See Keyse v. California Texas Oil Corp., 590 F.2d 45 (2d Cir. 1978). As to non-resident class members, however, New York's "borrowing statute," N.Y. Civ. Prac. Law § 202 (McKinney 1972),[19] would be applicable. Under the statute, a non-resident's cause of action will be limited by the laws of either the statute of the state where the cause of action accrued or the New York statute, whichever is shorter. See 1 J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 202.01 at 2-41 (1981) ("Weinstein"). As a matter of procedure, the New York borrowing statute would affect all non-New York resident members of the class whose claims arose outside of New York, thus creating differences based on residency. See Loengard v. Santa Fe Industries, Inc., 573 F. Supp. 1355, 1359 (S.D.N.Y. 1983). According to Weinstein, the New York statute of limitations and the statutes of

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[19] Section 202 provides that

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

foreign jurisdictions "are alternative bars to the maintenance of the action. Consequently, the action may be barred in New York even though it would not be barred in the state of accrual." Weinstein ¶ 202.01 at 2-44. In any case it becomes eminently clear that New York plaintiffs will have a decided advantage over many other class members.

Thus the court must determine where each absent Class III member's and plaintiff's causes of action under section 1981 accrued. Under New York law, it appears that the place of injury is where the action accrued. See Industrial Consultants, Inc. v. H.S. Equities, Inc., 646 F.2d 746, 747 (2d Cir.), cert. denied, 454 U.S. 838 (1981).[20] All class members were (or are) employees of Sumitomo/America at various offices. Assuming that the alleged discriminatory acts occurred, such acts presumably

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[20]The law is still unsettled in this area. Some New York courts have adopted the modern conflict of laws principle known as the "grouping of contacts" or "center of gravity" doctrine. See Martin v. Julius Dierck Equipment Co., 52 A.D.2d 463, 384 N.Y.S.2d 479, 482-483, aff'd on other grounds, 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978); Haberman v. Tobin, 466 F. Supp. 447 (S.D.N.Y. 1979), aff'd, 626 F.2d 1101 (2d Cir. 1980). Under this approach, the court looks to the contacts and state interests in deciding where the action accrued. Regardless of whether the court applies the modern approach or the "place of injury" rule, it would appear that the same result would be reached. With respect to denied advancement to local staff exempt positions, the plaintiffs clearly have had the most contact in the state in which they worked (and, most likely, lived). The same may well be true with respect to the particular positions assigned to rotating staff members but alleged to have been illegally withheld from members of the absent class. Thus, the causes of action should be found to have accrued in the states where advancement was allegedly denied.

took place where the class members were employed. That is, plaintiff and absent class members have alleged that they were restricted to clerical jobs and not trained or promoted at their sites of employment. Their causes of action thus accrued at the particular Sumitomo/America office in which they worked. See, e.g., Myers v. Dunlop Tire & Rubber Corp., 40 A.D.2d 599, 335 N.Y.S.2d 961 (1st Dep't 1972) (New York borrowing statute and the place of injury test used; the court applied Kentucky's shorter statute of limitations, finding that the cause of action had accrued in Kentucky where the injury occurred); Lang v. Paine, Webber, Jackson & Curtis, Inc., 582 F. Supp. 1421 (S.D.N.Y. 1984) (court applied the "place of injury" test; held, in actions alleging fraud the causes of action arose where the losses were suffered).

In the instant matter, and assuming plaintiff's allegations relate to all exempt positions, i.e., local and worldwide rotating staff, the losses alleged to have occurred because of Sumitomo/America's actions occurred where the parties work or worked and where they allegedly were neither promoted nor trained. Non-New York resident absent class members who work in states whose limitation periods are shorter than New York's would be limited to the shorter statute(s) with their attendant limitations and preclusive effect. For those persons residing in states where the statutory period is greater than three

years, New York's shorter statute should be held applicable.[21] Thus, female former employees who worked for Sumitomo/America within three years of the date the Incherchera complaint was filed and who live or work in New York or in states with longer statutes of limitation (Pennsylvania, Oregon and Illinois) are potential class members. These Pennsylvania, Oregon, and Illinois Sumitomo/America employees would not have the benefit of the longer six, six, and five year periods of their respective states. Other female former employees working in

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[21] Note that however the Court rules on the limitations question, the appropriateness of a broad Class III nationwide class action is called into question. Should the Court find that the limitation period varies from state to state, class members in states with longer limitation periods will be able to capitalize on a longer "back pay" period and bring more claims than others with shorter statutes. This may violate the requirements of Rule 23(a)(3), which mandates that the claims of all the parties be typical. On the other hand, if the Court finds that the law of the forum applies and that New York's borrowing statute is to be involved, many class members in other jurisdictions will have their claims either abridged or totally extinguished. For while the filing of a class action suit tolls the running of the statute for class members, see American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), it may not, however, "revive claims which are no longer viable at the time of the filing." Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). Those potential class members, who originally had a statute of limitation longer than three years, would now have to be limited to the New York period.

If all or part of the Section 1981 class were to be decertified, under the Supreme Court's ruling in American Pipe, it would appear that the claims of remaining absent class members will have been tolled while the class action was pending. These individuals could then file their own claims in their respective states with their respective applicable statute of limitations controlling.

states with shorter statutes, Massachusetts (six months) and Texas (two years), would be bound by the respective shorter period.

POINT IV

PLAINTIFF INCHERCHERA IS URGENTLY REQUIRED TO CLARIFY HER CLAIM UNDER SECTION 1981 (CLASS III) SINCE THAT STATUTE DOES NOT PROHIBIT DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN OR SEX

Section 1981 was originally enacted as a part of the Civil Rights Act of 1866. The act was passed by a Congress concerned with enforcing the Thirteenth Amendment's prohibition against slavery and with protecting the newly-found freedom of former slaves. McDonald v. Santa Fe Trail Transportation Co., 427 U.S 273, 289 (1976) ("the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves. . . ."). Congress' immediate objective notwithstanding, section 1981 also was designed generally to close the book on racial discrimination in this country, regardless against whom such discrimination occurred. Whites thus fall within the section's protection as well as blacks. Id. at 288-95 (review of the legislative history of section 1981). But it has been made clear beyond peradventure that the section did not intend to reach matters not involving race. See Georgia v. Rachel, 384 U.S. 780, 791 (1966) ("[t]he legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality.").

As a threshold matter, it is established beyond cavil that section 1981 does not apply to discrimination based on sex.

See Runyon v. McCrary, [illegible]; Guaranty Trust Co., 548 F. Supp. 1189, 1192 (S.D.N.Y. 1982); Wade v. New York Telephone Co., 500 F. Supp. 1170, 1173 (S.D. N.Y. 1980). Allegations pertaining to national origin discrimination also are generally rejected under section 1981. The law is well settled that section 1981 provides relief only for victims of racial discrimination.

