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Avagliano v. Sumitomo: On Remand to the  
District Court

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

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10-9-1980

## Affidavit in Support of Motion by EEOC for Leave to Present Oral Arguments on Time Ceded by Plaintiffs-Appellees

Equal Employment Opportunity Commission

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OFFICE OF THE  
GENERAL COUNSEL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20506

October 9, 1980

A. Daniel Fusaro, Clerk  
United States Court of Appeal  
for the Second Circuit  
United States Courthouse  
Foley Square  
New York, New York 10007

RE: Sumitomo Shoji America, Inc.  
v. Avigliano, et al.,  
No. 80-7418

Dear Mr. Fusaro:

The enclosed affidavit is submitted in support of the September 24, 1980 Motion by the Equal Employment Opportunity Commission for leave to present oral argument on time ceded by plaintiffs-appellees. Copies are included for distribution to the Court.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia B. Ruskin". The signature is fluid and cursive, with a large loop at the end.

Marcia B. Ruskin  
Attorney  
Appellate Division

Enclosures

cc: Lewis M. Steel, Esq. ✓  
J. Portis Hicks, Esq.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMITOMO SHOJI AMERICA, INC., )

Defendant-Appellant, )

v. )

LISA M. AVIGLIANO, et al., )

Plaintiffs-Appellees. )

No. 80-7418

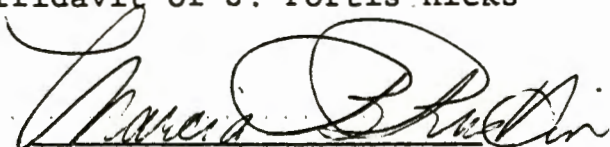
AFFIDAVIT IN SUPPORT OF MOTION  
BY EEOC FOR LEAVE TO PRESENT  
ORAL ARGUMENT ON TIME CEDED BY  
PLAINTIFFS-APPELLEES.

United States of America ) s.s.  
District of Columbia )

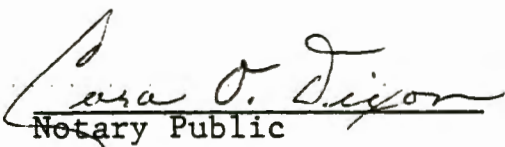
I, MARCIA B. RUSKIN, having been duly sworn, depose  
and say:

1. I am a staff attorney in the Appellate Division,  
Office of General Counsel, Equal Employment Opportunity  
Commission, and, since July, 1979, I have been assigned to  
work on the Commission's amicus curiae participation in  
Avigliano et al. v. Sumitomo Shoji America, Incorporated.

2. The attached documents are true copies of the EEOC's  
response to the September 29, 1980 letter which appears as  
Exhibit 1 to the October 3, 1980 affidavit of J. Portis Hicks  
filed with this Court.

  
MARCIA B. RUSKIN

Subscribed and sworn to before me this 9<sup>th</sup> day of  
October, 1980.

  
Notary Public

My commission expires 9-14-81



OFFICE OF THE  
GENERAL COUNSEL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20506

October 1, 1980

J. Portis Hicks, Esquire  
Wender, Murase & White  
400 Park Avenue  
New York, New York 10022


Re: Sumitomo Shoji America,  
Inc. v. Avigliano

Dear Mr. Hicks:

In response to the accusations contained in your letter of September 29, 1980, I enclose an affidavit detailing my recollection of the circumstances surrounding the Commission's motion for permission to present oral argument in time ceded by counsel for plaintiffs-appellees, as well as an affidavit of my supervisor, Assistant General Counsel, Lutz Alexander Prager.

It is my understanding that consent of opposing counsel is not required in order for the government to appear as amicus curiae in a United States Court of Appeals. The purpose of my telephone call on September 23, 1980 was to extend a professional courtesy, as was our ready willingness to have you pick up copies of our brief the moment it come back from the printer.

Sincerely,

  
Marcia B. Ruskin  
Attorney  
Appellate Division

Enclosures

A F F I D A V I T

I, LUTZ ALEXANDER PRAGER, having been duly sworn, depose and say:

1. I am Assistant General Counsel in the Appellate Division of the Equal Employment Opportunity Commission, and in this capacity have responsibility for supervising the Commission's amicus curiae participation in Avigliano v. Sumitomo Shoji America, Inc., 2d Cir., No. 80-7418, appeal docketed May 21, 1980.

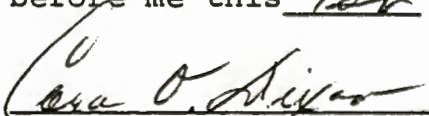
2. Early in the week of September 15, 1980 I received a copy of the September 9, 1980 diplomatic note from the United States to the Embassy of Denmark.