In fact, despite the various "advantages" to plaintiffs in such discrimination cases, e.g. jury trials, punitive damages, etc., the use of the statute has been carefully circumscribed. The Second Circuit has made clear that "[i]n the absence of allegations of racial animus, courts have rejected § 1981 complaints challenging discrimination based on national origin and cultural characteristics common to ethnic or national groups." Keating v. Cary, 706 F.2d 377, 384 (2d Cir. 1983). See also Porto v. Canon, U.S.A., Inc., 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981); Anooya v. Hilton Hotels Corp., 34 Fair Empl. Prac. Cas. (BNA) 1529 (7th Cir. 1984); Mouriz v. Avondale Shipyards, Inc., 428 F. Supp. 1025 (E.D. La. 1977). Indeed, it has long been held that the terms "national origin" and "race and color" are not synonomous; decisions to the contrary would rewrite section 1981. See Martinez v. Hazelton Research Animals Inc., 430 F. Supp. 186, 187-88 (D. Md. 1977); see also Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669 (N.D. Ill. 1984).

Indeed, in Avagliano I, this Court specifically and quite clearly held that "plaintiffs' allegations of discrimination based on sex and national origin are insufficient to sustain a cause of action under section 1981 and that these claims should be dismissed." Id. 473 F. Supp. at 514. Despite this Court's prior ruling and cases decided subsequently, plaintiff Incherchera, represented by the same attorney as plaintiffs in Avagliano, filed an action under section 1981 alleging discriminatory conduct by Sumitomo/America on the basis of sex, national origin, and "race." Specifically, plaintiff Incherchera states that she is seeking "equality for persons who are not of Japanese national origin or Japanese racial background." Incherchera Complaint § 6(4) (emphasis added).[22] Plaintiff's semantic gyrations notwithstanding, discrimination based on Japanese ancestry is discrimination based on national origin, not race. See Porto v. Canon, U.S.A., Inc., 28 Fair Empl. Prac. Cas. (BNA) 1679, 1684 (N.D. Ill. 1981). See also 29 C.F.R. § 1606.1 (EEOC definition of national origin).[23] Quite

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[22]As previously noted, Incherchera did not allege racial discrimination when she originally filed her charges with the EEOC.

[23]The contrived nature of plaintiff's allegation is clear from the following hypothetical. Assume a British company asserted a policy similar to that ascribed to Sumitomo/Japan, that is, preferring the assignment of only British nationals to certain positions in its world-wide network of subsidiaries. No one would assert that this preference was in any way racial in

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frankly, plaintiff is asserting a claim directly contrary to the law of this case. Simply and emphatically stated, there is no Japanese race.

The cases rejecting section 1981 as a vehicle to challenge what is purely a national origin discrimination claim, even where such discrimination is alleged to be synonymous with racial discrimination, which is not here contended, are legion and thus support the law of this case that plaintiffs have no cause of action under section 1981 for national origin or "race" discrimination on the facts here pleaded. See, e.g., Almendral v. New York Office of Mental Health, 568 F. Supp. 571, 577 (S.D.N.Y. 1983), rev'd on other grounds, 743 F.2d 963 (2d Cir. 1984) (court notes that a section 1981 allegation may not be predicated on national origin allegation); Ben-Yakir v. Gaylinn

(footnote continued)

character. On the contrary, it would be clear that the alleged policy disfavored all non-British nationals equally, including of course Americans regardless of their heritage. No American adversely affected by such a ruling could claim under section 1981 that he/she suffered from racial discrimination due to the preference for British nationals.

Moreover, most British, along with most French, German, Italians, Dutch, and other Europeans are members of the same race -- Caucasian. Similarly, the Japanese and the Chinese, Vietnamese, Koreans, Indonesians, etc., are members of the same race -- Oriental (or Asian/Pacific Islander), though of different nationality or ethnic backgrounds. The same is true of the black or Negro race -- contained within it are persons of an immense variety of cultural and ethnic backgrounds. Attempts to create new "races" out of different cultural or national origin groups have historically been rejected for anthropological and sociological reasons.

Associates, Inc., 535 F. Supp. 543, 545 (S.D.N.Y. 1982) (Israeli citizen's section 1981 allegation rejected as based on citizenship, not race); see also Anooya v. Hilton Hotels Corp., 34 Fair Empl. Prac. Cas. (BNA) 1529, 1531 (7th Cir. 1984) ("[i]n the absence of an allegation of racial animus, either explicit or reasonably inferable from the pleadings, plaintiff cannot maintain his section 1981 action.").

One recent decision from the Illinois District Court was based on facts almost identical to those at issue here. In Porto v. Canon, U.S.A., Inc., 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981), the plaintiff alleged violations of Title VII and section 1981. Specifically, he alleged that the hiring, promotional and employment system adopted by the company discriminated against individuals of non-Japanese national origin. In dismissing plaintiff's section 1981 claim, the court noted that although plaintiff's complaint alleged (as Incherchera does here) that he was being discriminated against because of his race, the facts simply could not support such a conclusion.

> The plaintiff is not complaining that he is discriminated against because he is white. Rather, the complaint clearly alleges that plaintiff is being discriminated against because he is not of Japanese origin. There is nothing in the complaint to indicate that plaintiff is treated any differently than blacks, hispanics, American Indians or orientals. The only facts alleged indicate that defendant is giving preference to persons of Japanese national origin over all other persons. Consequently, the complaint focuses on national origin as the basis for

> the discrimination and does not state a claim for discrimination on the basis of race. Consequently, plaintiff's § 1981 claim must be dismissed.

Id. at 1684.

Even more recently, in Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669 (N.D. Ill. 1984), the plaintiffs claimed injury when their employer replaced them with individuals who were born either in Germany or Switzerland. All the plaintiffs were individuals born in the United States. The court, however, rejected plaintiffs' race discrimination allegation and their assertion that race and national origin are synonymous. "Our understanding of the concept of 'race' leads us to conclude that plaintiffs, who apparently are white and were replaced by other whites, have not stated a racial discrimination claim under §§ 1981 or 1982." Id. at 672.

This Court also has had an opportunity to examine facts analogous to those raised in Incherchera. In Rios v. Marshall, 530 F. Supp. 351 (S.D.N.Y. 1981), the court dismissed a section 1981 claim of American migrant workers against foreign workers alleging that they were being discriminated against in favor of foreign workers. In rejecting their claims the court noted that

> [T]he provisions of 42 U.S.C. § 1981 are limited in their application to discrimination, the effect of which is to deny to any person within the jurisdiction of the United States any of the rights enumerated in that section, to the extent that such rights are

> enjoyed by white citizens of this nation. Discrimination on other grounds, such as religion, sex, or national origin, to which white citizens may be subject, as well as white non-citizens, non-white citizens, or non-white non-citizens, is not proscribed by the statute.

Id. at 361 (quoting Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 15 (E.D. Pa. 1975)). Thus, since the basis of the claim did not involve racial animus, the section 1981 claim was dismissed.

The Incherchera section 1981 allegation is markedly apposite to the claim rejected in Marshall, and merits similar treatment -- dismissal. The dispute centers on an alleged preference for the assignment of Japanese nationals (i.e., citizens) who are members of the rotating staff. The discrimination that arguably is occurring is based on national origin or citizenship. Moreover, plaintiff cannot be alleging that the defendant has exhibited a preference for all Japanese or all Japanese citizens, because it is clear from the within record that persons of Japanese national origin but not employees of Sumitomo/Japan are as "disfavored" as non-Japanese or, indeed, Japanese non-employees of Sumitomo/Japan. Thus, even Japanese citizens who are not hired by Sumitomo/Japan are equally "disfavored" and excluded from the allegedly favored class. Most certainly, those persons of Japanese national origin, but citizens of a country other than Japan and non-employees of Sumitomo/Japan are equally negatively affected by such a policy.

To decide whether this action should now continue with a nationwide class under section 1981, and whether notice should now issue, plaintiff Incherchera is urgently required to clarify her section 1981 claim in view of the evident legal infirmity of that claim.

POINT V

WHETHER NOTICE NOW SHOULD BE GIVEN TO ALL CLASS MEMBERS ULTIMATELY MAY DEPEND ON THE DETERMINATION AS TO THE PRECISE CONTOURS OF PLAINTIFFS' CLASSES

A. Due to the Complexity of the Within Actions, and the Conflicting Claims and Dispersion of Plaintiffs, Notice and the Right to Opt Out Must Be Given to Inform Potential Class Members of Their Rights and Obligations

Defendant now turns to the final issue posed for review herein: whether notice should be issued at this time to all absent class members of each class. In the Court's November 7 opinion, it indicated its initial reluctance to issue the notice now because "the class certification is of a somewhat preliminary nature." Avagliano II, slip op. at 48.[24]

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[24] As the Court has recognized, its discretion under Rule 23(b)(2) is not whether to issue notice, but when. At some time during the pendency of an action absent class members of each class must be notified, even if such notice is sent at the settlement of an action or at the conclusion of litigation. While

> it may be proper to delay notice until a more advanced stage of the litigation, for example, until after class-wide liability is proven. . . . before an absent class member may be forever barred from pursuing an individual damage claim, however, due process requires that he receive some form of notice that the class action is pending and that his damage claims may be adjudicated as part of it.

Johnson v. General Motors Corp., 598 F.2d 432, 438 (5th Cir. 1979). The issue presently before the Court is whether such notice should be issued now.

Despite the provisional nature of the certification, defendant submits that notice is necessary at this time, given the present configuration of plaintiffs' various and differing class claims.

Whether notice should issue to absent class members in the instant matters in large measure depends on the precise contours of the classes at issue and the nature of their claims. Immediate notice would serve a number of very valuable purposes. First and foremost, it would assist the parties in clarifying the matters at issue in these cases. Members of each class could, for example, examine the allegations made and decide which, if any, are being properly framed by plaintiffs or apply to them. Indeed, this is vital due to the complexity of this case, the attendant limitation of time issues, intra-class and inter-class conflict, the lack of familiarity by absent class members with their self-selected class representatives and counsel, the issues in the cases to which they are parties and the very fact that those actions have been commenced.

Absent class members, many of whom are current Sumitomo/America employees, ought to be advised of the broad and significant issues involved in these litigations and of their respective rights and obligations. Many Sumitomo/America employees have only second or third-hand information, rumor or office gossip regarding these actions. This is hardly surprising as absent and potential class members are dispersed throughout the country in eleven different jurisdictions. Sumitomo/

America has been hesitant, however, to discuss with its employees the matters at issue because of the uncertainty regarding the size and breadth of the classes plaintiffs may represent, the confused claims of plaintiffs, and in deference to the view of class counsel that any such communications might be viewed as unethical or lead to claimed retaliation under Title VII.

In this connection, such notice should issue only if it permits potential class members to exclude themselves from the class (opt-out). This would enable them to decide affirmatively whether to be associated with this litigation, the named plaintiffs and their counsel herein, and the claims they pursue. Thus, a notice with a right to opt out would advance the Court's concern that the absent class be afforded fundamental fairness in connection with this dispute and enhance manageability of the litigation.[25] Moreover, the notice should inform class members that every individual claim they may have common with those advanced on a class wide basis would merge with the class, and thus avoid duplicative claims and provide for a truly uniform

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[25]Giving absent class members the right to opt out is mandatory under Rule 23(b)(3), but discretionary in Rule 23(b)(2) actions. See Women's Committee for Equal Empl. Opp. v. N.B.C., 71 F.R.D. 666, 671 (S.D.N.Y. 1976) (permitting absent class members to opt out of a class is within the discretionary authority of the court). In view of the potential for conflict among the claims plaintiffs assert here, giving class members the power to exclude themselves from any or all of these actions appears essential. In the alternative, the Court could recertify these actions as a Rule 23(b)(3) action, wherein notice at this time would be mandatory. Unless such notice permits an opt-out, it would appear to serve no valuable purpose.

resolution of those issues properly subject to class treatment, unhindered by locally initiated independent actions. Unless the notice permits an opt-out, however, such notice would serve no purpose, but would merely cause confusion among the various classes on a very difficult matter. In fact, unless an opt-out is permitted, notice at this time would merely complicate and extend these proceedings by causing absent class members who may be troubled by the scope of the litigation, to retain counsel and to object and/or intervene.

To be sure, the more narrowly these classes are drawn, the less urgent the need for notice because of the greater identity and compatibility of claims between and among the remaining class representatives and absent class members. The Court's duty in this regard is to distill to their essence the claims of the three classes and those of the persons seeking to represent them. In these cases, it is defendant's position that if plaintiffs' Title VII sex and national origin discrimination allegations were the only allegations at issue, notice might be less urgent although still appropriate at this time in view of the obvious conflicts within the Title VII classes. Because of the Class III section 1981 claims, and for all other reasons cited herein however, and the potential these claims create for conflict among absent class members when read together, notice and the right to opt out should now be sent to

all persons who ultimately could be bound by the [illegible] sion.[26] Potential class members should be advised that if they wish to remain in those classes to which they now belong, their asserted and unasserted claims will be merged into the litigation to avoid redunancy and inconsistency of disposition.

B. Insofar as the 1981 Class May Not Assert Claims of Sex or National Origin Discrimination, Conflicts Exist With and Among the Title VII Classes, Presenting Significant Problems Which Require Notice to Class Members at This Time

Defendant asserts that plaintiff is unable in these premises to establish any claim whatsoever under section 1981 of sex and/or national origin discrimination (however disguised). Nevertheless, the fact that a class has been provisionally certified under section 1981 poses numerous problems. The Court's November 7 opinion and order has certified under section 1981 a class of all present and past female employees of Sumitomo/America to be represented by Palma Incherchera. For the reasons previously noted, a class so defined, that is, defined in terms of sex, and raising national origin and sex claims is facially overbroad and wholly inconsistent with the reach of section 1981.

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[26]As is noted infra at note 27, plaintiff Incherchera's two Title VII claims appear to conflict with one another, and they also appear to conflict with elements of the Class I claims (which also appear to be internally in conflict). The problems associated with the Class III allegations, in their current form, heighten this conflict so as to make notice now necessary.