3. Upon reviewing the draft of the Commission's brief prepared by Marcia Ruskin, the attorney assigned to brief the Sumitomo case I concluded that the Commission was obligated to call to the attention of the Court of Appeals the most recent official government position on the issue presented in Sumitomo. I therefore directed Ms. Ruskin to insert reference to the diplomatic note into the brief. I further directed that copies of the full document be mailed to the Court and counsel when the Commission's brief was filed and served.

  
LUTZ ALEXANDER PRAGER

United States of America     )  
District of Columbia         )

day of October, 1980.     Subscribed and sworn to before me this 1st

  
Notary Public  
My Commission expires 9-14-81

A F F I D A V I T

I, MARCIA B. RUSKIN, having been duly sworn, depose and say:

1. I am a staff attorney in the Appellate Division, Office of General Counsel, Equal Employment Opportunity Commission, and, since July, 1979, I have been assigned to work on the Commission's amicus curiae participation in Avigliano et al. v. Sumitomo Shoji America, Incorporated.

2. On Monday, September 23, 1980, I called J. Portis Hicks, counsel for Sumitomo, to advise him that the Commission intended to move in the Second Circuit for permission to use five minutes of time ceded by counsel for Avigliano at the October 17, 1980, oral argument and to ask whether Mr. Hicks would oppose the motion. Mr. Hicks asked whether the Commission intended to present anything new at oral argument. It was my understanding Mr. Hicks was inquiring about the basic legal theories asserted by the Commission in previous statements to this Court and others. I advised him that the Commission's legal position was unchanged and would be the same as that presented in the brief filed by the Commission in December 1979 in Spieß et al. v. C. Itoh & Co. (America), Inc., 5th Cir. No. 79-2382, appeal docketed, June 11, 1979, involving the identical issue.

3. On Thursday, September 23, 1980, Mr. Hicks called to request that he be able to pickup the next day a courtesy copy of the Commission's brief, in addition to being served by mail. Although I could not guarantee when the brief would be ready on Friday, as the draft was still being revised, I assured Mr. Hicks that I would make a copy available for a messenger to pickup some time during that day.

4. On Friday, September 26, 1980, Mr. Hicks first called around noon and was told the brief was still being typed and proofread, and that I was as yet unable to ascertain the time when it would be available in final form. He called twice again during the afternoon to ask if the brief was ready yet.

5. During one of the several conversations on September 26, 1980, I suggested that Mr. Hicks might not have need for accelerated service, and repeated that the brief being prepared was essentially the same as the one filed in C. Itoh.

6. At 4:30 P.M. the final copy of the brief was taken to the Commission's Print Shop for duplication. At 5:15 P.M. I left a courtesy copy with the guard at the front desk for early pickup by Mr. Hick's messenger.

7. At approximately 9:00 A.M. on Monday, September 29, 1980, an attorney with the Washington, D.C. office of Wender, Murase & White, called and requested that a copy of the

diplomatic note be made available immediately. I informed him that the note as well as the brief had been mailed the previous Friday afternoon, and should be received in the New York office that morning. The attorney indicated that the New York office had already received its mail delivery for that day and neither the brief nor a copy of the diplomatic note had arrived. I told him I would have to make another copy of the letter to the court, the diplomatic note, and the treaty provisions. These were available for pickup at the front desk within one-half hour.

8. On September 12, 1980, the State Department mailed a copy of the September 9, 1980, diplomatic note from the Government of the United States to the Embassy of Denmark to my supervisor, Assistant General Counsel Lutz Alexander Prager. This note did not reach my desk until on or about September 17, 1980, at which time my draft of the Commission's brief in the Sumitomo case was nearly completed. My final draft, submitted to Mr. Prager for review on September 18, 1980, contained no reference to the 1980 diplomatic note.

9. Mr. Prager decided it was the responsibility of the Commission to bring the most recent pronouncement of the State Department's position on the issue in this case to the attention of the Court. Mr. Prager directed me therefore to insert reference to the note into the brief, and to send copies to the Court and counsel of record under separate cover



at the same time the Commission's brief was filed.

10. I telephoned the State Department on or about Monday, September 23 to determine whether the note was a public document and could be released to the Court and attorneys of record. I was instructed not to release or use publicly the document until the State Department had, as a diplomatic courtesy, requested and received permission from the Embassy of Denmark.

11. I was not informed until Thursday morning, September 25, 1980, that the Embassy of Denmark had agreed that the diplomatic note could be released. At this time reference to the note was added to page 8 of the Commission's brief.

12. At no time did I intentionally misrepresent to Mr. Hicks the contents of the Commission's brief or the legal premises upon which it was based.

13. At no time did I intentionally interfere with or intended to impede Sumitomo's access to the Court.

  
\_\_\_\_\_  
MARCIA B. RUSKIN

United States of America )  
District of Columbia )

Subscribed and sworn to before me this 1st day of  
October, 1980.

  
\_\_\_\_\_  
Notary Public

My commission expires 9-14-81.