Given plaintiff's sex discrimination claims and the limited reach of section 1981, Ms. Incherchera would ordinarily be permitted to represent only one very precise group of past and present Sumitomo/America employees: females belonging to her racial group and asserting facially bona fide claims of racial discrimination.[27] As a white female employee, she would be an inadequate representative of either black or Oriental (non-Caucasian) female Sumitomo/America employees making such claims. See Grant v. Morgan Guaranty Trust Co., 548 F.Supp. 1189, 1193 (S.D.N.Y. 1982) (black female held inadequate representative for a class of white females and black males);

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[27]Ms. Incherchera's Title VII and section 1981 claims may be hopelessly in conflict with those of various absent class members. Ms. Incherchera's Title VII charge and complaint allege sex and national origin discrimination against all females, including those who are Oriental and those of Japanese descent. This allegation, however, encompasses all females, including those females who are of Japanese descent. Her section 1981 claim alleges discrimination on the basis of sex or national origin and "race." Within her Title VII sex discrimination class (Class II) of all females are females who are white, Oriental and black, which includes the racial and national origin groups whose members are the "favored" group in her Title VII and section 1981 national origin claims and certainly in her section 1981 "race" claim. In fact, Ms. Incherchera already has indicated resentment against female employees of Sumitomo/America who are of Japanese national origin, who have been promoted to local exempt positions, pitting the class representative in conflict against absent class members, whose interests she must advocate and protect. See Incherchera Dep. at 177 (relevant portions of which are appended hereto as Exhibit D.) See Spaulding v. University of Washington, 740 F.2d 686, 709 (9th Cir.), cert. denied, 105 S. Ct. 511 (1984).

The same conflicts exist with the claims of the members of Class I. Moreover, Class I appears to have the same internal conflict found in Class II (i.e., among national origin claimants.)

see also Moore v. Hughes Helicopter, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (black female held inadequate representative for a class of other females and black males).[28] The claims she would pursue would lack the requisite typicality to permit class treatment. See, e.g., Bartelson v. Dean Witter & Co., 86 F.R.D. 657, 661 (E.D. Pa. 1980) (claims of white female held not typical of claims of blacks and other minority groups). Even if Incherchera were deemed a proper representative of black and Oriental females, she would not be able to represent a class consisting of white females and both blacks and Orientals: it would leave no race as the favored race against which the unfavored group could be compared, for race discrimination allegations require the existence of a racial group receiving disparate preferential treatment at the expense of another racial group. Ms. Incherchera would be placed in the untenable position of having to choose whether to represent Caucasians and Blacks against Orientals, all of whom are now in the classes she represents.

The inquiry regarding class action notice and the section 1981 class does not end here, however. For unlike Title VII, which permits proof of discrimination under several theories, section 1981 requires proof of intentional discrim-

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[28]Concerns regarding the adequacy of representation often are cited in support of issuing early notice to absent class members. See, e.g., Inda v. United Air Lines, Inc., 83 F.R.D. 1 (N.D. Cal. 1979).

ination. General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375 (1982). The notice issue presently before the Court relates intimately with the plaintiff's burden of proof. In a Title VII disparate impact case, a plaintiff class frequently relies upon broad based allegations of discrimination.[29] But under a disparate treatment or intentional discrimination theory, the only one permitted under section 1981, a broad-based attack on an employer's policy is inadequate. See Hudson v. IBM Corp., 620 F.2d 351, 355 (2d. Cir.), cert. denied, 449 U.S. 1066 (1980) (use of statistics or a broad-based attack on an employer's general policy is insufficient in a lawsuit proceeding under the disparate treatment theory).

In this case, the plaintiffs have asserted the broadest possible class and extremely vague substantive allegations. A court must examine carefully the specific claims of a plain-

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[29]Disparate impact analysis is inapplicable here for its use is more properly limited to allegations regarding a specific selection procedure, such as a test or educational requirements "that can be shown to have a causal connection to a class based imbalance in the workforce." Pouncy v. Prudential Insurance Co., 668 F.2d 795, 800 (5th Cir. 1982); see also Furnco Construction Corp. v. Waters, 438 U.S. 567, 575 n.7 (1978) (disparate impact analysis is inapplicable to case not involving an employment test or other particularized requirements). See also Connecticut v. Teal, 457 U.S. 440 (1982). The plaintiffs in these cases have thus far failed to articulate their Title VII theory (i.e., disparate impact or disparate treatment), which itself supports the need for notice to the class, some of whom may have one, but not the other, type of claim, and some of which claims may conflict.

litigation that there exists sufficient typicality between the individual and class claims. Where a claim has not been articulated, under either Title VII or section 1981, with the requisite clarity or precision, notice to absent class members seeking information regarding allegations of intentional discrimination may be a necessary mechanism by which the Court may determine that there exists the requisite identity of interests between the class representative and the class, to assure proper representation.

Thus, the process of analyzing the propriety of notifying absent class members is intended to ascertain exactly the alleged discriminatory conduct at issue. To do this, it is important to identify and isolate the favored ethnic group. In the instant matter, the Incherchera Class III women must be alleging some form of intentional discrimination prohibited by section 1981 in connection with Sumitomo/Japan's alleged policy of assigning Japanese nationals, i.e., citizens, (who are Sumitomo/Japan employees) to rotating staff positions.[30] Any section 1981 allegation regarding Sumitomo's promotion practices to the local exempt positions would fail, since, noted within the

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[30] It is imprecise to identify the rotating staff as a category within which Sumitomo/America employs personnel. As was noted in the Facts section of this brief, the rotating staff is composed exclusively of Sumitomo/Japan employees assigned by the parent corporation to positions in this country.

brief recitation of noncontroverted facts, whites, generally, including some females, have been and are assigned to both the non-exempt and local exempt categories.[31] Plaintiff thus cannot allege intentional class-based discrimination violating section 1981 where members of her class are employed in the allegedly forbidden position because they may possess ethnic characteristics class members may not.

In the instant matter, plaintiff thus far has done nothing to articulate her claims under section 1981. Plaintiff's experienced counsel has artfully tried to dodge the bullet by masking the essence of his section 1981 claim with allusions to race. By doing so he has attempted to have this Court focus on issues not covered by that statute, i.e., national origin, sex, or nationality. He thus tries to reap the benefits of statutes not available to him - clever, but misdirected and wrong. As a result, the Court and defendant are left to guess at the contours of a claim that is ambiguous, amorphous and of dubious legal force. Indeed, this claim is spurious. The fair prosecution of an employment discrimination allegation requires a degree of specificity in order, at a minimum, to permit a defendant to prepare a defense. See, e.g., Pouncy v. Prudential Insurance Co., 668 F.2d 795 (5th Cir.

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[31] Indeed, plaintiffs' argument may be simply that some neutral practice has resulted in a claim that there are not enough women in the local exempt category, which would concern sex discrimination and involve Title VII only.

1982). Specificity also is important in order to protect absent class members who may or may not be within the class and whose claims may or may not be extinguished by the Court's ruling in this cause. See Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984).

If the plaintiff is able to state a viable section 1981 claim to the satisfaction of the Court, then notice issued at this time to absent Class III members, which would include an opt-out provision, is essential. If she agrees, however, that her claim under section 1981 has been accurately stated herein by defendant, notice to Class III absent class members would not be necessary as the claim must be stricken from the complaint.

If plaintiffs' claims are limited to the Title VII sex and national origin allegation, defendant believes that notice at this time to absent class members in Class I and Class II remains important and appropriate, although less urgently so. Even as limited to Title VII, plaintiffs' claims in both cases conflict. See supra note 27. This lack of cohesiveness clearly supports the early notification of absent class members. See, e.g., Plummer v. Chemical Bank, 668 F.2d 654, 659 (2d Cir. 1982); Elliott v. Sperry Rand Corp., 16 Fair Empl. Prac. Cas. (BNA) 1557 (D. Minn. 1976). Such persons still would need the protection of the Court available only through notice, in order to protect their rights, inform them of the issues involved in

these cases, permit them to intervene, obtain independent counsel, and, most important, permit them to opt out of the classes should they so choose. A proposed notice meeting these objectives has been appended to this Memorandum for the Court's consideration. (See Exhibit E.)

Dated: February 4, 1985

Respectfully submitted,

EPSTEIN BECKER BORSODY & GREEN, P.C.

By: _____
Ronald M. Green

A Member of the Firm
Attorneys for Defendant
Sumitomo Corporation of America
250 Park Avenue
New York, New York 10177
(212) 370-9800

-and-

Wender Murase & White
400 Park Avenue
New York, New York 10022

If you have a complaint, file in the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. *(Attach extra sheets of paper if necessary.)*

☐ RELIGIOUS CREED
☐ NATIONAL ORIGIN

NAME *(Indicate Mr. or Ms.)* Joanne Schneider	DATE OF BIRTH
STREET ADDRESS: 245 East 87th St.	COUNTY: Manhattan
CITY, STATE, AND ZIP CODE: New York, N.Y. 10028	SOCIAL SECURITY NO.
	TELEPHONE NO. *(Include area code)*: 831-6002

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME *(Indicate Mr. or Ms.)* Lewis M. Steel, Esq. Eisner, Levy, Steel & Bellman, P.C.	TELEPHONE NO. *(Include area code)*: 966-9620
STREET ADDRESS: 351 Broadway	CITY, STATE, AND ZIP CODE: New York, N.Y. 10013

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU *(If more than one, list all)*

NAME: Sumitomo Shoji America, Inc.	TELEPHONE NO. *(Include area code)*: 935-7000
STREET ADDRESS: 345 Park Avenue	CITY, STATE, AND ZIP CODE: New York, N.Y. 10022

OTHERS WHO DISCRIMINATED AGAINST YOU *(If any)*:

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY ☒ YES ☐ NO	DATE FILED: 10/6/76	AGENCY CHARGE FILED WITH *(Name and address)*: State Division of Human Rights 270 Broadway, New York, N.Y. 10007

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST: Approximately 400	DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, and year)*: Continuing discrimination date of filing

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

Sumitomo Shoji America, Inc. is incorporated in the State of New York and is a tradi company with offices in major cities in the United States and its headquarters in the Ci of New York. The corporation engages in a pattern and practice of discrimination aga women in that all or virtually all of its executives, managerial employees, and sales p sonnel are men. I have worked for the corporation continuously since 9/11/74 when I v hired as an administrative assistant. Since that time I have received no work promoti although I am qualified for a promotion into the managerial ranks, and am qualified to l come a salesperson. I have continuously requested of management that I be considere for promotion into either the managerial or sales categories and am qualified to perfor such work. I am aware of the fact that other women employees who are also qualified perform managerial and/or sales work have similarly been denied promotions. The discriminatory practices complained of are continuing.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE: 10/1/76	CHARGING PARTY *(Signature)*: Joanne Schneider 10/1/76

Subscribed and sworn to before this EEOC representative.

DATE	SIGNATURE AND TITLE

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(Day, month, and year)*
KENNETH S. KAPELAND
NOTARY PUBLIC, State of New York
No. 41-4637064
Qualified in New York County
Term Expires March 30 1977

SIGNATURE *(If it is difficult for you to get a Notary Public to si this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

EEOC FORM 5 JUN 72 — Previous editions of this form may be used. — GPO : 1971 O - 535-8

This will acknowledge receipt of the referenced charge. This agency

☐ Will process this charge. Please refrain from processing until we have reached a final disposition.

☒ Will not process this charge because No Jurisdiction

DATE 10/19/76

TO: [redacted]
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007

EEOC CHARGE NO. 021770049

706 AGENCY CHARGE NO. 8197

WMS CODE

EEOC FORM OCT 74 212

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974—625-817/194 3-1

Lewis M. Steel, Esq.
Ersner, Levy & Steel, P.C.
351 Broadway
New York, N Y 10013

Re: Joanne Schneider v.
Sumitomo Shoji America
Your File No. L-112
EEOC Charge No. 021-77-0049

Dear Sir:

The verified complaint in the above matter forwarded to this Division by you, was referred to our Regulatory Division for processing.

This matter was deferred to the State Division of Human Rights on October 12, 1976 by the Equal Employment Opportunity Commission.

This Division retains jurisdiction over all charges deferred by EEOC unless a request for a deferral waiver is made by EEOC.

In matters over which this Division has no jurisdiction, the charges are sent back to EEOC for processing.

Sincerely,

Juanita Lockhart
EEOC Unit

JL:mg

If you have a complaint, file it in person at your local Equal Employment Opportunity Commission's District Office. In most states, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. *(Attach extra sheets of paper if necessary.)*

☐ SEX ☐ COLOR ☐ RELIGIOUS CREED ☒ NATIONAL ORIGIN

NAME (Indicate Mr. or Ms.)	DATE OF BIRTH
Ms. Janice Silberstein	5/31/50
STREET ADDRESS / **COUNTY**	**SOCIAL SECURITY NO.**
201 E. 28th St. / Manhattan	074-426-326
CITY, STATE, AND ZIP CODE	**TELEPHONE NO. (Include area code)**
New York, New York 10016	(212) 684-1014

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME (Indicate Mr. or Ms.)	TELEPHONE NO. (Include area code)
Lewis M. Steel, Esq. Eisner, Levy, Steel & Bellman, P.C.	(212) 966-9620
STREET ADDRESS	**CITY, STATE, AND ZIP CODE**
351 Broadway	New York, N.Y. 10013

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU *(If more than one, list all)*

NAME	TELEPHONE NO. (Include area code)
Sumitomo Shoji America, Inc.	(212) 935-7000
STREET ADDRESS	**CITY, STATE, AND ZIP CODE**
345 Park Avenue	New York, N.Y. 10022

E. E. O. C. RECEIVED FEB 28 1977 N. Y. DIST. OFFICE

OTHERS WHO DISCRIMINATED AGAINST YOU *(If any)*	
CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY ☒ YES ☐ NO / **DATE FILED**	**AGENCY CHARGE FILED WITH (Name and address)** State Division of Human Rights 270 Broadway, New York, N.Y. 10007
APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST Approximately 400	**DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE** *(Month, day, and year)* September 10, 1976

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

Sumitomo Shoji America, Inc. is incorporated in the State of New York and is a trading company with offices in major cities in the United States and its headquarters in the City of New York. The corporation engages in a pattern and practice of discrimination against women in that all or virtually all of its executives, managerial employees and sales personnel are men.

The corporation further engages in a pattern and practice of discrimination in salaries and promotions on the basis of national origin against United States citizens and residents and in favor of individuals of Japanese origin or hired in Japan. As a result of these practices, I did not receive any promotions.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE	CHARGING PARTY (Signature)
2/24/77	Janice Silberstein

Subscribed and sworn to before this EEOC representative.

DATE	SIGNATURE AND TITLE

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(Day, month, and year)* 2/24/77
Notary Public, State of New York
No. 24-4137123
Qualified in Kings County
Cert. Filed in New York County

SIGNATURE *(If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

EEOC FORM 5 (Rev. 6-72) Previous editions of this form may be used.

GPO : 1974 O - 535-555

March 10, 1977

Honorable Werner H. Kramarsky
Commissioner
New York State Division
of Human Rights
2 World Trade Center
New York, New York 10047

Re: Bliss, Silberstein, Cristofari,
Mandelbaum, Mannina, Meisels,
Wong and Avagliano vs. Sumitomo
Shoji America, Inc.
Charge Nos. 021-77-1184, 1360, 1361,
1362, 1363, 1364, 1365, 1366 and 1367

Dear Commissioner Kramarsky:

May I request that the State Division of Human Rights waive the deferral period in the above-captioned related matters, recently received in this office, in which the charging parties requested us to obtain waivers and which we are prepared to immediately investigate. Copies of the charges are attached for your information, as are EEOC 212 "Notice of Deferral Transmittal" forms, which will enable your agency to place the charges into your system.

Thank you for your cooperation.

Sincerely,

Arthur W. Stern
District Director

This will acknowledge receipt of the referenced charge. This agency

☐ Will process this charge. Please refrain from processing until we have reached a final disposition.

☒ Will not process this charge because waiver granted

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TO: NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007

DATE 3/17/77
EEOC CHARGE NO. 021-77-1366
706 AGENCY CHARGE NO.
WMS CODE 091

EEOC FORM OCT 74 212

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974-625-817/194 3-1

90 Church Street, ...
New York, N Y 10007

Re: 021-77-1184 - Diane C. Bliss
021-77-1360 - Janice Silberstein
021-77-1361 - Rosemary T. Cristofari
021-77-1362 - Raellen Mandelbaum
021-77-1363 - Maria Mannina
021-77-1364 - Sharon Meisels
021-77-1365 - Elizabeth Wong
021-77-1366 - Lisa M. Avagliano
021-77-1367 - Catherine Cummins
vs.
Sumitomo Shoji America, Inc.

Dear Mr. Stern:

This is in response to your letter of March 10, 1977 requesting a waiver in the subject deferral.

In view of your continued interest in the above respondent, your request for a waiver is granted.

Sincerely,

Werner M. Kramarsky
Commissioner

By Juanita Lockhart
Juanita Lockhart
EEOC Unit

see Privacy Act Statement on reverse before completing it

☐ EEOC 021820685

Equal Employment Opportunity Commission and NYS Division of Human Rights
(State or Local Agency)

NAME (Indicate Mr., Ms. or Mrs.)
Ms. Palma Incherchera

HOME TELEPHONE NUMBER (Include area code)
(212) 822-1961

STREET ADDRESS
2859 Middletown Road

CITY, STATE, AND ZIP CODE
Bronx, New York 10461

COUNTY
Bronx

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below.)

NAME
Sumitomo Corporation of America

TELEPHONE NUMBER (Include area code)
(212) 935-7000

STREET ADDRESS
345 Park Avenue, New York, New York 10022

CITY, STATE, AND ZIP CODE

NAME

TELEPHONE NUMBER (Include area code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

☐ RACE ☐ COLOR XX SEX ☐ RELIGION XX NATIONAL ORIGIN ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year) Discrimination is continuing

THE PARTICULARS ARE:

Sumitomo Corp of America, Inc. is incorporated in the State of New York. Its headquarters is in the city of New York and it has offices in major cities in the United States. The corporation engages in a pattern and practice of discrimination against women in that all, or virtually all, of its executives, managerial employees, and sales personnel are men. Moreover, Sumitomo Corp of America, Inc. engages in a pattern and practice of discrimination against persons whose country of national origin is other than Japan.

I have worked for Sumitomo Corp of America, Inc. continuously since October 1972, and remain in the employ of the corporation. Throughout this entire period of time, I have functioned in a clerical capacity, despite being qualified to perform work at a higher level, and despite having requested such work.

RECEIVED
JAN - 5 1982
INTAKE
E.E.O.C. — N.Y.D.O.

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

x Palma Incherchera

I declare under penalty of perjury that the foregoing is true and correct.

x Palma Incherchera

CHARGING PARTY (Signature)

NOTARY — (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

x Palma Incherchera

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)

[signature] 12/30/81

Comm... 30, 1983

FORM 5B MAR 79 PREVIOUS EDITIONS OF ALL EEOC FORM 5'S ARE OBSOLETE AND MUST NOT BE USED

Exhibit C Exhibit D Exhibit E

December 1, 1974 through December 1, 1977 but objects to furnishing such information for any period prior thereto (see Sumitomo's Objections served and filed herewith). With respect to Sumitomo's documents reflecting its supervisory chain of command as of December 1, 1977, see Exhibit "1" hereto.*

INTERROGATORY

16. Has the Corporation since April 1, 1969 to date, utilized an employee's country of national origin, for example, Japanese citizenship, as a criterion for eligibility to hold certain jobs with the Corporation? If the answer to this interrogatory is yes, please answer the following questions:

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs the criterion is mandatory, and over what time periods from April 1, 1969 to date.

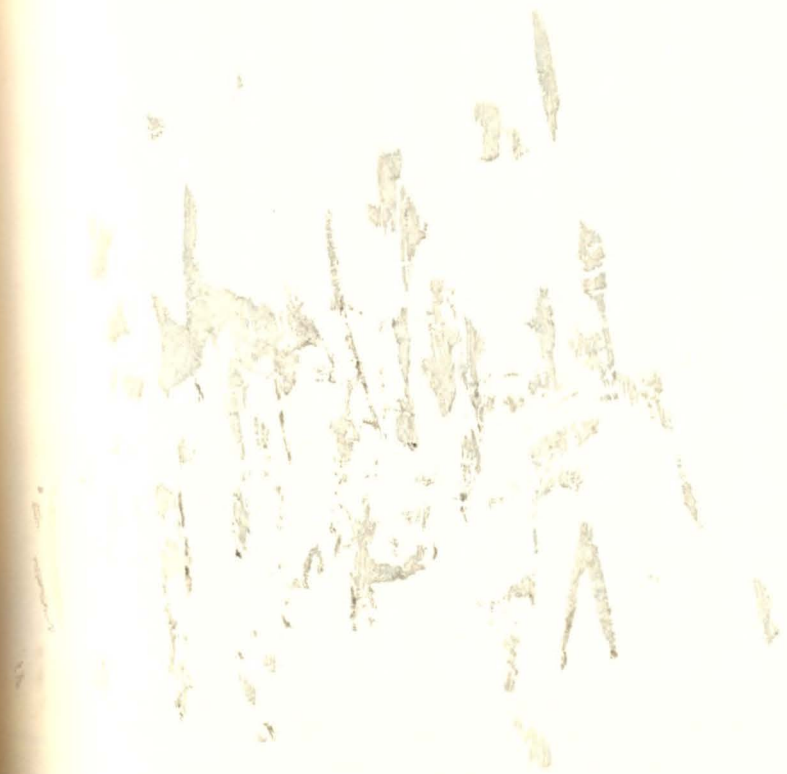
ANSWER

16. No.

INTERROGATORY

17. Has the Corporation utilized sex as a criterion for eligibility for any job with the Corporation from April 1, 1969 to date? If the answer to this question is yes, please answer the following questions:

*Information for the period commencing December 1, 1974 will be furnished at a later date to be mutually agreed upon by counsel.



BY MR. CARMODY:

Q Ms. Incherchera, referring you to the notice of motion for determination of class action, Exhibit 4 in this proceeding, on the cover page of that notice of motion, in paragraph 22, it states that you are seeking an order from the court determining that the class of plaintiffs be defined as all women who have been employed by the defendant, are employed by the defendant or have applied for employment with the defendants, is that correct?

A Yes.

Q And on page two of Mr. Steel's affidavit in support of that motion it states that the plaintiff seeks to represent a class which is defined as follows:

"All women who have been employed by the defendant, are employed by the defendant, or have applied for employment with the defendant."

By the notice of motion and the complaint in this action, are you seeking certification of a class which consists of all women or females as described in those two paragraphs?

A Yes.

Q Are you, by the complaint and notice of motion, seeking certification of a class consisting

of all females on the basis of sex discrimination?

A Yes.

Q And the basis of national origin discrimination?

A Yes. On the basis of national origin discrimination.

I don't understand. I am representing all women because we are all discriminated against.

There are also Japanese women in the company who I feel are getting preferential treatment over me because of this. Yet, still, I represent these women because they are kept in their clerical capacity.

But I don't understand the question.

Q If I understand what you have just testified to--correct me if I am wrong--that there are some females who you represent who are not suffering from national origin discrimination in the same way that you are suffering from national origin discrimination?

A I feel they are preferred over myself in that area of national origin discrimination.

Q Is it your allegation that, as far as those females who are being preferred on the basis

of their national origin, you are suffering discrimination with respect to them on the basis of national origin?

A I feel that because they are Japanese, they are being preferred over myself.

Yet, I also feel, being that they are women, they are being discriminated against just as I am, in that they are kept in clerical capacities.

Q The question is whether you feel that you are suffering by the claimed preference that you seek for them on the basis of their national origin. Are you personally suffering discrimination in some way by the defendant on account of their national origin?

A I feel that because they are Japanese and preferred over me, that I am being discriminated against on the basis of national origin.

Q Their origin, the female Japanese?

A Yes.

Q Are there members of the class of females whom you seek to represent, who are preferred over you on the basis of their race?

A If national origin and race mean the same thing.

Q National origin and race don't mean the same thing.

MR. STEEL: The Solicitor General of the United States has indicated to the United States Supreme Court that, in this case, given the facts of this case, they may well be interrelated.

For you to instruct the witness contrary to the position of the United States Government that they don't mean the same thing, seems to be inappropriate at this time.

You are familiar with the Solicitor General's brief, are you not?

MR. CARMODY: Yes.

MR. STEEL: I would ask you not to instruct the witness.

MR. CARMODY: There are those who would not agree with the Solicitor General's position.

MR. STEEL: I agree that is a question to be litigated. I think that is a complicated legal question. I have tried to suggest to you, over and over again that you are better off not asking this witness complicated legal questions.

If you disagree with the Solicitor General of

the United States, you are perfectly entitled. Your complaint may disagree.

Please don't instruct the witness concerning your personal opinion.

She has indicated that there may well be interrelations between national origin and race. The Solicitor General has indicated in his brief that there may well be an interrelation between national origin and race. The court will have to decide.

Q Is it your allegation that national origin and race discrimination is one and the same on the part of the defendant?

A I believe so.

Q Can you identify, for me, those females whom you claim to represent who have suffered sex discrimination, who have not suffered and are not suffering national origin discrimination?

A Yes.

Q How many are there?

A I know of one in particular. Her name is Masaoka, M-a-s-a-o-k-a, Okado, O-k-a-d-o.

There are other Japanese women in the company. I don't work in their areas, so I can't

answer according to them. But with Masaoka, I can answer.

Q Do you have an approximation of the number of females who have not suffered national origin discrimination in the New York City facility?

MR. STEEL: She has just answered you that she knows of one situation and no other situation involving the Japanese--the women who may be Japanese.

MR. CARMODY: I believe she testified that there are other Japanese women in other departments.

My question deals with how many Japanese women in other departments.

MR. STEEL: Are you asking her to be an expert?

MR. CARMODY: I am asking her, at the New York facility, the approximate number of females who she claims to represent who are not suffering from national origin discrimination in the same manner that she claims to be suffering from national discrimination.

MR. STEEL: You keep adding to the question.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REQUEST FOR EXCLUSION FROM CLASS ACTION

TO: Raymond F. Burghardt, Clerk
United State District Court for
the Southern District of New York
U.S. Court House
Foley Square
New York, New York 10007

The undersigned respectfully requests to be excluded from the class actions in the above causes, in accordance with the Notice of Class Suit dated _____ __, 1985.

I understand that by this request, I will not be able to share in the benefits of a judgment if it is favorable to the plaintiffs, and that I will not be bound by the judgment if it is adverse to the plaintiffs.

Dated this ____ day of _____, 1985.

_____
Signature

_____
Name (Please Print)

_____
Adddress

_____
City, State, Zip Code

( )_____
Telephone Number

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Note to the Court: Should this Court decide that plaintiff has failed to state any claim of race discrimination under section 1981, the material in brackets may be deleted.

NOTICE OF CLASS SUIT PURSUANT TO RULES 23(b)(2) AND 23(c) AND REQUEST FOR EXCLUSION FROM CLASS ACTION

To: All female present employees of Sumitomo Corp. of America or Sumitomo Shoji America, Ltd. (collectively, "Sumitomo/America" or "the Corporation"), female former Sumitomo/America employees claiming sex discrimination who left the company's employ after December 24, 1975, and female former Sumitomo/America employees claiming national origin discrimination who left the company's employ after May 21, 1976:

1. This notice is given pursuant to Rules 23(b)(2) and 23(c) of the Federal Rules of Civil Procedure and at the

direction of the Court sitting in the Southern District of New York.

2. This notice is being sent to all female employees of Sumitomo/America who either currently work for the Corporation or who worked for the Corporation at any time on or after February 15, 1976. Sumitomo/America has agreed to underwrite the costs of this notice so as to inform all potential class members of these actions to allow you to protect any legal rights that you may have herein.

3. This notice is not to be understood as an expression of any opinion by this Court regarding the actual merits of the claims or defenses asserted by any of the parties to this litigation. The Court has made no such finding. This notice is sent solely to inform you of the pendency of these lawsuits, to advise you of your rights with respect to them, and to advise you that you now must determine whether you wish to participate in these claims against the Corporation.

4. Two separate lawsuits have been filed by female employees and former employees of Sumitomo.

A. Avagliano, et al. v. Sumitomo Shoji America, Ltd., 77 Civ. 5641 (CHT), was filed on or about November/ America 21, 1977. In it, the plaintiffs are alleging that Sumitomo discriminated against its female employees in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The plaintiffs contend

that Sumitomo/America discriminated "against women by restricting them to clerical jobs" and "by refusing to train them or promote them to executive, managerial, and/or sales positions." A claim is also made that Sumitomo/America discriminated on the basis of "nationality."

B. Incherchera v. Sumitomo Corp. of America, 82 Civ. 4930 (CHT) was filed on or about July 28, 1982.

i. In Incherchera, plaintiff also alleges that Sumitomo/America discriminated against women on the basis of sex in violation of Title VII in the same manner asserted in Avagliano.

ii. Incherchera alleges that she is "desirous of obtaining equality for women and equality for persons who are not of Japanese national origin or Japanese racial background." Plaintiff thus asserts that Sumitomo/America violated Title VII by discriminating "on the basis of her national origin [and race] by restricting her and the class or classes she represents to clerical jobs" and "by refusing to train her and the members of the class or classes she represents or promote them to executive, managerial, and/or sales positions."

[iii. Finally, Incherchera alleges that Sumitomo/America engaged in intentional race discrimination against her and these same classes in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.]

5. Sumitomo/America has denied each and every allegation set forth by the plaintiffs. In its defense, Sumitomo/America states that it has acted lawfully with regard to all of its employees, that many of its nonclerical positions, in particular rotating staff positions, require knowledge of Japanese business practices, customs, and the Japanese language, Japanese expertise in international finance, trade, transportation and a multiplicity of very specific and select fields; and that the named plaintiffs do possess the requisite skills and qualifications for such assignments.

6. By order dated November 7, 1984, the Court certified three separate classes of plaintiffs.

Class I consists of all female Sumitomo/America employees and female former employees who worked for the Corporation as of December 24, 1975 based on the Avagliano allegations as set forth in paragraph 4A.

Class II consists of female present and former Sumitomo employees who worked for the company as of May 10, 1981, and it is based on the Incherchera allegations as set forth in paragraph 4Bi and 4Bii.

[Class III consists of a class of white female present and former Sumitomo employees, and it is based on the Incherchera allegation of intentional discrimination set forth above in paragraph 4Bii. Whether a former

employee belongs to this class (Class III) depends upon where she worked, in accordance with the following schedule:

California, Colorado, Illinois, Michigan, New York, Oregon, Pennsylvania, Washington, D.C., Washington State	former employees who left after July 28, 1979.
Texas	July 28, 1980
Massachusetts	January 28, 1982

Former Sumitomo/America employees from Illinois, Oregon, and Pennsylvania are advised that because this action has been brought in a federal court sitting in New York, they are subject to a shorter New York statute of limitations. This means that former Corporation employees who worked in Oregon or Pennsylvania between July 28, 1976 and July 28, 1979 or in Illinois between July 28, 1977 and July 28, 1979, and who otherwise might have individual claims of intentional race discrimination under Section 1981 are excluded from this class action.]

7. You have the right, pursuant to the Order of this Court to elect to withdraw from the above described classes for any reason you deem appropriate. Because this decision is an important one which will have significant and binding legal significance, please carefully consider the information in this notice. Do not ignore or disregard this notice. In this regard you have the right to consult an attorney of your choice and you are advised to do so promptly.

8. If you meet the criteria for class membership set forth in paragraph 6 in any of the three classes and unless you now exercise your right to withdraw, you will be deemed a member of each class to which you belong, and will be bound by the judgment entered in this action whether favorable or unfavorable to the class. Unless you object or intervene, as described in paragraphs 10 and 11 below, you will be represented by the named plaintiffs in this action and by their counsel: Steel & Bellman, P.C., 31 Broadway, New York, New York 10013 and by Lewis M. Steel, Esq.

9. If you choose to remain a member of either Class I, II [or III], you are precluded from maintaining, continuing or initiating administrative proceedings or litigation based on the allegations described above in paragraph 4A, 4Bi, 4Bii, [and 4Biii] as set forth in paragraph 6 as applicable based on your class status. Only if you exercise your option to exclude yourself from Classes I, II and III may you pursue independently any claims alleging sex national origin or race discrimination in connection with advancement from clerical positions to executive, managerial, and/or sales as embraced by the within action.

10. If you remain in the class(es) described above, and in order to ensure that the interests of the absent class members will be adequately represented, the class members are advised, based upon the advice of such counsel as they may consult, to now file with the Court any petitions for the

appointment of new class representatives or, in the alternative, to intervene in this action pursuant to the rights of a class member defined in paragraph 10.

11. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure, you may also enter your appearance in this action by counsel of your choice or intervene in these actions. As a member of the class, you also have the right to state to the Court at any time whether or not you consider the representation of the class by the named plaintiffs or their counsel to be fair and adequate.

12. If you do not wish to be included as a member of the class of plaintiffs in this action, you can be excluded only by now completing the form of "Exclusion Request" enclosed with this notice, signing it and mailing it to the clerk of this Court at the address given in paragraph 13 below by mail, postmarked on or before _____ __, 198__. If your "Exclusion Request " is timely received: (a) you will not be bound by the actions of plaintiffs and their counsel, but you will not be included in the class; (b) you will not be precluded from prosecuting any existing claim of your own in the manner you deem appropriate; and (c) should plaintiffs obtain any monetary recovery you will not share in it. This will constitute your only opportunity to withdraw from these actions. If you fail to exclude yourself from these actions at this time, you will be bound by the rulings of this Court.

13. Please address all requests to be excluded from the class and any other communications commenting upon the conduct of this action to Raymond F. Burghardt, Clerk of the United States District Court for the Southern District of New York, U.S. Court House, Foley Square, New York, New York 10007.

14. This Court has retained jurisdiction of these actions to correct, modify, annul, vacate, and supplement the Order determining these causes to be class actions from time to time before a decision on the merits.

15. The pleadings and other papers filed in this action are public records, available for inspection in the office of the Clerk noted above in paragraph 13.

Dated this ____ day of _____, 1985.

_____

Charles H. Tenney
United States District Judge